

Chapter XXXI.

GENERAL ELECTION CASES, 1880 AND 1881.

1. Cases in the second session of the Forty-sixth Congress. Sections 936-948.¹
 2. Cases in the third session of the Forty-sixth Congress. Sections 949-954.²
 3. The Senate case of Lapham and Miller. Section 955.
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936. The Arkansas election case of Bradley v. Slemmons in the Forty-sixth Congress.

Interpretation of the law limiting the time of taking testimony in an election case.

Testimony taken after the legal time, objections to which were part of the record, was rejected.

A party to an election case may object to testimony as it is completed, although he may have appeared and cross-examined.

On March 8, 1880,³ Mr. Samuel L. Sawyer, of Missouri, from the Committee on Elections, submitted the report in the Arkansas case of *Bradley v. Slemmons*.⁴

The sitting Member had been returned by an official majority of 2,827 votes.

At the outset the committee disposed of a question as to time of taking evidence:

At the very threshold of our inquiry we are met with an objection by the contestee to the consideration of any portion of the evidence taken by the contestant in the counties of Chicot and Hempstead, for the reason that the forty days allowed by law to contestant in which to take testimony in chief had expired before the taking of evidence in said Chicot and Hempstead counties commenced.

Protests of contestee were duly entered on the record against the taking of such testimony. Contestant, however, contends that, as he commenced taking testimony on the 18th day of February, 1879, the forty days allowed him commenced running from that day, and this view, if correct, will entitle him to the benefit of the testimony taken in those two counties.

Section 107 of the Revised Statutes provides that the time allowed for taking testimony shall be ninety days, and it shall be taken in the following order: The contestant shall take testimony during the first forty days, the returned Member during the next forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period.

¹ Also prima facie case of *Bisbee v. Hull*. (Vol. I, sec. 57.)

² Additional cases in the third session of the Forty-sixth Congress:

O'Hara, v. Kitchen, North Carolina. (Vol. I, sec. 730.)

Herbert v. Acklen, Louisiana. (Vol. I, sec. 751.)

McCabe v. Orth, Indiana. (Vol. I, sec. 752.)

The Iowa Members. (Vol. I, sec. 525.)

³ Second session Forty-sixth Congress, House Report No. 427; 1 Ellsworth, p. 296.

⁴ All the committee concurred in the conclusions of this report and the law except Mr. James B. Weaver, of Iowa, who filed minority views.

In order to settle definitely from what time the forty days allowed to contestant in which to take his testimony in chief should begin to run, it is provided by the act of Congress upon the subject of contested elections, approved March 2, 1875, that section 107 shall be so construed as to require that, in all cases of contested elections, the testimony shall be taken within ninety days from the day on which the answer of the returned Member is served upon the contestant. (Statutes 1875, chap. 119, sec. 18, p. 338.)

The answer of contestee to contestant's notice of contest was served on contestant on the 29th day of January, 1879 (p. 6). The time, then, for taking contestant's testimony in chief expired on the 10th day of March following. The taking of testimony by him in Chicot and Hempstead counties was commenced in Chicot County on the 20th day of March, ten days after the expiration of the time allowed to him, and was closed in Hempstead County on the 28th day of March. The provisions of the statutes referred to can not be disregarded, and contestant, without leave of the House, was unauthorized to take further testimony in chief after the 10th day of March, when his time for that purpose expired.

The law is intended to, and does, furnish each party ample opportunity for taking testimony, if ordinary diligence is used; and especially is this the case, when it is considered that a party may take testimony at two or more places on the sameday. This wise provision of the law furnishes a strong reason against an extension of time in ordinary cases like the present. (*Boles v. Edwards*, second session Forty-fifth Congress; *Vallandigham v. Campbell*, Thirty-fifth Congress; *Carrigan v. Thayer*, Thirty-eighth Congress.)

No application was made to the House by contestant for an extension of time, and the question is now clearly presented whether, without any cause whatever being shown therefor, the testimony thus taken out of time shall be admitted and considered. Another important fact may be considered in this connection. It appears from an examination of the record of the testimony that the time actually consumed by contestant in taking the entire testimony returned, including that taken beyond the time allowed by law, was only eighteen days; thus establishing the fact beyond controversy that he could, by the use of ordinary diligence, have taken the entire testimony within the time allowed him by law without trespassing upon the time allowed to contestee. In view of these facts, no reason exists why the committee should consider the testimony taken in Chicot and Hempstead counties, or should recommend that it be considered by the House.

The minority views dissented as follows:

The evidence taken in Chicot and Hempstead counties was taken after the forty days from the service of contestee's answer on the contestant had expired, but no protest was entered or made by contestee, so far as it appears in the record, until the depositions had all been taken, signed, and certified. Contestee appeared and cross-examined the witnesses without making objection. He entered his objection just as the depositions were ready to be sealed and transmitted. I submit to the House whether contestee by his appearance and cross-examination, without objection, did not waive all right to object to the testimony on this ground.

As to the merits of the question the committee discussed questions of fact principally; but a few questions of law were involved.

937. The case of Bradley v. Slemons, continued.

Abandonment of the polls by intimidated judges was not of itself considered sufficient to invalidate a poll.

Failure to hold an election in two townships, no reason being ascertained for such failure, did not affect the general result.

Election officers being robbed of the ballot boxes and returns by unknown masked men, the general result was not affected therefor.

(1) As to the vote of Melton Township, the following appeared:

The testimony shows that a short time before sunset, the time fixed for closing the polls, one of the judges of the election, J. D. Currie, was threatened with an arrest by a United States deputy marshal unless the polls were then closed and the votes counted; that quite a number of colored men crowded around the polls, some with guns in their hands and others having them stacked within a convenient distance, a guard being placed over them; that such was the demonstration the judges considered it

unsafe to remain and accordingly left, the ballot box having been thrown out to one of the colored men, a supervisor of the election for that precinct, which was afterwards returned to its place upon the table. After the judges had proceeded a short distance they concluded to return and endeavor to count the votes. Upon their return it was ascertained the deputy marshal had left, that the ballot box was in the possession of the colored men, who asserted their intention of retaining it, and such was the excitement it was believed to be unsafe to remain longer, and the judges accordingly left. (Pp. 85, 86, 88, and 89.) Mr. Nixon, one of the judges of the election at this precinct, estimates the vote cast at about 115.

There is no pretense that the election was an unfair one, or that the voters were intimidated, nor is there a particle of evidence connecting contestee or any of his friends with the transaction. The county clerk, Mr. Nivens (p. 36), testifies that the ballot box was brought to him by a United States deputy marshal securely locked, and still remains in that condition. It is not pretended that the ballot box had been tampered with, and the vote could easily have been ascertained had the proper exertion been made.

(2) As to failure to hold elections or failure to make a return, the report says:

It also appears there were no returns from Barraque or Dunnington townships, the inference from the testimony being that no election was held in either of those townships, and no reason is assigned for the failure to hold an election. It will not, however, be seriously contended that the result of the election can in any manner be affected by the failure of these townships to hold an election.

In Washington Township it appears from the evidence that an election was held, and that the judges, while on their way with the ballot box to make return, were assaulted by masked men and the ballot box was taken from them. It does not appear who those men were, nor what their party affiliations, nor can any presumption arise from the relative strength of the political parties to which, if to either party, those desperadoes belonged, as the testimony shows (p. 192) that the strength of the Democratic and Republican parties in that precinct was about equal. Hence neither party can be held responsible for the disgraceful and criminal act, nor can the result be in any way affected.

938. The case of Bradley v. Slemons, continued.

The circulation of fraudulent posters among the voters does not, in the absence of proof of effect or of complicity of the opposing party, justify rejection of the poll.

Judges of election not appearing and the voters neglecting to choose others, the House declined to take into account the preferences of the said voters.

The pleadings in an election case should be free from personalities.

(3) The report thus sets forth the facts as to the main point in the case:

We come now to the consideration of the most important point made by contestant in his brief and argument, the circulation of false and fraudulent posters in Chicot County a few days before the election, announcing John A. Williams, a well-known Republican, as the candidate of that party for Congress in that district. The object was evidently to deceive the Republican party in that county, and thus induce that vote to be cast for Williams, and to lessen the vote it was supposed would otherwise have been cast for contestant. It was a shallow device, dishonorable to those engaged in the transaction, and deserves the emphatic condemnation of every friend of free and fair elections; and if the testimony was sufficient to establish the complicity of contestee with an act so dishonorable, and we were satisfied that its effect upon the voters produced a result different from that which otherwise would have occurred, we would not hesitate to recommend that the election be set aside and a new one ordered.

After examining the evidence, the report concludes:

This evidence fails to satisfy us that the circulation of the posters produced any considerable effect upon the voters; certainly not to the extent of preventing any great number from voting. The general apathy and indifference to the result, testified to by contestant's witnesses, clearly and satisfactorily indicate the reason for the smallness of the vote, and, in connection with the testimony of other witnesses heretofore alluded to, afford the only satisfactory answer to the question why contestant, claim-

ing to be the Republican candidate, received so cold a support from the party, The total vote received by Williams was cast for him in Chicot County and reached the number of 90.

Suppose we assume (which is by no means certain) that the 90 votes cast for Williams would otherwise have been given to contestant. We have no means of computing the number who were so much confused as to prevent them from voting for contestant, as the testimony affords no light whatever upon the subject. It is entirely a matter of conjecture, a mere guess, as liable to be wrong as right, and in view of this state of the evidence contestant insists it is the duty of the committee to find that the confusion of the voters was so great as to prevent 1,265 Republicans from voting for him who would otherwise have done so, which, added to the vote he claims he should have received in Jefferson and Hempstead counties, would be sufficient to overcome the majority returned for contestee; not only that, but to count for him a number of votes that were never cast sufficient for the purpose, and to accord to him the seat now occupied by the sitting Member.

(4) The report, while not admitting the validity of the testimony as to Hempstead County generally, considers one question raised as to that county:

We now come to the testimony taken in Hempstead County, which it will be remembered is subject to the same objection heretofore mentioned. The evidence, however, shows (pp. 57, 58) that the judges of the election were not present at polling place No. 2 in Ozan Township, and that the voters there assembled erroneously concluded there could be no election; that 350 voters, with tickets for contestant in their hands, expressed a desire to vote for him; that at Saline precinct the polls were not opened for the same reasons; that 204 voters, having tickets for contestant, expressed their wish to vote for him, making 554 votes which contestant contends should be counted for him.

We concede there may be circumstances under which a legal voter being deprived of the privilege of casting his ballot, it may nevertheless be counted. Judge McCrary, in his work on elections (p. 99) says: "To require each voter belonging to a class of excluded voters to go through the form of presenting his ballot, and having a separate ruling in each case, would be an idle and useless formality." But the present class is not of the character entitling their votes to be counted. The voters assembled at the two precincts, in the absence of the judges of election, as has been shown, could have elected judges and proceeded with the election. It was, partially at least, their own neglect, arising perhaps from an ignorance of the law, which prevented an election being held in each of the precincts named.

No fraud, intimidation, or other misconduct being alleged or shown, preventing the holding of an election, if the voters in the absence of the regularly appointed judges fall to avail themselves of the privileges the law affords, their votes can not be counted.

In accordance with the principles thus set forth the committee, with but one dissenting voice, recommended this resolution:

Resolved, That William F. Slemons is entitled to retain the seat he now occupies as Representative from the Second Congressional district in the State of Arkansas in the Forty-sixth Congress.

The report was debated in the House on March 30 and 31¹ and on the latter day the proposition of the minority, that the seat be declared vacant, was disagreed to, ayes 30, noes 152, the yeas and nays being refused. The question then recurring on the resolution of the committee, it was agreed to, ayes 149, noes 21.

At the outset of this case the report thus treats of a subject not strictly involving the merits of the case:

Before commencing the discussion of the merits of the controversy, we deem it proper to express our disapproval of that portion of contestee's answer to contestant's notice of contest which indulges in personalities. The practice itself is unbecoming the dignity of the House, and we regret the necessity has arisen of imposing on the committee the duty of calling attention to the subject.

¹Journal, pp. 926, 927; Record, pp. 1969, 2006, 2007.

939. The Pennsylvania election case of Curtin v. Yocum, in the Forty-sixth Congress.

The State constitution providing that no elector should be disfranchised because not registered, the House refused to reject votes cast by nonregistered persons without certain affidavits required by statute.

Discussion of mandatory and directory law as related to the acts of voters and election officers.

On May 8, 1880,¹ the House began consideration of the Pennsylvania contested election case of Curtin *v.* Yocum.

Sitting Member had received an apparent majority of 80 votes, as shown by the division returns. The contestant's efforts to overcome this majority rested entirely on the disposition of certain votes cast by persons in violation of the registration law of Pennsylvania. The constitution of Pennsylvania, newly adopted and not yet construed by the courts, provided qualifications of voters as to age, citizenship, residence, and payment of taxes; and further provided:

SECTION 1. All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State; but no elector shall be deprived of the privilege of voting by reason of his name not being registered.

A registration law of the State also provided for making of registration lists by the assessors, and as follows:

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

SEC. 10. On the day of election any person whose name shall not appear on the registry of voters, and who claim the right to vote at said election, shall produce at least one qualified voter of the district as a witness to the residence of the claimant in the district in which he claim to be a voter for a period of at least two months immediately preceding said election, which witness shall be sworn or affirmed and subscribe a written or partly written and partly printed affidavit to the facts stated by him, which affidavit shall define clearly where the residence is of the person so claiming to be a voter; and the person so claiming the right to vote shall also take and subscribe a written or partly written and partly printed affidavit stating—

After specifying what these affidavits shall set forth the law continues:

The said affidavits of all persons making such claim, and the affidavits of the witnesses to their residence, shall be preserved by the election board, and at the close of the election they shall be inclosed with the list of voters, tally list, and other papers required by law to be filed by the return judge with the prothonotary, and shall remain on file therewith in the prothonotary's office, subject to examination as other election papers are. If the election officers shall find that the applicant possesses all the legal qualifications of a voter he shall be permitted to vote, and his name shall be added to the list of taxables by the election officers, the word "tax" being added where the claimant claim to vote on tax and the word "age" where he claims to vote on age; the same words being added by the clerks in each case, respectively, on the lists of persons voting at such election.

SEC. 12. If any election officer shall refuse or neglect to require such proof of the right of suffrage as is prescribed by this law, or the laws to which this is a supplement, from any person offering to vote whose name is not on the list of assessed voters, or whose right to vote is challenged by any qualified voter present, and shall admit such person to vote without requiring such proof, every person so offending shall, upon conviction, be guilty of a misdemeanor, and shall be sentenced for every such offense to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not more than one year, or both, at the discretion of the court.

¹Second session Forty-sixth Congress, House Report No. 341; 1 Ellworth, p. 416.

SEC. 13. * * * Whenever a place has been or shall be provided by the authorities of any city, county, township, or borough for the safe-keeping of the ballot boxes, the judge and minority inspector shall, after the election shall be finished, and the ballot box or boxes containing the tickets, list of voters, and other papers have been securely bound with tape and sealed, and the signatures of the judge and inspectors affixed thereto, forthwith deliver the same, together with the remaining boxes, to the mayor and recorder of such city, or in counties, townships, or boroughs to such person or persons as the court of common pleas of the proper county may designate, at the place provided as aforesaid, who shall then deposit the said boxes and keep the same to answer the call of any court of tribunal authorized to try the merits of such election.

This being the state of the law, it appeared that many persons whose names did not appear on the registration lists voted. It also appeared that none of the required affidavits of the said persons were on file in the required place, the prothonotary's office; but it did appear that some such affidavits had mistakenly been placed with the tickets and lists of voters in the ballot boxes, which, under the law, went to a depository other than the prothonotary's office. It further appeared that these votes in question were far more than enough to overcome sitting Member's majority, were it shown that they had generally been cast for him.

Several questions were discussed in connection with this state of facts:

(1) Was a vote cast by an unregistered person who did not give the affidavits required by the law, nevertheless a legal vote.

The majority report, presented by Mr. William M. Springer, of Illinois, and concurred in by seven of his associates, held that such votes were not legal, since the law was mandatory:

The authorities are uniform to the effect that all statutes are mandatory which can not be disregarded without ignoring the legislative intent. The will of the legislature can not be carried out unless this provision of the statute is complied with and to disregard it is to disregard one of the safeguards which the law-making power of Pennsylvania deemed necessary for the protection of the ballot.

It is contended by counsel for the sitting Member that the requirements of sections 3 and 10 above set forth are merely directory, and a disregard of them does not invalidate the vote cast without compliance with its provisions. But your committee can not agree to this view of the law. The true line of distinction as to whether a statutory provision is mandatory or merely directory in its nature is laid down in *Smith on Statutes* and other well known authorities.

The report then quotes *Smith, Cooley on Constitutional Limitations, and People v. Schoemerhorn* (19 Barb., 558). There being no Pennsylvania decisions since the adoption of the new constitution the report reviews decisions under the old constitution and then says:

Now, with all due respect for those who differ with us, we submit that there can be no directory provisions in a statute in regard to that which the statute itself forbids being done at all.

"Construction can never abrogate the text; * * * it can never fritter away its obvious sense; * * * it can never narrow down its broad limitations; * * * it can never enlarge its natural boundaries." (*Story on Constitution, sec. 407.*)

"The right rule of construction is to intend the legislature to have meant what they have actually expressed, unless some manifest incongruity would result from doing so, or unless the context clearly shows that such a construction would not be the right one." (*Jackson v. Lewis, 17 Johnson, 475.*)

The result of all the authorities is that all constitutional provisions in statutes defining what the voter himself must do, both as to qualifying himself as an elector and furnishing the quality and quantity of evidence thereof which the law demands, is mandatory, jurisdictional, and in the nature of conditions precedent, while those which merely relate to the conduct of the election officers may or may not be directory according as they may or may not appear to affect results, and according as they may or may not seem to have been regarded by the law-making power as essential and necessary safeguards against

the mischief the statute was intended to prevent. Thus in *Morris v. Haines* (2 N. H., 246), where the statute required State officers to be chosen by a check list, and by delivery of the ballots to the moderator in person; and it was held that the requirement of a check list was mandatory, and the election in the town was void if none was kept. The decision was put upon the ground that the check list was provided as an important guard against indiscriminate and illegal voting, and the votes given by ballot without this protection were therefore as much void as if given *viva voce*.

The following is the concluding portion of the opinion:

"If, at an election of Representative, the check list be flung aside and votes are indiscriminately crowded into the ballot box without an inspection by the moderator it must be obvious to all observing citizens that every evil which the statute was designed to remedy is likely to happen, and that two prominent provisions of it will be trampled under foot. Votes so given and received are neither given nor received in conformity to the essential requisitions of the statute, and such requisitions being violated the votes must be void. They would be no more void if given *viva voce* rather than by ballot. If such a neglect of the statute will not render the whole proceedings void, what neglect will have that operation? The whole balloting, therefore, in this manner is vitiated. No Representative can thus be duly elected."

A portion of the minority, in views signed by Messrs. W.A. Field, of Massachusetts, E. Overton, jr., of Pennsylvania, and J.H. Camp, of New York, also agreed that the statute was mandatory:

To the general reasoning of the report of the minority of the committee we assent. We think, however, that the registry law of 1874 is a valid law under the constitution of 1873. We think also that the requirements in that law of affidavits from persons not on the registry list in order to enable them to vote are mandatory, and that the requirements for the return of papers, affidavits, etc., are directory; that as it is made a crime on the part of the election officers to permit a non-registered person to vote without requiring the legal proof of qualifications, the strong presumption is, in the absence of evidence, that such officers have properly performed their duties in that respect.

The general minority views, signed by Messrs. W.H. Calkins, of Indiana, J. Warren Keifer, of Ohio, and J.B. Weaver, of Iowa, contended that the law was directory merely:

We do not believe that the provisions of the constitution relating to the registry of voters is mandatory in so far as it affects the right of a nonregistered voter to vote if he is otherwise qualified. The clause of the constitution in terms excludes any such conclusion. The words "but no elector shall be deprived of the privilege of voting by reason of his name not being registered," found in section 1, article 8, to my mind settles the question. They are plain and admit of but one interpretation, and, applying the acknowledged rule to them that the ordinary import of words shall be taken to be their meaning, leaves no room for doubt.

But the law passed to carry out the section seems to be imperative, and it is a matter of some difficulty to decide whether it is repugnant to that clause which would seem to limit the power of the legislature to disfranchise an elector for nonregistration who is otherwise qualified. Now, we admit that registry laws are salutary and ought to be maintained in all proper cases and by all proper methods, but to maintain them constitutional restrictions must not be disregarded.

The foregoing clause of the constitution is, in our judgment, a limitation on the power of the legislature of the State, and it can not pass a registry law whereby a voter shall be deprived of suffrage, if otherwise qualified, by reason of nonregistration. This, it seems to us, was the very purpose of the clause. If left out, the section would be perfect. It was to prevent the legislature from disfranchising qualified voters that it was inserted.

The new constitution of Pennsylvania was made whilst all the adjudicated cases respecting the old constitution and the laws passed thereunder were in full force and well known to the members composing the constitutional convention. It must be conclusively presumed that it was in the light of these past judicial constructions that the convention acted in framing the new constitution, and in all cases where the provisions of the old were adequate they were ingrafted into the new; but where they had been found to be deficient, and did not meet the will or wish of the people, they were taken down, altered, or amended.

A glance at the constitution of 1838 and its amendments shows that it was silent as to registry laws. Article 3, sections 1, 2, and 3, of the old constitution are among the changed and altered provisions of the new, and it must be presumed that the old constitution, and the judicial constructions given it on the subject of suffrage and elections, were not in harmony with the sentiment of the people of the State. Hence the provisions relating to registration. This is the only material change made. In view of this the act of 1839, section 65 et seq., referred to in the majority report, is not in point and can have no weight in determining the question before us, because the whole power relating to registration under the old constitution resided in the legislature; it was unrestricted by constitutional barriers; if it saw fit, as it did, to make an imperative registration law, there was no limitation on its power under the constitution of 1838. This was held in the case of *Patterson v. Barlow* (60 Penn. St. Rep., 54). This case expressly overrules *Page v. Allen* (58 Penn. St. Rep., 338), holding otherwise.

In the case of *Patterson v. Barlow*, supra, the supreme court of the State held the rule announced by Chief Justice Shaw, of Massachusetts, in the case of *Capon v. Foster* (12 Pick., 485), namely, that an imperative registration law, not forbidden by the constitution, was a reasonable regulation, under which the right to vote might be exercised, and was not therefore an additional test to the qualification of electors. (See *Brightly Contested Election Cases*, No. 2, p. 51.)

The new constitution expressly fixes and determines the right of all qualified nonregistered voters to vote by saying, "But no elector shall be deprived of the privilege of voting by reason of his name not being registered." We therefore conclude that all provisions of the law set out in the majority report and cited in this, so far as it attempts (if that is held to be its proper construction) to hold the elector responsible for the act or omission of election officers regarding registration, or so far as it restricts his right to vote if he is otherwise qualified, is an additional test of his right to vote, is repugnant to that sacred privilege reserved to each citizen.

The minority then quote *Cooley and State v. Smith* (67 Maine, 328), and conclude that the law was directory merely so far as the voters were concerned. "It is the duty of the election officers to comply with this law," says the views. "It is imperative on them, and if they fail they subject themselves to the penalties provided in section 12 of the registry law." But to allow a nonregistered voter to vote without requiring him to comply with the law, if he is otherwise qualified, is quite a different question. If he refuses to comply on being requested then it is clearly the duty of the officers to refuse his vote, because he refuses to obey a reasonable regulation prescribed by the legislature and he hurts no one but himself. But if he is allowed to vote without being required to file the affidavits, and is otherwise qualified, his vote is not an illegal one."

The minority considered that the Pennsylvania case of *Wheelock* (1 Norris, 297-299) sustained this view, but the majority denied this.

940. The case of *Curtin v. Yocum*, continued.

Failure of an election officer to perform a certain duty does not establish the presumption that he has failed as to other duties.

The showing prima facie by contestant of enough illegal votes to change the result does not shift the burden of proof to contestee.

Contestant having prevented the evidence by which contestee sought to answer contestant's charges, the House declined to permit contestant to profit thereby.

(2) The minority thus set forth the next question arising:

The contestant assumes that having shown a discrepancy between the registry lists and the poll lists, and the further fact that affidavits were not on file in the prothonotary's office corresponding to the excess of names on the poll lists, therefore all persons thus voting were prima facie illegal voters. In other words, that it must be presumed the officers of election failed to perform all their duties by the failure to return affidavits of nonregistered voters to the prothonotary's office.

The rule of law is that a public officer is presumed to do his duty the contrary not appearing. Under the law there were several acts required to be done by the officers. The first one was to ascertain whether a person offering to vote was registered; if he was not, to require an affidavit of himself and also of a registered voter to certain facts; to see that it was subscribed and sworn; to take and keep it till the election was over, and then return it to the prothonotary's office with certain other papers. To show that the last act was not performed does not show that the rest were left undone or that proof of failure in this one particular is proof of a failure in all. It doubtless does overcome the presumption as to the particular act, but we doubt whether it can be extended any further. We are not ready to assent to the proposition that because the election officers failed to return the required affidavits to the office of the prothonotary therefore they must be presumed not to have required them at all.

Happily, however, it appears in the testimony submitted that in nearly every instance direct proof was made that the officers did require the affidavits, but that they mistook their duty and, instead of returning them to the prothonotary's office, sealed them up in the ballot boxes with the tickets, and deposited the boxes with the nearest justice of the peace to the polling place, as required by law.

At this point an important and interesting question of evidence presents itself, namely, as to whether the burden of proof shifts from the contestant to the contestee after contestant has shown prima facie a sufficient number of illegal votes thrown which, if cast for contestee, would wipe out his majority

We can not perceive that the well-known rule contended for applies. To illustrate it we admit that in a case where A is sued on a promissory note by B—plea, payment. To support his plea A offers proof that on the day of or a day subsequent to the maturity of the note he paid B a sum of money equal to the amount due. B admits the receipt of the money, but alleges it was paid for another purpose. The burden now shifts to B, and he must show by preponderating evidence that it was applied on some other debt or for some other purpose than the payment of the note.

But the declaration in contestant's notice is that the contestee received a sufficient number of illegal votes to more than counterbalance his returned majority. Proof that tends to show a number of illegal votes cast in excess of the returned majority for the contestee is not of itself evidence that contestee received them. It does not even raise a presumption to that effect; and when contestee is disconnected with such vote—when he has no lot or part in bringing it about and exerts no influence in having it cast—he certainly can not be placed in the position of being compelled to prove a negative in order to maintain his seat. Such a doctrine simply overturns all rules of evidence. We can conceive of cases which might be different, but these cases are not applicable to the one at bar.

(3) Evidence showed that in many precincts the affidavits of the nonregistered voters were placed in the ballot boxes, so that the truth as to how the voters in question cut their ballots might have been ascertained by an inspection of these ballots. But the time during which the ballots were required to be preserved expired during the time allowed contestant for taking testimony and before the time when sitting Member could legally take testimony. But when sitting Member asked the court for an order for the further preservation of the ballots, counsel of contestant appeared and opposed this motion, "and procured the court to deny the prayer thereof," in the words of the minority views. The minority say further:

In the face of these facts, and knowing the necessity of preserving the papers contained in the ballot boxes so that the truth might be ascertained, what excuse can be urged for the contestant in resisting and defeating their preservation? Did not his act compass their destruction? Is he not here asserting the illegality of this vote and asking the House to unseat the sitting Member, when he himself was a party to the destruction of the very evidence which would have settled the question? Does he not stand in the position of the spoliator of documentary evidence asking to take advantage of his own wrong? How can we say the result is left in doubt when the contestant himself contributed largely thereto? We think it safe to stand on the elementary rule that one asking equity must do equity.

The majority dissented from this, implying that the extraordinary diligence of contestant in endeavoring by other evidence to supply the facts met this objection.

941. The case of Curtin v. Yocum, continued.

The House declined to declare the seat vacant because illegal votes, cast at a few precincts, but decisive of the general result, could not be segregated.

Where the nature of illegal votes could not be shown, the House preferred to reject the precinct poll rather than apportion pro rata.

Objections to the pro rata method of purging the polls of unsegregated illegal votes.

(4) The majority, in view of the difficulties of the situation, proposed the following solution:

It is true that the record fails to disclose for whom these persons voted, and if the failure is to be charged to anyone, the contestee is equally at fault with the contestant. They are, therefore, both in such default that neither has the right to claim the seat when it appears that there are illegal votes in the returns unaccounted for which are greater in number than the returned majority of the sitting Member. The people of the district have rights which can not be compromised by any failure, whether avoidable or unavoidable, either of the contestant or the contestee. They have the right to be represented by the person, and no other, who has received a majority of the legal votes of the district.

It having been determined that a large number of persons voted at the election who did not comply with the statute as to the proof of their right to vote, and the number of such ballots cast being largely in excess of both the returned majority of the sitting Member or the revised majority which he claims in his briefs, and the evidence not showing for whom such votes were cast, we must determine upon what rule the polls must be purged of such illegal nonregistered votes. McCrary, in his Treatise on Elections, section 300, page 225, lays down the following rule:

“It would seem, therefore, that in a case where the number of bad votes proven is sufficient to affect the result, and in the absence of any evidence to enable the court to determine for whom they were cast, the court must decide upon one of the three following alternatives, viz:

“1. Declare the election void.

“2. Divide the illegal votes between the candidates in proportion to the whole vote of each.

“3. Deduct the illegal vote from the candidate having the highest vote.

“And it is clear also that where in such a case no great public inconvenience would result from declaring the election void and seeking a decision by an appeal to the electors, that course should be adopted.”

It will be seen from all the authorities that where a new election can be held without injury it is the safest and most equitable rule to declare the election void and refer the question again to the people in all cases where there are a greater number of illegal votes proven, but for whom they voted does not appear, than the returned majority of the incumbent. In this case, it appearing that a number of votes many times greater than the official majority of the sitting Member were illegally received, counted, and returned, in violation of the constitution and mandatory statutes of Pennsylvania which were adopted for the purpose of securing the purity of the ballot box and preventing frauds at elections, and the true result of the election by the legal voters of the district has not heretofore been ascertained, and can not, from the nature of the case, be ascertained upon the facts presented in the record, your committee recommend that the election be declared void, in order that the people of the Twentieth Congressional district of Pennsylvania may have an opportunity of again expressing their choice for a Representative in Congress.

The minority views join issue on this view:

Referring to the point that because at certain polls and precincts 1,000 and more illegal votes were polled—being illegal because they were not registered, and no affidavits were filed as required by law—that therefore the vote at all of the other precincts must be set aside, is a doctrine we can not assent to. Admitting for the sake of argument that those votes were illegal, we maintain that the true rule is, where illegal votes have been cast, to purge the poll by first proving for whom they were thrown, and thus preserve the true vote; if by the use of due diligence this can not be done, and the result is still left in doubt, then to throw the poll out entirely. We think this is a safer rule to maintain the purity of the ballot box than the

other one, which apportions the fraud between the parties. This rule ought to be applied in all cases where the fraudulent vote is considerable and permeates the whole poll, and not in cases where it is scattering and inconsiderable. In those cases it may be justly inferred that the result would not be affected by retaining the poll unpurged. The authorities cited by the majority of the committee, and an almost unbroken line of authorities in Pennsylvania, support this view.

During the forty days which the contestant had for taking testimony he could have introduced in evidence every ballot cast at the polls of which complaint is made. He could, by an inspection of the contents of the ballot boxes, have ascertained whether the affidavits had been filed as required by law; by making a comparison between these and the registry lists and the poll list he could have ascertained the exact truth; and as each ballot was numbered, he could have ascertained for whom each illegal vote was cast. He did not do this, but actually aided in the destruction of all these papers, so that the contestee could not show the true state of affairs. He can not, therefore, be said to be within the rule of having used due diligence to purge the polls of illegal votes. He can not bring himself within the McCrary rule of deducting pro rata the illegal vote at each poll, for this would increase the returned majority of contestee by many hundreds. He can not insist on the true rule we have laid down, for that would leave a large majority of polling precincts throughout the Congressional district unchallenged, and would increase the contestee's majority to near 600.

He is therefore driven to the last resort, that of asking that the election be declared void because of the uncertainty of the result, as he claims, in certain specified polling districts. This can not be allowed, according to my view, for the reasons stated.

If the rule contended for by contestant is adopted, we maintain it must be applied to the polling precincts where contestant alleges the fraud occurred. Then each party is left to prove his vote by calling the voters in the rejected precincts. If they do not, they must stand on the vote of the other unchallenged precincts, and can not be heard to complain of their own negligence.

To apply either of these rules, as we have seen, confirms the title of contestee to his seat as a Member.

The majority of the committee presented a resolution declaring the seat vacant; but in the debate the first speaker for the majority side intimated that this solution was proposed when it was thought that the case might be decided in season to have the new election at the time of the local election in February in Pennsylvania. But as this time had passed, and a new election would be inconvenient, it seemed to him that the contestant should be declared elected.¹ The majority members did not generally concur in this idea, however.

The minority reported a resolution confirming the title of sitting Member to the seat.

The report was debated at length on May 8, 10, and 11,² and on the latter day the question was taken on substituting for the majority proposition the following proposed by the minority:

That Seth H. Yocum is entitled to retain his seat in the Forty-sixth Congress as a Member from the Twentieth Congressional district of the State of Pennsylvania, and that Andrew G. Curtin is not entitled thereto.

Mr. William M. Springer moved to insert the word "not" after the words "Yocum is," and on that question the yeas were 75, the nays 114.

Then the minority substitute was agreed to, yeas 113, nays 75.

Then the majority proposition as amended was agreed to.

So the minority views prevailed.

¹ Speech of Mr. F. E. Beltzhoover, of Pennsylvania. Record, pp. 3151, 3152.

² Record, pp. 3142, 3179, 3182, 3241-3251; Appendix, p. 156.

942. The New York election case of Duffy v. Mason, in the Forty-sixth Congress.

Illustration of a notice of contest deficient in the particularity of its specifications.

Participating in a subsequent agreement as to evidence the contestee was held to have waived his objections to the sufficiency of notice.

On May 21, 1880,¹ Mr. Walpole G. Colerick, of Indiana, from the Committee on Elections, submitted the report in the case of *Duffy v. Mason*, from New York. Sitting Member had been returned by an official majority of 736 votes.

At the outset a preliminary question arose as to the sufficiency of the notice of contest. The report quotes the notice and discusses it:

NOTICE OF CONTEST.

Hon. JOSEPH MASON,

Hamilton, Madison County, New York.

SIR: Please take notice that I shall, in the manner provided by law and the rules and precedents of the House of Representatives of the United States, contest your election and your certificate of such election as a Member of the Forty-sixth Congress of said United States from the Twenty-fourth Congressional district of the State of New York, on the following grounds, to wit:

First. That you did not receive a majority of the legal votes cast at the election held in said Congressional district on the 5th day of November last, but, on the contrary, that I did receive a majority of such votes.

Second. That your election was effected and procured by force, fraud, intimidation, promises of favor, corruption, the buying of votes and voters, and other corrupt and illegal means used by you and in your behalf; and that your certificate of election as such Member of Congress was and is based upon and the result of such force, fraud, intimidation, promises of favor, the buying of votes, and other corrupt and illegal means used by you and in your behalf.

Third. That your election was procured by illegal votes and illegal voting in your behalf, and by your procurement or the procurement of those interested in your election.

Fourth. That your certificate of election is invalid for the reasons stated in the second specification herein.

Fifth. That I was, on said 5th day of November, 1878, legally elected as such Member instead of yourself, and am entitled in your stead to a seat in said Forty-sixth Congress.

Dated Pulaski, December 23, 1878.

SEBASTIAN DUFFY.

The contestee insists that the grounds of contest are not stated with that precision and certainty required by the statute which authorizes and regulates the procedure in contests of this nature. The objections urged by the contestee are presented in his answer, as follows:

"II. Your notice in writing served upon me December 26, 1878, is insufficient and incomplete under the statute and practice in such case made and provided, in that it does not specify particularly the grounds upon which you rely—that is to say, your charges that my election was procured by force, fraud, intimidation, promises of favor, the buying of votes and voters, and other corrupt and illegal means used by me and in my behalf, and that my election was procured by illegal votes and illegal voting, and by my procurement or the procurement of those interested in my election, and grounds of contest therefor, respectively, do not state who was forced to vote for me, and what fraud contributed to my election, and who was intimidated, or in what manner, place, town, city, or county such intimidation was had, and to whom or in what manner promises of favor were made, and what votes and voters were bought or where and when such votes or voters were so bought, and what other corrupt and illegal means were used by me and in my behalf, and by what illegal votes and illegal voting by my procurement or the procurement of those interested in my election you were prejudiced, and who were so

¹Second session Forty-sixth Congress, House Report No. 1568; 1 Ellsworth, p. 361.

interested, and in what election district, town, city, or county such persons reside and perpetrated such acts complained of.”

The statute provides:

“SEC. 105. Whenever any person intends to contest an election of any Member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice, in writing, to the Member whose seat he designs to contest, of his intention to contest the same, and in such notice shall specify particularly the grounds upon which he relies in the contest.” (U.S. Rev. Stat., p. 18.)

McCrary, in his Law of Elections, section 343, referring to this statute, says:

“A good deal of discussion has arisen as to what is to be understood by the words ‘specify particularly the grounds on which he relies.’ It is evident, however, that these words are not easily defined by any others. They are as plain and clear as any terms which we might employ to explain them. Cases have arisen, and will again arise, giving rise to controversy as to whether a given allegation comes up to the requirement of this statute, and it must be for the House in each case to decide upon the case before it. It may be observed, however, that this statute should receive a reasonable construction, one that will carry out and not defeat its spirit and purpose. And perhaps the rule of construction which will prove safest as a guide in each case is this: A notice which is sufficiently specific to put the sitting Member upon a proper defense and prevent any surprise being practiced upon him is good, but one which fails to do this is bad.” (Wright v. Fuller, 1 Bartlett, 152.)

“The Houses of Congress when exercising their authority and jurisdiction to decide upon ‘the election returns and qualifications’ of Members are not bound by the technical rules which govern proceedings in courts of justice. Indeed, the statutes to be found among the acts of Congress regulating the mode of conducting an election contest in the House of Representatives are directory only, and are not and can not be made mandatory under the Constitution. In practice these statutory regulations are often varied and sometimes wholly departed from. They are convenient as rules of practice and of course will be adhered to, unless the House in its discretion shall in a given case determine that the ends of justice require a different course of action. They constitute wholesome rules not to be departed from without cause.” (Ibid., sec. 349.)

While it is true that this statute should receive a liberal construction, yet it will not do to permit parties to disregard its provisions. The House, in sanctioning in its violation in cases heretofore determined, has created precedents that are now frequently and pertinently cited to justify similar infractions. This practice, if tolerated, will finally result in the virtual abrogation of the statute. The only safe course to pursue is to require at least a substantial compliance with its provisions. We think that the notice of contest in this case is clearly insufficient. It is too indefinite and uncertain in its allegations. As was said in the case of Bromberg v. Haralson (Smith’s Digest of Election Cases, p. 355)—

“It is too vague and uncertain to be good. The statute requires that the contestant in his notice ‘shall specify particularly the grounds upon which he relies in his contest.’ It is impossible to conceive of a specification of the grounds of contest broader or more general in its terms. It fixes no place where any act complained of occurred. It embraces the whole district in one sweeping charge. This specification embraces three general grounds of complaint, not one of which possesses that particularity essential to good pleading.”

But the contestee in this case is justly estopped by his own act and conduct from assailing the sufficiency of the notice of contest, and its defects have been by him waived. The record contains the following agreement:

UNITED STATES OF AMERICA:

In the matter of the contested election of Joseph Mason, Representative-elect to the Forty-sixth Congress from the Twenty-fourth Congressional district, State of New York:

It is hereby stipulated and agreed, by and between Sebastian Duffy and Joseph Mason, contestees, through their respective attorneys, that all affirmative evidence heretofore given or which may hereafter be given be, and remain, in this contest as a part of contestant’s case, and that contestee, in consideration of this consent and stipulation on his part, have sufficient time after the expiration of the statutory limit of ninety days in which to give evidence in answer to such new matter so put in

evidence, to the end that simple and exact justice be done to all parties, and that contestant have reasonable time to put in evidence in rebuttal only to such evidence as the contestee may give after said ninety days shall have expired. * * *

Dated April 10, 1879.

S.D. WHITE,

Attorney for Duffy.

JOHN J. LAMOREE,

Attorney for Joseph Mason, Oswego County.

D. N. WELLINGTON,

Attorney of Joseph Mason for Madison County.

That such defects may be waived has been determined by at least two decisions of the House. (See *Otero v. Gallegos*, 1 Bartlett, 178; *Bromberg v. Haralson*, Smith's Digest of Election Cases, p. 356.)

If these defects had not been waived we would feel fully justified, by reason of the insufficiency of the notice, in dismissing this case or excluding the evidence offered in support of the alleged grounds of contest.

943. The case of *Duffy v. Blason*, continued.

Evidence of the unsworn declarations of voters as to their intimidation is hearsay and inadmissible.

Rumors that certain employees have been intimidated are not considered in an election contest.

Legal voters may not be disfranchised because members of political committees may have violated the law in assisting said voters to reach the polls.

The committee therefore proceed to investigate the grounds of contest, the following questions being developed:

(1) It was charged that a certain employer of labor had improperly influenced the votes of his employees. All the witnesses except three admitted that they had no personal knowledge of the existence of such a system, and that their only information was derived from rumors.

The committee say:

It is our duty to reject all the evidence that has been offered relative to the existence of the rumors to which we have alluded, as it is clearly incompetent, and we must, for the same reason, discard all evidence relating to voluntary statements made by persons not under oath or witnesses, as all such hearsay evidence is inadmissible.

The rule that we apply in rejecting this evidence is stated in 1 Greenleaf on Evidence, page 115, thus:

"Hearsay evidence is uniformly incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who speak from their own knowledge. That it supposes something better that might be adduced in the particular cases is not the only ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practiced under its cover, all combine to support the rule that hearsay evidence is wholly inadmissible."

None of the evidence excluded by us comes within any of the exceptions to the rule above stated, and this rule has often been applied by the House of Representatives in cases of this character.

The application of this rule results in the rejection of all the evidence introduced by the contestant in support of the first ground of his contest, save that rendered by Daniel Sweeney, Alexander Lemmon, and Hiram Hammond, all of whom were, at different times prior to 1878, employed in the factory, and who claim that they were discharged from their employment by reason of their political sentiments and affiliations.

Daniel Sweeney testifies that in the fall of 1862, eighteen years ago, he was discharged by Kingsford because he refused to vote for Wadsworth, the Republican candidate for governor of the State of

New York; that he had worked in the factory for fourteen years continuously, and it was the only occasion that he was ever spoken to by Kingsford on the subject of voting. (See Record, p. 202.)

Alexander Lemmon testifies that in 1873 or 1874 he was requested by Kingsford "to go to the polls and peddle tickets for him," and that he was discharged from his employment because he was accused of "peddling Democratic tickets with the Republican heads on." (See Record, p. 144.)

Hiram Hammond testifies that in 1876 Kingsford expressed his desire that witness should vote for Hayes for President, which he promised to do, but voted for Tilden, and that in the latter part of December, 1878, at the close of the year's work at the factory, he was discharged from his employment. (See Record, p. 987.) That he had worked at the factory "off and on" for fourteen years, and that the occasion to which he alludes is the only time that Kingsford ever talked to him on the subject of politics (p. 993).

These are the only instances, extending over a period of sixteen years, where it is shown by competent evidence that Kingsford or any other person interfered in any manner with the employees of the factory in the free and unrestrained exercise by them of the elective franchise. There is no evidence in the record that we have discovered showing a single instance of such interference on the part of Kingsford or any other person connected with the management of the factory relating to the election in controversy.

There was also evidence to show that the four were discharged for other than political causes.

The committee say as to the alleged system of improper influence:

If we accept as true the rumors that prevailed as to its existence, still the evidence is incomplete, as it wholly fails to furnish any data by which the number of voters affected by it can be ascertained; and, even excluding the ballots of all the voters then employed at the factory, which are estimated by witnesses at 150 to 200, it would not affect or change the result of the election.

(2) A statute of New York forbade any candidate or other person to promote the election of such candidate by furnishing entertainment to meetings of electors, by paying for the attendance of voters at the polls, or by contributing money for any other purpose intended to promote an election, except for defraying the expenses of printing, etc., or for conveying the sick, poor, or infirm electors to the polls. The report thus discussed the point made by the report in this connection:

The contestant seeks to hold the contestee responsible for the acts of the members of the committees representing the Republican party in the district who violated this statute, and in the absence of any proof showing, or tending to show, that the contestee directed or authorized the expenditure of the money contributed by him for the purposes forbidden by the statute. A principal is not liable for the illegal acts of his agent unless done at his instance or with his knowledge and assent. Good faith and innocence are always presumed. If A intrusts B with money to be used by him for certain lawful purposes, and B, without the knowledge and consent of A, diverts the money from the purposes to which it was to be applied and uses it for immoral and illegal purposes, A can not be held liable for the misconduct of B. That the contestee had the right to contribute and pay to these committees money to be used by them for purposes authorized by the statute is not controverted by the contestant, and in the absence of opposing proof the presumption exists that he did not authorize its expenditure for purposes prohibited by the statute. If the statute was violated, its offenders are by the provisions of the statute subject to punishment. Under the rigid, illiberal, and unreasonable construction placed upon this statute by the contestant it is even unlawful for a candidate or his friends to rent a hall for a political meeting, procure music, or employ a speaker to discuss the political issues, because it may tend to promote the election of the candidate; and if such a meeting is held, in disregard of this statute, the legal voters who attended it are subject to punishment therefor by the forfeiture of their votes, regardless of the result that may have been produced by the charms of the music or the eloquence of the speaker; or if a legal voter, who is too indifferent or indolent to attend the election, is conveyed to the polls in a carriage provided for that purpose by the committee of the party of which he is a member, it affords sufficient cause for challenging his vote to show that he was neither "sick,

poor, or infirm," and that he was able to walk or pay for his ride to the polls. To so construe the statute is absurd. If the person who attends such meeting or is so conveyed to the polls is a legal voter, his vote must be received and counted. We can not punish legal voters by disfranchising them because members of political committees have possibly violated the statute, as construed by the contestant. The evidence wholly fails to show that the money was used to corrupt or improperly influence the voters. The supreme court of New York, in the case of *Hurley v. Van Wagner*, 28 Barb., 109 (1858), in construing this statute, said:

"A person who pays money for his board, or railroad or steamboat fare, while going to or from a political meeting, or who pays for the use of a room for such meetings, or for the lights or attendance thereat, in one sense contributes money to promote the election of a particular ticket or candidate. But is it a contribution of money in the sense intended by the act? Did the legislature intend to prohibit and punish as a misdemeanor every expenditure of money which might indirectly promote or be intended to promote the election of particular candidates? Public meetings, large assemblies of the people, constant and almost universal intercommunication, one with another, and journeys from one part of the country to another, are the usual and customary means by which the election of particular candidates is made, and they necessarily involve the expenditure of large sums of money which may be said to be contributed. Is this the evil that the act was designed to suppress? If it was, it may be safely said to have utterly failed of its object, for during the twenty-nine years it has been upon the statute book hardly one attempt has been made to enforce it; and the evil practice, if it be one, has gone on and gained additional strength with each additional year. I infer, therefore, that these are not the contributions in money forbidden by the act. If the payment of a sum of money for the use of a room in which to hold a public meeting for political objects, or for the lights used thereat, or for the attendance of a person to prepare such room and keep it in proper order, is a contribution of money to promote an election within the meaning of the statute, so is the money a man may expend upon himself in the payment of tavern bills and the expenses of transportation, in going to and returning from such meetings, equally a contribution of money to promote an election; because all such expenditures tend to the same result, and the money is disbursed for the same object, and that is to aid in the election of a particular candidate or ticket. It is not possible to discriminate between them, so that to adopt the construction claimed is to impute to those who framed the law the most absurd intentions, or to give it an effect which they could not have contemplated."

Even if the law justified us in excluding the ballots of those voters who were conveyed to the polls, although neither "sick, poor, and infirm," yet we would be unable from the evidence to compute their number or determine for whom they voted; nor could we ascertain from the evidence whether the orators, under pay, who addressed public meetings in rented halls, converted lukewarm Democrats or indifferent Republicans into "stalwarts," and, if so, what ones, or how many.

944. The case of *Duffy v. Mason*, continued.

In absence of evidence to te him, a returned Member is presumed innocent as to acts of agents of his party.

Improper acts by a candidate's friends without his participation are of effect only so far as they are shown to have actually affected the result.

Discussion of the qualification as to residence of students who voted in the college town.

(3) Contestant charged that votes were bought in the interest of sitting Member; but the evidence on this point consisted mainly of proof as to the existence of rumors. One witness named Hollingsworth did state to different persons, as appeared from the evidence, that he received money for voting for sitting Member. But the committee say that even conceding Hollingsworth's statement to be true, it did not affect the contestee, as the evidence failed to connect him in any manner with the transaction. 'A candidate can not and ought not,' says the report, "to be held responsible for all the imprudent and censurable acts of indiscreet friends, who, in the zealous advocacy of his election, resort to improper means of securing that

result without his knowledge, and which he, if consulted, would condemn, unless the voters affected by such means are sufficient in number to change or render uncertain the result of the election.”

(4) The contestant insisted that certain students at Madison University voted illegally at Hamilton. The report cites and discusses the constitution of New York on this point:

“SECTION 3, ARTICLE 2. For the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of the State or of the United States, or of the high seas, nor while a student of any seminary of learning, nor while kept in any almshouse or other asylum at public expense; nor while confined in any public prison.”

Prior to the election in controversy a case was tried before Judge Wallace, of the United States district court, at Syracuse, N.Y., wherein a student at St. Bonaventure College, at Allegany, Cattaraugus County, New York, was indicted for illegal voting. Judge Wallace, in referring to the provisions of the constitution above cited, said:

“Of course, the defendant was not a resident of both Orleans County and Cattaraugus County; he could reside in one county only for the purpose of exercising the right of suffrage. It appears indisputably that until September, 1875, he was a resident of Orleans County, and was a legal voter there. Now, the presumption of the law is that he continued to be a resident of that county, in the absence of evidence to the contrary, and the whole case may therefore be determined by ascertaining whether or not he acquired a new residence in Cattaraugus County—whether the evidence adduced overcomes the legal presumption to which I have referred. And it is at this point that the bearing and effect of the constitutional provision found in section 3 of article 2 of the constitution of this State becomes important. The language there employed is: ‘For the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while a student of any seminary of learning.’ By force of this language it is clear that defendant neither lost his residence in Orleans County nor gained a residence in Cattaraugus County merely because of his appearance in the latter place as a student at the college. Now, I do not pretend to instruct you that this constitutional provision precludes a student from acquiring a residence at the place where he is attending college, but the fact must be established by evidence other than that which is afforded by this sojourn in the place as a college student. A change of residence may be effected by a change of location with the intent to make that location a new home, as distinct from an intent to return when some temporary purpose is accomplished. But a change of residence is not effected by intention alone, nor by change of location alone. Both must occur. And the intent must be evinced by consistent acts which denote an abandonment of the former residence and the selection of a new home. You may find here that defendant never intended to return to Orleans County as his home, from his declarations and his conduct, but you must also find, before you can decide that he can acquire a new residence, that he intended to make Cattaraugus County his future home, and evinced that intent by corroborative acts. It therefore follows, if the evidence does not disclose any circumstances which distinguish his case from that of the ordinary one of a college student, intent upon prosecuting his studies, but who has left the paternal roof to mark out his own future for himself, it fails to meet the requirements of the law for the acquisition of a new residence, and the main question in the case will turn upon your conclusion upon the subordinate one. In conclusion, it is appropriate to remind you that, although the defendant may have conscientiously believed he had acquired a residence in Cattaraugus County, and was exercising a lawful right in voting there, his violation of the law is not thereby purged of the criminal intent which is the essential element of every crime. Every citizen is presumed and required to know the law.” (See Record, p. —.)

The evidence in this case shows that it has been customary for many years for the committees of the different political parties in Madison County to secure the attendance of these students of Madison University at the polls as voters. (See Record, p. 714.) Some years as high as 75 students or more of the university voted at the village of Hamilton (Record, p. 710), while the number who voted at the election in dispute was 14. One of the witnesses, Edward D. Van Slyck, testifies that the reduction in number at the election in controversy was due to Judge Wallace’s opinion, above set forth, “which

was taken as the guide and became the decisive ground upon which they claimed their right to vote," and that the contestee advised the students "that no one should vote unless he was perfectly satisfied that he was a legal voter, and advised them to keep strictly within Wallace's opinion." (See Record, p. 710.)

The report continues to the effect that although the burden of proving that these students whose votes had been received were not legal voters was on the contestant' he had introduced no testimony tending to establish that fact. After the election several of the students were arrested and arraigned before C. M. Dennison, United States Commissioner. He discharged them. The evidence convinced him that each had absolutely and entirely severed his connection with his former home, and had gone to Hamilton with the intention of making that his only home and residence, at least while in attendance at the university, and had so remained there the time required by law to become a voter. The commissioner thereupon gave the opinion:

In my opinion there could be no question but that each of these young men would have been a legal voter at Hamilton had he gone there in the manner in which he did and performed the same acts which he did, were it not for the fact that they came within the classes of persons enumerated in article 2, section 3, of the constitution of this State, and that the determination of these cases turns wholly upon the meaning of that section. It is claimed by the prosecution that this section of the constitution is prohibitory, and that no person can possibly gain a residence while a student of any seminary of learning. I can not concur in this doctrine. This section of the amended constitution is the same as in the constitution of 1840, and, substantially, in my opinion, a simple enunciation of the common law, and meant rather as a protection than as a prohibition, and is not intended to prevent any class of persons from changing their place of residence and gaining a new voting residence, but rather to protect persons who shall leave their actual permanent residence with an intention of going temporarily in some of the occupations or callings in said section enumerated, and at the completion of said purpose to return to their actual residence, and being thereby disfranchised during such absence. In my opinion this section of the constitution is not intended to disfranchise any citizen of the State of New York, but rather to protect every citizen of the State in the full exercise of the right of elective franchise. It is further claimed by the prosecution that these cases are parallel and at all fours with the case of "The United States against McCarthy," decided by Judge Wallace January, 1878. The defendants in these cases had the opinion of Judge Wallace in that case and examined the same carefully and took legal advice thereon before offering to vote, and upon such examination and advice concluded that their cases did not come within that decision, and that there was nothing contained therein which would prevent their voting, and they all voted after challenge and took the oaths required by law. These defendants are all candidates for the ministry, and, in my judgment, acted conscientiously and with great care, and, as I construe the law, were entirely correct in their conclusion that they were legal voters of the place where they voted. It is ordered that each of the defendants be, and they are, discharged." (See Record, pp. 1170, 1171.)

The committee concluded that the evidence was wholly insufficient to authorize them to determine that the students in question were illegal voters.

As a result of their conclusions the committee reported resolutions confirming the title of sitting Member to the seat.

The House, without debate, agreed to the resolutions.¹

945. The Minnesota election case of Donnelly v. Washburn, in the Forty-sixth Congress.

A committee being unable to reach a decision, this fact was reported, with accompanying minority views.

¹Record, p. 3636.

Discussion of the degree and kind of evidence necessary to prove bribery in an election case.

On June 16, 1880,¹ the results of the investigation into the Minnesota contested election case of Donnelly *v.* Washburn were presented to the House from the Committee on Elections. The committee did not come to a conclusive result. Ten of the fifteen members supported a resolution declaring that Ignatius Donnelly, the contestant, was not entitled to the seat; but a resolution declaring William A Washburn, the sitting Member, entitled to the seat had the support of only seven out of the fifteen members.

No report was made from the committee; but two sections of the committee were authorized to present views.

Mr. Van H. Manning, of Mississippi, presented views in favor of seating the contestant. These views were signed also by Messrs. S. L. Sawyer, of Missouri, R. F. Armfield, of North Carolina, F. E. Beltzhoover, of Pennsylvania, and W. G. Colerick, of Indiana, while it was announced that Mr. E. C. Phister, of Kentucky, concurred in a portion of the propositions set forth in the views.

Mr. J. Warren Keifer, of Ohio, presented views sustaining the proposition that sitting Member was entitled to the seat, and these views were signed also by Messrs. E. Overton, jr., of Pennsylvania, W. H. Calkins, of Indiana, John H. Camp, of New York, and W. A. Field, of Massachusetts.

The case was not acted on, Mr. Washburn retaining the seat through the Congress.

The discussion in the two "views" involved not only a large number of questions of fact, but also the discussion of several important law questions.

(1) Contestant charged widespread and extensive bribery. The evidence of this consisted of testimony like the following:

Charles Berens, a Democrat, the postmaster of the village of North Prairie, Morrison County (situated about 100 miles from Minneapolis), testifies (p. 300, printed testimony) that prior to the election of November 5, 1878, he wrote and mailed a letter directly to the sitting Member, Washburn, in which he said that he would give his support at the election to him, Washburn, for \$50. This letter evidently reached the sitting Member, for Berens testifies that he received a letter in reply to it from Keith, the postmaster at Minneapolis, a political friend of the sitting Member, in which Keith said "he was glad that Berens would work that way." He, Keith, further stated that he would give Berens's letter to J. V. Brower, one of the Republican United States land officers at St. Cloud, and that Brower would attend to the matter. J. V. Brower testifies (p. 246):

"Charles Berens wrote a letter to Minneapolis demanding \$50 for which he was to support General Washburn [the sitting Member]. The letter was sent to me by some one in connection with the campaign; I can't say whether by the committee or by General Washburn or by some one for them."

Brower admits the receipt of \$50 from Washburn or his committee, and may have got more. Berens (p. 300) and Brower (p. 246) both agree that Brower visited North Prairie, Morrison County, and called on Berens. Berens says: "Brower said I should work for Washburn and he would see me all right." He says Brower did not pay him any money because he, Brower, did not trust him—he thought he was supporting Donnelly. Brower testifies:

"I advised General Washburn [the sitting Member] or some one for him, after I had been advised that no arrangements of that character could be entered into [that is, the purchase of Berens's support for \$50], or words to that effect, that he should not enter into such arrangements with Charles Berens, or anyone else."

¹Second session Forty-sixth Congress, House Report No. 1791; 1 Ellsworth, p. 439; Journal, p. 1516; Record, p. 4621.

Here it is clearly established that there was a negotiation between a Democratic voter and Mr. Washburn, the sitting Member; the one to sell his vote (for his vote is implied in his "support") for \$50 and the other to buy it. The letter is answered for Washburn by Keith, his friend; the proposition is accepted with thanks, and the letter is delivered to a Federal official, who goes, with the letter and with Washburn's money, or the money of Washburn's committee, in his pocket, to see the party and consummate the transaction. The offense of bribery was complete when one party offered to sell his vote and the other agreed to buy it. (See Russell on Crimes vol. 1, p. 159; *Hardinge v. Stokes*, 1 M. & W., 233.) Brower reports to Washburn, or some one for him, that the "arrangement" could not be entered into.

There is no denial of this testimony and no attempt to impeach Berens or Brower.

Certain wood choppers voted practically unanimously for sitting Member, and it was alleged that they were bribed by one of their employers, who was also paymaster of a railroad controlled by sitting Member. The views favorable to contestant say:

The testimony of George C. Morton (p. 125), John Mulvey (p. 120), Arthur. T. White (p. 305), and E. P. Webster (p. 297) shows that these 80 or 90 wood choppers were urged and requested by Webster and White, the wood contractors, to vote for Washburn; they were told that if they voted for Washburn they would be paid (p. 125) from \$1.65 to \$2.20 each for their votes; they did vote, and they voted for Washburn, and they were so paid; and they refused to vote at all unless they were paid (p. 297). The total sum paid by Webster and White to these men for their votes was \$160 or \$170 (p. 307). It further appears, by the admission of Webster, that the contractors expected to be repaid this money (p. 297) so paid out for these votes.

It also appears (see p. 121) that in addition to the 80 or 90 wood choppers so bribed to vote for Washburn, the contractors Webster and White gave two trappers their board for a week on condition that they would vote for Washburn; and they did so vote.

George C. Morton testifies (p. 126) that White told him in the presence of Webster that they, Webster and White, were to get \$200 for their services at the election in behalf of Washburn. The money paid out by them for votes was repaid to White, one of the firm (see p. 127), by Main Hale, of Minneapolis, the business manager of the contestee, Washburn, eight days after the election, by a check for \$182; and the check was cashed for White by one George B. Webster, the paymaster of the Minneapolis and St. Louis Railroad Company, of which the contestee, Washburn, was and is president. White admits (p. 307) that he was repaid the sum of \$168 or \$172, being the money so paid for these 80 or 90 votes, by said George B. Webster, paymaster of contestee's railroad company. There was no connection between the St. Paul and Pacific Railroad, for which the wood was cut, and the Minneapolis and St. Louis Railroad, of which contestee is president.

There was also the case of one Shagren, who testified that he was given money in sitting Member's office to vote and work for sitting Member. The money was given by the business manager of sitting Member, and in the presence of sitting Member's brother.

Also Bernard Cloutier, whose experiences are thus described:

Cloutier went to Washburn's office, and there met Charles W. Johnson and Doctor Keith (the postmaster at Minneapolis, and the same party who thanked Charles Berens for his offer to sell his support to Washburn for \$50). Johnson wanted Cloutier to go out and electioneer for Washburn. Cloutier said he would do so if he was paid for his time and expenses. Thereupon Johnson told him to start out. The next day Johnson met Cloutier at the post-office and paid him \$30. The following Wednesday Cloutier met Johnson again at Washburn's office. "I told him I wanted some more money. He asked me how much I wanted, and I told him I wanted \$20. He [Mr. Johnson] went into the next room and commenced talking with Mr. Washburn, the sitting Member. He came back and handed me \$20."

The witness, Cloutier, states in his cross-examination that he was in favor of Mr. Washburn in the first place; but it appears by his examination in chief that he had made up his mind to take no part in the election, because he had been previously promised bribes which were not paid; and thereupon he

was paid \$50 to convert him from that position of neutrality and indifference into a warm supporter of the sitting Member. In other words, the payment of that sum of money secured to Mr. Washburn a support and influence which he would not have had without it.

The views favorable to the contestant also give a résumé of much other testimony tending to show bribery, the voter sometimes acknowledging that he received money, and sometimes others testifying that they had heard him make such acknowledgment, and conclude that bribery is proven.

The views favorable to sitting Member deny that the testimony shows what it is claimed to show, and thus speak of it:

It will be found by an examination of the record that there is very little, if any, testimony which would be received or considered in any court of justice in this or any other civilized country. The testimony may be, generally, denominated hearsay. In so far as it relates to the question of bribery or illegal voting, very little of it rises even to the dignity of hearsay when scrutinized. It is understood that certain members of the committee, in order to arrive at the conclusion reached by them, have considered all, or very nearly all, of such incompetent testimony found in the record. With the single exception that in the case of a voter who has voted for the sitting Member, declarations of the voter are inadmissible. There are authorities, though they even are doubted, to the effect that the declarations of a voter, though hearsay evidence, are competent to prove his want of qualification to vote. It is seldom, if ever, proper to regard hearsay statements as competent evidence. Regarding the testimony as affecting the voter, and no other person, his statement as to his qualification to vote may be taken as an admission against him. The ordinary rules of evidence apply as well to election contests as to other cases. (See McCrary's American Law of Elections, see. 306.) We do not think it necessary to cite many authorities in support of this proposition.

There follow citations from Cushing (see. 210) and the Congressional cases of *White v. Harris*, *Ingersoll v. Naylor*; New Jersey case, *Reid v. Julien*. The views favorable to sitting Member then continue:

It is proper to observe that much of the hearsay evidence relied upon consists only of conclusions drawn from conversations held after the election, which are always unreliable, and, as a general rule, even though the testimony would otherwise be competent, are regarded as very dangerous, if at all admissible, in a court of justice. Of this latter class of testimony, a learned judge has said:

"No class of testimony, perhaps, is more unreliable, and a more frequent cause of error in courts of justice, than the narration of conversations, real or pretended. The meaning and intention of a person in a conversation often depend much upon gesture, attitude, mode of expression, or peculiar attending circumstances, known, perhaps, to but few present. A conversation may not be fully heard by the witness, imperfectly recollected, or inaccurately repeated, when the omission or addition of a single word, or the substitution of the language of the witness, under color of bias or excitement, for the words actually used, might change the sense of an entire conversation. This is apparent from the irreconcilable contradictions daily manifested in the narration of the same conversations from the mouths of different witnesses. The liability to error in this kind of testimony would be greatly increased by allowing witnesses to add their own conclusions, or understandings, from the conversation related, or their inferences as to the understanding of the parties to the conversation. Such latitude would break down an important barrier which protects judicial investigation from error and falsehood. The understanding or inferences of witnesses are very frequently formed from bias, inclination, or interest. And a witness's understanding or inference from a conversation or transaction rests entirely in his own mind, and his consciousness of falsehood would be incapable of proof, so that there could be no possibility of convicting a witness of perjury on the ground of such evidence." (Judge Bartley, 3d Ohio St., p. 412.)

It may be further noted that the charge of bribery, like that of fraud, must be proved and not presumed. This is a universal rule of law when it is sought to convict a party of a crime. There is a difference of opinion among members of the committee as to what rule should prevail in a contested election case in proving the crime of bribery. Some members of the committee maintain that it should be proved, as in criminal cases, "beyond a reasonable doubt." Others are satisfied with the rule which requires the testimony to be "clear, satisfactory, and convincing," but all should agree that so serious an offense as bribery should be proved and not presumed.

The views favorable to contestant say:

It must not be forgotten that bribery is a secret crime; both the parties to it are equally interested in keeping it secret; and when detected, both are ready to give ingenious explanations of it. If they have acknowledged to third parties the receipt of the bribe, they are ready to declare, when called to the witness stand, that they were in favor of the bribe giver before the money was offered, or that they voted for his opponent, or that the money was paid by some one else, some nameless party, for some other purpose. Under these circumstances, when it is shown that in an election over 300 cases of bribery and attempted bribery are proven, the presumption is not violent that for every case that was, by accident or the indiscretion of the parties, brought to the light, there were others that were never revealed.

946. The election case of Donnelly v. Washburn, continued.

Should participation of returned Member in bribery unseat him, although the bribed votes be not enough to change the result?'

Argument that bribery on the part of a returned Member does not constitute a disqualification justifying his exclusion.

May a returned Member, already sworn but found disqualified, be excluded by majority vote?

Discussion of English and American election law as related to bribery.

Distinction between qualifications and returns and election as related to jurisdiction of the Committee on Elections.

(2) As to the effect of the bribery alleged, the views favorable to contestant take the following position:

It is a clearly established principle of law, both in England and the United States, that bribery committed by the sitting Member, or "by any agent of the sitting Member, with or without the knowledge or direction of his principal, renders the election void." (See *Felton v. Easthorpe*, *Rogers's Law and Practice of Elections*, 221.)

"In England bribery is an offense of so heinous a character and so utterly subversive of the freedom of elections, that, when proved to have been committed, though in one instance only and though a majority of unbribed voters remain, the election will be absolutely void." (*Cushing's Par. Law*, p. 70, sec. 189; *St. Ives, Douglass*, 11, 389; *Coventry, Peckwell*, 1, 97; *Maine on Elections*, 345.)

"Freedom of election is violated by external violence, by which the electors are constrained, or by bribery by which their will is corrupted; and in all cases where the electors are prevented in either of these ways from the free exercise of their rights the election will be void without reference to the number of votes affected thereby." (*Cushing's Par. Law*, p. 68, sec. 181.)

The same doctrine was affirmed by the House of Representatives in the recent case of *Platt v. Goode*, Second Congressional district, Virginia. (See *Contested Elections, 1871-1876*, p. 650.)

The report, adopted by the House, declares:

"The bribed votes should not be counted. The record furnishes no method for their elimination. Their acceptance can only be avoided by applying the rule of law, so well known and of such general adoption that it need scarcely be repeated here, that when illegal and fraudulent votes have been proven and the poll can not be purged with reasonable certainty, the whole vote must be rejected."

But your committee do not think it necessary to rest the decision of this case upon this principle of law, although they believe that the evidence shows conclusively not only that bribery was committed in a multitude of instances, but that a great number of these cases were traced home to the sitting Member. They are of the opinion that the evidence shows that the contestant had a majority of the legal votes cast and returned.

The views favorable to sitting Member thus discuss the question:

As it is not claimed, even by the contestant, that enough bribed votes were cast to change the result of the election in the district unless all numbered ballots (2,282) cast for contestee are rejected because they were numbered, and unless the entire vote (538) cast for him in Isanti County and the total vote (832) given for him in Polk and Kittson counties are thrown out on account of alleged defective returns,

it would seem to be unnecessary to go into the question of bribery, save for the purpose of vindicating the sitting Member.

As it is very clear, and it will be admitted that the polls can be purged of all the alleged bribed votes or the entire vote of certain voting precincts wherein the alleged bribery occurred can be thrown out without affecting Mr. Washburn's majority, the rule contended for and quoted by the author of the majority report of the committee (p. 16), taken from the minority report in *Platt v. Goode* (Con. Elec. Cases, 1871-1876, p. 650), would still give Mr. Washburn his seat.

The English cases cited from Cushing's Parliamentary Law (p. 70, sec. 189, and p. 68, sec. 181) do not go to the extent, as we apprehend, of holding that the whole election in a district where there are several voting places is void because of the bribery at one of those places of an insufficient number of votes to affect the result, but they do go to the extent of holding that an election in a particular voting place may be declared void.

The rule undoubtedly is in this country that where bribery, fraud, or intimidation is so interwoven with the vote of any voting precinct that it can not be eliminated from the aggregate vote cast with certainty, the whole vote of the precinct may, and perhaps should, be rejected. The unassailed votes in other voting places would, however, still stand. Fraud or bribery does not vitiate what it does not impregnate.

If bribery were proved (as it is not) and brought home to the contestee, we should not draw any fine legal distinctions to save him his seat.

The American cases cited in contestant's brief (*Abbott v. Frost*, Con. Elec., 1871-1876, p. 594, and *Platt v. Goode*, supra) are all to the effect that before a Member can be unseated by reason of his own bribery of voters it must appear that his majority was obtained by such means.

To find that a candidate received an untainted majority of the votes cast, and on that find that he was not elected for the reason that other votes were rejected on account of bribery or other cause, would be a bold absurdity. In a contested election case in either branch of the Congress of the United States the sole question is one of fact in the light of the law, viz, Who of the parties to the case was elected, if either? The question in no possible case can involve the fitness of the sitting Member to hold his seat. In England, where there is no written constitution on the subject of expelling a member, it may be found that the practice has grown up of inquiring into the whole conduct of a Member in the course of a contestation, and if he is found unworthy, or rather ineligible, to hold his seat from any good cause, he may be unseated or kept out of a seat, notwithstanding he may have received a clear majority of the honest votes cast in the election. This under some circumstances would only be another mode of expulsion.

Our Constitution provides the mode, and it is the only one pointed out, for purging the House of a Member who, for crime or other cause, is unfit or unworthy to hold his seat. The Constitution provides that the House may "with the concurrence of two-thirds expel a Member." (Con., Art. I, sec. 5, par. 2.)

Bribery or other crime committed by a Member, and which did not affect or influence the result of his election, could in no sense be construed to render his election void. Such has been the holding in several of the States. (3 *Watts & Serg.*, 338; *Brightly's Elec. Cases*, 134; *McCrary on Elec.*, sec. 229.) Cushing, in his work on elections, questions the application of the English rule in this country in relation to the effect of bribery by the candidate or his agent in an election on the right or power to declare an election void (sec. 190). An examination of the English rule as stated by Cushing in his work on elections will make it clear that the principle the Parliament proceeds on in declaring an election void is not that the sitting member was not duly elected, but that by his evil conduct he has rendered himself unworthy of being elected and of holding a seat in the British Parliament. The election of a member under such circumstances is declared void as a punishment to the member and as a mode of condemning evil practices, and also to preserve the purity and freedom of elections in that country generally. (Cush., p. 70, secs. 189, 190, 191.)

Most, if not all, of the English cases put the rule on the ground that bribery works a disqualification of the Member to be elected to and to occupy a seat in the body to which he was elected. The basis of the English rule which allows in a contested-election case arising over the election of a member of the House of Commons a finding, where it is proved that the person actually receiving the highest number of votes was guilty by himself or his agent of bribing only a portion of his majority, that he was not elected, must be kept in view to enable a clear distinction to be drawn between the rule which obtains in England and the true rule in the American Congress.

At common law bribery at elections of members of Parliament was a crime. (*Rex v. Pitt*, 3 Burrows, 1335, etc.; 1 Russell on Crimes, 155.) The punishment at common law for such bribery was found inadequate, and hence the passage of the statute known as "the treating act," of 7 W. III, chap. 4 (1695), which provided that if any candidate, after the issuing of the writ for an election, should give or promise any money or entertainment to any elector he should be incapable to serve for that place in Parliament—that is, upon that election. The punishment provided by this act was fixed to remedy the defects of the common law, which, while it punished bribery, etc., in elections, provided no disqualification to hold an office, and such had been the holding of courts and legislative bodies.

It appears from good authority—Jacobs (author of the Law Dictionary), who, after citing statutes, 2 Geo. II, c. 24 (1731); 9 Geo. II, c. 38; and 16 Geo. III, c. 11, which attached some penalties to election bribery in the shape of fines, says: "But these statutes do not create any incapacity of sitting in the House. That depends solely upon the treating act above mentioned," referring to the act of 7 W. III, c. 4. (See Jacobs's Law Dictionary, title Parliament, VI (B3), vol. 5, p. 76, ed. 1813; see Russell on Crimes, 155, 159*a*, ed. 1845.)

The act of 5 and 6 Vict., c. 102, extends the treating act of W. III, and makes it include the acts of the agents of the candidate as well as of himself, and makes such acts, whether of himself or of his agents, "directly or indirectly," sufficient to disqualify. The agent is a well-known and recognized element in British Parliamentary elections of which we know nothing in this country. The candidate selects him in that country, and hence there is no hardship in holding the principal responsible for his acts; otherwise all amenability for criminal conduct at elections there would be avoided.

There are other English statutes upon the subject of treating, etc., at elections, and making candidates responsible for the action of their agents as well as their own acts, which must be kept in mind in reading Rogers, Douglas, and other English authorities whose comments are upon cases, governed by these statutes, which are not authority for us.

That bribery by a candidate for an elective office (in the absence of a statute making it a disqualification) does not disqualify to hold the office at the common law was held by the Court of Queen's Bench in *Regina v. Thwaites*, 18 Eng. Law and Eq. Reports, 219, 221, in a proceeding in the nature of a quo warranto to try the title to an office, where acts were shown which were by the court held to amount to bribery, but which did not affect votes enough to change the majority, and the respondent was therefore held entitled to retain his seat as a member of a municipal council.

The same doctrine is held in Pennsylvania as to a sheriff, in *Com. v. Shaver* (3 Watts and Sergeant, p. 338).

The English rule laid down by Cushing in his excellent work, without giving either the origin or reason of the rule, is calculated to mislead persons in this country.

It is quite demonstrable that the rule owes its existence to disqualifying statutes of England, and can have no application to questions arising in the Congress of the United States under our present Constitution and laws.

In the Galway election case (2 English Reports (Moak's ed.), pp. 711, 723), where it was argued that bribery, treating, and undue influence were not disqualifications at the common law, and that the act of 17 and 18 Victoria, chapter 102, repealed all the earlier acts making them a disqualification, and itself only made these acts a disqualification by the thirty-sixth section, "after they had been found guilty of the acts by an election committee," the court, taking a different view, gave the opinion, not that the common law made these acts a disqualification, but that, to quote from the opinion of the judge announcing the decision of the court—

"The true construction of the statute itself is that the commission of any of these offenses ipso facto disqualifies the candidate from being elected, or annihilates his status as a candidate."

The theory of the English cases is that a candidate is for the particular election in which the candidate or his authorized agent violates the disqualifying statutes ineligible to an election. No such rule obtains under the Constitution and laws of the United States as to Representatives in Congress.

An examination of all the cases cited in Rogers, Douglas, and other English authorities where a member of Parliament has been unseated for bribery, treating, etc., by himself or his agents, where the votes thus affected were less in number than his majority, will show that in every case the decision rests upon special English statutes, with which we have nothing to do.

Bribery in procuring an office is made a disqualification for holding the office by the constitutions of the States of Massachusetts, New Hampshire, Vermont, Rhode Island, Maryland, Missouri, Arkansas, Texas, California, and Florida.

Bribed votes should undoubtedly be rejected, but unless they are numerous enough to change the majority the candidate receiving the majority should be declared elected. (See 3 Arch. Cr. Pro., 470⁴-570¹⁰.)

It is said that in some of the States in this country where bribery in elections is made by constitutional provision a disqualification to hold an office, and bribery is proved against the candidate receiving the highest vote, the election should be declared void, even though the bribery did not affect the result. (Cush., secs. 190, 191.)

In some of the States it is held that prior conviction of the disqualifying crime is necessary before such a rule can be applied by a legislative assembly. It is not admitted that either the organic act of a State or its legislature can prescribe disqualifications of any kind for a Member of the House of Representatives of the United States, but it may be proper to state here that the constitution of Minnesota (sec. 15, art. 4) gives full power to the legislature of that State to render ineligible to hold office any person guilty of crime, and that legislature has not made bribery of voters a disqualification to hold office, but it has only made it a misdemeanor, punishable by fine and imprisonment in the county jail (Stat. Minn. 1878, p. 5, sec. 66.)

It may be observed that under no provision of the Constitution of the United States does crime committed by a Member in his election disqualify him from taking and holding his seat.

The reason for the English rule wholly fails in the case of a Member of the House of Representatives.

Justice Johnson, of the Supreme Court of the United States, in an early case, in speaking of distinctions between American and English legislative bodies, said:

“American legislative bodies have never possessed or pretended to the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment.” (6 Wheaton, 231.)

No case has been found in this country where any such rule (in the absence of an express constitutional provision) as is claimed to exist in England has obtained in the House of Representatives of the United States, or in any of the States of this Union, but there are a number of cases, as already appears, where the rule is entirely disregarded.

McCrary in his excellent work on American Law of Elections does not refer to or recognize any such rule, but all through his work it is taken for granted that no such rule has ever had any application to a contest in the House of Representatives of the United States.

It is true the Constitution of the United States makes “each House the judge of the elections, returns, and qualifications of its own Members.” (Art. I, sec. 5.)

In judging of the election of a Member, the House deals alone with the question of the number of votes the Member received, and if it appears that he has a majority of the votes cast, excluding all illegal and void votes cast, and a full and fair election has been held by which such majority has been obtained, or at least the majority would not have been affected by any unfairness or improper practices in the election, then the conclusion is irresistible that such Member has been duly elected.

In judging of the returns of its Members, the House deals with the formal returns, at least preliminarily, on which a Member is expected to be admitted to a seat in the first instance.

In judging of the qualifications of a Member, neither the question of election nor returns is involved. The qualifications of a Member of the House of Representatives are fixed by the Constitution of the United States, as follows:

“No person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.” (Art. I, sec. 2.)

Of these prescribed qualifications the House is the exclusive and final judge.

If before a person has been sworn in and taken his seat the House were to decide that he did not possess the constitutional qualifications, he could not be admitted to a seat. Even if sworn in as a Member it would probably not require an expulsion to vacate his seat if the House were to adjudge him without requisite constitutional qualifications entitled to hold a seat.

The power to expel a Member is given to meet cases of Members admitted to seats who would, under the Constitution, be qualified to sit, but for other than constitutional causes would be disqualified or unworthy to be a Member of the legislative body in the judgment of two-thirds of the House. (Art. I, sec. 5.)

The Committee on Elections, under the rules of the House, have only jurisdiction to consider such petitions, etc., touching elections and returns as shall come into question. Such has been the rule of the House since November 13, 1789.

We here quote the rule adopted at that date with a slight amendment of date of November 13, 1794:

“It shall be the duty of the Committee on Elections to examine and report upon the certificates of election, or other credentials, of the Members returned to serve in this House, and to take into their consideration all such petitions and other matters touching elections and returns as shall or may be presented or come into question and be referred to them by the House.” (Con. Manual] and Digest (Smith), Rule 75.)

Under the above rule this case was referred to the Committee on Elections.

It will be observed that under it the committee is given no power to consider questions of disqualifications of a Member to hold his seat where it appears that he has been duly elected.

The new rule of the House, adopted March 2, 1880, relating to the powers of the Committee on Elections, is as follows:

“All proposed legislation shall be referred to the committees named in the preceding rule, viz: Subjects relating (1) to the election of Members; to the Committee on Elections.” (Rule XI.)

By neither the old nor the new rules, it will be seen, has the Committee on Elections any power except such as relates to the election of Members.

The conclusion is irresistible that the committee has no right to report against a sitting Member who, as in this case, two-thirds of the committee find in effect was duly elected.

947. The election case of Donnelly v. Washburn, continued.

Does a numbering of the ballots by election officers who know it to be illegal justify rejection of the poll for intimidation?

Decision that the word “ballot” means secrecy of the vote.

Argument that right of a State to regulate time, place, and manner is derived from the Federal and not the State constitution.

Argument that intimidation should be shown from testimony of persons affected thereby and not from favoring conditions.

(3) Contestant alleged intimidation whereby many voters who would not otherwise have done so were caused to cast their votes for sitting Member.

The views favorable to the contestant describe the method:

In seven precincts of Minneapolis the judges of election placed a number on the back of each ballot to correspond with the number of the voter on the poll list. Let us consider the purpose of this numbering of the ballots.

At the session of the legislature of Minnesota in January and February, 1878, a special law had been enacted, providing that in cities containing more than 12,000 inhabitants the ballots should be numbered. This law applied, and was intended to apply, only to the cities of St. Paul and Minneapolis, where the workingmen were very numerous, and where alone the required population existed. It was felt by many that this provision of law was oppressive and unconstitutional, and at the spring election in St. Paul, held immediately after the law was passed, a party offered to vote without having his ballot numbered; he was refused, and he brought an action at once in the district court of Ramsey County, in which St. Paul is situated, to test the validity of the act. The court decided (see *Brisbin v. Cleary et al.*, printed testimony, p. 74) that the act was unconstitutional, inasmuch as the constitution of Minnesota, section 6, Article VII, provides that “all elections shall be by ballot;” that the ballot implies secrecy, and that this law requires every man “to vote, in effect, a ticket with his name indorsed on it;” and in case of a contest the ballots are to be made public. “This law,” says the court, “furnishes the means of ascertaining exactly how every elector voted; that is its acknowledged purpose.”

This decision of the district court of Ramsey County was the unanimous decision of a full bench of three judges; it was appealed to the supreme court, and was affirmed by the supreme court subsequently to the election. (See *Northwestern Reporter*, vol. 1, p. 75, foot p. 825, *Brisbin v. Cleary et al.*,

being an appeal from the district court of Ramsey County, in the same case referred to above.) The supreme court sustain the decision of the district court of Ramsey County, and say:

“The statutory provision with regard to the numbering of tickets, above quoted, clearly interferes with and violates the voter’s constitutional privilege of secrecy. It is therefore an unconstitutional provision. The voter can not be required to submit to its application the ticket offered by him. * * * The defendant’s demurrer was properly overruled, and the order overruling the same is accordingly affirmed.”

This decision was made subsequently to the election in controversy, but it is not retroactive in its effect upon this case.

It declares that the word “ballot” means secrecy and absence of every external mark whereby the elector who has cast the same can be identified. A ticket identified by placing the voter’s name, or a number indicative of his name upon it, is not a “ballot” in the sense of the constitution, and has therefore no right to be placed in the ballot box. When the court decided that such identified tickets were not “ballots,” it certainly follows that they are not entitled to be counted as “ballots.”

The views also allege that the numbering was done for a corrupt and fraudulent purpose. The election judges in the two cities of St. Paul and Minneapolis decided not to number the ballots, but in the precincts in question the judges reversed the decision. Of the twenty-one judges in these seven precincts only one was a friend of contestant. The views continue:

If the numbering of the ballots had been the result of an innocent mistake on the part of the judges of these seven precincts; if they had been ignorant of the decision of the district court of Ramsey County declaring such numbering unconstitutional; if there was no evidence to show fraud or intimidation, we should not be in favor of casting out the votes of these precincts simply for the reason that the ballots had been numbered. This was the view taken by the election committee in the case of *McKenzie v. Braxton*, seventh district Virginia (Contested Elections, 1871–1876, p. 20). The committee (McCreary, chairman), says:

“Although it would be possible, from the numbering of the ballots, to ascertain how each person voted, it is not claimed in this case that this was done, or that the tickets were voted for any such purpose, or for any improper or unlawful purpose whatever”.

The question of intent therefore is the true question at issue, and all the circumstances in the case under consideration point to a corrupt intent:

1. A cloud of bribery surrounds the vote of the whole city, which the contestee has made no effort to dissipate.
2. There is evidence showing a widespread conspiracy among the employers of labor to corrupt and, where they could not corrupt, to intimidate their workmen.
3. The testimony shows that the workmen were intimidated, and that they believed that they would lose their means of subsistence if they voted against Washburn.
4. The judges of election knew that the numbering of the ballots had been declared unconstitutional by a court of record second only to the supreme court in dignity, by the attorney-general of the State, by the city attorney of St. Paul, and by the county attorney of Ramsey County, and even by the attorney who had defended the constitutionality of the law in the district court had advised judges of election not to number the ballots.
5. They had been told by their own law officer, whose opinion they had requested, that it would be unconstitutional to number the ballots, inasmuch as it violated the secrecy of the ballot.
6. They knew that the supporters of Mr. Donnelly believed that the numbering of the ballots would prevent a free and fair election, and would result in the intimidation of the workmen.
7. They had deliberately voted by a large majority not to number the ballots.

There can be but one explanation of the intent with which they reversed this deliberate action. It was done to prevent a fair election and to give the employers of workmen an opportunity to still further intimidate them by preserving a record of how the men voted whose means of life depended upon the good will of those who employed them. The workmen well knew that the ballot boxes could be opened at any time in any real or pretended contest and the character of their votes revealed.

The views favorable to contestant proceed to quote statistics to show that this numbering of the ballots actually effected a loss to him, and conclude by citing with comment the following:

“In *William v. Stein* (38 Ind. Rep., p. 90) the court held that numbering of the votes cast violates the secrecy of the ballot as much as if the law had required the voters to vote *viva voce*, and McCrary (*American Law of Elections*, sec. 446) says: ‘Votes must be cast in the manner provided by law. Under a statute requiring that the manner of voting shall be by ballot, votes given *viva voce* can not be counted.’

“Upon an elaborate review of the authorities the conclusion is reached, upon what seems to be good ground, that in this country the ballot implies absolute and inviolable secrecy, and that this doctrine is founded in the highest considerations of public policy; that the term ‘ballot’ implies secrecy, and that this mode of voting was adopted mainly to enable each voter to keep secret his vote is clear.” (McCrary on Elections, sec. 413, p. 112, and authorities there cited; Cooley, *Constitutional Limitations*, pp. 506, 507, and 604.)

“The chief reason for the general adoption of the ballot in this country is that it affords to the voter the mean of preserving the secrecy of his vote. And this enables him to vote independently and freely, without being subject to be overawed, intimidated, or in any manner controlled by others, or to any ill will or persecution on account of his vote. The secret ballot is justly regarded as an important and valuable safeguard for the protection of the voter, and particularly of the humble citizen against the influence which wealth and station may be supposed to exercise. * * * All devices by which the secrecy of the ballot is destroyed by means of colored paper used for ballots, or by other similar means, are exceedingly reprehensible, and whether expressly prohibited by statute or not should be discountenanced by all good citizens.” (McCrary on Elections, sec. 194; *People v. Pease*, 27 N.Y., pp. 45 and 81.)

We have therefore reached the conclusion that the votes cast in the seven precincts where the ballots were numbered should be deducted, not alone because they were so numbered, but because such numbering was corruptly done, with an intent to intimidate the workingmen residing in those precincts, and because it was part of a general conspiracy of the friends and supporters of Mr. Washburn to prevent a free and untrammelled expression of the preferences of the voters.

The minority, favorable to sitting Member, antagonized the above conclusions:

Your committee need not, for the purposes of this case, turn aside to consider whether this law is unconstitutional or not, and it may be regarded, so far as the election of State, county, and municipal officers in the State of Minnesota are concerned, as unconstitutional. But we hold, first, that in so far as this law related to the judges of the election in the election of a Member of the House of Representatives of the United States it was constitutional; and, second, whether it is to be regarded as constitutional or not constitutional, the numbering of the ballots affords no reason, in the light of the law and the precedents, for rejecting the vote as cast. The legislature of a State does not acquire its right or power to make a law regulating the manner of holding elections for Representatives in Congress from the constitution of the State, but this right and power is derived exclusively from the Constitution of the United States. Section 4, Article I, of the Constitution of the United States is as follows:

“The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State 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.”

This provision of the Constitution of the United States has been under consideration in a very recent case in the Supreme Court of the United States (*ex parte Seibold*).

An examination of the opinions delivered by Judges Bradley and Field, the former for the majority of the court and the latter for the two dissenting judges, will show that on the question of the derivation of the power of the legislature to make laws regulating the manner of holding elections for members of Congress, all the judges agree that the legislature obtains its power from, and solely from, the provision of the Constitution just quoted. The State legislature is not responsible to the State, nor controlled by the State constitution, in its action in regard to the manner of holding Federal elections. In case of a conflict between the act of a legislature and the constitution of the State in matters purely of a Federal character the act of the legislature will prevail, provided it is not in conflict with the Constitution of the United States. This point was distinctly decided in the contested election case of *Baldwin v. Trowbridge* (*Contested Election Cases in Congress, 1865 to 1871*, p. 46).

The syllabus of that case reads as follows:

“Where there is a conflict of authority between the constitution and legislature of a State in regard to fixing the place of elections, the power of the legislature is paramount.”

The case arose over the constitutionality of an act of the legislature of the State of Michigan, passed February 5, 1864, which undertook to give to Michigan soldiers, while in the service of the United States during the late war, the right to vote at all elections authorized by law, whether at the time of voting they were within the limits of the State of Michigan or not. The constitution of the State of Michigan in express terms required the electors to reside in the State three months and in the township or ward in which they offered to vote ten days next preceding such election. The act of the legislature was declared by the Michigan courts unconstitutional, and yet Mr. Trowbridge, the sitting Member in that case, was allowed to retain his seat, although he was elected by the the vote of soldiers who were absent from the State, and who voted in accordance with the act named.

The views further contend that although numbered the votes should be counted, citing *McCrary* (see. 312) and the cases of *Giddings v. Clark*, *McKenzie v. Braxton*, and *Finley v. Bisbee*. The views further say:

There is not an iota of testimony in the whole record which it can be pretended tends to show that one of the electors in such precincts was influenced by reason of the ballots being numbered. The industry of contestant would have discovered some such evidence if the fact existed. The testimony does show that one eccentric or cowardly man, a lawyer (Robinson), refused at the polls to vote because the judges proposed to number the ballot (pp. 135, 137–138). This man disclosed the fact that he was a sort of Democrat, and that he did not want any person to know for whom he voted. The conclusion from his testimony is irresistible that he wanted to maintain his standing as a Democrat and at the time vote for Mr. Washburn, and that by this means Mr. Washburn lost the vote of one cowardly lawyer.

All of the alleged testimony in the record on the subject of intimidation, if, indeed, any of it could be called competent testimony, is so utterly shadowy that it does not deserve a critical review here.

We should, in the consideration of the charge of intimidation, keep in mind the salutary rule of law, repeatedly affirmed by the House of Representatives, that where it is alleged that a large number of persons have been deterred from voting by violence or intimidation, the testimony of those persons should be produced, or at least some of them. The opinions and impressions of others are not sufficient (*McCrary's Election Laws*, 430–441; *Norris v. Handley*, 42d Cong.).

The rule of law universally recognized where elections are held by the people is, that those who may have voted, and yet did not when they could have done so, are bound by the result (*McCrary's Election Laws*, secs. 445–448; 10 Minn., 107).

The attempt on the part of members of the committee to work out some sort of demonstration from a comparison of the votes cast on different years in the city of Minneapolis is exceedingly farfetched, and hardly deserves notice.

948. The election case of *Donnelly v. Washburn*, continued.

As to the validity of a supplemental return proven by the election officers and not by the best evidence, i. e., the ballots themselves.

Discussion of the validity of a return made by a canvassing board irregularly organized.

Was an official acting without authority of law on a canvassing board an intruder or a de facto officer?

If the contestant shows a return illegal, does the burden fall on contestee to prove the vote when contestant has not attacked it in his notice?

(4) A question as to supplemental returns:

Through an error of the secretary of the State of Minnesota, in not furnishing the proper blanks to the election officers, there were a number of instances where the votes polled for candidates for Congress were not returned and counted by the county canvassing boards (p. 320). The omission to make full returns occurred in Minneapolis, and in Steam, Morrison, and Douglas counties. The contestee does

not dispute the right of the contestant to count the votes cast in the counties of Stearns and Morrison, in each of which counties the contestant received a majority. Nor do we understand that any serious objection can be made to counting the vote in Leaf Valley precinct, in Douglas County (p. 270), where the contestant claims, to have received all the votes.

Supplemental returns were made on the 12th day of November, 1878, by the election officers of the precincts in the city of Minneapolis, where they had omitted to make the returns for Member of Congress immediately after the election. These precincts were first precinct, First Ward; second precinct, Second Ward; and third precinct, Fourth Ward. The majority for Washburn in these precincts was 714 (pp. 348, 349). We see no valid objection to these supplemental returns. They were made by the proper officers and within the time required by law to canvass and make returns. The supplemental returns from the three precincts of Minneapolis were duly canvassed by the county canvassing board (pp. 348–351); but it is hardly necessary to waste time in considering the validity of these supplemental returns. They were put in evidence by the contestant (pp. 58–63). The testimony clearly and unmistakably, independent of the supplemental returns, shows the vote as cast for Member of Congress in these precincts. It must be observed that all the witnesses who testified on the subject of the vote in these precincts agree that the vote for Member of Congress was duly canvassed, though not returned.

Asa R. Camp, one of the judges of the election of the second precinct of the Second Ward in the city of Minneapolis, testifies to the vote cast for Congress in that ward (p. 322). And he testifies also that the supplemental return, as made, is true in all respects (p. 323).

Isaac McNair, one of the judges of the election in the same precinct and ward, testifies that the vote was canvassed by the judges of election for Member of Congress; and he also gives the vote from recollection and memorandum, as it appears by the supplemental return (pp. 323, 324).

Thomas F. Andrews, another one of the judges in the same precinct, swears to the same state of facts (pp. 325, 326).

John M. Williams, one of the clerks of election of the second precinct of the Second Ward, testifies to the same facts stated by the judges of election (pp. 326, 327).

Charles Thielen, a judge of the election of the first precinct of the First Ward of the city of Minneapolis, testifies to the canvass of the votes in that precinct and to the correctness of the supplemental return (pp. 327, 328).

Other election officers proved the vote in the same way. The views favorable to sitting Member say:

Some complaint is made that the contestee did not have the ballots counted in the ballot boxes, and offer proof of the result of such count in this contest; and certain members of the committee think this would have been the best and highest evidence of how the vote stood. The contestee has given the vote as cast in these three precincts, as found by the officers who held the election, on an actual count of the ballots made by them as soon as the polls closed. It is hard to conceive how it is possible for a new count of the ballots by unauthorized persons long after the election would constitute higher evidence of the true state of the vote in these precincts than we have already given. It would be exactly the same character of evidence, but given by persons not authorized under the law to make the count.

The views favorable to contestant say:

It is very clear that the election officers of the precincts had performed their duties on the night of the election; had dissolved, and were *functus officio*, and had no right to make any such supplemental returns. Mr. Washburn claimed majorities in each of these precincts, and he therefore undertook to prove the votes cast aliunde. In strictness of law it was his duty to have proved the votes cast by the best evidence, to wit, by counting the ballots in the ballot boxes; and he took some preliminary steps to that end, issuing a subpoena *duces tecum*, to the officers who had charge of the ballot boxes to appear at a time named, in order that the ballots might be counted; but * * * for some reason he refused to count the ballots.

(5) A question as to the legality of the canvassing board.

The views favorable to contestant said:

The statutes of Minnesota (see. 19, p. 58, revision of 1866) provide that the county canvassing board of each county shall consist of the county auditor and two justices of the peace, to be by him selected.

In the case of Isanti County the canvass was made, the votes counted, and the return made by the county auditor, one justice of the peace, and the judge of probate of the county. (See p. 69, printed testimony.) It is true that subdivision 3, section 1, title 1, chapter 3, volume 1, Bissell's Statutes of Minnesota, provides that "words purporting to give a joint authority to three or more public officers or other persons shall, be construed as giving such authority to a majority of such persons or officers." If the county auditor had selected two justices of the peace and one had failed to attend, then the majority present might, under this law, have gone on and acted; but in the case of Isanti County the county auditor did not select two justices of the peace as the law required. The board of canvassers therefore was never constituted as required by law, and never having had a legal existence, there could be neither majority nor minority of it.

In the contested-election case of *Howard v. Cooper*, of Michigan, Thirty-sixth Congress (see Contested Elections, 1864-65, p. 282), the Committee on Elections say:

"Your committee have rejected the vote of the township of Van Buren. The law requires that the board of inspectors shall be constituted of three persons in number. The proof is clear that there were but two. And as there was no board of inspectors known to the law, your committee see no way by which any legal effect can be given to the returned vote. They have therefore deducted it."

In this case it was shown that there was a statute of the State of Michigan precisely the same as that just quoted from Minnesota, giving a majority of a board the power to act for the whole board; but the committee did not consider that it was sufficient to permit them to receive and count the return.

But if we will suppose that the board of county canvassers of Isanti County had been duly constituted as required by law, and that a majority had the power to act for the whole board, nevertheless the return could not be received, for it appears upon its face that a third party, not a member of the board, a stranger not qualified to act, an usurper without color of authority, intruded himself into the deliberations of the board and acted as one of them, and in all cases where the county auditor and the justice of the peace differed in opinion he gave the casting vote, and thus decided the action of the board. The statutes of Minnesota show that a judge of probate has none of the functions of a justice of the peace, and the constitution of the State (sec. 7, Art. VI) provides that a probate court "shall have no other jurisdiction except the estates of deceased persons and persons under guardianship." There is no testimony to show that this judge of probate was at the same time a justice of the peace, and if he had been, his exercise of the office of justice of the peace would have been incompatible with the spirit of the constitution of the State.

The views go on to cite the cases of *Jackson v. Wayne*, *Easton v. Scott*, and *Sloan v. Rawls*. The views further cite the English case of *The King v. The Corporation of Bedford Level* (6 East., 368) to show that the principle of the *de facto* officer does not apply in this case, and the views say:

Here the judge of probate did not claim to be a justice of the peace; he did not exercise the duties of the office under color of law; he did not exercise them at all; he distinctly claimed that he was a judge of probate and nothing else. It has never been pretended, in any court in the world, that when A B asserts himself to be the incumbent of one office a presumption of law arises that he holds another, an entirely different and (as in this case) an incompatible office.

A party claiming to be a judge of an election precinct, or a sheriff, or a judge may deceive and mislead innocent third parties to their damage; and hence the law wisely says that he who deals with such officers shall not be required to go back and inquire into every particular of their title. But in this case there is no pretense that anyone was or could have been misled by the declaration of the judge of probate that he was the judge of probate.

The views further say:

Neither is this a collateral proceeding between third parties. The validity of the return itself and the right of the judge of probate to act are the very questions in issue. The canvassing board of Isanti County was part of the machinery by which the votes cast for Member of Congress in that district is to be brought to the knowledge of the House of Representatives, "the sole judge of the election returns of its Members."

The views further show that in the Congressional cases already cited the boards impeached were only precinct boards. The case was therefore much stronger in the case of a county canvassing board. The case of *Delano v. Morgan* is further cited. The views then conclude:

It became the duty of the sitting Member to prove by a counting of the votes in the ballot boxes that the votes were actually cast as claimed by him and by proper testimony that they were duly counted by the precinct officers. As he has failed to do this, the presumption of law is that he was unable to do it. There was no obligation upon the part of the contestant to prove or disprove votes that had no existence before the committee in any legal return, while Mr. Washburn well knew that the fact of any such vote being cast in the county was denied by contestant and that the burden of proof was on him to prove it. The committee has no way to ascertain the votes cast except by the official return, and, where this is manifestly void, by testimony showing what the vote really was.

The views favorable to sitting Member antagonize this position:

There is nothing in the evidence offered by the contestant tending to show that the vote of this county was not cast as returned, was not counted as returned, or was not canvassed as returned, except what appears on pages 68 and 69 of the record. There it is made to appear that there was a complete abstract of the vote made as cast in the several election districts of the county, and duly certified to by the auditor of the county and district, whose certificate is attested by one A. B. O'Dell, who designates himself judge of probate, and Jonas Burch, who signs himself as justice of the peace. Had O'Dell signed and attested the auditor's certificate as justice of the peace there would have been no objection to counting this vote. This is a mere irregularity, which does not vitiate the returns; and if it did, the vote is not to be rejected unless the contestant shows it to be illegal. (McCrary's Election Laws, sec. 302, and cases there cited.)

The statute of Minnesota (Bissel's Revision, vol. 1, p. 172, sec. 28) provides:

"The county auditor and two justices of the peace of his county, by him selected, constitute the county canvassing board, and on or before the tenth day after the election said board shall proceed to open and publicly canvass the several returns made to the auditor's office."

Section 40 of the same Revision of the Statutes (p. 176) is as follows:

"The abstracts of the votes for Members of Congress and electors of President and Vice President shall be made on one sheet, and, being certified and signed in the same manner as in case of abstracts of votes for county officers, shall be deposited in the said county auditors office, and a copy thereof, certified as aforesaid, shall be inclosed, directed to the secretary of state, and indorsed on the outside of the envelope with these words: 'Abstract of votes for (naming the officers) returned to the auditors office of (inserting the name of the county) county,' and the said auditor's signature; and the said auditor shall forward the same to the secretary of state within eleven days after such election."

The statutes of Minnesota require nothing of the county canvassing board but to compile the returns made to the auditor of the county, and the auditor to certify to the same. The justices of the peace selected by the auditor to constitute with him the county canvassing board are not required to do anything more toward certifying to the truth of the abstract than to attest the signatures of the auditor. The statutes of Minnesota provide a form for the abstract and for the certificate, and in that form the two justices of the peace sign their names under the word "attest" to the left of the signature of the auditor. (See Bissell's Statutes, p. 174; also Young's Minnesota Statutes, 1878, p. 46.) The real purpose of selecting justices of the peace as a part of the county canvassing board and to assist the auditor of the county is doubtless that they shall be present to prevent the auditor in making up the abstract of votes, if so disposed, from committing any fraud. The board has no authority either to accept or reject any returns made to the county auditors, in their estimate of the votes, for any informality in holding an election or making returns thereof. The following is the law of the State on this subject:

"No election returns shall be refused by any auditor for the reason that the same are returned, or delivered to him, in any other than the manner directed herein; nor shall the canvassing board of the county refuse to include any returns in their estimate of the vote for any informality in holding any election, or in making any returns thereof, but all returns shall be received and the votes canvassed by such canvassing board and included in the abstracts; provided there is a substantial compliance with the provisions of this chapter." (Sec. 37, Bissel's Statutes, p. 175.)

For an authoritative construction of this section see 18 Minn., 351.

The views further say that it nowhere appears that the man who signed himself as judge of probate was not in fact a justice of the peace, and continue:

The most that can be said for this certificate to the abstract of the vote is that it is informal, and this the statute of Minnesota, in express terms, provides shall not be a good ground for setting it aside. We quote from the section of the statute which prescribes the form of an abstract of votes for county canvassers:

"The following is the form of the abstract of votes provided for herein to be used by all county canvassing boards, but no election shall be set aside for the want of form in the abstracts, provided they contain the substance." (Sec. 33, Bissel's Statutes, p. 173.)

See also form of abstract and certificate, Young's Minn. Stat., 1878, page 46.

This single item of evidence against counting the vote of Isanti County is that the auditor's certificate has not been duly attested. It can not be said that the abstract of the vote was not canvassed by the proper officers and in accordance with the law of the State. But if it even appeared that but one justice of the peace acted with the county auditor in making up the abstract and canvassing the vote of the county there would be no legal objection to it under the laws of that State. Subdivision 3, section 1, title 1, chapter 3, Bissel's Statutes, page 118, reads as follows:

"Words purporting to give a joint authority to three or more public officers, or other persons, shall be construed as giving such authority to a majority of such officers or persons."

We do not think it is even important to rely upon this excellent provision of the statute of Minnesota. But if there should be any doubt about it, the general principle of this statute makes it clear. It has frequently been held, in the absence of such a statute as we have just quoted, that where a certificate is by law required to be made by a board of officers composed of three or more persons, it is sufficient for a majority of such board to join in such certificate. (See McCrary's Law of Elections, sec. 158, where the subject is discussed; also *Niblack v. Walls*, Forty-second Congress, where it was held that if less than a majority sign the certificate is not good.) In the case of *Niblack v. Walls* the committee say:

"The committee are of the opinion that where the law requires the certificate to be made by three officers, a majority at least must sign to make the certificate valid."

Much stress is laid upon the fact that one of the attesting witnesses to the certificate of the abstract of votes was a mere intruder. While it may be true that where an intruder into a board, which had a duty to perform requiring some judicial action, and it appeared that such intruder participated in the determinations of such board, and was allowed a voice in the deliberations of the board, would render the acts of such board invalid, yet, as in this case, where the alleged intruder is not shown to have performed any duty, or attempted to perform any duty, other than to sign his name in the place of a justice of the peace, as a mere witness to the certificate of an officer, attached to an abstract of votes not shown to have been illegal or improperly made, it is hard to conceive how such signature could invalidate the acts of the other officers, who had legal authority to act.

The case of *Delano v. Morgan* (2 Bartlett, p. 171) is said to be in point, and to sustain the claim of the contestant that this certificate to the abstract of votes is not good, and that the whole vote should be thrown out. There is no possible analogy between the two cases.

The views then discuss the cases of *Delano v. Morgan* and *Howard v. Cooper*, and then say:

It has already been made to appear that the notice of contestant does not directly attack the vote of this county. If, in the notice, the contestant intended to charge that the vote was not cast, it was his duty to offer proof in support of the charge. The record is silent. If he, by his notice, intended to claim that the vote was not counted, he should have proved that claim. If, by his notice, he intended to allege that the votes of the several voting districts of the county were not returned by the county canvassing board, it was his duty to have offered proof of that. If, by his notice, he intended to deny that the vote of this county was not canvassed, on him rests the burden of proof of that. He contents himself by simply claiming that there is a failure to have a suitable number of duly authorized persons sign the certificate to the abstract by way of attesting it.

The defect in the returns from Morrison County, where the county auditor wholly fails to sign the certificate, and only one justice of the peace signs it, is not regarded by the committee (pp. 284, 304).

Before leaving this subject it may be proper to go further into the question of the duties of canvassing officers. Such duties, under the statute as it exists in the State of Minnesota, are purely ministerial. The canvassing board has only the right to cast up the votes as they appear from the returns of the officers of the different precincts of the county. They have no judicial power. In the case of the *State v. Stearns* (44 Missouri, p. 223) the court, after holding the duties of such canvassing board to be purely ministerial, say:

“When a ministerial officer leaves his proper sphere and attempts to exercise judicial functions, he is exceeding the limits of the law and guilty of usurpation. To permit a mere ministerial officer arbitrarily to reject returns at his mere caprice or pleasure is to infringe or destroy the rights of parties without notice or opportunity to be heard; a thing which the law abhors and prohibits.”

McCrary, in his work on Elections (sec. 82), says:

“The true rule is this: They must receive and count the votes as shown by the returns, and they can not go behind the returns for any purpose, and this necessarily implies that if a paper is presented as a return and there is a question as to whether it is a return or not they must decide that question from what appears upon the face of the paper itself. Thus in New York it has been held that the duties of the canvassers were “to attend at the proper office and calculate and ascertain the whole number of votes given at any election and certify the same to be a true canvass.” This is not a judicial act, but merely ministerial. They have no power to controvert the votes of electors.

In a case in *22 Barbour* (p. 77), the following language is used:

“They (the canvassers) are not at liberty to receive the vote of anyone outside of the returns themselves; their duty consists in the simple matter of arithmetic.”

McCrary also says that the doctrine that canvassing boards and return judges are ministerial officers, possessing no discretionary or judicial power, is settled in nearly or quite all of the States of the Union.

It has been directly settled by decisions in the State of Minnesota. (2 Minn., p. 180; 10 Minn., p. 107; 18 Minn., p. 351.)

See McCrary's Law of Elections, sections 81, 82, 83, 84, and 85.

Even though the return must be set aside the election must stand unless the party who attacks it shows fraud or other illegality in the election. (McCrary's Election Laws, secs. 306 and 364–369.)

It is hard to conceive how a mere ministerial board of officers can be rendered illegal and all its acts declared to be void simply because one person does not sign himself as an attesting witness to a certificate annexed to an abstract by such designation as to show affirmatively that he was a proper officer to do so.

The views further contend:

We do not admit, but deny that the burden was at all under the notice of contestant thrown upon the contestee to prove the vote of Isanti County. The contestee has, however, himself made the proof. As already appears, the notice of contestant does not attack the fact that the vote was cast. He simply undertakes to allege that it was not cast, etc., as provided by law, leaving the fact of its being cast to remain unchallenged. The contestant, moreover, directly admits in his brief, in effect, that the vote was cast as returned and counted. While he says the burden rested upon the contestee to prove this fact, and that the contestee declined to do so, he does say, quoting his exact language, “Had he done so the contestant was prepared to show the grossest irregularities in the conduct of the election in said county.” He thus admits that the vote was cast, but seems to think that when contestee offered proof of the fact, which he himself has already proved (as well as the contestee), that it would open the door for him to offer proof of the grossest irregularities in the conduct of the election in that county, notwithstanding the fact that there is not a word in his notice of contest which indicated any kind of irregularities in the election in that county, but he failed to do so. This county gave to the contestee, Mr. Washburn, a majority of 401, nearly 200 in excess of the majority which certain members of the committee find was the majority of the contestant after rejecting all the votes as indicated in its views. It is thus made to appear that on what could not be dignified as a technicality of the law it is proposed to unseat the sitting Member and to seat a man who was not, as is admitted by himself in his printed argument, elected.

It should be noted, in conclusion, on this point, that the law makes it the duty of the committee or the House to send for and tabulate the original precinct returns if the true vote can not be ascertained from the return. (McCrary, etc., sec. 345.)

(6) A question arose as to certain unorganized counties, but it involved only a construction of the law of Minnesota.

In accordance with the above discussions one party in the committee found a majority of 230 for Donnelly, the contestant; the other party found that at most the majority of sitting Member could not be reduced below 2,232.

949. The Massachusetts, election case of Boynton v. Loring, in the Forty-sixth Congress.

A notice of contest being defective, but objections thereto not being pressed, the committee examined the case.

A voter having cast a ballot he would not otherwise have voted in order to free himself from a prosecution, the vote was rejected.

In absence of evidence for whom a man voted or that he was improperly influenced, the House declined to reject the vote because of a suspicious remark of the voter.

On December 20, 1880,¹ Mr. William H. Calkins, of Indiana, from the Committee on Elections, submitted the report in the Massachusetts contest of Boynton v. Loring. Eleven members of the committee concurred in the result, while one member dissented. Mr. J. B. Weaver, of Iowa, filed minority views.

At the outset a preliminary question arose as to the specifications in the notice of contest, the committee stating that had the objections alleged against the notice of contest been pressed before the committee they would undoubtedly have been sustained. As it is, the committee content themselves with reaffirming the view taken in the recent case of Duffy v. Mason.

As to the merits of the case, several questions of fact were examined; and also a few questions of law were discussed, as follows:

(1) As to a vote given under duress, the report says:

As to the vote of Sheedy MacNamara, he probably voted under the idea that he would be able to enlist the active support of certain prominent citizens of the town in his behalf in getting him discharged from a prosecution for the violation of some of the laws of Massachusetts then pending against him. If his testimony is to be considered of sufficient weight to establish anything, it would seem to show that he applied to one or more of the select men for their influence in getting the prosecution dismissed, and offered for this influence to vote a certain ticket. Giving this testimony due weight, if it shows anything it shows simply that he voted a ticket that he would not have voted had he been free from the charge thus hanging over him. We do not think we could count his vote for the contestant, but would rather throw it out entirely as being tainted and not a perfectly free ballot.

It is claimed that some man as he voted said, "Here's a vote for Sheedy." It is also claimed that Sheedy MacNamara influenced certain of his friends, this being one of them, to vote the ticket upon which the name of the contestee was printed, under the idea that by so doing Sheedy was to escape prosecution, and that therefore the vote of the man who shouted at the time he voted "Here's a vote for Sheedy" should be counted for the contestant. In this view of the case we can not agree. The evidence is entirely insufficient to establish the fact that the man voted, or if he did vote, for whom he voted, or that he was improperly influenced to vote as he did.

Mr. Weaver, in his minority views, deducts not only the vote of MacNamara, but also of his brother-in-law, who, as he voted, said: "Here is a vote for Sheedy."

¹Third session Forty-sixth Congress, House Report No. 18; 1 Ellsworth, p. 346.

950. The case of Boynton v. Loring, continued.

Persons not possessing the constitutional qualification of electors may not complain of a technical illegality by which registration officers keep their names off the lists.

The presumption that sworn officers did their duty must obtain unless it is clearly shown that erasures from the ballot were made by them.

(2) Among the qualifications of voters was one that the voter should be able to read and write in the English language; and the registry law of 1874 was designed to more effectually carry out this provision of the constitution. The majority thus set forth a point developed in this connection:

We have nothing to do with the policy of the law, but simply to enforce that which the people of Massachusetts enacted into statutes for their guidance. It is strenuously urged that persons whose names had been upon the registry lists previous to the general election of 1878, and had been recognized as voters, and had voted at several preceding elections, could not be subjected to the test of being required to read and write in the presence of the registration officers as a condition to being registered. We can not agree to this construction of the law relative to the duties of the registration officers. We think that it is a reasonable regulation that the officers in charge of registration should see to it that persons offering to vote possess the necessary qualifications; and we can not see that, because persons not qualified to vote have been allowed to violate the law on one or more occasions, they can be heard to plead such violation as a bar to the enforcement of the law against them thereafter. Whenever the disqualification of voters appears, it is clearly the duty of the registration officers to refuse to register them. If the registration officers refuse in an illegal way to register this class of persons or give a wrong reason for their refusal, still this would give such persons no right to vote while they admit that they are clearly disqualified under the constitution. We therefore hold that all persons who could not read and write, as required by the constitution of Massachusetts, were not legal voters, and can not be heard to complain of any technical violation of law by the registration officers, whereby they were deprived of registration while admitting at the same time that they did not possess the constitutional qualifications of electors.

(3) In Haverhill 42 printed ballots were found with Boynton's name erased. The report says:

We do not think the evidence sufficient to justify us in finding that the votes were originally thrown for Mr. Boynton and afterwards corruptly changed. The presumption that the sworn officers of the law have done their duty must obtain until the contrary clearly appears.

951. The case of Boynton v. Loring, continued.

Discussion as to what constitutes a compliance with a mandatory law that the designation of the office shall appear "clearly" on the ballot.

As to the extrinsic evidence which sustains the sufficiency of the designation of the office on a ballot.

Reference to a discussion of alleged disfranchisement under the educational qualification of a State.

(4) A question as to the sufficiency of certain ballots is thus discussed in the report:

It is admitted that 138 ballots were counted for the contestee, the designation upon which ballots was as follows: "For Representative, sixth district, George B. Loring, of Salem." It is claimed that under the law of Massachusetts this was not a sufficient designation of the office, and that the ballots should not have been counted for the sitting Member as votes for the office of Representative in Congress from the Sixth Congressional district of Massachusetts.

The law of Massachusetts, chapter 7, section 13, is as follows: "No vote shall be counted which does not clearly indicate in writing the office for which the person voted for is designed." The word "writing," as it occurs in that section, under another statute of Massachusetts is allowed to include printing, as well as any other mode of representing words and letters. We do not think the law of Massachusetts changes the general rule with reference to the designation which must appear upon all ballots in order to make them effectual. The words, "No vote shall be counted which does not clearly indicate," etc., adds nothing to the general rule of law, which requires the election officers to reject any vote when either the name of the person intended to be voted for or the office which the voter intended the person voted for to fill does not appear from the ballot itself. That is to say, where there is such ambiguity in the writing or printing of the name of the person voted for, or of the office for which he is a candidate, that it is impossible to tell from the ballot itself what the name of the person intended to be voted for is, or the office which the voter intended him to fill, the ballot must be rejected, and no extrinsic evidence can be heard to supply the defect.

The public law of Massachusetts created the Sixth Congressional district. There was no other "sixth district" in which any of the voters of Groveland lived except the "Sixth Congressional district," nor did they live in any other sixth district, nor was there a Representative office to be filled in any sixth district in which the town of Groveland was situated except the Sixth Congressional district.

So it seems to us, in the light of the public law of Massachusetts creating this Sixth Congressional district, and the geographical location of Groveland, and the ballot itself, with the designation of "Representative sixth district," all considered together, makes the designation sufficient on the ballot to indicate the office which the voter designed when he cast the ballot, and is within the true interpretation and meaning of the law of Massachusetts, when it declares that "the ballot shall clearly indicate the office for which the person voted for is designed."

Judge Cooley, in his work on Constitutional Limitations, lays down the following general proposition as being the law relating to this subject:

"Every ballot should be complete in itself, and ought not to require extrinsic evidence to enable the election officer to determine the voter's intention. Perfect certainty, however, is not required in these cases. It is sufficient if an examination leaves no reasonable doubt upon the intention, and technical accuracy is never required in any case. The cardinal rule is to give effect to the intention of the voter whenever it is not left in uncertainty.

* * * * *

"The name on the ballot should be clearly expressed and ought to be given fully. Errors in spelling, however, will not defeat the ballot if the sound is the same; nor abbreviations, if such are in common use and generally understood, so that there can be no reasonable doubt of the intent. * * *"

The report then quotes Cooley on the subject of extrinsic evidence. Evidence of such facts as might be called the circumstances surrounding the election—who were the candidates, their residence, etc.—would be evidence of this kind.

The minority views say as to the ballot in question:

It is claimed, and we think with much propriety, that under the laws of Massachusetts this was not a sufficient designation of the office, and that the votes should not have been counted. The law of Massachusetts, chapter 7, section 13, is as follows: "No vote shall be counted which does not clearly indicate in writing (or printing) the office for which the person voted for is designated." The plain meaning of this law is this: The office must be "clearly indicated" on the ballot itself, and can not be made to appear by other and extrinsic testimony. The law is clearly mandatory, and the counting of such ballots is inhibited.

(5) The minority views discuss at length alleged disfranchisement under the educational qualification of the Massachusetts constitution. In the debate, also, this feature of the case was the subject of much discussion.

In accordance with their conclusions as to fact and law, the majority of the committee reported a resolution confirming the title of sitting Member to the seat.

Mr. Weaver, with his views, presented a resolution declaring contestant entitled to the seat.

The report was debated January 20 and 21, 1881,¹ and on the latter date the proposition of the minority was disagreed to, only 13 voting aye.

The resolutions reported by the majority were then agreed to without division, the yeas and nays being refused.

952. The Florida election case of Bisbee v. Hull, in the Forty-sixth Congress.

Instance wherein the House unseated a returned Member belonging to the majority party and seated a contestant belonging to the minority party.

The House does not reject an unassailed return because the State canvassers may have refused to count it.

The parties having agreed that a return should be counted, and testimony being unsatisfactory, the House refused contestant's claim that the canvasser's rejection should be approved.

Returns counted on mandamus of a State court; and unassailed, were counted without regard to the jurisdiction of the court to order the canvass.

The numbering of ballots through an honest blunder of election officers does not cause their rejection in absence of evidence of intimidation.

On January 18, 1881,² Mr. J. Warren Keifer, of Ohio, from the Committee on Elections, submitted the report of the committee in the Florida case of Bisbee v. Hull.³ In the original canvass by the State board of canvassers Mr. Hull, the sitting Member, had been returned by a majority of 12 votes. The report thus states the facts in this case:

The first canvass was made on December 21, 1878, by the State canvassing board, composed of the secretary of state, the comptroller, and the attorney-general of the State of Florida; and thereupon, on the same day, the governor of that State issued to Noble A. Hull a certificate of election. (Record, p. 500.) By virtue of this certificate Mr. Hull was admitted to a seat in the House.

It will be noted that in this first canvass the vote of only 15 of the 17 counties was canvassed; that the vote of Brevard and Madison counties was not canvassed.

The State canvassing board met again on January 8, 1879, and, in obedience to the mandate of the supreme court of Florida, again canvassed the vote of the second district of Florida and included in the canvass the returned vote from the county of Madison, no return being before the board from poll No. 4 of Madison County.

The vote thus canvassed from Madison County was, Hull 938, and Bisbee 1,151; majority for Bisbee, 213. The result of this second canvass showed Mr. Bisbee's majority to be 201, the State board of canvassers having found and certified Mr. Hull's total vote to be 10,578 and Mr. Bisbee's total vote 10,779. (Record, pp. 218-220.)

The opinion of the supreme court of Florida, pronounced by the chief justice, on the question of canvassing the vote of the county of Madison, will be found in the record (p. 221).

On this final canvass Mr. Bisbee applied to the governor of Florida for a certificate of his election, which was referred by the governor to the attorney-general of the State, who, on January 10, 1879, gave his opinion to the governor favoring in most emphatic language Mr. Bisbee's right to such certificate. (Record, p. 228.) Mr. Bisbee's application was, however, refused.

¹ Record, pp. 797, 827-835.

² Third session Forty-sixth Congress, House Report No. 86; 1 Ellsworth, p. 315.

³ There had been a question over the prima facie right to this seat. (See sec. 57 of Volume I of this work.)

The vote of Brevard County was never canvassed by the State canvassing board, for reasons assigned in writing by the board on December 23, 1878. (Record, p. 220.)

Parties and their attorneys agree that poll No. 4, Madison County, was never returned to the county canvassing board, and hence it was never canvassed; and it is in like manner agreed that the true vote cast at this poll was, Hull 129, and Bisbee 186; majority for Mr. Bisbee, 57. (Contestee's brief, p. 14; and Record, pp. 25, 27, 28.)

It is also proved, as admitted, that there was no return of the votes cast at Cow Creek precinct, Alachua County, and that the true vote cast there was, Hull 24, Bisbee 2; Hull's majority, 22. (Record, p. 242; and contestant's brief in reply, p. 4.)

It is also an admitted fact in the case that at Long Swamp or Whiteville poll, Marion County, 93 Democratic ballots were fraudulently substituted for a like number of Republican ballots, thereby making a difference in the vote as canvassed of 186 votes against Mr. Bisbee.

The contestee (brief, p. 37) agrees that this fraud was committed, and that at this precinct "134 votes should be counted for contestant and 41 for contestee."

The vote returned and canvassed was 134 for contestee and 41 for contestant.

An agreed statement fixes the vote of Brevard County at 116 for Hull and 41 for Bisbee. (Record, p. 487.)

The committee therefore found contestant's majority to be about 350.

The committee discuss the following questions:

(1) As to Madison County—

Without deciding the question of the jurisdiction of the supreme court to issue a mandamus to compel the State canvassing board to canvass the vote of Madison County, the committee, on the returns and testimony now before it, find that the board had no legal right to reject the returned vote of the county in their first canvass, and that Mr. Bisbee is now entitled to have such vote counted for him.

The testimony discloses no objection to the returns and none is known to exist. The returned vote of Madison County was rejected by the State canvassing board on the sole ground that one of the precincts (poll No. 4) had made no returns.

No case can be found where in a contest before the House of Representatives the vote shown by an unassailed return has been rejected on the ground of a failure of some other body to canvass it.

The vote of poll No. 4 having been ascertained indisputably, it must of course be counted.

(2) As to Brevard County—

While it is true that the contestant insists that the vote of this county should now be wholly excluded, as it was by the State canvassing board, in view of the agreement signed by the parties and also on account of the unsatisfactory character of the testimony the committee conclude that the vote of this county should be counted and as fixed in said agreement. (Record, p. 487.)

(3) Objection was made to counting the vote of three precincts in Alachua County. This vote was put in evidence by sitting Member, who nevertheless objected to it. The report says:

They are signed by all the officers of the election; they are perfect in form, clear and explicit in the statement of votes cast, and have all been adjudged by the unanimous opinion of the supreme court of Florida, in a case before it, to be good and valid returns of the election at these polls. They are by law the primary legal evidence of the votes cast and unless assailed are conclusive. The counsel for contestee, in their brief, have not assailed these returns, nor sought to impeach them upon any ground whatever. They argue that they should not be counted simply because the county canvassing board, in their first count, did not count them, and that the supreme court, under whose orders they were canvassed, had not jurisdiction to compel the board to canvass them. In answer to this it is sufficient to say that the returns, being unassailed, are conclusive evidence before this committee; and it is our duty to count them, no matter whether the supreme court of Florida had or had not jurisdiction to order them counted. The assault here made is not upon these returns, but upon the jurisdiction of the court, which we are not called upon to maintain or defend. We therefore overrule this objection to these three polls, and hold that the votes returned from them must be counted.

There is nothing in the testimony which in the least seeks to impeach the regularity of these returns.

And a certificate of election made in obedience to a writ of mandamus has the same legal force as in any other case. (McCrary on Elections, secs. 335, 345.)

Besides, the county canvassing board of Alachua County were expressly prohibited by statute from rejecting these returns, and the supreme court of Florida so held.

(4) **Sitting Member averred that at Arredonda pollballots for contestant were marked by the election officers—**

and that the act of marking the ballots rendered them illegal and intimidated voters from voting for contestee. (Record, p. 6.)

Counsel for contestee, in their brief, have not alluded to this objection, and it is therefore fair to presume that in their judgment it could not be sustained. In their oral argument it was suggested that if the contestee was injured—that is, lost votes by reason of the marking of the ballots—the returns should be rejected, while they admitted that the marking of the ballots did not, per se, vitiate them. We are unable to find any evidence in the record that contestee was injured by numbering the ballots. He received the highest vote that any of the local candidates on his ticket received at that poll.

Two of the election officers were sworn, and their testimony is, in substance, that they numbered the ballots to correspond with the numbers opposite the names on the poll list at the request of a United States supervisor because the latter thought it was necessary to make the election legal, and they did not know to the contrary, and without any improper motives. (Record, pp. 231–233, 235–236.)

Counsel for contestee admitted before the committee, in argument, that the ballots were not marked with the design or purpose of affecting the fairness of the election to the injury of contestee. It is evident that such was not their intention. It does not appear that it was generally known among the electors that the ballots were being marked, nor is there any evidence this contestee lost a single vote by it. Only one voter is called as a witness (except the inspectors) to prove that the numbering of the ballots influenced his vote, and he testifies that it did not influence his vote. (Testimony of Aaron Huey, Record, pp. 483–484.)

It can scarcely be claimed that the evidence is sufficient to prove that the contestee was injured by the numbering of the ballots. On the other hand, the return shows that contestant ran behind his local ticket 31 votes at this poll (Record, p. 488); and Inspector Tucker, a Democrat, and sheriff of the county, testified that contestant received less votes than the local ticket. (Record, p. 233.)

We therefore conclude that the contestant has as much cause to complain of the numbering of the ballots as the contestee.

The same objection is made to one poll in Orange County by contestant, and testimony was adduced to sustain it. But we think the testimony insufficient to prove that contestant was injured, if any person, by the marking of the ballots at this poll.

In accordance with these conclusions the committee reported the following:

Resolved, That Noble A. Hull is not entitled to retain his seat as a Member of the Forty-sixth Congress of the United States as a Representative of the Second Congressional district of the State of Florida.

Resolved, That Horatio Bisbee, jr., is entitled to a seat as a Member of the Forty-sixth Congress Representative of the Second Congressional district of the State of Florida.

The case was debated very briefly in the House on January 21 and 22, 1881,¹ and on the latter day the resolutions were agreed to without division, and Mr. Bisbee appeared and took the oath.

It may be noticed that Mr. Hull, who was unseated, was a Member of the majority party in the House, and Mr. Bisbee was a member of the minority party.

¹Record, pp. 836, 837, 865.

953. The North Carolina election case of Yeates v. Martin, in the Forty-sixth Congress.

A true return should be counted, although delivered by an election registrar when the law specifies one of the judges.

An election being opened after the legal hour and evidence showing only half the registration as voting, the poll was rejected, although essential harm was not shown.

On January 25, 1881,¹ Mr. Emory Speer, of Georgia, from the Committee on Elections, submitted the report of the majority of the committee in the North Carolina case of *Yeates v. Martin*.

The certificate of the secretary of state showed that sitting Member had received 51 votes more than contestant.

But the committee were unanimously of the opinion that the county canvassing board had wrongfully rejected the returns of Providence Township, which gave contestant a majority of 39 votes. The majority report says:

The action of this board seems to have been arbitrary and unjustifiable. There was no allegation of fraud or irregularity in the conduct of the election. It was not disputed that Mr. Yeates received a majority of 39 votes at this precinct, but the canvassing board for the county refused to count this return because the registrar of the election at Providence Township delivered the returns to the county canvassing board when the friends of the contestee insisted that one of the judges of the election was the proper party to deliver those returns. The judges of the election in this case appointed the registrar, who carried up the returns and delivered them conformably to law. To reject this return in this county was manifestly illegal, and the evidence shows that the contestant is entitled to have 39 votes added to his aggregate vote by the rectification of this error, this being contestant's majority in that precinct. Indeed, it is distinctly admitted by the contestee, on page 29 of his brief: "We do not regard this objection sufficient to justify the rejection of the return."

The minority views, presented by Mr. W. A. Field, of Massachusetts, give the same opinion more fully:

Section 21, chapter 275, acts of North Carolina of 1877, is:

"The judges of election in each township, ward, or precinct shall appoint one of their number to attend the meeting of the board of county canvassers as a member thereof and shall deliver to the member who shall have been so appointed the original returns, statement of the result of the election in such township, ward, or precinct; and it shall be the duty of the members of the several township, ward, or precinct boards of election to attend the meeting of the board of county canvassers for such election in the county in which they shall have been appointed as members thereof."

And by section 23 a majority of the members shall be sufficient to constitute such board. While for certain purposes the registrar and judges of election act together as a board of election, yet there are certain duties which by statute pertain to the registrar alone and certain others which alone can be performed by the judges of election. If the registrar refuses or neglects to perform his duties, the justices of the peace may remove him and appoint another in his place; but if the judges of election fail to attend, the registrar shall appoint some discreet person to act as such. We think, therefore, that section 21 requires the judges of election to appoint one of their own number to attend the said meeting of the board of county canvassers and deliver the returns; that the registrar is excluded, and that a registrar could not act as one of the board of county canvassers and is not the person designated by law to deliver the original returns to such board.

But if the returns be delivered by any person, and it be shown to be the true return, we know no reason why it should not be counted, and it is not disputed that the returns from Providence Township truly showed that Mr. Yeates had 39 votes over Mr. Martin. We think these votes should be counted for Mr. Yeates.

¹Third session Forty-sixth Congress, House Report No. 123; 1 Ellsworth, p. 384.

The counting of Providence Township left to sitting Member a majority of 12 votes. The remaining questions in the case caused generally sharp divisions in the committee.

(1) The majority of the committee decided that the returns of South Mills precinct, where sitting Member received a majority of 64 votes, should be rejected, for the following reasons:

(a) Because the election was not commenced until three hours after the time fixed by law. The report says:

McCrary on Elections lays down the general principle that if the deviation from regular hours is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it has not. Under the circumstances of this case we hold that the statute of North Carolina was so far disregarded as to vitiate the election at that precinct. The obvious purpose of the law is to give all voters an opportunity of costing their ballots. Not only were the voters of that precinct deprived of two-fifths of the time allowed them by law, but the evidence discloses the fact that only about one-half of the vote of the precinct was polled at the election, the registration of that precinct being 764 and the vote cast only 390.

The report further quotes Parson's Select Cases and *Chadwick v. Melvin*, from Brightley's election cases, in support of this contention. In the debate¹ Mr. Speer elaborated this question more fully. The report also advances this reasoning:

The soundness of this rule is indisputable; otherwise the door is opened for unmeasured frauds. Suppose, for instance, in a heated election, one party should by accident be prevented from polling its heavy vote until late in the afternoon, how easy would it be for a partisan board of managers to defeat a man who otherwise would be the choice of the people. And, again, by refusing to open the polls at the time fixed by law in the forenoon of election day, and by delaying for three or four hours and systematically challenging the voters, and consuming as much time as possible with each voter, it would be easy to procrastinate, so that the hour of closing the polls should arrive and a large vote remain unpolled.

The minority say:

When polls are closed before the hour prescribed by law, it may be that voters, without any fault of their own, are excluded from voting, because they have a right to expect that the polls will be kept open according to law; but when polls are not opened at the hour required by law, but are opened in season to give ample time to any voter to vote, and the delay has arisen from the fact that all the election officers have not attended, and some time is necessary to fill these vacancies according to law, and there has been no manifest abandonment of the attempt to hold an election, it is the duty of a voter to wait until the polls are opened. To hold otherwise would invite a minority to bring about a delay in opening the polls, in order to invalidate the election. Such laws necessarily imply that some time must be taken on election day to fill such vacancies, and the voter has no right under either the Constitution and laws of the United States or of the State to deposit his ballot immediately on reaching the polling place, and no rights of his are violated by compelling him to wait until the polls are opened in the lawful manner, provided there is time enough left for all to vote who desire to vote. No case has been shown to the committee in which a failure to open the polls at as early an hour as the law requires has been held to affect the election at such polling place. The cases all relate to closing the polls too soon. This election at South Mills ought not to be declared void on account of the delay in opening the polls. The only direct injury proved by the delay in opening the polls is: John C. Linton, pages 30, 31, testifies that he waited for the opening of the polls; that his business called him away, and he left; he would have voted for Yeates. He had heard of one other person who would have voted for Yeates if the polls had been seasonably opened. The last is hear say, which we reject. We reject Linton because he should have waited if he desired to vote.

Mr. Field elaborated this argument more fully in the debate.²

¹ Record, p. 972.

² Record, pp. 974, 975.

954. The case of Yeates v. Martin, continued.

As to what constitutes a majority of election officers competent to hold a valid election.

Election officers being sworn by an unauthorized sheriff, who was an officious intruder, the poll was rejected.

A State law forbidding a candidate to act as election officer, participation of contestee as an acting officer, was occasion of a division of opinion in the Elections Committee.

The State law forbidding a device on the ballot, the words "Republican ticket" were held sufficient to cause its rejection.

Evidence to justify counting of rejected votes should be the best, i.e., of the voters themselves.

(b) Because a quorum of the board of election officers was not present. Two judges of the four were present, and the report points out that two is not a quorum of four.

The minority say:

By section 9, chapter 275, acts of North Carolina, 1877, already quoted, the judges, with the registrar, "shall open the polls and superintend the same until the close of the election."

"Sec. 20. When the election shall be finished, the registrars and judges of election, in presence of such of the electors as may choose to attend, shall open the boxes and count the ballots, etc."

The registrar and judges of election constitute a board for the purposes of opening the polls, superintending the election until the close of it, and for counting the ballots. And on general principles a majority of this board could act upon the matters on which they are authorized to act together, and the registrar and two judges are a majority of this board. Besides, if the third inspector is held to have acted under the authority of the registrar, this, so far as the rights of these persons are concerned, should be taken as an appointment, and three judges are a majority of four, even if the four judges be taken to be a board separate from the registrar.

Chapter 108, Battle's Revised Laws of North Carolina, section 2, clause 2, is:

"All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority."

(c) Because the election officers were not sworn.

The majority say:

The law requires that the inspectors should be sworn by some person authorized to administer an oath. They were not so sworn, but the sheriff, who was a mere intruder and who made himself extremely officious on that occasion, presumed, outside of his limited powers, to administer the oath. The returns were signed and certified by persons who really were not election officials under the laws of North Carolina, and any other citizens present had the same right with them to receive votes and certify and send up a return.

The minority admit that the officers were not properly sworn; but state that there is no evidence that any of these officers acted unfairly or improperly except in the adjournment for dinner and testimony that one judge had taken liquor. The minority views say:

The officers acting must be taken to be de facto officers. The omission to take the oath will not vitiate the election. (Sec. 79, McCrary on Elections, and cases cited.) The principle is well established that the acts of public officers being in by color of an election or appointment are valid so far as the public is concerned.

In the debate¹ the cases of *Howard v. Cooper*, *Jackson v. Wayne*, and *Easton v. Scott* were cited by the majority in favor of their rejection of the returns.

(*d*) It was objected that the board adjourned an hour for dinner, the box being given over to the charge of one of the election officers who had been imbibing spirituous liquors, and that bribery and intimidation were resorted to. The majority did not consider it necessary to consider these objections as controlling, the other objections being sufficient to justify rejection of the vote.

(2) The majority report of the committee rejected the returns of Hamilton precinct, where sitting Member received a majority of 64 votes. But only 7 Members concurred in this. Thus this view did not command a majority, the committee being 15 in number. Messrs. William G. Colerick, of Indiana, and Samuel L. Sawyer, of Missouri, who were among the 9 Members concurring in the majority report, expressly dissented from the proposition to exclude the vote of Hamilton precinct. The majority report says:

At Hamilton precinct likewise the contestee received a majority of 64 votes, and the contestant objects to the vote being counted, for the reason that the contestee acted as the registrar of the election. The law of North Carolina (Laws of 1876–77, sec. 5, p. 517) is mandatory on this subject. It declares “that no person who is a candidate for any office shall be a registrar, or judge, or inspector of an election.” It is impossible for us to conceive of a provision more distinct in its terms or one which is from necessity more mandatory than this. It is conceded by the contestee in his brief that he did for a time act as registrar at this precinct. In the interest of the purity of elections, the committee are compelled to reject the vote of a precinct where a practice so reprehensible has been adopted by the claimant of this honorable and responsible office. No man should be permitted to be judge in his own case or take advantage of his own illegal act. The evidence fails to show that the conduct of Mr. Martin was justifiable, fair, and impartial while acting in this important official character; and even if it should be held that this conduct on the part of the contestee did not of itself vitiate the result of the poll at that precinct, it will be admitted that the contestee, who conducted his own election in this way, must have affirmatively shown that no illegal advantage was taken because of his action.

The minority views objected to this view:

It is not contended that Mr. Martin was appointed either registrar, or judge, or inspector of elections. So far as appears, these offices were all filled by other persons, who were present and performing their duties. Mr. Martin acted in the presence of the poll holders. Mr. Carraway was the acting registrar. Mr. Martin checked off some names on the registration book when on the side of the counter where the people came to vote, and at one time came around the counter where the judges of election were, but did not check off any names while there. Then it seems that he did not act corruptly, and that the election was fairly conducted, and that he took no part in receiving votes or keeping the poll book, and there is no evidence that any person was permitted to vote who was not entitled to vote, or, being entitled, was prevented from voting, or that any votes were improperly received or counted, or that Mr. Martin’s conduct had any effect whatever upon the election. This conduct of Mr. Martin may have been an act of indiscretion, but, in the absence of any evidence that it produced any effect upon the election, we do not think that any weight should be attached to it.

(3) The committee declined to count for sitting Member 108 votes rejected at Merry Hill precinct because the words “Republican ticket” were printed on them. This portion of the majority report on this question was actually written by Mr. Field, who was also author of the minority views.²

The law of North Carolina provided:

The ballots shall be on white paper and may be printed or written, or partly written and partly printed, and shall be without device.

¹ Record, p. 1046.

² This appeared in the debate. Record, p. 973.

There was also the provision that any ticket which "shall have a device upon it" shall "be void."

The counsel for contestee had cited an Indiana case, *Napier v. Mahew* (35 Indiana, 275), to show that these votes should be counted. But the Indiana law required a ballot to be folded by the voter, and that it should be put into the box unopened. Therefore, words on the inside of a ticket specifying the party were not on the same basis with words on ballots not required to be folded. The majority report says:

The North Carolina statute is express that the ballots shall be without device, and that if the ticket shall have a device upon it, it shall not be numbered in taking the ballots, but shall be void. This difference in the statutes renders the Indiana decisions inapplicable, and the sole question is, Are the words "Republican ticket" on the inside of a ballot a device within the meaning of the North Carolina statute? With the policy of the statute we have nothing to do; one purpose of the statute may have been to prevent bystanders from knowing from observation how the voters voted. No statute can altogether prevent this; experts can easily distinguish between different kinds of white papers, and the printing of the ballots of the opposite parties would ordinarily be done at different printing offices with different type and ink, and the arrangement of the names of the persons and of the office, the punctuation, and the place on the ticket of the printed matter would ordinarily be different and apparent to a well-trained eye. The intention of the statute could be easily evaded if it did not also prescribe the size of the ticket and the size of the type, which the North Carolina statute has not done. Still the statute, such as it is, must be enforced, even if some provisions have been omitted that are necessary completely to appreciate its intention.

Another purpose of the statute may have been to compel, as far as is possible, the voter to select the persons he votes for independently of any contrivances on the ticket calculated to inform or misinform him of the opinions of the persons voted for, because devices are often contrived to mislead. Either way, we think that words prominently printed on a ticket and intended to designate or describe it, and which have a distinct meaning in themselves, such as, if untrue, might mislead the voter, and whether true or untrue would render the ticket easily distinguishable, must be held to be a device within the meaning of the law. (*McCrary on Elections*, sec. 401.) These votes were rejected by the State authorities, and we think rightfully.

The minority views do not antagonize this view, but on the floor in debate it was urged that the printing of the words "Republican ticket" on the ballots was procured fraudulently by contestant's friends, and therefore that the rejection of the ballots sustained that fraud.¹

(4) Sitting Member claimed that 154 votes which the managers at Goose Nest precinct had declined to receive should be counted. The division of opinion as to these votes arose from the terms of the registration law, the majority taking one position on this question of fact, and the minority the opposite position.

The sitting Member had offered the testimony of one William A. Johnson, a bystander, who declared that he saw 154 ballots offered for sitting Member and rejected by the judges. The committee do not fully credit the testimony, and point out that sitting Member should have supported his case with the best evidence, which would have been the testimony of the men whose ballots were refused. So the majority declined to count the votes.

In accordance with their reasoning the majority of the committee find for contestant a majority of 156 votes, and report resolutions declaring him elected.

¹Record, p. 1040.

The report was debated in the House on January 27 and 29, 1881.¹ On the latter day a substitute proposed by the minority and confirming the title of sitting Member was disagreed to, yeas 110, nays 117.

Then the majority resolution declaring sitting Member not elected was agreed to, yeas 117, nays 106. The resolution seating contestant was agreed to, yeas 115, nays 103.

Thereupon Mr. Yeates appeared and took the oath.

955. The Senate election case of Lapham and Miller in the Forty-seventh Congress.

A legislature is not precluded from its constitutional power to elect a Senator by the fact that it may not do so on the date fixed by law.

The fact that less than a quorum of one house of a legislature is present in the joint meeting does not prevent the election of a Senator under the act of 1866.

A quorum being actually present in a joint meeting of a legislature for election of a Senator, it is not necessary that a quorum actually vote.

Conviction under sections 1781 and 1782 of the Revised Statutes, and not merely accusation, is required to raise a question of qualification against a Senator-elect.

The allegation of mere rumors of bribery is not sufficient to cause the Senate to investigate the election of a Senator.

In 1881² the Senate considered the case of Elbridge G. Lapham and Warner Miller, of New York. On October 11, 1881, the day on which Messrs. Lapham and Miller took their seats, a memorial was presented remonstrating against their admission until certain allegations affecting their elections had been investigated. October 21 the memorial was referred to the Committee on Privileges and Elections. December 12 the committee reported back the memorial and asked that it lie on the table, and that the committee be discharged from its further consideration. It was so ordered December 13. The statement of Mr. Hill, in the nature of an oral report, shows the nature of the allegations of the memorial and the reasons for the action of the committee:

I am instructed by the Committee on Privileges and Elections to report back to the Senate certain memorials from members of the legislature of New York affecting the right of the present Senators from that State to occupy seats in this Chamber and to ask that the memorials lie on the table and the committee be discharged from their further consideration.

In deference to the memorialists, and at the special request of some of them, it is proper that I should state briefly and generally the reasons which authorize this conclusion.

The memorials set forth five reasons as grounds why these gentlemen should not be allowed to sit here. The first alleges that the legislature did not proceed in separate bodies to vote upon the question until the third Tuesday after notice of the vacancy was communicated by the governor. The facts are such as to create some controversy as to whether they did proceed on the second Tuesday or the third Tuesday after the notice; but, in any view, the committee are unanimously of the opinion that the legislature was not deprived of its constitutional right to elect Senators to this body.

The second allegation is that at one of the joint sessions of the general assembly a quorum of the State senators was not present. It is not alleged that there was not a quorum present of each body on

¹Record, pp. 971, 1036-1052.

²Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 697; First session Forty-seventh Congress, Record, pp. 70, 71.

the days the respective elections took place, but it is alleged or claimed that under the act of 1866 the failure of either body to be present with a quorum on any day deprives the legislature of the right to elect. The committee differ with the memorialists in that view. We think that one body of the legislature could not deprive the legislature of the right to elect by such absence, if unquestionably on the day of the election a quorum of each body of the legislature was present and voting. We think the reason alleged in this ground is not sufficient to invalidate the election.

The third ground alleged is that there was not a majority of the whole legislature actually voting for the Members chosen. In our opinion that is not necessary. There was a quorum of each house present in the joint assembly; there was a majority of that quorum actually voting for the Members chosen. In our opinion that was a valid election.

It is alleged specifically in the memorial that the Stockton case is a precedent to the contrary. On examination it will be found that the Stockton case is not a precedent to the contrary. Mr. Stockton, of New Jersey, in the celebrated case so well known, was chosen, not by a majority, but he was chosen by a plurality vote, the legislature in joint session having declared before the election that a plurality should elect. The Senators now occupying the seats in question, from New York, were not chosen by a plurality vote; they were each chosen by a majority, a quorum of each body being present and a majority of the joint assembly voting. I will state that if the cases from New York were like the case from New Jersey, I do not think at this day any gentleman would regard the Stockton case as a precedent. Unquestionably the body that elects has a right to prescribe that a plurality may elect, and I think the report made by Senator Trumbull on that occasion is not only correct, but conclusive of the law of the case. The committee therefore are of the opinion that the ground is not sufficient to invalidate the election.

The fourth ground relates to Hon. W. Miller, and alleges that he is guilty of certain conduct in violation of section 1781 and section 1782 of the Revised Statutes which disqualify a Member from holding any office of honor, trust, or profit under the United States Government. It is sufficient to say that the Senator from New York has never been convicted of a violation of those sections of the Revised Statutes, and a simple inspection of the sections shows that it is conviction that disqualifies and not allegations by outsiders or third persons who do not prosecute. Therefore the committee overrule that ground and think it insufficient, conceding the facts alleged to be true for argument; we do not know anything about them.

The last ground is one of fact. Before I have alluded to what are called legal grounds or allegations that by legal operation the election is void. The last ground alleges that there were rumors of bribery in procuring the election of these gentlemen. The allegation of mere rumors of bribery is not sufficient, unaccompanied with evidence, to require investigation at the hands of the Senate or of its committees. It is alleged in this memorial that one State senator of New York is under indictment in that State for offering a bribe to a member of the house to vote in the Senatorial election. It is due to the Senators holding the seats that the committee should say that the indictment is not for a bribe offered to vote for either one of the present Senators. It is due also to state that while we find by reports that have been sent to us and investigations had that there were a great many scandals in connection with the Senatorial election in New York during the late session of the legislature, most of these scandal occurred before the two gentlemen now holding seats became even candidates before that body.