# Chapter XXXV.

## GENERAL ELECTION CASES, 1886 TO 1888.



**1000. The Ohio election case of Hurd v. Romeis in the Forty-ninth Congress.**

**The House declined to reject a vote on charges of general bribery sustained by hearsay testimony.**

**The House declined to reject a return because of irregularities on the part of election officers and the settlement of discrepancies between the ballots and the poll list by additions.**

**Proof of efforts to intimidate, unsustained by proof that it was effective, does not justify rejection of a return.**

On March 31, 1886,[3] Mr. Henry G. Turner, of Georgia, submitted the report of the majority of the Committee on Elections in the Ohio case of Hurd *v.* Romeis.

The sitting Member had been returned by an official majority of 295 votes, which contestant assailed on several grounds.

(1) Contestant claimed that the return of Precinct B of ward 8 of Toledo, which gave a majority of 220 for Mr. Romeis, should be entirely rejected, because of alleged bribery, fraud, and irregularities, claimed to be sufficient to taint the entire result.

(*a*) As to bribery.

The charges of contestant are thus set forth in the minority views:[4]

The testimony satisfies us that there was a conspiracy to corrupt the precinct by money in the interest of contestee, and that it was successfully carried out. The evidence of Gerstmann (pp. 115 and 128 of the record) shows the plan to defeat the contestant and the methods by which it was executed.

He testifies that he was agent of the Republican national committee, sent to Toledo for the purpose of finding the sentiment of people in certain districts before the October election of 1884. He, being able to speak the Polish and German languages, was assigned to this precinct, which was almost entirely

[1] See also case of California Members. (Vol. I, sec. 645.)

[2] See cases of—
Lowry *v.* White, Indiana. (Vol. I, see. 424.)
Chase, Cimarron territory. (Vol. I, sec. 412.)

[3] First session Forty-ninth Congress, House Report No. 1449.

[4] Submitted by Mr. Thomas A. Robertson, of Kentucky.

inhabited by Germans and Poles. He was deputed to work in this precinct by Captain Brown, who was the chairman of the Republican committee in the city of Toledo, and also the attorney of contestee in the contest.

He visited the precinct in pursuance of his instructions and went through it to find the sentiment of the people. He found them all for Hurd.

After some consultation he learned from them that the sentiment might be changed by the use of money. They informed him that from $2,000 to $10,000 would be required to change the precinct.

After having obtained this information he reported to the local committee and then went to New York to report to the national committee. There he had an interview with S. B. Elkins, in which he reported the condition and the necessity of money for this precinct.

Mr. Elkins said that the election of Mr. Hurd was a nationally important question; that he was a free trader; and that it was necessary he should be defeated. He said also that the money needed would be sent through the regular channels. He was directed to go to Toledo and tell them to do all they could to defeat Hurd.

In the work of his agency Gerstmann returned to Toledo a few days before the election.

He visited the same persons and places he had visited before. He found the sentiment all changed. It was then against Hurd and for the contestee.

He learned from the voters there that the change had occurred through the use of money; that their wants had been satisfied; and he left Toledo before the election, as there was nothing more for him to do.

We call attention to the testimony of Gerstmann on page 128:

"4. Q. What was said, at your last visit to Toledo before the election, by Warnke and other voters in precinct B, in ward 8, as to money or other considerations having been satisfactorily furnished to the voters of that precinct to carry it for Romeis?—A. From the general conversations with Warnke and others living in that neighborhood there was no doubt in my mind that money and other materials were furnished to defeat Mr. Hurd in that precinct. There was no further use for me, and I left Toledo. My reasons for leaving, no doubt, are from the conversations which I had on that subject with Warnke and other voters of that precinct. I was satisfied in my own mind that Romeis would carry that precinct, notwithstanding at my first visit everything was for Hurd there. Had it not been for the use of money and other considerations used in the political machinery, Hurd would certainly have carried the precinct."

To corroborate Gerstmann the testimony of Louis Johns is offered, who swears that shortly after the election of Henry Gates, the vice-president of the Republican organization in that precinct, boasted that he had paid on the night of election at a saloon in that precinct 19 persons from $3 to $10 apiece for services as ticket peddlers.

Jones also heard others say that the money had been so paid.

We think that if the statements of these witnesses are to be accepted as true there can be no doubt that this precinct should be rejected.

If there were a conspiracy to send from $2,000 to $3,000 to a little precinct of less than 450 votes; if the voters were changed in sentiment, by their own confession, within two or three weeks by the use of this money; if the officers of the Republican organization, from the national down to the local committee, interested themselves to carry out this conspiracy, and if the corruption were so open and public that the local Republican manager in that precinct boasted shortly after the election that he had paid unusually large sums for a day's work, to many more men than the legitimate expense of an election could possibly have required, it would be an outrage upon justice and fair dealing to permit the returns from this precinct to be counted.

The only answer made to this evidence by the contestee is that (1) the witness Gerstmann is not credible, and (2) that the testimony is not competent, as it is hearsay.

As to the first part, we reply that Gerstmann declared himself to be the agent of the Republican committee to do the work to which he was assigned, and stated that he was deputed to the special work in this precinct by Mr. Brown, the chairman of the Republican committee, the very man who was cross-examining him. He mentioned the name of Mr. Elkins and Mr. Schenck, two Republican managers, who had engaged him and to whom he reported. How easy it would have been for one of them to have gone onto the stand and testify that he was not their agent. They knew his testimony and realized its importance, and yet not one man undertook to contradict him.

Neither was there any effort to impeach him.

His testimony remains uncontradicted and unimpeached. There is nothing to affect his credibility, unless it shall be found in his cross-examination, and after the more thorough examination of that we are satisfied that there is nothing in it to weaken the force of the statement he makes as to the great points of his testimony.

The only question remaining is, Is the evidence competent?

It is said it is not, because it is hearsay. We are not of this opinion. The rule as to evidence in contested election cases is stated in Cushing's Parliamentary Law, section 210:

"The same general rules by which courts of law are governed in regard to evidence in proceedings before them prevail also in the investigation of cases of contested elections; but inasmuch as a legislative assembly touching things appertaining to its cognizance is 'as well a council of state and court of equity and discretion as a court of law and justice,' the legal rules of evidence are generally applied by election committees more by analogy and according to their spirit than with the technical strictness of the ordinary Judicial tribunals."

"The testimony in this case" continues the minority, "is not offered to prove the bribery of individual voters, but to show the prevalence of corrupt methods in an election precinct. It is sought to throw out an election district because of general bribery. If individual acts were to be proved the poll could be easily purged by the elimination of the bribed votes, which would disappoint the object in view. It is as though one were attempting to show the general reputation to be bad. You can not do this by proof of individual acts of bad conduct. It must be done by proof of what people generally say. When you would impeach a precinct for general bribery you must prove by analogy to the rule of courts of justice the fact in the same way. The general sentiment of a community, the changing it, and the common reports of the method by which it is done, are all facts to be established as any other fact of common reputation."

The minority then cite several English cases in support of their contention, and consider a conspiracy to bribe proven.

The majority dismisses these claims as to bribery

He alleges "general bribery" against the election in precinct B, Ward 8, in the city of Toledo. To support this charge he relies on the evidence of S. Gerstmann. This witness does not attract confidence either by his antecedents or by the character of his testimony. But waiving these tests of his credibility, his testimony on the matter in issue is hearsay only, and even by that method of establishing this charge he proves nothing; in no way does he disclose either the bribers or the bribed.

It is also alleged that in this precinct on the night after the election one Gates, a Republican, paid 19 ticket peddlers from $3 to $10 each. However reprehensible this transaction may appear, the witness (Louis Johns) admits that he knows nothing of it "except from what Gates and others told him."

In the debate this question was discussed at length. In the first place the majority showed from Gerstmann's cross-examination that he refused to answer pertinent questions as to his past life, one of these questions being as to whether he had ever been in prison. Aside from attacking the credibility of the witness, the majority attacked also the nature of his testimony, as indefinite and belonging to the realm of opinion and hearsay rather than of fact.

(*b*) The minority assailed the return as inaccurate and invalid:

The falseness consisted in this, that there were five tickets short at the end of the count, and the judges ordered two votes to be added to every candidate, with no tickets in the box to correspond to the votes so added.

This of itself is enough to bring discredit upon this return, as no confidence is to be reposed in the acts of officers who are willing to certify under oath, in a solemn matter of that kind, that to be true which they know to be false. But with this standing alone, while we might hesitate to exclude this

whole poll, we have no doubt on the subject when we consider the conduct of these officers in other particulars.

(2) Their irregularities were such as to leave the result in an uncertainty in which it is impossible to ascertain the true result. The following are the statutes of Ohio relating to the counting of the vote:

Page 2956: "At the close of the polls the poll book shall be signed by the judges and attested by clerks, and the names therein contained shall be counted and the numbers set down at the foot of the poll books in the manner hereinafter provided in the form of the poll books."

Page 2957: "Alter the poll books are signed, in the manner hereinafter provided for, the ballot boxes shall be opened, and the ballots therein contained shall be taken out, one at a time, by one of the judges, who shall read aloud distinctly, while the ticket remains in the hand, the name or names thereon contained, and then deliver it to the second judge, who shall examine the same and pass it to the third judge, who shall string it on a thread and carefully preserve it, and the same method shall be observed in respect to each of the tickets taken out of the ballot box until the number taken out of the ballot box is equal to the number of names in the poll books; and any ballots in the box in excess of the number of names on the poll books, together with the ballots strung as aforesaid, shall be deposited in the box and locked, and the box and contents delivered to the officer authorized to receive and keep the key or keys, and the box shall remain locked until the expiration of the time within which any legal notice of contest can be given, and if such notice be given shall remain locked until the trial of such contest."

The testimony shows that the poll books were not signed until after votes had been counted (p. 73 of the record). This made it impossible to do the counting as the statute prescribed. It was the intention of the law that the number of the vote should be ascertained before the counting began, in order that the judges might know the number of tickets to be taken out of the box. But in this case the number of votes was not attempted to be ascertained until the count had been finished.

The ballots were required to remain in the ballot box until the poll books had been signed and the total vote ascertained. Instead of that, immediately after the polls were closed the ballots were emptied onto the table in the room where the election had been held, and where there were 25 to 30 people present. That the ballots for several hours were away from the place in which, under the law, they ought to have been, out of the legal custody of the election officers, and exposed to the possibility of being tampered with, is clear. (See pp. 28, 29 and 68, 69 of the record.)

The statute required that the judges should take the tickets from the box one by one and read the name on each. Instead of this the tickets were arranged into four piles upon the table, from which the judges counted them by fives. The board also was illegally organized. Two of the judges were Republicans, while the third Democratic judge was a nonresident of the precinct. We think that a fair construction of the Ohio statute requires the judge to be a resident of the district in which the election is held. Both clerks were Republicans, while the law expressly provides that they should belong to different political parties.

From this it will appear that every important provision of the statute of Ohio as to conducting the election and counting the vote was violated.

It would have been singular if this misconduct had not brought confusion and uncertainty.

## The majority report thus disposes of this contention:

It is also claimed that the returns from this precinct ought to be excluded because there was a discrepancy between the number of names on the poll book and the number of ballots in the box. There was one, and, perhaps two, informal counts of the votes by the judges of election, which were not satisfactory because the number of names on the poll book and the number of ballots were not equal. No two witnesses give the same estimate of this discrepancy, one putting it at 7 votes on the first count, and 3 votes on the second count; and another witness putting the difference at 4 votes. But when the votes were officially counted and tallied, it appeared that there were 4 or 5 votes short of the poll list. The judges then added 2 votes to each canditate. In this course they erred, as the committee think, but it was an immaterial error which did not affect the result.

It is also said that one of the judges did not reside in the precinct; but the statute of Ohio governing elections in the city of Toledo does not require the judges of election to reside in the precinct. It is also averred that the clerks at this precinct were not of opposite politics, but under some circumstances the two clerks may belong to the same party. The proof does not exclude this hypothesis.

It is further objected that the judges spread the tickets on the table and assorted and counted them by fives, instead of counting them one by one from the box as the statute of the State directs. But this was a mere irregularity, and could not void the election, in the absence of any evidence of fraud or corruption. We fbin that the majority of 220 returned for Mi. Romeis from this precinct ought to stand.

In the debate it was further urged on behalf of the majority that the statute as to counting the votes was mandatory rather than directory; that the officers of election were not skilled men at counting votes, and that the final discrepancy of 2 votes was not such as to demand the rejection of the entire poll of the precinct.

(2) As to alleged intimidation the majority report says:

Contestant seeks to have rejected the return from Kelleys Island, which certified a majority for his opponent of 60 votes. The ground on which this rejection is invoked is intimidation alleged to have been attempted by one Kelly towards his employees. We think the burden was on the contestant to prove that this attempt was effectual. To justify the disfranchisement of an entire precinct on this ground there ought to be some evidence to show its influence on the election. We fail to find such evidence.

The minority views say:

Section 7065 of the Revised Statutes of Ohio declares it to be a felony for an employer to threaten to withhold or reduce wages of or to dismiss from service any laborer in his employ with a view of influencing his vote.

The effect of intimidation upon the result of an election is stated in the report made by ex-Speaker Keifer in the case of Donnelly *v.* Washburn, already quoted.

"The rule undoubtedly is in this country that when bribery, fraud, or intimidation is so interwoven with the vote of any voting precinct that it can not be eliminated from the aggregate vote cast with certainty, the whole vote of the precinct may, and perhaps should, be rejected."

To show how the nature and extent of the intimidation practiced in this precinct, we call attention to the testimony of Norman-Kelly and the other witnesses.

Mr. Norman Kelly (p. 308):

"Q. Did you have any conversation with any of your men upon the subject of the contestant's (Mr. Hurd's) candidacy for Congress?—A. I did.

"Q. Did you have any conversation with your employees as to the subject of free trade and the effect which its adoption in this country would have upon their employment?-A. I (did, so far as my opinion on that question is concerned.

"Q. Did you say to your employees, or any of them, that the effect of the adoption of free trade would be, in your opinion, to embarrass the business in which you were engaged and they were employed?-A. I think I did.

"Q. Did you say to your employees, or any of them, that in the event of embarrassment coming to your business by the adoption of free trade and the consequent necessary reduction of the force you employed, the persons to be first discharged would be those voting for the advocates of free trade?—A. No, sir; I have never told anyone in my employ so, unconditionally.

"Q. Did you conditionally; and, if so, with what conditions?—A. I said to two or three of my employees that in case Mr. Hurd was elected to Congress and Mr. Cleveland was elected President, and if free trade was adopted in this country, the effect would to be materially injure our business, and in that event, in my opinion, we would undoubtedly require over or to exceed one-half and probably not over one-third of our present force of men, and that we thought the interest of our men was the same as our own.

"Q. What, if anything, did you say to these employees with whom you talked as to the discharge of employees in the event of a reduction being made necessary by the election of Hurd and Cleveland and the adoption of free trade?—A. I have not a distinct recollection of what I said.

"Q. Can you give it generally and in substance?—A. I said in the event of the adoption of free trade that our employees knowing that their interest was identical with our own, we would naturally expect to retain those who voted for our interest and their own."

The minority quote other testimony to show that Kelly was bitter against Hurd and that he electioneered among his men at the polls that day, and conclude:

We think this testimony clearly shows that Mr. Kelly intended to intimidate his employees, that he made the men acquainted with his purpose, and that he carried it out by his presence and conduct at the polls on election day.

It is urged by counsel for contestee that the proof does not show that the intimidation is not shown to have made the result different from what it otherwise might have been. It was claimed that contestant was bound to prove that the intimidation compelled the employees to vote for contestee.

We do not think this is the law. 'We axe of the opinion that where intimidation is practiced over men sufficient in number to affect the result the burden of proof is devolved upon him in whose interest the intimidation was done, to show that the intimidation did not affect the result. If this proof be not made, the intimidation is so interwoven with the vote that it is impossible to separate with reasonable certainty the good from the bad vote, and the whole precinct must be rejected.

The minority quote Cunningham on Elections and the Drogheda case (10 M. Hard., p. 255), The County of North Durham (20 Hard., p. 156), and the cases of Ford *v.* Abbott and Goode *v.* Platt in the House, saying of these two cases:

In these cases the poll of the precincts where the navy-yard vote was cast was thrown out on account of intimidation practiced by the officers in the yard. The burden of proof was held to be upon the contestee to show that the violation of the law had not affected the result.

The contestee has failed to show that the intimidation practiced in his interest did not affect the result, and as that intimidation was great enough to affect the majority in the precinct we are of the opinion that the return from this precinct should be excluded.

In debate it was urged in behalf of the majority report that there was no proof that the men of Kelly's force were naturally partisans of contestant or that any one of them intended to vote for him, no proof that they all did not vote for him, and no proof that a single man was influenced by Kelly's interference to vote otherwise than he would have done without it.[1]

**1001. The case of Hurd v. Romeis, continued.**

**Handling of the ballots by an unauthorized person during the count, no fraud being shown, does not vitiate the return.**

**In a city precinct testimony that certain names on the poll lists are unknown to the witnesses., does not justify an assumption that the voters are disqualified.**

**Discussion as to the proper method of deducting from the returns unsegregated illegal votes.**

**The House declined to declare a seat vacant on hearsay evidence as to general bribery and irregularities.**

**Instance wherein the House declined to seat a contestant belonging to the political party in a majority in the House.**

(3) As to contestant's claim that the poll of another precinct should be rejected the majority report says;

Precinct C, Ward 3, in the city of Toledo, returned a majority of 166 for Mr. Romeis. Mr. Hurd asks that this return be excluded because he complains that one Bell, a Republican, took some of the ballots from the box and handed them to the judges while they were engaged in counting the vote. This complaint is supported by the evidence of one of the clerks of the election. It is negatived by the judges and flatly denied by BeIl. Bell had been one of the judges of election for that precinct for many previous years, and had been appointed to that office for the year of this election and had acted

[1] Speech of Mr. Boyle, p. 3444; also Mr. Payne, Record, p. 3449.

in that capacity at an election in the spring, but having moved out of the precinct he did not serve as judge at this election. His character seems to have been good, and he had the confidence of the judges of election. No evidence of the contestant impeaches his integrity. It is scarcely probable that he could have changed the tickets in the presence of the judges, the clerks, and of the public. It was a wrongful act or irregularity if it occurred, but under the circumstances we can not recommend the exclusion of this return.

The minority hold:

The only explanation of the conduct of Bell, as already stated, attempted was to show that the tampering with the box occurred in November. We are of opinion that contestee has failed in the explanation. The act of Bell is therefore without anything to extenuate or justify it.

In all elections the most important thing to be shown is that the votes counted were those cast. There can be no assurance of this fact, except that the ballots have been preserved in the exclusive custody of the officers charged with the duty of keeping them. Any interference with them by an unauthorized person, any handling or taking them into possession by others than the proper officers, whereby an opportunity to tamper with them and alter them has been given, will be fatal to the count unless the clearest and most satisfactory explanation has been made of the conduct of such persons. The burden is shifted to the contestee to show that what was done did not interfere with the ascertainment of the true result. This doctrine is declared in Duffy's case, supra, where it is said:

"Besides where the officers of an election board, as shown by the evidence in this case, have either, through design or ignorance, neglected to comply with some of the essential requirements of the law * * * presumption in favor of the legality, fairness, and regularity of the election predicated upon a return and tally sheet ought not to weigh heavily with a tribunal seeking to vindicate and administer the law. The burden of proof must be shifted to the other side. Those who are advantaged by such an election must show affirmatively its general fairness, otherwise it will become the duty of the court to throw it out altogether."

Here no proof was offered upon this point by contestee, except to attempt to show that the interference with the ballots by Mr. Bell occurred at the November election. This attempt having failed, the conduct of Mr. Bell remains without extenuation, indeed fuller of suspicion, because of the effort to set up a false explanation of it.

The rule of the law in disposing of a return made where the ballots have been taken from the custody of the proper officers is laid down in a case decided in the New York senate, hereafter cited.

The penalty for interference with ballots in Ohio before counting is very severe.

Section 7059 of the revised statutes provides:

"Whoever at any election, unlawfully, either by force, fraud, or other improper means, obtains or attempts to obtain possession of any ballot box, or any ballots therein deposited, while the voting at such election is going on, or before the ballots are duly taken out of such ballot box and enumerated by the judges of the election, according to law, shall be imprisoned in the penitentiary not more than three years nor less than one year."

The act here prohibited is not merely the fraudulent taking possession of ballots, but the illegal taking of them by any improper means. This shows the view in which the Ohio statute holds the giving of any opportunity to unauthorized persons to tamper with the votes.

The New York case above referred to is the case of Cary *v.* Twombly (New York Contested Election Cases, p. 474).

(4) The final objection of contestant is disposed of by the majority as follows:

The contestant insists that very many illegal votes were cast in the various precincts of the city of Toledo. Comparing the poll books of the October election, out of which this contest arose, with the poll books of the Presidential election in November (which were in the possession of the city clerk), he seems to have found the names of several hundred persons who voted in October but did not vote in November. With this information used as a basis of inquiry, he undertook to prove by certain witnesses that these persons were not known to the witnesses, or were not resident in the wards in which they seem to have voted. This mode of impeaching votes may be useful in country precincts, in small towns and villages, where each resident is known to almost every other resident, but in a busy and crowded city it can not be safe, however great the opportunities of the witnesses.

In the city of Toledo a large part of the population consists of foreigners. The officers of election, who in a given case may be native citizens, have to take the strange names of naturalized citizens, and in another case, naturalized citizens, acting as officers of election, have to take the names, equally strange to them, of native citizens.

The majority then go on to give illustrations of names misspelled on the poll books in such ways that the name of one man by the various spellings seemed to be the names of different men. And the majority conclude:

The poll books, it is obvious, under these conditions would be very misleading.

Much of the evidence on this branch of the case consists of statements and declarations of other persons, proven by the witnesses, and of conclusions drawn by the witnesses from these statements and declarations. The contestant contends that declarations of this character are competent to show the disqualification of voters, but not competent to establish their right to vote. Without commenting on this apparent inconsistency, we regard this evidence as hearsay and inadmissible for any purpose.

The contestant claims, as the result of this proof, that he has shown that 291 illegal voters cast their ballots in the city of Toledo, but admits that he has not shown for whom these unlawful ballots were cast. He insists, nevertheless, that these votes should be deducted from the majorities of the sitting Member and of the contestant in the various precincts, and by this arbitrary method he would take from Mr. Romeis 135 and from himself 56. By this process he reaches a result which makes a difference of 79 votes in his favor and against his competitor. We can not sanction this treatment of illegal votes. In the absence of any proof as to how they were cast, we think that they should not be deducted from either candidate, or, if deducted at all, should be taken from all the candidates, including the Prohibition candidate, in the several precincts where they were cast, in the proportion of the actual votes counted for each of the candidates in each precinct. This latter mode of elimination would not affect the result.

The minority say:

Lists were prepared of the names of these voters and put into the hands of people living in the precinct. These persons were placed upon the stand to testify as to whether those whose names had been given them were electors or not in the precincts where they had voted. The witnesses called upon from each precinct were persons who were residents, had in some cases lived many years there, and in many cases had been born there; were acquainted with the people; had been doing business with them, and had held offices, such as assessors and councilmen, among them. Besides, they had taken the lists and called in from the neighborhood a number of prominent persons from every part of it to consider the names. They made comparison with the directory, and in most cases went personally from house to house to learn whether the parties were voters.

With this information, possessed as to each precinct, the witnesses went upon the stand and testified that the 347 persons were not residents of the precinct at the time of October election and were not legal voters there at that time. This testimony will be found on pages 18, 20, 22, 24, 26, 31, 40, 47, 50, 53, 56, 60, 62, 64, 82, 84, 89, 93, 102, 106, 108, 111, and 113.

This testimony is entirely competent and always makes out a prima facie case against the votes claimed to be illegal. This doctrine is well settled.

After quoting from the case of Blair *v.* Barrett and McCrary, especially the latter, to show that proof of the above kind shifted the burden to the parties desiring the challenged votes to be counted, the minority continue by saying that sitting Member recognized the force of this rule and undertook to show that the votes were legal. The minority then say as to the votes alleged to be illegal:

It is admitted that there is no evidence to prove for whom these votes were given.

The question thus directly presented is, What disposition shall be made in a contested election of illegal votes where there is no proof as to how they were cast.

McCrary says that there are three methods of disposing of such votes. These are—

(1) To declare the election void; i. e., the election at the precinct where the illegal votes were cast; (2) to subtract the votes from each proportionally, and (3) to deduct them from the majority.

In disposing of these ballots we think that each precinct should take care of its own illegal vote. Where an election is declared void, it should be that held in the precinct where the illegal votes are cast. This is the rule laid down in the case of Goode *v.* Platt (p. 679):

"When illegal or fraudulent votes have been proven, and the poll can not be purged with reasonable certainty, the whole vote must be rejected."

When the illegal votes are not numerous enough to change the result in the precinct, they must either be subtracted from the candidates proportionally or deducted from the majority.

The first method is unsatisfactory. It is practically dividing the illegal votes between the candidates, upon the principle that the illegal voters have voted as the lawful voters did. This not a fair presumption, as from the fact that large numbers of illegal votes are cast in a precinct, it may well be inferred that it was intended by those who cast them to prevent the natural division of the votes from being effectual. Besides, when the majority in a precinct for a candidate is small, it would require a very large illegal vote to affect the result; i. e., under this rule large numbers of illegal votes could be cast with impunity, providing they left only a small majority for the successful candidate.

We think that the rule of deducting the votes from the majority candidate in each precinct is the correct one. It is on this theory only that the election can be avoided where there are enough illegal votes to affect the result.

It will make each candidate take care of his own precinct. It will make it for the interest of judges to prevent illegal votes which may injure their friends. It will cause that candidate to lose the votes who through his friends might have prevented their being cast.

This rule is approved in the case of Le Moine *v.* Farwell (Digest of 1871, p. 442), and Goode *v.* Platt (Digest of 1871, p. 686).

In Commonwealth *v.* McCloskey (Brightley's Cases, p. 211); in Marblehead case, reported in Cushing's Man. Election Cases, and in In *v.* Duffy (4 Brewster, p. 173).

The doctrine is also approved in Massachusetts Report of Contested Election, pages 52, 63.

In the recent case of In *v.* Barker (10 Phil., 596), the syllabus is as follows:

"When legal and illegal votes have been counted indiscriminately and a majority have resulted in various districts, embraced in the general return, whether for one candidate or the other, the only means whereby even approximate justice may be reached is to require him for whose advantages such majority inure to lift the curse which the law has imposed upon the illegal ballots; otherwise they will be deducted from his count."

Applying this rule, we find that contestee will lose 135 votes and contestant 56, making a total of 79 votes, after the polls are purged, to be deducted from the vote of the sitting Member.

In debate it was claimed on behalf of the majority contention that the presumption from all the facts was that the voters unaccounted for were actually legal voters, and because they could not be found five months afterwards in a large city was not conclusive evidence that they had not been there.[1]

In accordance with their conclusions, the majority of the committee reported resolutions declaring sitting Member entitled to retain the seat. The minority of four Members headed by Mr. Robertson proposed the following:

*Resolved,* That Jacob Romeis was not elected a Member of the House of Representatives of the Forty-ninth Congress from the Tenth Congressional district of Ohio.

*Resolved,* That Frank H. Hurd was elected a Member of the House of Representatives of the Forty-ninth Congress from the Tenth Congressional district of Ohio.

Another minority of two Members, Messrs. Robert S. Green, of New Jersey, and Benton J. Hall, of Iowa, came to this conclusion:

*Resolved,* That neither Frank H. Hurd nor Jacob Romeis was lawfully elected to the Forty-ninth Congress from the Tenth Congressional district of Ohio, nor is either of them entitled to a seat in said Congress.

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[1] Speech of Mr. Payne, Record, p. 3450.

The report was debated at length on April 13 and 14,[1] and on the latter day the question was taken on a motion to substitute the first resolution of those presented by Mr. Robertson for the majority proposition, and this motion was disagreed to—yeas 105, nays 168. The second proposition of Mr. Robertson was then rejected without division.

Then the resolutions of the majority, confirming the title of sitting Member, were agreed to without division.

The contestant, Mr. Hurd, was a prominent member of the majority party in the House.

**1002. The Iowa election case of Campbell v. Weaver, in the Forty-ninth Congress.**

**Discussion of a registration law as mandatory or directory.**

**Discussion as to the nature of a judicial construction of a State law as bearing on the duty of the House to accept it in an election case.**

**Unregistered voters having voted on the production of affidavits prescribed by law for such cases, the affidavits should be kept inviolate as in the case of ballots for a recount.**

**An elector having in good faith presented an affidavit in lieu of registration, and the vote having been accepted, the House declined to reject the vote because the affidavit did not meet the legal requirement.**

**A vote deposited in good faith by the elector, supposing himself to be registered, should not be rejected upon subsequent discovery that he was not registered.**

On April 12, 1886,[2] Mr. B. J. Hall, of Iowa, from the Committee on Elections submitted the report of the majority in the Iowa case of Campbell *v.* Weaver.

The sitting Member had been returned by an official majority of 67 votes. Contestant alleged various objections to the legality of this majority, and several questions of fact were decided by the majority report; but the report and the debate in the House shows that the decision of the case turned entirely upon a single question of law. The minority views, presented by Mr. Sereno E. Payne, of New York, state fairly the conditions under which the question arose:

> The following are in substance the sections of the Iowa code which prescribe the manner in which the registry shall be made for each election:
>
> "The township trustees and clerk shall constitute the board of registry, and shall meet annually, * * * and shall make a list of all qualified electors in their township, which shall be known as the register of elections." (Code, sec. 595.)
>
> "The register of elections shall contain the names of the voters at full length, alphabetically arranged, with residence set opposite. It shall be made from the assessor list and the poll books of the previous election, and shall be kept by the township clerk, and shall at all times be open to inspection at his office without charge. He shall, also, within two days after the adjournment of the board, post up a certified copy thereof in a conspicuous place in his office, or in such other place as the board may direct." (Code, sec. 596.)
>
> The board shall meet on Tuesday preceding general election to complete registry. Must give previous notice by publication; at time of meeting "they shall revise, correct, and complete the register of election, and shall hear any evidence that shall be brought before them in reference to

[1] Record, pp. 3442, 3483–3501; Journal, pp. 1242, 1246, 1247.

[2] First session Forty-ninth Congress, House Report No. 1622; Mobly, p. 455.

such correction." It further provides that names may be added or stricken from the register at this meeting. (Code, sec. 597.)

These sections seem to contemplate what would appear to be a most natural result from such a method of making up the lists in the first instamce—an incomplete list of the voters in a large precinct—unless the board were aided in their duties by the appearance before them of the voters themselves, who had neglected to vote at the last election, and who were not taxpayers in the district. But this registry law does not even require the presence of the voter at the place of registry, but his name may be placed on the register if any person shall make it appear to the registry board that he is a legal voter in that precinct.

But if the name of a legally qualified voter is left off the list he still is not deprived of his vote. The following section of the statute affords him an ample and a simple remedy:

"SEC. 618. The judges in election precincts where the registry law is in force shall designate one of their number to check on the register the name of every person voting; and no vote shall be received from any person whose name does not appear there, unless he shall furnish the judges his affidavit showing that he is a qualified elector, and a sufficient reason for not appearing before the board on the day for correcting the register, and shall also prove by the affidavit of one freeholder or householder, whose name is on the register, that such affiant knows him to be a resident of that election precinct, giving his residence by street and number, if in a city or incorporated town, as the same is in such cases required to appear on the register. Said affidavits shall be kept by the judges and by them filed in the office of the township clerk, and all such affidavits may be administered by either of the judges or clerks of election."

In Oskaloosa Township it seems that the Republican committee were diligent on the days for correcting the registry and saw that the voters belonging to their party were all registered. On the other hand, it appears that the committees for the Democratic and Greenback parties made no attempt to correct the registry or to see that the names of the voters of their party were put upon the lists before the election. The result was that about 200 of the members of those parties were not registered.

These unregistered voters presented affidavits, and it was not objected that these affidavits failed to show that each of those presenting them was "a qualified elector." But it was objected that the "sufficient reason for not appearing" did not appear in them.

These affidavits alleged to be defective were of two principal classes:

First, 31 affidavits, each of which gave no reason whatever for failing to appear before the board. The majority say as to these that they were not, when produced as evidence in the case, identified by the voters, the notary public, or the judges. They were simply produced by the township clerk, into whose hands they were placed after the election. The safe custody of them was not proven, and the majority reports imply that they should have been kept and identified with the same care as ballots for a recount. But the majority say that these 31 ballots are not decisive of the case.

Second, the following cases described in the majority report:

Thirteen cases where "neglect" is assigned, and 103 where "left off the register" is assigned for not appearing before the registry board. With one or two exceptions these affidavits were presented and used in the two Oskaloosa precincts in Mahaska County. The evidence shows very conclusively that the registry list in that township was not an honest one. In its preparation it was found in unauthorized hands and at unauthorized places. Out of a voting population of about 800, about 200 names, nearly all Democrats, were omitted. Old citizens who were property holders, and had voted there for many years, found themselves unregistered, although their names must have been upon the poll lists and assessment lists. On election day the fact that 25 per cent of voters' names was omitted, and nearly all of one political party, must have created a profound impression of neglect or fraud on the part of the registry board. The evidence shows that some of the electors were so indignant and humiliated that they refused to furnish the necessary affidavit and declined to vote. In such a state of affairs the words

"neglect" and "left off the register" are pregnant with meaning, and furnish "sufficient reason" to any unbiased mind. Those terms, as thus used, do not imply "neglect" on the part of the elector, but on the part of sworn officers in whose honesty and efficiency the electors were authorized by law to depend.

The minority views deny as a matter of fact that there was anything about the registry list that was dishonest.

Discussing the single question of law, the majority report says:

The question then presents itself whether the provisions of section 618 are directory or mandatory, or partly both. It is not a case in which the vote of a nonregistered elector was received without any affidavit or proof whatever, as directed in the statute. There is no claim or pretense that the elector was not in all other respects qualified. There is no claim or pretense that any of the alleged defects or imperfections in the affidavit were the result of design or of any intent to evade or defeat the statute.

But the case is where the elector, finding himself omitted from the registration list, resorts in good faith to the second method of qualifying himself as to the method of voting; attempts to prepare, subscribe, and swear to an affidavit in compliance with the statute; presents it to the judges for inspection and examination to satisfy them of the existence of the requisite qualifications and a satisfactory reason for not appearing before the registration board; the examination is made bona fide; the judges are satisfied and the vote received. Are all of these provisions mandatory; and can such a ballot be rejected because the reason for not being registered is omitted, or may not afterwards be satisfactory to some court or person who was not a judge of election, or because of some technical mistake, or clerical omission, which, if noticed at the time, could at once have been corrected, and all question as to the legality and regularity of the vote obviated?

Little aid is derived from decisions in Iowa or elsewhere. In the case of Edmunds *v.* Banbury (28 Iowa, 267), the plaintiff, insisting that the registry law was unconstitutional and void and being unregistered, tendered his vote without any attempt to make the required affidavit, which being refused, he sued the judges of the election. The court held the law constitutional and that the judges were justified in refusing his vote. This was correct whether the provisions of section 618 are directory or mandatory.

In a later case, Nefzger *v.* R. R. (36 Id., 642), at a special township election to determine whether property should be taxed to aid in building a railroad, held without any pretense of registration, the court held that the law requiring all elections to be conducted under the registry system was mandatory and that the election was void. But this does not reach the question, for there can be no doubt that a general statute which declares that all elections shall be held under a registry system is mandatory in its general sense.

The question has arisen as to the character of the statute, wherein it provides that no vote shall be received from any person whose name does not appear on the list, unless he shall furnish an affidavit, or proof, etc. In the cases of Doerflinger *v.* Helmantel (21 Wis., 566); in reelection of McDonough (105 P., 490), and cases in one or two courts of interior jurisdiction, provisions of this character have been held mandatory. It has been held directly otherwise in Illinois. (See Dall *v.* Irwin, 78 Ill., 170; Clark *v.* Robinson, 88 Id., 504.)

This identical question arose in the contested election case of Curtin *v.* Yokum in the Forty-sixth Congress.

The report also quotes the constitution of Iowa to show that the reasoning of the majority in the case of Curtin *v.* Yokum would apply here:

ART. 2. SEC. 1. Every male citizen of the United States of the age of 21 who shall have been a resident of this State six months next preceding the election and of the county in which he claims his vote sixty days shall be entitled to vote at all elections which are now or hereafter may be authorized by law.

The report also cites Wheelock's case (1 Norris, 297) and the case of Lowe *v.* Wheeler. Citing Wheelock's case, the report says:

The highest court of judicature in Pennsylvania has declared as follows:

"The State constitution gives to every citizen possessing the qualifications prescribed the right to vote; and section 7 of the same article provides that no elector shall be deprived of the privilege of vot-

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

It can not be seriously contended that the right of a single individual citizen to vote is not as securely guarded by the constitutional guaranty as that of the electors of an entire township. And it must be held that if the fraud, mistake, or omissions of a board of registry or of the judges of election could not deprive the electors of a whole precinct of their right to vote, so it could not that of a single elector. Accordingly, after much consideration in the Curtin-Yokum case, the House, whose decisions in matters of such high privilege and affecting the constitution of the House itself ought to be the highest authority in the world, decided in favor of the sitting Member, and in effect held the registry law to be directory.

The same action was had by the House in the later cue of Lowe *v.* Wheeler, in the Forty-seventh Congress, where it was held that when electors who are not registered are permitted to vote without challenge, their votes can not afterwards be rejected, became to do so would perpetrate a fraud upon the elector and deprive him of his vote. Thus it will be seen that the question is not a settled one, and it may be very doubtful as to the weight of authority one way or the other. But may not this conflict be reconciled in a manner entirely satisfactory and in recognition of a just rule of interpretation?

It is difficult to escape the conclusion that where a registry law requires the production of an affidavit by an unregistered elector as the condition for his voting, it is many to a certain degree and for a certain purpose. It is mandatory so far as to require good faith in its observance and to prevent its willful evasion. But the whole scope and purpose of such a law is to defeat fraud, subterfuge, and evasion, and to enable every lawful and qualified voter to vote and have his vote counted in a canvass purged of all illegal votes. The moment the operation of the registration defeats itself, operates to defraud the legal elector and defraud him of his vote, it not only ceases to be mandatory, but is quoad hoc void.

To illustrate this more fully: The law requires the registry board to enter the names of all the electors on the list. The elector, when he approaches the polls to vote, has the right to presume omnia recte acta, and that his name is properly on the list. He can not know that it is or is not there. Even though he may have appeared before the board of registry and seen his name registered, it may have been subsequently erased upon showing or fraudulently. Hence, when he comes to vote, his offer to vote is itself an inquiry whether he is registered.

The list is in the possession of the judges, and an inspection of it alone can give answer to the inquiry. The elector can not inspect it, and the law makes it the duty of the judges to answer whether the elector is registered. They may answer "yes" verbally, or silently by signs and acts, in receiving the vote. It matters not whether the elector makes the inquiry aloud, or simply by tendering the ballot; or whether the answer is aloud or by silently receiving the ballot; the effect is the same. The judges may have been mistaken in the name, or may have made the answer in fraud, intending to cause the subsequent rejection of the ballot for want of registry. There can be no question that the elector in such an instance, if correctly informed that he was not registered, could still rectify that omission and secure his vote by presenting the requisite affidavit. And the failure to give him the true information, as above supposed, would not only be a direct violation of law and a fraud on him, but deprive him of that right, and, consequently, of his vote; and the result would be the direct and immediate consequence of the conduct of the judges.

It would be a gross fraud upon the elector and deprive him of the very right which it is the whole purpose of the law to protect and subserve. The law should not bear a construction which would permit such consequences. Indeed, to that extent the law would be unconstitutional. For it may be safely asserted that where the Constitution affirmatively confers the right to vote upon the citizen, the legislature has no power to prescribe regulations that would thus entrap him and deprive him of that right.

Not any of the cases cited go to this extent. The Wisconsin case—Doerflinger *v.* Hilmartel—and the Pennsylvania case, in reelection of McDonough, simply hold the general doctrine that in its general sense the statute is mandatory. They simply assert that where the elector is not registered and votes as a nonregistered voter without the additional affidavit or proof, his vote must be rejected. If they are to be deemed as going farther than this they are obiter dicta and of no authority.

The elector can not be deprived of his vote except by conviction of felony. A registry law is only reasonable when it puts the elector who does not comply with it in the attitude of remaining away from the polls or refusing to vote. To register or furnish an affidavit is a reasonable regulation accompanying the act of voting. If this act is omitted or refused it is equivalent to remaining away and refusing to vote. But when this same statute deprives of his vote an elector who comes in good faith and is advised by the authorities, and believes he is registered, and whose vote is received in such manner as to deprive him of his right to rectify the omission by affidavit, it violates directly the constitutional clause conferring the right, and is to that extent void.

Hence we insist that a vote deposited in good faith by the elector, supposing himself to be registered, can not be rejected upon subsequent discovery that he was not. But where the elector is advised or knows that he is not registered, no such consequences will follow. No such fraud can be perpetrated upon him. He is not deprived of any locus penitentiae in procuring an affidavit. He knowingly violates the law, and his vote is a fmudulent one.

This your committee believe to be the true rule, and announce it as a principle. Where the elector, acting in good faith and honestly supposing himself to be registered, deposits his vote, and the same is received by the judges, it is a valid vote. But where the elector does not act in good faith and knows he is not registered his vote should be rejected.

It is worthy of consideration that the statute in question is only so far mandatory as to control the action of the judges of election. While it is a negative statute it applies to and affects the judge only. "No vote shall be received" by the judges unless the elector is registered. But suppose they do receive it. The judges might be punished. But there is no provision affecting the elector. He is not to be punished or his vote cast out.

Under the rule or principle announced above, it may sometimes be a matter of some difficulty to establish the want of good faith on the part of the nonregistered elector whose vote has been received by the judges. But most unquestionably, in the absence of other evidence, the presumption of innocence and omnia recte acta prevails in such case. The burden of the showing want of good faith must necessarily rest upon the one challenging the vote and asking its rejection.

It is quite well settled that when the elector offers his vote he must establish all legal qualifications to justify its reception. But the act of the judges in receiving it is judicial. When it has been received every presumption is in favor of its regularity and legality. Whoever seeks to cause its rejection must assume the burden of establishing the disqualifications, even to proving a negative.

"Evidence which might have been sufficient to put the voter to his explanation if challenged at the polls is not deemed sufficient to prove a vote illegal after it has been admitted." (Gooding *v.* Wilson, Forty-second Congress.)

"Of course some weight is to be given to the decision of the judges of election, whose province it is in the first instance to admit or exclude votes. Their action is to be presumed correct until it is shown to have been erroneous." (McCrary on Elections, sec. 372; see also Id., sec. 294; New Jersey Cases, 1 Bartlett, 24; People *v.* Peare, 13 N. Y., 74.)

There can be no doubt that if the foregoing views are maintained they are conclusive of the question involved in the present case. For if a ballot received from an elector who in good faith believed himself registered as required by law would be voted, still more so would it be the case where he in good faith presented an affidavit in supposed compliance with the law and the judges accepted it as sufficient.

The distinction between the essential qualifications of the elector and the mere methods or machinery of election must not be confounded. The judges of election can not by receiving a ballot give qualifications to one who is not a qualified elector. The elector, when challenged, may take the required oath as to his qualifications, and the judges then admit his vote. This will not prevent his vote from being subsequently thrown out when it is shown he was not qualified. But suppose in administering the oath by mistake some important line or sentence of the oath was omitted by the judge, would that alone cause a rejection when it appeared the oath was taken in good faith?

So, too, if regularly registered, acceptance of his ballot does not establish his real qualification. Neither does it when he votes upon affidavit. All these things are mere preliminary proofs to enable him to deposit the ballot. They are not part of his real qualifications. Hence an error or mistake in the preliminaries, when the ballot is received, will not cause its rejection.

But the statute, in so far as it provides what declarations shall be set forth in the affidavits, is directory only. And in this particular the assumption, hereinbefore rebutted, that a vote received without registration is illegal, would not control the actual question in this case. It may well be held that an affidavit is necessary, and also that a failure to comply in respect of all the statements required would not render the affidavit void. There is no prescribed formula for the affidavit. It shall show that the elector is qualified and a sufficient reason for not appearing before the registry. He shall also prove by one freeholder who is on the register that he knows him to be qualified, giving residence, etc.

Suppose there are errors or omissions in the statement, but the vote is received by the judges. What shall the proof be that will subsequently reject the vote? That the elector was not in fact a qualified elector or that he failed to "say in his affidavit" that he was a qualified elector? Shall the substance give way to the shadow? There is no doubt that the affidavit is to be submitted to the judges. They are to pass upon its compliance with the statute. Here again we find the same method of perpetrating a fraud upon the elector. The judges are to aid the elector by carefully inspecting the affidavit in the discharge of their duty, and if it does not contain the necessary allegations to so decide and by pointing out the imperfections enable the elector to rectify and perfect his proof. The law providing for affidavits was intended as a means of securing the vote, not defeating it.

In other words, the judges of election have no power to pass upon the legal and essential qualifications of the elector. They have no right or power to hear evidence or pass upon that question; but as to whether the affidavits comply with the statute, whether they show a satisfactory reason for not appearing at the registry board and contain the necessary statements, is a matter addressed to their judgment and examination; and when that judgment has allowed and received the vote it is final. The proof has been sufficient to justify the reception of the ballot, and thenceforward the only question that can be raised must relate to the essential qualifications of the voter. Of course it is not necessary to add that this proposition may be modified by the proviso that the paper offered as an affidavit is intended as such in good faith, and is not palpably an evasion or subterfuge.

The minority contended that the courts of Iowa had passed on the registration law and declared it mandatory, and say:

Congress has never reversed the decision of a State court as to the constitutionality and force of its own enactment.

But in debate it was denied that this was so, a Member arguing for the majority report saying: [1]

The State of Iowa in dicta has so decided; but the direct question involved in this case was not presented for decision, otherwise I should feel bound to follow the judgment of that case.

The minority discuss the cases of Edmunds *v.* Barnburry (28 Iowa, 267); Nefzgar *v.* R. R. Co. (36 Iowa, 642); in re Election of McDonnough (105 Pa., 490); Doerflinger *v.* Helmantel (21 Wis., 566), and two Illinois cases (78 Ill., 170, and 88 Ill., 504); and conclude:

After a review of all the cases we find it impossible, as it seems to be "difficult" for the majority (p. 7, majority report), to escape the conclusion that this registry law, requiring the "furnishing of an affidavit "by an unregistered voter as a condition for his voting, is mandatory. And we believe that it is mandatory upon all. It is the condition precedent—"no vote shall be received," etc. There is no middle ground.

It is not denied that this rule may sometimes work hardships and even deprive the honest elector of his right of suffrage. What law is there which is not obnoxious to the same charge? Ignorance will

[1] Speech of Mr. Rowell, Record, p. 4146.

pervert and set at naught the most perfect laws. If the plea of ignorance were allowed as an excuse many salutary laws would be practically annulled.

In Oskaloosa Township 31 voters presented affidavits, in which there were no reasons given for not appearing before the board on the day for correcting the registry. These affidavits are all in the same form, and the following is a sample of the whole:

STATE OF IOWA, *Mahaska County, ss:*

I, Walter Mitchell, on oath do say that I am a resident of West Oskaloosa Township, county of Mahaska and State of Iowa; that I am a citizen of the United States; that I am twenty-one years of age; that I have resided in the State of Iowa six months, and county of Mahaska sixty days last preceding this election; that I have not voted in this election, and the reason my name does not appear on the register list is Walter C. Mitchell.

C. BLATTNER.

Subcribed and sworn to before me by said affiant this 4th day of November, A. D. 1884.

[SEAL.]

J. B. BOLTON,
*Notary Public.*

In the same township 103 gave as a reason "left off the register." This is a sample of these affidavits:

STATE OF IOWA, *Mahaska County, ss:*

I, Walter Hunter, on oath do say that I am a resident of West Oskaloosa Township, county of Mahaska and State of Iowa; that I am a citizen of the United States; that I am twenty-one years of age; that I have resided in the State of Iowa six months, and county of Mahaska sixty days last preceding this election; that I have not voted in this election, and the reason my name does not appear on the register list is left off registry.

WALTER HUNTER.

Subcribed and sworn to before me by said affiant this 4th day of November, A. D. 1884.

[SEAL.]

J. B. BOLTON,
*Notary Public.*

It is conceded that all these affidavits were presented by Democrats, and upon them the affiants were permitted to vote. We maintain that all these votes should be deducted from the count of votes for the sitting Member. If we are right in our conclusions that this statute is mandatory, there cam be no doubt as to the rejection of the 31 votes where no excuse is given. But is it not equally true of the 103 voters who say that the reason they did not appear is "left off the register?" Can this, by any process of construction, be made to furnish an excuse? We will not go into the question as to who is to judge of the sufficiency of the excuse, or whether it is competent for the House to reverse a decision of the judges where any excuse is furnished; but in this instance we maintain that the words "left off the register" furnish no excuse for the nonappearance, and that there is nothing for the judges of election to act upon. It appears to us impossible to spell out an excuse from these words.

The majority of the committee, in their report, after a labored argument, at page 8 say:

"This your committee believe to be the true rule, and announce it as a principle: Where the elector, acting in good faith and honestly supposing himself to be registered, deposits his vote, and the same is received by the judges, it is a valid vote. But where the elector does not act in good faith and knows he is not registered his vote should be rejected."

But that principle, if correct, does not affect this contest. In this case the voter knew that he was not registered; hence his affidavit. He knew the law and that it was necessary to furnish the affidavit, presenting all the facts essential for the judges of election to act upon. He was not deceived by the judges as to any fact peculiarly within their knowledge; he knew that he was not registered as well as they; he knew that he must present a reason as well as they, for he was bound to know the law. And hence the reasoning in the majority report, as in the Illinois cases, is inapplicable to this case. It is impossible to work out any deception or fraud in this case from the evidence.

It is true that the unbiased mind must come reluctantly to a conclusion that would disfranchise a voter for the single reason that he had failed to comply with the registry law. And yet it is our duty to uphold the laws. Even were we convinced that the law was a bad one, our duty would be the same. But there are no more commendable laws upon the statute book than these same registry laws. No laws

have done more to guard the purity of the ballot box than these same laws. In every State where they are in force they have thrown up a bulwark against fraud and dishonest voting that human ingenuity has seldom been able to compass. Any construction that weakens their force or construes away their mandatory character is a step backward and should not be adopted, unless plainly required by the well-settled rules of construction. It should be our aim to enforce these salutary measures to their full intent and meaning. If we enforce them in this case we can reach no other conclusion than that the contestant is entitled to the seat now held by the contestee.

In accordance with their conclusions the majority offered these resolutions:

*Resolved,* That Frank T. Campbell was not elected to a seat in the Forty-ninth Congress as a Member from the Sixth Congressional district of the State of Iowa.

*Resolved,* That James B. Weaver was elected and is entitled to retain his seat in the Forty-ninth Congress as a Member from the Sixth Congressional district of the State of Iowa.

The minority presented resolutions declaring contestant elected.

On May 4[1] the report was debated at length, and then without division the minority resolutions were disagreed to, and the resolutions offered by the majority were agreed to.

**1003. The Rhode Island election case of Page v. Pirce, in the Forty-ninth Congress.**

**Although a contestant had accepted and held a State office in violation of the State constitution if he were really elected a Congressman, the House did not treat his contest as abated.**

**Testimony being taken after the legal time against returned Member's protest, but under color of a disputed oral agreement of counsel, the House declined to dismiss the contest.**

**Where contestant had taken testimony irregularly, the House gave returned Member additional time to cross-examine witnesses who had already testified and to take rebuttal evidence.**

On April 14, 1886,[2] Mr. R. S. Green, of New Jersey, presented the report of the majority of the committee in the Rhode Island case of Page *v.* Pirce. The law of Rhode Island required for election a majority over all other candidates.

The facts as to the phase of the contest involved in this examination were thus set forth in the minority views presented by Mr. Frederick D. Ely, of Massachusetts:

This contest concerns the Second Congressional district of Rhode Island. The election returns legally made show that Pirce received 7,746 votes; that Page received 5,995 votes; that Alfred B. Chadsey received 1,500 votes; and that other persons received 235 votes. Pirce received 1,751 votes over Page and 16 votes over all. Page does not appear in this case as a citizen claiming that the election was void, but as a contestant, claiming that he was duly elected in Congress from said district. At the date of the November election, 1884, Page was a member of the senate of Rhode Island, and continued to hold his seat in said senate and act and vote as a member of said senate after the 4th day of March, 1885, and after that date, in April, 1885, became a candidate for reelection, was elected a member of said senate, accepted the office, and has been since his said election, and during this session of Congress, acting and voting as a member of said senate, all in contravention and violation of the constitution of the State of Rhode Island, if he is and has been, since the 4th day of March, 1985, as he now claim and asks this House to declare, a Representative in Congress from his State.

It appears that Page served his notice of contest on Pirce within the time required by law, to wit, on the 5th day of February, 1885, and Pirce answered on the 5th day of March, 1885, and on that day

[1] Record, pp. 4138–4147; Journal, pp. 1488, 1489.

[2] First Session Forty-ninth Congress, House Report No. 1623; Mobly, p. 475.

served his answer on Page. Page took no testimony within the time required by law, but on the 12th day of June, 1885, did notify Pirce that he should begin to take testimony on the 25th day of June, 1885, and did between said date and the 20th day of July, 1885, in the absence of Pirce and against his written protest, examine certain persons, and the questions asked and answers given have been printed in this case, with the understanding and agreement that it should not affect, impair, or prejudice Pirce's rights. Said 25th day of June was seventy-two days after Page's time for taking testimony under the statute had expired, being one hundred and twelve days from the day on which the answer of Pirce, the returned Member, was served upon Page, the contestant.

The law limiting the time for taking testimony in contested election cases in the House of Representatives is found in section 107 of the Revised Statutes, and section 2 of chapter 119 of the Statutes of 1875.

Section 107 of the Revised Statutes is as follows, viz:

"In all contested election cases the time allowed for taking testimony shall be ninety days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first forty days, the returned Member during the succeeding forty days, and the contestant may take testimony in rebuttal during the remaining ten days of said period."

Section 2 of chapter 119 of the Statutes of 1875 is as follows:

"That section 107 of the Revised Statutes of the United States shall be construed as requiring all testimony in cases of contested election to be taken within ninety days from the day on which the answer of the returned Member is served upon the contestant."

Page alleges and makes oath that he made in oral agreement with Stephen A. Cooke, Jr., the attorney of Pirce, on the 9th day of March, 1885, to the effect that the testimony might be taken at any time before the meeting of Congress in December, 1885. Said Cooke, under oath, denies that he made said agreement. Page supports his affidavit by the affidavit of Frederick C. Hull, and Pirce in reply to Hull's affidavit files the affidavit of Charles C. Gray, to the effect that Hull had for some years made his headquarters at Page's office, had been employed by Page in various capacities, and derived therefrom most of his support, and that prior to the election for Congress, 1884, Hull presented at the printing office of which Gray is superintendent a written copy of a spurious Republican ticket to be used at said election; that said ticket was set up at Hull's request, and the form taken away by Hull, the name of the candidate on said spurious ticket being William H. Pirce. These affidavits are attached to the printed record in this case. It also appears that in a correspondence between Page and Cooke, Cooke informed Page on the 28th day of April, 1885, that he never made the agreement now claimed by Page, and yet Page allowed fifty-three days thereafter to elapse before he attempted to take any testimony.

After Page served his notice to take testimony on Pirce, Pirce served, on the 23d day of June, 1885, his protest against and objection to taking such testimony on Page, and notified him that he should not appear during the taking thereof in person or by attorney. Pirce seasonably appeared before the Committee on Elections and moved that this contest be dismissed, because the testimony was not taken in time.

The majority of the committee, by an inspection of the returns, concluded that the actual majority of returned Member was only 3 instead of 16.

This being the state of facts, the majority of the committee concluded:

While the committee would be inclined in ordinary cases to require that parties should strictly observe the directions of the statute, the testimony presented in this case by the contestant discloses such wholesale and open bribery, implicating even the contestee personally, that the House, in justice to its own dignity, must, in the opinion of the committee, take notice of the me. As the contestee, relying on his understanding of the agreement, abstained from cross-examination of the witnesses and from the production of evidence to contradict the case made by contestant, we recommend that time be given, as provided in the accompanying resolution:

*"Resolved,* That William A. Pirce, sitting Member from the Second Congressional district of Rhode Island, be allowed thirty days from the passage of this resolution within which to resubpoena and cross-examine witnesses heretofore examined by Charles H. Page, the contestant, and to take any testimony he may desire, and that ten days thereafter be allowed to said Page to take evidence in rebuttal."

The minority favor the motion of Mr. Pirce that the contest be dismissed:

In our opinion this motion should be granted. Even if the agreement were made, as claimed by Page, he has no standing before this House. Whether we regard the statutes concerning contested elections as absolutely binding on the House or as rules of procedure, neither Page nor Pirce nor both could waive or abrogate them. The House alone can do that. If Page desires the time for taking testimony to be extended, or that testimony already taken be received and considered as if taken in time, it is his duty to apply to the House, and this he has not done or attempted to do. He should also allege and prove a sufficient reason for such indulgence to him on the part of the House. This he has failed to do. If any agreement, founded on mere convenience of counsel, be sufficient, which we deny, certainly an oral agreement is not. This was decided in O'Hara *v.* Kitchin, in the Fortysixth Congress, five years ago, and has never been overruled or even questioned. We make one or two brief quotations from the able report of the Committee on Elections in that case and earnestly approve them as wise and just. Democrats and Republicans all join in saying:

"The evils resulting from permitting the parties, at their own convenience, to regulate the time of taking testimony, without regard to the statutes or public interest, are too serious and obvious to require comment. In any case, if such agreements axe to be regarded, they should be in writing and signed by the parties or their attorneys."

And again—

"The misunderstandings that often honestly arise from oral agreements axe alone sufficient to justify courts in insisting that none but written agreements will, if questioned, be recognized. We think it of great importance in election cases that parties should understand absolutely that all agreements in contravention of the statutes of the United States in regard to the taking of testimony, to be considered at all, should be in writing, properly signed, and made a part of the record itself."

The minority cite the decision of the committee in the case of O'Hara *v.* Kitchin and declare that the convenience of counsel or parties is not a sufficient reason for postponing the time for taking testimony beyond the statute limit. Therefore the minority recommended a resolution declaring Mr. Page not entitled to a seat, and a further resolution providing for an investigation into the intimidation and bribery alleged by contestant.

The report was debated at length on May 4[1] and the minority modified their proposition so as to provide for allowing the sitting Member forty days from May 12, 1886, within which to cross-examine witnesses heretofore examined by Mr. Page, and that ten days be allowed contestant to take evidence in rebuttal.

This proposition was offered as a substitute and was disagreed to, yeas 99, nays 127.

The resolution proposed by the majority was then agreed to, yeas 117, nays 78.

On January 15, 1887,[2] Mr. Henry G. Turner, of Georgia, submitted the report of the majority of the committee on the merits of the contest.

The majority report claimed that the actual majority of sitting Member was not 16 but 3. The minority denied this and presented during the debate a certificate of the secretary of State of Rhode Island giving the majority as 16. Thereupon Mr. Turner said that he would concede that the majority should be considered 16.

**1004. Case of Page v. Pirce, continued.**

**Affidavits of persons who did not appear at cross-examination because of failure of returned Member to pay witness fees were not rejected as ex parte.**

**There being direct testimony of voters that they were bribed to vote**

[1] Record, p. 4148–4161; Journal, pp. 1489–1493.

[2] Second session Forty-ninth Congress, Report No. 3617; Mobley, p. 489.

**against their convictions for returned Member, this fact contributed to overcome the returned majority.**

**A tinted ballot was not rejected as having a distinguishing mark when voters were not supplied with envelopes as required by law.**

**Influence of a highway superintendent over his employees at the polls was held to be intimidation.**

**In Rhode Island, in 1886, a majority vote was required for election of a Representative in Congress.**

The majority report discusses the only two issues in the case, the alleged bribery and intimidation practiced in behalf of sitting Member.

(1) As to bribery.

Ten witnesses swore that they received money for their votes, but afterwards they qualified this by saying that they received payment for their time. The testimony of Charles C. Gardiner is the most direct:

Charles C. Gardiner, having been sworn, testifies as follows:

1. Q. What is your name, age, residence, and occupation?—A. My name is Charles C. Gardiner; age, 48; Natick, R. I., is my residence; occupation, weaver.

2. Q. Were you a voter in the town of Warwick in the year 1884; if so, in which voting district?—A. I was; in district No. 1.

3. Q. Were you present at the election on November 4, 1884, and did you vote for Representative to Congress at that election?—A. Yes, Sir, I was present and voted for Representative to Congress.

4. Q. For whom did you vote?—A. For Pirce.

5. Q. Did you at that election receive any money for voting the Pirce ticket?—A. I did.

6. Q. How much money did you receive?—A. Two dollars.

7. Q. Did you receive this money from a person working for the election of Pirce for Congress?—A. I did.

8. Q. Was this person who paid you this money distributing Pirce tickets at that election?—A. He gave me one of the Pirce tickets, then saw me vote, and then gave me the money. I did not see this person distribute ballots to anyone else.

CHARLES C. GARDINER.

Cross-examination of CHARLES C. GARDNER, a witness called in behalf of Charles H. Page, contestant.

BY MR. COOKE:

1. Q. When you voted for Wm. A. Pirce, as you have stated in your direct examination, did you vote according to, or contrary to, your political convictions, in the election held November 4, 1884?—A. I voted the Republican ticket. I always have voted the Republican ticket ever since I have been a voter.

2. Q. Would you have voted for Mr. Pirce at that election for Representative in Congress if you had received no money?—A. I should have voted for Chas. Page if I had received no money.

3. Q. Why would you have voted for the Democratic candidate for Congress at that election, if you had always before that time voted the Republican ticket?—A. Because it was my choice in the man.

4. Q. Do you know for whom you voted for Representative in Congress at that election?—A. Voted for Pirce.

5. Q. Did you have a very decided choice in your candidate for Congress at that election?—A. I did at first. Some of the men around there told me to vote the straight Republican ticket, and I "done" so.

6. Q. Was your choice on account of personal or political considerations?—A. It was on the question: I liked Page better than Pirce, although I had never seen either one to know who he was.

7. Q. What did you know about either of them to cause you to wish to vote contrary to your party?—A. I did not know nothing about either of them. All it was they said that Page was the best man for Congress.

8. Q. So you voted for $2 against Page notwithstanding, did you?—A. Yes, Sir.

9. Q. Why so?—A. 'Cause I needed the money.

CHARLES C. GARDINER.

The testimony of William Wilcox was presented as showing not only how he had voted for money, but how others had been paid:

6. Q. Will you please state whether you received any money as an inducement to or as pay or reward for having so voted?—A. After I voted I received $3 for voting the ticket for Mr. Pirce.

7. Q. At the time you voted did you expect to receive money for voting the Pirce ticket which you would not have expected to receive had you voted for Mr. Page?—A. No, sir.

8. Q. State how and by whom the money was paid to you. Give the particulars.—A. I don't wish to give the name of the gentleman who paid me the money at present. It was paid in Atwood's Hotel, in Warwick, Kent County, R.I.; there were probably 100 voters there waiting for money. This gentleman whom I have spoken of, and whose name I do not wish to give, paid the money in greenbacks right out of his own pocket.

9. Q. Do you know if there were any voters paid at Atwood's Hotel who had voted for Mr. Page?—A. No, sir; there was no money paid there for Mr. Page; I don't know a man who got a dollar there for voting for Mr. Page.

10. Q. In whose interest and for whose election as Representative was the person who paid the money as you have stated working?—A. In the interest of Mr. Pirce; John H. Collingwood was the managing man for Pirce at that election in Warwick.

11. Q. How came you to go down to Atwood's Hotel and join the crowd of voters, as you have stated?—A. I was called there to get my pay for voting.

12. Q. When did you first understand that you would receive some money if you voted the Pirce ticket?—A. Soon after the polls were open-probably twenty minutes.

13. Q. From your knowledge and observation, about how many voters were paid for voting for William A. Pirce at that election in the town of Warwick?—A. In our district, which is the first voting district in the town of Warwick, there were probably from 100 to 125.

WILLIAM WILLCOX.

Jinks also testified:

5. Q. How much did you receive, and where, when, and from whom? State the particulars.—A. I got $3; I received it at the office in the barn of Atwood's Hotel that night after the polls closed. I am unwilling to state the name of the person who paid it. A number of voters went up there with me. All these voters that went with me voted for Pirce. I probably saw 100 people paid the same amount that I got. This person I have spoken of had a list of our names, called them off, and we answered them, and as we went up he paid us the money out of his pocket.

6. Q. When did you first know or when were you first given to understand that you would be paid if you voted the Pirce ticket at that election?—A. This man that I have mentioned came to me two days before the election, and told me to see him before I voted and he would give me as much as there was going. He said he knew there would be money going on the Pirce ticket, and he also said a man had been to him and hired him to buy voters to vote the Pirce ticket. I saw him on election day and he took my name as I went up and voted.

7. Q. To what political party do you belong, Republican or Democratic, and for whom would you have voted at that election if there had been "no money going," as you expressed it?—A. I am a Democratic man and I voted the Republican ticket that day because I got money for doing it; otherwise I should have voted for Mr. Page.

JESSE JINKS.

On testimony like the above the majority of the committee based their conclusions as to this portion of the case.

The minority [1] contended that only 8, or at most 10, could be found who testified to anything that could be construed as an admission of bribery. The testimony of Wilcox and Jinks as to the men paid at the barn at Atwood's stable was condemned as hearsay. The minority also criticise the evidence:

Instead of considering these ex parte affidavits as in the nature of information which might justify the House in entering upon an investigation, and requiring the evidence to be taken de novo,

[1] The minority views were presented by Mr. J. H. Rowell, of Illinois.

so that it might be entitled to the credit due to evidence lawfully taken, the House upon the recommendation of the majority of the Elections Committee, simply authorized contestee to cross-examine the witnesses whose ex parte depositions were on file, and to take testimony in his own behalf, giving him thirty days in which to do so, and to contestant ten days in which to offer testimony in rebuttal.

When it is known that a large part of the so-called testimony was in the nature of hearsay, or opinions in cases where opinions are not allowable as evidence, and that the method of examinin the witnesses, the way of putting questions so as to shape the answer, would not be tolerated in a court of justice, the necessity of applying strict rules in considering the evidence is made apparent.

Under permission of the House, given as above recited, contestee proceeded to cross-examine such of contestant's witnesses as answered to his subpoena, and to examine witnesses in his own behalf.

Several of contestant's witnesses did not appear for cross-examination at all, although duly subpoenaed, and it is upon the testimony of some of these that the decision of the case is made to turn by the majority of the committee.

In debate it was stated on behalf of the majority that the failure of witnesses to appear for cross-examination was due to the fact that sitting Member declined to pay the witness fees.

The minority also assailed the character of the witnesses and denounced them as men whose word was not to be relied on.

(2) As to intimidation, two questions arose:

(*a*) As to the color of the ballots the majority report says:

The contestant has also alleged in his notice of contest, and proven incontestibly, that the party managers of Mr. Pirce's candidacy used ballots printed on tinted paper easily distinguishable at the polls, and contends with much force that this device violated the secrecy of the ballot, and operated greatly to his prejudice in a district in which there are many manufacturers belonging to Mr. Pirce's party.

The statutes of Rhode Island prescribe that voting shall be by ballot, but there is no express direction as to size or color of the ballot. But the law also requires that voters shall be supplied at the voting places with envelopes in which to inclose their ballots, and uniformity of the envelopes is prescribed. For this reason, largely, we decline to recommend that these ballots for Mr. Pirce should be rejected on account of their color, it not having been shown that the envelopes were not supplied, or their use discouraged or denounced.

(*b*) As to alleged intimidation by employers of labor.

majority rely on the following testimony principally:

JOHN GARLAND, having been duly sworn, testifies as follows:

1. Q. What is your name, age, residence, and occupation?—A. John Garland; age, 39 years; residence, Pawtucket; occupation, teamster and contractor.

2. Q. Were you, on November 4, 1884, a qualified voter in Pawtucket, R.I.; and, if yea, how long had you been such?—A. I was, and had been ten or twelve years.

3. Q. Were you present at the polling place in said Pawtucket on that day; and, if yea, how long did you remain there?—A. I was, and I remained all day.

4. Q. What was your business at that time?—A. Foreman on the highways.

5. Q. As such foreman, did you at that time have under your superintendence and control any considerable number of employees who were voters in said Pawtucket; and, if yea, about how many?—A. I did. I can't say how many; it might be 30; it might be 50; that or more, I can't remember.

6. Q. Did you at the election held at said Pawtucket, on said 4th day of November, 1884, work to secure the election of William A. Pirce to Congress; and, if yea, at whose request did you so work?—A. I did; at the request of the town committee.

7. Q. What was the color of the ballots used on that day at said Pawtucket in voting for William A. Pirce?

(Objected to as immaterial under the laws of this State by Mr. Cooke.)

A. I couldn't remember; there was two or three colors of tickets there.

8. Q. Did the use of such colored ballots then and there in anywise intimidate voters or prevent them from voting according to their political views?

(Same objections to this question as were made by Mr. Cooke to question 4 of Harley Howard's testimony.)

A. I think they might.

9. Q. Did you as such foreman exercise or attempt to exercise any influence upon the employees whom you superintended in said highway department in reference to their voting at said election, and if yea, in what manner did you exercise or attempt to exercise such influence, and with what effect?—A. No more influence than request them to vote, and I stayed at the polls all day to see that they did vote, as I voted, for Major Pirce.

10. Q. Were the majority of such employees, your subordinates, Democrats, and would they, to your knowledge or belief, vote the Democratic ticket if not influenced to the contrary?

(Same objection made by Mr. Cooke to this question as he made to question 8.)

A. They were most of them Democrats. I believe they would have voted the Democratic ticket.

11. Q. How, as a matter of fact, did said employees vote on that day?

(Same objection made by Mr. Cooke as above.)

A. They voted as I wanted them to at any election. They voted the Republican ticket on that day

12. Q. Did any person or persons furnish you with money to be used at said election in treating voters or otherwise improperly influencing them to vote the Republican ticket, and did you treat any such voters with the money so furnished?

(Same objection as to the previous question made by Mr. Cooke.)

A. No, sir.

13. Q. Did you treat any voters on that day?

(Same objection as above and as immaterial if not done for the purpose of influencing their votes.)

A. I did.

14. Q. For what purpose did you treat them?—A. I suppose for friendship.

15. Q. Was it to influence their votes or because they had voted as you desired, and was it for the purpose of retaining your influence over them?

(Objected to by Mr. Cooke for the same reasons included in objection to question 13, and also because witness has already stated the purpose of treating them without assistance of counsel.)

A. It was because they had voted as I requested and to have the influence with them again.

16. Q. Who was the chairman of the Republican town committee of the town of Pawtucket at the time?—A. Almon K. Goodwin.

17. Q. Were you not on said day, and on all election days while you were foreman of the highway department, employed by said Goodwin to work at the polls and to remain there for the purpose of seeing that laborers on the highways voted as the Republicans wanted them to vote?

(Objected to for reasons included in objection to question 13, and also as to all matters relating to any other day than November 4, 1884. Mr. Baker insists upon the answer for the purpose of showing that such laborers knew from past experience the purpose for which the witness was stationed at the polling place.)

A. Yes.

Witness also continued with testimony indicating that men who did not vote as he wished would be liable to lose their positions.

The minority do not consider this testimony as establishing actual intimidation.

The claim that a number of voters at Pawtucket were intimidated by their employer, the overseer of highways, amounts only to a complaint that the voters allowed themselves to be influenced by the wishes, of the overseer, expressed only by a simple request that the men should vote as he did.

This claim would overthrow, if allowed, all labor to secure votes for one party or another.

If one may not ask a voter to vote his ticket, he may not make a political speech, publish a political newspaper, or dare to express an opinion in the presence of voters.

As a result of their conclusions the majority proposed the following:

*Resolved,* That William A. Pirce was not elected a member of the House of Representatives of the Forty-ninth Congress from the Second Congressional district of Rhode Island, and that the seat be declared vacant.

The minority proposed as a substitute:

*Resolved,* That William A. Pirce was elected a Representative to Congress for the Second Congressional district of Rhode Island at the election held November 4, 1884, and is entitled to retain his seat.

The report was debated at length on January 25,[1] and on that day the question on agreeing to the substitute was decided in the negative—yeas 108, nays 130.

Then the resolution of the majority declaring the seat vacant was agreed to—yeas, 130, nays 33.

**1005. The Indiana election case of Kidd v. Steele, in the Forty-ninth Congress.**

**The fact that an election officer before he became such had made a bet from which he withdrew before acting did not vitiate the return.**

**The House requires very plain evidence to presume such an interweaving of bribery in the votes as to justify rejection of the poll.**

On February 21, 1887,[2] Mr. John S. Henderson, of North Carolina, from the Committee on Elections, submitted the report in the Indiana case of Kidd *v.* Steele.

The sitting Member had been returned by a plurality of 54 votes.

Two questions were raised by contestant's objections:

(1) The report describes the first thus:

The contestant insists, however, that the returns from precinct No. 2, Liberty Township, Wabash County, must be rejected for the reason that George E. Vandergrift, inspector of election at that precinct, was disqualified to act because he had an interest to the extent of $50 in a bet of $100, which George T. Rowan is alleged to have made with Ben Sweetzer to the effect that the contestee, George W. Steele, a candidate for Congress against the contestant, would be elected. It is assumed that the statutes of Indiana prescribe that no person shall be eligible as a member of the board of elections if he has anything of value bet or wagered on the result of the election.

Mr. Rowan, a witness for the contestant, testified that he received $50 from Vandegrift about two weeks before the Ohio October election, and that this money was bet for Vandegrift." That was the intention at the time." On cross-examination he stated that about a week after the bet Vandegrift came to him and wanted to be let out of the bet, as he was going to be inspector of elections, and wanted him to assume it, and that he did so, and gave him his note for $50, which was afterwards paid. It is not proven, nor even alleged, that Vandegrift had any interest in the bet at the time of the election. The vote of this precinct was 182 for Steele and 66 for Kidd. The election appears to have been fair and free from fraud or corruption of any kind. The committee agreed that the returns of this precinct ought not to be rejected.

(2) A question as to bribery.

The report says:

The contestant also insists that the returns from the first, second, and third precincts of Center Township, Grant County, should be excluded because "the proof of bribery, of the almost open and shameless purchase of votes for money by Steele and his agents is full and conclusive." The contestee

[1] Record, pp. 1008–1028; Journal, pp. 372–375.

[2] Second session Forty-ninth Congress, House Report No. 4142; Mobly, p. 513.

resides in Center Township. This allegation requires a careful and patient investigation. The returns of these precincts show the following votes:

| | Kidd. | Steele. |
|---|---|---|
| First precinct | 103 | 212 |
| Second precinct | 121 | 307 |
| Third precinct | 199 | 380 |

As to the testimony:

Andrew Sheron testifies that Amos Six, whom he supposed lived on sitting Member's farm, offered him $3 to vote the Republican ticket. Sheron testified that he declined the offer.

Robert H. Home testified that he saw Amos Six, with whom he was acquainted, pay James Havens $5 to vote for Steele, and that he marked Havens's ticket for him, knowing that he was to receive money for it. Havens was a Democrat.

William Odom testified in reference to a conversation with sitting Member just before the election:

He then called me out to one side and said, "Here, Bill, I know you are a Democrat anyhow;" and said, "If you will support me, here is a $5 note to get the drinks on." I said, "You just give it to me and I will get the drinks anyhow, and you can tell after the election whether I supported you or not." He then gave me the $5 note. He pulled it out of his pocket and handed it to me behind him. The next time I had any conversation with him was over here on the court-house steps, at the south end. Me and Mr. Pilcher were together, and I stepped up to him (Mr. George Steele) and asked him if he had a dollar to spare. He said, "It is owing to what it is for.' I said, "That don't make any difference to you, does it, George, so we get it?" He asked me who we was. I told him it was me and Mr. Pilcher; and he said that wouldn't do me no good, would it? I said, "I don't know." He said, "If you will not forget me to-morrow I will give it to you." He then just reached down in his pocket and pulled out a roll of bills and pulled a $1 bill off of it and handed it to me. This was the night before the election. The other time was a month or six weeks before the election.

Cross-examination:

Q. Then he did not give you the $5 because of any assurance of support by you?—A. I had promised him a few minutes before that to support him, but not right at the time he gave me the $5.

Q. What act or word on the part of Steele caused you to say to him that you would give him your support?—A. I don't know as I can say just what words were used there at that time when I told him that.

Q. Then whatever was said about the $5 and whatever was done with it was said and done after your promise of support?-A. Yes; he gave it to me after I promised him my support.

Q. Then all that was said about the $5 by Steele was said after you promised him your support?—A. No, sir; I asked him for the $5 before, and he wouldn't give it to me till I did promise him my support.

William Pilcher made affidavit:

That he is a resident of Grant County and State of Indiana; that on the 4th day of November he was in the town of Marion, in said county, and that he did on said day, between the hours of opening and closing the poll, see one Charles Parker, of Marion, pay James Maxwell money and one-half pint of whisky to vote the Republican ticket at said election. And he further says that he heard Charles Brown say on said day that he had $200 of Steele's money, but he had paid it all out, but would see him (Steele) and get more; and afterwards heard Brown say that he had $30, and heard him offer the same for 7 votes, if they would vote for Steele; and he further says that on said day and between the hours above stated, he heard George Steele say to William Hubbard, in reply to said Hubbard's proposition to vote for him (Steele) if he would pay him money, that he did not dare to handle any money himself, but see Chs. Brown, Steve Smith, or Chs. Parker, and they would fix it for him.

Later when cross-examined Pilcher affirmed that he saw Charles Parker pay James Maxwell money and whisky to vote the Republican ticket; declined to answer when questioned as to the alleged remark of Brown about Steele; declined to identify his signature to the affidavit, and declared that to the best of his knowledge he did not swear to the affidavit.

An affidavit similar to that of Pilcher was also presented as from George R. Cresswell, but on examination Cresswell repudiated the affidavit.

James F. McDowell testified to conversations with Cresswell about Pilcher, which tended to give the impression that either of them might repudiate an affidavit for money. McDowell's testimony tended, but not conclusively, to show that both had made the affidavits.

Both McDowell and David Overman gave testimony tending to show that Jacob Malott had acknowledged after election that he had been induced by money from Steele to change his support from Kidd to Steele. They did not know personally whether he had done so or not.

John L. Parker, otherwise known as Charles Parker, the individual referred to in Pilcher's testimony, swore that he did not pay any money to anyone to induce him to vote the Republican ticket; but declined to testify as to his use of money at election time.

The report says of this evidence:

> This evidence, if uncontradicted, would be sufficient to authorize the rejection of the returns of these three precincts. The witnesses Pilcher and Cresswell have not testified in a plain, straightforward way. Their statements are contradictory, and can not serve one side any better than the other. (See pp. 118, 123, 916, 921.) William Pilcher (979) swears that William Odom, since he testified before Samuel Babb, the notary, made a statement to John A. Kersey that the testimony he had given before Babb was false in every particular, and that he had been hired by Mr. Overman to make the statement. George R. Cresswell (980) also testified to the same effect. It is impossible for the committee to conclude, from an impartial examination of the testimony, that "bribery had been so interwoven with the vote of these precincts that the whole return thereof should be rejected." Bribery is a heinous crime, and those who practice it should be denounced and punished. But there is not sufficient evidence in this case to warrant the rejection of the returns from the first, second, and third precincts, of Centre Township, Grant County.

After examining certain questions of fact the committee say that the contestant has failed to satisfy the committee that he received a plurality of the legal votes duly cast, and therefore they report resolutions confirming the title of sitting Member to the seat.

**February 24[1] the House agreed to the resolutions without division.**

**1006. The Kentucky election case of Thobe v. Carlisle, the Speaker, in the Fiftieth Congress.**

**Contestant not having used due diligence in taking testimony, the House declined to extend the time therefor.**

**House was disinclined to extend the time of taking testimony in order to procure testimony on points not referred to in the original notice of contest.**

**Contestant having presented ex parte affidavits in support of his**

[1] Journal, p. 716.

**motion for further time to take testimony, returned Member was permitted to rebut with ex parte affidavits also.**

**As to what contestant must show to cause the House to reopen an election case for further testimony.**

**The mere fact that election officers are not divided as to party is not of itself proof that the law requiring such division has been violated.**

**Election officers belonging to one political party only, in violation of the requirements of law, are nevertheless de facto officers.**

On January 17, 1888,[1] Mr. Charles F. Crisp, of Georgia, from the Committee on Elections, presented the report of the majority of that committee in the Kentucky case of Thobe *v.* Carlisle.

The sitting Member had received an official majority of 825 votes.

The notice of contest and answer, also an amended notice and an answer to that, were duly filed in this case. Thus the issues were joined between the parties.

The majority report thus gives the history of the contest:

On the 15th day of February, 1887, contestant took the testimony of three witnesses; on the 16th, of one witness; on the 17th, of three witnesses; on the 25th, of one witness; on the 26th, of one witness; on the 2d March, of one witness; and on the 3d, of one witness. Contestee, through his counsel, cross-examined the witnesses of contestant, but took no testimony himself.

On the 6th day of January, 1888, the cause came on for a hearing before the committee, when counsel for contestant argued the case upon the record, and also moved that the committee recommend to the House the appointment of a special committee to proceed to the sixth district of Kentucky and investigate the case further, or that the case be opened so that testimony might be again taken under such rules as should be prescribed by the committee. In support of this motion contestant presented and filed certain affidavits, letters, etc., copies of which accompany this report as an appendix, marked "A."

Contestee addressed a letter to the committee asking time to file affidavits in answer to those presented by contestant, whereupon the further hearing was adjourned until the 14th day of January, 1888. On that day contestee appeared by counsel and submitted affidavits, letters, etc., copies of which accompany this report as an appendix, marked "B."

Your committee first considered the motions submitted.

To excuse his failure to take testimony sustaining his notice of contest, contestant charges his attorney, L. A. Wood, esq., with being unfaithful to him; says he misled and deceived him, and intimates, if he does not charge, that said Wood, for a money consideration, "sold out" to the friends of contestee. In support of this allegation he presents the affidavits of himself and one John J. Pearce. Contestee in reply submits affidavits of L. A. Wood, esq., of Charles A. Tinley, the notary before whom the testimony was taken in Kenton County, of L. E. Wood and of John A. Goodson, an examination of which will show that contestant signally fails to establish the charge made against Wood.

Contestant avers that the case should be opened to allow him to establish the following facts:

(1) That on the evening of the day after the election contestee admitted to Horace Cambron, esq., that he, contestee, was defeated, and that said admission was published in the Evening Telegram, a newspaper published in Cincinnati, Ohio.

(2) That John A. Goodson, brother-in-law of contestee, two days after said election, admitted to Charles Easton that contestee was defeated, and the next day, on meeting said Easton again, said that "things were shaping up right, and that Carlisle would get in."

(3) That on the second day after the election there was held in the Federal Building, in the city of Covington, a conference of the friends of contestee for the purpose of determining arrangements to override and disregard the result of said election of contestant, and to the end that contestee might be declared elected.

(4) That in most of the counties of the district no tickets bearing the name of contestee were distributed before the election.

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[1] First session Fiftieth Congress, House Report No 48; Mobly, p. 523.

(5) That at midnight of the day after the election a hack drove from the direction of Covington toward the residence of A. S. Berry, esq., and in a few moments returned to the comer of York and Madison streets, and three men got out of said hack and went into the office of the Kentucky State Journal, and one of these men was contestee, and another was William Hanes.

(6) That on the poll books of seven of the eight precincts in Carroll County the register of names of voters are in the same handwriting, and that the signatures of the same election officers in many of the precincts are different upon the oath and to the certificate of election.

(7) That in certain other precincts and counties there were irregularities on the part of election officers.

It might be answered to all this, that the notice of contest fails to specify as grounds of contest the acts and omissions contestant now asks leave to prove, and therefore the evidence would not be competent, even if the case were reopened. Such is the well-established rule.

"Whenever any person intends to contest an election of any member of the House he shall, within thirty days, * * * give notice in writing, to the Member whose seat he designs to contest, of his intention to contest the same; and in such notice shall specify particularly the grounds upon which he relies in the contest." (U.S. Rev. Stat., sec. 105.)

"The language of the statute is specific and admits of but one construction. The grounds of the contest which are to be insisted upon must be stated in the notice. This, of course, is to the end that the contestee may be fully advised of the nature of the case which he has to meet. The notice is the only pleading required of contestant; it is the foundation upon which the whole proceeding rests, and if the contestant could introduce one new cause of contest not mentioned therein, he could introduce any number, and the contestee could never know in advance of the taking of the testimony what issues are to be tried." (Barnes *v.* Adams , Forty-first Congress.)

Again, to induce the House to order a new hearing of his case, contestant must show diligence in the use of the time allowed him by statute. (Giddings *v.* Clark, Forty-second Congress; Howard *v.* Cooper, Thirty-sixth Congress; Mabson *v.* Oates, Forty-seventh Congress, and authorities there cited.)

Contestant took testimony on only seven of the fifty days allowed him by statute; he made no efforts to procure evidence; he avowed that he never wanted to enter into the contest, and would like now to get out of it; that he did not want to pay out money in the matter; that the labor clubs had forced him into it; that he had only lost one day's work on account of the business, and he would not pay out any money but for the imputation that had been cast upon him by his own party that he and Wood had been bought up (see evidence, Tinley). In contestant's brief, beginning on page 17, will be found this statement:

"Contestant could, had he deemed it necessary, have proven every allegation in his notice and amended notice of contest; but when contestee in his answer admitted that 1,643 votes for himself and only 210 for contestant were improperly returned and counted by the returning officers of the State of Kentucky, contestant deemed any other action upon his part would be a work of supererogation, as the taking of these votes, thus admitted to be illegally counted, from the returns, would elect contestant."

In the opinion of your committee the laches of the contestant and his counsel have been such as to preclude him from asking further indulgence of the House.

Again, the case should not be reopened, unless it appear to the House that on a new hearing the contestant would probably be able to produce evidence which would entitle him to his seat. To do this he must produce the affidavits of some of the witnesses upon whom he relies, stating what facts are within witnesses' own knowledge (Giddings *v.* Clark, Forty-second Congress), and it must appear that such witnesses are credible, and have opportunity of knowing whereof they speak. Let us examine this case in the light of these rules.

The majority then analyze the showing made by the affidavits and conclude:

Very careful consideration of the papers of file satisfy your committee beyond all reasonable doubt that not one of the substantial averments of contestant could be established by satisfactory proof. The committee concede the right of the House to investigate the title of the contestee to a seat even if contestant has been guilty of such negligence as to preclude him as a party, but fail to see anything in the case before us calling on the House to institute an inquiry and investigation for its own vindication or to purge itself of a Member unelected, in fact.

Mr. J. H. Rowell, Of Illinois, who filed individual views supporting the conclusion of the majority, said:

I do not think it good practice to try disputed questions of fact upon ex parte testimony. In concurring with the recommendation of the committee, that the case ought not to be reopened, I do not give my assent to the proposition that all of the affidavits presented on behalf of contestee were legitimate matters for the consideration of the committee.

The serious charge made by contestant, and supported by affidavit as furnishing conclusive reason for reopening the case, was that the returns from seven out of eight election precincts in one county were in one and the same handwriting; or, in other words, that the returns were forgeries. Standing alone and uncontradicted this charge so supported would furnish ample ground for granting the motion of contestant.

In answer to this charge the original returns were brought before the committee and completely refuted it. No amount of testimony can change the appearance of these returns. In regard to them there can be no cross-examination to test the knowledge and truthfulness of witnesses. Regarding the attack upon these returns as the vital and material point raised in the motion to reopen the case for further testimony, and considering the presentation of the original returns as legitimate and not of the same character as a counter affidavit upon disputed questions of fact, I can not see any good reason to reopen the case in order that witnesses may be examined with reference to them.

The minority views, presented by Mr. Joseph Lyman, of Iowa, and concurred in by three other members of the committee, cite in full the motion:

Motion to investigate the conduct of the election held November, 1886, for Representative in Congress from the Sixth Congressional district of Kentucky.

(1) By select committee, as was done in the case of the First and Second Congressional districts of Ohio by the Forty-sixth Congress, first session.

(2) By resolution to reopen the case and take testimony, as was done in the Forty-third Congress in cases of Lawrence *v.* Sypher and Davidson *v.* Smith.

(3) By summoning witnesses before this committee.

And then say:

The minority then felt and now feel that a case involving such grave charges of fraud should not be settled in this hasty and off-hand manner, on the mere presentation of ex parte affidavits. They therefore felt obliged to urge a fitting investigation of the case, and failing in this, three of them felt unable to vote, as they would on every personal ground have been glad to do, in favor of the sitting Member's title to his seat and for the resolutions reported by the majority of your committee.

The single point is, whether when a prima facie case is made for reopening an election case, that prima facie case be rebutted by affidavits as was done, and for the purposes of this question, we may say completely done in this instance. The minority think that in a case of such gravity as this it is highly improper to try and decide the question on ex parte showings alone. But they believe that a reasonable showing having been made by contestant, he should, in all justice and fair dealing, be allowed to establish by legal and competent evidence, if he can, these allegations, by him made, of fraud and illegality in said election.

The minority cite the cases of Sypher and Butterworth and Young as sustaining their view; but in the debate these cases were analyzed to show their difference.

The question of reopening the case was the only one on which an issue was joined, either in the committee or on the floor of the House.

A question on which the committee were united was as to a certain allegation made by contestant in his notice of contest, and admitted by sitting Member in his answer.

The report says as to this:

Without expressing an opinion as to how far as a general rule the House should be bound by or act upon any admission of a contestant or contestee in a contested election case, your committee have accepted the admission of contestee, relied upon by contestant, as if the facts thus admitted were duly proven, and considered the case accordingly.

The fourth specification of contestant is in the following words:

"(4) And for the further cause that all the officers of the said election, at all the precincts or voting places of said Trimble County, and at each and every one of them, were selected and appointed from the Democratic party and belonged to one only of the political parties in this Commonwealth, to wit, the Democratic party; that said officers of election were not so selected and appointed as that one of the judges at each place of voting was of one political party and the other judge of the other political party, and that the like difference at each place of voting between the sheriffs and clerks of election at said precincts, and this, too, notwithstanding the fact that there were sufficient numbers of persons, discreet voters, to fill said offices, residing within said several precincts, of Republicans, from which said officers of election might have been selected and appointed, as the law provides and requires.

"Whereof said election so held in said Trimble County as aforesaid was and is illegal, invalid, and null and void, and the returns thereof are likewise illegal, invalid, and void, and I therefore object and protest against the counting of same in this contest."

The answer of contestee to this specification is as follows:

"(5) For the response to the fifth specification in said notice (numbered 4), it is true that all the officers of election in said county of Trimble belonged to one political party, to wit, the Democratic party, except the clerk and one judge at Barrows precinct, in said county; but I aver that the said election was legally and fairly held and that every vote cast for you in the said county of Trimble was counted for you. There were no qualified Republican resident in any of the other precincts of said county who were willing to accept the said offices or to serve therein."

This is the admission relied upon by contestant. The statutes of Kentucky provide:

"That hereafter, so long as there are two distinctive political parties in this Commonwealth, the sheriffs, judges, and clerks of elections in all cases of elections by the people under the Constitution and laws of the United States and under the constitution and laws of Kentucky shall be so selected and appointed as that one of the judges at each place shall be of one political party and the other judge of the other or opposing political party, and that a like difference shall exist at each place of voting between the sheriff and clerk of elections: *Provided,* That there be a sufficient number of the members of each political party resident in the several precincts, as aforesaid, to fill said offices.

"Should the court fail to appoint such judges or clerks, or either fail to attend for thirty minutes after the time for commencing the election, or refuse to act, the sheriff shall appoint a suitable person or persons to act in his or their stead for that election."

Under these statutes, the fourth specification of the notice of contestant, and the answer of contestee two questions arise:

(1) Whether it follows from the answer of contestee that the law of Kentucky as to selection of officers of election has been violated.

(2) Whether, if the law of Kentucky has been violated in the selection of officers of election, as claimed by contestant, the election is invalid.

As to the first question:

In certain contingencies the officers of election may, without violation of law, all belong to the same political party—i.e., "if there is not a sufficient number of each political party resident in the several precincts;" if the officers appointed do not arrive upon the ground and open the polls within thirty minutes of prescribed time. The legal presumption is that the appointing officers did their duty. (McCrary on Elections, sec. 87 and case cited.) That presumption remains until overcome by proof, and before the House will find against that presumption it must appear affirmatively that there were a sufficient number of each political party resident in the several precincts to act as election officers. Contestee denies this as to some of the precincts, is silent as to others, admits it as to none. In this state of the case it is incumbent on the contestant to make proof that the appointing officer might have complied with the law and did not.

Your committee are of the opinion that it does not follow from the admission of contestee that the law of Kentucky was violated in the selection of the officers of the election.

Should the House agree with the committee in their finding on this question it would not be necessary to proceed further, but inasmuch as the other question presented has been fully considered by the House heretofore, and determined after careful investigation, your committee feel that attention should be called thereto. In the case of Barnes *v.* Adams, from the Eighth district of Kentucky, Forty-first Congress, one of the questions was—

"Whether an election was valid under the first act named (the act now relied on by contestant), if the officers thereof were not equally divided between the two political parties in a precinct where there were a sufficient number of persons belonging to each party to fill said offices."

The report in the case was presented by Mr. McCrary, of Iowa, and is a very able one. The committee say:

"We inquire, in the next place, what was the effect of a failure to divide election officers equally between the two political parties? We are altogether unable, consistently with our views of the law, to hold that such failure of itself avoids the election. What we have said, and what we shall hereafter say, about the validity of the official acts of officers de facto applies here, for such officers are clearly of that class. Besides the statute which we have quoted, requiring an equal division of election officers between the two political parties, itself provides the penalty which shall be incurred by the persons appointing these officers if the statute is disregarded. It declares that the penalty shall be a fine of $100 for each offense of the kind. It does not declare that the election shall be set aside in such cases."

The report then proceeds to review the decisions of the courts of the various States as to the validity of the acts of an election officer who is in by color of authority, an officer de facto, and not a mere usurper. A long list of cases is cited sustaining the acts of such officers, and the report says:

"After a careful examination of the authorities the committee is satisfied that no principle of law is better settled by judicial decisions, and that no authority can be found emanating from a respectable court in conflict with those cited."

After referring to the conflicting decisions on this question by the House of Representatives, the summing up is as follows:

"The question, therefore, regarded in the light of precedent or authority alone, would stand about as follows: The judicial decisions are all to the effect that the acts of officers de facto, so far as they affect third parties or the public, in the absence of fraud, are as valid as those of an officer de jure. The decisions of the House are to some extent conflicting. The question is, therefore, a settled question in the courts of the country, and is, so fax as this House is concerned, to say the least, an open one.

"Your committee feels constrained to adhere to the law as it exists and is administered in all parts of the country, not only because of the very great authority by which it is supported, but for the further reason, as stated in the outset, that we believe the rule to be most wise and salutary. The officers of election are chosen of necessity from among all classes of the people; they are numbered in every State by thousands; they are often men unaccustomed to the formalities of legal proceedings. Omissions and mistakes in the discharge of their ministerial duties are almost inevitable. If this House shall establish the doctrine that an election is void because an officer thereof is not in all respects duly qualified, or because the same is not conducted strictly according to law, notwithstanding it may have been a fair and free election, the result will be very many contests, and, what is worse, injustice will be done in many cases. It will enable those who are so disposed to seize upon mere technicalities in order to defeat the will of the majority."

House adopted the report in Barnes *v.* Adams without dissent, and since that time the rule therein stated has been almost universally accepted and acted on. Your committee approve and adhere to it.

Inasmuch, therefore, as there appears nothing to impeach the fairness of the election of contestee, your committee present and recommend the adoption of the following resolutions:

*Resolved,* That George H. Thobe was not elected a Representative to the Fiftieth Congress of the United States from the Sixth district of Kentucky.

*Resolved,* That John G. Carlisle was duly elected a Representative to the Fiftieth Congress of the United States from the Sixth district of Kentucky, and is entitled to his seat.

The report was considered in the House on January 20,[1] and at the conclusion of the debate the question was taken on a proposition offered as a substitute by Mr. Lyman, that all the papers in the case be referred to a select committee, or a subcommittee of the Committee on Elections, with instructions to investigate the case carefully.

[1] Record, pp. 590–606, 610, 629; Journal, pp. 481, 489, 504.

This substitute was disagreed to—yeas 125, nay 132.

The question recurring on the resolutions reported by the majority of the committee, there appeared yeas 139, nays 3—no quorum voting. Thereupon the House adjourned.

On January 23 a quorum was obtained, and the resolutions were agreed to—yeas 164, nays 7.

**1007. The Alabama election case of McDuffie v. Davidson, in the Fiftieth Congress.**

**The House declined to impeach a return on the testimony of a witness who distributed tickets and testified that he saw them voted in numbers greater than the returns credited.**

**The House declined to seat a contestant on the claim that, after rejecting the greater part of a district, he had a majority of the remainder.**

**As to what constitutes a general conspiracy justifying a rejection of the returns of a large part of a district.**

On February 24, 1888,[1] Mr. Levi Maish, of Pennsylvania, presented from the Committee on Elections the report of the majority of that committee in the Alabama case of McDuffie *v.* Davidson. The vote in the district had been returned as follows: For Davidson, 14,913 votes; for McDuffie, 3,526; for Turner (colored), 2,519. The report states:

> The notice of the contestant contains seventy specifications of grounds of contest, each applying to a different precinct or polling place. No evidence was taken as to twenty-six of these precincts. Of the remaining specifications, thirty-three allege the same grounds of contest, and therefore they can be advantageously considered together.
>
> The grounds upon which the contestant relies in this group of precincts is that the votes were cast for the contestant but were fraudulently counted for the contestee. The several specifications vary slightly in language, but the gist of them all is that the inspectors did not count the ballots as they were cast by the voters.

The majority at the outset discuss a legal question which they hold to involve, if strictly construed, the decision of the case:

> It will be observed that in none of the specifications now under consideration is it alleged that the law has been violated in the manner of receiving the ballots, numbering them, depositing them in the boxes, sealing, or preserving them, nor that the poll lists were not properly made out and returned.
>
> It is virtually admitted that the election was fairly conducted until the officers proceeded to ascertain the result. Then it was, as is alleged, that the fraud was perpetrated.
>
> It is not pretended that the ballots were changed during the progress of the election, or afterwards, when they were counted, or that they were destroyed when falsely counted. The allegation simply is that they were so counted as to make it appear that they were cast for the contestee when they were, in point of fact, cast for the contestant.
>
> These statutes have been cited to show what provisions of law have been made in Alabama to protect the ballot box against frauds and the means of discovering them when perpetrated. It must be admitted that they are admirably designed to promote the purity of elections, and afford the best methods yet discovered for detecting frauds upon the ballot box.
>
> As will be seen, the names of the voters are written down and numbered as they vote, forming what is called the "poll list," and the ballots cast are correspondingly numbered with the number of each of the electors, so that it can easily be ascertained, when necessary, for whom the voter cast his ballot, or whether the officers of the election fraudulently substituted ballots for those cast by the voters.
>
> The statutes also provide that a statement of the number of votes received for each person, and

[1] First session Fiftieth Congress, House Report No. 707 Mobley, p. 577.

for what office, must be made in writing and signed by the officers, and they must also accompany this statement with a certified poll list of the election and seal the same in the box furnished by the sheriff for such purpose. The ballots, also, after being counted out must be rolled up and securely sealed and labeled, and securely fastened up in the ballot box, which must also be sealed and labeled so as to show the nature of its contents and kept by one of the inspectors for the space of sixty days for the express purpose of being available as evidence in cases of contest.

All this elaborate machinery is prescribed for the express purpose of ascertaining the true result of the election and providing certain and effectual methods for discovering frauds upon the ballot box. It is, in other words, the preservation of the best evidence that the case admits of, they being the records made by the sworn officers of the election and the very facts in controversy. Yet it is a singular fact that the contestant failed to offer in evidence to establish the allegations of his notice the ballots thus preserved, and offers no reason or excuse for not doing so.

Cases of contest of election are governed by the ordinary rules of evidence. The burden of proof is upon the contestant. He can not introduce secondary evidence when primary evidence is within his reach. Especially is this so when the law expressly preserves the best evidence the case admits of for that purpose, and places it within the reach of the parties.

The majority then cite the New Jersey case, and People *v.* Holden (28 Cal., 123), in support of this contention, and conclude:

In regard to the precincts in question, as has already been stated, no charge was made that the ballots or poll lists were tampered with and, therefore, no evidence to impeach their integrity could lawfully be introduced under the authorities just cited. This would fairly and legally dispose of the contestant's case against him, if the errors alleged in the remaining precincts did not affect a sufficient number of votes to change the result of the election, and in a court of justice it would be so decided; but as this House, in the exercise of its constitutional power, does not always rigidly follow precedents, it was deemed proper to examine the case as if the evidence offered were admissible.

The minority views, presented by Mr. Henry Cabot Lodge, of Massachusetts, say:

It would also seem from the character of the objections made by contestee to the examination of witnesses and from statements of counsel that it was intended to argue further that the official returns being the best evidence of the vote at an election all other testimony as to such vote is merely secondary and ought to be excluded as of no weight. The plenary power of Congress already alluded to is really a sufficient answer to this argument, which it seems hard to believe could be seriously advanced, but it may be added as entirely conclusive on this point that the precinct returns are merely prima facie evidence of the vote, and may of course be attacked, rebutted, or impeached by evidence from any source. There is, however, no need to resort to the plenary power of Congress in this case. The testimony is all regular and legal and would be admitted anywhere to rebut and impeach the official documents, for which purpose it is entirely competent.

In the debate this point was further examined. In the first place it was shown [1] that the majority report was in error in stating that the names of the voters and their ballots were numbered. This law had in fact been repealed, and therefore the minority pointed out that an important premise was removed from the argument of the majority that the ballots should have been produced. Furthermore, the minority argued that the honesty of the election officers was impeached, and that their count could not be verified by the production of ballots kept in their tainted custody.[2]

Proceeding next to the testimony which the majority consented to examine, although they had denied that it was the best evidence, and held it not to be strictly

[1] Remarks of Mr. Lodge and admission of Mr. Crisp, Record, p. 1750.

[2] This point is stated forcibly by Mr. J. H. Rowell, of Illinois, Record, p. 1758.

competent, it appears that the testimony on which contestant assailed the returns of the election officers was as follows:

At Liberty Hill the official returns gave Davidson 132 votes, McDuffie 31, and Turner 37. A witness, Tony Talbert, testified:

I now live in Perry County; at the time of the election I lived in Liberty Hill precinct, Dallas County. I had been living in Liberty Hill beat ten years. There was an election held in that beat on the 2d day of November, 1886, and A. C. Davidson was the Democratic candidate for Member of Congress and John V. McDuffie was the Republican candidate. I do not know who the inspectors were, or the clerks either. I reckon there was about 100 votes cast there that day. About 60 or 70 colored electors voted; the white electors were about 15 or 20.

Interrogatory. Who issued the tickets for the Republicans on that day at that beat? If you say that you issued them state how many of those tickets you issued, and state also whether or not you stationed yourself so that you could see the voter from the time that he took the ticket from you until he placed it in the hands of the inspector whose duty it was to receive it. And state how many of the identical tickets that you say you issued that you saw handed to the inspectors by the elector when he voted.

Answer. Martin Williams issued the tickets for the Republicans. I saw about 65 or 70 of those tickets issued; I did station myself so that I could see the electors from the time they received their tickets from Martin Williams until they placed them in the hands of the inspectors. I saw about 65 or 70 of the tickets issued by Martin Williams placed by the electors into the hands of the inspectors.

Interrogatory. Look at the paper handed you and say whether or not it is an exact copy of the tickets which you saw Martin Williams issue to the electors and which the electors voted. Read the paper handed you.

Answer. This is an exact copy of the ticket that Martin Williams issued, and so voted by the elector: "For Representative in the Fiftieth Congress United States, from the Fourth district of Alabama, John V. McDuffie."

Interrogatory. Do you mean to be understood as saying that, in your judgment, you saw 65 or 70 of the electors of Liberty Hill beat vote tickets the exact copy of the one that is shown to you?

Answer. Yes, sir.

Interrogatory. At what time did you go to the election on that day; and how long did you remain there during the day; and during the time that you said you were there, did you not see and converse with nearly every colored elector who voted there on that day? If yea, did you see or converse with any colored electors that day who expressed an intention to vote for any other person other than John V. McDuffie? If so, how many?

Answer. I went to the polls about 10 o'clock, and stayed there until night. I conversed with a good many of the colored electors—the most of them. I did not see or talk to any person who expressed a determination of voting for any other person than John V. McDuffie.

A witness testifying to a similar condition at Union precinct said that he was 40 or 50 yards away from the polls when he issued the tickets, but that he could and did see that they were voted.

The majority contended that such evidence was totally inadequate to overturn the presumption that the sworn officers did their duty. On the other hand, the minority showed testimony like the following:

The official returns of Valley Creek precinct gave Davidson 501, Turner 149, and McDuffie 35. W. H. Haynes testified as follows:

Q. What time did the polls open that day and what time did they close?—A. They opened between 8 and 9 and closed between 5 and 6.

Q. What were you doing there that day?—A. I was issuing Judge McDuffie tickets.

Q. How many tickets did you issue there that day, and did you see the parties to whom you issued tickets vote them?—A. I issued 100 McDuffie tickets and Alf Boyd issued 4; 1 saw 95 of the persons to whom I issued McDuffie tickets vote them, and I saw the 4 men to whom Alf Boyd issued tickets vote them.

Q. How far were you from the polling place when you gave the voters the McDuffie tickets and you saw them vote them?—A. I would meet the voters from 10 to 20 feet from the polls; ask them what ticket they wanted to vote; they would tell me they wanted McDuffie tickets. I gave them a McDuffie ticket, walked up to the polls with them, and saw them vote it, and when they voted I was not over 3 or 4 feet from the inspectors who took the tickets.

Q. Did anyone notice you watching the voters vote, and, if so, whom, and what did they say to you, if anything?—A. Mr. Ben Harrison noticed me and said to me, "Can you swear to all to whom you gave tickets voted them?"

Q. What did you say to him?—A. Very nearly all.

The supporters of the majority report, in the debate, insisted that the testimony was not sufficient, and urged that the contestant should have summoned the voters themselves to testify how they voted.[1]

The minority contended that the evidence showed a conspiracy to defraud the contestant of election, and attempted to show this by testimony to the effect that the nomination of Turner was brought about by corrupt connivance on the part of sitting Member's supporters, and that another prominent supporter of contestant had declared that they should carry the election, peaceably if they could, but by force if necessary, "and that arrangements had been made to do it."

The majority minimized the force of this testimony, and also held that it was not competent, having been introduced in rebuttal; also that no conspiracy was alleged in the notice of contest.

The minority also presented testimony to show that in some precincts more votes were cast than there were voters present or living; also that persons had voted on the names of dead men.

In conclusion the minority say:

This review of the testimony seems to the minority to show conclusively and overwhelmingly that a conspiracy to carry the election of November 2, 1886, in the Fourth Congressional district of Alabama existed and was carried out successfully in four of the five counties of the district. They have no doubt that if the vote had been honestly counted Judge McDuffie would have been returned by a large majority. Inasmuch, however, as it is impossible to tell what the exact vote was in the precincts where the returns are contested and obviously vitiated throughout by fraud, they believe that the vote from all such precincts should be thrown out and only the uncontested precincts of Lowndes County counted. Judge McDuffie lived in that county, and the conspiracy broke down among the neighbors of a man generally respected by all, without distinction of party. The uncontested precincts of Lowndes County give Judge McDuffie 2,014 votes and Davidson 362.

The minority is therefore of opinion that Judge McDuffie is entitled to his seat in the Fiftieth Congress.

The majority in the debate pointed out that the Lowndes County precincts were not the only ones unassailed, but that there were nine in Wilcox County, nine in Dallas, six in Hale, which were not assailed, and that these gave Davidson 3,385 votes, and McDuffie 208; and adding these votes to the unassailed Lowndes County vote, the sitting Member would have a majority of 1,425.[2]

It was also maintained on behalf of the majority[3] that the proposition of the minority to seat contestant on the unassailed Lowndes County vote, i.e., on a total of 2,376 votes in a district containing 20,000 voters, was an extraordinary proposition.

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[1] Speech of Mr. Outhwaite, Record, pp. 1755, 1756; also Mr. O'Ferrall, Record, p. 1792.

[2] Speech of Mr. O'Ferrall, Record, p. 1792.

[3] Speech of Mr. Maish, Record, p. 1748.

**1008. The case of McDuffie v. Davidson, continued.**

**An election officer having committed a fraudulent act in counting ballots, the return was rejected and only votes proven aliunde were allowed.**

**The return being destroyed by a tampering with the ballots after the count, contestant was permitted to prove his vote aliunde by testimony of persons who saw the votes cast and tallied or estimated it.**

**Contestant was required to sustain charges against the correctness of the count by the ballots.**

**The ballots are higher and better evidence of the result than the poll lists.**

**Returns not signed or certified by the election officers are not admissible.**

The majority of the committee made certain rulings in specific cases:

(*a*) As to Lowndesboro precinct:

In this precinct the evidence shows that one of the inspectors, whilst counting the ballots, put some of them in his pocket, saying as he did so that they were McDuffie tickets, and that "he was not going to let them pass." Although this allegation is not specifically set forth in the notice, the committee is of the opinion that it is substantially averred, and should have been met by the contestee, affecting, as it does, the integrity of the ballots. The official return, therefore, is set aside.

No evidence of a satisfactory character was produced to show what number of votes were cast for the contestant, excepting the few who testified for him, and stated that they were Republicans, qualified voters, and attended the election. And these, being 7 in number, are accordingly counted for him.

The contestee failed to establish his right to any votes in this precinct.

(*b*) As to uncontradicted evidence impeaching a return, and proof aliunde of the vote:

It is charged that at the Uniontown precinct, after the ballots were counted they were put in a bag and taken charge of by Alek Pitts, a nephew of the contestee and an officer of the election.

Pitts was not called to deny this charge, and no effort was made to controvert this evidence of tampering with the ballots. It is sufficient, in the opinion of the committee, to destroy the prima facie character of the returns. This being so, the parties were required to prove aliunde the number of votes they respectively received. The contestant called witnesses to prove certain facts, from which the committee was asked to infer the number of votes cast for him. George A. Clark testified that he issued 836 McDuffie tickets, took down the name of each voter as he delivered the ticket to him, and with the ticket held open in his hand the voter proceeded in the direction of the polling place. Other witnesses corroborated this testimony. The polls were more than 300 feet from the place where the tickets were issued by Clark, in a room on the second story of the city hall, and the inspector could not be seen receiving the ballots from outside the building. Fountain Hudson, an inspector at the election, testified that he saw about 400 of these tickets in the box. Eight colored witnesses were called who testified that they voted for the contestee. Though the evidence is very slender, yet it is the best that was produced. The committee finds, under the circumstances, that the contestant is entitled to 400 votes in this precinct and the contestee 8.4

(*c*) As to the comparative value of the ballots and poll list as evidence:

It was charged and established to the satisfaction of the committee that in the Walthall precinct there was a discrepancy between the poll list and the certificate of the inspectors of 21 votes. It is also charged that votes cast for the contestant were counted for the contestee. It has always been held that the ballots were higher and better evidence than the poll list [People *v.* Holden, supral]; and it was incumbent upon the contestant to sustain both charges in this specification by the production of the ballots. Under the evidence no additional votes can be given to the contestant in this precinct.

(*d*) As to St. Clair precinct:

In the St. Clair precinct the regularly appointed officers failed to open the polls, and after the hour of 9 o'clock the polls were opened by five qualified electors, one of whom was the regular inspector. The county canvassers refused to receive the returns of this poll, because the officers omitted to sign them. The action of the canvassers was in accordance with law. In the cases of Chrisman *v.* Anderson (1 Bart., 328) and Barns *v.* Adam (2 Bart., 760) it was held that returns not signed nor certified by the officers of the election were not admissible.

The evidence on which the above action was predicated was questioned by the minority in the debate.

In accordance with their conclusions of fact and law, the majority found that sitting Member had a majority of 8,890 votes over contestant, and, reported resolutions confirming his title to the seat.

The minority, apparently basing their conclusion on the uncontested precincts of Lowndes County, reported resolutions giving the seat to contestant.

The report was debated at length on March 5 and 6,[1] and on the latter day the question was taken on substituting the majority resolutions, and decided in the negative—yeas 122, nays 144.

Then the resolutions proposed by the majority were agreed to without division.

**1009. The Illinois election case of Worthington v. Post in the Fiftieth Congress.**

**A mandatory State law providing in effect that the writing of the name of one candidate under the unscratched name of another should make the ballot void, the House did not count the vote.**

**The intention of the voter being clear, the House counted the ballot, although irregular in form.**

**A judgment of the court was held sufficient evidence that a person was disqualified as a voter by being a convict.**

**In determining qualifications of voter as to length of residence, either the first or last day is excluded from the reckoning.**

On March 14, 1888,[2] Mr. Charles T. O'Ferrall, of Virginia, from the Committee on Elections, submitted the report of the committee in the Illinois case of Worthington *v.* Post.

Sitting Member had been returned by a majority of 29 votes.

The objections of contestant involved the consideration of several questions of law and many questions of fact. As to the principles involved:

(1) As to irregular ballots:

The contestant claimed that there were 24 ballots which were not counted for him, either in the original count or recount to which he was entitled.

The statutes of Illinois provide that—

"If more persons are designated for any office than there are candidates to be elected * * * such part of the ballot shall not be counted for either of the candidates." (Ill. R. S., 1885, chap. 46, sec. 57.)

The committee construing this provision of the statutes of Illinois as mandatory, which construction is sustained by the decisions of the supreme court of that State, proceeded to examine the ballots referred to, 24 in number.

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[1] Record, pp. 1747, 1782–1806; Journal, pp. 1052, 1059, 1060.

[2] First session Fiftieth Congress, House Report No. 1140; Mobley, p. 647.

On some of these ballots, under the words "For Representative in Congress, Tenth district," there were two names, the name of the contestee printed and the name of the contestant written with pencil. On others the name of the contestant was written under the words "For State superintendent of public instruction" and no name under the words "For Representative in Congress, Tenth district."

After a careful examination of all of these 24 ballots the committee found only 2 which, in its opinion, were legal.

One will be found on page 100 of the record, and is in the following form:

DISTRICT.

NICHOLOS E. WORTHINGTON.

The other will be found on page 104 of the record, and is in the following form:

[In pencil] NICHOLAS E.
For Representative in Congress, Tenth Congressional district.
[In pencil] WORTHINGTON.

The committee thought that the intention of the voters was clearly indicated by these ballots, and counted the same for the contestant.

(2) As to a convict's vote:

William A. Wright. He was a convict and had not been restored to citizenship. The contestant insisted in his brief that the entire record from the finding of the indictment down to the sentence must be produced. The contestee produced the judgment of the court and the committee thought that was sufficient.

(3) As to the time of residence of two men:

These men had not been in the election district thirty days before election. They did not move into the district until the 4th clay of October, 1886. The contestant says that both the 4th day of October and the 2d day of November ought to be counted. Your committee differ with the contestant, and exclude one day, which will give only twenty-nine days in district before election.

### 1010. The case of Worthington v. Post, continued.

**Students who have left their parental homes and are relying on their own resources, with no fixed determination as to future abode, are legal voters in the college precinct.**

**A contestant having conceded certain votes on a construction of law at variance with the committee's, the votes were left to his credit.**

**An unregistered voter being required to produce an affidavit and an oral witness as to qualifications, the House, because of a defective affidavit, rejected a vote received by the election officers.**

(4) As to the vote of certain students:

There were 18 votes cast by students of Knox College and Lombard University, which were claimed by contestant to be illegal; 14 of these votes were cast for contestee and 4 for contestant.

The committee, in passing upon the legality of these votes, was of the opinion that where young men had entirely severed their connection with the home of their parents, and were relying upon their own resources, efforts, and means, and had no fixed determination as to their future place of abode, they were legal voters at the point where these colleges were located; that to hold differently would be to deprive many worthy young men of the right to vote, and disfranchise them during the years they might be engaged in their laudable efforts to secure an education. With this principle in view the committee made a careful examination of each individual vote, and found that the votes of three persons, whose names are included in the above list of conceded illegal votes for contestee, did not come within the principle laid down.

(5) As to the effect of concessions by one of the parties in his brief:

The contestant in his brief conceded that 4 votes cast for him by students were illegal, but he made this concession upon a construction of the law which is not in accordance with the views entertained by the committee, and the committee has, therefore, left them to his credit.

(6) As to the technical competency of certain affidavits required of unregistered voters:

The qualifications of electors in Illinois are as follows:

"*Who may vote.*—Every person having resided in this State one year, in the county ninety days, and in the election district thirty days next preceding any election therein, who was an elector in this State on the 1st day of April, in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in this State prior to the 1st day of January, in the year of our Lord 1870, or who shall be a male citizen of the United States above the age of 21 years, shall be entitled to vote at such election." (Ill. Rev. Stat., ch. 46, sec. 65.)

There is a registration provision, and where a voter presents himself and his name is not on the registry list, and his vote is challenged, the statute provides that he may make and subscribe an affidavit in the following form, which shall be retained by the judges of election and returned by them with the poll books:

"STATE OF ILLINOIS, *County of* ———.

"I, ——— ———, do solemnly swear (or affirm) that I am a citizen of the United States (or that I was an elector on the 1st day of April, A. D. 1848, or that I obtained a certificate of naturalization before a court of record in this State prior to the 1st day of January, A. D. 1870, as the case may be); that I have resided in this State one year, in the county ninety days, and in this election district thirty days next preceding this election; that I now reside at (here give the particular house or place of residence, and if in a town or city, the street and number), in this election district; that I am 21 years of age and have not voted at this election; so help me God (or this I do solemnly and sincerely affirm, as the case (may be).

"Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

"_____ _____."

(Sec. 69, chap. 46.)

It is also provided that—

"In addition to such an affidavit the person so challenged shall produce a witness personally known to the judges of election and resident in the precinct (or district), or who shall be proved by some legal voter of such precinct or district, known to the judges to be such, who shall take the oath following, viz:

'I do solemnly swear (or affirm) that I am a resident of this election precinct (or district) and entitled to vote at this election, and that I have been a resident of this State for one year last passed and am well acquainted with this person whose vote is now offered; that he is an actual and bona fide resident of this election precinct (or district) and has resided herein for thirty days, as I verily believe, in this county ninety days, and in this State one year, next preceding this election.'" (Starr & Curtis's Statutes of Illinois, sec. 70, chap. 46.)

Again:

"No vote shall be received at any State election in this State if the name of the person offering to vote be not in the said register, unless the person offering to vote shall furnish to the judges of the election his affidavit, in writing, stating therein that he is an inhabitant of said district and entitled to vote therein at such election, and prove by the oath of a householder and registered voter of the district in which he offers to vote that he knows such person to be an inhabitant of the district, and if in any city, giving the residence of such person when in said district." (Part of sec. 145, chap. 46.)

There were 27 votes attacked by the contestant, cast by parties who were not registered and who were sworn in, upon the ground that the affidavits were defective. Twenty of these votes were cast for the contestee and 7 for the contestant.

The committee, after a careful consideration of these affidavits, was of the opinion that all but 5 of them were substantially within the requirements of the law. It has deducted from the vote of the contestee the 5 votes cast upon the five defective affidavits—in fact, five blank affidavits.

In accordance with their decisions the committee found a majority of 47 votes for sitting Member and reported these resolutions:

*Resolved,* That Nicholas E. Worthington was not elected a Representative to the Fiftieth Congress of the United States from the Tenth Congressional district of Illinois.

*Resolved,* That Philip Sidney Post was duly elected a Representative to the Fiftieth Congress of the United States from the Tenth Congressional district of Illinois and is entitled to a seat in the same.

On March 27 [1] these resolutions were agreed to by the House without debate or division.

**1011. The Missouri election case of Frank v. Glover, in the Fiftieth Congress.**

**The House in determining its election cases passes on the validity of State laws under State constitutions.**

On April 24, 1888,[2] Mr. John T. Heard, of Missouri, submitted the report of the Committee on Elections in the Missouri case of Frank *v.* Glover.

The sitting Member had a certified plurality of 100 votes.

The only question in the case was as to 249 ballots tendered for contestant, but rejected because the names of those tendering them were not on the registration lists. The report says:

The constitution of Missouri, which went into effect November 30, 1875, provides:

"The general assembly shall provide by law for the registration of all voters in cities and counties having over 100,000 inhabitants, and may provide for such registration for cities having a population exceeding 25,000 inhabitants and not exceeding 100,000, but not otherwise."

Article 9, section 7, constitution of 1875, provides:

"The general assembly shall provide, by general laws, for the organization and classification of cities and towns. * * *"

Pursuant to the above, by acts approved April 21, 1877, and May 23, 1877, the general assembly carried into effect the foregoing provision of the constitution of 1875.

"SEC. 1. All cities and towns of this State containing 100,000 inhabitants or more shall be cities of the first class."

Section 5 provides for any town becoming a city of the class to which its population would entitle it.

Session Acts, 1877, page 49, provides for registration in cities of the first class.

By Session Acts, 1877, page 250, the following law was enacted:

"SECTION 1. In all State, county, and municipal elections hereafter held in any city of this State having a population of 100,000 inhabitants or more no person shall be deprived of the right of voting at such election by reason of having failed to register: *Provided,* That in all cities where registration is required by law, the party offering to vote shall be, on the day of such election, registered by a special registrar of election, appointed by the judges of election for that purpose at each precinct, as a qualified voter, in a book to be kept for that purpose, and the ballot of such voter shall be received and counted at such election; and such registrar shall return to the registrar of voters of such city the list of such voters so registered within ten days after such election: *Provided,* The said registrars shall be sworn as provided for the recorder of voters, and the books shall contain the written or printed oath as required in the regular registration books.

"Approved March 30, 1877."

By an act "approved March 26, 1881," the general assembly provides, Session Acts, 1881, page 47:

"SECTION 1. That the act entitled 'An act to provide for the exercise of the right of voting by persons who have failed to register,' approved March 30, 1877, be, and the same is hereby, repealed.

"SEC. 2. By reason of the frauds believed to have been perpetrated under the law this act seeks to repeal, and the near approach of an election in the city of St. Louis, an emergency is deemed to exist; therefore, this act shall take effect and be in force from and after its passage."

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[1] Journal, p. 1333.

[2] First session Fiftieth Congress, House Report No. 1887; Mobley, p. 655.

The legislature of Missouri at the same session, to wit, Session Acts 1981, page 48, adopted a general registration law for the city of St. Louis.

The question really at issue is whether the registration law of 1881 is valid; the contestant's counsel claiming in the argument before the committee and in his brief that the law is unconstitutional and invalid.

Says McCrary on Elections, second edition:

"SEC. 6. While the legislature cannot add to, abridge, or alter the constitutional qualifications of voters, it may and should prescribe proper and necessary rules for the orderly exercise of the right resulting from these qualifications. * * *

"SEC. 7. The power to provide for the orderly exercise of the right of suffrage, which we have seen belongs to the State legislature, includes the power to enact registry laws and prohibit from voting persons not registered. It is now generally admitted that these laws do not add to the constitutional qualifications of voters, and are therefore not invalid. (Capon *v.* Foster, 12 Pick., 485; Brightley's Election Cases, 51; Hawkins *v.* Carroll Co., 50 Miss., 735; State *v.* Baker, 38 Wis., 71.)"

The committee being united in the opinion that the law is constitutional, do not consider it necessary to go further into the legal argument.

Therefore the committee reported:

*Resolved,* That Nathan Frank was not elected and is not entitled to a seat in this House as a Representative in the Fiftieth Congress from the Ninth Congressional district of Missouri.

That John M. Glover was duly elected and is entitled to the seat he now holds in this House as a Representative in the Fiftieth Congress from the Ninth Congressional district of Missouri.

On June 12[1] the House agreed to the resolutions without division or debate.

**1012. The California election case of Lynch v. Vandever, in the Fiftieth Congress.**

**In an election case the House disregards evidence in chief introduced during time for rebuttal testimony.**

May 4, 1888,[2] Mr. James T. Johnston, of Indiana, submitted the report of the Committee on Elections in the California case of Lynch *v.* Vandever.

The sitting Member had been returned by a majority of 55 votes.

The committee passed on only one question of principle:

As to the third charge, that is, the use of money by the friends of the contestee to improperly influence voters to vote for the contestee, the committee find that the evidence wholly fills to sustain the charge. The only proof offered by the contestant tending in that direction was offered in rebuttal when the contestee had no opportunity to contradict the same, and such evidence, besides being insufficient to sustain the charge, was offered in open violation of every known principle of the laws of evidence, and we hereby enter our protest against such practice before this committee in the future.

The committee recommended resolutions confirming the title of sitting Member to the seat, and on June 12[1] the House agreed to them without debate or division.

**1013. The South Carolina election case of Smalls v. Elliott, in the Fiftieth Congress.**

**Contestant producing no legal evidence as to the return, and nothing to show that such return might not have been produced, parol evidence as to the vote was not considered.**

On December 7, 1888,[3] Mr. Charles F. Crisp, of Georgia, presented the report

[1] Journal, p. 2122.

[2] First session Fiftieth Congress, House Report No. 2035; Mobley, p. 659.

[3] Second session Fiftieth Congress, House Report No. 3536; Mobley, p. 663.

of a majority of the Committee on Elections in the South Carolina case of Smalls *v.* Elliott.

The sitting Member had been returned by an official majority of 532 votes, which contestant assailed on the ground of frauds and irregularities. There were also countercharges of bribery and intimidation.

The examination of the case involved, besides the exploration of many questions of fact, a discussion of the following legal questions:

(1) As to the sufficiency of the proof of fraud at Pocotaligo and certain other precincts. As to Pocotaligo the report says:

> Contestant claims that there was an excess of ballots in the box when the count began of 105 or 148 votes; that only 143 votes were cast at the precinct; that the managers, after drawing out the excess in accordance with the law, returned to the commissioners of election, who are the county canvassers, the vote of this precinct as follows: Elliott, 87 votes; Smalls, 56 votes; and that the county board of canvassers in canvassing the vote of Beaufort County so counted it. Contestant then examined 118 witnesses, each swearing that he voted for Smalls, and claims from this that there was fraud on the part of the managers; that the return is impeached and should be disregarded, and that he should have counted for him the 118 votes of those sworn, and Elliott should have the remainder of 143, which, he says, was the total vote cast.
>
> Devaux, the Republican supervisor, and Bampfield, the son-in-law of contestant, swear they were present at the count by the managers, and that there was an excess of boots; that is, more ballots in the box than on the poll list. Bampfield says that he suggested to the managers that the proper way to do was to ascertain the number of ballots in the box, then mix them up and draw out enough to reduce the number in the box to the number on the poll list. This was done. Bampfield says the excess was 148. Devaux says the excess was 105. Devaux says that of the 105 drawn out 47 were Small's ballots. That would leave 58 Elliott ballots drawn out. There is no evidence as to who put the surplus ballots in the box. The managers were not examined. The law of South Carolina provides, "If more ballots shall be found on opening the box than there are names on the poll list, all the ballots shall be returned to the box and thoroughly mixed together, and one of the managers or the clerks shall, without seeing the ballots, draw therefrom and immediately destroy as many ballots as there are in excess of the number of names on the poll list." The drawing out of the excess of ballots seems to have been done in accordance with the law, in the presence of the Federal supervisors of election and the son-in-law of contestant, and at the suggestion of the latter.
>
> Contestee denies that there is any evidence as to what vote was counted by the county canvassers from this precinct.
>
> The law of South Carolina requires one of the managers of election, within three days after the election, to deliver to the commissioners of elections the poll list, the boxes containing the ballots, and a written statement of the result of the election in his precinct. The commissioners of elections, who are the county board of canvassers, on the Tuesday next following the election, after being duly sworn, shall proceed to canvass the votes of the county, shall make such statement thereof as the nature of the election requires, and shall transmit to the board of State canvassers any protest and all papers relating to the election, and, finally, after adjournment, shall by messenger transmit to the governor and secretary of state the returns, poll lists, and all papers appertaining to the election. These papers remain in the office of the secretary of state, who is the custodian thereof.
>
> It appears in the record that contestant offered in evidence a paper claiming it to be a copy of the poll list and return kept by the managers of election at Pocotaligo, precinct. Contestee objected to its introduction because it was not certified to be a copy of the poll list and return by any official and not proven by anyone to be such. We have this paper before us; it is clearly not the original, and is not certified by anyone as a true copy. There is no evidence in the record tending to prove that it is a correct copy. Under the circumstances your committee do not think this paper should be considered.
>
> The only evidence in the record as to the vote cast, counted, and returned at this precinct is that of Devaux and Bampfield. The highest and best evidence of the return, which is presumed to be on file in the office of the secretary of state, is a certified copy thereof, which was easily accessible. Your Committee are of the opinion that, in the absence of any evidence of the loss, destruction, or inaccessibility of the returns, parol evidence as to what the vote was should not be considered. This is the established rule of

law, and the propriety of the rule is well illustrated in this case by the conflict in the testimony of the two witnesses by whom the number of votes cast is sought to be proven. In the absence of any legal evidence as to how the vote was counted from this precinct by the county canvassers in canvassing the vote of the county, the evidence of the voters as to how they voted is immaterial.

In the foregoing and one other precinct an excess of ballots was found. In South Carolina the voter deposits his own ballot in the box. The law says the opening in the box shall only be large enough to admit of the entry of one ballot at a time; but it is difficult to see how it could be so arranged as to prevent the voter from depositing two or more ballots at the same time if he desired to do so. The presumption is that the managers complied with the law in seeing that no ballots were in the boxes at the beginning of the election. There is nothing in the evidence that throws any light on the matter.

The minority views, signed by Mr. J. H. Rowell, of Illinois, and five others, take this position as to this precinct:

When the process of purging the box of the excess of votes was finished, the manager counted the 143 votes left and found 87 votes for Elliott (contestee) and 56 votes for Small (contestant). Now the curious part of the story comes. An examination of the record from pages 215 to 260 discloses the names and oaths of 118 men, each of whom swears he voted for Smalls. The poll list (Rec., p. 262) discloses the names of these identical 118 voters as having voted at Pocotaligo box. If 118 men whose names are on the poll list voted for Smalls, how is it that he received only 56 votes, or, in other words, how was it that 62 of his votes were stolen from him?

That the ballot box was stuffed is clear. One or two, or even a dozen surplus votes, out of a total poll of 143 votes, might by accident or carelessness get into the box, but here over a hundred extra votes were in the box. The box was stuffed. No one denies it. How was it done? Who had charge of it? Three Democratic managers, a Democratic clerk, two Democratic State constables. It was stuffed in order that the purging process might be resorted to. The fact that nearly double the proper number of ballots got into the box while in charge of the managers solely is proof so overwhelming of their deliberate fraud that their every act is tainted, and the presumption that the law ordinarily attaches to official acts, omnia proesumuntur rite acta esse, is destroyed and every act of these managers attainted with suspicion and fraud.

Why did not contestee put these Democratic officials upon the stand? Did he fear to do so? They were all within the jurisdiction. Contestee administered testimony within a stone's throw of them. Contestant charged them with fraud and crime and proved it; yet not one of them is put upon the stand to contradict or to defend. And if the sanctity attaching ordinarily to the acts of managers of an election is destroyed as to these officials, it is competent for contestant to establish the true return as best he may.

He proves 118 votes out of 143. The canvassing board gave him but 56. To his vote should be added 62 votes, and from Elliott's vote of 87 should be deducted 62 votes, leaving him 25 votes at Pocotaligo box.

**1014. The case of Smalls v. Elliott, continued.**

**The regular returns being lost or invalidated, and not canvassed, the House took into account a statement of the United States supervisors as to the state of the vote.**

**As to votes received by election officers but rejected by canvassers because of mere informalities as to registration.**

**Although only one of the three election officers was sworn, the House overruled the State canvassers and counted the vote as cast.**

**Although irregularly chosen, an election officer was regarded as a de facto officer, whose acts were valid.**

(2) As to proof aliunde in a case where the purity of the returns was impeached. This occurred at the Fort Motte and Adams Run precincts. The report of the majority says:

At these two precincts the election appears to have been properly held, the returns made out regularly and signed, the boxes locked and sealed, and in each case delivered to one of the managers to

be carried to the county board. The Fort Motte box was carried to the office of Doctor Hydrick, a Democratic county politician, who was not one of the county canvassers, and in his absence left with a young medical student therein. Doctor Hydrick, upon his return, refused to take charge of the box. The young gentleman who had received it in his absence then carried the box to the president of the county board of canvassers, who refused to receive it because it was not delivered to them by one of the managers. The box was then deposited in the office of the probate judge of the county, where it now remains. The Adams Run box was taken by one of the managers to Waterboro, and left in the store or office of one Gruber, a man who had nothing to do with the election officially, and since that time the box: has been lost sight of. The county canvassers in making up the returns counted no votes from either of these precincts. It appears from the evidence that the supervisors at each of these precincts, at the time of the counting of the vote, made and mutually signed a paper showing the vote cast thereat.

After reproducing these papers the report says:

Your committee are of the opinion that under the circumstances of this case these returns should be received and counted.

The minority take the same view:

Of course, having no box, the canvassers made no return.

The question for the House is, Whether the fault or neglect or crime of one manager can deprive the citizens of their election and contestant of his rights under it? If so, the power of the people is gone and their right to rule through the honest ballot is lodged, in South Carolina at least, in the hands of a few men called managers. The law as laid down gives to the contestant the right to show by secondary testimony what the vote really was. (McCrary, Jaw of Elections, pp. 97, 131; 11 Mich., 362; 9 Kansas, 569.)

At this stolen box there were two Federal supervisors; one was a Republican (Bailey) and the other (Simmons) was a Democrat. These men each kept a poll list and made a return, and each signed the other's list and return.

This return is not denied. It is found at pages 531, 532, and is as follows:

*"Return of the election held at Adams Run precinct, Colleton County, November 2, 1886.*

"The whole number of votes given for Member of Congress was 214—of which Smalls received 177; of which Elliott received 37.

"We, the undersigned supervisors, certify that the above is a correct return of the votes cast at the election held at Adams Run precinct, of Colleton County, on the 2d day of November, 1886.

"M. W. SIMMONS,
"C. R. BAILEY,
*"Supervisors."*

These returns, official in their character, and attested by the Federal supervisors of each party, should be counted, and to contestant's vote must be added 177 and to contestee's vote 37.

To reject and refuse to count this return is to permit contestee to be benefited by the fault or crime of his own partisans. Nay, more, it is to permit the triumph of criminal neglect, designedly perpetrated in the interest of contestee, by which American citizens are cheated of their election. Who can afford to do this? Who can afford to be parties to it?

(3) The county and State canvassers rejected the poll at Brick Episcopal Church, under the terms of this law:

All electors of the State shall be registered as hereinafter provided; and no person shall be allowed to vote at any election hereafter to be held unless registered as herein required.

Each elector registered as aforesaid shall thereupon be furnished by the supervisor with a certificate which shall contain a statement of his age, occupation, and place of residence, as entered in the said registration book, and which certificate shall be signed by the said supervisor; and no person shall be allowed to vote at any other precinct than the one for which he is registered, nor unless he produces and exhibits to the managers of election such certificate: *Provided,* In case there shall be no election precinct within any township or parish, the supervisor shall designate in the certificate at which of the

neighboring precincts the elector shall vote; and in case there be more than one precinct in any township or parish, the supervisor shall likewise designate in the certificate at which of the said precincts the elector shall vote. The certificate of registration shall be of the following form.

The majority quote the testimony of the supervisor of registration for the county to show that he held his books open and never refused a certificate of registration for Brick Episcopal Church, and never issued one, for there were no applications. Then the majority say:

This was a new polling precinct.

Section 5 of the act of the general assembly, No. 719, approved July 5, 1882 (17 Statutes of South Carolina, p. 1172), provides as follows:

"Whenever a new polling precinct is established by law, it shall be the duty of the supervisor of registration to transfer from the books of registration the names of such qualified voters registered at other precincts as should, under this act, register and vote at the new precincts so established, and who may request such transfer, and to make such changes as may be necessary in the certificate of registration issued to such voters, and such voters shall thereafter vote only at such precincts to which they have been thus transferred."

The chairman of the board of county canvassers says in his testimony that he refused to count the vote of this precinct "on the ground that the voters voting at that precinct were not registered there." This poll we think was properly rejected.

The minority find a state of fact which in their opinion modifies conditions:

In order to arrive at a correct understanding of the election at this box it is necessary to state that "Brick Episcopal Church" and the town of Mount Pleasant are both in Berkeley County, but 6 miles apart. The former is in the Seventh Congressional district; the latter is in the First. They are both in the same registration precinct. But voters in the town of Mount Pleasant voted there both for State and county officers, as well as for Congressman for the First district. But voters outside of the town had to vote for State and county officers at Mount Pleasant, and then go 6 miles to Brick Episcopal Church, where the polling place for Congressman from the Seventh district was held. The laws of South Carolina require separate boxes for State and county officers, and for Congressmen and Presidential electors. Sometimes these boxes axe placed conveniently near each other. In other cases, as in the one under review, the boxes were placed miles apart. Mount Pleasant and Brick Episcopal Church are in the same voting precinct, but the polling place for State officers for voters residing outside of Mount Pleasant is in Mount Pleasant, while they must travel 6 miles to vote for Congressman or President. The voter residing in Mount Pleasant is entitled to vote for State and county officers as well as Congressman at Mount Pleasant. But different registration certificates are not required. No voter is obliged under the law to have one registration certificate for Congressmen and another for State officers. He votes for all upon one certificate, though at separate boxes, often placed miles from each other.

The minority continue:

It is folly to contend that the mere establishment of a separate poll for the Federal election within the same precinct necessitated a change of registration certificate. The officer of registration should have made duplicate books containing the names of the registered voters of Mount Pleasant precinct, and one book should have been sent to Mount Pleasant for the State poll and one to Brick Episcopal Church for the Federal poll. He did not do so. He failed in his duty, and he was the partisan of contestee. He made one book, but it was retained at Mount Pleasant, where only 60 votes were cast, and denied it to Brick Episcopal Church, where 270 votes were cast. This was done by Mr. Kirk, the Democratic chairman of Federal elections. (Rec., pp. 94, 95.)

But the question for the House of Representatives to determine is whether the people shall be disfranchised for the fraud or neglect of officials. The testimony (Rec., pp. 96 to 99), shows that the managers were all Democrats; that they compelled every voter to show his certificate of registration; that no one was permitted to vote who did not produce his certificate, and that the election was fair and peaceable. We see no reason why the vote should not be counted. The certificate and not the book is the requisite. Mr. Kirk says they rejected the box "on the ground that the voters voting at that

precinct were not registered for that precinct (Rec., p. 95), and in the very next breath almost admits that the "books for Mount Pleasant contained the names of those who should vote for Member of Congress at Brick Episcopal Church in the Seventh Congressional district;" and he could have taken that list in the book and compared it with the poll list from Brick Episcopal Church and verified and counted the vote as was his duty to do. Why he failed to do so we can only infer.

The vote should be counted, and to Smalls' vote should be added 267 votes, and to Elliott 3 votes.

(4) At Cedar Creek the county board rejected the box because only one of the managers was sworn. The vote was, Smalls 18, Elliott 0. The other managers were present and acting, and sitting Member admitted that the return should have been counted.

The minority views represent that only one manager failed to take the oath. The election is represented as fair and regular in all other respects. The minority consider the failure to take the oath immaterial and hold that the poll should be counted.

(5) At Griers, say the majority—

the poll was opened by Jenkins, one of the managers, and two other persons appointed by the Federal supervisors. Grier was a regularly appointed manager, and reached the poll at 7 o'clock a.m. The poll was then opened; he took the place of one of the managers appointed by the Federal supervisor, and the election was thus managed to the close. The county canvassers rejected the poll because of this irregularity. It is not perfectly clear that this was wrong, but your committee are inclined to think that this poll should have been counted.

The vote was William Elliott, 4; Robert Smalls, 65.

The minority say:

The next rejected box is Griers precinct. The voting was fair, election regular; no complaint of it from any source. There were three managers, two regularly appointed and Alston, a third manager, sworn in and served in place of one who would not qualify. (See testimony of all the managers—Jenkins, p. 70–71; Grier, 666–668; Alston, 73–74; Johnson, 72–73.)

The minority further say that the third officer was a de facto officer, with color of authority.

**1015. The election case of Smalls v. Elliott continued.**

**The House will not examine testimony as to a precinct not included in the notice of contest.**

**An informal poll, held by one election officer instead of three, and irregularly conducted, was rejected.**

**Only one legally appointed election officer presiding, and the voting being interrupted by disorder, the poll was rejected.**

**The House declined to order a new election because of a failure to open polls at a few places in a district, neither party being shown to be responsible therefor.**

**Because of a general condition of intimidation practiced by the dominant faction in a precinct, the return was rejected.**

(6) As to Sandy Island, the majority say:

This precinct was not included in notice of contest, and hence the evidence referring to it should not be considered. It is well settled that a contestant can not make any points in his contest which are not in his notice of contest. (McCrary on Elections.)

(7) As to the box at Santee the majority say:

This box was rejected because only one manager held the election. The law was entirely disregarded. Poll was in open air under a tree, no space railed off, and everyone allowed to vote whether a legal voter or not. The evidence shows that the one manager allowed 25 men not registered and 34 who had changed their residence to vote. This box was properly rejected.

The minority say that not a syllable impeaches the fairness and regularity of the election, except the fact that two Democratic managers would not qualify, although they visited the polls during the day. The election was held by one regular manager, a clerk, and a Federal supervisor. The minority hold that the poll should be counted.

Discussing in full the four polls of Sandy Island, Cedar Creek, Griers, and Santee, the minority say:

But we contend that all of these votes should be counted. Let it be remembered that there is not an iota of testimony going to impeach the fairness and regular conduct of the election at these polls, the legal count, and proper return of the boxes. They stand rejected because of the failure of the full number of managers to qualify. In every instance the managers failing to qualify were the partisan friends of contestee. Now, the question is whether the voters at these boxes and the contestant shall be deprived of the result of the election because of the neglect or failure of some of the officers to do their duty. The law of South Carolina provides for three managers at each box. But it does not void the election because of the failure of three managers to serve. Hence it is only directory in so far as it provides for three managers. McCrary says:

"Irregularities are generally to be disregarded unless the statute expressly declares that they shall be fatal to an election, or unless they are such in themselves as to change or render doubtful the result." (McCrary, 2d ed., p. 186.)

The laws in relation to boxes, locks, the number of managers, clerks, etc., and the ordinary facilities of an election are mainly directory, unless the statute makes them otherwise, and an infraction of these directory provisions, in the absence of fraud, will not vitiate the election.

The minority then quote Judge Cooley, the cases of Arnold *v.* Lea, Cox v. Strait, and other authorities, and continue:

If South Carolina had intended that an election held by less than three managers should on that account be void, she would have said so in her statute. She did not say so; hence the law fixing the number of managers is simply directory. The State board of canvassers of South Carolina so held, because the record in this very case shows that both State and county boards canvassed and counted boxes at which there were not three managers. At Indiantown precinct, Williamsburg County there were two boxes (one for the sixth and one for the seventh district) and but two managers, or one manager for each box, yet the box was counted by both the State and county boards.

At Kingston, in the same county, there were also two boxes (one for the sixth, Dargan's district, and one for the seventh) and only three managers to the two boxes. Still it was counted by both State and county boards. At Cades precinct, the same county, was a similar state of affairs, and yet the box was counted. So much for construction by the State and county boards.

There is no proof of fraud at the four boxes under discussion—not even an allegation—nor is there a whisper of complaint that the result was affected by the fact that less than the prescribed number of managers were present.

Another fact is, that the manners who failed to serve were the partisan friends of the contestee. He now seeks to take advantage of the neglect of duty of his own friends, and that, too, without a single allegation or word of proof against the perfect integrity of the election at these boxes. He relies upon a bare technicality, occasioned by the willful neglect of duty by his own friends, and asks that hundreds of voters be disfranchised and deprived of the results of an election against the integrity of which he utters not a syllable of complaint.

Judge Cooley lays down the rule, quoted before, which he emphasizes, saying:

"This rule is an eminently proper one, and it furnishes a very satisfactory test as to what is essential and what not essential in election laws. And when a party contests an election on the ground of these or any similar irregularities, he ought to be able to show that the result was affected by them."

Now, what is the rule so recommended by this great lawyer?

"Any irregularity in conducting an election which does not deprive a legal voter of his vote or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of the party seeking to derive benefit from it, should be overlooked in a proceeding to try the right to an office depending upon the election." (Cooley, Const. Lim., pp. 618, 619.)

Now, test the question of counting these four rejected boxes by this rule. The irregularity upon which contestee asks their exclusion did not deprive a single legal voter of his right to vote, did not admit a disqualified person to vote, did not cast doubt or uncertainty upon the result, and was caused by the failure and neglect of the partisan friends of him who seeks to profit by it.

By every rule of law and of justice the votes of these four boxes should be counted, and to the vote of Smalls should be added 328 votes and to Elliott's 8 votes.

(8) *A* cognate question arises as to Brick Church precinct, of which the majority report says:

As to Brick Church it appears that managers were regularly appointed, but that two of them did not serve, one because he was sick, the other because he was afraid of being mobbed. Only one legally appointed manager conducted the election. It further appears that three times during the day this manager was compelled to close the polls for a time because of the riotous and violent conduct of contestant's friends; that the poll remained closed in all about thirty minutes. For these reasons both boards of managers rejected this poll.

The minority do not agree to the propriety of the rejection of this poll by the boards of canvassers, denying that there was riot or that the polls were in fact closed:

The statute of South Carolina requires the polls to be kept open from 7 a.m. to 6 p.m., "without interruption and adjournment." It does not void an election because of temporary adjournment. The purpose of the law is that all shall be given an opportunity to vote and that the eleven hours set apart for the exercise of that right shall not be curtailed. It is nowhere alleged or shown that the twenty-five minutes interruption deprived any man of the opportunity to vote or had the slightest effect upon the result of the election the one way or the other.

The law is clearly laid down in McCrary (p. 104, par. 142):

"1. If the statute fixing the hours during which the polls shall remain open expressly declares that a failure in this respect shall render the election void, it must be strictly enforced.

"2. But in the absence of such a provision in the statute it will be regarded as so far directory only as that unless the deviation from the legal hour has affected the result it will be disregarded.

"3. If the deviation from the legal hours be great or even considerable, the presumption will be that it has affected the result, and the burden to overthrow this presumption will be on him who upholds the election. But if the deviation be slight, the presumption will be that the result was not affected, and the onus will be shifted to him who attacks the election to show that the deviation did affect the result."

Such is undoubtedly the law.

In the case at bar the whole interruption was slight.

It is not pretended that the result was affected thereby.

The statutes of South Carolina do not void an election because of deviation from the hours fixed.

The evidence shows that the election was fair and peaceable.

Under this condition of law and fact, upon what principle the board of canvassers threw out the Brick Church box we are unable to see.

In argument before the committee contestee's counsel claimed that there was not a quorum of managers at Brick Church box.

This question was not raised by the contestee in his replication. But if it were we need only cite the law, which provides for three managers; that Tripp was one, and that he obtained authority to appoint others, and that under that authority he "appointed Gabriel Eddings, a Republican, and a good man." (See Tripp's testimony, Rec., 627.) Eddings served "under color of authority" at least, and was a de facto officer, and with Tripp constituted a quorum of managers present.

Up to the Forty-first Congress the authorities conflicted, but the weight of authority was as laid down in Jackson *v.* Wayne, to wit, that, when the law required three magistrates to preside at the election, a return by three persons, two of whom were not magistrates, was defective. In three other cases it had been held that a failure on the part of election officers to take the required oath voided the election. (McFarland *v.* Culpepper; Easton *v.* Scott; Draper *v.* Johnson.) In another case a precinct was thrown out because only two inspectors were present, the law requiring three. (Howard *v.* Cooper, I Bartlett, 375.)

The minority next quote Milliken *v.* Fuller, Clark *v.* Hall, Flanders *v.* Hahn, and Blair *v.* Barrett to show that in the absence of fraud the acts of a de facto officer of election are valid as to third persons and the public. And finally the minority quote the case of Barnes *v.* Adams as giving the settled law on this question.

(9) The majority thus discuss the failure to open polls:

It appears from the evidence that at several of the precincts in the district the polls were not opened, and contestant claims that such failure was designed by the political friends of contestee for the purpose of depriving him, contestant, of a large number of votes. Indeed, he claims that he was thus deprived of about 2,000 votes, and while contestant does not aver that this number of votes should be counted for him, he does insist that in the event that the committee finds that he has not a majority of the votes cast, that then a new election should be ordered. Out of the whole number of precincts in the district there was a failure to open the polls at only four. The registered voters of these precincts were but an inconsiderable part of the voters of the entire district, and unless the failure to open the polls there can be traced to the contestee, or it appears that such failure was the result of a design on the part of his political supporters to thus deprive legal voters of an opportunity to vote for contestant, under no rule of law with which your committee is acquainted could such failure of itself justify the ordering of a new election. We have very carefully considered the evidence bearing upon the points made, and find that contestee, the Democratic executive committee, and the appointing officers did all they could to secure the opening of the polls at each precinct. We further find that at some of these precincts there appear to be as many Democratic as Republican voters who were deprived of an opportunity to vote, and there is no satisfactory evidence of the number of either class who were thus deprived of the right of suffrage.

(10) The majority of the committee decided that the returned vote of Beaufort and Ladies Island precinct should be rejected because of intimidation practiced by friends of contestant. The report thus summarizes the evidence:

James G. Cole testifies, at page 542, that he was born at Woburn, Mass.; graduated at Harvard in 1862; moved to South Carolina in 1863; was Government superintendent of abandoned lands during the war, and has resided twenty-one years on Ladies Island, Beaufort County, S. C.; that ordinarily he is the only white voter on the island; that in 1886 the total vote was 206, of which 11 were cast by white men, and that contestant got 129 and contestee 77; that Ladies Island lies between Beaufort and St. Helena Island and is 1 mile from Beaufort; that most of the colored voters are landowners and taxpayers, and since 1886 have had a general tendency to vote the Democratic ticket in consequence of reduction of taxation by the Democrats, improvement of the public schools, and general security of their rights; that after the mass meeting at Beaufort in October, 1886, which the Ladies Island Democratic Club attended, and of which accounts are elsewhere given, most determined efforts were made by the Republican leaders to break up this club; that a club of women was organized to beat all men voting the Democratic ticket, and that many threats were made against Democratic men and women; that it had been announced that contestee would speak on the island the day before the election; but in consequence of many threats

that he would not be allowed to speak the meeting was abandoned, although contestee was ready and anxious to attend; that prior to the election the Democratic voters were in a state of fear for their personal safety, and that there would specially be trouble on election day.

That in consequence of this, deponent distributed Democratic tickets on the night before the election himself—stayed all night with many of the voters at a house near the polls, so as to quiet their fears, and that all were instructed to be early at the polls, so as to vote as soon as the polls were opened, and to take Republican tickets from the runners for that party. That during election day many women were near the polls, armed with sticks, making a good deal of noise and disturbances, threatening talk, cursing, threats of what ought to be done and would be done with Democrats; that a Republican runner jerked from the hand of a voter a Democratic ticket which deponent had given him; that early in the campaign deponent had good reason to believe that Democrats would carry the poll, but that in consequence of this intimidation "numbers that intended voting the Democratic ticket did not vote at all, and others voted the Republican ticket." That the Democrats were specially fearful of trouble after the polls were closed, and many left the polls on that account, and for a month after the election many did not dare go out at night, and some so continued up to the date of witness's deposition; that in every contest between the parties for ten years past some Democrat had been beaten; that it required a great deal of nerve and courage, not only on Ladies Island, but at Beaufort and St. Helena (or Brick Church) for a colored man to admit that he was a Democrat,

After quoting evidence, the report continues:

The record contains much more evidence of this character, and it also contains much evidence submitted by contestant in rebuttal. Your committee find that at the precinct now under consideration almost all the voters were colored persons; that a large number of these voters were bitterly opposed to contestant, and had determined to vote for Colonel Elliott; that the leading supporters of contestant were very much incensed at this, and resorted to all means in their power to overawe and intimidate such voters and force them to vote for contestant. Colored men inclined to vote or expressing an intention to vote for contestee were rudely assailed and violently assaulted; they were threatened with expulsion from their churches; they were threatened with expulsion from the island, where many of them owned land; they were threatened with a denial of sexual intercourse with their wives; they were threatened with beating; they were cursed and abused; and this conduct on the part of the followers of contestant began early in the campaign and continued uninterruptedly down to the dosing of the polls on the day of the election. Smalls himself was a party to these acts; indeed he incited his followers to their perpetration.

After citing the testimony of those who heard contestant incite his followers to deeds of intimidation, the report calls attention to the fact that Smalls did not deny this, and continues:

Your committee venture the opinion that, in the whole history of election contests in this country, no case can be found where one of the candidates for election so openly and publicly advised and counseled his followers to perpetrate wrong and outrage upon those who supported his opponent. Without doubt many colored persons who desired to vote for Elliott were deterred from doing so through intimidation and fear of violence; how many it is hard to say. Men do not like to admit that they axe controlled by such influences, and yet we know they are. Beaufort County, the home of the contestant, was the theater of most of the violence and intimidation. The methods and practices resorted to in this county at the election in 1886 were of the same kind, only worse in character, as those resorted to by this same contestant in the same county at the election in 1876 (see Tillman *v.* Smalls, Forty-fifth Congress, second session, Report No. 916). Because of such violence, threats, and intimidation of voters by the contestant himself and his leading followers, your committee do not believe the vote returned at Brick Church, at Beaufort precinct, and at Ladies Island, in Beaufort County, should be counted. Your committee are reluctant to recommend the exclusion of a poll or polls, but in this case the ends of truth and justice, as well as the protection of the voter and the purity of the ballot box, imperatively demand it.

The majority, to account for the alleged fact that many colored voters wished to vote for sitting Member, brought in the fact that contestant had been convicted of bribery and alleged that he was unpopular with his race. The minority

minimized all this and also the testimony tending to show intimidation, claiming that it did not bear out the contention of the majority.

In accordance with their reasoning the majority concluded:

According to the return as canvassed and declared by the State board, the vote was: William Elliott, 6,493; Robert Smalls, 5,961.

We give to Smalls and Elliott each the votes cast for them at Fort Mott, Adams Run, Cedar Creek, and Greer's precinct, and we deduct from Smalls his majority at Beaufort precinct, and at Ladies Island precinct, and the count stands as follows:

| | | | |
|---|---|---|---|
| Returned vote for Elliott | 6,493 | Returned for Robert Smalls | 5,961 |
| Vote at Adams Run | 37 | Vote at Fort Mott | 236 |
| Vote at Fort Mott | 58 | Vote at Adams Run | 177 |
| Vote at Cedar Creek | 0 | Vote at Cedar Creek | 18 |
| Vote at Greer's precinct | 4 | Vote at Greer's | 65 |
| Total vote for Elliott | 6,592 | Total vote for Smalls | 6,457 |

| | | |
|---|---|---|
| Deduct from Smalls: | | |
| Majority at Beaufort | 136 | |
| Majority at Ladies Island | 52 | |
| | ..... | 188 |
| | ..... | 6,269 |
| Total vote for Elliott | | 6,592 |
| Total vote for Smalls | | 6,269 |
| Majority for Elliott | | 323 |

Your committee find that the sitting Member was duly elected, and recommend the adoption of the following resolutions:

*Resolved,* That Robert Smalls was not elected a Representative to the Fiftieth Congress from the Seventh district of South Carolina.

*Resolved,* That William Elliott was duly elected a Representative to the Fiftieth Congress from the Seventh district of South Carolina, and is entitled to his seat.

The minority recommended these resolutions:

*Resolved,* That William Elliott was not elected and is not entitled to a seat in the Fiftieth Congress from the Seventh South Carolina district.

*Resolved,* That Robert Smalls was elected and is entitled to a seat in the Fiftieth Congress from the Seventh South Carolina district.

The report was debated at length on February 11, 12, and 13,[1] 1889, and on the latter day the question was taken on substituting the minority for the majority resolutions, and the motion was disagreed to, yeas 127, nays 142.

Then the resolutions of the majority were agreed to without division.

**1016. The California election case of Sullivan v. Felton in the Fiftieth Congress.**

**Instance wherein the Elections Committee considered as a suspicious circumstance a variation from the vote of the preceding election.**

**Although a portion of the election officers were disqualified persons, corruptly appointed, the Elections Committee did not reject the poll, but corrected the return by a recount.**

[1] Record pp. 1754, 1785, 1860–1878; Journal, pp. 537, 615.

**Ballots tainted with bribery and distinguishable by a mark were deducted from the return.**

**Discussion of directory and mandatory requirements of law as applied to the ballot and in relation to the rights of the voter.**

December 12, 1888,[1] Mr. J. H. O'Neill, of Massachusetts, presented the report of the majority of the Committee on Elections in the California case of Sullivan, *v.* Felton.

The sitting Member had been returned by a certified majority of 119 votes.

The examination of the various charges in this case brought out the following discussions of principles:

(1) In the eighth precinct of the forty-sixth assembly district of San Francisco the vote returned showed a change, as compared with the vote of the preceding election, which the majority of the committee consider suspicious. There was testimony, corroborated by a recount, tending to show that the judges miscounted, also that they were corruptly organized, as the majority report says:

The testimony as a whole shows that the election board was illegally organized, and in the light of all the evidence it is very plain that the illegal organization was in the interest of Felton. The law of California requires, in the city of San Francisco, that the election board shall be composed of an inspector and of two judges, and an additional inspector and two additional judges, six in all; that these inspectors and judges should belong equally to the parties casting the most votes; that all should be electors in the precinct where appointed. A man by the name of James Hughes was Democratic committeeman of this precinct, or Democratic "captain," as he was called. He it was that selected the Democratic or reputed Democratic members of the election board—D. D. Sullivan and Thomas J. Barden. His own evidence (see Record, p. 962) shows that he received Felton's money. He screens himself, however, under the plea that the money was distributed to certain parties, of whom he was one, who had suffered loss from fire. Most singular, other sufferers from that fire received none of it and heard nothing of it until it dropped out in the evidence of Mr. Hughes in this contest. When asked under oath how he voted, whether for Sullivan or Felton, he refused to answer.

The majority conclude that the men in question were not residents of the precinct, not legal electors therein, and for that reason not eligible as judges:

In short, no one can read the testimony in relation to the election in this precinct without being convinced that Hughes was hired to import, and did import, these men—D. D. Sullivan and Thomas J. Barden—for the purpose of having them placed on the election board to deliberately assist in counting Frank J. Sullivan out and Charles N. Felton in, and that had no recount been called for and had, the purpose would have been accomplished to the extent of a change of at least 92 votes.

The majority rule as to this precinct:

The organization of the election board and the manner of holding and certifying to the election in this precinct is so tainted with fraud as to warrant the throwing out of the precinct vote as returned in toto. The evidence in the case would fully justify such a course. That being done, under well-established rules of law (see McCrary on Elections, sec. 442) each party would have the right to prove his vote aliunde. Should this course be adopted Felton's entire majority of 119 would be more than overcome by this precinct alone. Sullivan called more than enough of the electors of this precinct and by them proved that they voted for him to overcome Felton's majority of 119, while Felton did not Call a single voter of the precinct to prove a vote for himself. By accepting the result as shown by the recount we think, under all the circumstances, the ends of justice will be best subserved. Hence we here deduct 92 from Felton's 119 majority.

[1] Second session Fiftieth Congress, House Report No. 3538; Mobley, p. 747.

The minority views, signed by Mr. J. H. Rowell, of Illinois, and five others of the committee do not place credence in the testimony as to this precinct and say of the recount:

This vote was not recounted until the last day of taking rebuttal testimony in San Francisco, with no opportunity to answer.

The ballots were not identified as the real ballots cast at the election, and there were strong indications that they had been tampered with.

(2) As to alleged bribery:

The majority report finds suspicious changes in the vote of the Fourth Ward of San Jose, when the vote for Felton is compared with the results of prior elections; and conclude from the evidence that the changes were brought about by the questionable use of money. The testimony of sitting Member admits that he sent money to the county, direct to one J. H. Barbour, the county committeeman; but Mr. Barbour declined to say how much he received or expended. After quoting the testimony the report says:

From the above it will be seen that Barbour testifies he received $250 from the Congressional committee, but refuses to say whether he received more than $250, or whether he received any money from Felton direct. Felton, however, testifies that he sent money to Barbour direct, but to some of the committee "less money than they thought was sufficient and necessary."

Now, let us inquire further into the methods practiced at this precinct. We find that one Bailer and one McKenzie hired a room on election day, in the Cosmopolitan Hotel, in which to buy up such of the purchasable vote as could be inveigled therein.

Then, as to the application of money in this ward, the report gives the testimony of Baler and others, and concludes:

A careful reading of Bailer's testimony, coupled with other testimony hereinafter referred to, shows that he (Bailer) and one McKenzie had a room rented in the Cosmopolitan Hotel, and within less than 100 feet of the polling place. To this room electors willing to make merchandise of their right to vote were invited and taken; that the price paid started at $2.50 per vote in the forenoon, and increased to $4 later in the afternoon. The tickets given to the voters in this room were, for the purpose of "branding" them, "marked" with a red pencil across the items:

31. For the Amendment No. 1; and
32. Against the Amendment No. 1.

Of this class of tickets, 53 were found in the ballot box, and were all Republican tickets, with the name of Charles N. Felton thereon. To say nothing of the fact that they were bought and paid for in a most shameful and unblushing way by Mr. Bailer and his friend, McKenzie, who would get around the voter "like a Sheeny," and "tote," "influence," and "soup" into him. The tickets are in contravention of section 1197 of the Political Code, which reads:

"No ballot or ticket must be used or circulated on the day of election having any mark or thing thereon by which it can be ascertained what persons, or what class of persons, used or voted it, or at what time in the day such ballot was voted or used."

Contestee insisted that to come within the purview of this statute the mark or thing must be placed on the back of the ticket, and that the object and purpose of the statute was to secure to the voter the right of a secret ballot, and to prevent intimidation by rendering it impossible for the looker on to determine how the elector, when depositing his ballot, was voting. If we could persuade ourselves that such was the only object and purpose of the statute we might so conclude. To hold that only on the back or outside of the ticket was contemplated would make it "permissible" to place a mark "on the inside of a ticket to indicate the person or class of persons who voted it," and thus encourage "combinations of voters engaged in the greatest of all outrages against the elective franchise and free government—selling their votes—and to make proof of their perfidy." (Note of the code commissioner to section 1197, Political Code, California.)

The majority report cite Kirk *v.* Rhoads (46 Cal., 404) to show that irregularities beyond the voter's control do not vitiate the ballot, and say:

A statute in relation to such irregularities, as want of uniformity in size, color, texture, or appearance of ticket, or something of that character, under the control of those clothed with the power and duty of providing tickets, would and should be construed as directory. But an irregularity in contravention of a statute intended to protect the purity of the ballot box against frauds, which irregularity is within the control of the voter himself, must not be tolerated. A statute applied to such irregularities is, by the courts, and of right should be, construed as mandatory. Mr. Bailer says these "marks" placed upon the tickets were placed there as a "brand," and that a memoranda was kept of them, but that the memoranda had been lost six months later, when he was testifying.

The report further finds that the law providing that there should be no interference with the voters within 100 feet of the polls was disregarded.

As to the witnesses the report says:

Much of the testimony of these witnesses is hearsay. Aside from the hearsay the facts testified about and of which the witnesses had knowledge, and properly constituting a part of the res gesta, sufficiently and abundantly establish, first, that a room within 100 feet of the polling place was being used to deal in "merchantable" votes, and that such voters were marched up and down and watched when depositing their ballots; and, secondly, that 53 marked Republican tickets are found in the box and that they were "fixed" in that room, and that when these tickets were being counted out they were so well understood that they were denominated the "McKenzie tickets," and when so denominated McKenzie, who was standing by, "smiled." (See Record, p. 780, testimony of Julius Kraig, a member of the election board.) As to these electors who voted these 53 tickets the testimony shows that most of them were Democrats.

**1017. The case of Sullivan v. Felton, continued.**

**One candidate's name being scratched and another's written in with a pencil of illegal color for a corrupt purpose, the ballot was vitiated as to both names.**

**The Elections Committee knowing judicially that paupers could not, by reason of living in the county almshouse, have a residence in the precinct, and there being no proof that any did have a residence there, their votes were rejected.**

**The Elections Committee rejected returns tainted with fraud on the part of an election officer.**

**Instance wherein final action in an election case was prevented by obstruction.**

(3) The majority find also in the Fourth ward of San Jose the following condition:

In addition to these 53 tickets there were, in this Fourth Ward of San Jose, 13 other tickets—Democratic tickets—with Sullivan's name erased with blue or red pencils, and with the same kind of pencil Felton's name written in place of Sullivan's. The testimony sufficiently shows that these tickets were likewise "fixed" in the Bailer-McKenzie room. Bailer testifies that when they (himself and McKenzie) could not induce an elector "to go the whole hog" by "toting influence" and "soup" into him they would get him to vote for Felton and as much of the ticket as possible.

To say nothing of the testimony showing the corrupt influence used to secure these votes, let us examine them in the light of the California statutes. Section 1191, specification 3, provides: "That the names of the persons voted for, and the offices designated, are printed in black ink." Section 1204 provides: "When, upon a ballot found in any ballot box a name has been erased and another substituted therefor in any other manner than by the use of a lead pencil or common writing ink, the substituted name must be rejected and the name erased, if it can be ascertained by an inspection of the ballot." * * * These requirements are that it must be printed in black ink, and when so printed

all erasures must be made with lead pencil or common writing ink. Common ink is black ink. A ticket printed in red ink would not conform to the requirements of the statute, but as to a ticket so printed and furnished the voter by the authorities the statute might be construed as directory. But when the voter himself undertakes to change the uniformity of the ticket, then that is under his control, and the statute must be construed as mandatory. The letter and spirit of the statutes were intended to secure uniformity in the appearance of the tickets, and we think the tickets should be written and printed in common black ink or common lead pencil, and that all the erasures and substitutions should be made with like black ink or pencil.

Placinging this construction upon the intention of the law we might deduct 13 votes from Felton and give them to Sullivan, thus adding 26 more to the majority already found for Sullivan.

This accords with the justice of the case, because if 13 Democrats were bought to vote these tickets 13 were taken from Sullivan and given to Felton, making a difference of 26. We insist for that reason and for the reason that Sullivan's name was erased with red or blue pencil, and Felton's name substituted with such pencil, that they should at least be deducted from Felton's vote.

(4) In the county of San Francisco were two almshouses, and the majority report declares that 25 or 30 paupers, most of them shown to have been Democrats, voted for sitting Member, who was a Republican. The majority report takes the ground that these votes should be excluded, because the paupers were shown to have resided elsewhere than at the almshouse.

The law requires that the registration of an elector shall show the correct residence of the elector. These paupers were registered as residing at the almshouse. We judicially know that they did not reside there, because the constitution and laws of the State expressly provide that persons do not gain or lose a residence while residing in the almshouse at public expense. At whose expense does the evidence show these paupers were residing at the almshouse? At the public expense, of course. Then they do not gain any residence there, nor do they lose the residence from which they came. While residents, presumably, of the county, still under the laws of the State electors can not vote anywhere in the county wherein they reside, but must vote only in the precinct of the county wherein they reside. It would seem from the evidence in this case, and from the briefs of contestant and contestee as well, that these paupers are treated as residing at the almshouse.

Without any proof whatever on the point, we judicially know otherwise. Thus, by judicial knowledge, we know these paupers did not reside at, and could not be registered and vote from, the almshouse on account of any residence therein. Then, can it be presumed that these men were legal residents of the precinct in which the almshouse is located? We think not. From the evidence in the case, and by reference to the statutes of the State, it appears that there is but one almahouse in a county. That part of the county of San Francisco in this Fifth Congressional district, described in the record and the evidence as the southern half of the city and county of San Francisco, contains some 80 precincts. If the northern half contains as many that would make 160 in all. In view of these facts can we presume that these paupers, prior to being domiciled at the almshouse, all resided in the fifth precinct of the forty-eighth assembly district? We think not; and if not, when shown to have registered and voted from a place where they did not reside, does not that of itself shift the burden upon the other side to show that, notwithstanding they did not live at the almshouse, still that they lived in the precinct where the almshouse was located. We think the burden is thus shifted. There being no evidence offered on that point it is our duty to throw out these votes to the number at least of 25.

(5) In the second precinct of the forty-eighth assembly district of San Francisco the returns gave Felton 172 votes and Sullivan 117. The majority of the committee decided to throw out this return because it was tarnished with fraud. The report says:

To understand the merits of the controversy had before the board it will be necessary to refer to the statutes of California, which provide that in each precinct there shall be an inspector and two judges, an additional inspector and two additional judges, two clerks and two additional clerks. The inspector, additional inspector, judges, and additional judges—six in all—constitute the precinct board. At least

four of these, a majority, must sign certain papers and returns hereinafter stated. As the election progresses the clerks make and keep a list of the voters as they vote and these lists are duplicates. At the close of the polls two tally sheets are made out. These are duplicates of each other. When the count is completed the tickets are placed in an envelope, provided for that purpose, sealed, and the board, or a majority—which requires at least four members—sign their names across this envelope, which has printed thereon "Envelope No. 1." One of the duplicate copies of the poll lists and tally sheets, and certain registration papers, are placed in a second envelope, which is sealed, and the names of the members of the board signed thereon, as on the first envelope. This envelope beam upon it the printed words "Envelope No. 2." The other tally sheet and poll list are placed in a third envelope, "Envelope No. 3" which is not required to be signed or sealed.

Envelopes numbered 1 and 2 the law requires the inspector to file with the county clerk within eighteen hours after the close of the count. The other envelope, No. "3," the inspector is required to retain.

The evidence before the board showed that so far as the signatures were concerned the names of all six members of the election board were placed on one of the poll books, one of the tally sheets, and lists attached. Doctor Humphrey and E. J. Morrison not being present, their names were signed by one of the clerks. Not a single one of the judges testify to having examined the poll books, tally sheets, and lists attached before or at the time of signing. They all, the four members who were there, testify that they signed envelopes Nos."1" and "2." The clerks likewise testify that the envelopes "1" and "2" were signed; Lincoln himself testifies to this. These envelopes and returns were then turned over to Lincoln, the inspector, who took them home with him. It was then 9.30 o'clock p.m. of Thursday, November 4, 1886. The next day, about 10 o'clock, Lincoln appeared at the office of the registrar to place on file that portion of the returns which it was incumbent upon him to so file. The clerk refused to receive envelope No. "2," because not signed. In fact, Lincoln or someone else had made away with envelope No. "2," and had substituted an unsigned No. "3" therefor.

The report goes on:

Lincoln went back to the polling place, got a No. "2" envelope, broke the seal of the No. "3," took out the contents and placed them in the No. "2," calling the attention of Strozynski, a shoemaker, and Jurgens, a groceryman, to witness the performance. He then sealed the No. "2," wrote his own name thereon, and coolly requested both Jurgens and Strozynski to sign the names of certain other members of the board under his own (Lincoln's) name. Jurgens, thinking he wanted his name as a witness merely, took the pen and innocently inquired, "Where do you want my name?" "Well," says Lincoln, "sign Sweeny's name first." (Sweeny was a member of the board.) "What" says Jurgens, "you don't want me to sign some other man's name? "Oh, yes," rejoined Lincoln, "it is nothing but a form." Jurgens thought otherwise.

A like request was made of Strozynski with a like result, both of these men telling him that it would be forgery, and for him to sign them himself. "No; it won't do for me to sign more than one name," said Lincoln. Later, Morrison, one of the members of the board, and one who up to this time had signed nothing, was hunted up and procured to sign it. The names of the other members of the board were thereafter signed by someone; by whom the evidence does not disclose. The members themselves testify that they were not signed by them, or by anyone by them authorized. The envelope No. "2," purporting to be signed by the members, was returned to the clerk's office, by him received and placed on record. In canvassing the returns, it was claimed before the board of election commissioners that their functions were simply ministerial and not judicial. This view seems to have been held by a majority of the board, for they failed to call attention to anything connected with the returns, or to go into any investigation further than to examine the signatures of the members of the precinct board. From the evidence, these names had been affixed in a most careless manner.

The report concludes that during Lincoln's custody, after the polls were closed, someone removed the envelope signed by the board and substituted another. Testimony showed Lincoln to be an unreliable man.

(6) The majority report also discusses reasons for supposing that in sitting Member's party there was a conspiracy to defraud, and cites circumstances sug-

gesting intimidation, but as a matter of fact makes no definite rejection of votes for these reasons.

As a result of its conclusions, the majority find that sitting Member's majority is overcome by reasons of the following deductions:

(1) In the eighth precinct, forty-sixth assembly district, San Francisco, votes out of which Sullivan was counted, 92.

(2) In the fourth ward, San Jose, we find votes bought for Felton in a room within 100 feet of the polling place, and the tickets "branded" with a red pencil to the number of 53.

(3) In the same ward, and in the same room, 13 other votes bought and Sullivan's name erased and Felton's substituted, with red or blue pencil. These we think might not only be deducted from Felton, but counted for Sullivan, but we simply deduct them from Felton, 13.

(4) In the second precinct, forty-eighth assembly district, San Francisco, because of frauds, and uncertainty, we throw out the precinct, with its majority for Felton of 55.

(5) Illegal pauper votes bought for Felton, at least 25.

And the majority recommend these resolutions:

(1) *Resolved,* That Charles N. Felton, the contestee, was not elected a Representative in the Fiftieth Congress from the Fifth Congressional district of the State of California, and is not entitled to a seat on this floor.

(2) *Resolved,* That Frank J. Sullivan was duly elected to represent the Fifth Congressional district of California in the Fiftieth Congress, and is entitled to a seat therein.

The minority, who had denied the competency of the testimony and generally dissented from the conclusions of the majority, recommended the following:

*Resolved,* That Charles N. Felton was duly elected a Member of the Fiftieth Congress from the Fifth Congressional district of California, and is entitled to retain his seat.

*Resolved,* That Frank J. Sullivan was not elected to the Fiftieth Congress from the Fifth Congressional district of California.

An attempt was made to consider the report on February 18, and again on the 25th,[1] but in each case the purpose was defeated by dilatory tactics. So the sitting Member, Mr. Felton, continued to occupy the seat.

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[1] Record, pp. 2029–2032, 2296–2304; Journal, pp. 537, 615.