Chapter XL.

GENERAL ELECTION CASES, 1902 TO 1906.

1119. The Alabama election case of Spears v. Burnett, in the Fifty-seventh Congress.

Unfair conduct on the part of election officers and suspicious circumstances do not justify overturning a majority not destroyed by testimony.

On February 28, 1902,[4] the Committee on Elections No. I reported in the case of Spears *v.* Burnett, of Alabama. The committee reported the sitting Member entitled to the seat, saying:

> On the face of the returns the contestee, Burnett, appears to have been elected by a plurality of 747. The contestant disputed the validity of these returns, claiming that in certain precincts in the district he was denied proper representation, and that at many of the precincts fraud and bribery were resorted to its accomplish the return of the contestee.
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> Your committee have given full and careful attention to all of the claims made by the contestee and to the testimony in the case. The contestant appears to have been the regularly nominated Republican candidate for Congress, and in the main received the support of his party. While in some of the

[1] Additional cases in the Fifty-seventh Congress are classified in other chapters:
Wagoner *v.* Butler, Missouri. (Vol. I, sec. 713.)
Walker *v.* Rhea, Virginia. (Vol. I, sec. 737.)

[2] Other cases in the Fifty-eighth Congress:
Reynolds *v.* Butler, Missouri. (Vol. I, sec. 730.)
Kahn *v.* Livernash, California. (Vol. I, sec. 731.)
Cross *v.* McGuire, Oklahoma. (Vol. I, sec. 732.)
Moody *v.* Gudger, North Carolina. (Vol. I, sec. 739.)
Duborrow *v.* Lorimer, Illinois. (Vol. I, sec. 740.)
Edwards and White *v.* Hunter, Kentucky. (Vol. I, sec. 741.)
Bonynge *v.* Shafroth, Colorado. (Vol. I, sec. 742.)

[3] Other cases in the Fifty-ninth Congress:
Michalek, Illinois. (Vol. I, sec. 426.)
Iaukea *v.* Kalanianaole, Hawaii. (Vol. I, sec. 527.)
Houston *v.* Broocks, Texas. (Vol. I, sec. 643.)
Jackson *v.* Smith, Maryland. (Vol. 1, sec. 711.)
Coudrey *v.* Wood, Missouri. (Vol. I, sec. 715.)

[4] First session Fifty-seventh Congress, House Report No. 624.

precincts, concerning which complaint is made, there is evidence of unfair treatment on the part of the Democratic managers and some circumstances appear raising at least a suspicion of fraud, there was certainly no general conspiracy to dishonestly deprive him of votes in the precincts of which complaint is made and concerning which proof is presented to us, and there is not sufficient ground of criticism to seriously affect the return majority of 747 votes.

On March 22[1] the House, without division, agreed to the report of the committee.

1120. The Kentucky election case of Moss 42v. Rhea, in the Fifty-seventh Congress.

A technically informal ballot having been illegally received by a judge of election was counted, the voter being guiltless of collusion in the illegal act.

The failure of an election judge to detach a stub from a ballot, as he was required to do by law, did not justify the rejection of a ballot cast in good faith.

As to what is a sufficient return of rejected ballots under the Kentucky election law.

On February 28, 1902,[2] the Committee on Elections No. 1 reported in the case of Moss *v.* Rhea, of Kentucky, that the sitting Member was not entitled to the seat and that the contestant was elected and was entitled to the seat.

The official returns gave to Rhea a plurality of 156 votes. The majority of the committee added to the official return "the number of undoubted votes received by each of the two candidates upon the ballots which were rejected and not counted in the various precincts in the district" as follows: For Rhea, 135; for Moss, 312; leaving for contestant a plurality of 21.

The minority denied this conclusion, and joined issue with the majority on two general points:

(1) As to the proper identification of the rejected ballots, in order to determine whether they had or had not been already counted in the original return.

(2) As to what irregularities in the ballots should be sufficient to sanction rejection.

The Australian ballot law of Kentucky, in providing generally for the count of the ballots, provides:

> That if there are any ballots cast and counted or left uncounted, concerning the legality or regularity of which there is any doubt or difference of opinion in the minds of the judges of election, said ballots shall not be destroyed, but sealed up and returned to the clerk of the county court with the returns of the election for such judicial or other investigation as may be necessary, with a true statement as to whether they have or have not been counted, and if counted, what part and for whom.

The minority contended that under the judicial decisions of Kentucky each of the rejected ballots should be accompanied by a statement signed by all the election officers of the precinct. And it was further urged that under the provisions of the Constitution the House was bound by the law of Kentucky as construed by the Kentucky courts.

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[1] Journal, p. 396; Record, p. 2236.

[2] First session Fifty-seventh Congress, House Report No. 625.

The majority of the committee denied that the courts of Kentucky had construed the statute in the way declared by the minority.

From the general return the rejected ballots were sufficiently identified in the opinion of the majority:

> The certificate of the election officers states the whole number of ballots voted, the number counted as valid, and the number questioned or rejected. It seems to us quite evident that if, for instance, the precinct election officers, in their certificate of election, state that the number of ballots cast was 400, that the number counted as valid was 300, and that the number questioned or rejected was 100, that this is a sufficient statement to show that there are 100 rejected ballots not counted. And if in such case the election officers have returned in proper form and in the proper envelope just 100 ballots as questioned or rejected ballots to the county court clerk, then it seems to us this establishes clearly that these 100 ballots were not counted by the precinct election officers, but were ballots rejected by them in making the count.
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> "In such case we can not conceive of any reason why there should be any other or further certificate made by the precinct election officers. If, on the other band, we take a case where we find the election officers returned 400 ballots as cast, 350 ballots counted as valid, and 100 ballots returned as questioned or rejected, then it is very evident that, without a further identification of the questioned ballots which have been counted and the rejected ballots which have not been counted, it is impossible to determine which of the ballots returned as questioned and rejected can be counted where contest is made."

As to the second point—the irregularities in the ballots themselves—the majority and minority joined issue on several points:

(*a*) A considerable number of ballots were cast without the indorsement of the clerk of election, required by the following provision of law:

> No judge or other officer of the election shall deposit any ballot on which the facsimile signature of the county clerk and the name of the election clerk do not appear.

The minority contended that these ballots should not be counted, and had been properly thrown out by the election officers. (Case of Slaymaker *v.* Phillips, 5 Wyoming 453, cited.) The majority held that in a case of this kind the ballot should be counted if received, referring for authority to the Missouri case of Heyl 42**v.** Guion, 55 Southwestern Reporter, page 1036.

1121. The case of Moss v. Rhea, continued.

An evidently accidental ink blot on a ballot, or blot of stencil mark caused by folding is not a distinguishing mark and the ballot should not be rejected if the intent of the voter is apparent.

Faint pencil marks, evidently not of utility in identifying ballots, and appearing under circumstances suggesting fraud, were held not to be such distinguishing marks as to justify the rejection of ballots.

Where the intent of the voter was not in doubt the House followed the rule of the Kentucky court and declined to reject a ballot because not marked strictly within the square required by the State ballot law.

A voter having marked above two tickets on an Australian ballot, the counting of a vote for Congressman was considered of doubtful propriety, even in view of the fact that one ticket contained no candidate for Congress.

The question raised as to the right of the House to determine the rule as to evidence it will receive, even though State law and decisions are alleged to prescribe a rule.

(*b*) A large number of ballots were blotted in folding so that the stencil mark made by the voter, as provided by law, was reproduced with greater or less distinctness on another portion of the ballot. In some cases this blotting was so extensive as to make a doubt as to which, of two tickets on the ballot, the voter had marked. The election officers threw out not only those where there appeared a real doubt, but also many where the fact that the second mark was a mere blot, appeared so evident that the majority of the committee, after careful inspection, decided that they should be counted. The Kentucky law provides that when the voter has made on his ballot any distinguishing mark to show to another how he has voted, the vote shall not be counted; but the majority of the committee could not find that these blots were such distinguishing marks.

(*c*) Certain ballots, some for sitting Member and some for contestant, had been rejected by the election officers because of a faint, barely distinguishable pencil mark, usually on the upper right-hand corner of the ballot. The evidence, though not conclusive, tended to show that the mark had been put on the ballots by an election clerk who was a partisan of the sitting Member. The majority of the committee decided that, as inspection made evident, these pencilings were not distinguishing marks within the meaning of the law.

(*d*) Certain ballots were thrown out because of the negligence of an election judge, who was required to detach a stub from the ballots before they were deposited in the ballot box, and did not perform this duty. The majority of the committee decided that these ballots should be counted, the voter not having anything to do with the detachment of the stub.

(*e*) Certain ballots were rejected because they were found marked in both the Republican and Socialist-Labor circles, and others in both the Democratic and Socialist-Democratic circles. As there was no candidate for Congress on either the Socialist-Labor or Socialist-Democratic tickets, the claim was made that the doubly marked tickets should be counted for the only candidate for Congress appearing on the two. The majority of the committee cite Parker *v.* Orr (158 Ill., 618) in support of this view, but consider it doubtful whether such votes should be counted and do not include them in the list of counted votes, according to which the election of contestant is shown. The minority contended that such ballots were neutralized, and should not be counted, citing the case of McMahon *v.* Polk (10 S. Dak., 296).

(*f*) On the Kentucky official ballot there is a blank space on which the voter may, under the statute, write the name of his choice if he does not wish to vote for the regular candidate. Under the law the voter marks the ballot in a circle above the party ticket, or in a square opposite the name of the particular candidate. On certain ballots the voter marked in the square opposite the blank space below the name of the candidate, and on others in the blank space itself. The majority of the committee contended that, under the decision of the Kentucky courts and under the following provisions of law, the intent of the voter was plain and the ballots should not be rejected.

Should any elector desire to vote for each and every candidate of one party he shall make a cross making the large square [changed to circle] embracing the device and preceding the title under which the candidates of said party are printed, and the votes shall then be counted for all the candidates under that title: *Provided, however,* That if a cross mark be made in the large square including the device of such

party, and a cross mark be also marked in the square after the name of one or more candidates of a different party or parties, the vote shall be counted for the candidate so marked, and not for the candidate for the same office of the party so marked; but the vote shall be counted for the other candidates under such party name or designation.

The minority, quoting as authority 17 R. I., 812, and 18 R. I., 822, contended that votes marked as above were not votes for any persons.

The case was considered by the House on March 22, 24, and 25.[1] During this debate especial stress was laid by those speaking on behalf of the sitting Member that the laws and judicial decisions of Kentucky were binding on the House in the decision of the case. Mr. George F. Burgess, of Texas, expressed the contention as follows:

The right to vote is not a matter guaranteed to any citizen in this country by the Constitution of the United States or any act of Congress. It is a State privilege. The only provision of the Constitution which could attach to an election in one of the States is that which has reference to the color line, and that is not involved in the remotest degree in this contest now before the House.

The Constitution also provides that the Members of the House of Representatives "in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." That provision is not involved at all in this case. The Constitution also further provides that "times, places, and manner of holding elections for Senators and Representatives shall be prescribed by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators." That provision is not involved in this contest.

Mr. Tucker, in his work, tersely and completely states this whole contention in the sentence when he says: "Suffrage is a State privilege belonging to State citizenship, and is exclusively under State jurisdiction."

The minority report says: "The State of Kentucky has fixed the qualification of electors and has prescribed the time, places, and manner of holding elections for Representatives in Congress. Although perfectly competent to do so, Congress has not at any time made such regulations or altered those made by the State of Kentucky."

Hence it follows this House is bound by the laws of the State of Kentucky and the decisions of her supreme court thereunder, and it is therefore perfectly obvious that the gentleman from Illinois admits the legal situation when he says this House is bound by the statutes and decisions of the State of Kentucky touching upon the manner and conduct of her elections, Congressional or otherwise.

The majority report, drawn by Mr. James R. Mann, of Illinois, did not combat this proposition, for the reason that the decisions of the Kentucky courts did not, in the opinion of the majority, lay down the rules which the minority claimed that they did.

Mr. Walter I. Smith, of Iowa, while agreeing with the majority of the committee in their construction of the Kentucky decisions, also took the position that the rejected ballots were admissible without the individual certificates of the election officers, "even in defiance of the statute and in defiance of the decision of the supreme court of Kentucky. I propose," he said—

to put it on both grounds, and I feel that it may be well to read even to our Democratic friends the provisions of the Constitution of the United States upon this subject. "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof."

Does that provide that the legislature of any State can prescribe the rules of evidence which shall govern this judicial body in sitting and trying contested-election cases? Does the Constitution, when it says—"That the times, places, and manner of holding elections for Senators and Representatives shall be

[1] Record, pp. 3158, 3204, 3247–3255.

prescribed in each State by the legislature thereof," confer authority to enact rules of evidence for the government of this judicial tribunal?

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

Is this House, sitting in the exercise of its high judicial functions, to be bound and limited by rules of evidence derogatory of the common law enacted by the legislature of the Commonwealth of Kentucky?

Mr. Smith quoted the contested election case of Norris *v.* Handley in support of his contention.

The House sustained the report of the majority of the committee, unseating Mr. Rhea and seating Mr. Moss.

The vote on the motion to substitute the minority resolutions, favorable to Mr. Rhea, for the majority resolutions, favorable to Mr. Moss, was yeas 124, nays 136.

The majority resolutions, declaring Mr. Rhea not entitled to the seat, and Mr. Moss entitled to it, were then agreed to without division.

1122. The Missouri election case of Horton 42v. Butler, in the Fifty-seventh Congress.

The contestant is not limited as to the number of places in which he will take testimony at the same time.

A certified copy of a public record was admitted in an election case, although presented in the time for taking rebuttal testimony.

Discussion as to the extent to which the House is bound by the technical law as to taking evidence in an election case.

On April 5, 1902,[1] Mr. Robert W. Tayler, of Ohio, from the Committee on Elections No. 1, submitted a report in the case of Horton *v.* Butler, from Missouri.

Two preliminary questions were considered by the committee before proceeding to the merits of the case.

(*a*) In relation to the taking of testimony the majority of the committee say:

No important questions of practice are raised respecting any relevant testimony, although, in view of the fact that strenuous objection was made to the fact that during a period covered by the taking of testimony witnesses were examined for the contestant at several different places at the same time, we deem it proper to state our views in relation to the subject.

We see no objection to such practice, especially in such a case as this, where about a thousand witnesses were examined, many of them on matters of great importance and at considerable length. To deny the right to take such testimony at as many places as the necessities of the case may require is to deny the right of the contestant to make out his case at all.

Instances have occurred in our experience where a contestee by frivolous and unnecessary cross examination has so consumed time as to seriously interfere with the orderly and just progress of the investigation.

(*b*) In relation to rebuttal testimony the majority of the committee say:

The contestant having consumed forty days in taking his testimony in chief rested his case. The contestee examined no witnesses. After the expiration of the time allowed to contestee for that purpose the contestant, having given due notice thereof, proceeded, on March 26, to examine E. A. McBurney, and his testimony then taken appears at pages 2199–2204.

The contestee did not appear either in person or by counsel, but on May 1 presented his objection to the consideration of this testimony to the Clerk of the House of Representatives, for the following reasons:

"First. It is rebuttal when no testimony was taken for the contestee, and therefore nothing to rebut.

"Second. It was taken after the time for taking testimony had expired."

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[1] First session Fifty-seventh Congress, House Report No. 1423.

The testimony of McBurney at this time was of two classes:

First. Certified lists from the Director of the Census giving the name, address, color, and age of the males 21 years of age and over in the Fourth, Fifth, Sixth, Fourteenth, Fifteenth, and Twenty-third wards of the city of St. Louis as returned by the census enumerators engaged in compiling the United States census of the year 1900.

Second. Comparative tabulated statements made up from the registration lists, the recount of the ballots, the poll books, the McBurney canvass (all of which had been offered in evidence within the first forty days), and the certified census lists referred to above.

As to the matter embraced under the second head, it is apparent that it is not testimony at all, but only a consolidation, tabulation, and rearrangement of the testimony formerly introduced. It is valuable if correctly consolidated, tabulated, and arranged, and in so far as it has been found to be, or is believed to be, correctly done it has been of service to us in considering the case.

The sole question remaining, therefore, is, Must we disregard the certified census lists?

We see no reason whatever for so doing.

1. It is a public record, and such testimony is always competent. If it had been offered when the case came on for hearing before the committee, it would have been received. If, in the opinion of the committee, its reception at that time would find the contestee unprepared to meet and answer any inferences which might be drawn from it, he would have been given ample time to suitably respond, either by rebutting testimony or by such an examination of it as he might need.

2. In the case cited by contestee as showing the ground why this testimony should not be considered in the case the rule is held to apply only to "ordinary cases" and "without any cause whatever being shown therefor."

The case under consideration is far from being an "ordinary case," and excellent reasons appear why the course followed should have been adopted.

We agree that in ordinary cases the letter of the law should be followed; but after all the serious question always is, Has the party been diligent, and more important still, has the opposing party been prejudiced and has he had opportunity to make answer to the testimony taken out of time? No wrong has been done the contestee by the introduction of these lists.

Counsel for contestee closed his argument with an eloquent panegyric of technicalities and their value in art, science, and jurisprudence. What he so well says in that relation may be freely admitted to be sound. In a certain sense it may be said to have some application to contests in the House of Representatives. But if it be true that courts must sometimes be compelled to confess themselves powerless in the face of rigid rules and precise "technicalities" such is not the unhappy state of the House of Representatives. There is no power lodged anywhere which limits its discretion and authority, except the Constitution and its sense of right. Partisan prejudice may color its judgments and want of wisdom may make its decrees unsound, but it is never without power to do the right within the limits of its wide jurisdiction.

1123. The case of Horton v. Butler, continued.

Where fraud so permeated a large part of the district as to prevent a full, free, and fair expression of the voters' will, the seat was declared vacant.

The degree and kind of testimony required to show a registration to be fraudulent, in connection with a conspiracy.

As to the validity of census returns and a canvass in proving a registration to be fraudulent.

As to hearsay evidence of persons participating in a fraudulent registration.

The kind and degree of evidence required to establish a conspiracy to defraud in a district.

As to the merits of the case, the majority of the committee, in their report, set forth that the official returns gave the sitting Member a plurality of 3,553. The contestant attacked these returns on numerous grounds, the most important

of which were fraudulent registration, fraudulent voting, violation of law as to appointment of election officers, violence, intimidation, and false counting. The majority of the committee thus summarize:

We find that no valid election was held for Representative in the Fifty-seventh Congress from the Twelfth district of Missouri, because—

First. Fraud so permeated the conduct of the election in a large part of the district as to prevent a full, free, and fair expression of the public desire in respect to the election of a Representative in Congress.

Second. While the evidences of Democratic fraud are numerous and in almost every precinct discoverable, yet upon one of the many phases of the testimony showing Democratic frauds it appears that about 5,000 votes were cast for the contestee and about 2,000 for the contestant under names and addresses which a careful canvass could not discover as representing actual residents. We can not apply one rule of inference to one side and refuse to apply it to the other side. Nor can we when so many votes apparently tainted with fraud are involved determine that he who has least benefited by them shall be declared elected. It is possible that this conclusion may not be entirely fair to the contestant, but we are convinced that it is the only just decision we could render.

The minority of the committee, in views submitted by Mr. Sydney J. Bowie, of Alabama, contend that—

there is no competent evidence in this record which remotely tends to invalidate a sufficient number of these votes to make this majority even doubtful.

The majority of the committee, preliminary to the consideration of specific acts of fraud, call attention to certain conditions which existed or were created to further what is termed a conspiracy. A new election law had recently been enacted, which enabled the party of the sitting Member to deny to the other party an efficient, representation on the boards of officers conducting the registration and voting. The police board of the city in which the district was located was also under the partisan control of sitting Member's party; and the committee concluded, from a report of a grand jury which sat in St. Louis, that it was used in furtherance of a conspiracy entered into by leading officials of sitting Member's party.

A further fact having a bearing on the decision of the case was the provision of the constitution of Missouri that every ballot voted should be numbered in the order of its reception and opposite the name of the voter depositing it, and that this record should be open in case of contest. The majority of the committee examined—

1. The fraudulent registration. There appeared from the testimony to have been a fraudulent registration to the extent of about 9,180 in a total registration of 27,467. The methods and extent of this registration were proven as follows:

(*a*) By the testimony of 5 witnesses, who saw acts disclosing a system of illegal registration by the issuance of slips of paper containing fictitious names on which repeaters registered.

(*b*) By canvassers in certain precincts which disclosed enough fraudulent registration to discredit the election in those precincts.

(*c*) By the testimony of persons living in houses neighboring to those wherein suspicious registrations were located, and who did not know the persons registered, although they did know everyone living in the houses.

(*d*) Testimony similar to the above from persons actually living in the houses from which the alleged fraudulent registration occurred.

(*e*) Registration from lots found to be vacant.

(*f*) That registered letters addressed to about 1,500 suspicious names could be delivered only in a few cases. The minority attempt to impeach this by showing certain cases where the persons were in fact living at the address but did not receive the registered letters. These cases were not numerous.

(*g*) Apparent registration of about 2,500 names from low resorts, saloons, yards, shops, stables and other places where there were no dwellings attached.

(*h*) By admissions on the part of those who participated in the frauds. The majority of the committee say:

> There is much heresay evidence of specific admissions by persons claiming to have participated in the frauds, but we have not considered such evidence unless it appeared that the person thus confessing was in a position of authority, or was engaged in the fraudulent work aside from his admissions.
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> Thus we learn, that one Reese Evans was industriously engaged with a gang of repeaters distributing slips to his men, so that they might have timely advice as to their names, ages, and places of residence. The plan of using these dips will be more fully referred to when we come to a description of the election itself. Reference is here made to it for the purpose of showing Evans's relation to the conspiracy.
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> The witness tells us, that he knows Evans well, and that before the election Evans told him that he had 20 men on his list, and that he was registering them as many as twenty times a day.
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> It may be said that this testimony narrates an improbable story. The simple answer to that is that it is very full and explicit, and that Evans does not go upon the stand and deny it; nor is any explanation suggested why he did not do so.

(*i*) The excessive registration in the district as compared with population. The ratio was 24 per cent of the population, while in New York the ratio was 17.7, and in Philadelphia 18.1. The minority contended that this comparison was misleading and made on a false basis.

(*j*) By a comparison, on the initiative of the committee itself, of the first 509 names to which registered letters were sent, with the city directory which was made from a canvass within two or three weeks after the election, the committee found in the directory 110 of the persons, and did not find 399.

(*k*) By a comparison with the returns of the Federal census taken in the June preceding the registration in October. From this it appeared that of 27,467 persons registered, 14,088 were not enumerated in the census. The majority say:

> It is not to be denied that no census can be exactly accurate, and it must be true that conditions in June do not necessarily determine conditions in October. Nevertheless, whatever may be the conditions of population as to permanence, it is not for a moment admissible that in a city like St. Louis half of the population registered in October did not reside in the district in June, nor can it be true that if residing there they were not found by the census enumerators.

(*l*) By a canvass made in the latter part of December under direction of attorneys for contestant, and ostensibly for the purpose of a trade directory. This canvass, called the "McBurney canvass," failed to find 12,411 of the 27,467 names on the registration lists. This canvass also demonstrated that many persons entitled to registration were not registered. As to this canvass, which was a subject of much contention in this case, the majority of the committee say:

> While some question is raised as to the competency of this canvass as evidence in the case by reason of the fact that the canvassers themselves were not put upon the witness stand, we are yet inclined to receive it for what it is worth in precisely the same way and for exactly the same purpose as that for which we would consider a city directory competent.

It must not be forgotten that this is not a case in which an effort is being made to prove that Richard Roe did or did not commit a crime or whether John Doe did or did not vote at a certain place at a certain time. Considering the character of the issue made in this case and the nature of the frauds alleged and otherwise proven, it is difficult to understand what kind of testimony could be more persuasive or even more competent than the results of the canvass made under the circumstances in which a city directory of a great city is ordinarily made.

It is proven in this case to our entire satisfaction that the canvassers under McBurney were competent to perform their duty; were suitably instructed; that each made an affidavit to the correctness of his returns; that that affidavit was the basis upon which his compensation was fixed; and that the canvass made by them and by them returned, and tabulated by Mr. McBurney, is, in all respects, as worthy of credibility as any canvass for a city directory could possibly be.

As to its persuasiveness respecting any particular individual we would of course have very grave doubts, but as to the charges made and the facts en masse nothing could be more convincing. So we consider that whatever objections there are to the McBurney canvass go to its weight, and its weight is to be determined by its comparison with other testimony.

The minority of the committee assail this testimony as heresay:

There were 57 canvassers who did this work, only one of whom, Mr. Elmer L. Moone, was examined. The testimony as to the work done by the remaining 56 canvassers consists simply of a lot of names and residences written down in a book, signed by them, and which they left with Mr. McBurney. The latter testifies that he knows absolutely nothing as to the correctness of the work of any of these canvassers, but the tabulated figures which he makes are based upon the assumption that it is correct. In other words, he testifies as to what they told him.

The minority then quote at length the authorities against heresay evidence; and also attacks the canvass on its merits.

(*m*) The majority of the committee also draw unfavorable conclusions from the failure of sitting Member to contradict the testimony of false registration:

But when we consider the specific testimony on behalf of the contestant, pointing out people by name who had participated in unlawful registration and unlawful voting, when house after house was specifically referred to as places from which many persons had been registered, but did not live there and had never lived there; when, in a word, hundreds of accurately and unmistakably described instances were given of fraud which, if they had not occurred, could be disproved in a moment by witnesses who must have been subject to the call of the contestee, it amounts to little short of an admission of the truth of the contestant's statement for the contestee to say that it was not necessary to take testimony in his own behalf.

2. The fraudulent voting. The system under which the majority alleged this to have been done was disclosed by testimony as to the following features of the election:

(*a*) It was shown in a recount of the ballots that—

In the wards in which the greatest frauds were perpetrated, 60 out of 113 judges and clerks who were appointed by the Democratic deputy commissioner as Republican judges and clerks were opposed to the election of Horton.

(*b*) The ejection of Republican challengers from polling places where fraudulent voting was about to take place.

(*c*) The activity and inactivity of the police in apparent furtherance of the plans for fraudulent voting, as shown by uncontradicted testimony.

(*d*) The use of repeaters, described by the majority of the committee as follows:

The various leaders in charge of repeating gangs possessed themselves of slips, upon each of which was recorded the name and address of some fictitious person, or of a person having no right to vote, who was registered in a certain precinct. Arranging these slips by precincts, the man in charge of the

repeating crowd would, when approaching the polling place, distribute among his people the slips representing registrations from that precinct. The crowd then entered the polling place, each one giving to the judges the name which he found written on the slip in his hand. The judges, of course, promptly found the proper name and address upon the registration list and permitted the offering voter to vote. This operation was repeated at that precinct as often as it was deemed safe to do so until as many of the illegally registered names could be voted as the leader cared to risk; then the crowd passed on to the next precinct, where the same process was carried on.

Among the most striking incidents was the fact that at a polling place the votes cast while the repeating gangs were present would be given by voters who, to the number of over 100 consecutively, had no middle names, although in other parts of the poll lists such a phenomenon was not observed.

3. The recount of the ballots showed that sitting Member had been credited on the count with a larger number of votes than were actually cast. Contestant charged that this excess amounted to 913; and sitting Member admitted that it amounted to 402, thus leaving his official majority at only 3,151.

The recount also showed that sitting Member received 3,727 votes of persons not found either by the census or the McBurney canvass; and that contestant received 1,345 votes from such persons.

Deducting the 3,727 apparently fraudulent votes from sitting Member, would leave a majority for contestant; but the committee consider that in applying such a rule it would be necessary also to deduct the 1,345 apparently fraudulent votes from contestant's vote, which would still leave sitting Member elected. But in view of the widespread corruption. which tainted so many of the polling places, and in view of the fact that the testimony indicated that there had been some fraudulent manipulation of ballots after they were cast, the majority reported the following resolution:

Resolved, That no valid election for Representative in Congress was held in the Twelfth Congressional district of Missouri on the 6th day of November, 1900, and that the seat now held by the contestee is hereby declared vacant.

The minority reported resolutions declaring sitting Member elected and entitled to the seat.

The report was debated on June 27 and 28,[1] and on the latter day the motion to substitute the minority proposition for the majority was disagreed to, yeas 100, nays, 136. Then the resolution declaring the seat vacant was agreed to.

1124. The North Carolina election case of Fowler v. Thomas, in the Fifty-seventh Congress.

Although the election in a large part of a county may be vitiated by disregard of law by the county election officers, yet the returns of unassailed precincts in the county should be counted.

On April 9, 1902,[2] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted a report in the case of Fowler *v.* Thomas, of North Carolina.

The sitting Member had on the face of the returns a plurality of 1,909 votes over contestant, and a majority of 1,893 over all. The contestant claimed the

[1] Record, pp. 7527, 7577–7594.

[2] First session Fifty-seventh Congress, House Report No. 1514.

rejection of enough votes to give himself a plurality of 574 votes. But in order to effect a result favorable to contestant it would be necessary to deduct, the entire vote of the two counties of Craven and Duplin, the first of which gave sitting Member a majority of 911 votes and the second of which gave him 810 majority.

Craven County.—The first reason given for excluding the entire vote of Craven County is—

that the county board of elections of Craven County, in appointing judges of election for the various voting precincts under the law of the State of North Carolina, which provides that each party shall have representation among the said judges, ignored those who had been recommended by the Republican executive committee in all the precincts in said county except Maple, Cypress, Truitts, Dover, Fort Barnwell, Core Creek, Lees Farm, First Ward, and Third Ward.

The vote in these excepted districts, as to which contestant concedes that the judges were properly appointed, was 915 for sitting Member and 357 for the contestant, a majority of 558 for the sitting Member. The report goes on:

There is evidence that in some or all of the other precincts the election officers were all Democrats, or that if Republicans they were not those recommended by the Republican executive committee. We are not satisfied that the consolidation of some of the other precincts, so as to crowd more Republican and Populist voters into one precinct than could readily vote and be counted in single day if attempts were made to delay the voting, was done for an honest purpose. But if we were to throw out all of those districts Mr. Thomas would still have a majority in the unattacked districts as above stated, and we have been shown no reason why the vote of the unattacked districts should be rejected. Therefore, notwithstanding the evidence of considerable irregularity in some parts of this county, we are unable to reject the entire vote as requested by contestant.

Duplin County.—The report says:

Contestant also complains that in Duplin County the election boards were either composed entirely of Democrats, or where Republicans or Populists were appointed they were not those recommended by the recognized authorities of said respective parties. It does not appear from the evidence that the Republican party submitted any list of those whom it desired placed upon the respective election boards. The Populists did, and asked for the appointment of a Populist on each election board. The county board, however, in some instances appointed Republicans and in others appointed Populists, but not always the persons named by the party authority.

There is evidence tending to show that in some of the districts the so-called Republican or Populists who were appointed were of doubtful allegiance to the parties they were supposed to represent and sometimes voted mixed tickets, but we have not been pointed to any evidence that they worked or voted against the contestant.

As to some districts no cause has been shown for complaint as to the complexion of the election boards, and upon the whole we are not satisfied that the vote of the entire county can properly be rejected.

There was also some evidence that, in the August election preceding the Congressional election of November, there was intimidation in Duplin County, but very little evidence of any in November.

There was also some evidence of other irregularities, but not enough to prevent the committee from arriving unanimously at the conclusion that the contestant had not been elected, and that the sitting Member was entitled to the seat.

On May 21,[1] the House, with little debate and no division, concurred in the report.

[1] Record, p. 5754.

1125. The Ohio election case of Lentz v. Tompkins, in the Fifty-seventh Congress.

Instance wherein the Elections Committee condemned pleadings in notice and answer for irrelevant charges and insinuations.

The Elections Committee has no authority to alter or suppress improper pleadings in the notice and answer.

Ex parte and hearsay testimony is rejected by the Elections Committee.

The House should not count a bribed vote, although no State law may require its rejection.

The entire vote of a precinct should not be rejected simply because certain votes are shown to be corrupt by reason of bribery.

On April 10, 1902,[1] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, presented the unanimous report of that committee in the case of Lentz *v.* Tompkins, of Ohio, finding that contestant was not elected, and that the sitting Member was entitled to the seat.

This report discussed two questions—(1) a question of pleading, and (2) the merits of the contest.

1. As to the pleading the committee say:

The statute governing contested Congressional elections provides that the contestant shall, within a specified time, give notice to the Member whose seat he designs to contest, "and in such notice shall specify specifically the grounds upon which he relies in the contest." The Member whose seat is contested must, "within thirty days after the service thereof, answer such notice, admitting or denying the facts alleged therein and state specifically any other grounds upon which he urges the validity of his election." (R. S., secs. 105, 106.)

This notice and answer constitute the pleadings of the case and are intended to present clearly the issue to be determined.

The notice filed by the contestant in this case contains 29 specifications, 18 of which were declared by his counsel to have been abandoned, no testimony whatever having been offered in support of any of them. They embraced charges against persons and matters in no wise connected with the Congressional election. They were evidently not intended to have any bearing upon the contest, but simply to place upon record slurs, insinuations, and direct charges against persons not parties to the proceeding and having no opportunity to defend themselves. The reply of the contestee also contains much that is objectionable and wholly unjustifiable, except as it may be stated to be a reply in kind to the notice of contest. Contestant then filed an additional paper, not authorized by law, containing matter still more scurrilous and abusive. All three of these papers would, if contained in pleadings in any court, be suppressed as scandalous and impertinent. Your committee has no authority to suppress or alter them, but desires as earnestly as possible to condemn the manifestly improper use of papers, which are intended by the act of Congress to be the means of enlightening the committee and the House as to the precise points at issue in the contest, by making them vehicles of abuse and vilification of each other by the parties to the contest, and particularly of third parties in no way connected therewith.

2. As to the merits of the contest, the committee found that Mr. Tompkins had an apparent plurality on the face of the returns of 18 votes. The report says:

The ballot in use in Ohio is of the form known as Australian, and under the laws of that State each ballot about which there is any dispute or question is required to be placed by the election officers in a sealed envelope, with evidence showing whether it was counted or not, and if counted, for whom. It is remarkable that in an election at which 51,903 votes were polled there were only 25 such ballots. Some

[1] First session Fifty-seventh Congress, House Report No. 1528.

of them were counted for contestant, some for contestee, some were not counted at all, and as to others there is no evidence showing whether they were counted or not, or if counted, for whom.

Having carefully examined these ballots and the law relating thereto, your committee finds that a proper counting of them shows an increase of 1 vote in favor of contestee, increasing his plurality to 19.

The committee go on to notice the charges of bribery made against the sitting Member, and after analyzing the testimony rejected certain as ex parte, certain other as hearsay, and other because it was shown that it had been procured by the offer of bribes. Finally the committee conclude:

But if the ex parte affidavits and the hearsay testimony were all admitted and all the testimony accepted as true according to the construction most favorable to contestant, it could not be found that more than 10 persons had received or been promised, either directly or indirectly, compensation to vote for Mr. Tompkins.

The integrity of the election returns is in no way attacked. No election officer has been proved, or even charged, with any irregularity whatever. No such general bribery in any precinct has been shown as ought to require the entire return to be rejected. But if there had we could not tell what precincts to throw out, as the evidence as to some of the said 10 persons does not show in what precinct or precincts they voted, and as to others does not show that they voted at all. Furthermore, as to some of the 10 who are shown to have voted, it does not appear whether they voted for Tompkins or Lentz.

If we were convinced that any precinct ought to be thrown out entirely we could not say whether to throw it out would benefit the contestant or contestee, as we have not been furnished evidence showing the vote by precincts. We have the vote by counties only. Surely we could not throw out a whole county, even if it were clearly shown that the 10 persons had been bribed and had voted.

The injustice of disfranchising more than 50,000 honest voters will at once appear. There is authority in the minority report in Delano *v.* Morgan, 2 Bart., 204, written by a former Speaker of the House, that as the law of Ohio provides only for the punishment of persons offering or receiving bribes, but does not declare their votes illegal, therefore they must be counted. But we can not consent to this doctrine, holding, as we do, that to receive and count a vote clearly shown to have been cast as the result of a bribe would be in violation of the spirit, if not the letter, of all laws tending to secure the freedom and purity of the ballot.

If satisfied from the evidence that these 10 persons had been paid to vote for contestee and bad so voted, your committee would not reject the entire vote of the respective precincts in which they deposited their ballots, even if we knew which precincts they were, or had returns by precincts so that we might act upon them. We would not throw out the entire precinct, but exclude the illegal votes, following Robinson *v.* Harrison, Fifty-fourth Congress, Report 1121, Bowen *v.* Buchanan, Rowell, 196. But the throwing out of such votes would not change the result of the election.

On May 21 [1] the report was considered by the House, and after brief debate the House, without division, concurred in the conclusion of the committee, and confirmed the sitting Member in his seat.

1126. The South Carolina election case of Johnston v. Stokes, in the Fifty-seventh Congress.

Where the notice of contest was objected to as to specifications not relating to vital questions, the Elections Committee disregarded the objections.

A declination of members of one political party to participate at an improvised poll legally conducted does not vitiate the vote cast.

The House, overruling its committee, declared the seat vacant in a case wherein thousands of voters were kept from the polls by what it deemed an unconstitutional registration law.

[1] Record, p. 5755.

Instance wherein the House determined that a State registration law was obnoxious to the State constitution.

The House declined to count votes of persons whose right to vote was illegally nullified on the evidence of statements of fact signed by those persons.

Discussion of a signed statement of an elector whose vote has been refused in relation to the doctrine of res gestae.

Form of resolution declaring a contested seat vacant.

On April 13, 1902,[1] Mr. John J. Jenkins, of Wisconsin, from the Committee on Elections No. 3, submitted the report of the majority in the case of Johnston *v.* Stokes, of South Carolina. The sitting Member, on the face of the returns, had a plurality of 4,702 votes, but certain corrections reduced this to 4,204.

A preliminary question had been raised by the sitting Member, who insisted that the notice of contest was not sufficient under the law, inasmuch as it failed to state particularly the grounds upon which the contestant relied in the contest. But as the result did not turn upon the objections, the committee went on and heard the case without passing on the question. In the course of his argument[2] before the House Mr. Jenkins discussed these specifications quite fully.

Two features of the case, over which there was no argument as to law or fact, were:

(*a*) At the precincts of Gadsden and Eastover the regularly appointed election officers—all members of sitting Member's party—did not open the polls. Thereupon members of the party supporting contestant improvised a board of election and held an election, following all the requirements of law. The voters of sitting Member's party declined, however, to participate in this election. The committee were unanimous in counting the votes of these precincts, which had also in fact been allowed, at the request of counsel for both sides, by the State canvassers.

(*b*) At Strawberry Ferry, after the official returns were made by the precinct officers to the board of county canvassers, and before that body proceeded to canvass the votes of Berkeley County, the ballot box used at Strawberry Ferry, containing the votes cast at that precinct, the official returns, poll list, and tally sheets, were all stolen. By competent evidence it was proved that there were cast at that precinct 104 votes—92 for Johnston and 12 for Stokes-and the committee has counted them for the respective parties, as proven.

Aside from these minor points the decision of the case turns upon the registration law of South Carolina and questions arising out of its application. No better statement of the facts in regard to this law can be made than is contained in the brief minority views filed by Mr. Samuel W. McCall, of Massachusetts, chairman of the committee, whose views the House finally adopted.

I concur in the conclusion of the majority of the committee that the contestant was not elected. The testimony, in my opinion, does not show such a tender of votes on the part of the excluded voters, such as the authorities require, as will justify the counting of a sufficient number of them to overcome the adverse plurality. But while the testimony is not sufficient for such a purpose, it does show a wholesale exclusion of voters and an unfair application of the registration law.

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[1] First session Fifty-seventh Congress, House Report No. 1229; Rowell's Digest, p. 530.

[2] Record, p. 5766.

The law only provides one registration place in each county, and only one day for registration each month from December to June, inclusive. Although the constitution provides that a male person otherwise qualified shall have the right to vote who has resided in the precinct sixty days before the election, the registration law, in fact, denied him registration, and, consequently, the right to vote unless he had resided in the precinct on the 1st day of July preceding the election. This provision is clearly repugnant to the constitution of South Carolina, which, under the pretense of regulating suffrage, imposes a new qualification upon it and is, therefore, unconstitutional. I may add that the chief justice of South Carolina and the judge of the United States court for that circuit each rendered an opinion that the law was unconstitutional, and although their associates held in each of the cases presented that the court did not have jurisdiction, that fact does not detract from the weight of the opinions.

The testimony shows that many voters, some of them coming 30 or 40 miles, appeared regularly at the places of registration from month to month, and were denied registration by means of a systematic obstruction. It shows further that many thousand men who had the constitutional qualification, but were not registered, and who therefore had the right to vote if the registration laws were unconstitutional, expressed their desire to vote by going to the polls. Doubtless many thousands more unregistered voters remained at home who would have come had they not known that a rule requiring registration certificates was in force and that they would be excluded if they came.

"If the officers conducting an election adopt and enforce an erroneous rule as to the qualification of voters which prevents certain legal voters who offer to vote from giving in their votes, and being made known prevents other legal voters similarly situated from offering to vote, the election may be set aside, especially if it appear that such votes if offered and received would have changed, or rendered doubtful, the result. After a decision has been made by the election officers affecting the right of a class of voters to vote and that decision becomes known, it is not necessary that every voter belonging to such class should offer his vote and have it formally rejected." (McCrary on Elections, third edition, section 241; Scranton borough election case, Brightly's Election Cases, 4,55.)

The colored race is enormously in the majority in this district, and it appears that as a rule the voters of that race in that district were Republicans. Believing that the registration law of South Carolina was unconstitutional, I am constrained to find from the evidence in this case that if said law had not been applied at all, or even fairly applied, the result would probably have been different, and I am therefore not able to give my assent to the conclusions of the majority of my colleagues that the contestee was elected.

The entire committee were—unanimously of the opinion that this registration law was unconstitutional, and all arguments proceeded on the basis that such was the fact.

The contestant, realizing that this registration law was the means of disfranchising his supporters, had printed in advance and distributed to list keepers at the several polling places the following forms of petition:

To the honorable Senate and House of Representatives of the United States in Congress assembled:

The petition of the subscribers, citizens of the State of South Carolina, respectfully showeth

That your petitioners are over the age of 21 years and male residents of the county of Colleton, and the voting precinct of Walterboro, in the county and State aforesaid, and are legally qualified to register and vote.

That on this the 6th day of November, 1894, they did present themselves at said voting precinct in order to vote for Member of Congress, and that they were denied the right to vote.

That your petitioners have made every reasonable effort to become qualified to vote according to the registration law of this State, but have been denied an equal chance and the same opportunity to register as are accorded to others of their fellow-citizens.

Your petitioners desired and intended to vote for Hon. Thomas B. Johnston for Member of Congress

Wherefore your petitioners pray that you investigate the facts herein stated and the practical workings of the registration and election laws of this State and devise some means to secure to us the free exercise of the rights guaranteed to us by the constitution of this State and the laws and Constitution of the United States, and your petitioners will ever pray, etc.

An aggregate of 7,336 names were signed to petitions of this kind, the signatures being made sometimes by the person and sometimes by the list keeper or another who was authorized to sign.

The main issue of the case arises over the admissibility of these lists as testimony that the person whose vote was rejected was a legally qualified voter, that he actually made a tender of his vote, and that the vote so tendered was a vote for contestant.

Two distinct questions are involved in this branch of the case: (1) A question of law, and (2) a question of facts.

1. As to the question of law.

A minority of the committee, composed of Messrs. Jesse Overstreet, of Indiana, James A. Walker, of Virginia, and Henry F. Thomas, of Michigan, contended that the lists were competent evidence. They say in their views:

> The evidence discloses that, on account of the very large number of voters who were present at the polls and desired to vote for the contestant, and made effort to cast their votes and failed, it was impossible to take the evidence of each separate voter, and to facilitate the matter and properly show the entire conditions that existed, and the number of voters thus deprived of their vote, lists of voters were kept by various parties at the precincts; and the person keeping said lists submitted himself to examination and testified to the facts, and it is sought by the contestant to admit in evidence these lists so prepared as above stated.

After describing the form of the petition, they say—

> Nor should we be unmindful of the truth so we11 expressed in Reed *v.* Kneass (Brightley's Election Cases, 260):
>
> "The true policy, to maintain and perpetuate the vote by ballot, is found in jealously guarding its purity, in placing no fine-drawn metaphysical obstructions in the way of testing election returns charged as false and fraudulent, and in assuring to the people by a jealous, vigilant, and determined investigation of election frauds, that there is a saving spirit in the public tribunals charged with such investigations, ready to do them justice if their suffrages have been tampered with by fraud, or misapprehended through error."
>
> This language is quoted with approval in McCreary on Elections, section 467, and the author adds:
>
> "It is the spirit of this rule that questions respecting evidence in contested-election cases should be solved."
>
> No doubt it is true, as a general proposition, that the party offering evidence is required to produce the best evidence of which the case in its nature is susceptible, but it will be observed that the nature of the case is to be considered. Here a class of men numbering thousands was denied the right to vote because of the nature, as well as the administration, of the registration law of South Carolina. To have examined each of these witnesses concerning each and all of the facts establishing his right to registration and to vote, proving the incidents of the attempt or failure to exercise the right of suffrage, and subjecting the witnesses to lengthy cross-examinations by contestee's attorneys, would have required more time than the law grants for the taking of testimony and have caused a miscarriage of justice. And so it became incumbent upon the contestant to offer the best evidence that he could command within the limitations and conditions existing, and he did that by furnishing the written declarations of these men as to their qualifications, efforts, and purposes, supplemented by the testimony of men who knew them, to the effect that they were entitled to but were denied the right of suffrage. Where there is no substitution of evidence, but only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule concerning the production of the best evidence is not infringed. (1 Greenleaf on Evidence, 14 ed., sec. 82.) We submit that the contestant's evidence was a selection of weaker instead of stronger proofs, and for the very best of reasons, considering reasons from the standpoint of existing conditions and not of theory.

They then proceed to refer to the text writers and the precedents, Greenleaf on Evidence, the New Jersey, or Broad Seal case, Vallandigham *v.* Campbell, certain English cases,[1] etc., and say:

The principle underlying the Congressional cases above cited is this: That the declaration of a voter, or one entitled to vote at a given election, made at or in the vicinity of the voting place immediately following his effort to vote, concerning his own acts and qualifications or disqualifications, are parts of the res gestae, and are admissible in evidence. In voting or in attempting to vote, or in being present at the polls with the desire to vote, the voter is discharging, or attempting to discharge, or desiring to discharge one of the most solemn and momentous duties of citizenship, and to us it seems clear that his every act and word calculated to show in any degree what his purposes or qualifications were are clearly admissible in evidence as part of the res gestae. This evidence may be furnished by the depositions of others, or by the written statements of others, made at the time, preserving and exhibiting the statements or declarations or admissions, either oral or written, made by the voter or the nonvoter, as the case may be, as is clearly established by the preceding authorities.

After announcing their endorsement to the following statement of principle made by counsel in the case—

We are aware that, while the same general rules of evidence which govern courts of law are observed in the investigation of contested election cases, yet the rules of evidence are applied by the committee more according to their spirit than with the technical strictness observed by ordinary judicial tribunals.

The minority call attention to the fact that the declarations of the rejected voters "were brought into the record by the depositions of the men who made the lists, or who signed to the petitions the names of the rejected voters at their request," and say:

These authorities, and the reasoning upon which they are predicated, clearly show that the declarations of those who were deprived of the privilege of voting on election day are competent evidence in support of the allegation that they were lawful voters, intended to vote, were deprived of that privilege, and would have voted for contestant. These declarations were made at the time of holding the election, and to persons in or near the voting places. They related to the subject-matter of the election, formed a part of the history of the transactions of the election, and were in the highest and truest sense parts of the res gestae.

Further, in debate,[2] Mr. Overstreet explained that the minority counted only the lists where the voters in person approached the list keeper in the vicinity of the polling booth immediately after the rejection of the vote and disclosed to him the facts which showed his qualifications; and second where the persons did not approach the list keeper, but where the latter swears that he saw the vote rejected, and also swears to the facts that show the person to have been a qualified voter and belonging to a political party supporting contestant. In cases where a third person, not the list keeper, deposed to the fact that the list was kept, or where the lists were not kept, at the polling place, the minority rejected them.

The majority of the committee—and on this feature of the case Mr. McCall concurred with them—decline to accept the lists as testimony. The report says:

No doubt it is the safer and better rule, when the evidence will warrant it, and as this House has done in many instances since the Nineteenth Congress, to count lawful votes, lawfully tendered and unlawfully refused, when the number is sufficient to change the result and it is known for what candidate the elector intended to vote. But before the vote can be counted, it ought to appear by competent evidence that qualified electors, sufficient in number to change the result, had lawfully tendered their

[1] Pages 22–26 of report.

[2] Record, pp. 5868, 5871.

votes and were unlawfully rejected, and for whom the rejected electors would have voted if they had been permitted to vote.

Certainly this is as far as any court or legislative body ought to go. But in this case, to unseat the contestee, this House is asked to go further—to receive the declarations of a supposed elector in order to count his vote—a position not sustained by any law writer or judicial authority anywhere. Yet even if this was the law and rule of the House it would not affect the right of the contestee to his seat in the House, because under it not a dozen votes could be counted for the contestee according to law and evidence.

An examination of the evidence will prove that, with very few exceptions, no declarations were made, not even anything that could be called hearsay evidence, and if what are called declarations are admissible none of the same are sufficient to show that a qualified elector lawfully tendered his vote and was unlawfully rejected, and for whom he would have voted if permitted to vote. Moreover, all of these so-called declarations were made away from the polling place and subsequent to any offer or attempt to vote, even if any such were made. Yet it is asked, on this class of testimony, that enough votes be counted to impeach the certificate of election held by the contestee.

In the debate [1] Mr. Jenkin more specifically criticized the petition, calling attention to the fact that the signers do not even declare that they tried to vote, but say that they desired and intended to vote; that they were not in fact declarations or even memoranda.

The report of the majority continues further in this line:

It is also difficult to understand what reliance can be placed upon the lists as evidence, if the heading to the lists contained all the necessary elements to justify the counting of the votes. The signing of the same would not make the lists evidence. It would only be ex parte evidence at the best. It would not be as strong as an affidavit, and certainly an ex parte affidavit would not be considered as evidence, for a party has a right to be present when witnesses are examined in his case and participate in the examination.

If the mode of procedure had in this case is permitted, this valuable right would be denied. Not a fact that must be proved in order to count a vote can be found in the headings of the lists. There is no statement in the heading that they tendered their vote or that they belonged to a class of electors that were denied the right to vote by the election officers. If the declaration of the elector who was denied the right to vote can not be received, certainly the headings of the petition can not be admitted as evidence for a declaration.

No doubt a few votes can be counted, but not enough to make mention of; but independent of that there is no evidence to show declarations of electors as to their qualifications, intentions, or efforts to vote.

It is elementary that hearsay evidence is not admissible in election cases. The same rules of law apply in election cases as in all other cases, and while the power of the House is very great in election cases, yet its actions should be governed by law and evidence. It is not only just, but safe.

If the House, uninfluenced by partisan feeling, decide election cases according to the established principles of law and rules of evidence, it will come nearer doing exact and equal justice; and it will be establishing a dangerous precedent to admit what is offered in this case to impeach the title to a seat in this House.

It was argued upon the part of the contestant that these lists, etc., might be received as a part of the res gestae. It certainly is no part of the res gestae, for anything said or done after the vote was rejected and the elector had gone away from the polls would have no connection whatever with the principal fact, which in this case was what was said and done by the elector at the polls when offering to vote. But even this position would fail from the fact that no declarations were made, if correct as a proposition of law.

The question of the res gestae was also gone into very thoroughly in the debate.[2]

(2) As to the facts relating to the petitions.

The minority of the committee did not contend that all of the 7,366 names on the lists should be credited to contestant. They credited him with 4,523 votes—

[1] Record, pp. 5909, 5910.

[2] See remarks of Mr. Powers, of Vermont, Record, p. 5904.

enough to show his election—adopting principles governing their rulings, illustrated by the following cases:

(*a*) In Calleton County they count the lists for these reasons:

The lists of voters taken at the various precincts in said county were brought into the record by the witnesses who took the declarations from the voters immediately after the vote was rejected and in the vicinity of the polling place, the qualification of all of said voters whose ballots were so rejected being shown either by the heading of the petition or paper upon which their names were entered or by the statement of the voter himself, for the paper, being signed by the voter or by one authorized to sign it for him, discloses the qualification and intention of the voter, and therefore becomes a part of the declaration itself; and, taken together, all constitute one and the same transaction, and each of said votes should be counted the same as if each of the voters themselves had come upon the stand and testified singly to the same statements.

(*b*) In Sumter County a more liberal rule was followed:

Lists of voters whose votes were rejected were kept by persons who testify in the case, but at these precincts the voters whose votes were so rejected did not make the declaration to the persons who kept the lists, but an examination of the evidence shows that the witnesses who testify to having kept these lists testify to the qualification of the voters and the fact of their rejection, and testify also that these voters belong to the Republican party; and, as herein before held, inasmuch as Johnston was the regular candidate of the Republican party, it is reasonable to assume that the voters at these precincts mentioned intended to cast their votes for the contestant, and we therefore count the votes at these precincts.

The minority also say:

Objection is made in the majority report of the committee that all of these lists are not properly tendered in evidence, and therefore can not be considered as part of the record. But, while it is true that the formal technical presentation of the list, filed as an exhibit, was not resorted to in each case, yet the lists themselves appear in the record and are subject to the scrutiny and criticism of the committee; and, inasmuch as they conform to the testimony introducing them, it is our opinion that the objection to their form of presentation is too technical to warrant their exclusion, and we have therefore considered them as having been properly introduced in the case.

The majority of the committee do not admit the contention that the lists justify the addition of the number of votes allowed by the minority, even in view of their admission as evidence. Mr. James H. Codding, of Pennsylvania, who filed views of his own,[1] called attention to three precincts, on the lists of which contestant was credited by the minority with 293 votes (the minority contention only allowed him a plurality of 233 votes), on evidence that did not come up even to the rules established by the majority.

From the different views of the case, the majority proposed to declare sitting Member entitled to the seat; the minority proposed to seat the contestant, and Mr. McCall proposed to declare the seat vacant, on the ground that there had been no valid election.

The report was debated fully and ably in the House on May 26, 28, and 29.[2] On the latter day the proposition of the minority, to award the seat to the contestant, offered as a substitute, was rejected—yeas 95, nays 105[3]—and at the same time the majority resolution declaring contestant not elected was agreed to—yeas 103, nays

[1] These views do not appear with the report, but were presented in the House on May 28, and may be found in the Record, p. 5875.

[2] Record, pp. 5756, 5866, 5897–5915.

[3] Journal, pp. 552, 553.

99. On June 1 this latter vote was reconsidered, and Mr. McCall offered as a substitute for the majority resolutions the following:

That there was no valid election for Representative in the House of Representatives of the Fifty-fourth Congress from the Seventh Congressional district of South Carolina on the sixth day of November, eighteen hundred and ninety-four, and that neither Thomas B. Johnston nor J. William Stokes is entitled to a seat therein.

This substitute was agreed to—yeas 130, nays 125. Then the resolutions of the majority, as amended, were agreed to.[1]

1127. The Virginia election case of Wilson v. Lassiter in the Fifty-seventh Congress.

Incompetent testimony and long statements by counsel tending to present such evidence should not be included in the record of an election case.

The mere existence of frauds and irregularities does not vitiate an election if insufficient to affect the result.

On June 30, 1902;[2] Mr. Kittredge Haskins, of Vermont, from the Committee on Elections No. 3, submitted a report in the case of Wilson *v.* Lassiter, of Virginia. The sitting Member in this case was returned by an official majority of 4,738. The committee concluded:

That while the evidence shows that frauds and irregularities were practiced in the interest of the contestee it falls short of being sufficient to legally justify a change in the result of the election.

The minority of the committee concurred in the result, but not in admitting that frauds were shown.

On an incidental question the report says:

The practice of introducing into the record in contested election cases, as was done in this case, testimony clearly incompetent and irrelevant, and long statements by counsel intended to convey information as to facts which could not be properly proven, is inexcusable and deserves to be severely condemned.

This report was not acted on at this session of Congress.

1128. The Missouri election case of Wagoner v. Butler in the Fifty-seventh Congress.

The returns of 41 out of 116 election precincts being rejected, the contestant was seated on his plurality in the remaining precincts, which cast over half the returned vote.

Offlcial copies of registration lists, such copies made in pursuance of law, were admitted as evidence of the registration by a divided committee.

A fraudulent registration was held to justify a conclusion that a conspiracy existed to perpetrate fraud in the election.

Instance wherein the city directory and a canvass by means of registered letters was accepted to discredit a registration.

Where a law requiring ballots to be numbered, even though directory merely, was totally disregarded, and the poll books and ballot boxes disagreed essentially, the returns were rejected.

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[1] Journal, pp. 557, 558.

[2] First session Fifty-seventh Congress, House Report No. 2744.

In a district where gross frauds prevailed generally irregularities in the reception and record of the ballots were held to justify rejection of the return.

On February 24, 1903,[1] Mr. Marlin E. Olmsted, of Pennsylvania, presented the report of the majority of the Committee on Elections No. 2 in the Missouri case of Wagoner *v.* Butler. The sitting Member had been returned at a special election, November 4, 1903, by a plurality of 6,293. The report thus states the circumstances of the case:

At the regular Congressional election in 1900 James J. Butler, the Democratic candidate, was returned as having been elected to membership in the Fifty-seventh Congress by a plurality of 3,553. His Republican opponent, William M. Horton, contested his election.

That case was heard by Committee on Elections No. 1, which, in an able and exhaustive report[2] presented by its chairman to this House April 5, 1902, found that frauds numerous and varied had been so extensively practiced in or relating to said election that the honest choice of the voters could not be determined, and recommended a resolution, adopted by this House June 28, 1902, to the effect that there had been no valid election and that the seat held by Mr. Butler be declared vacant. The governor of Missouri ordered a special election to fill the vacancy thus caused, which special election was held Tuesday, November 4, 1902, that being also the day for the regular election of Representatives in the Fifty-eighth Congress. Mr. Butler was returned as elected to fill the vacancy in this present Congress caused by his own unseating and by the increased plurality of 6,293. He took the oath of office December 1, 1902, and now occupies the seat of which he was once deprived by the action of this House, as above indicated.

His counsel informs your committee that at the same election Mr. Butler was also elected to membership in the Fifty-eighth Congress and by a still larger plurality. No evidence concerning that election has, however, been presented to your committee, and with it this Congress has, in any event, no concern.

Mr. Wagoner, who was not a candidate for membership in the Fifty-eighth Congress, contests the election of Mr. Butler for the remainder of the Fifty-seventh Congress and claim himself to have been lawfully chosen to fill the vacancy.

The notice of contest charges that in and with respect to 63 election precincts, hereinafter named, there were practiced nearly every variety of fraud yet devised for producing unfair and dishonest political results, such as padded registration, repeating, false personation, the reception of ballots from persons whose names were not upon the registration books and, therefore, under the laws of the State of Missouri, not entitled to vote at all, the stuffing of ballot boxes, fraudulent conspiracies on the part of election officers to prevent free voting and honest returns, improper interference by the police, intimidation, and, in some instances, actual violence. As to some, if not all, of these precincts the charges are well sustained by proof.

The Twelfth Congressional district comprises certain wards and parts of wards, and is wholly within the city of St. Louis. It extends across the city from east to west, the western end, however, being considerably wider and greater in extent than the eastern, which borders upon the Mississippi River. No complaint is made as to the election in the western portion of the district, but the middle and eastern portions embrace what are, let us trust, the worst portions of the city, and contain the lowest classes of her inhabitants. Saloons, bawdy houses, low theaters, mule stables, boarding houses for roustabouts, gambling houses, etc., here abound in great profusion, and the field is well adapted to corrupt political practices.

The district comprises 116 election precincts. As to 53 of these, counsel for the parties mutually agree that there were no such irregularities as would justify the setting aside or modification of the returns.

As to the 63 precincts remaining in dispute, the majority found that in 41 it was impossible to determine the true and lawful vote, and therefore that the returns

[1] Second session Fifty-seventh Congress, House Report No. 3857.

[2] First session, Fifty-seventh Congress, House Report No. 2744.

should be rejected. These returns from the 41 precincts had given Butler 9,239 and Wagoner 2,179, a majority of 7,060. So it is evident that the rejection of the 41 precincts gave to contestant a majority of 1–67 in the district. The vote returned for contestant and sitting Member together in the whole district was 27,395, and the total vote for both in the rejected 41 precincts (out of 116 precincts in all) was 11,418. So the portion rejected was less than half the vote and less than half the precincts.

In discussing the reasons justifying the rejection of the precincts in question, the majority first describe the registration system.

The so-called "Nesbit law," adopted in 1899, provides election machinery applicable to the city of St. Louis only.

Counsel for contestant claim that the provisions of this law give partisan control of the election machinery and facilitate the perpetration of corrupt practices. Counsel for contestee claims that some of its most objectionable provisions were eliminated by the supplementary act of 1901. It appears that in 1898, just prior to the adoption of the Nesbit law, this particular district elected a Republican Congressman by a majority of 2,321, but since the adoption of the law Democratic majorities have invariably been returned. This of itself may or not prove anything. It seems to your committee that the law, even as amended, contains some very objectionable features.

The entire election machinery of the whole city is placed under the control of a "board of election commissioners," composed of three members appointed by the governor for the term of four years. The law does, indeed, provide that "one of said commissioners shall be a member of and belong to the leading party politically opposed to that to which the governor belongs." Nevertheless, he is selected by the governor and not likely to be very antagonistic to the party whose governor confers upon him the position. It is provided that "said election commissioners shall make all necessary rules and regulations, not inconsistent with this article, with reference to the registration of voters and conduct of elections, and shall have charge of and make provisions for all elections, general, special, local, municipal, State and county, and of all others of every description to be held in such city or any part thereof at any time."

The voters in the several election precincts are not permitted to select their own judges, inspectors, and clerks of election, but this board of three election commissioners appointed by the governor is authorized to select for each polling place four judges and two clerks of election. It is, indeed, provided that two of the judges and one of the clerks shall be "designated" by the minority commissioner. It requires, however, the concurrence of at least one of the majority commissioners to make this designation effective.

The provision of the Nesbit law with reference to registration is a striking feature, and, it is believed, unknown to the election machinery of any other city. A voter may upon a certain day register in the precinct in which he lives, but except upon that day registration must be made outside of the precinct, and in many cases outside of the Congressional district, at the office of the central board of election commissioners. The provisions of the Nesbit law upon this matter of registration afford a wide field for fraud. It appears from the testimony that by far the greater portion of the names appearing upon the registration books were placed there not in the precincts where the voters lived, but at the central office of the board of election commissioners.

The four judges of election in each precinct are constituted by law a board of registration for their precinct, but, as already stated, the majority of registrations are made at the office of the board of election commissioners and not with the precinct board.

The general board is required to furnish to the precinct board verification lists. No new, names are permitted to be added after "the Saturday following the Tuesday three weeks preceding such election," but the clerks of election are constituted canvassers of their respective precincts and, being supplied with the verification lists, may "come together and canvass their precinct, calling at each dwelling house for the purpose of verifying the register." When that has been done a further meeting is to be had for corrections of the registration. Then it is provided by law that—

* * * * * * *

"SEC. 7238. Judges shall sign registry—registry to be sent to commissioners—commissioners to proceed—how lists public records.

"At the end of the last session provided for the said board of registration and said clerk shall compare and correct the registers aforesaid and make them correspond and agree; and said judges shall then, immediately following the last name on each page of the register, sign their names so that no other name can be added without discovery, and shall return the two registers to the possession of the election commissioners; thereupon the said commissioners shall at once cause copies to be made of such registers, of all the names upon the same, with the address, and arranged according to the streets, avenues, or alleys, commencing with the lowest number and arranging the same in order according to street numbers, and shall then cause such precinct register, under such arrangement, to be printed in sufficient numbers to meet all demands, and upon application a copy of the same shall be given to any person in such precinct. Said registers in the office of the election commissioners shall be public records and open to public inspection."

Duly authenticated copies of these precinct registers were presented in the testimony and relied on by the majority.

The minority views [1] present testimony to show the unreliability of the lists, and say:

The lists above referred to, which are named "Exhibit C, of January 3, 1903, on the part of the contestant," and are made a part of the record in this case, were introduced on January 3, 1903, with the testimony of Louis P. Aloe, which appears on page 289 of the record. Mr. Aloe identified them as official lists of the registered voters of the various precincts, as issued by the election commissioners' office for the convenience of voters, official, however, only, as he afterwards stated, in the sense that they were issued by the election commissioners' office. He states that these sheets were printed from the verification lists which are prepared by the judges and clerks of election in the various precincts as provided for by section 7233, which is as follows:

"SEC. 7233. *Verification lists—challenges.*—The election commissioners shall prepare and furnish to the board of registration in each precinct two blank books to be known as 'verification lists,' each page to be ruled into columns and contain pages sufficient for each street, avenue, and alley in the precinct. During the progress of registration or immediately thereafter, the clerks of said board shall transfer all the names upon the register to the left-hand pages of such 'verification lists,' arranging them according to the streets, avenues, alleys, or courts, beginning with the lowest residence number and placing them numerically, as nearly as possible, from the lowest up to the highest number. They shall, first write the name of such street, avenue, alley, or court at the top of the second column and then proceed to transfer the registered names to the pages of such 'verification lists,' headed 'Registered names,' according to the street number, as above indicated.

"If, during either day of registration, a registered voter of the ward shall come before the board of registry and make oath that he believes that any particular person upon such registry is not a qualified voter, such fact shall be noted, and after the completion of such 'verification lists,' such board or one of said judges shall make across or check a in ink opposite such name upon each of said 'verification lists.' If such judges shall, however, know that any person so complained of is a qualified voter, and shall believe that such complaint was only made to vex and harass such qualified voter, then such cross or checked mark shall not be put upon such lists. Said board of registration shall, before 8 o'clock on the following day, return said 'verification lists' to the office of such election commissioners." (New section.)

The above section is contained in the law of 1895 and is no part of the much-abused Nesbit law.

It will be seen that these registration sheets, upon which the majority of the committee rests so much of their case, can not be said to have special verity or genuineness of character to be admitted as evidence of the actual legal registration in any court in the United States. It is not suggested that they have the color of verity in any degree, such as would examined copies or certified copies of the registration books.

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[1] Presented by Mr. John J. Feely, of Illinois.

They are not copies of the registration books. They are not even copies of copies of the registration books, but they are arranged from verification lists, which verification lists are made up by taking the names of the registered voters from the registration books and arranging them by streets, avenues, and alleys, commencing with the lowest street number of any voter registered from any street, etc.

The majority report finds from testing the registration that it was to a large extent false and fraudulent and that the conclusion therefrom is irresistible that a conspiracy existed in the district to perpetrate systematic fraud in the interest of sitting Member:

Contestant addressed or caused to be addressed and sent through the post-office a registered letter to each person whose name and address were thus shown to be registered in the 63 precincts in controversy. The total number of registered letters thus Mailed was 25,179. Of this number, 12,608 were returned, with endorsements bearing the number of the letter carrier and statements to the effect that the parties were not found at the address given. These letters were mailed, some on the 16th and some on the 17th of December following the election.

Of the 25,179 names appearing on the officially published registry lists, 16,045 do not appear in the city directory for 1902, and, as will hereinafter appear, thousands of votes were cast and counted in names not appearing upon either.

Four thousand six hundred and sixty-nine of the registered letters returned bore the statements of the letter carriers to the effect that the parties to whom they were addressed had "removed." Of this 4,669 names of persons appearing upon the registry lists, all of whom "removed "shortly after election, only 245 grace the pages of the St. Louis city directory for 1902.

These registry lists, printed by authority and required by law to be published for the information of the public as to the registration in each precinct, were offered and received in evidence, with no objection whatever on the part of the contestee, either as to their authenticity or relevancy, or as to their not being the best evidence. But the minority election commissioner was cross-examined and subsequently called on behalf of contestee for the purpose of showing that they were not correct. He actually testified that they were not, but that a great many of the names which were actually upon the registration books in his office were not included in these printed sheets.

Contestee also placed in evidence the certificate of the secretary of the board of election commissioners, showing 425 names upon the original registration book of Ward 22, precinct 1, whereas the printed registry sheets showed only 205; also a similar certificate showing 676 names upon the registration book in the office of the board of election commissioners from Ward 4, precinct 7, although the printed registry sheets showed only 169.

These exhibits, offered on behalf of Mr. Butler, seem to your committee to present the highest evidence of fraud. No names could have been honestly placed upon the registration books after the published registry sheets were given out except in a few cases of persons who, having been refused registration in their respective precincts, had appealed to the board of election commissioners. The testimony of the minority commissioner is to the effect that there were not more than forty of such cases in the entire city of St. Louis, but in this Congressional district alone thousands of persons voted whose names were not upon the printed registry lists, and it now appears from the contestee's own testimony that in one of the precincts above mentioned less than half the names upon the registration books were contained in the printed sheets and in the other less than a fourth.

This same state of affairs, extending throughout the entire district or at least throughout the 63 precincts in controversy, shows premeditated and deliberate fraud, for either thousands of names were illegally added to the registration after the giving out of the printed sheets or else thousands of the names upon the registration books were deliberately and intentionally omitted from the published lists for the purpose of depriving the public of ascertaining or knowing the extent to which false registration had been made. No such glaring discrepancies as are here apparent can possibly be accounted for upon the ground of accident or ignorance.

Counsel for Butler has insisted with great earnestness that the evidence as to the sending out of the registered letters and the results thereof was improperly offered by contestant in rebuttal and ought not, therefore, to be considered by your committee. The fact appears to be, however, that the

sending of such letters having become public, the person who had charge of the matter was called by contestee himself and much information concerning the results elicited.

An attempt was also made by contestee to impugn the character of this witness, for the purpose of discrediting his evidence as to the number of letters sent out and those returned. The contestee himself having proceeded so far in the taking of testimony upon the subject, your committee is unable to see that it was not proper for contestant, in rebuttal, to place in evidence the letters themselves, bearing the returns of the letter carriers who had attempted to deliver them. We are not prepared, however, to accept the conclusions which the contestant asks us to draw from this testimony. In a given case a man may have been lawfully entitled to vote, although his name did not appear in the city directory published some months before the election, and he was not found by the letter carrier a few weeks after the election. We therefore decline to cast out any particular vote or votes upon that ground.

Nevertheless the fact that so great a number of names appearing upon the registry list could not be found either in the directory or by the letter carriers does throw suspicion upon the integrity of the registration. When this is coupled with evidence offered by the contestee himself to show that thousands of names were found upon the registration books which do not appear in the printed lists, and were therefore not embraced within the registered-letter scheme of detection, and that the votes of such persons not upon the registry lists were received by hundreds and thousands throughout these 63 precincts, the conclusion is irresistible that there was premeditated and systematic fraud perpetrated in the interest of the contestee.

It appears from the evidence that, although the law of Missouri expressly provides that no vote shall be received from any person not registered, there were in these 63 precincts actually cast for Mr. Butler 3,017 ballots and for Mr. Wagoner 636 ballots by persons whose names did not appear upon the printed registry sheets submitted to the public. Higher evidence of fraud it would be difficult to imagine.

The constitution of Missouri expressly provides "that in all cases of contested elections the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law."

There appear in the evidence in this case the complete registration lists for these 63 precincts, showing the name of every person registered according to the information which the election commissioners supplied to the public immediately before election. Also the poll books giving the name and address of every person who appeared and voted, or at least in whose name a ballot was deposited, and, the boxes having been opened, the evidence showing for what candidate for Congress the ballot voted in that name was cast. With all this information before us it is possible to detect some, though not all, of the frauds which have been perpetrated.

The report proceeds to consider each of the 41 precincts in detail. In several of these there is direct affirmative testimony as to the fraudulent character of the registration, the witnesses being personally cognizant of frauds. In the Fourth Ward, ninth precinct, where a mob assaulted and badly injured an election officer of contestant's party, the following state of facts was disclosed, as viewed by the majority:

We have in evidence the registration list, which contains, or ought to contain, the names of all persons entitled to vote in this precinct. The manner in which it was made up appears from the testimony cited. There has been also offered in evidence the poll book, which, as that term is used in Missouri, means a book supplied in blank and in duplicate to the election officers. The numbers 1, 2, 3, etc., are printed at the beginning of each line. The name and address of the first person who appears and votes is, or should be, written in the first line. The name and address of the second person in the second line, etc.

Each voter is, or should be, given a ballot numbered to correspond with the number of the line upon which his name and address are written. This poll book, which is thus made up as the voting proceeds, should show the name and address of each person voting. It has been offered in evidence (p. 459). It contains the names, addresses, and numbers of 258 persons who are supposed to have appeared and voted in this precinct.

The ballot box was opened, and commencing on page 796 will be found a statement showing the number of each ballot found therein and the name of the candidate for whom said ballot was voted for the

short term for Congress. A study of these tables shows remarkable results. According to the poll book 258 persons, and no more, whose names and addresses are given, appeared and voted. There were found in the ballot box 260 ballots. According to the poll book 258 was the highest number of ballot voted, but there were found in the box ballots numbered 270, 275, 302, 303, 304, 305, 306, 307, 308, 310, 312, 314, 315, 317, 318, 319, 320, 321, 323, 328, 335, 349, 351, 352, and 898–25 numbers in all, none of which appear upon the poll book, and all of which were counted for Butler.

Another remarkable fact is that ballots numbered 43, 115, 117, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 134, 136, 137, 138, 139, 142, 144, 146, 149, 150, 151, 152, 154, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 180, 181, 182, 183, 185, and 222—45 in all, were voted and counted twice for Butler, while ballot number 137 was voted and counted three times for him. In other words, these 46 persons in repeating did not even take the usual precaution of voting under different names. How many times they voted under other names will never be known.

The further fact, still more significant if possible, is that as to 77 names of persons appearing in the poll book no corresponding ballots are found in the box at all. These numbers are 3, 5, 12, 13, 20, 34, 37, 39, 46, 48, 52, 55, 56, 61, 64, 71, 77, 78, 80, 89, 105, 109, 111, 112, 113, 178, 187, 188, 190, 191, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 211, 213, 215, 216, 221, 226, 227, 228, 231, 233, 234, 236, 237, 238, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, and 258.

Thus, if the integrity of the poll book can be assumed, it appears that 77 ballots cast were not found in the ballot box at all, their places being supplied in part by the duplication of other numbers upon the poll book and the addition of 25 numbers not found on the poll book. Those who fixed up this return tried to make the accounts balance. There were 258 names and numbers on the poll book, and they returned 258 votes, 237 for Butler and 21 for Wagoner. But even counting the 45 duplications and 1 triplication and the 25 additional votes not accounted for on the poll book at all, there were in the box only 227 ballots bearing Butler's name, while there were 28 bearing Wagoner's, 3 bearing the name of Artz, and 1 containing no name for Congress.

Election signifies choice. In view of this array of facts it needs no argument to show that the returns from this precinct afford no evidence whatever as to the choice of the voters. The registration, the conduct of the election, the poll books, and the returns are all fraudulent and utterly unreliable. There was ballot-box stuffing and ballot-box robbing, and nearly every form of irregularity known to political history.

The minority admit in their views that the returns of the above-mentioned precinct should be rejected.

On another precinct, No. 10, of Ward 15, an issue is joined. The majority say:

The poll book shows 171 persons as having voted. The opening of the ballot box disclosed 167 ballots. Not a single one of these ballots was numbered, as required by law, and it is therefore impossible to tell what ballot was voted by any particular person whose name appears upon the poll book or whether any of them were voted by the persons whose addresses thus appear. Eighty-nine ballots bearing Butler's name were found in the ballot box. The returns gave him 98. Fifty-nine bore Wagoner's name. The returns give him 61. By reason of the absence of numbers upon these ballots it is impossible to tell whether all or any of these ballots cast by persons who, according to the poll book, did appear and vote, were found in the box or whether the persons who cast the ballots which were found in the box were registered voters, or whether, as in most of the other precincts, there were duplications of ballots by the same voters. The provision of the Missouri statute upon this subject is as follows:

"SEC. 7247. *Procedure when ballot is offered by voter in cases of challenge.*—One of the said judges of election shall receive the ballot from the voter, and shall announce his residence and name in a loud voice, and shall write on the back of said ballot the number of the same, in the order in which it was received, which number shall also be placed opposite the name of the voter in the poll book in the column headed 'number,' and another judge shall put the vote in the ballot box in the presence of the voter and the judges and clerks, and in plain view of the public. The judge or clerk having charge of the registry shall then, in a column prepared thereon, in the same line of the name of the voter, mark 'voted,' or the letter 'V.'

"If such person so registered shall be challenged or disqualified, the party challenging shall assign his reason therefor, and thereupon one of said judges shall administer to him an oath to answer ques-

tions, and he shall be questioned by said judge or judges touching such cause of challenge and touching any other cause of his disqualification, and may also be questioned by the person challenging him in regard to his qualifications and identity, but if a majority of the judges are of the opinion that he is the person so registered and a qualified voter his vote shall then be received accordingly. The vote of no one shall be received by said judges whose name does not appear upon the books of registration as a qualified voter."

Whether the provision as to numbering the ballot should be considered as mandatory or as merely directory it is not important to consider. Ordinarily an honest voter ought not to be deprived of his vote by any dereliction on the part of the election officers, but where the action or inaction of election officers renders it impossible to ascertain the honest vote in a precinct the whole return must be rejected. It seems incredible that 171 or 167 persons could have voted without noticing that their ballots were not numbered.

The minority say in opposition:

We have had no positive evidence pointed out to us by counsel for the contestant of any irregularity in this precinct outside of what is shown in the Owen registered letter and directory tabulation. On the contrary, we find the positive testimony of Judge of Election Steve Pensa that the election in that precinct was conducted honestly, fairly, and in an orderly manner.

As to Ward 15, precinct 6, the majority say:

The poll book shows 140 persons to have voted. The opening of the ballot box disclosed 139 ballots. Ninety-three of these (including 4 duplications) bore Butler's name. The returns give him 95. Fifteen ballots bore the initials of but one judge, whereas the law requires two. Thirty-two ballots cast for Butler, 16 for Wagoner, and 2 for Artz were not numbered as required by law. Four ballots were duplicated and counted for Butler. Notwithstanding the fact that the number of ballots found in the box is only one less than the number of persons whom the poll book shows to have voted, 52 names appearing upon the poll book as having voted were not found represented by ballots in the box when opened, their numbers being missing. It is impossible to ascertain whether the unnumbered ballots were cast by persons whose names appeared upon the poll book.

The minority say:

No citation of positive evidence of irregularity was furnished the committee by contestant's counsel, and we find positive evidence of Election Officials William S. Wellman and Otto Bell as to the absolute fairness and regular conduct of the election in that precinct.

The minority also say generally:

It is true that there is shown in the evidence instances where fewer ballots were found in the box than the poll books show to have been cast, and this is taken by the majority to be an evidence of fraud, and great stress is laid upon that particular fact in their report. They totally exclude from their guessing the possibility that defective ballots are not placed in the box, but are directed under the law to be segregated and placed in envelopes and kept separate and apart from the remaining ballots when returned.

These envelopes are what axe known as rejected-ballot envelopes. The evidence shows that no demand was made by contestant or his counsel for these rejected-ballot envelopes, by which the discrepancy between the number of ballots found in the box and the number of votes shown by the poll book to have been cast would have been accounted for.

Ward 4, precinct 2, affords another example, thus set forth by the majority report:

The poll book (p. 440) shows 488 persons to have appeared and voted. The opening of the ballot box (p. 780) disclosed 486 ballots therein. Of this number, 472 (including 45 duplications) bore Butler's name. The returns give him 471. Wagoner had 14 ballots in the box. The returns give him 17. Three hundred and thirty-two persons voted in this precinct whose names were not on the printed registration list. Forty-five persons voted twice upon the same names and numbers. There were missing from the ballot box the ballots of 48 persons who, according to the poll book, appeared and voted.

The fact that 31 persons, mostly Irish, registered from one building, 1038 Third street, in this precinct and arrived at the place of registration in reverse alphabetical order is not more remarkable than that 39 others, mostly Italians, registering from 615 Franklin avenue, by a singular coincidence, arrived in precisely the same order. Assuming that each one of these persons did appear personally for registration, as the law requires, these coincidences would be remarkable, but upon the not very violent assumption that if there were such persons actually in existence, which may be fairly doubted, their names were handed by designing persons to registration officers anxious to assist in false registration for the purposes of the election. The case is not unusual. It is perhaps not singular that every vote cast from the two houses above named were cast for Butler.

After an examination of the 41 precincts, and in accordance with their conclusions, the majority recommend the following:

Resolved, That James J. Butler was not elected a Representative in the Fifty-seventh Congress from the Twelfth Congressional district of Missouri, and is not entitled to a seat therein.

Resolved, That George C. R. Wagoner was elected a Representative in the Fifty-seventh Congress from the Twelfth Congressional district of Missouri, and is entitled to a seat therein.

The minority views, while conceding that some frauds might have existed, dissented from the conclusion that they were sufficient to invalidate sitting Member's title to the seat.

The report was debated on February 26,[1] and on that day the question was taken on substituting resolutions confirming the title of sitting Member for the resolutions proposed by the majority; and the motion to substitute was lost, yeas 112, nays, 153.

A motion to recommit was disagreed to, and then the question recurred on the first resolution proposed by the majority report. This resolution was agreed to.

The second resolution was also agreed to, ayes 161, noes 2, the minority not generally voting in pursuance of dilatory tactics, and the Speaker pro tempore overruling the point of no quorum present as dilatory.

Mr. Wagoner thereupon appeared and took the oath.

1129. The Massachusetts election case of Conry v. Keliher in the Fifty-eighth Congress.

The House declined to consider false publications, neither party being shown to be concerned therein, and no deception of voters being shown, as a reason for changing an election return.

On January 18, 1904,[2] Mr. Joseph H. Gaines, of West Virginia, from the Committee on Elections No. 1, submitted the unanimous report[3] of the committee in the Massachusetts election case of Conry *v.* Keliher.

The committee found the following facts:

It appears that the Ninth Congressional district of Massachusetts, which is located in Boston, is a district of overwhelming Democratic strength. The Democratic Congressional convention in that district in 1902 was unable to agree upon a nominee within the time fixed by the law of Massachusetts for convention nominations. The contestant, Conry, and the contestee, Keliher, were each candidates before the Democratic convention, and after the final adjournment of the convention each became a candidate by petition.

Each of these candidates, a few days before the election, endeavored to get the support of Hon. James M. Griggs, chairman of the Democratic Congressional committee. Each of them communicated

[1] Record, pp. 2715–2728.

[2] Second session Fifty-eighth Congress; Record, p. 844.

[3] House Report No. 385.

with Griggs and each received a telegram from Griggs. Each of these candidates caused to be published, as an advertisement, in certain Boston papers, a telegram purporting to have been received by him, or the chairman of his committee, from Mr. Griggs.

Contestant insists that contestee was guilty of gross fraudulent representations in the publication of the telegram which contestee caused to be published, and contestee claims that contestant was guilty of gross fraudulent misrepresentations in the telegram which contestant caused to be published.

Contestant denies, and it is not shown, that he was responsible for the published advertisement of the fraudulent telegram which was published in his interest, and it is not shown that contestee was personally cognizant of the fraud in the telegram published in his interest.

At the election contestee received 10,352 votes and contestant 10,099 votes. Contestant insists that by reason of the false telegram from Mr. Griggs, published as a paid advertisement in behalf of contestee, enough voters who would otherwise have voted for contestant were led to vote for contestee. It is not shown by the evidence that any particular person so changed his intention or was led by the advertisement to vote for contestee when he intended otherwise to have voted for contestant.

But contestant urges that it is the duty of the Committee on Elections, and of the House itself, to assume that the publication of a false telegram from the chairman of the Democratic Congressional committee recommending to the voters of the Ninth Congressional district of Massachusetts that he favors a particular candidate ought to have great weight.

The telegram published in the interest of contestee purported to be a denial of a previous telegram published in the interest of contestant, both telegrams purporting to be from Mr. Griggs. Contestant urges that the telegram, published in behalf of contestee, which denied the authenticity of the telegram published in behalf of contestant, attributed such moral turpitude to contestant that many people who read contestee's later telegram, and believed it to be true, were thereby persuaded to vote against contestant, because they believed him to have published a falsehood in his own favor.

Contestant urges that it is the duty of the Committee on Elections and the House itself to assume that voters must have been so influenced and must have so changed their votes from contestant to contestee.

The conclusions of the committee were as follows:

It appears to this committee that the claim that the Committee on Elections should assume a certain number of voters in the Congressional district were influenced, because they ought to have been influenced, by improper charges, to vote for one candidate when otherwise they would have voted for the other candidate, is a claim which belongs in the realm of hypothetical presumptions. To agree to the claims set up by contestant would require a method of ratiocination on our part too fantastic for our minds.

We do not condone the offense of publishing false telegrams or telegrams in a different manner from the one in which they are sent. It may be true that the resident voters in Boston were waiting with bated breath to learn what Hon. James M. Griggs thought before they cast their ballots. Mr. Griggs himself, however, thinks otherwise. His conduct in the matter was very careful and very gentlemanly, as would be expected coming from him.

We are inclined to agree with him that the influence upon the Boston voters of the telegrams sent by him, and those published and purporting to have been sent by him, has been very much exaggerated by the counsel in this case.

Some allegations of fraudulent voting and of fraudulent colonization of voters have been made by contestant, but not enough votes are involved in these charges to make any change in the result of the election.

The Committee on Elections No. 1 therefore beg leave to report to the House, and respectfully recommend the adoption of the following resolutions:

"Resolved, That Joseph A. Conry was not elected a member of the Fifty-eighth Congress from the Ninth Congressional district of Massachusetts, and is not entitled to a seat therein.

"Resolved, That John A. Keliher was elected a member of the Fifty-eighth Congress from the Ninth Congressional district of Massachusetts, and is entitled to retain his seat therein."

The resolutions were at once agreed to, without debate or division.

1130. The Pennsylvania election case of Connell v. Howell, in the Fifty-eighth Congress.

It being shown that election officers had flagrantly ignored and violated mandatory law, the House declined to purge and rejected the poll.

As to the extent to which hearsay testimony is admissible to prove that a person recorded as voting was not within the precinct on election day.

As to the force of admissions by counsel during argument of an election case.

Admissions in the brief of a party to a contest are of force if not contrary to proven facts.

Election officers being required to file certain affidavits with a prothonotary, his certificate that this was not done was accepted as proof that the affidavits were not taken.

On February 9, 1904,[1] the House began consideration of the election case of Connell *v.* Howell, from Pennsylvania. The sitting Member had received the certificate by a returned plurality of 461 votes. In the course of the contest over 6,000 witnesses were examined, the great majority in behalf of contestant, and the evidence filled 3,824 large pages.

Four essential points were involved in the examination:

(1) The rejection of the returns of certain polls:

(*a*) The poll of the borough of Winton, Second Ward. After quoting the law of Pennsylvania the majority,[2] in their report, say:

> Notwithstanding the plain, unequivocal statement in the statute which provides that "No man shall be permitted to vote at the election on that day whose name is not on said registry list, unless he shall make proof of his right to vote," as herein before required; and notwithstanding the oaths of said election officers above set forth, they permitted in this ward a large number of men to vote whose names were not on the registry list, without affidavits in proof of their right to vote as required by law. Contestant's counsel claimed in the argument that there were 83 such voters, and their names are set forth in his brief. Contestee's counsel, in his presence, admitted 50. The returns show that 220 votes were cast in this ward, and of these 50 are admitted to have been received by the election officers contrary to the positive directions of the law and in violation of their solemn obligations. The evidence does not disclose that any affidavits were required at that voting precinct from unregistered voters. And contestee's counsel practically admitted it, for at page 18 of their brief, in referring to the Second and Third wards of Winton, they say:
>
> "The contestee affirms that a careful examination of the evidence fails to disclose any fraud, irregularity, intimidation, improper or corrupt practices of any of the election officers in either of these election districts. An examination of the list of voters who voted at this election, and a comparison with the registry list, shows that no persons voted who were not registered; therefore no affidavits were taken by the election officers."
>
> This fact alone is sufficient to cast grave suspicion on the honesty and good faith of those election officers. But other facts are disclosed by the evidence. In the neighborhood of 50 votes were received in the names of men who were not present and did not vote. Votes were received in the names of dead men. Several duplications were received. A large number of names were added to the registry list of this ward by the election officers, in violation of the law and their duty. The illegal votes received amounted to much more than a majority of the votes cast and counted.

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[1] Second session Fifty-eighth Congress, Record, pp. 1791, 1845–1867.

[2] Report No. 639, submitted by the chairman of the committee, Mr. Michael E. Driscoll, of New York.

The minority views, by an evident clerical error, fail in certain respects to join issue, taking up considerable space in discussion of documentary evidence relating to another borough, that of Old Forge. On the points where issue is joined they say:

The majority of the committee insist that the reception of so large a number of illegal votes from nonregistered persons, who filed no affidavits, can be accounted for on no other ground than that of gross and palpable fraud, connived at, encouraged, and participated in by the managers of election.

Not one single manager or clerk of that precinct was called to the stand in the case and no witness has testified to any single act or utterance of said election managers, so that the sole ground for rejecting the precinct is the inference that such a large number of illegal votes could not have been cast without fraud. Let us see if there is any testimony in the record that shows that any man voted who was not entitled to vote. Contestant's counsel argued that there were names on the poll list that were not on the registration list, and that no affidavits were required of the nonregistered voters. There is absolutely no proof in the record that the managers of election did not take affidavits as the law required from all nonregistered persons who applied to vote.

The second finding, that about 50 votes were received in the names of men who were not present and did not vote, is based upon evidence printed in the record. We think the evidence established that Wallace Barber, D. W. Dawson, Michael Corcoran, Richard Sanderson, Thomas Wright, and John Mackey were not present and did not vote and somebody impersonated them and voted in their names. The two last-named men were dead. The other four were called to the stand and testified that they did not vote at said precinct on November 4, 1902. Their evidence is competent and unimpeached. As to all the other alleged impersonations, we are not inclined to argue them. Begging pardon for encumbering this report with such matter, we here quote every word of the testimony in the record tending to establish the impersonations. Aside from the fact that it is given by men who were employed by the contestant to hunt up evidence, almost every sentence is hearsay and is utterly incompetent.

The minority then quote, in support of this attack on the evidence, the testimony of two witnesses, Gaughan and Kearney, each of whom had an acquaintance with the people of the ward and had canvassed it to ascertain whether or not the persons recorded as voting had actually voted. The witness would testify in some cases that he had seen the voter personally and the latter had told him that he did not vote, and that he (witness) knew personally that no other person of that name lived in the ward. In other cases witness would testify that the wife or parents or an associate of the voter said that voter was at some other place on the day of election, and then witness would testify that he knew personally that no other person of that name lived in the ward.

After quoting the testimony, the minority say:

We now come to the finding that the election officers added a large number of names to the registry list in violation of the law and of their duty. If any witness testified touching such a matter, we have been unable to find it after a most careful and painstaking examination. We confidently assert that there is no evidence on that point, and that there is nothing to discuss.

The fourth and last finding of the majority is that there were duplications. The only evidence we can find to sustain this is that the name John Kennedy appears twice on the poll list as voter 176 and 211, and Thomas O'Connor appears as voter 8 and 75. It is fairer to assume that there are two John Kennedys and two Thomas O'Connors than it is to impute fraud to the election officers.

In the debate, on February 9,[1] a question arose as to the admissions made by sitting Member's counsel. Mr. Joseph T. Johnston, of South Carolina, conceded that Mr. Balentine, counsel for sitting Member, admitted that there were 50 illegal votes; but denied that sitting Member was present, claiming without contradiction

[1] Record, pp. 1791, 1850.

from the majority that Mr. Howell was absent in Pennsylvania at the time. Mr. Johnston denied that such admission was effective, saying:

I admit that a lawyer can bind his client by an admission in a pleading. I admit that a lawyer can bind his client by an admission in writing entered upon the minutes of the court. That is all right; but to tell me that when a lawyer is arguing a case before a judge, if he misstates the facts and the record shows that he misstates the facts, the judge is bound to decide the case by what the lawyer said and not by what the record shows, is a new sort of justice to me. That is the way it happened. In the argument of the case this lawyer did say that there were 50 illegal votes at that precinct, but that does not bind anybody. The record says otherwise. We are trying the case on the record.

Speaking on the next day for the majority of the committee, Mr. James Kennedy, of Ohio, said:

When the argument opened we stood in the presence of this record a. little appalled at the amount of work that the committee thought was before it, and when Mr. Balentine, representing the contestee, arose to talk, I inquired of him whether or not certain admissions could not be agreed upon by counsel, so as to shorten the labor of the committee, calling his attention directly to the claim of the contestant to the great number of votes in these three wards cast by men whose names were not on the registration list. That was at the beginning of the hearing, and he said that the figures presented by the attorney for the contestant were inaccurate in this regard.

I forget what the exact figures were with reference to the Second Ward of Winton, but it was something like 83 votes that the contestant claimed had been cast in this way, the names of those who cast them not appearing upon the registry list. Mr. Balentine said that there were 50 in that ward, that the balance of the 83 names on that list were not names that did not appear on the registry list, but that they were substitutions.

The minority views lay stress on the fact that Mr. Green, associate counsel for sitting Member, declined to concur in the admissions.

As to the admission in sitting Member's brief, quoted by the majority report, Mr. Johnston said:

The majority of the committee quote that as an admission of counsel that no affidavits were taken. Why, gentlemen, if you are going to quote that for anything, quote it for all it is worth. He makes two affirmative declarations. One is that no affidavits were taken and the other is that nobody voted who was not on the registry list. If you are going to take his statement about one, take it about the other.

In reply on this point, Mr. Henry W. Palmer, of Pennsylvania, stated that a comparison of the list showed the declaration that no one not on the registry list voted not to be true.

(*b*) As to Winton, Third Ward, the majority report states:

Contestant's counsel claimed that in this ward 80 votes were received from persons whose were not on the registry list, and from whom no affidavits were required in proof of their right to vote, as required by law. Contestee's counsel, in his presence, admitted 53.

James Conry, judge of election in that district, swore that no affidavits were taken from men who voted and whose names were not on the registry list.

The evidence further discloses that in this precinct about 22 votes were cast and received in the names of other persons, and it is difficult to understand how so many violations of the election law could be due to honest mistakes on the part of the election officers. It was also claimed, with some evidence to sustain the contention, that about 15 men voted at this precinct none of whose names appeared on the voting, list as returned by the election officers. That one H. V. Lawler, a tax collector and adherent of the contestee arranged with one Benni Betti to bring in his friends to vote and when he was informed that they were not citizens he did not hesitate but said" take them anyway." When those men reached the polls they were taken in charge by one John Lally, one of the inspectors of election and a friend of the contestee, their ballots were marked, and they were voted.

The majority further cite facts indicating that the election machinery was entirely in the hands of sitting Member's friends.

The minority, in their views, say:

The judge of elections at this precinct was sworn, and testified that no persons voted who were not registered, and for that reason no affidavits were taken. In so far as it is alleged that some men voted in the names of men who were not present, and that some voted whose names were not entered on the poll list, we think the fairest thing we can do is to quote the evidence relied upon by the contestant. The witnesses are F. A. Snyder, Benni Betti, and Domineck Cherntom, and they utterly failed, in our judgment, to sustain their allegations.

The minority here cite testimony similar in general character to that cited in discussion of the Second Ward of Winton, and which was criticized as hearsay.

Speaking of this evidence on February 10 [1] Mr. Henry W. Palmer, of Pennsylvania, said:

The committee finds that there were 50 men who were returned as having voted in that precinct who were not there at all. I suppose the best evidence in proof of this fact would have been to summon the men themselves if they could be found on the face of the earth, to bring them before a commissioner and take their testimony that they were not present and did not vote. That was not the course pursued. A man was sent out who was not a stranger—a man who was a tax collector and assessor in that little borough of Winton, who knew every man, woman, dog, and cat in the place. They sent him out with a list in his hand of 50 men who were returned as having voted there, but who did not in fact vote, as it was alleged. He was sent out to ascertain facts, and he came back and reported that A had moved away, that B was in some other country, that C had died, etc. Nobody contradicted his testimony or doubted his veracity. It may not have been the highest or best form of evidence; but in the absence of any contradictory proof which Mr. Howell could have made, if any such existed, it was enough to satisfy a reasonable man of the fact.

Mr. B. P. Birdsall, of Iowa, speaking particularly of the committee's investigation of this ward, showed, by quoting the testimony of a considerable number of persons who voted, that in regard to the voting of unnaturalized persons not on the list, the testimony was not hearsay but direct and positive as to the fact of illegal voting. After showing that the law of Pennsylvania requiring affidavits from persons not on the lists was declared by the courts to be mandatory (Cusick's case, 13 Pa., 459), he said: [2]

The testimony hereinbefore quoted shows that illegal voters, without any declaration whatever to the judges, were accompanied by adherents of contestee into the voting booths, and in truth did the voting for the foreigner, who was indifferent as for whom he voted.

In the face of the positive injunctions of the law as to the care in the exercise of their duty, how, in the light of this testimony, can we conclude that an honest election was held? How could the election officers on this record defend themselves from the charge of negligently performing their duties? And if they can not, it is folly to urge that conduct which subjects them to the penalty of the law does not amount to such fraud as will vitiate their returns.

(*c*) As to Old Forge precinct the majority report says:

Contestant's counsel claimed in the argument that there were 158 votes cast in this district by persons whose names did not appear on the registry list and from whom no affidavits were taken in proof of their right to vote, as required by law. Those names are set forth in their brief. Contestee's counsel, in his presence, admitted 90.

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[1] Record, p. 1860.

[2] Record, p. 1801.

There was some dispute in the arguments on the question whether any affidavits were taken from unregistered voters in proof of their right to vote. But the certificate of the prothonotary of Lackawanna County seems to settle it. The following is a copy of the certificate:

"COMMONWEALTH OF PENNSYLVANIA, *County of Lackawanna, ss:*

"I, John F. Cummings, prothonotary of said county of Lackawanna in said Commonwealth, do hereby certify that among the returns of the election held in the said county of Lackawanna on the 4th day of November, A. D. 1902, which returns are now on file in my office pursuant to law, it appears that one affidavit only was filed from the first district of Old Forge borough in said county, which affidavit is the oath of office taken by the election officers, and that no affidavit of any voter was filed from said district.

"In witness whereof I have hereunto set my hand, and have affixed the seal of court of common pleas of the said county of Lackawanna, at the city of Scranton in the said county, this 12th day of January, A. D. 1904.

"JOHN F. CUMMINGS,
"Prothonotary of Lackawanna County."

According to the evidence about 11 persons voted at that election in that district whose names did not appear on the voting list as returned by the election officers. There were duplications and substitutions in that district, and about 8 persons were permitted to vote, opposite whose names the letters "D. I." appeared on the registry list, without filing affidavits in conformity with the law in proof of their right to vote.

On the morning of election, one Michael Cafferty was sent for and appointed an inspector of election. He was not registered, but he voted without making an affidavit in proof of his right to vote. Although there was no disturbance, peace officers were present, apparently assisting the election officers who were friends of the contestee; threats were used; a Republican watcher was forcibly ejected; the right of challenge was denied; voters were denied the right to make their own selection of persons to assist them in marking their ballots, and ballots were marked contrary to the instructions of voters; and the election generally in this district was conducted in a high-handed manner and without regard to the provisions of law and the sworn obligations of the election officers. And the active participants in those lawless practices were the political friends and adherents of the contestee.

(*d*) Speaking generally of the propriety of rejecting the three above-mentioned polls, the minority say:

From the foregoing facts, and others which may be recited from the evidence, pertaining to the conduct of the elections in the Second and Third wards of the borough of Winton and the first district of the borough of Old Forge, your committee is of the opinion that the election officers in those three districts, and other friends of the contestee acting with them for a common purpose, were guilty of carelessness, lawlessness, and fraud to such an extent as to impeach the returns from those districts.

Fraud can never be presumed, and must in all cases be proved. But it may be established by circumstantial as well as by direct evidence. In those three districts the character and ignorance of a large proportion of the voters, the political conditions, the party feeling, the admitted violations of the election law and reckless disregard of their oaths on the part of the election officers, the opportunities for substitutions, personations, and other illegal voting, the advantage taken of those opportunities, as shown by the evidence, all point to such fraud on the part of the election officers and others, by their consent and connivance, as to vitiate the returns from those districts.

It is a serious matter to disfranchise the honest and legal voters in three districts, or even in one; but it is a more serious matter to trifle with the law which was enacted and intended to be so enforced as to protect the legal and honest voters against fraud and imposition. If the honest, legal voters in any district would insure an honest vote and a fair count, they must see to it that only honest and competent election officers are on guard. The maintenance of the law in its purity and vigor is of more importance than the vote of one or three districts, and your committee is of the opinion that should it excuse the election officers in those three districts for their acts as disclosed by the evidence, such a decision would be accepted by them and others as a justification of their reckless and lawless practices in disregard of their sworn official duties.

Your committee therefore finds that the election in those three districts was so tainted and permeated with fraud as to make them void, and that the returns from them should be thrown out and deducted from the official returns of the respective candidates.

Legal voters in those three districts who supported the contestee were not necessarily disfranchised by this action. Their votes could have been proven aliunde during the contest. That was not attempted.

The minority cite McCrary at length in support of this view. In the debate on February 9, Mr. Michael E. Driscoll, of New York, cited the cases of Knox *v.* Blair, Finley *v.* Walls, Van Wyck *v.* Green, Wise *v.* Young, Murray *v.* Elliott, Robinson *v.* Harrison, and Noyes *v.* Rockwell.

Speaking on February 9,[1] Mr. Birdsall said on behalf of the majority, after showing the mandatory nature of the laws of Pennsylvania controlling the acts of the election officers:

The evidence, to my mind, establishes such gross negligence and a willful violation of the law as to render their acts and returns unworthy of belief in any tribunal worthy to investigate them. It is difficult, indeed, to find a single provision of the law that was not violated in some one of the districts in question. A few of these violations may be noted, as clearly shown by the evidence already alluded to and elsewhere found in the record, namely:

The reception of known illegal votes;

The appointment of a disqualified inspector;

The denial of the right of assistance;

The permission to accompany voters to the booths and mark their ballots when no assistance was demanded;

The acceptance of votes from nonregistered persons who made no affidavits;

The reception of votes on defective affidavits;

The presence of peace officers in the voting places;

The rejection of Republican watchers;

The failure to seal the ballot boxes as required by law;

The failure to deposit them as required by law; and

The electioneering of one of the inspectors.

If such gross violations of the law as are shown in this case are permitted to stand and meet with our approval, then we may as well desist in all efforts to enact laws for the protection of the ballot. No man can with honesty be the beneficiary of such frauds. Let us set a higher standard for the conduct of election officers and keep as pure as possible the fountain of authority in this Government. * * *

In the debate Mr. Johnston, speaking for the minority, urged that the polls should have been purged:[2]

I want, before I take up this case in detail, to say that it is a dangerous doctrine, it is a damnable doctrine to throw out entire precincts in an election. You may find that where partisan zeal has controlled it has been done, but I challenge you to show where courts of law have thrown out entire precincts. The law which is laid down in the books, the law which must commend itself to our sense of justice, is that if it is possible to purge a ballot box of illegal votes it shall be done. I do not stand for fraud; I detest it whether it is in politics or in the private walks of life. In this case there is absolutely no reason for saying that fraud was shown to such an extent as to justify throwing out entire precincts. Every illegal ballot can be ascertained. The contestant has set forth with great particularity the name of every voter that he claims cast an illegal ballot. He has referred to the testimony upon which he bases that contention.

There is nothing in the way of this committee—there is nothing in the way of this House taking up those names one by one and determining the facts judicially whether the alleged vote was illegal, and if it was illegal, and the testimony shows for whom it was cast, deduct it from the candidate who

[1] Record, p. 1802.

[2] Record, stpp. 1789, 1790.

received it. If the testimony fails to show for whom it was cast, then adopt the sound rule of law that says that illegal votes, in the absence of testimony showing how they were cast, shall be deducted from the candidates in proportion to their legal votes. I want in my remarks to incorporate certain citations from authorities in regard to the law upon this point.

Mr. Johnson cited the cases of Le Moyne *v.* Faxwell, Taylor *v.* Reading, Burch *v.* Van Horn, Atkinson *v.* Pendleton, Bromberg *v.* Haralson, Cessna *v.* Myers, Butler *v.* Lehman, Chaves *v.* Cheever, Abbott *v.* Frost, Koontz *v.* Coffroth, English *v.* Hilborn, Wallace *v.* McKinley, Hurd *v.* Romeis, Todd *v.* Jayne, and Barnes *v.* Adam in support of his contention.

1131. The case of Connell v. Howell, continued.

The mutilation of ballots in the return of election officers did not cause rejection of the returns in absence of proof of fraud on part of the officers or the party apparently benefited.

Over 2,000 illegal votes having been proven, the committee by proof aliunde determined for whom a portion were cast and rejected them without disturbing the remainder.

A voter's testimony under oath that he was disqualified and voted for a certain candidate was accepted as justification for rejecting the vote.

Where the ballot was secret, testimony of an acquaintance as to voter's declaration before election was accepted as proof aliunde.

(2) As to their refusal to reject the poll of Dunmore precincts the majority say:

Contestant's counsel in their briefs and arguments vigorously attacked the returns from the first and second districts of the First Ward, the second district of the Second Ward, the third district of the Third Ward, and the first district of the Sixth Ward, all of the borough of Dunmore, for fraud, and for the reason that after the contest was commenced the ballots returned from those districts were destroyed, or so mutilated by being wet as to make them undecipherable. It was claimed that this was done in the interest of the contestee, for the purpose of covering and concealing fraud perpetrated by the election officers. The destruction of those ballots, under the circumstances revealed in the evidence, is not; free from suspicion. But your committee does not find sufficient evidence to establish fraud on the part of the election officers nor to charge the contestee with the responsibility of destroying the ballots, and therefore this claim is dismissed.

(3) As to illegal votes in the district at large and proof aliunde as to how they were east, the majority show that 489 votes were cast by persons who gave defective affidavits where the law required accuracy, and continue:

It was also urged on the part of the contestant, in the notice of contest and in the briefs and arguments of his counsel, that, aside from the 489 votes above referred to and aside from the Second and Third wards of Winton and the first district of Old Forge, 1,795 votes were cast in said Congressional district for Representative in Congress, received by the election officers, counted by them, returned to the canvassing board, and canvassed by men who were illegal voters under the statutes of the State of Pennsylvania, as construed by the courts of that State. The contestee's counsel admitted this claim, except as to the number of about 211, and it was practically conceded that 1,584 of those votes were illegal. Therefore, according to the evidence and the concessions of counsel on the argument, about 2,002 votes were cast in said district by illegal voters, aside from the Second and Third wards of Winton and the first district of the borough of Old Forge.

Contestant attempted to prove aliunde that those votes were cast for contestee. Proving how men voted is generally a difficult matter and always is so when the political supporters of the opposing candidate are on the witness stand. The law provides for a secret ballot. No man is required to state

how he voted. On the part of the contestant evidence was introduced tending to show that practically all those illegal votes were cast for contestee. However, the evidence in many of those cases was not entirely satisfactory to a majority of your committee, but after a careful examination of the evidence it finds that at least 200 of those votes were proven by competent and sufficient evidence to have been cast for the contestee and should be deducted from his count, and that one of those votes was proven by competent and sufficient evidence to have been cast for contestant and should be deducted from his count.

The minority say:

Testimony was taken tending to show that more than 2,000 illegal votes were cast in districts other than the three which the majority of the committee have thrown out entirely. The majority of the committee have declined to take up these alleged illegal votes and purge the ballot boxes. They have gone just far enough to find a plurality for the contestant and ignored all other illegal votes. The pleadings brought up the question of the legality of votes in every precinct. Testimony was taken for the purpose of substantiating these allegations. By what rules of law or justice the committee can consider only a part of the record and a part of the illegal votes we are unable to discover. At a trial of causes at law it may and frequently does happen that the determination of one point renders the consideration of all others unnecessary.

For instance, if one brings suit for personal injuries against a railway company, where the doctrine of contributory negligence obtains, after the jury finds that the plaintiff sustained his injuries through his own negligence, it is unnecessary for the jury to go further and consider the expenses he incurred on account of his injuries, his sufferings, etc. This is not a case of that nature. The whole election is at issue. Suppose, for instance, that the contestee had been elected to Congress by a plurality of two votes, and the contestant had demanded and this Congress had granted a recount of the ballots; and suppose, further, that after counting three boxes the contestant had gained three votes, would any committee or any Congress stop then and there and say that they had gone far enough, and that the contestant is entitled to his seat? It would shock the ordinary lawyer and paralyze the honest layman. It appears to the minority of the committee that under the circumstances supposed the entire vote would be counted. It appears to us that the entire illegal vote should be eliminated according to the rules and forms of law and the seat awarded to that man who received the majority of the legal votes.

Speaking on February 9 [1] on behalf of the majority, Mr. Birdsall said:

The committee relied on all these points, and I desire to say that the gentleman who preceded me is entirely mistaken in saying that the majority of the committee rely on the character of the testimony that he refers to, and which is set out in the minority report in determining the fact that an illegal vote was cast. A stronger rule was adopted by the majority of the committee than met with my approval. I think there is sufficient evidence in this record to establish the fact that between 1,500 and 1,600 of these illegal votes were cast for Mr. Howell.

Mr. Kennedy, on the same point, said [2] as to the mass of testimony:

Now, when we approached that testimony, it was as if this House had submitted to this committee the question of whether or not in that great haystack there were rats to a greater number than eight or nine. We went out and hunted and hunted, and we found 200 rats. We saw them. The committee all saw them. There were many more than I discovered; there were evidences all around us of more rats. It seemed unreasonable to go through, clear through, that entire stack, straw by straw, when we had already found so many illegal votes that were cast for Mr. Howell.

Mr. Kennedy, then proceeded to reply to the assertions of the minority that the evidence by which illegal votes were shown to have been cast for sitting Member was inadmissable as heresay. He quoted a number of witnesses whose testimony showed that they were not qualified voters, and who declared positively that they voted for sitting Member, and declared that he found 200 cases as well substanti-

[1] Record, p. 1802.

[2] Record, p. 1853.

ated as those quoted. In conclusion he presented a table giving the names of the persons illegally voting and the precincts where their votes were cast.

Concluding the argument on February 10,[1] Mr. Driscoll said:

Judge Birdsall, who addressed the House yesterday on this question—who has been on the bench and is a well poised lawyer—said that about 1,400 or 1,500 of those 2,000 illegal ballots were cast for Mr. Howell. And another gentleman from Ohio [Mr. Kennedy], who has spoken this morning, has said that 600 or 800 or 1,000 of those votes were cast for Mr. Howell. I suppose I was one of the conservative members of that committee. I did not go as high in my estimate as some of the rest; but I had no doubt that on the evidence at least 200 of those votes were cast for Mr. Howell.

Questioned as to why the names were not set forth in the majority report, he said:

That was not necessary when we showed that only 10 illegal votes were required to overcome the apparent plurality for Mr. Howell after those three precincts were thrown out. Nobody questioned this in the committee. It was unnecessary to set out the names with the pages of the evidence.

(4) As to the proof aliunde by which contestant proved 32 votes cast for him in the three precincts of which the committee had rejected the poll, the minority views say:

One witness proves all these aliunde votes, except three. Here is the evidence, and, in our judgment, it is incompetent, for reasons appearing on its face.

The minority give a list of the votes, all but five of which were in the Second Ward of Winton, and then quote the evidence, which generally as to each voter was as follows, the questions being put by contestant's counsel, to one Flynn, witness for contestant:

Q. Patrick J. Walsh, do you know him?—A. Yes, sir.
Q. Was he supporting Mr. Connell?—A. Yes, sir.
Q. Do you know Daniel Dyer up there, also?—A. Yes, sir.
Q. Was he supporting Mr. Connell in the last campaign?—A. He was.
Q. Do you know John Kearney?—A. Yes, sir.
Q. Was he supporting Mr. Connell in the last campaign?—A. Yes, sir.
Q. Do you know John E. Walsh?—A. Yes, sir.
Q. Was he supporting Mr. Connell in that campaign?—A. He was.
Q. Do you know John Macker?—A. Well, Macker—I don't know that gentleman.
By Mr. BALENTINE (sitting Member's counsel):
Q. Are you attempting to tell whom these men voted for?—A. Yes, sir; men told me that.
By Mr. DONOVAN (contestant's counsel):
Q. Do you know Anthony O'Connor?—A. Yes, sir.

Q. And was he supporting Mr. Connell last fall?—A. Yes, sir .

On cross-examination witness testified generally that he did not see the voters cast their votes, but that they told him before election how they should vote.

The majority in their report content themselves with declaring the sufficiency of the proof; but in the debate[2] on February 9, Mr. John A. Sterling, of Illinois, one of those concurring in the report, said:

The question arises, What kind of testimony is competent to prove how a vote was cast? Where the ballot is secret, the ballot does not disclose the fact. What is the next best evidence? The party who casts the vote, and in that regard I desire to call attention particularly to the statement made by the gentleman from Iowa, that in the pages of this record it appears that when the contestee had asked

[1] Record, p. 1864.

[2] Record, p. 1805.

witnesses as to how they had voted the contestant interposed an objection and stated and instructed the witness that he need not answer. We are not complaining of that. The gentleman representing the contestee is complaining of the character of the evidence, and I desire to call his attention now to the testimony of the very witness from which he read, Mr. Flynn, who testified that some of these persons who voted legally in these precincts had voted for Mr. Connell, and that same witness was asked by the attorney for the contestant for whom he voted, what his politics were; and the contestee objected and instructed that witness that he need not answer.

Both the contestee and contestant seem to have tried this case on the theory that a voter was not permitted and could not be required to testify as to how he voted, and the pages of this record are full of objections made by counsel for contestee when contestant sought to prove by a witness as to how he voted. I say the record is full of objections and instructions from their mouths to the witnesses.

So he is estopped now from complaining that the evidence in this case as to how these men voted did not come from the mouths of the voters themselves. He told these witnesses that they need not disclose that fact, and witness after witness took advantage of the instruction and this information as to what their rights were under the law, and refused to tell under the instructions of counsel for the contestee as to how he voted. * * *

It is convenient here now to call attention to the position taken by the counsel for the contestee on that very question by this very witness. I am quoting from the testimony of Flynn. The counsel for the contestant asked what was his politics—that is, the witness's politics. He asked, "Do you know James Flynn?" That is the witness himself. He said, "Yes." He was asked, "What is your politics?" The witness answers, "Mine?" And the question is, "Yes; yours." Mr. Ballentine, attorney for the contestee, says, "You don't have to answer that question if you don't want to." I am reading on page 26 of the Views of the minority, a little above the middle of the page. That is the witness that the gentleman from Iowa read from on that same page.

The gentleman from Iowa [Mr. Martin J. Wade, who sustained the minority contention] also said this is the character of his testimony, and he read as follows: "Patrick J. Walsh; do you know him?" "Yes." "Was he supporting Connell?" "Yes." Now, that is not all the evidence of James Flynn. The evidence farther down on the same page, on cross-examination of Flynn, is, "Are you attempting to tell whom these men voted for?" And the witness says, "Yes; the men told me so."

Now, the question is whether or not the declaration made by the voters themselves is competent to prove how they voted. If the ballot does not disclose the facts, if the witness himself is not allowed to testify, where are you going for proof as to how this or that man voted in any election? Is it impossible to purge the ballot for the reason that these two classes of evidence are barred under the law? The next best evidence, and the only evidence that is left for any party in a case of this kind, is to prove what? Why, to prove what the voter said—prove his declarations, prove what political party he belongs to.

In accordance with their conclusions, the majority rejected the three polls above mentioned, thus deducting 172 votes from contestant and 625 from sitting Member; credited contestant with 32 legal votes proven aliunde; and deducted from sitting Member 200 illegal votes proven aliunde to have been cast for him. One illegal vote was deducted from contestant.

The result of these corrections left a plurality of 223 for contestant; and the majority reported the usual resolutions:

Resolved, That Hon. George Howell was not elected a Representative in the Fifty-eighth Congress from the Tenth district of the State of Pennsylvania.

Resolved, That Ron. William Connell was duly elected a Representative in the Fifty-eighth Congress from the Tenth district of the State of Pennsylvania, and is entitled to a seat therein.

The minority proposed substitute resolutions declaring Mr. Connell not elected, and Mr. Howell elected and entitled to the seat.

The report was debated at length on February 9 and 10, and on the latter day the substitute was disagreed to, yeas 150, nays 161. Then the first resolution

of the majority was agreed to, yeas 160, nays 148. The second resolution was agreed to, yeas 159, nays 147.

Mr. Connell then appeared and took the oath.

1132. The Tennessee election case of Davis v. Sims, in the Fifty-eighth Congress.

The House will not, on pretense that a class of voters are unconstitutionally prevented from voting, count the votes of persons not shown individually to have attempted or desired or been qualified to vote.

Votes may not be proven aliunde on mere estimates of witnesses.

The Elections Committee declined to consider the failure of election officers to hold the elections in certain precincts when it was not shown that either party was deprived thereby of votes to which he was entitled.

No fraud being shown, a slight irregularity in canvassing returns was not considered by the Elections Committee.

On March 4, 1904,[2] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted the report of the Committee in the Tennessee election case of Davis *v.* Sims. The sitting Member had been returned by a majority of 976, which the committee found reduced to 970 by corrections which it made in the returns. But one question was involved in the decision made by the committee. Contestant claimed—

that a large number of votes, not cast nor offered to be cast, should be counted as if actually cast for him, because, as he alleges, the persons who would otherwise have cast them were prevented from voting by the operation of the "Dortch law," which he holds to be unconstitutional.

For the sake of the argument the committee admit that the law is unconstitutional, and thus conclude:

What would be the effect of holding the Dortch law unconstitutional? The election was held under it in only 13 civil districts out of a total of 168 in the Congressional district. If we throw out entirely the returns from these 13 districts the contestee will still have a majority. The contestant insists, however, that in the event of holding the law unconstitutional the vote already counted should stand, presumably upon the theory that persons who voted under the Dortch law would also have been entitled to vote under the laws in force at the time of its enactment and which it, if constitutional, must be held to have repealed. He also contends that we must add to his total a large number of unvoted votes which he asserts would have been cast had the Dortch law not been enacted. He claims that it has been proved that 1,061 persons named in the testimony would have voted for him had they been entitled to vote under the Dortch law, thus giving him a majority of 85—and that 1,920 persons, "estimated," but not named in the proof, should also be treated as having voted for him, thus increasing his majority to 2,005.

Just 20 persons who were actually called to the stand testified that they would have voted for contestant had not the Dortch law prevented, and as to one of them the testimony does not show that he was registered or had paid a tax so as to be qualified to vote under any law. As to all the other persons claimed, the evidence is purely hearsay and very unreliable.

As to 12 of them, contestant's claim that they shall be considered as having voted for him rests solely upon the testimony of J. H. Falls (the first witness called to prove names of this class), of which the part bearing upon this question is as follows:

"5. Q. Can a person who can not read vote under the provisions of the said Dortch law?—A. No, sir.

"6. Q. What effect does the Dortch law have upon the Republican voters of the Fourth civil district of Hardin County?—A. It has a big effect to keep them from voting.

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[1] Record, pp. 1783–1810, 1845–1867.

[2] Second session Fifty-eighth Congress, House Report No. 1382; Record, pp. 2804–2809.

"7. Q. How many do you know, of your own knowledge, in said Fourth district who are disfranchised under the provisions of this law?—A. Twelve, that I know of.

"8. Q. Will you please give the names of those whom you know to be disfranchised?—A. Buck House, old man Ras White.

"9. Q. How long have you lived in this district?—A. I have lived in this district all my life.

"10. Q. How old are you?—A. 1 am 53 years old.

"11. Q. Have you a list of persons who did not attend the November election because the same was held under the provisions of the Dortch law?—A. Yes, sir; I have got a list of them.

"12. Q. Please give the names of the parties contained on your list, and are they Republican or Democrats?—A. Marion Cole, Wiley Cherry, Bud Campbell, Henry Doran, Tom Ellison, Ike Kendall, Ike Rhone, B. F. Rinks, Ulis Lowry, Buck House, John White, and old man Ras White. They are all Republicans.

"13. Q. Do the above-named parties all live in the Fourth district of Hardin County?—A. Yes; every one of them.

"Cross-examined:

"1. Q. Where did you get the list of names that you have just read?—A. I got them all over there at my store.

"2. Q. When did you make up said list?—A. I do not recollect whether it was before Christmas or since Christmas.

"3. Q. How came you to make up said list? What was it made for?—A. Abernathy come along there one day and asked me if I knowed how many around there that had not voted, and I told him there was a good many. He told me to write them down; that he would be back a certain day and I could hand them to him.

"4. Q. Did Mr. Abernathy tell you what he wanted with the names?—A. I believe he did tell me. I do not exactly remember, it was about the election some way or another.

"5. Q. How do you know that the names you have given are men who can not vote under the Dortch law?—A. I do not know. I did not ask them about that.

"6. Q. Then you just mean that they did not vote in the last November election, and do not know whether they could vote under the Dortch law or not. Is that correct?—A. I do not know whether all of them could or not. Them two old men told me they could not vote, because they could not make their mark straight.

"7. Q. As a matter of fact, most of those that you have named did vote in the last August election, in 1902, did they not?—A. I do not know whether they did or not; I did not even ask them that.

"Further this deponent saith not."

The witness practically contradicted every statement he made save that the 12 were all Republicans. Not one of the 12 was called to testify whether he was or was not a Republican, or had registered and paid taxes, or had or had not voted, or was prevented by the Dortch law from voting, or whether, if able to vote, he would have voted for contestant.

The substantial part of the testimony of the next witness, L. K. Freeman, is as follows:

"5. Q. What kind of a qualification does said law put upon the voters where the same is in operation, if any?—A. It is necessary for the voter to be able to read and write; both.

"6. Q. How has this law operated upon the Republican party in the elections of the Fourth district of Hardin County, and how did it operate in the election of November 4, 1902?—A. It disfranchises a great number of the voters.

"7. Q. Give your best estimate of the number of Republicans disfranchised in the Fourth district of Hardin County, in said November election, by the provisions of said law.—A. From 75 to 100 voters.

"8. Q. Have you gone over and made a list of the names of the Republican disfranchised by the Dortch law in said election of November 4, 1902, in said district; and if so, will you give the names of those whom you know to be unable to vote under the provisions of said law?—A. Yes; I have made a. list to the best of my knowledge and recollection. The names are as follows: Sam Broyles, Wes Bailey, Lute Bailey, Andy Bailey, Josh Bailey, Bill Cherry, Newt Campbell, Marion Cole, Bud Campbell, Lige Dixon, Henry Doran, Mose Davis, Henry Dillahunt, A. C. Duckworth, George Graham, Ned Graham, Pete Gillis, Tom Graham, Fred Guinn, Gus Houston, Pate Hopson, Jack Hunt, Bob Hunt, Bob Hardeman, Lewis Hassell, John Hassell, Ben Higgins, G.O Hunt, Bill Hunt, Bud Hunt, Chub Hunt, Caesar Kendall, George King, Bill Kyle, Jim Lutts, Jerry McDougal, Jim McKinney, John Pol-

lard, Sid Pollard, Frank Pollard, Tom Patton, Green Patton, W. A. Palmer, Otis Pointer, Jerry Sevier, Elias Stephens, Jim. Stephens, Joe Sanderson, Mose Shull, Sam Tall, Dave Winters, Bishop White, Elias Williams, Joe Young, Louis Hassell, Bob House, Buck House, John Hinton, Dez Johnson, Ernest Johnson, Ike Kendall, Bob Johnson, Ras White, Ike Lynch, Bill Wolf, Will Fitzgerald, Adam Ellison, Sam Bundy, Charlie Ermin, Press Martin, Andrew Mack, Jonas Ross.

"9. Q. Will you please file said list as Exhibit A to this, your deposition, making it a part of the same?—A. I herewith file the same, marked 'Exhibit A.'

"10. Q. Was the parties whose names you have given otherwise qualified voters in said November election for all State and county officers, barring the provisions of the Dortch law?—A. I think they were."

In his cross-examination this passage occurs:

"14. Q. How many of the persons named by you in answer to question 8 in chief that can not read?—A. I could not say just how many.

"15. Q. Had the persons whose names you give in answer to question 8 in chief paid their poll taxes for the year 1901 before the November election, 1902?—A. I could not say whether all of them had or not, but I know some of them had.

"16. Q. How many of them had registered for voting?—A. I do not know."

Even among these vague statements there is not a single assertion that anyone of the 72 persons named desired, even if qualified, to vote for contestant.

S. J. Creevy produced a list of 345 names, concerning which he testified as follows:

"27. Q. I will ask you to state if you have briefly, made a list of voters in this city and civil district who are unable to read?—A. Yes, sir; I made that yesterday.

"28. Q. How many names does this list prepared by you contain?—A. If I made no mistake in the count it is 345.

"29. Q. Do you think those persons appearing from this list are able to vote under what is known as the Dortch law?—A. I do not.

"30. Q. If those persons appearing upon said list could vote, what ticket would they vote?—A. My opinion is they would vote the Republican ticket."

From his cross-examination the following is taken:

"8. Q. You have stated that there were 750 Republican voters in the city of Jackson, and of this number you estimated about 345 were unable to read. Now state whether the remaining 405 voters are able to vote under the Dortch law.—A. I think they are.

"9. Q. Then how do you account for the fact that Hon. F. M. Davis, candidate for Congress, received only 23 votes in this city at the last November election?—A. I account for it by the Republican voters not having their poll taxes and by general indifference as to the result of the election.

"10. Q. What was the cause of that indifference?—A. To some extent dissatisfaction existing in the Republican party in the county; and being what we term an off year, accounts for some of it.

"11. Q. What dissatisfaction do you speak of existing in the Republican party?—A. Dissatisfaction as to the county organization; as to who would be recognized as county chairman and members of the executive committee.

"12. Q. Is it not a fact that there were two factions—one headed by H. C. Worsham and the other headed by F. R. Bray—amd that the majority of the colored voters were identified with the Worsham faction?—A. I can't say a majority. They were nearly equally divided from the strength exhibited in the convention.

"14. Q. Which faction had the larger following?—A. Both factions claimed it.

"15. Q. Did either faction champion Mr. Davis's candidacy?—A. The Bray faction recognized Mr. Davis as the regular nominee and entitled to the Republican support.

"16. Q. What was the attitude of the Worsham faction toward Mr. Davis?—A. Apparently it was hostile.

"17. Q. Did this apparent hostility serve to keep the members of the Worsham faction from voting for Mr. Davis?—A. I am of the opinion that it did.

"18. Q. Of the 345 voters in the city of Jackson whom you say are unable to read, what per cent of these can be instructed or coached before election so as to be able to vote under the Dortch law?—A. My opinion, not over 5 per cent.

"19. Q. Is it necessary to pay poll tax in order to vote in the Fifteenth civil district?—A. If you are not exempt by age or infirmity, it is.

"20. Q. Are you able to state what per cent of the persons whose names appear on Exhibit A pay their poll taxes?—A. I estimate 75 per cent of them are over age.

"21. Q. Can you say of your own knowledge what per cent of the remainder pay their poll taxes?—A. I can not.

"22. Q. From your personal knowledge, then, it may be that none or a very few of them?—A. It may be; yes, sir. I am not informed."

Upon the mere expression of opinion by the witness that "they would all vote the Republican ticket" and without evidence of registration or tax payments we are asked to add 345 to contestant's vote. The evidence concerning the remainder of the names claimed as proved by contestant is of the same class except that in some instances there was evidence tending to show registration and payment of taxes.

Upon this character of testimony we are asked to treat 1,061 named persons as if they had voted for contestant. As already shown, 20 only of them have testified. As to the other 1,041, the evidence is even less satisfactory than that which was rejected in the Forty-third Congress in Bell *v.* Snyder (Smith's digest, 247), in which case the committee said:

"L. Bloomer, supervisor at that precinct, in his deposition, page 164, states that the 20 persons whose names are given by him had certificates of registration, and that he saw all of them registered except two, and that they would have voted for contestant if they had been allowed to vote; that they presented their certificates of registration and offered to vote; then made affidavit and offered to vote. He says that he did not read all the tickets, but to the best of his knowledge the parties would have voted for Bell, as all the Reform tickets were alike.

"The committee regard the fact of these 20 persons having been registered as voters as sufficiently proven, but the proof as to the fact that all of them offered to vote for contestant or that they intended to or would have voted for contestant is insufficient."

In the case in hand 1,041 of the persons named did not even offer to vote. As to many of them we have no evidence of their registration or payment of taxes, and as to none of them have we any save hearsay evidence that they desired to vote at all or would in any event have voted for contestant.

The additional 1,920 claimed by contestant rest upon evidence even more flimsy—the mere estimates of witnesses of which a fair sample is found in the testimony of T. J. Sawner, here given in toto:

"1. Q. What is your age, place of residence, and what position do you hold in the county?—A. I am 46 years old; reside at Savannah, Tenn., and am sheriff of Hardin County.

"2. Q. What experience have you had in the politics of Hardin County, and how many times have you canvassed the county?—A. I have had some experience in the politics of the county. I have canvassed the county something like half a dozen times, but not thoroughly, though, every time.

"3. Q. How many times have you been sheriff of Hardin County, and what other offices have you held?—A. I have been sheriff three times, and was constable of the fourth district before I was elected sheriff.

"4. Q. Are the elections of the Fourth civil district of Hardin County held under the provisions of the Dortch law and what kind of qualifications does it place upon the voters?—A. They are held under the Dortch law, and a man is required to read and has to be a good marker.

"5. Q. Is it possible for a person who can not read to vote the Dortch ticket?—A. It is not, unless he has assistance.

"6. Q. What effect has the application of the Dortch law had upon the Republican vote of Hardin County? I mean how much has it diminished their vote?—A. I believe it has diminished their vote something like 500.

"7. Q. In your best judgment, how many Republicans are there in the Fourth civil district of Hardin County who can not vote under the Dortch law?—A. I believe there is 100.

"8. Q. What effort was there made by the leading Republicans of Hardin County in the campaign in 1902 to poll their full strength for their ticket?—A. They made as strong an effort as possible under the circumstances.

"9. Q. I will ask you if there were men selected and put into each civil district of the county several days before the election for the purpose of canvassing each Republican voter in order to get him out to the November election, 1902?—A. That is my understanding.

"10. Q. I will ask you if the Republicans felt very buoyant and hopeful of success in the Congressional election of November, 1902—?–A. They did.

"11. Q. Have you made a list of the Republicans whom you know to be disfranchised under the operation of the Dortch law in the Fourth civil district of Hardin County?—A. No; I have not.

"Further this deponent saith not."

Upon this it is demanded that 100 votes be added to contestant's count, and upon similar testimony a total of 1,920. No names are given, no evidence of registration or payment of taxes, nor of intention or desire upon the part of the unknown persons to vote for contestant. Such evidence is wholly inadmissible for any purpose. There have been cases in which persons proved to have been qualified, desiring, intending, and attempting to vote, have had their votes counted, notwithstanding that they were not received by the election officer; but there is no precedent for adding to the count the votes of persons not shown to have attempted or desired or been qualified to vote for any candidate under the law.

A careful study and analysis of all the evidence in this case and of the printed briefs, supplemented by exhaustive oral arguments of able counsel, convinces us that, no matter what view may be taken of the Dortch law, the result of the election is not changed. Your committee therefore recommends the adoption of the following resolutions (H. Res. No. 241):

"Resolved, That F. M. Davis was not elected to membership in the House of Representatives of the United States in the Fifty-eighth Congress, and is not entitled to a seat therein.

"Resolved, That T. W. Sims was elected to membership in the House of Representatives of the United States in the Fifty-eighth Congress, and is entitled to a seat therein."

The resolutions were agreed to by the House without debate or division.

Although the main issue was thus simplified, the committee discussed several questions related to the case but not essential to its determination:

(1) As to a failure of election officers to hold elections in certain precincts:

In the two precincts of Sibley and Walnut Grove, in Hardin County, the election officers failed to hold any election. It is claimed that the Republicans are in considerable majority in these precincts, and that by the failure of the Democratic officials to hold elections the contestant was deprived of votes which he would otherwise have received. It appears, however, that under the law of Tennessee a voter may vote in any one of several precincts in the same civil district, and it is in evidence that there were three other voting places in that particular civil district in which the residents of Sibley and Walnut Grove might have voted. We are not fully satisfied with the reason given for failure to hold elections in these precincts. It is perhaps not unfair to presume that the real reason was a desire to prevent or reduce the Republican vote by subjecting these people to the inconvenience of journeying to other precincts at distant points. But as we are not advised whether all or any of the voters in these precincts did vote in any of the three other precincts in which they were lawfully entitled to vote, we are unable to say to what extent, if at all, failure to hold elections in Sibley and Walnut Grove affected the votes of the respective parties to this contest.

(2) As to an irregularity in handling returns:

Contestant charges that the returns in Henry County were opened before the meeting of the election board. The fact appears to be that the chairman, upon receipt of the returns, opened them, compiled the vote on a properly prepared sheet, and upon the meeting of the full board submitted the same to them, when the returns were compared with the tally sheet and certified. There is no evidence of any dishonesty in this practice or that the returns as certified were not correct.4

1133. The case of Davis v. Sims, continued.

Discussion of the claim that a ballot law practically disfranchising the ignorant established an unconstitutional qualification.

Discussion of the claim that a law practically disfranchising the ignorant in certain portions only of a State violated a constitutional provision that "elections shall be free and equal."

Reference to the principle that in exercise of the powers conferred by the Federal Constitution the State legislature is not controlled by the State constitution.

(3) As to the constitutionality of the Dortch law.

The committee describe the law:

The so-called "Dortch law" (named after the person who originally devised or introduced the system) now comprises a principal act passed in 1890 and a number of supplemental acts of various later dates. It does not apply to the whole State, but requires that in certain specified portions there shall be used an official ballot, which may be described as one variety of the Australian form.

"This ballot contains no party emblems, devices, designations, nor party column. There is no provision for voting a straight party ticket by marking in a circle or square or in any other manner. The law requires that "the names of all candidates for the same office shall be printed together and arranged alphabetically according to the initials of their surnames, irrespective of party; but the order in which the title of the various offices to be filled shall be arranged upon each separate ticket or ballot shall be left to the will of the officer or officers charged with the printing of said ticket."

After giving forms of ballot, the report continues:

The voter having received a ballot is to go into the voting compartment and "prepare his ballot by marking in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided therefore and marking a cross (X) opposite thereto."

He may not have in advance a specimen ballot, and until he receive the official ballot, just before going into the booth, can not even know the order in which the respective offices will be grouped thereon. But he may with his ballot receive a printed card of instruction, of which the following is a sample:

"Official card of instructions prepared by commissners of registration of election.

This card is intended to assist and instruct voters how to prepare their ballots.

"1. Having received from the registrar your polling place an official ballot, present it with your certificate of registration to the assistant registrar, who will number the stub of the ballot and put the same number on your certificate of registration; then go to one of the shelves or compartment and prepare your ballot by placing a cross mark (thus X) before or after the line in which the name of your choice appears.

"2. You are not allowed to vote any ticket except the official ballot.

"3. If you spoil your ballot in trying to mark it correctly, return it to the registrars and get another; you will be allowed to get but three ballots. You are not allowed to take or remove any ballot from the polling place, but must deposit the ballot as received, or return the same to the registrars, as above provided, in case you have spoiled the game.

"4. If you are unable to your ballot, by reason of blindness or other physical disability, ask the officer holding the election to assist you.

"5. Before leaving the voting shelf fold your ballot without displaying the marks thereon, but so that the words 'Official ballot for,' etc., printed on the back of the ballot, and the numbered stub shall be plainly visible; then present to the officers of election your certificate of registration, your poll-tax receipt, and your marked ballot.

"6. It is your duty to mark and deposit your ballot without undue delay and quit the polling place as soon as you have voted. If other persons are ready to vote when you get your ballot you will be allowed only five minutes in which to mark it, but if no other voters are waiting you will be allowed ten minutes.

"7. You must not allow any person to see your ballot, or to take the same from you, or remove the same from the polling place, nor to place any mark on the same other than as hereon instructed, it being a misdemeanor to do so."

If "by reason of blindness or other physical disability he is unable to mark his ballot" the voter may receive the assistance of the officer holding the election in marking the same, but unless so blind or otherwise physically disabled he can be assisted only in the following way:

"The registrar shall upon demand of any voter made at the time his ballot is handed to him give

to such voter a correct statement of the order in which the title of the various offices to be filled stand upon the particular ballot furnished to such voter."

It is expressly provided that "a voter who shall, except as herein otherwise provided, allow his ballot to be seen by any other person * * * or any person who shall * * * aid, or attempt to aid, any voter by means of any mechanical device, or any other means whatever, in marking his ballot, shall be punished by a fine of not less than $10 nor more than $100," and election officers are to cause the arrest of any person so violating this provision, and the offender is to be "treated as one caught in the very act of committing a misdemeanor."

It is alleged by contestant in his notice of contest that these statutory provisions "are highly partisan; were passed, together with their amendments, with partisan motives and in an intolerant partisan spirit."

We do not see, however, that we have anything to do with that. This House can hardly be expected to preserve the balance of partisanship in State legislatures, nor can the motives of State legislators be considered in determining Congressional elections, provided the statutes enacted by them were within their constitutional authority.

The inquiry as to the constitutionality of this law involved two branches:

(*a*) Does it establish an additional qualification:

But contestant contends that no person who can not read can vote the official ballot; that by the Dortch law an additional qualification is thus imposed, and that it violates Article I of the State constitution of Tennessee, which declares "that elections shall be free and equal, and the right of suffrage as hereinafter declared shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime previously ascertained and declared by law and judgment thereon by a court of competent jurisdiction."

And section 1 of article 4, which is as follows:

"Every male person of the age of 21 years being a citizen of the United States and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers of the county or district in which he resides; and there shall be no qualifications attached to the right of suffrage, except that each voter shall give to the judges of election where he offers to vote satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the legislature shall prescribe, and at such time as may be prescribed by law, without which his vote can not be received; and all male citizens of the State shall be subject to the payment of poll taxes and to the performance of military duty within such ages as may be prescribed by law. The general assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box."

Some seventy witnesses in this case, some of whom were white and some colored, some Democrats and some Republicans, all testified that ability to read is essential to enable one to vote this form of ballot. The contestee himself frankly admits that a person unable to read can not vote "as well as a man who can read and write; but he can possibly vote some ballots under the law, and they do it." It must be manifest to anyone that the persons unable to read, who can successfully mark all the candidates of a particular party, especially in a Presidential year, must be very few, if any.

The supreme court of Tennessee, however, in Cook *v.* State, 90 Tenn., 407, sustained an indictment and conviction for "aiding electors in marking their ballots, instructing them how to vote," etc., and expressly declared that this law does not violate Article IV of the State constitution. This ruling was followed by the Elections Committee and the House in Thrasher *v.* Enloe in the Fifty-third Congress, the minority, however, expressly declaring its opinion that the act was unconstitutional.

(*b*) As to the provision of the Tennessee constitution requiring that "elections shall be free and equal":

The Tennessee court does not appear to have considered the constitutional requirement that "elections shall be free and equal." This provision, found in many State constitutions, must have been intended to have some meaning and effect. Unlike the rain from heaven, the Dortch law does not fall upon the just and the unjust alike or, to be more accurate, it does not fall upon all of the just

nor upon all of the unjust. It does not apply to the whole State nor to the whole of this Congressional district. It applies only in spots.

In the Eighth Congressional district there are 168 civil districts. The Dortch law applied in 13 of them and practically required the voter to be able to read in order properly to mark his ballot. In the other districts a voter might use a printed ballot or write his ballot, if he desired, or have somebody else write it for him and carry it in his vest pocket for a week or six weeks and vote it freely upon election day and have it counted, provided, of course, he was duly registered and had paid his taxes. With such varying conditions in different parts of the same Congressional district, are elections "free and equal?"

The supreme court of Tennessee further sustained this law in Moore *v.* Sharp, 98 Tenn., 491.

The constitution of Kentucky, like that of Tennessee, contains a provision that all elections shall be "free and equal." The legislature prescribed a form of ballot and required each voter to retire to a compartment and there unaided and alone indicate by marks on his ballot the various candidates for the several offices for whom he wished to vote. The supreme court of that State in Rogers *v.* Jacob, Mayor, etc. (98 Ky., 502), unanimously declared that provision of the statute unconstitutional, Mr. Chief Justice Lewis, who delivered the opinion, saying (p. 508):

"A statute requiring votes to be given by ballot need not, any more than the mode of voting viva voce, operate unequally or so as to deprive any person entitled of the privilege of suffrage, and if the one we are considering conflicts with that clause of the constitution, or denies the privilege of free suffrage, which really exists independent of that section, it is simply on account of defect or vice of some particular provision not indispensable to the general or successful operation of the law. And the only question about which we have any difficulty is in regard to section 9, that, by requiring each voter to retire to a compartment and there, alone and unaided, indicate by a mark on his ballot the various candidates for numerous offices he wishes to vote for, practically operates to deprive those unable to read or write of a free and intelligible choice, and in fact makes free suffrage as to them a matter of chance or accident. And thus, while the interests and rights of many may be involved and should not be denied or jeopardized by nullifying the entire statute already in operation, if it is in other respects valid, we have no right to sanction any law or part of a law that takes from a single human being his constitutional rights. It is, however, permissible and often important to limit the operation of, disregard, or strike from a statute one or more provisions that conflict with the constitution rather than allow them to vitiate the whole; and in accordance with, or at least in analogy to, that rule section 9 must be held inoperative to the extent it in the manner mentioned deprives illiterate persons of the opportunity and means of freely and intelligibly voting, for they have the right to avail themselves of whatever reasonable aid and information may be necessary to enable them to cast their ballots understandingly, and can not be legally deprived of it."

The State of Virginia had a similar provision in its constitution requiring freedom and equality of elections. The legislature passed a law providing a ballot much like the Dortch-law ballot, except that it provided that "at the request of any elector in the voting booth who may be physically or educationally unable to vote, the said special constable may render him assistance by reading the names and offices on the ballot and pointing out to him the name or names he may wish to strike out, or otherwise aid him in preparing his ballot."

In passing upon that statute, in Pearson *v.* Supervisors, etc. (91 Va., 322), the supreme court of that State said (p. 330):

"It will not be disputed—

"First. That the right of suffrage is derived from the constitution of the State, and to it we look for the qualification of voters and the limitations and restrictions upon the right of voting; in other words, to ascertain who may or who may not vote.

"Second. That the legislature can not prescribe any qualification in addition to those found in the constitution, and any attempt to do so openly or covertly, directly or indirectly, is void.

"Third. That there is no educational qualification prescribed by our constitution, and a person otherwise qualified to vote, no matter how ignorant he may be, is entitled to vote.

"Fourth. That the sole function of the legislature, with respect to the exercise of the right of suffrage, is to provide the mode in which those entitled to vote may do so and have their votes counted, and to guard against improper, illegal, or fraudulent voting.

"Fifth. That to this end the legislature may adopt and enforce reasonable rules and regulations to secure the one and prevent the other.

"Sixth. But if under cover of a law to regulate voting a provision is introduced into the law which virtually establishes a test of the qualification of the voter, additional to those prescribed in the constitution, such provision of the law transcends the power of the legislature and is null and void."

And again (p. 332):

"It is obvious that one who, either from physical or intellectual blindness, is unable to read, is wholly incapable of voting by ballot without assistance from some quarter."

The court sustained the statute in that case by construing the word "may" to mean "must," thus making it absolutely the duty of the sworn special constable not only to point out the names and offices on the ballot, as provided in the Tennessee statute, but also to do what is positively prohibited by the Dortch law, viz, "otherwise aid him in preparing his ballot."

A Michigan statute, providing an official ballot and requiring it to be marked by the voter in the booth, contained no provision either forbidding or allowing him to have assistance. Its constitutionality was challenged in Common Council *v.* Rush, 82 Mich., 532, and the supreme court of that State, after referring to the Kentucky case, said (p. 541):

"It is contended that under the act in question the result is the same, because no one is permitted to accompany the voter to the booth to assist him. It is to be regretted that the legislature did not expressly provide for furnishing ballots to this class of voters. We must therefore carefully examine the act to ascertain if it leaves no way for such voters to obtain ballots. It is clear that if voters are limited to the use of tickets provided in the booths then some voters are disfranchised by the very terms of the law. But we do not think that the law necessarily bears that construction. There is no express prohibition against assisting such a person in the preparation of his ticket, nor against his obtaining a ticket outside the polling place for that purpose, nor against assisting to a booth or the polls one physically unable to go alone. Such a case is not within the mischief aimed at, and we hold that under this law such a voter is entitled to receive assistance in the preparation of his ticket, and to receive and have his ticket prepared outside the polling places. This, we think, is in accord with that maxim of interpretation that a thing which is within the spirit of a statute is within the statute, although not within the letter, and a thing within the letter is not within the statute unless within the intention."

In other words, in order to sustain the statute, the Michigan court construed into it a very liberal provision providing for such assistance to the voter as, under the Dortch law, would render the voter and the person assisting him subject to fine and imprisonment.

In Capen *v.* Foster, 12 Pick., 488, the supreme court of Massachusetts marked the distinguishing line between laws which took away or abridged the right of suffrage and those which may lawfully be enacted to regulate its exercise, and held, substantially, that in order to belong to the latter class, such laws must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote. This proposition was sustained by the supreme court of Ohio in Monroe et al. *v.* Collins, 17 Ohio, 665, in which case a statute of that State was declared unconstitutional and void because, although entitled "An act supplementary to the act entitled 'An act to preserve the purity of elections,'" it imposed upon certain classes of persons conditions not imposed upon others, to enable them to exercise the right to vote.

The supreme court of Pennsylvania in a very recent case held in an opinion by Chief Justice Mitchell, as reported in the Philadelphia Press of February 16, 1904, that—

"The constitution confers the right of suffrage on every citizen possessing the qualifications named in that instrument. It is an individual right and each elector is entitled to express his own individual will in his own way. His right can not be denied, qualified, or restricted. The constitution itself regulates the times and, in a general way, the method, to wit, by ballot with certain specified directions as to receiving and recording it. Beyond this the legislature has the power to regulate the details of place, time, manner, etc., in the general interest for the due and orderly exercise of the franchise by all electors alike. Anything beyond this is not regulation, but unconstitutional restriction.

"It is never to be overlooked, therefore, that the requirement of the use of an official ballot is a questionable exercise of legislative power, and even in the most favorable view treads closely on the border of a void interference with the individual elector. Every doubt, therefore, in the construction of the statute must be resolved in favor of the elector.

"Every elector, as already said, has the right to express his individual will in his own way and for his own reasons, which are not open to question, however unsound or unimportant others may deem them. And the rights of electors acting together as a party are equally beyond question. The electors themselves are the only tribunal to decide whether the principles, platform, aim, or method of reaching the desired object are broad enough, permanent enough, or important enough to be the basis of united action as a party, and, if they so decide, courts must recognize and treat them accordingly."

We have stated contestant's contention very fully and the authorities bearing thereon in conflict with the Tennessee decisions.

(4) Another question raised by the sitting Member was stated by the committee but not discussed.

But the contestee, while not admitting that the Dortch law is in violation of any provision of the State constitution, contends that even if it were it would still be valid because of the provision of sec. 4, art. 1, of the Constitution of the United States, that in the absence of action by Congress "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof." He contends that in the exercise of the powers thus conferred by the Federal Constitution the legislature can not be controlled by the constitution of the State, and in support of this proposition cites Baldwin *v.* Trowbridge, 2 Bart.; Donnelly *v.* Washburn, 1 Ells., 495, and McCrary's Law of Elections, 109–112.

The resolutions recommended by the committee were agreed to without division.

1134. The South Carolina election case of Dantzler v. Lever in the Fifty-eighth Congress.

The House declined to invalidate an election because a State constitution had established qualifications of voters in disregard of reconstruction legislation.

As to the duty of the House to pass on the constitutionality of a State law as to the qualifications of voters.

On March 18, 1904,[1] Mr. James R. Mann, of Illinois, from the Committee on Elections No. 1, submitted the unanimous report of the Committee on the South Carolina election case of Dantzler v. Lever. This report was as follows:

At the Congressional election in the Seventh district of South Carolina on the 4th day of November, 1902, the contestant, Alexander D. Dantzler, received in said district the total number of 167 votes. The contestee, Asbury F. Lever, received 4,220 votes.

There is nothing in the record or in the case to sustain a claim that the contestant, Dantzler, was elected. It is indisputable that if a legal election were held in the district the contestee, Lever, was fairly elected.

It is urged on behalf of contestant that no legal election was held in South Carolina, and the claim is made that both the election laws and the constitution of South Carolina, then and now in operation, are illegal, invalid, and unconstitutional because in direct conflict with the so-called reconstruction act of June 25, 1868 (15 Stat. L., 73), readmitting South Carolina and other States to representation in Congress upon the condition (stated in said act to be a "fundamental" condition) "that the constitution of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State who are entitled to vote by the constitution thereof herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided,* That any altering of said constitution may be made with regard to the time and place of residence of voters."

The constitution of South Carolina referred to in the reconstruction act of June 25, 1868, did not contain any educational or property qualification of voters. The constitution of South Carolina of 1895

[1] Second session Fifty-eighth Congress, House Report No. 1740; Record, p. 3429.

(which was adopted and put into effect by a constitutional convention without a vote of the people adopting it), as well as the election laws adopted or passed in accordance with it, contain educational and property qualifications.

It is claimed that under the South Carolina constitution of 1895, and the election laws in force under it, many citizens are deprived of the right to vote in said State who were and would be entitled to vote by the constitution of 1868, referred to in the reconstruction act of June 25, 1868. The South Carolina constitution of 1895 and the election laws under it are therefore claimed to be in direct conflict with the reconstruction act of June 25, 1868, readmitting South Carolina to representation in Congress upon the conditions therein named as "fundamental conditions."

Contestant claims that if the citizens of the Seventh Congressional district of South Carolina who could have voted under the terms of the constitution of 1868 had been permitted to vote he would have been elected, and he asserts that many thousands of colored voters in the Congressional district entitled to vote under the constitution of 1868 were deprived of the right to vote under the educational and property qualifications of the constitution of 1895.

It is very plain that contestant was not elected; but counsel for contestant insists that if contestant was not elected then no election was held, and that it is the duty of Congress to declare that no valid election was held in South Carolina for Members of the Fifty-eighth Congress, and therefore to unseat the contestee.

It would seem that if no valid election was held in the Seventh Congressional district of South Carolina in November, 1902, and if the House of Representatives, holding this view, should declare the seat from that district vacant, then no election could be held to fill the vacancy until after the South Carolina constitution of 1895 and the election laws under it had been changed. This would necessarily involve an entire lack of representation from the district for a considerable period of time.

If the Seventh district of South Carolina were the only district involved it might be proper for the Committee on Elections, as well as the House itself, to put on record its opinion in the case and to declare elected or not elected, as that opinion might run, the contestee. But the reconstruction acts were not confined to South Carolina. Practically the same "fundamental conditions" are found in the acts readmitting Virginia, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas to representation in Congress. Most of these States have adopted new constitutions said to be in conflict with the terms and provisions of the reconstruction acts readmitting them to representation in Congress.

It follows, therefore, quite logically that if the House should unseat the contestee on the ground that no valid election was held or could be held in his district under the present constitution and election laws of South Carolina, a similar construction would require the House, in the case of contest, to unseat all of the Members from South Carolina and from most of the other Southern States, and that new elections could not be held to fill the vacancies until the respective constitutions of these States had been changed so as to comply with the reconstruction acts.

The question of the constitutionality and validity of the constitution and election laws of South Carolina, therefore, in its effect upon the membership of this House is one of far-reaching importance. It involves in its outcome the right of a very large number of the Members of the House to their seats. But the decision of this House against the contestee in this case would have no binding force in South Carolina except in this particular case. It probably would not be followed or obeyed by the State of South Carolina except in this particular case.

However desirable it may be for a legislative body to retain control of the decision as to the election and qualification of its members, it is quite certain that a legislative body is not the ideal body to pass judicially upon the constitutionality of the enactments of other bodies. We have in this country a proper forum for the decision of constitutional and other judicial questions. If any citizen of South Carolina who was entitled to vote under the constitution of that State in 1868 is now deprived by the provisions of the present constitution he has the right to tender himself for registration and for voting, and in case his right is denied, to bring suit in a proper court for the purpose of enforcing his right or recovering damages for its denial.

That suit can be carried by him, if necessary, to the Supreme Court of the United States. If the United States Supreme Court shall declare in such case that the "fundamental conditions" in the reconstruction acts were valid and constitutional and that the State constitutions are in violation of those acts, and hence invalid and unconstitutional, every State will be compelled to immediately bow in

submission to the decision. The decision of the Supreme Court would be binding and would be a positive declaration of the law of the land which could not be denied or challenged.

On the contrary, the decision of the House of Representatives upon this grave judicial question would not be considered as binding or effective in any case except the one acted upon or as a precedent for future action in the House itself.

A majority of the Committee on Elections No. 1 doubt the propriety in any event of denying these Southern States representation in the House of Representatives pending a final settlement of the whole question in proper proceedings by the Supreme Court of the United States. Some of the members of the committee believe the "fundamental conditions" set forth in the reconstruction acts to be valid and the constitutions and election laws of these States to be in conflict with such conditions, and hence to be invalid.

Some of the members of the committee believe the "fundamental conditions" set forth in the reconstruction acts to be invalid and the constitutions and election laws of the States claimed to be in conflict with such conditions to be valid. Some members of the committee have formed no opinion and express no belief upon the subject.

Your Committee on Elections No. 1 therefore respectfully recommend the adoption of the following resolution:

"Resolved, That Alexander D. Dantzler was not elected a Member of the Fifty-eighth Congress from the Seventh Congressional district of South Carolina, and is not entitled to a seat therein."

The resolution was agreed to by the House without debate or division.

1135. The South Carolina election cases of Jacobs v. Lever, Myers v. Patterson, and Prioleau v. Legare, in the Fifty-ninth Congress.

The House will not count votes of persons alleged to have been illegally denied the right to vote, on the strength of mere lists of such persons kept loosely and not authenticated by testimony.

Affirmation of the conclusion that the House would not invalidate an election because a State had disregarded reconstruction legislation as to qualifications of voters.

Where the validity of a State's election system was questioned, the House merely declared contestant not elected, and did not declare sitting Member entitled to the seat.

On June 5, 1906,[1] Messrs. James R. Mann, of Illinois; Lewellyn Powers, of Maine, and H. Olin Young, of Michigan, from the Committee on Elections No. 1, respectively reported on the South Carolina election cases of Charles C. Jacobs *v.* Asbury F. Lever, Isaac Myers *v.* J. O. Patterson, and Aaron P. Prioleau *v.* George S. Legare.

Each of these cases involved the constitutional question passed on in the Fifty-eighth Congress in the case of Dantzler *v.* Lever,[2] and in each case the committee affirmed the conclusion arrived at in that case.

In the Prioleau case [3] this further question was decided:

At the Congressional election held in said district November 8, 1904, the contestant, Aaron P. Prioleau, received 234 votes. The contestee, George S. Legare, received 6,068 votes. This gave to the contestee, on the face of the returns, a majority of 5,834 votes.

To overcome this apparent majority, the contestant claims that 11,800 legal voters in said district applied to the managers of election in the different precincts for the right to vote and were denied that right; that all of said persons would have voted for contestant and that, as the refusal to permit them to vote was illegal, their votes should be counted for contestant. To sustain the claim of contestant,

[1] First session Fifty-ninth Congress, Record, p. 7886; House Reports Nos. 4779, 4780, 4781.

[2] See Section 1134 of this chapter.

[3] Report No. 4779.

he has introduced in evidence lists of names purporting to be the names of persons who were those illegally refused the right to vote for contestant. These lists, as set forth in contestant's brief, are as follows:

VOTING TABLE.

Name.	Town.	Ward.	Polling precinct.	A. P. Prioleau. Rejected Voters. No.	G. S. Legare. No.
J. L. Smalls	Charleston, S. C	4		279	6,068
Thadus Smalls	do	6		400	
A. Campbell	James Island			450	
J. S. Glover	Charleston, S. C	12		300	
J. J. Lockwood	do	10		400	
R. B. Geddes	John Island			620	
S. G. Gilliard	Beach Hill			350	
Henry Wilson	Fivemile House			450	
Robert Small	Charleston, S. C	7		683	
Frank Barnwell	do	8		520	
I. L. Prioleau	Calamus Pound			570	
R. W. Sinchler	Summerville, S. C			650	
F. J. Byas	Edisto Island			583	
J. C. Tingman	St. Steven		5	560	
R. W. Green	Biggins Church			460	
R. G. Richardson	Tenmile Hill			398	
Robert Heywood	Charleston, S. C	6		200	
J. W. Keith	Cams Crossroad			680	
James Wright	Cooper Store			650	
E. W. Polly	Charleston, S. C	5		335	
S. W. Barnwell	St. Andrews			450	
George Frost	Charleston, S. C	10		250	
C. J. Glover	do	12		231	
S. S. Maxwell	do	11		198	
Solomon Brown	do	1		150	
J. C. Gary	do	1		300	
John Drayton	do	11		300	
J. E. Tentin	do	9		300	
J. R. Cuthbert	do	7		200	
James Collins	Mount Pleasant, S. C.			386	
Robert Teaden	Charleston, S. C	7	No. 2	280	
C. P. Ragin	St. Paul, S. C. (P. O.).		St. Paul, S. C	516	
Ira Learn	Manning (P. O.)		Harmony	300	
Jno. Dow	do		Panda	400	
Jno. Gill, secretary county executive committee.			Aledo	112	
			McFaddin's store	69	
			Davis station	165	
			Boykin's store	72	
			Jordan	174	
			Wilson	21	
			Fonston	17	
Total rejected voters vote.				14,429	
Vote counted				234	
Total				14,663	6,068

Majority for A. P. Prioleau, 8,595.

The tabulation in contestant's brief makes a total of 14,429 rejected voters, which added to the 234 votes actually cast for contestant would, as he claims, make 14,663 votes which he is entitled to have counted for him, or a majority over contestee of 8,595.

It is claimed by contestant that these lists were kept by persons who were stationed for that purpose not far from the respective polls in a large number of precincts in the district and that the men whose names appear upon the lists, after attempting to vote and being denied the right, returned to the persons who were keeping the lists in the various precincts and either wrote their respective names upon the lists or gave their names to the persons in charge of the respective lists who wrote the names thereon. In some instances the person keeping a particular list was not near enough to the polls to know of his own knowledge whether the men whose names he placed upon the lists, or which were placed there by the men themselves, had, in fact, actually offered to vote. He could have no means of knowing how the rejected voters would have voted, if permitted to do so, except from their own statements, and in many cases he could not know whether they were, in fact, qualified voters.

Without expressing any opinion upon all of the lists offered in evidence, the committee is of the opinion that a considerable portion of the lists would have to be rejected in any event, because wholly lacking in any sort of identification of either the person offering to vote, his right to vote, or how he would have voted. Candidates can not be elected to office merely by having some one keep lists of names of persons who come near the polls. It is not necessary in this case to determine whether sufficient identification has been made in this case in regard to some of the lists to consider them as prima facie evidence, because, in any event, the lists as presented do not, in the opinion of the committee, make out a case in favor of contestant. The evidence is utterly lacking to show that contestant is entitled to the election on the facts presented by him.

A careful comparison of the tabulation of the lists set forth above with the lists themselves as they appear in the record shows that the tabulation made by contestant's counsel in his brief gives a number of persons far in excess of the number of names actually appearing on the lists themselves. The committee find from an examination of the lists that the correct tabulation would be as follows:

[The committee then give a revised tabulation, showing a total of 9,026 rejected votes.]

This reduces the footings of the lists from 14,229 to 9,026; but a large number of these lists must be rejected because of absolute failure to make any effort to properly prove the lists or identify the persons. For example, take the following cases:

R. B. Geddes, John Island; list, 620 name

Because Geddes's testimony shows that he did not keep all of this list, but was assisted so to do by one A. E. Croffort, who took part of the names and was not called as a witness, and the testimony utterly fails to show which of the names were taken by Geddes and which were taken by Croffort.

Frank Barnwell, Charleston; list, 194 names.

This list must be rejected because the testimony fails to show that any person on that list was refused the right to vote.

R. W. Sinchler, Summerville; list, 650 names.

This list must be rejected because the testimony shows that Sinchler did not keep all of the list; that he had no knowledge as to the persons" he did not himself place upon the list; that he fails to identify any of those he placed upon the list or state how many there were, and these omissions are not supplied by any other testimony.

J. C. Tingman, St. Steven; list, 560 names.

This list must be rejected for the reason that the testimony shows that "some two or three persons" kept this list, the names of whom are not given, and Tingman does not state how many of the names he placed upon the list, and no other testimony was produced for filling the gaps in his evidence.

R. W. Green, Biggins Church; list, 460 names.

This list is not authenticated by any testimony whatever, nor is it identified as a list of rejected voters.

R. G. Richardson, Tenmile Hill; list, 398 names.

It clearly appears that the precinct at Tenmile Hill had been abolished in 1898, and there is no evidence that any of the persons appearing upon this list offered or were refused the right to vote at the precinct in which they lived or at any legal precinct whatever.

J. E. Tentin, Charleston; list, 96 names.

The testimony shows that one John Graham, who was not called as a witness, assisted in keeping this list. Tentin could identify only seven names upon it as having been placed there by himself, nor

is there any testimony in regard to the other names upon the list placed there by Graham or some one else.

James Collins, Mount Pleasant; list, 386 names.

This list was kept by Peter Johnson, who was not called as a witness. Collins could not read or write and so could not know and did not know that Johnson kept the list correctly, nor is there any other evidence to supply this omission.

There is another infirmity about all the above lists, namely, that it nowhere appears in the testimony or the lists themselves that the parties named thereon were voters in the particular precinct in which they attempted to vote.

John Gill, secretary of the county executive committee, Clarendon County; lists, 638 names.

The exhibits produced by Gill included those marked "D" to "J," inclusive, making a total of 638 names. These lists were left with Gill and are not authenticated by any testimony whatever, and the persons who kept the lists are not even named in the testimony, nor, indeed, that they were kept at all as a list of rejected voters.

Ira Learn, Manning, Harmony; list, 58 names.

John Dow, Manning, Panada; list, 168 names.

The list produced by Ira Learn and that produced by John Dow were not kept by the parties producing them, neither of whom could write, but both signed their testimony with a mark.

The deductions made in the examples of rejections of lists, asset forth above, amount to 4,228. The cases given as examples only indicate the various infirmities which attach to nearly all of the testimony in this case. The testimony which is not analyzed above is generally as defective as that so analyzed. But deducting the 4,228 votes comprised in the above lists, shown to be utterly worthless as testimony, from the total footing of all the lists, 9,026, there is left 4,798, which, if the 234 votes cast for Prioleau be added, makes a total of 5,032, or 1,036 less than the number of votes cast and counted for contestee.

The Committee on Elections No. 1 has shown every consideration to the contestant; has listened to long and exhaustive arguments in his behalf, and is of the opinion that the contestant, Aaron P. Prioleau, was not elected a Member of Congress at the election in question.

In the Myers case,[1] a similar question was thus decided:

At the Congressional election in the Second district of South Carolina, on the 8th day of November, 1904, the contestant, Isaac Myers, received in said district 419 votes. The contestee, J. O. Patterson, received 7,426 votes.

The contestant asserted in his notice of contest that 10,000 or more voters offered to vote for him at the election, but were refused the opportunity and deprived of their rights by the election officers, who resorted to unfair and fraudulent methods to bring about the election of the contestee. The contestant offered in evidence a number of lists of persons who were thus deprived of the opportunity to vote for contestant. The committee finds that these lists contain the names of 2,963 persons whom the contestant alleges would have voted for him had they not been deprived of their legal privileges, and contestant asserts that all of the persons whose names appear on the lists were entitled under the laws and Constitution of the United States to the right of suffrage at such election.

Your committee does not express any opinion as to whether these lists of names have any legal validity as evidence for the purpose of showing that the persons named therein were entitled to vote, were denied the right to vote, and would have voted for contestant if permitted to vote, except to say that such evidence at the best is unsatisfactory. If lists of persons offering to vote and refused the right to vote are to be considered as evidence in any case, that such persons were entitled to vote, and, if permitted, would have voted for a particular candidate (which is doubtful, unless a conspiracy to commit fraud be shown), then such lists should be kept by persons who know all the persons offering to vote, who see such persons offer to vote, and who testify as to their knowledge when called as witnesses where thorough cross-examination may be had.

But if all the lists offered in evidence in this case were accepted as legal evidence they only affect something less than 3,000 persons, not enough to overcome the majority of the contestee.

Your committee is of opinion therefore that the contestant, Isaac Myers, was not elected.

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[1] Report No. 4780.

With each report the committee recommended a resolution similar to the following:

Resolved, That Charles C. Jacobs was not elected a Member of the Fifty-ninth Congress from the Seventh Congressional district of South Carolina, and is not entitled to a seat therein.

The House, without debate or division, agreed to each of the resolutions.

It is to be noted that the decision in each case declares only that contestant was not elected, and does not-as is usual in cases of contested elections—pass on the title of sitting Member.