Chapter XXXII.

GENERAL ELECTION CASES IN 1882.

1. Cases in the first session of the Forty-seventh Congress. Sections 956–971.[1]

956. The Iowa election case of Cook v. Cutts in the Forty-seventh Congress.

A resolution granting further time for taking testimony in an election case was admitted as privileged.

Form of resolution providing for taking additional testimony in a case wherein contestant alleged that with due diligence he could not complete the evidence within the legal time.

A contestant desiring additional time for taking testimony presents his application by memorial.

On February 13, 1882,[2] Mr. William H. Calkins, of Indiana, from the Committee on Elections, to whom had been referred the Iowa contested case of Cook *v.* Cutts, as a question of privilege, reported the following resolution, which was agreed to by the House:

Resolved, That the contestant be granted further time to take testimony in this contest upon the following terms and conditions, namely:

First. Upon giving contestee notice of time and place and names of witnesses proposed to be examined not less than thirty days exclusive of day of service.

Second. Contestant shall then have ten days to take the testimony hereafter mentioned.

Third. Contestee shall then have fifteen days in reply.

Fourth. Contestant shall then have five days in which to take testimony in rebuttal; all periods allowed being exclusive of Sundays and holidays.

The testimony of contestant shall be confined exclusively to the examination of witnesses who may now be in possession of the books and pay rolls mentioned in contestant's subpoena duces tecum, here-

[1] Additional cases during this session are classified in other chapters:
Bayley *v.* Barbour, Virginia. (Vol. I, sec. 435.)
Stovell *v.* Cabell, Virginia. (Vol. I, sec. 681.)
Samuel Dibble, South Carolina. (Vol. I, sec. 571.)
Stolbrand *v.* Aiken, South Carolina. (Vol. I, sec. 719.)
Mackey *v.* O'Connor, South Carolina. (Vol. I, sec. 735.)
Smith *v.* Robertson, Louisiana. (Vol. I, sec. 750.)
Witherspoon *v.* Davidson, Florida. (Vol. I, sec. 753.)
Mabson *v.* Oates, Alabama. (Vol. I, sec. 725.)
Campbell *v.* Cannon, Utah. (Vol. I, sec. 471.)

[2] First session Forty-seventh Congress, Journal, p. 550; Record, p. 1088.

tofore served on W. A. McNeill, who testified on the 9th day of March, 1881, in this case as contestant's witness, and one Major Shoemake, who is mentioned in contestant's memorial as having knowledge of the same facts, which testimony has, as alleged, been discovered by him since his time expired to close his testimony, and which by the use of reasonable diligence contestant alleges he could not have ascertained in the time allowed by law.

When this testimony is taken the contestant may then take evidence tending to show for whom any illegal voter voted, which may have been disclosed by the testimony first herein allowed to be taken. All the evidence taken shall be directed and confined to the point above indicated.

This resolution was in response to a memorial of John C. Cook, the contestant, presented in the House by a Member on January 30,[1] and referred to the Committee on Elections.

957. The case of Cook v. Cutts, continued.

Report of an Elections Committee is sometimes presented by a Member belonging to the minority party in the House. (Footnote.)

Unidentified votes cast by disqualified persons were proven by testimony as to party affiliations of the persons and circumstances attending the voting.

As to validity of an answer with no proof of service except an ex parte affidavit.

On February 19, 1883,[2] Mr. F. E. Beltzhoover, of Pennsylvania,[3] presented the report of the majority of the committee, finding that contestant was entitled to the seat.

The sitting Member had been declared elected by a majority of 9 votes.

Both majority report and minority views assumed that the result of the contest really turned on the disposition of certain votes, 23 in number, alleged to have been polled at Muchikinock coal mines by colored miners who had not been in the State the six months required by the constitution of Iowa. The testimony was voluminous and somewhat conflicting. The majority of the committee felt confident that it sustained contestant's claim. The minority views, presented by Mr. William G. Thompson, of Iowa, opposed this contention.

Aside from this question of fact, the report develops the following question of law:

To prove for whom these votes were cast contestant issued subpoenas for all these men. The returns on the subpoenas show that only a very few (three) could be found. (Rec., 306, etc.) All those who appeared either under summons from contestant or as witnesses for contestee declined to disclose for whom they voted when asked by contestant; and all those who came in the May crowd refused to say whether they voted or not. (Rec., Geo. W. Lewis, 334; Jesse N. Carroll, 335; James Martin, 612; Geo. W. Lewis, 633; Hugh Lee, 643.)

It is shown generally that the men who employed these miners were favorable to Mr. Cutts; that they were brought to the polls by Republicans; that their votes were challenged by Democrats and Greenbackers (contestant's friends), and their votes urged and directed by Republicans. Republicans and men distributing Republican tickets gave them their ballots, etc. (Rec., 112, and from 326 to 391, inclusive.)

"When the voter can not, by reasonable diligence, be found, or, being found, refuses to state for whom he voted, it may be shown by circumstances. And here great latitude must be allowed." (McCrary on Elections, p. 306.)

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[1] Journal, p. 421.

[2] Second session Forty-seventh Congress, House Report No. 1961; 2 Ellsworth, p. 243.

[3] It may be noted that Mr. Beltzhoover was a member of the minority party in the House.

By the above circumstances the contestant has shown all that can be shown in any case, that these colored miners all voted the Republican ticket, on which was contestee's name.

In addition to this it is shown by a colored man who went with the last crowd that voted at Harrison Township poll that he and another man supplied the whole lot with tickets that were voted, and that they were Republican tickets; and this is nowhere denied. (Rec., 367.) This crowd voted just before the polls closed, as shown by the poll list (Rec., 349), beginning with No. 320 and ending with No. 388. This includes James Usher, James Byers, John Clark, Wm. H. Hues, Spencer James, John W. Jackson, Andrew Lewis, G. W. Randall, Hardin White, Joseph James, and D. F. Woodard, eleven in number.

In addition to this it is shown that these illegal voters all were Republicans, and in the celebrated "New Jersey cases" it was held that this alone was sufficient to warrant the conclusion that they voted their party ticket.

It is further shown by evidence and the poll list that all the colored men from the coal mines voted together, there being two crowds brought to each poll at different times; and to illustrate the testimony on this point we take the testimony of Thomas S. Barton (Rec., 712):

"Well, they came up in a wagon, with fifteen or twenty in it, a white man driving—a Republican—whooping and hallooing, 'Hurrah for Cutts!' They would get out of the wagon, march them up to a couple of men who had tickets for them—Republican tickets. After they got their tickets they would go up to the window where they voted, and they would vote just as fast as they could be sworn in, and then they would load them up and start back with them after another load, and went through the same performance next time."

The same is shown by numerous witnesses as to all the colored men at both polls; and that when Greenback or Democratic tickets were offered they were refused.

The testimony is voluminous and uncontradicted, and no one can read it without being convinced that all the colored miners voted for contestee.

We have no hesitation in concluding that twenty-three votes should be deducted from the contestee on account of the colored vote from Muchikinock.

As to certain other votes, claimed by contestee not to have been cast by qualified electors, the report holds first:

The contestee claims that certain persons not qualified voters voted for the contestant in various parts of the district.

There is a technical objection to this claim which, under former decisions, rests upon a valid foundation.

There is in the record no answer to contestant's notice. There is on file an answer, but no proof of service except ex parte affidavit, and this shows no personal service on contestant. It has been expressly held in Follett *v.* Dellano and in Boyd *v.* Kelso that this can not be accepted as proof of service. (2 Bartlett, 121.)

958. The case of Cook v. Cutts, continued.

As to efficacy of voter's admissions to prove an illegal vote.

An unofficial recount of ballots not kept inviolate is of no force.

As to the counting of ballots found in the box for township officers and not in the Congressional box.

The House is disinclined to give force to a point raised in debate but overlooked both in the report and views of the Elections Committee.

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

Assuming, however, that the above objections were waived, the report thus discussed the objections:

(1) As to some of these votes there is no proof whatever that they voted except hearsay. As to others, there is no proof for whom they voted, except the voters' admissions, which, according to McCrary and the recent case of Cessna *v.* Myers, is insufficient.

In nearly all of them the proof relied on by the contestee consists of some statement of the voter made in casual conversation to a witness under circumstances making them neither competent nor reliable.

But even if the evidence be accepted as competent and sufficient to prove the facts claimed, in no case would the facts thus established be sufficient to show the vote illegal.

(2) The contestee claims that two votes should be added to his and two deducted from contestant on account of error in official count in Washington Township, Appanoose County.

All the evidence upon this point is that one witness, on April 18, 1881, counted the ballots then in the box, and found this change from the official count.

There are two insurmountable objections to this: First, there is not the slightest proof that the ballots counted April 18, 1881, were those cast November 2, 1880.

Under the authorities quoted in contestant's reply brief, page 2, being McCrary on Elections, and Gooding *v.* Wilson, decided in 1872, and we may add the recent case of People *v.* Livingston, 79th New York Court of Appeals, 289, all directly in point, this must be affirmatively shown before this second count can be received as evidence.

Not only this, but it appears affirmatively that the box was exposed, and, so to speak, in the possession of a party unfriendly to contestant, and not an officer, with the key in the box, until April 16, and that before this recount he predicted accurately the change that a recount would disclose.

The ballots were counted by one individual, and not produced and publicly counted before the officer taking the deposition.

Three of the election officers appear and testify to the correctness of the official count.

In accordance with their conclusions the majority found contestant elected, and reported resolutions seating him.

The minority views found sitting Member entitled to retain his seat.

The report was debated in the House on March 2, 1883.[1] During this debate Mr. A. A. Ranney, of Massachusetts, a member of the committee concurring in the minority views, advanced the proposition that the report and views had overlooked a controlling feature of the case, viz, the counting for contestant by the precinct officers of 34 ballots found in the box for township officers, whereas they should have been deposited in the box for Congressman. Mr. Ranney pointed out that the rejection of these votes would be decisive of the case in favor of the sitting Member, and held that they should be rejected. It might be that those casting these ballots had also voted for Congressman in the congressional box, in which case there would be a double vote. The cases of Washburn *v.* Ripley and The People on the Relation of Michael Hayes *v.* George Bates (11 Michigan) were cited, as well as McCrary, to show that the ballots in the wrong box should be rejected unless it had been affirmatively proven that they were put there by mistake.

Considerable stress was laid on this point by supporters of the minority views; but the supporters of the majority report were not inclined to accept as justified by the evidence a point which had escaped notice until after the case had been made up for the House.

On March 3, 1883,[2] the resolutions of the majority, unseating Mr. Cutts and seating Mr Cook, the contestant, were agreed to by the House, yeas 154, nays 81.

Mr. Cook thereupon appeared and took the oath. It may be noted that Mr. Cutts belonged to the majority party in the House, while contestant belonged to a minority party.

959. The Mississippi election case of Lynch v. Chalmers, in the Forty-seventh Congress.

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[1] Record, pp. 3638–3649.

[2] Journal, pp. 566–568.

A printer's dash separating the names was held not to be a distinguishing "device or mark" within the meaning of the State law.

The House does not consider itself necessarily bound by the construction which a State court puts on the State law regulating times, places, manner., etc.

The courts of a State have nothing to do with judging the elections, qualifications, and returns of Representatives in Congress.

Statement of the true doctrine as to construction of election laws as mandatory or directory.

Discussion as to whether State laws prescribing times, places, and manner become in effect Federal laws as to election of Congressmen.

On April 6, 1882,[1] Mr. William H. Calkins, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Mississippi case of Lynch *v.* Chalmers.

The vote returned by the county inspectors of election to the secretary of state showed a majority of 3,779 votes for sitting Member.

Contestants objections involved the discussion of several important and interesting questions of law:

(1) As to the form of certain ballots. The law of Mississippi provided:

SEC. 137. All ballots shall be written or printed in black ink, with a space not less than one-fifth of an inch between each name, on plain white printing newspaper, not more than two and one-half, nor less than two and one-fourth, inches wide, without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the ticket; but this shall not prohibit the ensure, correction, or insertion of any name by pencil mark or ink upon the face of the ballot; and a ticket different from that herein prescribed shall not be received or counted.

In Warren County 2,029 ballots were thrown out by election officers, most of them being because of the dashes in the ticket as printed:

REPUBLICAN NATIONAL TICKET.
For President,
JAMES A. GARFIELD.

For Vice-President,
Chester A. Arthur.

For Electors for President and Vice-President,
HON. WILLIAM R. SPEARS.
HON. R. W. FLOURNOY.
DR. J. M. BYNUM.
HON. J. T. STETTLE.
CAPT. M. K. MISTER, JR.
DR. R. H. MONTGOMERY.
JUDGE R. H. CUNY.
HON. CHARLES W. CLARKE.

For Member of the House of Representatives from the 6th Congressional District,
JOHN R. LYNCH.

[1] First session Forty-seventh Congress, House Report No. 731; 2 Ellsworth, p. 338.

The majority of the committee find that there was no intentional violation of the law in the printing of these ballots or in the use of them. The report further says:

It is also proved that tickets precisely similar to those that are questioned in this contest, in so far as the printer's dashes are concerned, were printed and furnished to the opposing party in at least one of the counties in the Sixth Congressional district of Mississippi, and were unquestionably voted without a suspicion that they were obnoxious to the law. To further illustrate the entire good faith with which these tickets were printed and used, and how they would be regarded by practical printers, the testimony of Charles Winkley, one of contestee's witnesses, becomes very important; it is as follows:

"Cross-interrogatory 2. Are you a practical printer, and have you critically examined the "marks" so called, on the tickets of Lynch, rejected from Warren County? If so, were not these only the usual printer's dashes to be found generally in newspaper articles and upon tickets generally?

"Answer. I am a practical printer; I have not critically examined the tickets, but the dashes used are such as any printer of taste would either put in or leave out, according as he wanted to lengthen or shorten the ticket to suit the paper, or otherwise.

"Cross-interrogatory 3. If you were called upon generally to print tickets, without any special instructions, is it likely that you would have printed the tickets similar to those complained of and rejected from Warren County?

"Answer. I might or might not, just as it might have seemed to strike me at the time.

"And further deponent saith not." (Rec., p. 261.)

It further appears that printer's dashes, such as were used on the tickets in this case, are universally known among printers as punctuation marks; in fact most of the characters which appear upon these tickets are set down in Webster's Unabridged Dictionary under the head, "Marks of punctuation." It is known to the most casual reader of print that printer's dashes frequently occur in books, newspapers, and publications of all kinds, and to the common understanding to argue that they are of themselves "marks or devices" would not meet approval.

We have already found that they were not used or placed upon the tickets for the purpose of distinguishing them from any other ballots, nor as a device for that purpose, and not being of themselves devices we can not say that they are inimical to the statute. It is true that printer's dashes may be intended and used as a mark or device, and so may different kinds of type, or punctuation marks of different kinds. Arrangement of names and heading of tickets may also be made "marks and devices," and it seems to us that the reasonable interpretation of the law would be, first, in the use of these appliances, which are ordinarily used in printing, were they so arranged as that they become "marks and devices" and were they so used and arranged for that purpose and, secondly, was the unusual manner of their being used such as might or ought to put a reasonably prudent man on his guard?

This view of the law would be the extreme limit to which we think we would be justified in going under well-established principles of construction is like cases. No case has been called to our notice which goes this far.

What we have here remarked does not, of course, apply to the marks or devices ordinarily used on tickets, such as spread eagles, portraits, and the like; those would be considered "marks and devices" of themselves, and not necessary in the ordinary mechanical art of printing.

The majority further quote the California case of Kirk *v.* Rhoades (46 Cal., 398) to show that such small departures from the exact rule should not be allowed to defeat the will of the voter. The report dissents from the conclusion of the majority in the case of Yeates *v.* Martin.

The minority views, presented by Mr. Gibson Atherton, of Ohio, affirm adherence to the decision in the Yeates *v.* Martin case, and say:

The first and leading case on the subject of marked ballots was in Pennsylvania in the case of The Commonwealth *v.* Woelper (3 S. and R., 29). The opinion was delivered by Chief Justice Tighlman and concurred in fully in separate opinions by Justices Yeates and Gibson, and they all held that the law should be strictly construed as written. The court said:

"The tickets in favor of those persons who succeeded in the election had on them the engraving

of an eagle. The judge who tried the case charged the jury that these tickets ought not to have been counted. The case is certainly within the words of the law. The tickets had something more than the names on them. But is it within the meaning of the law? I think it is. This engraving might have several ill effects. In the first place, it might be perceived by the inspector, even when folded. This knowledge might possibly influence him in receiving or rejecting the vote. But in the next place, it deprived those persons who did not vote the German ticket of that secrecy which the election by ballot was intended to secure to them. A man who gave in a ticket without an eagle was set down as an anti-German and exposed to the animosity of the party. Another objection is that the symbols of party increase that heat which it is desirable to assuage. We see that at the election some wore eagles on their hats. The case thus falling within the words and practices of this kind leading to inconvenience, I think the court ought not exercise its ingenuity in support of these tickets. Let us at least prevent future altercations at elections by laying down such plain rules for the conduct of inspectors as can not be mistaken. I am for construing the by-law as it is written, and rejecting all tickets that have anything on them more than the names. This objection strikes at the root of the election, for the evidence is that all the tickets in favor of the defendants were stamped with an eagle. Whatever, therefore, may be the law on other points, it is clear, upon the whole, that the defendants were not duly elected."

The precise same doctrine was held in Oregon. The court says:

"Section 30, page 572, of. the Code provides that 'all ballots used at any election in this State shall be written or printed on a plain white paper without my mark or designation being placed thereon whereby the same maybe known or designated.' The voter in this instance is conclusively presumed to have had knowledge of this requirement and to have had it in his power to comply with it by using a proper ballot. It was a matter entirely under his own control, and if he chose to disregard the law, he cannot complain if the consequence was that his vote was lost." (The State *v.* McKinnon, 8 Oregon, 500.)

This fully sustains the Mississippi decision, even if we admit the distinction taken by the majority report that the voter is only bound to observe so much of the law as he could by the exercise of proper diligence in matters under his control. The California case cited by the majority, though it differs from the case of Perkins *v.* Carraway recently decided in Mississippi, as to the spaces between the names on the ticket, sustains Oglesby *v.* Sigman as to the marks. The court say:

"There are, however, other requirements of the Code within the power of the elector to control, and these, if willfully disregarded, should cause his ballot to be rejected. He can see, for instance, that his ballot is free from every mark, character, device, or thing that would enable anyone to distinguish it by the back, and if, in willful disregard of law, he places a name, number, or other mark on it, he cannot complain if his ballot is rejected and he loses his vote." (Kirk *v.* Rhoades, 46 Cal., 398.)

Also the Alabama case of Plato *v.* Damus was quoted; and the minority consider that a strict construction of the State law is best.

(2) But the supreme court of Mississippi had passed on the validity of these ballots; and thereby arose a question as to whether or not the House should be bound by the construction which the State court put upon the law. In the case of Oglesby *v.* Sigman the court held that the commissioners of election had the authority to reject the ballots in question; and that the ballots were properly rejected:

If the device or mark is external, and observed by the inspectors, they should not receive the ballot. If it is received, and on being opened is discovered to be of the kind condemned as illegal, it is not to be counted; but if the inspectors count such ballots in disregard of law and their duty the commissioners of election, assembled at the court-house, with time and opportunity afforded to scrutinize and correct, as far as may be done by the data furnished by the face of the returns, without a resort to evidence aliunde, should reject, as the inspectors should have done, ballots which the law says shall not be counted. The only safe guide as to what ballots are illegal because of devices or marks is the statute. It excludes any mark or device by which one ticket may be known or distinguished from another. A distinction between ballots by means of devices or marks instead of by means of the names

on them is what the statute aims to prevent, and we are not at liberty to confine the broad language of the statute to any particular description of devices or marks, for ingenuity would evade any Bach limit. The law should be enforced as written.

Two questions arose in regard to this decision:

(*a*) Was it an actual decision, or merely an obiter dictum.

The circumstances leading up to it were as follows:

On November 16, 1880, the contestant applied to one of the judges of the supreme court of Mississippi for an injunction to restrain the secretary of state from declaring contestee duly elected, basing the application on the allegation that certain unlawful deductions had been made from his vote. The judge declined to grant the injunction for the reason that the House of Representatives was the exclusive judge of the elections, returns, and qualifications of its own Members. This decision was rendered November 17.

The report further shows, as a later development:

By the Revised Code, 1880, of Mississippi, the following provision is made relative to the writ of mandamus:

"SEC. 2542. On the petition of the State by its attorney-general, or a district attorney, in any matter affecting the public interest, or on petition of any private person who is interested, the writ of mandamus shall be issued by a circuit court commanding any inferior tribunal, corporation, board, officer, or person to do or not to do an act the performance or omission of which the law especially enjoins as a duty resulting from an office, trust, or station, and where there is not a plain, adequate, and speedy remedy in the ordinary course of law."

Under this section the district attorney of Tunica County filed his petition in the circuit court of that county against the election commissioners to compel them to reassemble and reject 506 ballots which had been counted for the contestant, Mr. Lynch, and which were claimed to be illegal because they contained marks and devices in violation of the election laws. The petition was denied, and an appeal was taken to the supreme court of the State.

The case was submitted by counsel without brief or oral argument. In the debate attention was called to the fact that Lynch was not a party to the record and could not be heard.[1] The court passed upon the legality of the ballots, declaring that they were illegal because of the marks, and concluded:

We do not think that the commissioners of election can be required to meet and recanvass the returns of the election. Having made their canvass and declared the result, and transmitted a statement of it to the secretary of state, their connection with the returns ended. Any error committed by them is not to be corrected by requiring them to reassemble and correct it. The legality of their action may be the subject of judicial investigation in cases in which provision is made for contesting the election by an appeal to the courts of the State, but only in those cases.

The House of Representatives of the Congress of the United States is the judge of the elections, returns, and qualifications of its own Members, and the courts of the State have nothing to do with this matter.

This case might properly have been disposed of without considering any of the questions made by the record except that last mentioned, but the attorney-general informs us from the bar that doubts exist as to the proper interpretation of the election law of 1880, and that criminal prosecutions have been instituted against the commissioners of election of some of the counties for supposed violations of the law in reference to their duties, and we have complied with his request in declaring our view of the several questions presented by the record.

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[1] Speech of Mr. Calkins, Record, p. 3446.

The majority contended that the court did not have jurisdiction of the question as to the ballots, the proper persons to give it jurisdiction not being parties, and that the decision was a mere obiter dictum. The minority of the committee deny these positions:

But before proceeding to the consideration of that question we wish to dispose of two points of objection made by the majority report to the case of Oglesby *v.* Sigman (58 Miss. R.). They are, first, that the decision is a mere obiter dictum; and the second, that it is confessedly without jurisdiction. An obiter dictum is an expression of opinion by way of argument or illustration, and rendered without due consideration as to its full bearing and effect. To show the want of authority of an obiter dictum the majority quote from Carroll *v.* Carroll (16 How., 286–287).

The court say: "If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the common law, an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question to be determined to fix the rights of the parties and decide to whom the property belongs." There can be no doubt about the judicial mind being directed to the construction of the Mississippi election laws. The court say they considered them, and that they were asked to consider them. This decision is, therefore, not obiter as to the marked ballots, because it is one of the very points carefully considered and directly decided.

An obiter dictum is exactly what its term imports—a saying of the judge outside of and beyond the point decided. Therefore it can not be said that the decision of one of the very questions submitted, and to which the judicial mind was especially directed, is obiter.

But the majority say—

"First. The court declared in terms it had no jurisdiction of the subject-matter embraced in the first and second grounds stated in the opinion; but the court, after remarking upon its want of jurisdiction on the first two points stated in the beginning of its opinion, and having disposed of the third on the ground that the official duties of the election officers were at an end and that they could not be reassembled, proceeded to construe the law relative to distinguishing marks, and decide what were such by the terms of the Mississippi Code so far as it could do so, the same being confessedly not before them."

This is neither legally nor historically true of this decision. The court did not anywhere admit its want of jurisdiction, nor did it, after admitting that a decision of one point in the case might have been sufficient to decide the whole case, proceed to decide the other two points first stated. Historically, it decided first the two first points, and then the third. It is a general rule that where a court has decided one point which is decisive of a case it will not decide others, but this rule is by no means universal. (See Ram on Legal Judgments, 258–259, and the cases there cited.) But it is an unheard-of proposition to say where there are several distinct and vital points in a case, and the court decides them all, the opinion is not authority except on one point, if that would have been decisive of the case.

Thousands of cases can be found where all the points presented are decided, though the decision of one might have been sufficient. The most notable instance is the case of ex parte Siebold (10 Otto).

Continuing, the minority say:

The court was called on to compel, by mandamus, the election commissioners to make right a wrong they had committed. The first thing to be settled was whether he had done any wrong. If the court had decided that the commissioners did right in counting the marked ballots, that would have ended the case, and it would have been unnecessary to go further.

The court held, however, that the commissioners did do wrong, but that it had no power to make them reassemble and right that wrong.

It might be said the court could have stopped short with this declaration, but it did not. It proceeded to show what was the proper remedy for the wrong. It said the remedy was in a contested election. That in State cases this contest must be made before State tribunals and in Congressional elections before Congress.

To claim that this election can have no weight in a contested election before Congress because the court said Congress must settle Congressional contests would lead to the conclusion that it could have no weight in a contest before a State tribunal, because it said the State tribunal must settle State contests.

This question as to the nature of the decision was also much discussed in the debate.[1]

(*b*) What was the binding effect on the House of the decision of the State court construing the statute of the State?

The majority report says:

It is seriously contended by the contestee that the decision of the supreme court of Mississippi construing the sections of the election laws of that State ought to be followed by Congress, and that it is against the settled doctrine of both Congress and the Federal judiciary to disregard the decisions of State tribunals in construing their own local laws. This is too broadly asserted, and can not be maintained. It is true that where a decision or a line of decisions has been made by the judiciary of the States, and those decisions have become a "rule of property," the Federal judiciary will follow them. Not to do so would continually place titles to property in jeopardy, and disturb all business transactions. The rule as to all other questions is well stated in Township of Pine Grove *v.* Talcott (19 Wall., 666–667), as follows:

"It is insisted that the invalidity of the statute has been determined by two judgments of the supreme court of Michigan, and that we are bound to follow these adjudications. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. * * * The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of States where the cases arise; it must hear and determine for itself."

There is still another reason why Congress should not be bound by the decisions of State tribunals with regard to election laws, unless such decisions are founded upon sound principles, and comport with reason and justice, which does not apply to the Federal judiciary, and it is this: Every State election law is by the Constitution made a Federal law where Congress has failed to enact laws on that subject, and is adopted by Congress for the purpose of the election of its own Members. To say that Congress shall be absolutely bound by State adjudications on the subject of the election of its own Members is subversive of the constitutional provision that each House shall be the judge of the election, qualifications, and returns of its own Members, and is likewise inimical to the soundest principles of national unity. We can not safely say that it is simply the duty of this House to register the decrees of State officials relative to the election of its own Members.

The foundation of this contention is that if the Congress of the United States fails to enact election laws, and makes use of State laws for its purposes, it adopts not only the laws thus enacted, but the judicial construction of them by the State courts as well.

We do not agree that this is the rule except as it may apply to a "positive statute of the State, and the construction thereof, adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character." (Swift *v.* Tyson, 16 Peters, 1–18.) As to matters not local in their nature, the Supreme Court of the United States has uniformly held that the decisions of the State courts were not binding upon it.

Election laws are, or may become, vital to the existence and stability of the House of Representatives, and to hold it must shut itself up in the narrow limits of investigating solely the question as to whether an election has been conducted according to State laws as interpreted by its own judiciary would be to yield at least a part of that prerogative conferred by the Constitution exclusively on the House itself.

It may be stated generally that the House of Representatives will, as a general rule, follow the interpretation given to a State law regulating a Congressional election by the supreme court of a State, where decisions have been continued and uniform in such a way and for such time as to become the fixed and settled law of a State. The processes of determining the election and all questions relating to the honesty and bona fides of ascertaining who received the highest number of legal votes must of necessity forever reside exclusively in the House.

Where decisions have been made for a sufficient length of time by State tribunals construing election laws so that it may be presumed that the people of the State knew what such interpretations

[1] See speeches of Messrs. Atherton, Hammond, Tucker, and Calkins, Record, pp. 3333, 3380, 3426, 3445, 3446.

were would furnish another good reason why Congress should adopt them in Congressional election cases. But this reason would be of little weight when the election had been held in good faith before such judicial construction had been made, and where there was a conflict of opinion respecting the true interpretation of a statute for the first time on trial.

There is still another cogent reason why this House may, and perhaps should, disregard the decisions of State courts when such decisions are made in cases where there is confessedly no jurisdiction in the court to pass upon the question which it assumes to pass upon, or where the court assumes to pass upon questions not properly involved in the case before it.

We can not express in better language the effect which obiter dictum in judicial opinions should have on future decisions than that employed by Mr. Justice Curtis in Carroll *v* Carroll (16 How., 279–287). After considering the maxim at common law of stare decisis, the learned judge proceeds to discuss the thirty-fourth section of the judiciary act in connection with the maxim, and then says:

"And therefore this court, and other courts organized under the common law, has never felt itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties."

Citing some cases, he continues:

"And Mr. Chief Justice Marshall said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used.' If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relations to the case decided, but their possible bearing on all other cases is seldom completely investigated. The cases of Ex parte Christy (3 How., 292) and Jenness et al. *v.* Peck (7 How., 612) are in illustration of the rule that any opinion given here or elsewhere can not be relied on as binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

There is abundance of authority running through all the reports of the judicial opinions of the various States, and also through the reports of the Supreme Court opinions of the United States, that they will not be bound by the obiter of their own decisions, much less that of other courts. And where there is a conflict in the decisions of a State supreme court, other State courts and the Supreme Court of the United States will adopt, not the later, but that line of decisions which best speaks the reason and common sense of the proposition elucidated, except in those cases purely local, as pointed out in Swift *v.* Tyson, supra.

Another suggestion in argument needs greater amplification than we can give it now, which is: That by adopting the machinery of the States to carry on Congressional elections this House stands in the nature of an appellate court to interpret these election laws so far as they relate to Congressional elections; that it ought not in this view to be bound by the decisions of the State courts at all, unless the reasons given by them are convincing to the judicial mind of the House while acting in the capacity of a court.

It need, however, hardly be added that a line of carefully considered cases in the States, in which such courts have undoubted jurisdiction, so far as they would apply in principle, would go a long way toward settling a disputed point of construction in any State election law. In fact it may be said that it would probably be the duty of Congress to follow the settled doctrine thus established.

It now becomes necessary to review the opinion of the supreme court of Mississippi in Oglesby *v.* Sigiman. As will be seen by an examination of the case it was a mandamus proceeding, under a section of the Mississippi Code, to compel the commissioners of election in Tunica County to reassemble and recount the votes cast in that county on the 2d day of November, 1880, for Member of Congress in the Sixth Congressional district of Mississippi. The allegations, substantially, are that the election commissioners counted 506 ballots for the contestant in this case, Mr. Lynch, which had upon them marks and devices, and which were illegal under the provisions of sections 137, 138, 139, and 140 of the Mississippi Code, and ought to have been rejected instead of being counted as they were. A fac simile of the ballots challenged is set out on the record, and on the ticket is found certain printers' dashes which are similar to those challenged in the pending contest, and which are the distinguishing marks complained of. The Oglesby-Sigiman case "was submitted by counsel without brief or oral argument,"

as we are informed by the contestee's brief. The judge who delivered the principal opinion in this case closes the opinion of the court with this remark:

"The House of Representatives of the Congress of the United States is the judge of the elections, returns, and qualifications of its own Members, and the courts of the State have nothing to do with this matter.

"The case might properly have been disposed of without considering any of the questions made by the record except that last mentioned, but the attorney-general informed us from the bar that doubts exist as to the proper interpretation of the election law of 1880, and that criminal prosecutions have been instituted against the commissioners of election of some of the counties for supposed violations of the law in reference to their duties, and we have complied with his request in declaring our view of the several questions presented by the record."

The point, as remarked by the judge, on which the case might have been disposed of, was as to whether the official life of the election commissioners was functus officio, and they were therefore incapable of being brought together to perform official duties; which being determined in the affirmative, the court had nothing to do but to dismiss the petition, as it did when it refused to entertain a petition on behalf of Mr. Lynch, made on the 9th day of December, 1880, to prevent the governor of the State from issuing to the contestee a certificate of election as Member of Congress from the Sixth Congressional district of Mississippi, on the ground that it had no jurisdiction of the subject-matter of the action.

Had the Mississippi supreme court stopped here the question of how far the decision of State courts in construing their own election laws ought to bind this House would be free from embarrassment; but the court, after remarking upon its want of jurisdiction on the first two points, stated in the beginning of its opinion, and having disposed of the third on the ground that the official duties of the election officers were at an end and that they could not be reassembled, proceeded to construe the law relative to distinguishing marks, and decide what were such by the terms of the Mississippi Code so fax as it could do so, the same being confessedly not before it.

It is sufficient to say that if the argument sustaining the conclusions reached by the Mississippi court met our views of the true construction of the law, a further analysis of the opinion would be unnecessary, but, as we can not agree with the argument or the conclusion of the court, it becomes necessary to give some of the reasons why we do not concur and why we do not feel bound by it.

First. The court declared in terms it had no jurisdiction of the subject-matter embraced in the first and second grounds stated in the opinion. The third ground does not involve a construction of the law, and of course can not be considered in determining the question raised in the pending contest.

It is with great hesitation and reluctance that we feel compelled to disagree with the eminent gentleman who concurred in the opinion, and we do so in no spirit of unjust criticism, for we would much prefer to follow rather than dissent from it. Had the opinion been rendered before the election of 1880, or become one of settled law of Mississippi, we do not say but that it would have such weight with us that, though we might disagree with it in logic, we might feel compelled to follow it. We think that the decision is against the current of authority and contrary to the well-settled doctrine heretofore discussed; that it can be regarded as obiter dictum merely, and as the opinion of eminent gentlemen learned in the law, but not as a judicial construction of the code. It may happen, should the supreme court of Mississippi adhere in the future to the reasons advanced in this case, in cases where it has jurisdiction, that this House will adopt them; but until the happening of this event we can not say that the reasons given in the Oglesby-Sigiman case are controlling.

The general doctrine in construing election statutes is that they are to be construed liberally as to the elector and strictly as to the officers who have duties to perform under them. A statute directing certain things to be done by election officers ought to be followed by them with a high degree of strictness, but duties to be performed by the electors, as declared by statute, are directions merely, which, if not observed, it is true, may in some instances defeat his ballot; but when there is an honest intention to obey the law, and the voter is not put in fault by any laches or negligence which he, by the use of reasonable diligence, might or could avoid, or where there is no palpable intention of violating the law apparent, in order to maintain the inestimable right of voting, courts have generally adopted the most liberal construction.

In an almost unbroken line of precedents, from the foundation of the Government, in all the States this rule has been declared. (McCrary on Elections, sec. 403; Kirk *v.* Rhoades, 46 Cal., 398; Prince

v. Skillen, 71 Me., 493; People *v.* Kilduff, 15 Ill., 492; Millholland *v.* Bryant, 39 Ind., 653; The State ex rel. *v.* Adams, 65 Ind., 393; Pradut *v.* Ramsey (5 Morris), 47 Miss., 24, and many other cases not necessary to cite.)

In the debate Mr. Calkins, who drew the report, said:

While I am a Member of this House, whether short or long, wherever the State courts have construed their election laws so that they have become a part of the system of election laws in a State, I will follow them * * * even though I can not agree to the reasoning.

The minority views thus discuss this phase of the case:

If any rule of law can ever be regarded as settled, certainly the rule that Federal authorities would follow the construction of State statutes by State courts must be regarded as settled by a long line of able and unbroken decisions. The only exceptions made to this rule by the Supreme Court of the United States are where the State courts have made conflicting decisions, as in the case of the City of Dubuque, (1 Wall., 175), or in cases arising under the twenty-fifth section of the judiciary act.

From the time of the case of Shelby *v.* Gray (in 11 Wheaton, 361), through Green *v.* Neal (6 Peters, 291), Christy *v.* Pritchett (4 Wallace, 201), Tioga Railroad *v.* Blossburg Railroad (20 Wallace, 137), down to Elmwood *v.* Macey (2 Otto, 289), an unbroken line of decisions will be found.

The court say, in the case of Green *v.* Neal:

"The decision of this question by the highest tribunal of a State should be considered as final by this court, not because the State tribunal, in such a case, has any power to bind this court, but because a fixed and received construction by a State in its own court makes it part of the State law."

In the case of the Tioga Railroad Company *v.* The Blossburg Railroad (in 20 Wallace, 143) the court uses the following language:

"These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles.

"See Jefferson Branch Bank *v.* Skelly (1 Black, 443); Gut *v.* The State (9 Wallace, 37); Randall *v.* Brigham (7 Wallace, 541); Secomb *v.* Railroad Company (23 Wallace, 117); Polk's Lessee *v.* Wendell (9 Cranch, 98); and Nesmith *v.* Sheldon (7 Howard, 818). Numerous other adjudications of that court could be cited to the same effect."

It is now maintained that this doctrine applies only as a rule of property. The only excuse for this new idea to be found in the decisions in the Supreme Court is where the court say they will not follow the last decision of a State court changing the construction of its laws after the first decision has become a rule of property; otherwise the Supreme Court of the United States would follow the new construction given by the State court. To say that the Supreme Court of the United States will only follow a State court "on a rule of property" is a total misconception of the principle announced by the court. But whatever may be the rule in the Supreme Court of the United States, Congress has in every case, without exception, followed this rule, and in the Tennessee cases in the Forty-second Congress, and the Iowa cases in the Forty-sixth Congress, extended the rule to following the construction of the State laws given by the governor of a State. The same rule was followed, and on the question of marked ballots, in case of Neff *v.* Shank in the Forty-third Congress and Yeates *v.* Martin in the Forty-sixth Congress. The game rule was followed in Bisbee *v.* Hull, and the doctrine broadly laid down as correct in Boynton *v.* Loring in the same Congress. We cite the Language of the committee in these cases.

This rule was first established in the Forty-second Congress in what is called the Tennessee cases, when the report was made by the Ron. G. W. McCrary:

"In a report from the Committee on Elections, adopted by this House April 11, 1871, in the matter of the Tennessee election (Digest of Election Cases, compiled by J. M. Smith, p. 1), the committee say:

"'It is a well-established and most salutary rule that where the proper authorities of the State government have given a construction to their own constitution or statutes that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex government, State and national, and your committee are not disposed to be the first to depart from it.'"

This decision was cited with approbation in the Forty-sixth Congress in the Iowa cases, and in the report on these cases, signed by Messrs Field, Keifer, Calkins, Camp, Weaver, and Overton, they say:

"We are not disposed to be the first to depart from it, and we certainly think that such a decision,

made in good faith and acquiesced in at the time by the people of the State, and followed by a full and fair election, should not be overthrown or questioned, except for the gravest reasons, founded on an undoubting conviction that it was plainly an error, and that the error had worked some substantial injury."

In the same case Mr. Beltzhoover says:

"2. The question whether the constitution of the State of Iowa 'must be amended in order to effect a change in the election of State officers,' is one which it is the exclusive right of the State to decide. The persons to whom the constitution and laws of Iowa confide this decision have made it, and their determination is a finality and is conclusive on all parties. The committee have not the right to review the decision."

The case of Curtin *v.* Yocum, in the Forty-sixth Congress, turned upon the construction of the constitution of Pennsylvania, and the minority report, which was made by Mr. Calkins and signed by Messrs Keifer and Weaver, relied upon the construction of the State court, and used this emphatic Language, speaking of an unregistered voter:

"We think this question, under the present constitution and laws of Pennsylvania, not an open one. The highest court of judicature of the State has decided it; at least, it has given a construction to that part of the new constitution under consideration, and we quote therefrom."

This minority report was adopted by Congress, and a Greenbacker was permitted to retain his seat in a Democratic House.

In the case of Bisbee *v.* Hull, in the Forty-sixth Congress, the decision of the supreme court of Florida was held to be conclusive by the committee and the House. When the admission of Mr. Hull, who held the governor's certificate, was under discussion, Mr. Calkins said:

"How can this certificate stand, even as establishing a prima fade right, when the basis upon which it rests has been swept away by a decision of the supreme court of the State of Florida?"

When the case was considered on its merits, the committee unanimously followed the decision of the supreme court of Florida, and a Democratic House unseated a Democrat and seated a Republican under it.

The report made by Mr. Keifer uses this emphatic language:

"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, page 221.

"* * * 'As already stated, duly certified copies of these returns were put in evidence by the contestee; they are signed by all the officers of the election; they are perfect in form, clear and explicit in the statement of the 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.'" (17 Florida Rep., p. 17.)

Again, in the case of Boyntonv *v.* Loring, the report, which was prepared by Mr. Calkins, and signed by every member of the committee except Mr. Weaver, contains this clear and explicit announcement of the doctrine we contend for. It says:

"But it is not necessary for us to decide this question, and we do not, much preferring that the courts of Massachusetts shall first construe their own statutes, and when they have undergone judicial construction we would follow the decisions of the courts of that State."

The Committee on Elections is as much a continuing body in contemplation of law as a court, and should have as much respect for its own rulings as a court has for its decisions, and "stare decisis" should be our rule. Under the rule that Federal authorities follow the construction given by State authorities to their own statutes, two Tennessee Republicans were seated in the Forty-second Congress; Shanks, a Republican, was seated in the Forty-third Congress; Yocum, a Greenbacker; Bisbee, from Florida, and three Republicans from Iowa were seated in the Forty-sixth Congress. To undertake now to change this rule or limit it to a rule of property, may subject us to the same severe rebuke for oscillation administered to a State court by the Supreme Court of the United States. To say in one Congress we will follow the decision of the supreme court of Massachusetts in construing its statute when made, and in the next Congress refuse to extend the same rule to the supreme court of Mississippi, is glaring inconsistency or invidious distinction between States. If we have respect for ourselves, we should make no radical change of ruling that may subject us to the charge that we "immolate truth, justice, and law because party has erected the altar and decreed the sacrifice."

LIMITATIONS ON THE RULE.

But while the majority of the committee have expressed some views looking to a change in this rule, said to be essential to the preservation of our complex system of government, they do not go to that extent. They say:

"It need, however, hardly be added that a line of carefully considered cases in the States, in which such courts have undoubted jurisdiction, so far as they would apply in principle, would go a long way toward settling a disputed point of construction in any State election law. In fact, it may be said that it would probably be the duty of Congress to follow the settled doctrine thus established."

We have here two new limitations on the old rule. First, it must not be a single decision, but "a line of carefully considered cases." Second, the court must, in the opinion of Congress, when collaterally considering the subject, have had jurisdiction of the case. It is a new and somewhat startling proposition that the opinion of a supreme court is not to be considered authority until it has been repeated. If the citizens of a State acquiesce in a decision of their own supreme court it may and often does happen that the court is not called on to reaffirm its opinion, because no one doubts or disputes its first ruling on the subject, and yet Congress is now asked not to regard as authority anything less than a line of well-considered cases.

DO STATE LAWS BECOME FEDERAL LAWS?

Again, the majority report says:

"Another suggestion in argument needs greater amplification than we can give it now, which is, that by adopting the machinery of the States to carry on Congressional elections this House stands in the nature of an appellate court to interpret these election laws so far as they relate to Congressional elections; that it ought not in this view to be bound by the decisions of the State courts at all, unless the reasons given by them are convincing to the judicial mind of the House while acting in the capacity of a court."

The suggestion made in argument was that the State election laws became Federal laws when Congressmen were elected under them, and therefore Congress had the same right to review the decision of a State court in construction of these laws that the Supreme Court of the United States had to review the decision of a State court on any question arising under the twenty-fifth section of the judiciary act. This was an ingenious suggestion, but it is completely refuted by the Supreme Court of the United States in ex parte Siebold (10 Otto). The court say, "The objection that the laws and regulations, the violation of which is made punishable by the act of Congress, are State laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws." Again, "the paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no further." The great question in this case was whether Congress could make a law to punish a man for the violation of State election laws in Congressional elections, and the able opinion of the court would have been wholly unnecessary if the new theory now advanced were true, that the State laws become Federal laws simply because Congressmen are elected under them. Such an idea is wholly repugnant to the Constitution, which expressly provides that the States may make laws for the election of Congressmen while Congress may make, alter, or amend them.

The debate on this branch of the case was especially well considered and occupied a large share of the attention of the House.[1]

960. The election case of Lynch v. Chalmers, continued.

Although an uncertified return was rejected by the State canvassers the House counted it, sitting Member not having denied in his answer that the vote was cast as claimed by contestant.

Neither the House nor the Elections Committee is bound by the technical rules of the courts as to the admission of evidence.

[1] Especial notice should be taken of speeches by Messrs. Robson, Carlisle, and Calkins. Record, pp. 3427, 3433, 3442.

Certificates of canvassing officers, supplemented by certified transcripts by a chancery clerk, were held prima facie evidence of the votes at a poll whereof the primary returns were rejected.

Reference to a discussion of the return of United States supervisors as evidence of the vote cast.

(3) The commissioners of election of Bolivar County sent to the secretary of state a report in obedience to the following statute:

SEC. 140. The commissioners of election shall, within ten days after the election, transmit to the secretary of state, to be filed in his office, a statement of the whole number of votes given in their county for each candidate voted for for any office at such election, etc.

This return, which was duly signed by the three commissioners, gave Lynch 979 votes and Chalmers 301:

The following statement accompanied the foregoing returns:

"ROSEDALE, BOLIVAR CO., MISS.,
"November 4, 1880.

"TO HON. HENRY MYERS,

"Secretary of State, Jackson, Miss.:

"DEAR SIR: We have this day duly met and canvassed the returns of this county and complied with the law in every respect, as we construed the same after duly consulting the best legal authority in the county, and we now inclose to you our certified report of the same. We have thrown out the Australia precinct box, 30 Democratic and 192 Republican votes, because the returns were not certified to by the inspectors or the clerks. We have thrown out Holmes Lake precinct, because the box was not opened nor the ballots counted by the inspectors and numbered by the clerks and no returns nor tally sheet made. We have thrown out the Bolivar precinct, 45 Democratic and 311 Republican votes, because there was no certified return from the inspectors and clerks. The tally sheets sent in the box show the names of the electors of the Democratic and Republican parties of James R. Chalmers, John R. Lynch, G. B. Lancaster, M. Roland, James Winters, Fleming, and James White, but does not show for what office they were voted for. The tally is kept on four different sheets of paper. The total can only be guessed at and not ascertained correctly. We have rejected the Glencoe precinct vote—27 Democratic, 233 Republican votes—because the vote was counted out in part by all the inspectors and clerks and then discontinued until next day, when the count was finished by one inspector and one clerk and a very imperfect tally sheet and return sent in by those two not certified to.

"JNO. H. JARNAGIN,
"RILEY ROLLINS,
"W. A. YERGER,
"Commissioners of Election."

The majority of the committee determined to count the rejected vote of Australia and Bolivar precincts on the strength of the statement made by the commissioners, saying:

This duty being enjoined by statute, their certificate is evidence of the fact that the number of votes which they certify were given.

The minority assail this action of the majority:

But to accomplish even this reduction of the proper majority of Chalmers the votes claimed by contestant in Bolivar County at Australia and Bolivar precincts are counted. The returns of these precincts were rejected by the commissioners of election because they were not certified to. In other words, the commissioners had no legal evidence that the ballots returned in these boxes were ever cast by voters. They might have been stuffed in by anyone on the road from the precinct to the court-house. That returns not certified to can never be counted is stated by every writer on election cases.

After quoting McCrary the minority continue:

The majority of the committee do not deny this principle of law, but they contend that the votes, though rejected by the commissioners for a lawful reason, must now be counted, because the commissioners in their certificate to the secretary of state show how many votes were rejected.

"Under section 138 of the Mississippi code the inspectors of elections are required to send up to the commissioners the whole number of votes cast at the poll, and the commissioners, under section 140 of the code, are required to 'transmit to the secretary of state, to be filed in his office, a statement of the whole number of votes given in their county for each candidate.'

"This duty being enjoined by statute, their certificate is evidence of the fact that the number of votes which they certify were given."

The majority are mistaken in this statement of the duty of the inspectors under the law of Mississippi. Their duty under section 138 is not "to send up to the commissioners the whole number of votes cast," but "a statement of the whole number of votes," etc.; and by section 139 it is required that the statement shall be certified as correct by both the inspectors and their clerks. (See secs. 138 and 139, above set out.)

Now, it is clear that the certificate is essential to identify and make certain the return and that without the certificate it is no legal return and can not be counted or considered as evidence in any way.

Without the certificate the commissioners, who know nothing of their own knowledge as to the election, can certainly make no statement of the votes that would import verity as to the result.

The minority further say:

If these commissioners had undertaken to count and to transmit to the secretary of state a statement of votes not certified by the inspectors to them, this would have been clearly illegal, and yet when the commissioners of Bolivar County refused to receive and count returns not certified to them, and in the appendix to their statement to the secretary of state stated that they had rejected these votes because not certified, Congress is asked to count them without any other proof that they are good and valid votes except the appended statement of the commissioners as to the number of votes rejected and for whom they purported to be cast.

In the debate on the floor [1] Mr. Calkins called attention to the fact that in the case of Bolivar precinct—against which strong arguments had been directed by Mr. John G. Carlisle, of Kentucky [2]—the election was admitted on both sides to have been peaceable, orderly, and quiet; the officers counted the votes and sent the count, together with the tally lists and all the papers and ballots, to the commissioners, as the law required. But the returns were thrown out because the certificate of the result was not made by the election officers. The sitting Member, who had made the statement of the vote a part of his answer, did not deny that the vote was cast as claimed by contestant. It was true that the statement of the commissioners merely said that so many Republican and so many Democratic votes were rejected; but as Lynch was the only Republican candidate for Congress and Chalmers the only Democratic candidate for that office, it was presumable that these tickets contained each all the candidates of the party. Mr. Calkins admitted that the proof as to what votes Lynch got and what Chalmers got was not the best proof, but it stood uncontradicted. If not true, the other party could have shown its falsity. The friends of contestee had launched their whole argument against the machinery, not against the immutable facts.

(4) As to a precinct in Issaquena County, Hays Landing, a question arose which the minority views state thus:

Will Congress receive and count votes of which there is no evidence except the certificate of a chancery clerk as to what purports to be a transcript of election returns of record in his office, when there

[1] Record, p. 3444.

[2] Record, p. 3435.

is no law in Mississippi authorizing any record to be made of election returns by any officer and when neither the chancery nor circuit clerk nor any other officer in Mississippi is by law made the custodian of the election returns after they have been counted by the commissioners of election?

The majority in their report say of Issaquena County:

There are two statements in the record, which, taken together, enable us with reasonable certainty to arrive at the vote cast in three of the four rejected precincts of this county. The first is the certificates of election made by the commissioners of election to the secretary of state, and found on page 17 of the record.

HAYS LANDING.

They say with regard to this poll that they find 75 votes reported by the election officers; on four of the ballots all the names are scratched off, and they reject the poll because there was no separate list of voters kept. At page 89 of the record, Richard Griggs, clerk of the chancery court for Issaquena County, certifies, under the seal of said court, that the paper appearing on that page of the record is a true and correct transcript of the election returns made by the election officers as appears of record in his office, by which it appears Lynch received 34 votes and Chalmers 29 votes for Member of Congress. The commissioners of election for that county certify to the secretary of state that they rejected this precinct return, and the clerk of the court certifies that that return is on file in his office, a copy of which he gives. The two statements taken together are prima facie evidence of the vote received at that poll. The highest number of votes appearing on the tally list as certified by the clerk agrees with the number the commissioners say were returned from that poll. The commissioners are authorized by law to certify as a fact the number of votes cast; and the clerk of the court is authorized by law, as the keeper of public records, to give certified transcripts thereof.

For the reasons given in reference to Hays Landing precinct, we also count Ben Lomond and Duncansby precincts, by reference to which it will be seen that Lynch's vote was 332 and Chalmers's 20 in the former (Record, pp. 17 and 90), and 371 for Lynch and for Chalmers 45 in the latter.

The minority say:

Now, it is clear that the certificate of the commissioners to the secretary of state is not of itself sufficient to prove the votes rejected in this county, and the majority do not so pretend. It is equally clear that the certificate of the chancery clerk, if it was evidence for any purpose, would fully prove the vote by itself without any aid from the certificate of the commissioners, but the majority do not claim this for that certificate. But because the number of votes stated by the commissioner to have been rejected corresponds with the pretended certificate of the clerk we are asked to receive this as corroborating evidence. But in order to reach this conclusion the majority say that "the clerk of the court is authorized by law, as the keeper of public records, to give certified transcripts thereof." That is true when the clerk is "keeper of the record," but the election returns form no part of any public records in Mississippi, and therefore neither the chancery clerk nor any other officer is the keeper of election returns after they have been counted, and can give no certified transcripts thereof.

The law of Mississippi provided:

SEC. 105. The books of registration of the electors of the several election districts in each county and the poll books as heretofore made out shall be delivered by the county board of registration in each county, if not already done, to the clerk of the circuit court of the county, who shall carefully preserve them as records of his office, and the poll books shall be delivered in time for every election to the commissioners of election, and after the election shall be returned to said clerk.

After quoting the law the minority say:

From this it will be seen that neither the circuit clerk nor chancery clerk is the keeper of any public record which contains election returns, and that the certificate of Griggs in this case is a nullity. The law on that subject is as follows:

The law is well settled that statute certifying officers can only make their certificates evidence of the facts of which the statute requires them to certify, and when they undertake to go beyond this and certify other facts they are unofficial and no more evidence than the statement of an unofficial person. (Swetzler *v.* Anderson, 2 Bartlett, 374.) This rule of course applies to election returns and to all certifi-

cates which are by law required to be made by officers of election, or of registration, or by returning officers. They can only certify to such facts as the law requires them to certify." (Am. Law of Elections, sec. 104.)

In the United States district court, in the case of the United States *v.* Souder, it was held:

"In New Jersey a copy of the return of the township election filed with the clerk of the county and sent to the office of the secretary of state, accompanied by the clerk's certificate that it is a full and perfect return of said election as filed in his office, is not so made and certified and does not come from such a source as to constitute it an official paper." (2 Abbott, C. C. Rep., 456; 1 Greenleaf, sec. 498, "Certificates.")

In regard to certificates given by persons in official station, the general rule is that the law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. (Willes, 549, 550, per Willes, Ld. Ch. Justice.)

If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated.

But as to matters which he was not bound to record, his certificate, being extra official, is merely the statement of a private person, and will therefore be rejected. (Oakes *v.* Hill, 14 Pick., 442, 448; Wolfe *v.* Washburn, 6 Cowen, 261; Jackson *v.* Miller, 6 Cowen, 751; Governor *v.* McAffee, 2, Dev., 15, 18; United States *v.* Buford, 3 Peters, 12, 29; Childers *v.* Cutter, 16 Miss., 24.)

In the debate Mr. Calkins [1] displayed an executive document of Mississippi to show that in this case the offices of circuit clerk and chancery clerk were held by the same person. This also was admitted by the minority. He held that under the law the ballot boxes came into the office of this clerk, citing a section of law not quoted in the minority views. The circuit clerk, being the legal custodian of the papers, could certify them.

At the beginning of his speech, evidently with this question in mind, Mr. Calkins had said: [2]

Neither this House nor its Committee on Elections is or ever has been bound by the technical rules of the admission of evidence such as is applied in the courts. I announce this as a principle settled in the early Congresses, followed all the way down, and acted upon not only by the present Committee on Elections but by every one that has preceded it.

He then referred to the cases of Donnelly *v.* Washburn and Vallandigham *v.* Campbell, especially noticing the remarks of Mr. L. Q. C. Lamar, of Mississippi, in that case.

(5) There was a question of fact as to Kingston precinct, in Adams County, over which there was some division.

In accordance with the above conclusions the majority of the committee found that Lynch had a majority of 385 votes, made up as follows:

The corrected vote of the parties will stand thus:

	Lynch.	Chalmers.
Returned vote	5,393	9,172
Add rejected votes:		
Warren County	2,029	20
Deadmans Bend	85	15
Palestine	231	17
Australia	192	30
Bolivar	311	45
Hay's Landing	39	24
Ben Lomond	332	20
Duncansby	371	45
Rodney	247	92
Stoneville	315	60
	9,545	9,540
From which we deduct	.....	190
And add that number to Lynch's vote to correct the returns in Kingston precinct, Adams County	190	.....
Which makes total	9,735	9,350
Majority for Lynch	385	.....

[1] Record, p. 3445. Also Mr. Carlisle in opposition, p. 3436.

[2] Record, p. 3443.

Both the majority and minority discussed the effect of the returns of United States supervisors of election as evidence, but the decision of this was not considered essential.

In accordance with their conclusions the majority reported resolutions seating contestant.

The report was debated at length on April 26 to 29[1] and on the latter day[2] the question recurred on the first resolution of the majority, declaring sitting Member not elected.

As a substitute for this a resolution declaring contestant not elected was offered and disagreed to, yeas 104, nays 125.

Then the first resolution was agreed to, yeas 125, nays 71.

Then the second resolution of the majority, declaring contestant elected, was agreed to, yeas 124, nays 84.

Thereupon Mr. Lynch appeared and took the oath.

961. The Alabama election case of Lowe v. Wheeler in the Forty-seventh Congress.

A numbering of districts placed unnecessarily before names of candidates for Presidential electors was not held to be such distinguishing mark as to vitiate the ballot as to Congressman.

As to whether a distinguishing mark as to candidates for one office on a ballot invalidates the ballot as to other offices.

Reference to the Federal statute as to voting by ballot in its relation to State laws prescribing time, place, and manner.

On May 17, 1882,[3] Mr. George C. Hazleton, of Wisconsin, from the Committee on Elections, submitted the report of the majority of the committee in the Alabama case of Lowe *v.* Wheeler.

Upon the face of the official returns Mr. Wheeler had been declared elected by 43 majority, and received the certificate of election. The majority report thus sets forth the salient points of the case:

It is conceded that a much greater number of votes were received for Lowe than appears upon said certificate of the secretary of state, and it is practically admitted that if all the votes cast and received for Lowe had been counted and returned by the inspectors of the election the result would have shown the election of Mr. Lowe by a large majority.

As the case is presented to the committee, two leading and controlling questions arise for consideration and determination: First, as to the proper and legal form of the ballot; and, second, as to registration. The evidence discloses that in order to declare Mr. Wheeler elected by 43 majority the inspectors of the election at 14 out of nearly 200 precincts in said district had to reject and did reject in the count 601 ballots cast for the contestant.

The number of ballots so rejected is assumed in the arguments of contestee's counsel at about 515.

Several questions are discussed at length, both by majority and minority.

(1) As to the form of ballot.

The law of Alabama provided:

The ballot must be a plain piece of white paper, without any figures, marks, rulings, characters, or embellishments thereon, not less than 2 nor more than 2½ inches wide, and not less than 5 nor more than

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[1] Record, pp. 3316, 3376, 3415, 3441–3452.

[2] Journal, pp. 1151–1154.

[3] First session Forty-seventh Congress, House Report No. 1273; 2 Ellsworth, p. 61.

7 inches long, on which must be written or printed, or partly written and partly printed, only the names of the persons for whom the elector intends to vote, and must designate the office for which each person so named is intended by him to be chosen; and any ballot otherwise than described is illegal, and must be rejected.

Certain ballots were cast in this form:

FOR ELECTORS FOR PRESIDENT AND VICE-PRESIDENT:
State at large.
JAMES M. PICKENS.
OLIVER S. BEERS.
District electors.
1st District—C. C. MCCALL.
2d District—J. B. TOWNSEND.
3d District—A. B. GRIFFIN.
4th District—HILLIARD M. JUDGE.
5th District—THEODORE NUNN.
6th District—J. B. SHIELDS.
7th District—H. R. MCCOY.
8th Distfict—JAMES H. COWAN.
For Congress—Eighth district.
WILLIAM M. LOWE

These ballots were rejected, and the majority contend that they should be counted:

The contestee in this case insists that the expressions "1st district," "2d district," which appear on said ballot, do of themselves render the ballots illegal under said section 274, as amended.

This statute provides that the "ballot must be a plain piece of white paper, without any figures, marks, rulings, or embellishments thereon." We are unable to conceive how this form of ballot infringes upon either the letter or spirit of the statute. If we are to adopt the narrow and strained construction of this statute presented by the contestee, then we must assume that the legislature of Alabama intended to impair and destroy the integrity of the legal voting power of the State instead of securing it in its proper rights, because it would be impossible to prepare a ballot that would stand the test of such a construction and that could not be rejected at the caprice of a party inspector of elections for a reason as valid and strong as that presented in this case. Such a construction means simply disfranchisement of the citizen, and makes the law itself a fraud upon the freeman's boasted right of franchise. We quote with favor the following extract from the contestant's brief on this point:

"Does the use of the numerals or figures 1st, 2d, etc., make the ballot illegal? The intention of the statute is to be looked for before construing it. The word 'figures' must be construed in connection with the words 'marks, rulings, characters, embellishments.' If a construction so literal as that suggested by this objection be given this statute, no legal ballot can be written or printed, because the literal meaning of the word 'character,' for instance, would force one to print or write his ballot without making a letter, for a letter is literally a 'character.' A rejection of those ballots because they contained the letter 'o,' the 'figure' of a circle, used in spelling contestant's name, would not have been further from a correct construction of the statute than the one which holds that the numerals 1st, 2d, etc., are 'figures' within its meaning. The meaning is clear. The word 'figures' refers to 'embellishments, characters,' designs, pictures, or prints that would deprive the ballot of its secrecy. The ballot must not contain a flag, an eagle, or other device. It must be on plain white paper."

It has been a long-standing custom throughout the South, as well as the North, and especially in Alabama, to designate and form electoral tickets in just this way, and no one ever claimed before that it impaired the secrecy of the ballot or was subject to the feeble objection now made against it.

The act to amend 276 of the Code of Alabama declares that—

"One of the inspectors must receive the ballot, folded, from the elector, and the same passed to each of the other inspectors, and the ballot must then, without being opened or examined, be deposited in the proper ballot box."

The act to amend 286 of the Code of Alabama provides that—

"In counting out, the returning officer or one of the inspectors must take the ballots, one by one, from the box in which they have been deposited, at the same time reading aloud the names written or printed thereon and the office for which such persons are voted for; they must separately keep a calculation of the number of votes each person receives and for what office he receives them; and if two or more ballots are found rolled up or folded together so as to induce the belief that the same was done with a fraudulent intent they must be rejected; or if any ballot containing the names of more than the voter had a right to vote for, the first of such names on such ticket to the number of persons the voter was entitled to vote for, only must be counted."

We conclude, from reading and construing these sections together, that the rejected ballots were legal, and should have been counted.

Mr. Webster, in the Rhode Island case, stated admirably the two governing principles of the American system of suffrage:

"The first is that the right of suffrage shall be guarded, protected, and secured against force and against fraud.

"The second is that its exercise shall be prescribed by previous law; its qualifications shall be prescribed by previous law; the time and place of its exercise shall be prescribed by previous law; the manner of its exercise, under whose supervision (always sworn officers of the law), is to be prescribed. And then again the results are to be certified to the central power by some certain rule, by some known public officers, in some clear and definite form, to the end that two things may be done:

"First, that every man entitled to vote may vote; second, that his vote may be sent forward and counted, and so he may exercise his part of sovereignty in common with his fellow-citizens."

In a spirit as broad as this the bill of rights of the constitution of Alabama (sec. 34) declares that "the right of suffrage shall be protected by laws regulating elections," and prohibiting, under adequate penalties, all undue influences, etc.; and the constitution (art. 8, sec. 2) declares that "all elections by the people shall be by ballot."

The right of suffrage thus guaranteed by the constitution of Alabama can not be imperiled or destroyed by any legislative enactment whose construction makes this great constitutional right of the freeman to hang upon the caprice or whim of the partisan inspector of elections, which, if exercised, as in this case, must inevitably and for all time sacrifice all the substantial rights of citizen franchise to doubt, shuffling, and uncertainty.

The style in which they were printed does not violate the secrecy of the ballot. They were printed on plain white paper, without anything whatever upon them to betray their character or contents.

It is contended by the contestant that this peculiar construction of the law of Alabama had its origin in the following circular, issued and placed in friendly hands by the chairman of the Democratic committee, just before and on the day of election. The notice is at least significant:

"DEAR SIR: As soon as the polls are closed, inform the inspectors of the election that the Lowe tickets with Hancock electors on them are illegal. They contain the figures 1st, 2d, etc., designating the district. These are marks or figures which are prohibited by the election laws (see acts 1878–79, p. 72), and all such tickets should be rejected when the votes are counted, after the polls are closed.

[Indorsed on back in writing:]

"To be shown only to very discreet friends."

But we beg leave for a moment to refer to the bearing of the laws of the United States upon this question. Congress has the power (art. 1, sec. 4) "to make or alter" State regulations as to "the manner" of holding Congressional elections. In section 27, Revised Statutes, Congress has enacted that "all votes for Representatives in Congress must be by printed or written ballots." This provision as to the ballot is exclusive and supreme so far as it goes. The State can not alter it. See also sections 2012, 2017, and 2018 of the Revised Statutes. These sections relate to the appointment of supervisors and to the definition of their powers and duties in national elections.

The majority of the committee found that contestant had proven 601 votes as rejected in the manner discussed above.

The minority views, presented by Mr. F. E. Beltzhoover, of Pennsylvania, held:

If the legislature had merely prescribed the form of ballot, without declaring those cast in any other form to be illegal, or commanding their rejection, then, of course, it would be a question whether the requirement of the statute, that the ballot must contain only the names of the candidates and the designations of the offices, is directory or mandatory. And to the decision of that question such authorities as in McKenzie *v.* Braxton, Smith, 19, would be applicable. But when the law makes a ballot not cast in a prescribed form illegal and requires its rejection, there is no place for the question whether the statute is mandatory or directory. The ballot which is not in the prescribed form is illegal, and must be rejected, because the law in terms declares it to be illegal and commands its rejection.

The legislature of Alabama, exercising a power expressly conferred by the Federal Constitution, had prescribed the mode of choosing Presidential electors as follows:

"On the day prescribed by this code there are to be elected, by general ticket, a number of electors for President and Vice-President of the United States equal to the number of Senators and Representatives in Congress to which this State is entitled at the time of such election."

Under this statutory provision there could be no choice of "district elector" for the "first district" or "second district" or for either of the other eight districts designated. The ballots in question each contained the designations of eight different offices unknown to the law; that is to say, the offices of district electors for the eight districts of the State. They were deposited in the ballot boxes in violation of the requirement of the statute that the ballot shall contain only the names of the candidates and the designations of the offices.

It is submitted, as an incontrovertible proposition, that this statutory provision, for the choice of Presidential electors, makes the office of each and every Presidential elector an office for the State at large, and that the office of district elector is unknown to the law of Alabama. It is submitted, as a second incontrovertible proposition, that the ballots in question were ballots for two electors from the State at large, and for eight district electors, one for each of eight districts. If these two propositions are correct, so also must be the conclusion that eight of the offices designated on these ballots are unknown to the laws of the State, and that the designation of these eight offices was a violation of that requirement which excludes from the face of the ballot everything except the names of the candidates and the designation of the offices voted for, and that therefore, under the law, it was the duty of the inspectors to reject these ballots.

The minority contend that this provision for the law requiring the electors to be chosen by general ticket is peculiar to Alabama; and also claims that by the evidence the figures in question were shown to be in fact distinguishing marks.

Mr. A. A. Ranney, of Massachusetts, one of the majority, filed individual views, in which he says, in regard to the alleged distinguishing marks:

To sustain the objection made to the ballot by contestee would shock both the moral and the legal sense of every fair-minded man.

My conclusion is that the course pursued was a perversion of the statute, and the objection was seized upon as a pretext and induced by outside manipulation.

In any event, it would seem that the part which relates to the candidate for Congress may be regarded as a separate ticket.

A New York statute once required State and county officers to be voted for on separate ballots. At an election held under that statute a large number of ballots were cast for "Cook, for State treasurer," which had at the bottom of them "for county judge, Ezra Graves." These ballots were alleged to be illegal and the election contested. The supreme court in passing on the question said:

"I have not been able, after the most deliberate consideration of the objection raised, to perceive that there is anything in it. The ballot for every office on a ticket containing the names of more than one officer must be regarded as a separate ballot." (People *v.* Cook, 14 Barbour, 259, 299.)

The case was carried to the court of appeals and there affirmed. The court said: "The Speiman ballot, headed 'State,' had at the bottom 'for county judge, Ezra Graves.' Whatever effect this had on the candidate for county judge, it had none on the candidates on the State ticket." (People *v.* Cook, 8 N.Y., 4 Selden, 68, 85.)

962. The case of Lowe v. Wheeler, continued.

A vote received by election officers is presumed to be legal and is not to be impeached by a question of registration except on indubitable proof.

Instance wherein the minority views proposed that the poll should be purged of illegal votes by deductions pro rata.

(2) Sitting Member claimed that several hundreds of persons who were not registered as required by law voted, and that on this account 1,846 votes should be deducted from contestant's vote and 852 from his own vote.

The majority report thus discusses this question:

In regard to the registration of voters the facts as shown by the testimony do not sustain the claims made by the contestee. His testimony does not establish what he alleges it does. It is largely secondary and of a hearsay character at the best. The fact is that in many instances where he claims registration was not made it was made, and in few instances, if any, does he establish the identity of the voter wherein he claims nonregistration.

But whatever may be the facts upon this question of registration, we are clearly of the opinion that the constitution of Alabama does not make registration an absolute condition or prerequisite of voting, nor do the statutes of the State.

The provisions of the Alabama constitution (art. 8, sec. 5) in regard to registration is subject to two constructions: One making registration constitutionally essential to voting and the other making registration essential only "when it is so provided" by law. The latter construction is the one taken by contestant. It is the plainest and most satisfactory construction that can be derived after giving full force to all the words in the section. On the contrary the construction given by the contestee would eliminate the words "when it is so provided" and make the section read as follows:

"The general assembly may, when necessary, provide by law for the registration of electors throughout the State or in any incorporated city or town thereof, and no one shall vote at any election unless he shall have registered as required by law."

This reading of the section with the words "when it is so provided" eliminated is the construction given by the contestee to the entire section. But these words can not be properly eliminated. They stand out in the section to qualify and limit its meaning. They must be given due consideration. They declare, in effect, not that registration shall be a prerequisite for voting, but that, when the general assembly shall so provide, no person shall vote unless registered—meaning that the legislature may make registration a prerequisite for voting, and that when "it is so provided" no person shall vote without being thus registered.

But the legislature has not seen fit to make such provision. Registration is not a prerequisite. It is not compulsory. It is not even put down as one of the qualifications of an elector.

The registration law of Alabama contains the following provision:

"SEC. 233. *Registration on election day, and certificate.*—The assistant registrars shall be present at the voting precinct or ward for which they are respectively appointed, on the day of election, to register such electors as may have failed to register on any previous day in their precincts or wards, which registration must be done, in every respect, according to the form prescribed; and the assistant registrar shall furnish to each elector who may register on the day of election a certificate of registration, which shall be in the following form:

"I, _____, assistant registrar, do hereby certify that _____ has this day registered before me as an elector.

"(Signed) _____, *Registrar.*

"Which certificate, signed by the registrar, shall be sufficient evidence that such elector is registered; and in case such assistant registrar, for any cause, is unable to attend, or there be a vacancy in the office of assistant registrar for such precinct or ward, the county registrar shall appoint some competent person as assistant registrar for that day; and if no appointment be so made by 10 o'clock of that day, then the inspectors of election may appoint an assistant registrar, who may qualify and act as such for that day; but this section shall not apply to incorporated towns or cities having a population of more than five thousand inhabitants, except as is hereinafter provided by this chapter."

Every voter that complied with this condition complied with the requirements of the registry law of Alabama, and was as much entitled to vote as though he had been registered days before the election. In the face and eyes of such a provision, and in the absence of such proof as would show that the officers who had registration in their charge had deliberately violated their oaths, how are we to assume that this provision of law was not complied with in all cases of voters not embraced in the general registry? As to the presumption that the officers of the law charged with a duty performed it, we cite McCrary on Elections, page 231; to the election case of Finley *v.* Bisbee, volume 1, third session Forty-fifth Congress, House Reports.

We conclude, therefore, and we think rightfully, that the votes which the contestee claims should be thrown out on account of alleged nonregistration can not be deducted from contestant's votes; and, besides, that they could not be taken pro rata from the whole vote cast, because there is no evidence which establishes definitely and identically for whom they voted. It was held in Curtin *v.* Yocum, volume 2, House Reports of Forty-sixth Congress, where an elector votes without challenge, his vote can not afterwards be rejected, because his name may not be found on the registration list, but that it will be presumed the officers of the election did their duty till the contrary is proven.

Mr. Ranney, in his views, says:

There seems to be no decision of the State courts on the point raised, and the question becomes immaterial, unless the necessary basis of facts is first established. I am inclined, however, to the opinion that, under the constitution and the statutes passed thereunder (both being in harmony), that registration was designed as a reasonable regulation, although not prescribed as a qualification.

The question is not free from doubt, but, considering the object and purposes subserved by a system of registration, I am inclined to so hold.

It is quite doubtful whether the law of Alabama renders void a vote of a nonregistered elector when once cast and received. But for the purposes of the present case I may safely assume that registration was intended as a prerequisite, and so regard it.

Analogous questions were discussed in the case of Finley *v.* Bisbee in the Forty-sixth Congress and in Curtin *v.* Yocum in the Forty-sixth Congress. They furnish, however, no substantial authority beyond the general doctrine discussed, as the constitution and statutes of those States differ materially from those of Alabama.

While, for the purposes of this case, I assume that registration is a prerequisite in Alabama as a reasonable regulation, I find that the proof does not sustain the charge made by the contestee.

After quoting from documents to show the great interest in the election and the care exercised by sitting Member's party, Mr. Ranney says:

It is hardly probable that so many persons would openly violate the law or be allowed by sworn officers to do so. The penalty prescribed for the fraudulent voter is severe under the laws of Alabama, although it is said to be quite light comparatively as regards the officers of election. They had with them in each precinct, as must be assumed under the provisions of the law cited, full certified copies of the registration lists with the names of the electors alphabetically arranged thereon, and the assistant registrar of the precinct was required to be present at the polls with papers ready to register all electors who had not been registered prior to that day, and it may be assumed that he was present or that some other person was appointed by the inspectors to attend to that duty in his absence.

The vigilance exercised generally is illustrated by what was done in regard to the so-called marked ballots already considered. Similar activity is probable in respect to the registration and challenging.

It is not now claimed or shown that any of those who voted were not in fact qualified voters and entitled to vote otherwise or that any of them were challenged. No one of them is called as a witness to prove his identity or failure to register.

All this renders the claim of contestee very improbable. It would require proof of an indubitable character.

"It is the settled law of elections that where persons vote without challenge it will be presumed that they were entitled to vote, and that the sworn officers of the election who received their votes performed their duty properly and honestly, and the burden of proof to show the contrary devolves on the party denying their right to vote." (Report in Finley *v.* Bisbee, Forty-fifth Congress.)

We call attention to the case of Perry *v.* Ryan, 68 Illinois, 172.

"Where a person votes at an election without having been registered and without any proof of right, if it does not appear he was challenged or any objection made to his vote the presumption must be that he was a legal voter and was known to the judges of election."

In 83 Illinois, 498, where a registry law very similar to the law now under consideration was construed by that court, it was held:

"The presumption of the legality of a vote in no way depends upon the omission to challenge or object to it or any presumed knowledge of the judges of election, but it arises from the fact of its having been deposited in the ballot box. When once deposited, it will be presumed to be a legal vote until there is evidence to the contrary."

Mr. Ranney thus states his objections to the evidence:

Now let us see what the proof adduced is.

Contestee has procured and put in evidence certain papers certified to by the probate judges in five several counties, respectively, purporting to be copies of the registration lists for the precincts involved, and also of papers called the poll lists from the same precincts. His claim is that he produces certified copies of all the registration lists of these precincts, which show all the persons registered and qualified to vote in the same, and poll lists showing the names of all those who did vote as written down by the clerks at the election. By comparing these papers in each precinct named in his table, cited hereinbefore, he finds, as he says, and as witnesses who have compared them swear, 2,698 names in the aggregate on the poll lists which are not on the registration lists, and he contends that it follows that they were not registered, and their votes illegal.

The minority of the committee, in their report (p. 27) in Bisbee *v.* Finley, an analogous issue, said that "the evidence relied on was wholly inadequate, being altogether inferential." But we go further:

Now, in order to have this proof satisfactory and sufficient it must at least be shown by affirmative, competent, and credible evidence that the records contain copies of all of the original and supplementary lists of registration made out by the registrars and assistant registrars since 1875 and before the election of November 2, 1880, together with all that were made on election day at the polls by the assistant registrars, or those appointed in their place by the inspectors in the absence of the registrar. Unless we have copies of all the registration books and lists, we have not got the proper basis for comparison.

We must next have all of the requisite poll lists duly proved and properly authenticated.

Upon examining the copies certified to, we do not find, save in a few cases, what answers these requirements.

After showing wherein the registration and poll lists were defective as evidence, Mr. Ranney concludes:

We are asked to presume that all registrars did their duty; that judges of probate had all the papers which the law provided should be sent to them; that the poll lists not signed were the genuine and true ones, when they could be so easily manipulated without complicity on the part of the judges, in order to overcome all the presumption in favor of the legality of the votes cast. I can not do it in the face of so much evidence as appears to weaken those presumptions invoked by contestee.

There is another consideration which ought to be noted as a very strong reason at least why contestee should be held to the strictest rules of evidence, if not as justifying the claim that the ballots of voters not on the registration lists apparently should not now be rejected after they were offered and deposited without challenge or objection at the time. Under the law of Alabama, as already stated, any qualified voter, if not on the copy of registration lists with the inspectors conducting the poll, and challenged, may register at the time and on the spot, or take the requisite oath and then rightfully vote. If he is not challenged, and is allowed to vote without doing this, the failure of duty on the part of the registrar or inspectors may unjustly deprive the elector of his vote. The case would perhaps come within the spirit, if not the strict letter, of section 2007 of the Revised Statutes of the United States.

The remarks of Mr. Calkins in case of Curtin *v.* Yocum, although not in all respects applicable to this case, are pertinent and forcible, and we quote them:

"I call the attention of the Members of the House especially to the conclusion reached by Judge Briggs in construing this law. He says: 'By accepting the vote,' referring to the nonregistered voter who presents himself at the polls without an affidavit, etc.—'by accepting the vote without demanding the proof they deprive the voter of the opportunity of furnishing it.' To construe the law as contended for by my friend from Pennsylvania (Mr. Beltzhoover) makes it a mere trap, for the reason that the voter presumes, or he has a right to presume, that he is registered. He has lived in the precinct the time required by law; he has paid his tax; the assessor has been to his house; he knows his name ought to be on the registry list, and he goes up to the ballot box with the ballot in his hand. They take his ballot and deposit it in the ballot box, and afterwards, when he can not furnish the proof, it is contended his vote is an illegal one, while if the election officers had called his attention to it at the moment he could have supplied the evidence required and established his right to vote to the mode prescribed. But that evidence was not demanded. He voted knowing that he had a legal right to vote, but the legal evidence of his right was not required of him by the election officers. And applying the same doctrine as in Wheelock's case, 'you can not deprive the legal voter of the right to vote by reason of the failure of the officer to do his duty,' and it seems to me that the position is unassailable."

Regulations may be merely directory, and if the officer of election or the voter does not follow them they do not necessarily vitiate the vote when deposited and received.

The present case is a very strong one for the application of that rule, in the absence of any statute making registration a prerequisite, and where the system of registration is so imperfect and loosely managed.

The minority views contend that the majority have misconstrued the constitution:

It will be observed that the language of the constitution is that "the general assembly may, when necessary, provide by law for registration, * * * and when it is so provided no person shall vote unless he shall have registered as required by law."

Now, what do these words, "so provided," refer to? Plainly to registration. That is to say, the general assembly was authorized to provide by law for registration; to determine the mode and requisites of registration generally and particularly. The registration had reference to persons who were entitled under the constitution to vote. It has nothing whatever to do with the qualifications of the voter, because those qualifications are fixed by the constitution itself, and could not be interfered with by any act of the legislature. And therefore the concluding words of this section are unmistakable in their meaning, "no person shall vote at any election unless he shall have registered as required by law;" and that meaning is that the constitution having fixed the qualifications of the voter, this registration law was intended to furnish the evidence of the right of the party to vote, to wit, his being registered as a voter according to the forms and requirements of this act of the legislature. This act of the legislature was provided for by the constitution, not to determine the qualifications of the voter, but to furnish the qualified voters with the evidence that they were qualified and entitled to cast their ballots; and the constitution simply provides, and no other rational meaning can be attributed to it, that registration, and that alone, shall be evidence of the fact that the party is a qualified voter, and therefore any person who is not registered is clearly an illegal voter under the constitution and laws of the State of Alabama. Registration is the act of the voter. If he fails to register, it is his own fault, and he can not complain, nor can anyone else, if his right to vote is lost by reason of nonregistration.

After a careful examination of the testimony in this case, we believe that it conclusively shows that not less than 2,400 persons voted in this district who were not registered, and that not less than 1,000 of them voted for the contestant.

The minority views further say that if it be conceded that there was doubt as to how the nonregistered voters voted, the law from McCrary afforded a solution:

In purging the polls of illegal votes, the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number. (Shepherd *v.* Gibbons, 2 Brewst., 128; McDaniel's case, 3 Penn., L. F., 310; Cushing's Election Cases, 583.) Of course, in the application of this rule such

illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each. Thus, we will suppose that John Doe and Richard Roe are competing candidates for an office, and that the official canvass shows:

	Votes
For John Doe	625
For Richard Roe	575
Total vote	1,200
Majority for Doe.	

But there is proof that 120 illegal votes were cast, and no proof as to the person for whom they were cast. The illegal vote is 10 per cent of the returned vote, and hence each candidate loses 10 per cent of the vote certified to him. By this rule John Doe will lose 62½ votes and Richard Roe 57½ votes and the result, as thus reached, is as follows:

	Votes
Doe's certified votes	625
Deduct illegal votes	62½
Total vote	562½
Roe's certified vote	575
Deduct illegal votes	57½
Total vote	517½
Majority for Doe.	

Applying this principle, we here submit a table showing the number of votes cast for contestant and contestee at various precincts, the number of nonregistered voters, and the pro rata of deductions from each party on account of the nonregistered voters.

The minority deny that the poll lists and registration lists are inadequate as proof.

963. The case of Lowe v. Wheeler, continued.

Discussion as to the evidence required to justify taking into account ballots rejected wrongfully by election officers.

As to the use of heavy type as a distinguishing mark on ballots.

In regard to minors and nonresidents as voters, the mere opinion of a witness, who does not state facts to justify it, is insufficient.

In regard to convicts as voters, the record of conviction is the only evidence acceptable to the House unless the record has been destroyed.

(3) The minority in their views objected strongly to the testimony by which the majority determined the number of ballots rejected, because of the figures designating the districts of the Presidential electors:

We think that none of the evidence by which he attempts to prove these facts is legal. The witnesses merely give their recollection on the subject. Many of them made out returns one or more days after the election was over, and in many cases they admit that even these returns were made out from hearsay, and many of them show by their evidence that their entire knowledge on the subject is hearsay.

The law of Alabama (see Code, par. 288, printed p. 1215 of the record in this case) provides that all rejected ballots shall be rolled up by the inspectors and labeled as rejected ballots, and that they shall be sealed up together with the other ballots, and securely fastened up in the box from which said ballots were taken when they were counted. The answer of the contestee distinctly alleged that where votes for William M. Lowe were discarded it was so stated in the returns made by the inspectors. In no instance did the contestant put these returns in evidence or give any reason for not doing so. Nor did he put the ballots which he claimed were rejected in evidence, nor does the record show that he gave any reason for not doing so.

Furthermore, not one of the 49 depositions was in any way certified by any commissioner.

None of the depositions has any certificate of any kind whatever.

It is provided in the Revised Statutes of the United States as follows:

"SEC. 127. All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward the same, by mail, addressed to the Clerk of the House of Representatives of the United States, Washington, DC."

The contestee objected to these depositions at the commencement of the present session of Congress on the ground that they were not certified according to law, and has persisted in that objection until the present time.

Again, none of these alleged depositions was reduced to writing in the presence of the notary.

The provision of the Revised Statutes of the United States is:

"SEC. 122. The officer shall cause the testimony of the witnesses, together with the questions proposed by the parties or their agents, to be reduced to writing in his presence and in the presence of the parties or their agents if attending, and to be duly attested by the witnesses respectively."

The corresponding provision of the judiciary act of 1789 is in the following words:

"And every person deposing as aforesaid shall be carefully examined and cautioned and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence."

The provision that the deposition must be reduced to writing in the presence of the officer is common to the contested election law and the judiciary act of 1789. It is obvious therefore that decisions of the Federal courts on the provision of the judiciary act for the writing out of the deposition will be authorities in cases which may come before this committee under the corresponding provision of the statute relating to contested elections.

In Bell *v.* Morrison, 1 Peters, 351, Judge Story, delivering the opinion of the court, held that under section 30 of the judiciary act a deposition is not admissible if it is not shown that the deposition was reduced to writing in presence of the magistrate.

The same doctrine is maintained by the following authorities: Edmondson *v.* Barret, 2 Cranch C. C., 228; Pettibone *v.* Derringer, 4 Wash., 215; Rayner *v.* Haynes, Hempst., 689; Cook *v.* Burnley, 11 Wall., 659; Baylis *v.* Cochran, 2 Johns. (N. Y.), 416; Summers *v.* McKim, 12 S. & R., 404; United States *v.* Smith, 4 Day, 121; Railroad Co. *v.* Drew, 3 Woods C. Ct., 692; Beale *v.* Thompson, 8 Cranch, 70; Shankriker *v.* Reading, 4 McL., 240; United States *v.* Price, 2 Wash. C. Ct., 356; Hunt *v.* Larpin, 21 Iowa, 484; Williams *v.* Chadbourne, 6 Cal., 559; Stone *v.* StillweU, 23 Ark., 444.

(4) Sitting Member also set up a counterclaim that a large number of ballots cast for contestant had his name, "William M. Lowe," printed in type so much heavier than the other names as to constitute, in fact, a distinguishing mark. The minority sustain this contention, saying:

The question here presented is a new question. It was not considered by the Committee on Elections in the Mississippi case of Lynch *v.* Chalmers. The differences between the statutory provisions of Mississippi and Alabama and between the ballots in the two cases are such that a decision in one of the cases will not necessarily furnish a precedent for the other. The Mississippi statute is in the following words:

"All ballots shall be written or printed in black ink, with a space not less than one-fifth of an inch between each name, on plain, white, printing newspaper, not more than 2½ nor less than 2¼ inches wide, without any device or mark by which one ticket may be known or designated from another, except the words at the head of the ticket; but this shall not prohibit the erasure, correction, or insertion of any name by pencil mark or ink upon the face of the ballot; and a ticket different from that herein prescribed shall not be received or counted."

As we have seen, the Alabama provision is that——

"The ballot must be a plain piece of white paper, without any figures, marks, rulings, characters, or embellishments thereon, not less than 2 nor more than 2½ inches wide and not less than 5 nor more than 7 inches long, on which must be written or printed, or partly written and partly printed, only

the names of the persons for whom the elector intends to vote, and must designate the office for which each person so named is intended by him to be chosen; and any ballot otherwise than described is illegal and must be rejected."

The provisions of the Mississippi law applicable to the case of Lynch v. Chalmers are: (1) That the ballot shall be without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the ticket, and (2) that a ticket different from that prescribed shall not be received or counted. The provisions of the Alabama statute applicable to the case now on trial are: (1) That the ballot must be without marks and must contain only the names of the persons for whom the elector intends to vote and the designations of the offices, and (2) that any ballot otherwise than as described is illegal and must be rejected. In the Mississippi case the grounds of objection to the ballots were that certain printer's dashes separated different headings of the ticket. In this case the grounds of objection are that the ballots contained the designations of eight offices unknown to the law and that they were so marked, by the use of peculiar paper, ink, and type, as to be readily distinguished from other ballots, even when folded. The differences between the two cases are too palpable to require or justify any comment.

What we have said is sufficient to show that these ballots are illegal, but there is other evidence in this case which makes their rejection still more imperative.

The evidence shows that Mr. Lowe's supporters used the marked ballots, together with violence and terrorism, to destroy secret voting.

The evidence shows clearly that the using of these ballots in the precincts where it is claimed they were rejected was for the unlawful purpose of preventing a secret ballot.

It is evident that with these ballots secrecy was impossible and that such ballots could be identified in the hands of the voters.

It is certain that when voters are abused, terrorized, and ostracized for not voting as their leaders dictate, the weaker classes will hesitate before going to the polls with ballots different from those ordered by their leaders.

(5) The sitting Member charged that certain persons not qualified as electors voted for contestant. The majority of the committee thus ruled on this point:

In regard to minors and nonresidents, the mere statement of a witness that an elector is one of this class seems to be the sole reliance of the contestee. This is not sufficient. The witness must give facts to justify his opinion.

In regard to convicts, the record of conviction is the best evidence and the only evidence to be accepted by the House, unless the loss or destruction of that record is shown. In no instance has the contestee produced the record or sought to account for its absence.

964. The case of Lowe v. Wheeler, continued.

The law providing for representation of both parties on the board of elections officers being violated and the vote being impeached, the House rejected the return.

The return being rejected, votes were proven aliunde on testimony of the voters, corroborated by a witness who saw them vote.

Confidence in the integrity of the poll being destroyed, the returns are rejected.

The returns being rejected, the vote aliunde was proven entirely by the testimony of the voters.

Instance wherein a return was rejected and count aliunde admitted without request for the same in contestant's notice.

(6) At Meridianville precinct every State officer was a member of sitting Member's party, in violation of the law, which provided for a representation of both parties. The box gave contestant 47 votes, but a witness, who was partially

corroborated, presented a list of 67 names of voters whom he saw take tickets for contestant and vote them. Also 55 voters testified that they voted for Lowe. So the majority consider that the evidence of fraud was such as to require the rejection of the return, and they credit the contestant with the 55 votes proven aliunde.

(7) As to Laniersville the majority report says:

> At this precinct, as at Meridianville, all the State officers, sheriffs, and clerks were ardent partisans of the contestee; the contestant had no friends among them. The poll list shows that 188 persons voted at this box. Yet, the inspectors, in defiance of law and mathematics, counted for contestee 142 votes and for contestant 57 votes, making 199 votes, or 11 more ballots in the box than names on the poll list. The blundering fraud is apparent on the face of the returns.
>
> The inspectors certify that on counting the ballots after the election there were 11 more ballots in the box than were names on the poll list, and that they deducted 2 Republican ballots and 9 Democratic ballots, because they were found folded together. But the certificate of the probate judge, also a partisan of the contestee, shows the vote cast and counted at this box as follows:
>
> "Ballots counted for Wm. M. Lowe, 56; ballots counted for Joseph Wheeler, 142."
>
> If this be the truth, there must have been not only 199 ballots, an excess of 11, but there must have been 210 ballots, an excess of 22 ballots. The fact, however, remains that only 188 names are upon the poll list, and that, therefore, only that number of voters could have legally voted and only that number of ballots could have been honestly counted. The inspectors, nevertheless, after deducting 11 votes in excess of the poll, return 57 for the contestant and 142 for the contestee. Who can give this return a fair and honest explanation?
>
> But the show of fraud on the face of the returns is made apparent, if not conclusive, by the evidence that the box was stuffed in the interest of the contestee, and the integrity of the election at that poll substantially destroyed.

The contestant called the voters, and 128 swore that they voted for contestant. So the committee credit him with that number. The minority object:

> The majority of the committee, however, reject this box, without a request to that effect in the contestant's notice, and then, still without a request, and without a particle of legal evidence, count for Mr. Lowe 128 votes, and give Mr. Wheeler none, although 132 votes were cast and counted for him, and Mr. Lowe's own witness swears that some 30 votes were cast for Mr. Wheeler.

In accordance with their conclusions as to law and fact, the majority of the committee find that the contestant actually received a majority of 847 votes, and accordingly report resolutions giving to him the seat.

The report was debated at length on June 2 and 3, 1882,[1] and on the latter day[2] a motion to recommit, with instructions to examine with reference to certain tissue ballots, was disagreed to, yeas 90, nays 129. Then the resolutions reported by the majority of the committee were agreed to, yeas 148, nays 3, not voting 140—the minority evidently attempting obstruction by refraining from voting.

Mr. Lowe thereupon appeared and took the oath.

965. The Alabama election case of Smith v. Shelley, in the Forty-seventh Congress.

Instance wherein votes of previous elections and nature of population were cited to establish a presumption as to the political preferences of the district.

When by a conspiracy of officials ignorant election officers were

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[1] Record, pp. 4455, 4491–4505.

[2] Journal, pp. 1397–1399.

installed and then their imperfect returns rejected contestant was permitted to prove the vote aliunde by oral evidence of inspectors, etc.

Distinction between proof required to set aside returns of sworn officers and that which will establish a vote aliunde when returns do not exist.

A contestant dying after a report in his favor, the House unseated the returned Member and declared the seat vacant.

Form of resolutions when a contestant who is entitled to the seat dies before the case is heard by the House.

On June 27, 1882,[1] Mr. W. G. Thompson, of Iowa, from the Committee on Elections, submitted the report of the majority of that committee in the Alabama case of Smith *v.* Shelley. At this election there had been three candidates, but the contest had been between sitting Member and contestant, the former being seated by a returned majority of 2,651 over contestant.

After reviewing the condition of the district, which had been constituted to relieve other districts of a preponderating colored population, and was therefore largely dominated by that class of population, the majority report claims that the colored voters were almost entirely Republican, and that the voters of the district were Republican by a large majority. Figures of the votes in other elections are cited to prove this, although the minority views, presented by Mr. F. E. Beltzhoover, of Pennsylvania, denied that any such assumption might be made.

The majority report charges a conspiracy, developed as follows:

> And your committee can not escape the conviction, from the testimony, that a thoroughly organized and preconcerted plan and purpose had been made and understood by and amongst the Democratic partisans and supporters of Mr. Shelley, that in all the precincts where the Republican majorities were large and Democratic voters very few that the Democratic inspectors of such precinct should fail and refuse to open the polls on the day of election, and thereby leave the work of so doing in the hands of colored voters whose education was such as to make it quite probable that some clerical error would occur, so as to furnish an excuse for rejecting the box entirely.
>
> Strong corroborative evidence of this is found in the further fact that the county supervisors refused to appoint any Republican in such precincts selected by the Republican county committees, but invariably selected one who was unable to read or write, or who, however honest in intention, would not be competent to make out the required returns in a proper and legal manner, or technically correct in all particulars, and the evidence conclusively shows that the Democratic supervisors, composed of the sheriff, probate judge, and clerk of the court of the county, did not fail to find a pretext for refusing to count such boxes, where, by sacrificing one vote for the Democrat, they would destroy 360 for the Republican. This the committee, however much they may admire the heroic effort for a fair vote and honest count, can not in this case allow the sacrifice.

This alleged conspiracy was operative at fourteen precincts, seven in Dallas County, four in Loundes County, and one each from the counties of Wilcox, Perry, and Hale. In these fourteen precincts the majority of the committee found that 4,029 votes were actually cast for Mr. Smith, and 282 for Mr. Shelley.[2]

It was by rejecting the returns of these votes that the canvassing officers of the several counties so changed the aggregate of votes in the district as to give an official majority for sitting Member.

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[1] First session Forty-seventh Congress, House Report No. 1522; 2 Ellsworth, p. 18.

[2] See remarks of Mr. Ranney, Appendix of Record, p. 627.

The conditions leading up to this rejection are thus set forth in the views of Mr. A. A. Ranney, of Massachusetts, one of those concurring in the majority report:

Under the election law of Alabama it is made the duty of the judge of the probate court, the clerk of the circuit court, and the sheriff of each county, thirty days previous to any election, to designate three inspectors to hold an election in each voting precinct, two of which shall be members of opposing political parties. The sheriff is made county returning officer, and it is made his duty to send to each of the precincts in the county ballot boxes for the purposes of the election, and he is the peace officer who is to be present, in person or by deputy, at each election precinct. (Ala. Code, sec. 258, art. 2; sec. 259.)

It appears that the judge of the probate court, the clerk of the circuit court, and the sheriff, whose duty it was to appoint precinct inspectors of election, in all of said counties, were Democrats in politics and supporters of the contestee; and the same officers are by law made the county supervising board to canvass the returns made by the precinct inspectors of election appointed by themselves.

The legal questions arising are satisfactorily shown in the following passage from Mr. Ranney's views descriptive of the proceedings in Dallas County:

It appears that previous to the election the officers whose duty it was to appoint precinct inspectors in Dallas County, one of whom should be of the opposing political party, were notified in writing and requested to obey the election law of Alabama in this respect, and give an opportunity to suggest some suitable men to act for the Republican party, but they refused to do so. One of them (the sheriff) stated "that if he received forty such notices he would pay no attention to them." (Depositions of Roundtree and Judge Wood.)

It appears that in seven precincts of Dallas County, to wit, Pine Flat, River, Mitchell's, Chillatchie, Cahaba, Martin's, and Lexington, about which testimony has been taken, and for each of them three inspectors were appointed, two of whom were white Democrats and one a negro, who was supposed to be a Republican on account of his color; that of the two white Democratic inspectors for each of the seven precincts it appears that they were not present on the morning of the election to open the polls, and the white Democratic inspectors, appointed by county authority, failing to be present, the colored electors present, under the election statute of Alabama, opened the polls and held elections in said precincts; that the returns made of the result to the board of county supervisors in Cahaba, Pine Flat, Mitchell's, River, Lexington, and Martin's were not in statutory form, and were for informality rejected, and the vote not counted by the board of county supervisors, and that the sheriff, the returning officer, refused to receive the ballot box from Chillatchie precinct because it was a cigar box, and it was not before the supervising board. (Record, p. 133.)

It appears that no box was furnished as required by law. (Record, p. 141.) The sheriff swears that he sent boxes. If he did the Democratic inspectors had them probably and did not produce them, as they did not act.

The returns being informal, irregular, and insufficient, and therefore defective, went for nothing, and the votes cast not being counted for the contestant or the contestee, and the ballot box from Chillatchie not being received, evidence is resorted to prove the actual vote, under the well-recognized and settled rule stated by McCrary in his work on Contested Election Cases (sec. 302, pp. 268 and 269; Littlefield *v.* Green, 1 Chicago Legal News, 230); Brightley's Election Cases, 493; McKenzie *v.* Braxton, Forty-second Congress; Giddings *v.* Clark, Forty-second Congress. (See sec. 304, p. 270, and sec. 81, p. 104, McCrary on Contested Election Cases.) In Alabama, where this contested election case arose, the supreme court of that State lay down the law of contested elections as follows:

"It is the election that entitles the party to office, and if one is legally elected by receiving a majority of legal votes, his right is not impaired by any omission or negligence of the managers subsequent to the election. (State ex rel. Spence *v.* The Judge of the Ninth Judicial Circuit, 13 Ala. Rep., 805.)

"Nor will a mistake by the managers of the election in counting the votes and declaring the result vitiate the election. Such a mistake may and should be corrected; the person receiving the highest number of votes becomes entitled to the office. (State ex rel. Thomas *v.* Judge of the Circuit Court, 9th Ala. Rep., 338.)"

The returns from Pine Flat, River, Mitchell's, Cahaba, Martin's, and Lexington precincts of Dallas County being declared irregular and informal, as not coming up to statutory requirements, were not counted by the board of county supervisors for either candidate for Congress, and the ballot box from Chillatchie precinct being refused by the sheriff was not before the board of county supervisors and was not counted by them; therefore, in such a case each candidate was required to prove the actual number of ballots east for him.

The contestant introduced evidence as to the votes cast for him at the seven precincts; but sitting Member introduced no proof whatever to rebut the proof made by contestant in this respect.

The method by which contestant sought to prove the vote cast was by taking the testimony of the inspectors, supervisors, and others who were present at the polls, saw the ballots cast, counted and tallied, and knew whereof they spoke.[1]

There were generally two or three witnesses to the main facts, and the vote as proved accorded with the reports of the United States supervisors; but these reports were not relied on as substantial evidence, and the competency of it was questioned somewhat in the committee.

The minority assailed this evidence:

As the returns from the precincts mentioned were rejected, and therefore not included in ascertaining the vote of the county, it was clearly competent for the contestant or contestee to establish the vote by evidence if at any of them a lawful election was held. The contestant attempts to establish his vote, and it is for us to ascertain whether or not he has succeeded.

As the sitting Member held the seat by a title prima facie sufficient, it is incumbent on the contestant to affirmatively prove this title defective. This rule is well stated in the celebrated New Jersey case (1 Bartlett, pp. 24 and 26):

"Before a Member is admitted to a seat in the House something like the judgment of a court of competent jurisdiction has been pronounced on the right of each voter whose vote has been received, and in order to overturn the judgment it must have been ascertained affirmatively that the judgment was erroneous. * * * When the polls are closed and an election is made, the right of the party elected is complete; he is entitled to the returns, and when he is admitted there is no known principle by which he can be ejected, except upon the affirmative proof of the defect in his title. Every effort to oust him must accomplish it by proving a case. The difficulties in his path can form no possible reason why the committee should meet him half way. The rule of reason requires that he should fully make out his case even though it require proof of a negative, and such is also a rule of Parliament in analogous cases."

The burden of proof being upon the contestant, by what character of evidence should he be required to prove his case? The ordinary rules of evidence must of course apply to election contests as well as to other cases. (McCrary on Elections, sec. 306.) One undeviating rule of evidence is that the best evidence must be produced of which the nature of the case will admit; that secondary can not be substituted for primary evidence unless it be shown that the litter is not within the power of the party, and the former should certainly not be substituted for the latter when it is apparent that the primary evidence is within the reach of the party and is by the law placed within his power.

Now, there are certain documentary evidences of the election which the law of Alabama provides should be preserved for the sole purpose of furnishing evidence of the vote in case of contest; these are the ballots which were cast at the election. The ballots cast at each voting place, together with one poll list, are required to be carefully sealed up in the ballot box and delivered into the custody of one of the inspectors, who is required to retain it for sixty days intact, and then to destroy the contents of the box, unless he is notified that the election of some officer for which the election was held will be contested, in which case he must preserve the box for such election until such contest is finally determined, or until such box is demanded by some other legal custodian during such contest. (Sec. 298, Code of Alabama.)

It will be seen that the ballots are required to be preserved expressly for the contestant. These

[1] Mr. Ranney's speech, Appendix of Record, p. 627.

are the evidences of the result of the election which the law provides. In addition to this the certified poll lists statements, etc., which are returned by the board of inspectors of each precinct and the county board of canvassers, are required to be retained intact in the office of the judge of probate. (Sec. 293, Code of Alabama.)

Now, if the returns are made by the board of inspectors and are attacked, or if insufficient or defective returns or no returns are made, will it be denied that these ballots are the best evidence of the result of the election, especially where it must be admitted from the nature of the case that the ballots in the box retained by law for the purpose of evidence are the genuine ballots which were cast at the election? And if it be true, as it is, that the ballots from the election at each of these precincts in Dallas County were placed in the custody of the Republican inspector by the Republican, that they were received from the hands of the voter by Republicans only, counted by Republicans only, placed in the box and sealed up by the Republicans only, will it be gravely contended that the contestant should be permitted to offer secondary and inferior evidence to prove what the vote was at the several voting places without having attempted to put these ballots in evidence, or furnish any reason or excuse whatever for his failure to do so? In no instance is any inquiry made for the ballots, nor is any effort made to produce them, not even where the testimony itself shows to whom the ballots were committed, and even in those cases where the person who had the ballots in his custody, as shown by the testimony, appeared and was examined as a witness by the contestant. Without showing that the ballots were not in his power to produce, contestant resorts to oral evidence. This he clearly could not do. Oral evidence can not be substituted for any instrument which the law requires to be in writing, and no proof can be substituted therefor so long as the writing exists and is in the power of the party. (Greenleaf on Ev., sec. 86, Vol. 1.)

In the contested election case of Spencer *v.* Morey (Smith's Digest, p. 449) it was admitted by both parties that no official returns could be found, because they had been abstracted or destroyed. This being the case, the minority of the committee say:

"The best evidence, viz, the returns, having been lost or destroyed, secondary evidence is then admissible to establish what was the contents of the written instrument, viz, the returns. We understand the rule governing the admissibility of secondary evidence with respect to documents to be that proof of their contents may be established by secondary evidence, first, when the original writing is lost or destroyed; second, when its production is a physical impossibility, or at least highly inconvenient (p. 480)."

In this case it is not shown that any of these conditions existed to justify the introduction of oral testimony. We can only conjecture why contestant failed to have the ballots produced, but we can not avoid the suspicion which the law itself creates that the failure to produce the ballots was because they would not conform to the imperfect returns or the unreliable testimony of the witnesses for the contestant. If this plain principle of law be not disregarded, it is unnecessary to further consider the testimony in relation to these precincts; but we think that an examination into the testimony produced will show that contestant has failed to establish the vote by satisfactory evidence.

As to a question of fact the majority contention, as voiced by Mr. Ranney, was—

It was contended at the hearing that inasmuch as the statute of Alabama provides that the ballot boxes with the ballots shall be kept by the inspectors for sixty days for use in case of a contest, contestant was bound, as his best evidence, to procure and put in evidence the ballots themselves when proving what the actual vote was. It is claimed, or appears, however, that in many, if not most, of the instances where there was occasion to do this, if important, the boxes had not been kept as required by law, but had gone and been allowed to go into other hands. Whatever may be the rule otherwise, it certainly could not apply in such a case.

I find that several of the parties named in this report, and charged with frauds upon the election law in the election in question, were duly presented to the grand jury and indicted for the same. Some of the boxes in question had been taken and used before the grand jury in their investigations. There is no record of any conviction or acquittal of the parties indicted. The fact of indictments having been found is of course no competent evidence to impeach the parties as witnesses, and the committee have not so considered it.

As a question of law, Mr. Ranney, in debate,[1] said:

It must be remembered that this is not a case, so far as regards the 14 precincts now being considered, where the contestant is attempting to overthrow and control the returns of sworn officers of elections, as against presumptions of verity. The rule of law is quite different in such a case.

In general, so far as the 14 precincts were concerned, the minority denied that conspiracy was shown and attacked the character of testimony offered to prove the vote. Many issues of fact arose, and there were apparently some attempts to defraud; but the essential legal principles of the case are the same throughout.

Contestant died before the case came to a hearing in the House, but there was no serious question about the following resolutions, as proposed by the majority, affording the right course of procedure:

Resolved, That Charles M. Shelley was not elected as a Representative to the Forty-seventh Congress from the Fourth Congressional district of Alabama, and is not entitled to retain the seat which he now occupies in the House.

Resolved, That James Q. Smith was duly elected as a Representative from the Fourth Congressional district of Alabama to the Forty-seventh Congress, and, having deceased, the seat is declared vacant.

The minority recommended resolutions confirming the title of sitting Member.

The report was debated in the House on July 20,[2] and on that day the resolutions of the majority were agreed to, yeas 145, nays 1, not voting 144. The minority evidently undertook to break a quorum, hoping to delay decision.

966. The Alabama election case of Strobach v. Herbert, in the Forty-seventh Congress.

Time and place of an election being fixed by law, the failure of officials to give a required notice was held not to justify rejection of the returns.

There being no doubt of the intent of the voter, the wrong spelling of a candidate's name does not vitiate the ballot.

The returns of the regularly constituted authorities will not be disturbed by presumptions raised by a census of voters by races.

On June 27, 1882,[3] Mr. Ambrose A. Ranney, of Massachusetts, from the Committee on Elections, submitted the report of the committee in the Alabama case of Strobach, *v.* Herbert.

The case involved the following points:

(1) It was claimed on behalf of contestant that the entire vote of Escambia County, where sitting Member received 634 majority, should be thrown out. The report thus disposes of this claim:

As to Escambis County, by the law of Alabama it is the duty of the sheriff, judge of probate, and clerk of the circuit court to give notice of an election and appoint managers. This duty the sheriff, judge of probate, and clerk of the circuit court of Escambia County failed to perform. But by the statutes of Alabama it is provided that when for any cause managers and other officers of election are not appointed the qualified electors present may elect them. It appears that this was done and the election held; and it further appears that on the 30th day of October, 1880, the chairman of the Congressional executive committee of the Democratic party gave contestant notice that this course would

[1] Appendix of Record, p. 627.

[2] Record, pp. 6269–6280; Appendix, pp. 522, 626; Journal, pp. 1681–1684.

[3] First session Forty-seventh Congress, House Report No. 1521, 2 Ellsworth, p. 5.

be pursued, and invited him to name the persons he desired as managers to represent them at the different boxes. Under these circumstances, as the law is well settled that when time and places of holding an election are fixed by law no notice by the officials is essential, your committee can see no good ground upon which to exclude the vote of Escambia County.

(2) It was claimed on behalf of contestant that 1,190 votes should be deducted from sitting Member's vote in Pike County, because the name was spelled Hebert instead of "Herbert." The report holds:

As to the alleged misnomer in Pike County, your committee find that the evidence does not establish that more than 50 votes were cast in which Mr. Herbert's name was spelled *Hebert.* They further find that these ballots were intended to be cast for Herbert; that they were printed *Hebert* by mistake of the printer; that no person of like name except contestee was being voted for or was a candidate, and they believe that under the law and the precedents these votes were rightfully counted for contestee. Indeed, Mr. Ingersoll, one of contestant's counsel, admits they should be so counted.

(3) Counsel for contestant claimed that certain votes should be deducted at two precincts in Butler County, but the report denies this claim:

The vote at these boxes is not assailed in the pleadings or by the evidence further than by a comparison with the census returns. This comparison does not show that the vote was unduly large, but simply that Herbert received more than the white vote and Strobach less than the colored vote. Your committee can not consent, for such reason as this, to disturb the returns of the regularly constituted authorities.

967. The case of Strobach v. Herbert, continued.

To vitiate the election of returned Member a general scheme of fraud must be proven both to have existed and to have been effective.

The Elections Committee felt bound to follow a State law as it stood, although inadequate to secure honesty from election officers.

The House sometimes determines an election case by permitting the contestant to withdraw his case.

Form of resolution permitting a contestant to withdraw his case.

(4) As to frauds the report says:

The only doubt which the committee has had in regard to this case is whether the irregularities and frauds alleged and appearing in evidence were not sufficient to render the election of contestee void.

Contestant has arrayed the schemes of fraud conceived and executed in the election held in August, 1880, and claims that the same practices were resorted to in the November election of that year. The committee have scrutinized closely the proof and evidence in this regard, and are impressed with the fact that this seems to have been so to a considerable extent. But applying the rules of law which obtain in election cases, it is not satisfactorily proved that there was any such general scheme of fraud which appears to have been successfully practiced in a sufficient number of cases as to change the general result.

(5) As to a final point:

The statute law of the State of Alabama has also been arraigned as wholly insufficient and inadequate to secure an honest election, and as a safeguard against fraudulent practices which seem to be so rife in that State. With this the committee have nothing to do, as a general principle. But it may be permitted to say that the charge seems to be true to a lamentable degree. The law seems to be quite severe as against the elector, but as regards the officers and managers of election there appears to be no adequate provision to insure fidelity and honesty of action or to punish derelictions of duty.

The committee have felt bound, however, to follow the law as it stands.

So the committee recommended the following:

Resolved, That contestant be allowed to withdraw his contest without prejudice.

This resolution was agreed to by the House.[1]

968. The South Carolina election case of Smalls v. Tillmmui, in the Forty-seventh Congress.

Discussion as to the sufficiency of returns and the validity of the State canvass based thereon.

The driving of voters from the polls by armed force in the majority of the precincts of a county caused the rejection of the returns of the entire county.

It being impossible to determine from the evidence what votes had been returned in the few honest precincts of a county, the entire county returns were rejected.

On June 29, 1882;[2] Mr. John T. Wait, of Connecticut, submitted from the Committee on Elections the report of the majority of that committee in the South Carolina case of Smalls *v.* Tillman.

At the outset the majority discussed a question as to the sufficiency of the returns and canvass on which the certificate of sitting Member was based; but did not assume to determine the case on the conclusions which they reached.

The South Carolina law of 1868 provided for a board of State canvassers, and three sections of that law provided:

SEC. 24. The board, when thus formed, shall, upon the certified copies of the statements made by the board of county canvassers, proceed to make a statement of the whole number of votes given at such election for the various officers, and for each of them voted for, distinguishing the several counties in which they were given. They shall certify such statements to be correct, and subscribe the same with their proper names.

SEC. 25. They shall make and subscribe, on the proper statement, a certificate of their determination, and shall deliver the same to the secretary of state.

SEC. 26. Upon such statements they shall then proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices or either of them. They shall have power, and it is made their duty, to decide all cases under protest or contest that may arise when the power to do so does not by the constitution reside in some other body.

Sitting Member claimed that under the above law "the certified copies of the statements made by the board of county canvassers" were the only legal data necessary to enable the State convassers to declare the result.

The majority report says:

Under the act of 1868 the precinct non delivered the boxes containing the ballots and the poll lists to the county board of canvassers within three days after the election, and this board counted them upon the following Tuesday and made up their statements, transmitting them by mail, one each to the governor, comptroller, and secretary of state.

In view of a contest before the House these provisions became the subject of severe animadversions, and in 1872 an act was passed providing that all elections shall be regulated and conducted according to the rules, principles, and provisions therein and "all conflicting" acts are repealed.

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[1].Journal, p. 1546.

[2] First session Forty-seventh Congress, House Report No. 1525; 2 Ellsworth, p. 430.

Now the principal provisions of this law are:

First. That the ballots shall be counted by the precinct managers as soon as the polls are closed, and that the boxes containing the ballots shall be sent to the county board; and, second, that a statement of the county board of canvassers should be sent by a special messenger, with the returns, poll lists, and all papers appertaining to the election, addressed to the governor and secretary of state. Under the law of 1868 the ballots were liable to be tampered with after the polls closed and during the interval before they were counted, and the county board of canvassers was wholly without check upon their statement.

The act of 1872 takes from the county board the counting of the votes and devolves that duty upon the precinct managers, and requires that it be done publicly at the closing of the polls. It also places a check upon the aggregated statement of the county board by requiring that the returns, poll lists, and all papers appertaining to the election be sent by a special messenger, addressed to the governor and secretary of state. To use the terms of the act itself, the "principle" contained in this "provision" is a check upon the opportunity of the county board to perpetrate fraud, and all acts in any way conflicting with the rules, principles, and provisions are repealed. It is unquestionable that if the State board is to make up its statement of the vote of the district solely upon the statements of the county boards, aggregating the votes of each of the counties, there is no check whatever upon the statements of the county boards, and the "rules and principles" are defeated, and there is no purpose whatever in sending by a special messenger "the returns, poll lists, and all papers appertaining to the election" to the governor and secretary of state. This provision is a part of a remedial statute, and is to be liberally construed, and all acts "in any way conflicting with its rules, principles, and provisions" are repealed. By no canon or rule of construction can this provision of the remedial amendatory act be thrown away.

But if the section 24 of the act of 1868 is not thereby repealed, the two acts must be construed in pari materia, and the State board of canvassers should make up their statement of the vote of the district from the certified copies of the statements made by the board of county canvassers, and from the precinct "returns, poll lists, and all papers appertaining to the election."

These, then, become together the data upon which the State board of canvassers make up their statement whereon the certificate is based. If it is based upon anything else, or only upon a portion of the data prescribed by law, it is without legal validity as regards the election of a Member of Congress; and this, wholly independently of the question as to whether this is done fraudulently, ignorantly, or is a mere casus omissus.

The party relying upon such a certificate must prove his vote aliunde. In this case there is a peculiar and most forcible illustration of the wisdom of this requirement that the precinct return and poll list shall accompany the statement of the board of county canvassers, for this board has no judicial authority. This is admitted by counsel on both sides. Yet in two counties they have assumed to exercise judicial powers in throwing out entire boxes and in not counting the vote polled for Congress at others, and without any pretense of cause. And in consequence of the failure of the county boards of these counties to send to the governor and secretary of state the precinct returns and poll lists, as they are specifically required to do by law, the official data is wanting upon which to add the vote at these several boxes. In the three counties of Edgefield, Colleton, and Barnwell the legal data by which the frauds of county boards of canvassers is intended to be detected and corrected, and which forms an important part of the basis on which the Member's certificate of election is based, has been deliberately withheld and suppressed. There is no official data by which to fix the vote at polls which have been fraudulently omitted from the count, in contravention of the plain letter of the statute, and the construction placed thereon for years past by the court of last resort in that State. And, on the other hand, there are polls which should be rejected from the count for gross illegalities and fraud in the management thereof and others for violence and intimidation; but, in consequence of the illegal suppression of the data required by law, it is impossible to ascertain how these polls were counted in the statement as made up by the State board from the aggregate furnished by these three county boards.

The principle is correct and sound, and is well settled, that when the reliability of the official statement is destroyed, whether for fraud, for ignorant neglect of legal duty, or because made up from insufficient, illegal, or fraudulent data, it must be disregarded as evidence. But the vote of the electors is not lost because the pretended statement of it is defective, illegal, and unreliable, but it may be proven aliunde.

It is clearly established that the State board had not "the precinct returns, poll lists, and all other papers appertaining to the election" before it at the time it made up its statement on which the certifi-

cate of election was given to contestee; and it is equally well established that that board made up its statement merely from the aggregated statement of the county board, without any of the legal data with which to correct their errors or detect their frauds. It is strenuously claimed for the contestant that these returns, poll lists, etc., were essential factors, and that the want of them destroyed the validity of the statement of the State board absolutely, whilst for the contestee it is urged that the law of 1868 remains unchanged as to the State board.

The committee has not deemed it necessary to decide this legal question, as there are other questions, both of law and fact, which enter into the case, and, as they think, control it.

The minority [1] do not agree to this, either as to fact or theory;

Our colleagues, the majority of the second subcommittee, will find themselves to have been wholly misled as to the facts in their statement at page 3 of their report, that these boards "assumed to exercise judicial powers in throwing out entire boxes, and in not counting the vote polled for Congressman at others, and without any pretense of cause." They did not throw out a single box, nor did they fail to canvass the vote for Congressman of any precinct from which the managers sent up any return to be canvassed.

The contestant's third charge is that from the three counties of Barnwell, Colleton, and Edgefield the returns and poll list were not forwarded to the governor and secretary of state by the chairman of the boards of county canvassers of those counties, as directed by law; and that this omission upon the part of the chairmen, whether originating in fraud or in ignorant neglect of legal duty, destroyed the reliability of the official statements by those boards of the result of the election in those counties, from which statements the board of State canvassers made up their statement of the result of the election in the Fifth Congressional district.

Strictly speaking, there is no competent evidence that there was any such omission as charged. As a matter of fact, however, it appears that the election officers in some counties of the State, having construed the requirements to forward the returns and poll list "to the governor and secretary of state," as imposing the duty of sending one set of those papers to the governor and a duplicate set to the secretary of state, the latter officer, just prior to the election, issued a circular to the effect that it was not necessary to send poll lists to the secretary of state, which instruction, it would seem, was understood by the chairmen of the boards of canvassers in the three counties named as dispensing with the necessity of sending up such papers at all.

If it be conceded, however, that these papers were not sent up from the three counties in question, as directed by law, and even if it were held—though there is no shadow of testimony to that effect—that the omission was willful, there are two propositions which, to the undersigned, appear to be too clear to admit of an intelligent difference of opinion as to them, viz: *(a)* That such omission can not be held to have the effect of invalidating the reliability of the official statements of the result of the election made by the county boards of canvassers, as contended by the contestant; and, *(b)* That such omission could not possibly have in any manner affected the rights of the contestant, for the reason that the State board of canvassers could not have considered those papers had they been sent up as directed.

(a) By reference to section 4 of the amendment to the election law of South Carolina, of March 17, 1872, quoted above, it will be seen that the duty of forwarding the papers in question is imposed, not upon the county board of canvassers, but, after its final adjournment, upon the individual who had been its chairman. Upon what possible principle can it be said that any omission of duty, whether fraudulent or merely negligent, upon the part of such individual, after the board of which he was chairman has finally adjourned and gone out of existence, shall destroy, or in any manner invalidate the reliability or legal effect of the concurrent, unanimous, official act of the entire board, Republican and Democratic members alike?

(b) The papers in question, it will be further observed, are directed to be forwarded, not to the State board of canvassers, but to the governor and secretary of state. The governor is not even a member of the State board; and, although the secretary of state is, yet not only is there no direction that the papers in question shall be submitted to, or considered by, that board, but as will be seen by reference

[1] Minority views by Mr. L. H. Davis, of Missouri; S. W. Moulton, of Illinois, and Gibson Atherton, of Ohio.

to the law prescribing the duties of the State board, quoted above, they are expressly and specifically required to make up their statement "upon the certified copies of the statements made by the board of county canvassers," and upon those statements it is enacted that they shall "proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices," etc.

Upon these grounds, therefore, we hold it to be clear, beyond the possibility of an intelligent difference of opinion, that the omission of the three individuals who had served as chairmen of the boards of canvassers in the three counties of Edgefield, Colleton, and Barnwell to send the returns and poll lists from those counties, after the adjournment of their respective boards, to the governor and secretary of state, is not even an element to be considered in this case. It has absolutely no possible bearing, either one way or the other, upon the rights of either of the parties to this contest. The sending of them up could not have benefited either, nor can the omission to do so justly injure either.

The majority appear rather to base their decision on other features of the case.

The sitting Member had received, by the official returns, a majority of 8,038 over contestant in the six counties of the district. The majority of the committee found that in fact contestant had received a majority of 1,489.

The following decisions brought about this result:

(1) The rejection of the entire returns of the county of Edgefield, which gave 6,467 votes to sitting Member and 1,046 to contestant.

The majority cite testimony to show that the partisans of sitting Member, who were the white voters principally, took possession of polls at precincts in this county, and by force and arms prevented contestant's supporters, who were largely colored men, from voting. Eleven precincts are enumerated where there was violence, varying from browbeating of voters at one poll while the local military company stood by, to the driving off of voters by squads of armed men at another poll. One supporter of contestant was killed. At two precincts the papers and poll lists of the supervisors were taken away. The report thus summarizes the action as to five other precincts, and to the county as a whole:

With the boxes containing the ballots, and from all but one of them the poll lists also, before them the county board refused to count or include in the statement the vote of five precincts, to wit, Etheridges Store, Perrys Crossroads, Colemans Crossroads, Caughmens Store, and Liberty Hill. In this they clearly transcended their powers under the law. The testimony most conclusively shows that in the county the whites were Democrats and the colored people were voting or trying to vote the Republican ticket. The testimony shows that 3,020 Republicans were at the polls in this county anxiously trying to vote and who were prevented by force from doing so. The contest was to keep the colored people from voting, for the nature of their vote was unquestionable. The census taken the year of this election shows whites over 21 years, 3,553; colored, 5,648. Yet it is claimed the contestee received 6,467 votes and the contestant only 1,046. Had every white voter in the county, therefore, actually voted for the contestee he could not have gotten this vote by 2,877, and the utter absurdity of the proposition that this or any considerable number of colored people voted for the contestee is fully established by the testimony; and this fact also illustrates the conclusiveness of the proofs which have induced your committee, after a thorough and careful consideration of the testimony, to conclude that there was no legal and valid election held in the county of Edgefield on the 2d of November, 1880; that the will of the electors was suppressed by violence and intimidation, and that the pretended count and canvass of the vote is involved in an inextricable confusion of fraud, and that the records which should establish the truth in regard to it have been illegally suppressed.

In the debate it was claimed by the minority that the majority had, by rejecting the whole county, rejected certain precincts, nine in number, against which there was no insinuation of irregularity. In answer to this it was replied that there was not a particle of evidence before the committee or the House, or returned by the

managers, to show how any one of the nine precincts voted.[1] So, it being impossible to purge the county vote, the whole was thrown out.

The minority denied that the testimony showed what was claimed by the contestant.

969. The case of Small v. Tillman, continued.

Evidence showing that a county was divided politically on the color line, incompatibility between the returns and the census was admitted to impeach the election and the returns.

Instance wherein returns of a former election were cited to corroborate proof of intimidation and fraud.

(2) By purging the vote of Aiken County. The official returns in this county had given Tillman 4,980 votes and Smalls 1,467. The majority, after making corrections, found this vote to be: Tillman, 3,409; Smalls, 1,058. This result was brought about by rejecting the returns of four precincts where intimidation was shown.

Thus, at Aiken Court-House red pepper was thrown in the eyes of voters, some were cut with knives, a piece of artillery was trained on the voters, and the local military company, either as an organization or as individuals, acted with the mob. There was evidence also that the ballot boxes were stuffed. At other places voters were driven off, ballots for contestant forcibly confiscated, shots were fired, and supervisors representing contestant's party were driven off.

The majority conclude as to this county:

> The statements represent this county as casting 6,447 votes, whereas by the census of the same year there were only 5,985 males over 21 years of age, so that if every elector had voted there are 562 more votes than voters, and this, too, in the face of the fact that hundreds of voters were excluded from the polls. The testimony shows that in this county the vote was essentially upon the color line, and according to the census of the same year there were only 2,873 white males over 21 years old, so that if everyone had voted for contestee it would require 2,107 colored votes to have given the contestee the 4,980 votes claimed for him.
>
> In 1876 both parties had a full national, State, and county ticket in nomination, and the campaign is historic, yet the whole vote of this county that year was only 4,820. The pretended vote of 1880 is an increase of 1,627, indicating an increase of more than 25 per cent of votes for a campaign in which only a national ticket was run, and yet as an illustration it may be noted that at Silverton precinct in 1880 not a single Republican vote is reported, while in 1876 it counted 232 for the present contestant and only 182 for present contestee. In 1876, at Aiken Court-House, the contestant received a majority of 327 over the present contestee, whilst in 1880 the present contestee is reported to have received a majority of 336.

(3) For similar reasons the majority rejected the returns of four precincts in Hampton County, where intimidation and fraud were considered to be proven. As to this county the majority conclude:

> It is a curious and very contradictory fact that, whilst it is claimed and certified that 4,165 votes were polled and counted in this county, the census shows that there were only 3,828 males over 21 years. This, too, in the face of the testimony that a large number of voters were driven from the polls without voting. By the census the white males 21 years old were only 1,381, whilst the vote certified for the contestee is 2,590, and this, too, when his friends and adherents were riding over the county on the night previous and on the day of election, uniformed and armed, threatening, beating, and shooting the colored people to prevent them from voting the Republican ticket.

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[1] See debate, Record, p. 6216.

There is absolutely no testimony of colored men voting the Democratic ticket which will in anywise explain the statement. The only attempt at an organization of colored Democrats is shown in the testimony of George Bellinger (p. 557), in which he says the largest number ever answering were 22, and in his statement of the officers is Daniel Platts, as vice-president, who testifies (p. 412) that he did not vote that ticket and joined a Republican club, in which he remained during the campaign. The utter failure of the colored Democratic club is fully shown on page 416. Indeed, it would be most extraordinary if any number of colored people should vote the Democratic ticket, in view of the overwhelming testimony of the lawless violence of "the red-shirt Democracy, "not only in this county but in four others of this district.

The only way by which such a statement of the vote of this county can be explained is by the method illustrated so well at Brunson's, as to the facts of which the Democratic manager and supervisor, as well as Republicans, testify. On the first count this box contained "something over 500;" the excess over the poll list "was near 200" (see testimony of Democratic supervisor, p. 101), whilst the manager (Democratic) who drew them out says, "that excess was about 232" (p. 100). And yet this box is certified to as containing 356 legal votes, and it is on such official statements that the contestee has received the certificate and now occupies a seat in the House as the Representative from this Congressional district.

(4) For intimidation Allendale precinct, in Barnwell County, was rejected.

970. The case of Small v. Tillman, continued.

The Elections Committee corrected a return wherein testimony of bystanders showed that partisan election officers had acted unfairly in drawing from the box an excess of ballots.

The House corrected the act of local canvassers who, without judicial power, threw out a poll.

The House took into account the loss occasioned by failure of election officers to open a poll at a regular polling place.

Polls being illegally closed, the House took into account the injury resulting to contestant thereby.

Although fraud and intimidation in a district had been very extensive, the House preferred seating contestant to declaring the seat vacant.

(5) The official returns of Colleton County had given Tillman 3,475 and Smalls 2,776. The conclusions of the majority of the committee were that Tillman was entitled to 3,385 and Smalls 3,760. The reasons for these changes are given in the report:

The testimony shows conclusively that the mode of managing this poll was most unfair; that the managers were under control of the Democratic county chairman, who was also chairman of the commissioners of election, who appointed all of the managers from one party, and appeared also as the attorney for the contestee. The following extracts show something of the methods resorted to:

Testimony of William A. Paul (p. 336):

"At the opening of the ballot box the managers found the box to contain 1,036 ballots; at the closing of the polls the amount of the poll list was 895 ballots; the excess found in the box was 141, according to my account. After the box was opened the managers were quite undecided as to how they would stir the votes up, and they were for some time devising a plan how they could mix them so as to take out the excess over the poll list and to take out a majority of Republican ballots if possible, which they succeeded in doing; and I found after they had commenced to draw the ballots from the box when they would draw out two Democrat ballots and destroy them they would draw out from five to six Republican ballots and destroy them also; and one of the managers was blindfolded who was required to draw the ballots, and turning his back to the table upon which the box was placed, the box being set into a large stick basket, the box not being able to hold the ballots after being thoroughly stirred, they then stirred the ballots into this basket, from which they drew the excess of the poll list. The manager

who was required to do the drawing deliberately passed the ballots through his hands; by so doing one ballot was easily distinguished from another; they succeeded nicely in carrying out their premeditated plan."

Also the testimony of Daniel Sanders (p. 370):

"Then came the confusion about the votes; both Republicans and Democrats crowded around the box; the box was opened in the presence of all; the law was furnished the managers how they should proceed before counting votes; the box was so full that the ballots could not be mixed according to law. The box was set into a stick basket; one of the managers tried to mix the votes in the box, and he failed to mix them, and then emptied the votes into the basket. Then the managers got confused how they would mix them; they stirred them up; they brought two-thirds of the tickets, as well as I could see; to the top were Republican tickets; then the managers commenced drawing; they drew for a while from the top, and, as well as I could see, the manager sometimes would draw from the bottom. All this occurred after counting the number of ballots in the box. There was, to my recollection, 140 ballots in excess of the names on the poll list; then the ballots were put back into the box—130 drawn out, to the best of my recollection. While drawing, or before drawing, they were stirred up again in the same basket; then one of the managers was blindfolded; he drew out about 20 Democratic ballots—would not be positive to that number—and the balance were Republican ballots."

It is clear that there were from 90 to 110 votes illegally taken from the contestant at this poll, and the same number illegally given to the contestee.

The entire conduct of the election in Colleton is most discreditable to those who had it in charge. Except one Republican on the county board, appointed by the governor, and who was outvoted by the other two, every election officer was appointed from the contestee's partisans, save one manager at Green Pond poll, and their sole purpose, apparently, was to subserve his interests. Three large Republican precincts—Adams Run, Ashepoo, and Bennetts Point—having been abolished, this vote was thrown to Gloversville and Jacksonborough. The Democratic managers at Gloversville did not open the poll on the day of election, and to Jacksonborough the commissioner sent the smaller of two sizes of boxes. At 1 o'clock this box was full of ballots.

It contained 618, and the managers refused to use another, though over 100 Republican voters were standing at the polls waiting to vote, and others were in sight approaching. Whilst neither the county nor State board had under the plain wording of the statute, which has been construed by the State court of last resort, any judicial power as to the vote for Congressman, yet they threw out this box, depriving the contestant of not less than 618 votes, and without any assigned, known, or apparent reason the board failed to canvass the 276 votes polled for contestant at Horse Pen. (Record, pp. 353–357, and 378, and following.)

Besides the failure to open the Gloversville poll, whereby contestant lost 400 votes, the testimony shows that he lost 700 more by the failure to open the Summerville poll, where a large number were actually present and listed; besides more than a hundred votes were lost by illegally closing the poll at Jacksonborough.

At Delams, also, the manager failed to open the poll, whilst at Sniders Cross-Roads, Smoaks Cross-Roads, and Carters Ford the supervisors were hindered and obstructed in the discharge of their official duties. At Maple Cane 26 Democratic ballots were stuffed into the box and 25 Republican were withdrawn, whereby the contestant lost that number of legal ballots, and the same number were left to be, and were, counted for the contestee.

At Bells Cross-Roads 31 of contestant's votes were withdrawn and a like number of fraudulent ones counted for the contestee. In this county alone it is shown that from 1,400 to 1,800 Republican voters were deprived of an opportunity of voting by failure to open and illegally closing polls, whilst 223 fraudulent ballots were stuffed into the boxes.

The minority in this county, as in other counties, take exceptions to the conclusions which the majority draw from the testimony. They also say:

The election law of South Carolina, as quoted above, provides that if more votes are found in the ballot box than there are names on the poll list all the ballots shall be returned to the box and thoroughly mixed together, and that one of the managers, or the clerk, without seeing the ballots, shall thereupon draw therefrom and immediately destroy as many ballots as there are in excess of the number of names

on the poll list. At a number of precincts in the Fifth Congressional district of South Carolina excessive ballots were found in the boxes and were drawn out by a blindfolded manager, as required by law. And the only testimony in the record tending to prove the above charge on behalf of contestant is the allegations of some of his witnesses that discrimination was made in drawing out this excess of ballots at certain precincts, through which the contestant lost more than his due proportion of the votes cast for him. On the other hand, as to every precinct save one against which this charge is made, the officer who drew out the excess, and one or more of the other officers who witnessed it, were produced, and testified that the drawing was in strict conformity with the requirements of the law, done publicly, without seeing the ballots, without discrimination, and with perfect fairness. And whether tested by their means of knowledge, their intelligence, their social standing and character, or any other of the tests which are applied in nonpartisan, fair, judicial investigation, where the witnesses irreconcilably differ, no man who will read the record can hesitate to believe that the witnesses produced on behalf of the contestee are entitled to superior credit. There is absolutely no unpartisan, nonpolitical test which can possibly lead to any other conclusion.

It is to be further observed here that there is no testimony whatever tending to fix the responsibility for the excess of ballots upon the contestee's adherents. Republicans charge it upon the Democrats, and the Democrats charge it upon the Republicans; but there is no proof, nor anything which is offered as proof, by either side upon the subject. No single witness on either side claims to have either seen or heard of a "tissue ballot," or any other device for the purpose of creating an excess.

In accordance with their conclusions, the majority reported these resolutions:

Resolved, That George D. Tillman was not elected as a Representative to the Forty-seventh Congress from the Fifth Congressional district of South Carolina, and is not entitled to retain the seat which he now occupies in this House.

Resolved, That Robert Small was duly elected as a Representative from the Fifth Congressional district of South Carolina in the Forty-seventh Congress, and is entitled to his seat as such.

The minority declined to concede that the election of contestant could be shown.

The report was debated on July 18 and 19, 1882,[1] and on the latter day a substitute amendment proposed by the minority and confirming the title of sitting Member was rejected, without division.

The question recurring on the first resolution proposed by the majority, it was agreed to, yeas 145, nays 1, the minority generally refraining from voting, to break a quorum, and the Speaker voting to make one.

Then the second resolution was agreed to, yeas 141, nays 5.[2]

Mr. Smalls then took the oath.

971. The Maine election case of Anderson v. Reed, in the Forty-seventh Congress.

There being no suggestion that sitting Member was implicated in alleged bribery, and the amount alleged not being decisive, the House did not give weight to the charges.

The House will not overrule the decisions of honest election officers on conflicting testimony as to qualifications of voters.

Common rumor of an indefinite amount of intimidation of workingmen by employers was disregarded by the House.

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[1] Record, pp. 6180, 6213–6237; Journal, pp. 1675–1679.

[2] Among those voting in the negative on the second resolution was Mr. William H. Calkins, of Indiana, chairman of the Committee on Elections. This may be taken as an indication that he thought the seat should be declared vacant, but it does not appear that he gave any reasons.

On July 18, 1882,[1] Mr. George C. Hazelton, of Wisconsin, from the Committee on Elections, submitted the report of the committee in the Maine case of Anderson *v.* Reed.

Sitting Member had been returned by a majority of 123 votes over contestant. The three objections urged by contestant were thus discussed by the committee:

(1) As to the charge of bribery, the report says:

No suggestion or intimation is made of any complicity or even knowledge on the part of the sitting Member. Whoever was bribed voted for the Member of Congress simply because his name was on the general ticket. The number of cases alleged by the contestant seem to be but 7, of which 1 is proved by the statement of the man bribed, which are not contradicted. The rest are in dispute and rest on rather vague evidence.

(2) As to the admission and rejection of certain votes. The law of Maine made it an essential prerequisite to the right of voting that the voter's name should be on the check list, which is the registry of the names of voters. The report says:

The contestant claims that a number of voters voted for Reed who had no right to, and another number who would have voted for Anderson were not allowed so to do. These numbers if added together he claims would overcome the 123 plurality.

It is to be observed in regard to all these cases that there are no allegations of fraud or willful wrong, only that the selectmen erred in judgment. It is an appeal from those who, especially in the towns, were perfectly conversant with the status of every voter to Congress, on evidence taken in depositions.

The nature of some of this evidence may be inferred from the following extracts from contestant's brief:

"At Falmouth it is both affirmed and denied that Dayen, Stone, and True, who voted for Reed, were nonresidents or paupers, and that the votes refused to Anderson of Murray, Reynolds, and Black were lawful ones (pp. 131 to 133, and 206–207, 215–217, and 293–294). The officials to decide were partisans of Reed.

"At Standish, McKenzie, a nonresident, voted for Reed. Cotton voted for Reed, and says he was not bribed (p. 291); though his father supposed it to be an admitted fact that he was (p. 150). Merrill, of Washington, voted for Reed at Brighton, where his residence is both denied and affirmed (pp. 160–162 and 315, 348, 364).

"At Westhook the evidence sharply conflicts as to the right of Hoegg and others to vote for Reed (pp. 117 and 249–250).

"At Otisfield, Pike and McNeil voted for Reed. It is positively affirmed and denied that they were nonresidents (pp. 51 and 330–335).

"At Gorham, Ney, Rowe, and Shaw, nonresidents, voted for Reed (p. 163). And Bacon and Hall's votes refused to Anderson (p. 162). An attempted explanation will be found on page 297. Ney's name was added on election day; and a witness says Hall admitted he was not a voter (p. 222)."

These examples will be found on pages 10 and 11 of contestant's brief.

An examination of the testimony will show that every case is a disputed one which has been settled on testimony more or less conflicting by men who, as selectmen of the town, were thoroughly familiar with all the facts, and in the open town meeting, in the presence of men who also knew all the facts. To overrule such decisions in the absence of any suggestion whatever of bad faith would need something more than conflicting evidence. There was another class of cases in Portland where it does appear that a small number of voters lost their rights because of a failure to look after their registry. But this is shown on both sides, and was evidently the result of carelessness on the part of the voter and such accidents as must occur in a registry of more than 7,000 votes.

It should be added that cases of similar proof were shown on the part of the contestee, both as to the class of omitted voters and as to the cases of bribery, but we have not deemed it necessary to particularize, because the contestant on the testimony does not make out his own case.

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[1] First session Forty-seventh Congress, House Report No. 1697; 2 Ellsworth, p. 284.

(3) "As to intimidation," says the report, "the evidence falls far short."

Third. As to the chance of intimidation, the evidence falls far short of substantiating the charge. It consists mostly of hearsay and rumors, and does not disclose a single instance of violence or even threatened violence. A common report "that men would lose their job" if they did not vote as their superiors directed, and the testimony generally referred to in contestant's brief (pp. 4 and 5) hardly constitute such an overthrow of men's wills and determinations as can be taken notice of by the law.

Therefore the committee recommended resolutions confirming the title of sitting Member to the seat. The resolutions were agreed to by the House without division on debate.