Chapter XXXIX.

GENERAL ELECTION CASES, 1898 TO 1901.

1. **Cases in the Fifty-fifth Congress. Sections 1097–1110.**[1]
2. **Cases in the Fifty-sixth Congress. Sections 1111–1118.**[2]

1097. The Alabama election case of Aldrich v. Plowman, in the Fifty-fifth Congress.

There being a general fraudulent conspiracy of election officers extending over a whole county, the entire county return was rejected, including precincts not specifically attacked by evidence.

In proving the vote aliunde, the Elections Committee rejected hearsay testimony and conjecture, and required the evidence of the voter or the marker.

The returns giving contestant much fewer votes than were proven to have been cast for him, the return of the precinct was rejected.

Where election officers procured incorrect markings for illiterate voters, so that the ballots were rejected, the House corrected but did not reject the vote.

Where certain electors testified that they were bribed to vote for contestee, the House subtracted their votes from his poll, but did not reject the entire poll.

On January 27, 1898,[3] Mr. R. W. Tayler, of Ohio, from the Committee on Elections No. 1, submitted the report of a majority of the committee[4] in the Alabama case of

[1] Other cases in the Fifty-fifth Congress are classified in different chapters:
Davis *v.* Gilbert, Kentucky. (Vol. I, sec. 313.)
Brigham H. Roberts, Utah. (Vol. I, secs. 474–480.)
Wilcox, Hawaii. (Vol. I, sec. 526.)

[2] Other cases in the Fifty-sixth Congress are classified elsewhere:
Hudson *v.* McAleer, Pennsylvania. (Vol. I, sec. 722.)
Cromer *v.* Clayton, Alabama. (Vol. I, sec. 745.)
Clark *v.* Stallings, Alabama. (Vol. I, sec. 747.)
Hunter *v.* Rhea, Kentucky. (Vol. I, sec. 746.)
Willis *v.* Handy, Delaware. (Vol. 1, sec. 748.)

[3] Second session Fifty-fifth Congress, House Report No. 284; Rowell's Digest, p. 554; Journal, pp. 181, 186, 187; Record, pp. 1546, 1589–1603.

[4] Minority views were presented by Mr. Charles L. Bartlett, of Georgia.

Aldrich *v.* Plowman. The official returns gave sitting Member a plurality of 2,967. The case divides itself into two branches, one relating to an alleged general conspiracy to defraud contestant in the county of Dallas, and the other to individual cases of fraud in the county of Talladega. In Dallas County the population by the census of 1890 was 2,146 white people, and 8,531 colored. In Talladega there was a preponderance of whites. The contestant was originally the nominee of a bolting Republican convention and of the Populists; but before the close of the campaign he was recognized as the regular and only Republican nominee. It was claimed on behalf of the sitting Member that contestant had much opposition in his own party; but this argument did not bear on the legal questions involved.

The majority of the committee begin the discussion with a description of the Australian ballot used in the election, wherein the names of the candidates for each office were arranged alphabetically. The report says:

On this ballot there are five different electoral tickets arranged, not according to parties, but alphabetically.

In view of the provision of section 43, which makes it a misdemeanor for one to have in his possession a copy of the ballot, it becomes a curious subject of inquiry how anyone can vote without the aid of a marker.

(*a*) The majority of the committee proposed to reject as untrustworthy the entire returns of the county of Dallas on the ground that they were fatally tainted by a fraudulent conspiracy. The report thus outlines the alleged conspiracy:

The machinery was simple and effective. Fortunately, it has been discovered and the details of its operation laid bare.

The law of Alabama, as already indicated, provided for the appointment, by certain county officers, of three inspectors of election for each voting precinct in the county, and two of these inspectors must be members of opposing political parties, if practicable.

In Dallas County the appointing officers were all Democrats. Notwithstanding the statutory requirement, they did not appoint a single Republican or Populist inspector of election. Lists were submitted to them of suitable men in each precinct; one by the so-called regular Republican nominee for Congress, and one joined in by the chairman of the People's Party of Dallas County, the chairman of the Republican party of Dallas County, the chairman of the Aldrich campaign committee, the member of the Republican executive committee for the Fourth district, and Mr. Aldrich himself.

Except in two or three instances where by mistake a Democrat's name was given in a list of three or four, not a single person was appointed inspector out of about two hundred names thus proposed by the opposition to Democracy. At the opening of the polls the friends of contestant at the several polling places submitted, in accordance with the law, names of suitable persons for markers and clerks. In a few instances a marker was appointed and in one precinct a clerk.

Some pretense was made, here and there, of appointing opposition inspectors, clerks, and markers by naming persons recommended by one Crocheron, a venal negro, who admitted his depravity, and worked for Plowman, or by appointing so-called representatives of the Gold Democratic candidate. But as only 111 votes were polled for other candidates than Plowman and Aldrich the pretense is apparent.

The fact is, and is constantly in evidence, that the machinery of election, in practically every precinct of Dallas County, was organized against the Republicans and Populists, and was so organized in pursuance of a conspiracy to absolutely control the casting, counting, and returns of the votes. It was successful. It was only because the necessities of the case seemed to be fully met that the cupidity of the Democratic managers was satisfied by returning a majority of 3,089, out of a vote of a little over 5,000, in a county where the colored vote outnumbered the white vote four to one.

Let us examine the methods by which this was done. Only representative instances will be taken. Fraud is everywhere; not lurking or secret, but bold and insolent. It is chiefly of five kinds.

1. Fraudulently padding the poll list with names of persons not registered; sometimes of fictitious persons and sometimes of persons who did not live in the precinct.

2. By padding the poll list with names of persons on the registration list who did not vote.

3. By imposing on illiterate voters who desired to vote for Aldrich, but whose tickets, against their will and without their knowledge, were marked for Plowman.

4. By the old-fashioned method of falsely recording votes cast for Aldrich, and certifying them as having been cast for Plowman.

5. By refusing to hold any election at all in certain strong Republican precincts. This was especially true in precincts 5 and 32, Dallas County, where for trivial and transparent reasons the inspectors failed to open the polls.

The report then goes on to review 7 precincts of Dallas County, showing the evidence of fraud from the poll lists, registration lists, and from testimony, and reaches this conclusion:

The result of our investigation is the conclusion that every precinct in Dallas County in which a contest is made is so fatally tainted with fraud that the returns therefrom must be entirely disregarded, and that we can count only such votes as the testimony in the case shows were actually cast. In doing so we considered as proved only those which were shown by direct testimony to have been cast, as when the voter himself, or a marker, testified. We have counted none which depend upon hearsay testimony or conjecture.

The minority, in their views, while apparently admitting some of the frauds charged in Dallas County, deny that contestant's party was denied representation on the election boards, and combat the principle on which the returns of the whole county are rejected:

The demand of the majority report that because the testimony concerning 8 of the precincts in Dallas County would seem to them to justify the exclusion or rejection of the returns therefrom as unreliable, but leaving all of the remaining 23 precincts unchallenged, the returns as a whole from Dallas County must be rejected, is absolutely untenable and unprecedented. There are no charges, nor is there any evidence, tending to show anything that would indicate that the returns from the 23 uncontested precincts are not entitled to full confidence and all the prima facies given them by the law. The official returns of Dallas County, therefore, should not and ought not to be rejected as a whole, but each precinct should be judged by its own acts and stand upon its own merits. Such an act is unwarranted by law, and such is not the course of procedure justified by the authorities or by the precedents in Congressional cases. The only just and proper course in this case is to deal with the returns by precincts, and where it is shown by competent and sufficient evidence that the returns from a precinct are overturned by proof of fraud, then the correct rule is to permit proof aliunde of the vote cast.

We shall endeavor to show the true result of the evidence as regards the precincts contested in Dallas County, and shall take it for granted that the House will not follow the recommendations of the majority of the committee in excluding the whole county returns, because of their claim that the returns are impeached in 8 of the precincts out of the 31 in that county. For the information of the House it is stated that there are only 31 precincts in Dallas County, there being no precincts of the numbers from 17 to 21, inclusive. We contend that the returns from the 23 precincts uncontested should stand as returned, the only charge against these 23 precincts being the general charge that inspectors were not appointed as required, unsupported by any proof of actual or other fraud.

(*b*) In Talladega County no general conspiracy was alleged and in only one precinct, Munford, was there a refusal to appoint an inspector to represent the opposition to sitting Member's party. The majority find that the official returns of that precinct give contestant 68 votes, while the evidence shows that 114 votes were cast for him. Therefore the majority conclude that the returns are so unreliable that no credit can be given them, and reject them. Contestant is allowed the 114 votes proved aliunde, and the sitting Member 7 votes similarly proven. The returns had given sitting Member 149.

In Childersburg precinct, where there was proper party representation on the election board, the majority of the committee purge the poll for the following reason:

Boaz, the leading Democratic inspector, seemed to be in charge of the election, and directed the markers, from time to time, to mark on the ballots exactly what the voter wished. If he said "Aldrich," without giving the Christian name or initials, the marker was instructed to write the name; and so, where the colored man, in pronouncing the name Aldrich in a manner not entirely suited to Mr. Boaz's sense of euphony, the marker was instructed to spell the name phonetically—as, for instance, "Alldridge," "Alldige"—Mr. Boaz insisted that there was no such name on the ticket as "Aldrich," or the two just given, and, therefore, there was no place where a cross mark could be put. None of these ballots were counted.

Boaz admits that there were 15 or 20 of them, and the inspector, Coleman, says there were 25. They ought to be counted for contestant. Other outrages against suffrage were committed by Boaz, but we do not feel that they ought to invalidate the poll, and we can not appraise their extent.

In another precinct the majority purged the poll for bribery:

In box 1, precinct 5, Talladega County, where the returned vote was 382 for Plowman and 19 for Aldrich, we find indubitable evidence of bribery on behalf of the contestee. It is probable that justice and precedent require the exclusion of the entire poll, but in view of the other evidence in the case and the general conclusion arrived at we prefer to base that conclusion on other grounds. "We must, however, subtract from contestee's votes in that precinct 10 votes of persons who testify that they were bribed to vote for Plowman.

The report was fully debated in the House on February 8 and 9, 1898, and on the latter day the resolutions of the minority confirming the title of sitting Member to the seat were disagreed to—yeas, 124; nays, 144.

Then the resolution declaring sitting Member not elected was agreed to—ayes, 129; noes, 114, by a rising vote. The resolution seating contestant was agreed to—yeas, 143; nays, 112.

Thereupon Mr. Aldrich appeared and was sworn in.

1098. The Virginia election case of Thorp v. Epes, in the Fifty-fifth Congress.

The House counted as if cast the votes of electors who, after using due diligence, were prevented from voting by the delays of election officers.

In proving votes not cast the House required that each elector should testify as to the facts which entitled him to vote and have his vote counted.

When the registration list was not conclusive as to the right to vote the House admitted parol evidence as to voter's qualification.

On February 10, 1898,[1] Mr. James A. Walker, of Virginia, from the Committee on Elections No. 3, submitted the report of the majority of the committee[2] in the Virginia case of R. T. Thorp *v.* Epes. The official return was as follows, showing a plurality of 2,621 for sitting Member:

For Sydney P. Epes	12,894
For R. T. Thorp	10,273
For J. L. Thorp	491
For others	25

[1] Second session Fifty-fifth Congress, House Report No. 428; Rowell's Digest, p. 565; Journal, pp. 363, 369, 370; Record, pp. 3099, 3140–3151.

[2] The minority views were presented by Mr. R. W. Miers, of Indiana.

Sitting Member conceded that his plurality should be reduced to 2,488 votes by the rejection of votes in various counties.

The majority of the committee, before proceeding to examine the election in detail, call attention to certain general conditions, viz, that the district in previous elections had shown a strong predisposition in favor of contestant's party; that the supporters of contestant were united while there was division among their opponents; that the negro population of the district was in excess of the white population; that the election machinery was entirely in the hands of sitting Members's party; that the law operated to the disadvantage of the illiterate voter by commanding that the ballot be kept a secret as to arrangement and form until the time when it should be put into the voter's hand; and finally that an obscure and ignorant person, named J. L. Thorp, had, through the agency of an election officer, petitioned to have his name put on the official ballot as a candidate for Congress. It was shown that this action was taken to delude ignorant voters and diminish the vote for contestant.

The majority of the committee, as a result of their examination, found a plurality of 812 votes for contestant. These changes resulted from the following conditions: (1) the addition to contestant's vote of 623 votes on account of that number of voters who were at the polls in seven precincts but could not vote; (2) the rejection of the returns from nineteen precincts where the election officers, all of whom were of sitting Member's party, were alleged to have done certain specific illegal and fraudulent acts as such election officers; and (3) the rejection of the returns from six precincts where unfit judges were appointed to represent contestant's party, and where frauds were proved.

1099. The Virginia election case of Thorp v. Epes, continued.

As to the counting of votes not cast, and the relation thereto of a repealed section of the Federal election law.

Although a mandatory State law provided for counting no ballot but the official one, the House righted a wrong by counting votes not cast.

Discussion as to the act of tendering a vote under the old and new ballot laws.

Although the State law declares that no election shall be invalid by failure to have party representation on boards of election officers, the House will reject the returns where fraud accompanies the irregularity.

(1) In regard to the votes of voters who did not succeed after proper effort in casting their ballots, a sharp controversy arose between the majority and minority [1] of the committee. The majority, after quoting the opinions of McCrary and Paine, and citing the cases of Ball *v.* Snyder, Wallace *v.* McKinley, Wise *v.* Waddell, Featherstone *v.* Cate, Mudd *v.* Compton, Sessinghaus, *v.* Frost, Yates *v.* Martin, and Yost *v.* Tucker, takes the ground that in this case, where the testimony showed that voters were in line waiting to cast their votes, and where there were delays for which the election officers were responsible, the tendered votes should be counted. In the course of the debate [2] Mr. Walker stated that in the district over 1,000 votes were in this way excluded, but that the committee had counted only 623, because each one of those 623 voters was put on the witness stand during the proceedings

[1] The minority views were presented by Mr. Robert W. Miers, of Indiana.

[2] Record, p. 3100.

in the contest and proved the facts which entitled him to vote and have his ballot counted. In cases where the names of such voters had been kept on tally lists, or where the voter had given a certificate of the fact to some one at the polls, the votes had not been counted. As to a question whether the testimony of the voter should be accepted as to his qualification, the report says:

It is contended, however, by the contestee that the votes excluded can not be counted in this case because the contestant has failed to prove that these voters were registered as required by law. This objection is based upon the idea that the registration book is primary evidence as to whether a voter is registered or not, and that no other proof of that fact can be received.

The registration books in Virginia are not public records to which verity can be attached. In fact they are only prima facie evidence that a man is a voter and may be attacked by parole evidence in many ways. It is true they are the best evidence as to whether a voter's name is on the registration book, but the fact that it is on the book is not conclusive evidence that he is a registered voter, and the fact that his name is not on the book is not conclusive evidence that he is not a registered voter.

The question in this case is whether the excluded person is a legally qualified voter at the precinct at which he offers to vote, and not the question whether his name is on the registration list or not. A citizen applying to vote whose name is not found upon the registration book may vote upon a transfer from another precinct in the same district, or he may prove that he was a duly registered voter at that precinct and that his name had been, by fraud or by accident, left off or erased from the list of registration. If the registration books are destroyed, the voters whose names were on them are still registered voters. The act of registration makes the voter a registered voter. The registration lists are only the subsequent memorial of the fact made by the registrar. Again, a voter whose name appears upon the registration book may not be a duly qualified elector for various reasons.

He may have removed from the election district more than ten days before he offers to vote; or he may have been convicted of some criminal offense; or he may have fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, or knowingly conveyed a challenge, or aided or assisted anyone in fighting a duel; or he may prove that his disabilities have been removed by a pardon or by an act of the legislature; or it may be shown that he is an idiot or a lunatic; or he may prove that in purging the polls as provided by the statute his name was improperly stricken from the list of voters.

All these cases for or against the right of a citizen to vote can be proved by parole evidence; and the question as to whether the name is upon the registration book or not is not the real issue, but whether the party offering to vote is entitled to vote at that election and at that precinct.

This question can be decided only by oral evidence furnished by the affidavit of the voter himself, by the evidence of other witnesses who know the facts, or by the records of the court. The fact that his name is on the registration book is only prima facie evidence that it is legally entitled to be there, and its failure to appear upon the book is only prima facie evidence that he is not a registered voter. The distinction lies between what constitutes a registered voter and what the poll books show. A duly registered voter who has not forfeited his title to be a registered voter at the precinct where he is registered is nevertheless a registered voter, although his name does not appear upon the books.

In this case it appears that no exception was made at the time in many instances to the testimony of the witnesses proving that they were duly registered voters.

The minority, in their views, combatted the proposition of the majority:

Votes not cast can not be counted as a matter of law generally. No contrary opinion can be cited from the adjudged cases of the ordinary courts of any of the States of this Union. This was a uniform rule of the House of Representatives until 1873, some time after the adoption of section 2007, et seq., Revised Statutes of the United States (adopted May 31, 1870). This section was repealed by act of February 8, 1894, and whatever influence it may have had is thereby removed.

The minority cite the cases of Biddle and Richard *v.* Wing, Whyte *v.* Harris, Morris *v.* Handley, Niblack *v.* Walls, Frost *v.* Metcalf, Bradley *v.* Slemons, Bisbee *v.* Finley, Sessinghaus *v.* Frost, and Waddill *v.* Wise, as well as passages from Cooley's Constitutional Limitations, Wold *v.* Hanson (87 Wis., 179), Pennington *v.* Hare

(60 Minn., 147), Hartt *v.* Harvey (19 Howard, N. Y., 252), Webster *v.* Byrne (34 Cal., 276), etc., in support of the general proposition, and then give special reasons why such votes should not be counted under the Virginia law, which provides for the official ballot and declares that "no ballot save an official ballot above provided for shall be counted for any person." The minority furthermore show that where a ballot is wrongly marked the intention of the voter does not save it from rejection, and say:

> If, therefore, under the Australian system we can not in such cases resort to the intention of an actual voter, what possible justification can there be in accepting the intentions of individuals as to whom we have no evidence or means of knowing how they intended to express their subsequently declared intentions?
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> It will not be forgotten, moreover, that all of the cases relied on in the majority report for the counting of votes not cast were decided under the old system of individual or party tickets, and the peculiar difference in the two systems was an important factor in the former cases.
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> In Frost *v.* Metcalf the ballots must have been offered at the polling place.
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> In Bisbee *v.* Finley and in Waddill *v.* Wise the identical ballots were filed.
>
> In Sessinghaus *v.* Frost the ballot must have been actually offered, i. e., the clearly expressed intentions of the voter must have been declared at the time in the form prescribed by law.
>
> The broadest statement of the doctrine sought to be enforced by contestant is that of Niblack *v.* Walls, so often quoted as the language of Paine, 518:
>
> "When a legal voter offers to vote for a particular candidate and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote should be counted."
>
> It is unnecessary to call attention again to the fact that this decision was prior to the adoption of the Australian system.

Furthermore, as to the qualification of such voters, the minority state:

> Legal registration is an essential prerequisite for voting in Virginia.
>
> By express statute the officers of election themselves can not take parol evidence of this fact, but the name must be found on the registration books (Idem).
>
> This circumstance of legal qualification is essential to the doctrine stated above, and in contested elections the party desiring to invoke its application should furnish proof of equal dignity with that which the officers of election must have required. The registration books are the best evidence of the qualification of a voter, and, being in existence, are the only competent evidence on this subject.

After citing authorities, the minority state that due exception was taken by sitting Member to parol evidence on this subject and the contestant was challenged to produce the registration books.

In the debate [1] Mr. Walker replied to the contention that the Virginia law prevented the counting of excluded votes, saying it was admitted that when a voter put a ballot in the box it must be an official ballot in order to be counted; but in this case the question was not as to the counting of an illegal ballot, but as to the exclusion of a voter by fraudulent methods from voting. It was also denied that the right to count such votes depended on the former Federal statute. It existed independently of it.[2]

The evidence presented by the majority showed not only the fact that the supporters of contestant used due diligence, being long in line waiting to vote, but that they were prevented by illegal, arbitrary, or fraudulent acts of the election

[1] Record, p. 3101. Also see p. 3115, argument of Mr. Edgar D. Crumpacker, of Indiana.

[2] Argument of Mr. Edgar D. Crumpacker, of Indiana; Record, p. 3113.

officers tending to make delays or put contestant's supporters at a disadvantage in getting to the ballot box.

(2) As to the 19 precincts where the officers of election were all of sitting Member's party; and the six precincts "where judges were appointed to represent the Republican party, who were educationally unfit to be judges, or who were not recognized by the party as Republicans," the majority report gives the law:

The statute law of Virginia, as before shown, requires that wherever it is possible judges of election "shall be chosen for each voting place from persons known to belong to different political parties, each of whom shall be able to read and write."

It further requires that the judges of election shall designate one of their number "whose duty it shall be, at the request of any elector who may be physically or educationally unable to prepare his ballot, to enter the booth with said elector and render him assistance in preparing his ballot by reading the names and offices to be voted for on the ballot and pointing out which name or names the said elector may wish to strike out, or otherwise aid him in preparing his ballot."

The report cites the cases of Thorp *v.* McKenney, English *v.* Peelle, Threet *v.* Clark, McDuffie *v.* Turpin, in support of the doctrine that where the testimony shows frauds in conjunction with a disregard of the law providing for representation of different parties on the boards of election officers, the returns should be rejected even though the law of the State may provide, as did the Virginia law in this case, that "no election shall be deemed invalid when the judges shall not belong to different political parties." Such a law did not apply to an election dishonestly conducted.

Concluding as to this point, and also as to the appointment of incompetent members of contestant's party, the report says:

It can not be contended that the electoral boards failed by inadvertence to comply with this law, for their attention was called to its importance both by the report in the last-named case and by the Republican county chairman.

We are constrained, therefore, to conclude that it was designedly done for the sole purpose of enabling partisan election officers to defeat the will of the voters as declared at the polls. If any doubt existed as to this design, it would disappear before the evidence in this case, which, as before shown, discloses that frauds, illegalities, and irregularities were perpetrated by these Democratic election officers at every precinct where this law was disregarded.

All that is here said with reference to the refusal of the Democratic electoral boards to comply with the law requiring the selection of judges known to belong to different political parties applies with as much force to those precincts where these boards, in pretending to comply with the law, selected as representatives of the Republican party men who were not recognized by that party as Republicans or were educationally or morally unfit to be judges of election.

That the statute requiring the judge selected for that purpose to enter the booth with the illiterate voter "and render him assistance in preparing his ballot by reading the names and offices to be voted for, and pointing out which name or names the said elector may wish to strike out, or otherwise aid him in preparing his ballot," is clearly mandatory is plain, not only from the language itself, but by a decision of the supreme court of appeals of Virginia. (Pearson et al *v.* Board of Supervisors of Brunswick Co., 91 Va., 322.)

In the case last cited it was held to be the duty of the judge to render to the voter whatever assistance he might request in the preparation of his ballot. It is the duty of such judge, when requested to do so, to mark the ballot of the illiterate voter in such a manner as to make it a legal ballot for the candidates of his choice. As before shown, at many of the precincts the judges refused to render this assistance to the illiterate Republican voters, thus violating a mandatory requirement of the law. Paine on Elections, section 497, says:

"A violation by electors or officers of a mandatory requirement of law, which changes or materially affects the result, is, even in the absence of fraud, a sufficient ground for rejecting an entire poll when it can not be purged."

That this assistance was almost universally requested can hardly be questioned in the light of the evidence in this case. Illiterate Republican voters were instructed by public speeches and by handbills not to rely on themselves, but to ask the judges to mark their ballots so as to enable them "to vote for McKinley, Hobart, and R.T. Thorp," the Republican candidates. Yet it is not denied that in this district 3,607 ballots cast by duly qualified voters were never computed or accounted for in the returns of votes cast for Congressional candidates, and that 491 votes were returned for J.L. Thorp, showing, practically, that over 4,000 ballots cast by qualified voters were improperly prepared. When it is remembered that at many precincts the election was held entirely by Democratic officials, and that in all the election was under the control of such officials, it is not reasonable to assume that any considerable number of these mismarked ballots were cast by voters who intended to vote for the Democratic candidate.

The majority of the committee review at length the testimony as to each of the rejected precincts, showing the inconsistencies in the returns and illegal and fraudulent acts of the partisan election boards.

The minority deny that the testimony had the effect claimed by the majority, and after analyzing the precedents cited by the majority, say:

From the foregoing analysis of the authorities relied on in Thorp *v.* McKenney it will be seen that there is little weight of authority to sustain an imputation against the verity of sworn returns by reason of the simple fact that officers of election are all of the same political party. It will be recollected, also, in addition, that the legislature of Virginia has added to the directory provisions of the statute the mandatory clause—

"But no election shall be deemed invalid when the judges shall not belong to different political parties or who shall not possess the above qualifications."

The report was debated at length on March 22 and 23, 1898, and on the latter day the House, by a vote of yeas 131, nays 151, rejected the resolutions of the minority in favor of the sitting Member, and then, by a vote of 151 yeas to 130 nays, agreed to resolutions declaring sitting Member not elected and that contestant was elected.

Thereupon Mr. Thorp took the oath of office.

1100. The Oregon election case of Vanderburg v. Tongue, in the Fifty-fifth Congress.

A contestant must put in evidence the returns of the district as a basis for showing the effect of his charges.

A contestant having failed to show reasonable diligence, his request for time to take further testimony was denied.

On February 14, 1898,[1] Mr. Lemuel W. Royse, of Indian , from the Committee on Elections No. 2, submitted a report on the case of Vanderburg *v.* Tongue, from Oregon. The contestant, in his notice of contest, had charged frauds and irregularities; and the contestee in his answer had admitted certain of the charges as to Clackamas County, but denied all others. The contestant took testimony only as to Coledo precinct, in Coos County. This evidence, in the opinion of the committee, clearly showed that several persons, not over 25, voted who were not qualified electors. It was reasonably clear from the evidence that five of these persons voted for the contestant. The committee concluded:

We are unable to determine from the record how the others voted on Representative for Congress, but should we conclude that they voted for contestant, we would still be unable to tell how it would affect the result, since we have not been furnished with the election returns of the district. Several

[1] Second session Fifty-fifth Congress, House Report No. 437; Rowell's Digest, p. 5,59; Journal, p. 198.

irregularities and violations of the law occurred in the conduct of the election held in this precinct, but we are satisfied that these were all brought about through the ignorance and unskillfulness of the officers of election. We believe that these officers were trying to hold an honest and fair election, and that the irregularities occurred through their want of a clear understanding of their duties as provided by law. There is no evidence which shows that these acts were committed or suffered to be done in the interest of any particular candidate. Some of the officers who participated in these acts were the friends and political adherents of the contestant, and there is nothing in the evidence tending to show that they would have been engaged in, or would have permitted, any thing detrimental to his interests. We therefore think that the vote of this precinct should stand as returned; but should the vote of this precinct be cast aside it would avail nothing, for, as stated before, it does not appear from the evidence that the exclusion of the vote of the precinct would change the result of the election.

The committee also say:

Contestant appeared before us by his attorney, and asked to reopen the case for the purpose of taking further testimony to sustain the charges in his notice of contest. But as he failed to show that he had been reasonably diligent in his effort to procure such testimony in the time allowed him by the statute, we recommend that his application be denied.

The House, without debate or division, agreed to resolutions confirming sitting Member's title to his seat.

1101. The Alabama election case of Crowe v. Underwood, in the Fifty-fifth Congress.

Although extensive frauds and irregularities were shown, the failure to show that the official return was overcome caused the House to confirm contestee's title.

On March 2, 1898[1] Mr. Romulus Z. Linney, of North Carolina, from the Committee on Elections No. 1, submitted a report in the case of Crowe *v.* Underwood, from Alabama. The statement of the case is sufficiently embodied in the following from the report endorsed by the majority members of the committee:

The committee examined the evidence taken in the cause and find that according to the official returns the contestee received at said election 13,499 votes, contestant received 5,618 votes. The Hon. Archibald Lawson, Gold Democrat, received 2,318 votes; that the contestee received a majority over all candidates of 5,565 votes and a plurality over contestant of 7,881 votes.

The committee considered these returns as being prima facie true, and examined the evidence in the case in order to determine whether the fraud and other wrongs alleged and upon which contestant claimed that evidence had been offered had been established by a preponderance of the evidence to the extent of vitiating the returns. The committee find that there were many irregularities and much fraud practiced by the officers of the said election. The ticket voted at said election contained 57 names arranged in alphabetical order, with no device or other means of determining the politics of any candidate voted for. An illiterate man voter, in fact the most intelligent voter, would find it difficult to vote said ticket in the time allowed by law for an elector to be at the polls.

The laws of Alabama provide for the presence of a fixer at the polls to mark the ballots of illiterate voters, as directed by said voters, as to the candidate for whom he desired to vote. This ticket alone made it necessary that the fixers of each party should be intelligent. An ignorant or illiterate man could not have performed the functions of said office of fixer.

The entire absence of fixers or other officers to represent the illiterate voter would, in the opinion of the committee, strongly suggest fraud if it were confined to one party while the other party had no representation, and it appears on page 30 of the record that the chairman of the Populist party presented a list of names for inspectors of election for 42 beats in Jefferson County, but as no list as to the inspectors actually appointed appears the matter is left without proof as to how it was, and the official returns pre-

[1] Second session Fifty-fifth Congress, House Report No. 597; Rowell's Digest, p. 557; Journal, pp. 270,271.

vail. In Perry and Hale counties the evidence tends to show that the Populists and Republicans did not have an equal share of fixers as provided by the statute. Out of 48 inspectors of election in Perry County 40 are Democrats and only 8 Republicans and Populists, and in Cleveland beat, Perry County, all the inspectors and markers were organized Democrats. (See pp. 168–169 of the record.) The irregularities in said beat were so glaring and the fraud so clearly established that the contestee at the hearing admitted that the returns from that beat were successfully assailed, and that beat should be thrown out. When we consider the evidence as to Hale County, it is shown by the evidence to have about 4,000 registered voters, and about 1,150 of this number are white, the balance negroes. The opinion of a witness, Adison Wimbs, on page 196 of the record, which appears to have been given without objection, puts the vote of Hale County, so far as the negro vote is concerned, at 2,800 for Lawson, and that Underwood's vote at a fair election would not have been more than 850 or 900 votes, whereas the official returns put the vote of Hale County, Underwood, 2,458; Crowe, 152, and Lawson, 965. Mr. Wimbs further says that at Greensboro beat, Hale County, the Republicans and goldbug Democrats presented a list of fixers, each presenting six names, and none were appointed at that beat, and the returns show that Greensboro beat gave Underwood 467, Crowe 17, and Lawson 359 votes. This evidence tends strongly to show that the election in Hale County was unfair and that the Gold Democrats became the victims of the frauds of the organized Democracy to a greater extent than Crowe, the Populist and Republican candidate, but as it is founded chiefly on the opinion of a witness and the lack of a fair representation of inspectors and fixers at the polls the committee concluded that it was not sufficient to destroy the legal force of the official returns, although it is highly probable that the grossest frauds were practiced by the organized Democracy of Hale County in said election against both the contestant and the Gold Democratic candidate, A. Lawson, but more against Mr. Lawson than Mr. Crowe, the Republicans in this county having indorsed Lawson, the goldbug candidate. (See testimony of Adison Wimbs.) The contestant, on page 33 of his brief, claims that 40 votes should be added to contestant's vote, but it is admitted in contestant's brief that there is the absence of effective proof of the irregularities and frauds in said county at Centerville. The want of that effective proof of fraud as to Bibb County leaves the official returns in force. As to the counties of Bibb and Blount, we failed to find evidence sufficient to overthrow the returns.

The committee unanimously recommended resolutions confirming the title of contestant to the seat, inasmuch as sufficient fraud and irregularities to overcome his majority were not proven.

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

1102. The Virginia election case of Wise v. Young, in the Fifty-fifth Congress.

Where returns are falsified by election officers they have no prima facie effect, and the parties may be credited only with such votes as may be proven aliunde.

Where election markers fraudulently mark the ballots of illiterate voters, the returns may be impeached by the testimony of the voters as to the ballots they intended to vote.

Discussion of the weight of testimony of election officers as to their own acts when impeached by the evidence of illiterate voters.

Where returns are rejected because of fraudulent act of election officers friendly to contestee, the contestant yet loses his returned vote as well as contestee.

On March 21,1898,[1] Mr. W.S. Mesick, of Michigan, from the Committee on Elections No. 3, submitted the report of a majority of the committee[2] in the

[1] Second session Fifty-fifth Congress, House Report No. 772; Rowell's Digest, p. 569; Journal, pp. 492, 497, 498; Record, pp. 4250, 4279–4287; Appendix, p. 342.

[2] Minority views presented by Mr. Robert E. Burke, of Texas.

Virginia case of Wise *v.* Young. The official returns for the district gave to sitting Member a plurality of 2,399 votes.

The contestant charged frauds and irregularities, and presented a large mass of testimony to overcome the official plurality.

At the outset a question was raised and discussed as to the election law, of Virginia. The committee review at length the provisions of this law, which provided for the Australian ballot, but had several features which the majority of the committee considered as especially favorable to fraudulent acts. The electoral machinery was all in the hands of one political party, and while it provided that the precinct judges should be of different political parties it also provided that the election should not be vitiated if this provision should be neglected. The form and arrangement of the ballot were kept from the voter until the time came to mark it, and he was allowed two and a half minutes for this act. The ballot was marked by drawing a line through the names of the candidates whom the elector did not wish to vote for, and no name was to be considered scratched unless the mark extended through three-fourths of the name. In case a voter was physically or mentally incapable of marking the ballot, a judge was to accompany him to the booth and point out the names "or otherwise aid him in preparing the ballot." The Virginia court of appeals declared this law constitutional, and that its provisions in regard to persons who marked their own ballots were reasonable. As to the provision for illiterate voters, it said that very great power was placed in the hands of the judge who assisted the voter, and commented on the fact that such confidence was liable to abuse. The majority of the committee, after quoting from the message of the governor of the State condemning the law, say:

> From this statement of a governor in full political sympathy with the framers of the law we turn to the undisputed fact that in the election which is the subject of our examination, the poll books at 88 precincts in this district, exclusive of the county of Norfolk, show that 32,277 voters deposited ballots, and of these but 25,433 were returned for anybody for Congressman, and but 22,758 were returned for Presidential electors. Thus nearly one-sixth of the entire vote cast for Congressmen were thrown out as defective, and one-fourth of the entire vote cast for Presidential electors.
>
> The law is plainly too intricate for illiterates to protect themselves and the trouble undoubtedly springs from errors or frauds committed by the election officers. Turning to the evidence to solve this last inquiry we find that the contestant has taken an immense amount of testimony on this point and taken it with much care and observances of legal requirements.

The minority, after showing that the law is valid, take the ground that all such irregularities as may be supposed to result from its intricacies or from ignorant misconception of it are removed from the category of fraudulent practices such as destroy the value of returns.

The minority further say:

> The highest court in the State of Virginia having upheld the validity of this law, and declared its provisions reasonable, we are bound by that decision, and in considering the evidence here we must endeavor to ascertain whether this election was conducted in accordance with the provisions of that law. If we find it so, the contestee is entitled to retain his seat. If we find that any of the provisions of this law were disregarded in the conduct of this election, we should further ascertain whether such disregard of the law was with fraudulent intent or through ignorance or misinterpretation of the law. If done with fraudulent intent, the value of the returns as evidence is destroyed, and the returns may be rejected; but if done through ignorance or misconstruction of the law, while the votes may be illegal, that fact will not affect the election or render it void, unless the number of such illegal

votes is great enough to affect the general result; and where it is shown that illegal votes have been cast for a candidate they should be deducted from his vote. This is the common leaning of the profession on this subject.

The distinction is between mere illegality and fraud in the conduct of elections. The first does not deprive the candidate of any votes save those proven to have been illegally cast for him; the second, by destroying the value of the returns as evidence, causes the rejection of the entire poll and deprives the candidates of all the votes cast for them, as well the legal as the illegal ones, unless otherwise proved. * * *

Fraud, however, is never presumed, and "nothing but the most positive, credible, and unequivocal evidence should be permitted to destroy the credit of official returns. It is not sufficient to cast suspicion upon them." * * *

A fortiori mere opportunities for fraud should not be taken for proof of fraud. Reference to these fundamental principles of evidence is made necessary by the very general disregard of them by the majority in treating the evidence in its report. Instead of waiting for "positive, credible, and unequivocal evidence (of fraud) to destroy the credit of official returns," as the law requires, the majority seems to have started out with a presumption of fraud against the conduct of the officers of this election, and to have accepted trivial circumstances, uncertain and equivocal testimony as conclusive proof to sustain that presumption. For it must be remembered that the great majority-4ndeed, nearly all-of the witnesses whose testimony is relied on to prove fraud are ignorant, uneducated, unintelligent negroes; that the testimony of large numbers of them who testified that they voted for contestant, when subjected to cross-examination, shows that at the time of the election they did not know the contestant by name or that he was a candidate for Congress; that others, in large numbers, at the time of their examination as witnesses could not remember, when subjected to cross-examination, who they voted for Congress; that there was great defection from the contestant in his own party and that many negroes were opposed to. him. * * * The evidence of fraud on the part of the judges who assisted the illiterates consists almost entirely of the evidence of these illiterates themselves as to acts which, in the nature of the case, must have occurred only in the presence of two persons (i. e., the judge and the illiterate voter), both of whom testify in direct contradiction to each other; in which conflict of testimony the majority accept as true the statement of the ignorant, unintelligent, bow-ridden negro, characterizing the testimony of the judges as "perjury."

After this preliminary view of the law, the majority and minority proceed to consider the returns of 10 precincts, which the majority propose to reject entirely because of overwhelming evidence of fraud in each. The fraudulent acts in all 10 precincts fall under a class fully illustrated by the case of Longview, in Isle of Wright County, of which the majority say:

In this precinct 162 votes were cast and 127 returned; 102 for Young and 25 for Vise. Contestant examined 75 voters (pp. 569 to 605), whose names appeared on the poll book, all of whom swore that they voted for him, and only 6 of these prepared their own ballots. The others swore the judges helped them, and most of them swore that the judges themselves marked their ballots; thus contestant examined all but 87 of the men who voted, and the return gives Young 102 votes. Warren, a voter (p. 571), swore he saw the judge mark his ballot in a zigzag line. Jordan (p. 576) swore the judge marked his ballot from top to bottom in a straight line. Stewart (p. 581) swears he saw the judge mark his ballot by making the letter X on each name. All the judges and clerks for this precinct were Democrats. It was proved that of the 162 voters 78 were white and 84 colored. The return of the contestee gave him 24 more votes than the white voters, and gave McKinley, for President, but 16 votes, where 84 colored men had voted, and Bryan 98, where but 78 white men had voted.

The political complexion of the colored men as voters was admitted. The contestee examined nobody but the judges and the clerks. One of the judges (C. C. Brock, p. 31–18) swore he allowed voters to vote improperly marked ballots, when he knew them to be so marked. Another judge (Coulter, p. 3122), in answer to the question asked if he ever read the election laws of Virginia, replied: "Part of it—a very small part; I don't believe in law nohow." The registrar also was a Democrat (p. 603), and 11 duly qualified voters (pp. 584 to 604) swore that he refused to register them, and that if he had done so they would have voted for contestant.

The majority report goes on to quote the case of Clayton *v.* Breckinridge: "When returns are impeached they can not be received for any purpose, and only those proved aliunde can be counted." "If the returns have been falsified by the election officers," continue the majority in their review of Longview precinct, "it is a well-settled rule of law that they cease to have any prima facie effect, and each party can only be credited with such votes at the box in question as each may show by other evidence."

The minority minimize the effect of the testimony as to this precinct, and deny that it should have the effect of throwing out the entire precinct, since the judges testified that they rendered all the assistance asked for by illiterate voters, while the registrar testified that he never refused to register any man who presented to him a legal and proper transfer certificate. The clerks of the election further testified to the fairness of the conduct of the election."There is no reason," say the minority, in comparing the legal weight of testimony, "why these men should not be believed as readily as the ignorant, unintelligent, illiterate voter, who testifies against them, and they have the advantage of the presumption in their favor growing out of the fact that they are public officers acting under the sanction of their official oaths."

One other precinct of the 10 may be noticed because of the view which the minority take. The majority, in their report, say of Creed's Bridge precinct:

> The poll book showed 160 men voting. All the election officers were Democrats. The ballot box was nearly covered from sight by a curtain and the house darkened by bagging. The return gave Young 123 votes and Wise 16.
>
> Contestant put 54 voters on the stand. Twenty-five of these prepared their own ballots, and 29 were prepared by the Democratic judges. Only one mentions any other ballot fixer than Midgett. Young could by no possibility have received exceeding 105 votes—the return gave him 123—if every voter who marked his own ballot marked it wrong. Midgett, the judge, marked 28 ballots for Wise, and he received a return of but 16. The contestee's own witness said it was the smallest Republican vote he ever knew of. The details of the fraud at this precinct are too long to embody in this report.

The minority make this concession:

> There is no direct testimony of fraud in this precinct except some conflict of testimony as to whether the ballot box was in full view of the voters or not. But, if not, the provision requiring it to be so is simply directory, and its violation would not of itself invalidate the election. The judges, too, are men of good character, as the evidence shows (William A. White, postmaster, p. 3184). Yet the testimony here as to the vote cast and that returned is totally irreconcilable, and we think the entire poll should be rejected for uncertainty as to the vote cast. The contestee loses 123 votes in this precinct.

Reviewing the 10 precincts, the majority say:

> The aggregate vote returned for contestee from these 10 precincts was 1,517. He must lose this much, for he made no effort whatever to set up, aliunde, his vote, and he must have seen the utter worthlessness of these returns.
>
> The contestant would also lose his vote in these precincts if he had not set it up by evidence aliunde. His vote from these 10 precincts as returned was but 565, but in the fast 9 precincts, where but 425 votes were returned for him, he examined personally 805 witnesses, who swore they voted for him. His poll at these precincts and his increased vote, as established by his proofs, appears in a later statement. The contestee loses, therefore, on these 10 precincts, 1,517 votes.

1103. The case of Wise v. Young, continued.

Certificates of voters, stating how they had voted and given at the time of voting to a person who sustained them by testimony, were admitted as evidence against the return.

Discussion of the doctrine of res gestse as applied to certificates made by voters at the time of voting.

Where electors were present, ready to vote, and were prevented by dilatory acts of election officers, the House counted the votes as if cast.

In an election case allegations as to the means by which a person became a candidate are not properly considered.

Although the fraud in a district may be extensive, the House prefers to purge the return rather than declare the seat vacant.

The committee then take up 44 other precincts where the methods of proving the fraud were essentially the same, and where the majority recommend that the entire return be rejected. The majority say:

It will be seen that he has introduced nearly 5,000 witnesses in person to prove their votes for him at these precincts, when he received a return of but 3,729. It will be further seen that in 16 of these precincts, marked in the table with a star, he has introduced certificates or the rolls of his tally keepers, which, if they are admitted, will sustain his claim that he received at least 6,086 votes where but 3,729 were returned for him. In our view of the matter, it is unimportant to the contestant whether we count the votes proved by tally lists and certificates by him or not. His majority is already established, and the admission of the tally lists and certificates only swells that majority.

After citing the cases of Wallace *v.* McKinley, Sullivan *v.* Felton, Smith *v.* Jackson, and McDuffie *v.* Turpin, the report argues from the principles there laid down that the contestant in this case should be allowed the benefit of the certificates of the voters and the tally rolls. Thus, in Isle of Wright County, 102 voters swore that they voted for contestant, although but 31 votes were returned for him. Furthermore, in this precinct, says the report—

contestant placed upon the stand Goodwin, who swore that 121 voters, whose names appeared on the poll books, came to him at the time they voted, and stated to him that they voted the Republican ticket, and that he kept the tally and put their names down. He produced and identified and filed his book. Of these 121, 102 appeared and testified. It was in the nature of the case impossible to procure the attendance of all, and the question is whether the unimpeached testimony of Goodwin entitles the contestant to the other 19 votes of persons not personally examined.

The next phase of this is presented by the returns from Stone House precinct, which are impeached and rejected. There 109 men appeared in person and falsified the return so that it has been rejected. These 109 men had given certificates. (See p. 2666.) They were part of 113 voters, who, on the day of the election and just after voting, gave to contestant's representatives on the ground certificates that they had voted for him, in the form which appears on page 2666. The other four men were dead or absent, but their certificates were produced by the persons to whom they were given.

Shall the production of such certificates, completely identified by the party who took them, entitle the contestant to the vote of these absentees? This question becomes important when we reach a precinct like Walls Bridge, Surry County, where 254 certificates were given, and from press of time and inability to reach the witnesses only 176 were produced. We are disposed, on the authorities above cited and upon the facts proved in this case, to admit these certificates and the evidence of these tally keepers

The testimony shows that the Republican managers had no confidence in the Democratic judges; that this distrust was communicated everywhere to the Republican voters; that they were instructed not to attempt, where ignorant, to fix their own ballots. The danger of their attempting to fix their ballots was foreseen. They were supplied with yellow slips which they took to the judges, in writing,

requesting them to prepare the ballots for them. They were also supplied with these printed certificates as to how they had voted, which, immediately after voting, they voluntarily took to the tally keepers of the election and gave to them. That the Democrats understood what they were doing, and why they were doing it, is amply proved, and in many precincts the attempt was made to intimidate the voters from presenting the printed. slips asking the assistance of the judges, and to drive away the representatives of the contestant who were there to take the statements of Republican voters and the certificates of how they voted.

When a voter, thus suspecting the integrity of the election judges, seeks to protect himself by a contemporaneous statement to a competent and unimpeached representative of his party, we believe that the unimpeached testimony of the representative is admissible evidence concerning the vote. The transaction was certainly part of the res gestae, and after the poll has been impeached, the evidence of such a tally keeper and such certificates is the best evidence obtainable; for the judges of election are no longer credible, and the voters are in many instances inaccessible. We therefore think that the contestant is entitled to the excess of votes proved at these precincts, not only by the testimony of the voters themselves, but by the proofs of these certificates and these tally lists, and so we add to the poll of contestant 2,357 votes at these 43 precincts, that being the number proved in excess of the return for him.

The contestee's counsel argued that we ought not to count these votes, because even if we believe the statements of the witnesses that they voted, non constat that the ballots were correctly made out. We can not assent to this. On the evidence it is clear that if the judges had done their duty by these illiterates the returns would not have been so easily impeached. But they are impeached, and the contestant is trying to establish his vote by evidence aliunde. When witnesses swear that they voted for him, the presumption is that the ballots were correctly made out. The burden in every such case would be on the other party to show that it was not. If we err in admitting it, we err on the side of an expression of the popular will untrammeled by technicalities.

The minority do not admit that the proof is sufficient to allow contestant the votes claimed to be proven, and argue that votes may not be proven by certificates:

We can not agree with the majority that these certificates could be counted as proven votes. They seem to us the barest kind of hearsay. And while it is true that it often occurs that what would other wise be regarded as hearsay testimony becomes admissible as a part of res gestae, this is true only where the admission of such testimony would not contravene some well-established principle of law or be against public policy. In this case both of these reasons apply against their admission. The State of Virginia has passed a law for the conduct of elections in which, according to the opinion of her highest court, the dominant purpose is to "secure the independence of the voter by secluding him within an isolated booth;" "to free him from all solicitations and annoyance." (Pearson *v.* Supervisors, 91 Va., 331.)

But how is this independence to be secured if the voter is permitted to be escorted to the polls by his political bosses, instructed or even given to understand by his political overseers that he is expected to disclose his vote after depositing it, and knows that he will be spotted as a political traitor if he refuses to do so? To permit such practices is to continue the very evil the law was enacted to cure, to destroy the independence of the voter, and to make a delusion of the secrecy of the ballot. Such considerations overcome the mere rule of evidence that testimony otherwise hearsay may be admitted as part of res gestae. The contestant should not be allowed these additional votes.

The majority of the committee next consider the contention of the contestant that he should have counted for him 1,989 votes of "duly qualified voters who were hindered delayed, obstructed, and prevented from voting for him in 29 precincts." Of these excluded voters, 717 were in precincts where the conduct of the judges was such that the returns had already been rejected. The committee had no doubt that if the election had been properly conducted, all these votes might have been received. As to other precincts the report says:

The mass of testimony at every one of these is overwhelming to show delays in opening the polls, dilatory questioning of voters, waste of time, and wrangles with Republican representatives, recesses

for meals, failure to supply adequate voting booths, and every kind of device to delay the vote. While this course was pursued toward the Republicans, equally plain discrimination was made at all points in favor of receiving the white vote.

The voters, contrary to law, were ranged in lines of whites and blacks. White men were voted in preference to blacks. Where the blacks were very numerous and the whites very few, at many of these points, ropes were stretched to keep off voters, but white men never had any difficulty whatever in passing under the ropes or coming up and voting directly. The discrimination was palpable everywhere and the result all in favor of the contestee. In fact, in the whole district but two men went on the stand to declare that they had lost their votes for him.

The minority denied that the testimony showed the improper exclusion of this vote, and combated the doctrine of counting excluded votes, quoting the cases of Biddle and Richard *v.* Wing, Whyte *v.* Harris, Frost *v.* Metcalf, and the following from Judge Cooley:

An exclusion of legal voters, not fraudulently, but through error in judgment, will not defeat an election, notwithstanding the error in such a case is one which there was no mode of correcting, even by the aid of the courts, since it can not be known with certainty afterwards how the excluded electors would have voted, and it would obviously be dangerous to receive and rely upon their subsequent statements as to their intentions after it is ascertained precisely what effect their votes would have upon the result. (Cooley, Const. Lim., p. 781.)

As we have seen that no evidence is admissible as to how parties intended to vote who were wrongfully excluded from so doing, such a case is one of wrong without remedy, so far as the candidates are concerned. (Idem, p. 789.)

The majority note that sitting Member has presented no countervailing proof to meet the issues raised by the contestant and sum up to show that the plurality of contestant is in reality 5,119.

Before closing their report the majority say:

The contestee introduced much in his answer and something in his testimony concerning the manner of the contestant's nomination. Now, in the case of Lowry *v.* White (Mobley, vol. 7, p. 622) it was well said:

"In contested cases it is improper to consider allegations in the testimony intended to show simply by what means the person became a candidate."

And so we dispose of that question.

The contestee raised a question about the legality of the electoral board of Norfolk County. His counsel did not seriously press the question, nor do we think there was anything in it; but if we should throw out the whole returns from Norfolk County, it would not affect the result.

Where fraud is rampant in an election, as it is admitted to have been in this district, it is sometimes decided to remand the election, but we do not think that rule should apply to the present case.

As was said in the case of Waddill *v.* Wise (Rowell, 1889–1891, pp. 203 and 204):

"If the fraudulent exclusion of votes, if successful, secured to the party of the wrongdoer a temporary seat in Congress, and the only penalty for detection in the wrong would be merely a new election, giving another chance for the exercise of the same tactics, such practices would be at a great premium and an election indefinitely prevented * * * but if * * * the wrong is at once corrected in this House, no encouragement is given to such dangerous and disgraceful methods."

The report was debated at length in the House on April 25 and 26, and on the latter day a motion to recommit the case with instructions to examine the ballots was defeated, yeas 110, nays 147. The resolution submitted by the minority, proposing to confirm the title of sitting Member to the seat, was then disagreed to, yeas 107, nays 147. The resolutions of the majority, seating contestant, were then agreed to without division, and Mr. Wise appeared and took the oath.

1104. The Tennessee election case of Patterson v. Carmack, in the Fifty-fifth Congress.

Instance wherein conditions of a district as to party and racial lines were considered in an election case.

Discussion as to appointment of election officers of one party only as prima facie evidence of fraud.

Discussion as to the sufficiency of tally lists kept by watchers at the polls to impeach the returns of the officers.

On March 31, 1898,[1] Mr. W. S. Kirkpatrick, of Pennsylvania, from the Committee on Elections No. 3, submitted a report of the majority in the Tennessee case of Patterson *v.* Carmack.[2]

The sitting Member had been returned by a majority of 365, which contestant sought to impeach by charging fraudulent conspiracy on the part of sitting Member's supporters in one county, and other frauds in two precincts of another county. Sitting Member also made certain counter charges, the principal of which related to use of poll-tax receipts by contestant's friends. Certain general conditions were considered as of influence in this case. Both sitting Member and contestant were Democrats, there having arisen a division in the party in the district over the money question. Contestant had been indorsed by the Republicans. The majority in their report exhibit tables showing analysis of the vote, from which it is concluded:

> It will be seen that in these 10 contested districts the contestee overcame a hostile majority in the rest of the Congressional district of 1,207, and converted it into a majority in the entire Congressional district of 365. The total vote of these 10 contested districts is 2,170. It will be found from the evidence that of these 950 were white and 1,120 colored. A very short calculation will prove that in order to secure the vote returned for him, contestee must have received the entire white vote and three-fourths of the colored vote in these contested districts.

The election law of Tennessee provided as follows:

> The sheriff, and if he is a candidate, the coroner, shall hold all elections. (M. and V. Code, sec. 1044.)
>
> The county court shall appoint three judges for each voting place, who shall be of different political parties. If the court fail to make the appointment, the sheriff, with the advice of three justices of the peace, or, if none be present, three respectable freeholders, shall appoint said judges. (M. and V. Code, secs. 1047 to 1049.)
>
> If the sheriff or other officer whose duty it is to attend the particular place of voting fail to attend, any justice of the peace present, or if no justice is present, any three freeholders, may perform these duties, or in case of necessity may act as officers or inspectors. (M. and V. Code, sec. 1050.)
>
> When the election is finished, the returning officers and judges shall, in the presence of such of the electors as may choose to attend, open the box and read aloud the names of the persons which shall appear on each ballot. (M. and V. Code, sec. 1068.)

The case as presented naturally divides itself into three branches: (1) A charge of conspiracy in Fayette County, which was effective in eight voting districts, and a charge of fraud in two districts in Tipton County; (2) the propriety of counting

[1] Second session Fifty-fifth Congress, House Report No. 895; Rowell's Digest, p. 574; Journal, pp. 481, 484, 485; Record, pp. 4167, 4182–4200; Appendix, p. 422.

[2] The minority views were presented by Mr. Stephen Brundidge, jr., of Arkansas, and concurred in by Messrs. R. E. Burke, of Texas, and R. W. Miers, of Indiana.

returns from ballot boxes extemporized in opposition to the regular poll; and (3) the use of tax receipts as an inducement to voters.

(1) As to the charge of conspiracy in Fayette County, the evidence showed that the opposition to sitting Member failed generally to procure from the sheriff of Fayette County proper representation on the boards of officers holding the elections in the various districts of the county. The majority, after citing from the cases of Threet *v.* Clark, Thorp *v.* McKenney, and English *v.* Peele, say:

According to the foregoing citations, the appointment on the election boards to represent one of the opposing parties of persons not in sympathy with or objectionable to that party, or of persons unable to read and write and without the necessary mental capacity to enable them to serve intelligently, should of itself be regarded as evidence of conspiracy to defraud on the part of the election officials, and that the appointment of such persons was prima facie evidence of fraud and misconduct on the part of those charged with the constitution of these boards and the conduct of the election, where it was possible to appoint competent and well-known representatives of the complaining party to act as judges or inspectors of election. This presumption is still more emphatic where, as in this case, these appointments were strongly objected to by the friends of the contestant in the several districts complained of, and where timely application was made for proper representatives and the attention of the appointing parties called to a number of proper and unobjectionable persons for such place on the boards.

The record shows that in every single voting precinct in Fayette County, against whose election returns contestant brings the charge of fraud, all the judges were Carmack supporters, or the Republican representative to whom the law intrusted the duty of protecting the interest of his party was an ignorant negro, unable to read and write, and of a very low grade of intelligence.

There is no pretense that it was not possible to have selected persons who could read and write, the proof showing that there were many such persons in all these districts who were Republicans. Therefore, according to the rule laid down in the cases above cited, this one fact is a very strong circumstance, sufficient in itself, unless explained, to prove a conspiracy to defraud, and even making out, according to the holding in Thorp *v.* McKenney, a prima facie case of fraud and misconduct on the part of the officials charged with the conduct of the election.

The minority thus meet the charge of conspiracy:

Manifestly if there is any force whatever in the claim of "conspiracy" it is that the alleged conspiracy operated against the contestant individually. So far from this being true, the face of the returns shows that contestant received 613 more votes than the Republican electors, and that contestee's majority was only 365 as returned, whereas the admittedly lawful and actual Democratic majority in the district is over 2,000. Moreover, it is charged that the alleged conspiracy had its chief operation in Fayette County, whereas it is shown by the record that in this county contestant received and had returned for him majorities at five of the election precincts. These returns absolutely destroy all possibility that there was any conspiracy by showing that it did not exist in that portion of the county at least. There is, in our opinion, absolutely no foundation in fact for the claim of the contestant that a conspiracy existed, having for its object his defeat by fraudulent methods.

The attitude of the colored vote in the county of Fayette was a matter of dispute, the minority contending that it was hostile to contestant personally for remarks he had made about the race, while the majority cited the returns of adjoining precincts in the county to show that such a general cause evidently did not operate.

The majority and minority join issue in the various contested precincts of the county to determine whether or not the testimony rebuts or sustains the presumption of conspiracy which the majority alleged had been raised by the action of the sheriff.

In general the testimony relied on to show the alleged fraudulent acts of the election officers was of two classes:

(*a*) The ballot not being secret, at several polling places friends of contestant kept lists of names of persons voting for contestant. In some cases the persons keeping the lists handed the ballots to the voters and saw them deposited. In addition to this, testimony was produced to show that the election officers refused to permit witnesses to be present at the count in spite of the fact that the law made a provision to that effect. When, under these conditions, the return showed for contestant fewer votes than were shown by proof aliunde, the discrepancy being material, the majority ruled that no confidence should be placed in the return, and that it should be rejected. The minority combated this proposition by showing the bad character of those keeping the lists, some of them having a record as "ballot-box stuffers," and by impeaching the verity of the lists kept by them through witnesses who testified that they did not vote, although their names were on the lists. Evidence was also introduced to show the unpopularity of contestant among those naturally expected to support him. And also the minority rely on testimony as to the good character of the election officers.

In Mason district, in Tipton County, the watcher at the polls did not preserve the names of those voting for contestant, but simply a tally of the number of Republican votes he saw cast, which he submitted with his deposition. The minority thus assail this testimony:

> No list of names was kept by them or by any other persons at or near the polls, making them a part of the "res gestse," but one of the witnesses says he kept a "tally list"—that is, made a mark on a piece of paper as each man voted; but he gives no names of such voters, and none of the witnesses are able to swear that any single particular man did vote for Patterson.
>
> We submit that such a dangerous precedent has never yet been set by the House of Representatives, and should never be, as to accept such incompetent evidence to impeach returns of a precinct.

As to the charge that the election officers had refused to allow the counting to be witnessed, the minority minimized it by endeavoring to show that the demands were not made in a proper way and in good faith.

(*b*) In one precinct contestant took the testimony of intelligent voters as to how they voted, and proved 36 votes, although the official returns credited him with only 10 votes. Therefore the majority proposed that the returns be rejected. The minority strove to impeach this evidence by showing that it was collected by a notorious "ballot-box stuffer" who had previously tried to corrupt the officers of election, and also by showing that the witnesses might have been mistaken, since some Republican tickets used did not have contestant's name, while a person who claimed to distribute Republican tickets that day did actually distribute Democratic tickets.

1105. The case of Patterson v. Carmack, continued.

Discussion as to the disposition of rival polls caused by a division among election officers.

Discussion of the theory that State election laws are Federal laws for Congressional elections, and that constructions by State courts must yield to the precedents of the House if there be conflict.

Discussion as to the validity of outside polls.

Discussion of the legality of a vote cast by an elector whose qualifications as to poll-tax payment have been perfected at the expense of other persons.

2. In three districts outside polls were instituted. These districts were Galloway and Oakland, in Fayette County, and Tabernacle, in Tipton County.

At Galloway the opening of the polls was delayed for two hours under pretense, as the majority find, of trying to find a Republican judge. The majority claim that then the judge in charge, Braden, publicly announced that there would be no election; whereupon, as the report says:

> Immediately after this public announcement, and before Braden had left, Squire L. E. Griffin announced publicly that if Braden did not hold an election he would.
>
> This was his right, under the laws of Tennessee, as we understand them, he being a justice present and vested with the power of holding the election if the officer appointed to this duty failed to attend, or, having come, refused to perform that duty.
>
> Griffin, in accordance with the law, called in three freeholders, appointed judges and clerks, swore them in, and then these persons legally opened and held the election, Braden and his appointees having refused to act and having left the polls, as already stated.
>
> After the poll was thus opened and a number of voters had registered their votes Braden returned and opened another poll, selecting two of the judges who had been appointed in the first instance and one other person, and also proceeded to hold an election.

The majority also find that Braden had openly declared before the election that he was going to count Patterson out. The majority recommended that the Griffin poll be counted and that the Braden poll be rejected, as held in violation of law, citing the case of McDuffie *v.* Davidson as a precedent. The committee justify this act because:

> Griffin swears positively that he stayed at the place where his election was being held until after the voting began and then went up the street, passing the place where the Braden election was held, and that when he passed no one was there and no election was then being held.
>
> It further appears from the testimony that the persons holding the Griffin election actually went into the room where Braden subsequently held his election and took out the table which they used at their polling place. No one was in the room when the table was so removed.
>
> We are fully satisfied from the evidence that Braden had refused to hold the election, and, from all his conduct and the attending circumstances, that he expected thereby to defeat the holding of any election after being checked in his plans to commit a fraud on the clear Republican majority in this precinct.
>
> We also find from the great preponderance of the evidence that the Griffin poll was opened and underway before Braden changed his mind and concluded to open his polling place.

The minority deny that contestant shows by preponderance of evidence that the sheriff did refuse to hold the election and abandoned the place, and cite testimony and circumstances to prove that the election held by Braden was the regular election.

At Oakland the supporters of contestant became apprehensive that they would be defrauded at the regular poll, and opened another box, holding an election whereat contestant received 154 votes, which were not counted by the sheriff, however. The majority feel satisfied from the testimony that the officers intended to commit fraud, and, in fact, find the integrity of the regular box impeached by the testimony and not sustained by testimony to repel the presumption of fraud. As to counting the votes cast at the outside poll, they say:

> It is true that there are cases in some of the States which hold that the purpose to commit a fraud on the part of the election officers in charge, however clearly evidenced, is not of itself sufficient to authorize electors who fear to cast their votes at such polling place, however reasonable that apprehension may be, to set up and hold another election.

No case, however, was cited from Tennessee, and in view of the very liberal provisions of the statutes of that State and the still more liberal interpretation placed upon those statutes by its courts in construing and overlooking irregularities in the interest of a fair and free expression of the popular will, there is room for doubt as to whether this poll might not be sustained.

But in judging "of the elections, returns, and qualifications of its own Members" under the grant of the Constitution, this House exercises judicial power, and is a court of competent and exclusive jurisdiction.[1] In passing upon these returns and elections, even if no Federal statute is in existence regulating the elections of its Members, it interprets and construes the State election laws which, for the purposes of such election, are to be regarded as having the quality of Federal legislation, and the opinions of State judges are only to be adopted so far as they commend themselves by the intrinsic force of their reasoning; and where such decisions are in conflict with its own determinations, the precedents established by Congress are the expression of the law, and must control that court with the same force and effect that its own prior deliberate rulings guide and control any other court.

It has been decided in numerous cases by Congress that it is its privilege and its duty in the exercise of its constitutional right to pass upon the election and qualifications of its own Members, to award the seat in Congress to the candidate who is ascertained to be the choice of the majority of the legal voters of his district, even though slight technicalities are required, in doing so, to be overlooked and disregarded. This power may be regarded as implied in the constitutional grant, and to that extent and thereby State legislation, so far as it relates to and regulates the elections of Members of Congress, supplemented and modified by that Constitution as the supreme law of the land.

After quoting the case of McDuffie *v.* Turpin, the majority say:

As already stated, an adherence to strict technical rules would seem to necessitate the rejection of the returns received from this precinct. However, as this would involve for the contestee a greater loss than would follow the counting of both, and as the contestant in his brief expresses a willingness that both should be counted, while recommending that the precedent set by the case of McDuffie *v.* Turpin be followed and that the vote cast in the box held by the supporters of contestant be counted under the authority of that case, we also recommend that the vote cast in box No. 1 be counted, especially as contestant does not insist that it should be rejected.

We are entirely satisfied that the recommendations made in the case of McDuffie *v.* Turpin as to a strict performance of all legal requirements were followed in this case, and that all persons who voted for contestant at box No. 2 were legal and qualified voters. Counting both returns, the vote from this district would be: For contestant, 159; for contestee, 241.

The minority do not agree that the outside poll should be counted:

We are of the opinion that the poll opened by Griffin at the brick house where these votes were cast were the outside polls, and that the returns thereof can not be counted, and we are strengthened in this opinion by the fact that the contestant, in his notice of contest, seeks to have these 247 votes counted, because, he says, "they were legal voters and their votes ought not to be lost simply because they were badly advised as to which of the boxes they should vote at."

At Tabernacle there was a conflict of authority between the sheriff in charge and election officers appointed by the county court, and two boxes were opened. The sheriff counted both boxes. The minority considered the outside poll illegal, and the majority apparently consider the sheriff poll illegal. This precinct is not discussed at length, as it did not affect the result.

3. As to the poll-tax receipts. Sitting Member charged that a large number of votes were cast for contestant upon poll-tax receipts which had been paid for by contestant's political friends, and that the votes so cast were illegal. The

[1] This point was debated on April 25, 1898, during consideration of another case. Record, second session Fifty-fifth Congress, pp. 4252–4254. Also Appendix, p. 427.

majority found no sufficient ground in this respect to modify the conclusions already arrived at. They say:

We are of the opinion that when the voters accepted the poll-tax receipts for taxes paid by others for them, they ratified the payment so made for their benefit, and they thus constituted the parties so paying the taxes their agents in that behalf. Nor was it necessary that the voters should offer or bind themselves to repay such taxes to the person so paying them in order to constitute it a payment by the voter or a ratification thereof. The acceptance by the taxpayer of the receipt is in itself a sufficient adoption of the payment by another for him, and it makes no difference how or by whom the payment was made, the State's demand is fully satisfied by the payment and the delivery of the receipt to the voter, and his acceptance thereof is a final payment and appropriation.

Besides, according to a proper construction of the Tennessee statute, a voter who has any one of the evidences named in the statute that he paid his poll tax is entitled to cast his vote and have it counted upon exhibiting such statutory evidence, whether he paid his tax in person or some other person paid it for him, provided he adopts the act by availing himself of such receipt, even though such payment was by a political committee for the purpose of qualifying him to cast his vote.

After citing the case of Re Griffith (1 Kulp, Pa., 157) and Massey *v.* Wise, they say:

Nor is the mere furnishing and acceptance of such receipt a corrupt act or proof of bribery. It must appear that such payment of a tax by another than the voter and delivery to him of the receipt therefor was done as an inducement or consideration for the vote or for the purpose of influencing the choice of the voter. The evidence utterly fails to establish these elements, or even to identify any sufficient number of voters voting on such tax receipts to affect the result. Indeed, there is no adequate or competent proof that such voters for whom poll taxes were paid actually voted for contestant, or to what extent their votes were included in the returns.

The majority further cite the case of United States *v.* Foster (6 Fed. Rep., 248).

The minority fully recognize the doctrine "that one's poll tax may be legally paid by another, provided the voter shall properly ratify the act afterwards, but we do not think the mere taking of the receipt and voting on the same is such a ratification as the law contemplates. We think the better and sounder doctrine is that the voter should not only accept the receipt, but he should recognize the act the more substantial way, by repaying or promising to repay the amount." Humphrey *v.* Kingman (Mass., 5 Metcalf, 162) was cited in support of this contention.

The minority further say:

The evidence also discloses the further fact that a great many of these poll-tax receipts were issued in blank, and were delivered to the friends and agents of the contestant, who carried them to the polls on the day of the election and issued them out to those persons who would agree to vote the Republican ticket, and especially for the contestant.

That a great many of them were given out in this manner is sufficiently shown from the evidence. It also appears that at the time these poll-tax receipts were issued there was an agreement and understanding made with the officer issuing them, that all those not used could be returned and pay would only be exacted for such as were not returned; and many of them, in fact, were returned.

This practice does not meet with our approval. The laws of the State make the poll tax a charge and burden against the voter, and it is not a tax against a campaign committee or a certain candidate, and neither of them should be permitted to use them for the purpose of bribing voters.

It is held in 12 Phil., page 626 that where a poll tax is paid by an agent of another, not previously authorized to do so, credit must be given to the individual for whom payment is made by the collector at the time of receiving the money; otherwise there was no valid payment of the poll tax. No such credit was given in this case, nor was such a thing ever contended for. But, upon the contrary, the

the proof shows that at least $150 of this poll-tax money was not paid until some eighteen days after the election. This being so, there can be no question but what 75 of these votes were illegal and, as the testimony shows, they were cast for the contestant. We think that this number should be deducted from his vote.

The majority say:

We are disposed to hold that unless the fact of such actual nonpayment was known to the voter, his acceptance of the receipt in good faith constituted his discharge as between him and the taxing authority and under the law the liability of the collector to account for the tax became fixed.

The voter thereupon became qualified to cast his vote upon exhibiting his receipt, and the acceptance thereof by the election officers was an adjudication of his right which could not be afterwards collaterally set aside, especially after he had lost his opportunity to perfect his right had it been questioned before casting the vote.

The report was debated fully on April 21 and 22, and on the latter day the question was taken on amending the resolutions of the majority by substituting resolutions proposed by the minority declaring setting Member elected and contestant not elected. There appeared yeas 138, nays 120, so the motion to amend was agreed to. The original resolutions as amended were then agreed to, yeas 136, nays 118. So the contention of the majority of the committee was overruled, and the title of sitting Member to the seat was confirmed.

1106. The New York election case of Fairchild v. Ward, in the Fifty-fifth Congress.

Although contestee's name may have been unlawfully placed on the ballot, yet in the absence of deception, the ballot might be used to express the honest and intelligent wish of the voter.

A decision by a State court after the election that contestant's name, which had appeared in the independent column, was entitled to place in the regular party column, was held not to affect the election, no deception of the voters having occurred.

On March 23, 1898,[1] Mr. Lemuel W. Royse, of Indiana, from the Committee on Elections No. 2, submitted a report[2] in the New York case of Fairchild *v.* Ward. The facts in relation to the election and the ground of the contest are set forth in the report:

At the election held for Representative in Congress in this district on the 3d day of November, 1896, there were five candidates for the office, viz: William L. Ward, the regular Republican nominee; Eugene B. Travis, Democrat; James V. Lawrence, National Democrat; Lucien Sanial, Socialist; Ben L. L. Fairchild, Independent Republican.

The certified returns from this election show the following results:

	Votes.
For William L. Ward	30,709
For Eugene B. Travis	23,450
For James V. Lawrence	1,697
For Lucien Sanial	1,299
For Ben L. Fairchild	770

William L. Ward therefore received the certificate of election, by virtue of which he now holds a seat in this House.

[1] Second session Fifty-fifth Congress, House Report No. 798; Rowell's Digest, p. 559; Journal, p. 442; Record, pp. 3709–3720.

[2] Minority reviews were filed by Mr. John W. Gaines, of Tennessee.

In due time, after the result of the election was declared, the contestant served upon the contestee his notice of contest, in which he charges that before the election he had been regularly nominated by the Republican party of the district as its candidate for Representative in Congress, and that therefore his name as such candidate should have been placed upon the official ballot in the Republican column; that the contestee, by tricks, devices, and abuse of the process of the courts, wrongfully and fraudulently procured his name to be placed upon the official ballot in the Republican column as a candidate for Representative in the Fifty-fifth Congress instead of contestant's name.

The contestee, in his answer to contestant's notice, denies all the charges contained therein, and asserts that he was the regular nominee of the Republican party, and that his name was rightfully placed upon the official ballot in the Republican column.

The law of New York, under which the election was held, is fashioned after the Australian system. It provides that the names of candidates nominated by a party organization shall appear upon the official ballot in a separate column and under a device chosen by said party. No other person's name can legally appear in such column. The voter, by making a cross in a circle at the head of this column, votes for all the candidates appearing in such column.

It appears that the Republican district convention of 1894, held for the purpose of nominating a candidate for Congress, appointed a committee to call the next Congressional convention. In the spring of 1896 this committee called a convention of the Republicans of the district to select delegates to the national convention. This latter convention, before adjourning, appointed a committee to call the next Congressional convention. So there were two committees charged with the duty of calling the Congressional convention of 1896. The result was two conventions, the first of which nominated sitting Member, while the second nominated contestant. Each candidate, complying with the law, filed with the secretary of state his nomination paper, and that official, after a hearing, decided in favor of the contestant. A State law allowed an appeal, and the report, after quoting the statute, says:

Under the provisions of this statute the contestee brought proceedings before Judge Edwards, a justice of the supreme court of the third judicial district, to review the decision of the secretary of state.

It will be observed that the act is silent as to who should be made parties to the proceeding for review. It does provide, however, that notice shall be served upon the officer whose decision is sought to be reviewed. No other notice seems to be required. It appeared in the first instance the secretary of state and the contestee were the only parties to the proceedings. The contestant, however, asked to intervene as a party. Over the objections of the contestee, Justice Edwards granted this request, and accordingly contestant was admitted as a party. Contestant thereupon moved to dismiss the cause for want of jurisdiction in Justice Edwards. This motion was overruled by Justice Edwards, and he proceeded to hear the review. At its conclusion he reversed the decision of the secretary of state and decided that the contestee was the regular nominee of the Republican party, and that his name as such should go upon the official ballot.

Contestant appealed from this decision to the appellate division of the supreme court of the third judicial department, and upon hearing of this appeal the decision of Justice Edwards was affirmed. Thereupon the secretary of state directed the printing of the name of the contestee upon the official ballot as the regular nominee of the Republican party. He also directed that the name of contestant be printed upon the ballot in a column by itself, in obedience to a petition filed with him by the contestant. The ballot was framed in accordance with these directions, and as so framed was voted at the election. After the election contestant perfected an appeal of the cause to the court of appeals of the State of New York. In January, 1897, the court of appeals reversed the decision of the supreme court and that of Justice Edwards.

The court of appeals held: First. That the proceedings to review the decision of the secretary of state should have been brought in the second judicial district, where the complainant resides and in which the district is located for which the nomination is made, and that therefore Justice Edwards

had no jurisdiction to hear such review. This necessarily required a reversal of the decision of the supreme court and that of Justice Edwards. Ordinarily this would have ended the case, but the court said that it regarded the questions of sufficient importance to warrant it in going further and passing upon the merits of the case in order "to prevent other complications that may arise out of the existing state of affairs and prevent embarrassment in the future administration of the law."

On the consideration of this phase of the case the court held that Mr. Fairchild was the regular nominee of the Republican party, and that his name, therefore, should have appeared upon the official ballot in the column of that party.

In the debate considerable was said about an alleged unfair act of sitting Member's attorney in delaying the filing of the order in favor of his client to such an extent as to deprive the contestant of a decision on appeal before election day, but this delay was reduced to a few hours when analyzed by a member of the committee. The committee—and all the members of the committee signed the report except Mr. John W. Gaines, of Tennessee, who presented minority views—deny that the court of appeals could by its decision affect the election already held, and state that it did not go into the original merits of the controversy, but deferred to the action of the State convention in seating Fairchild delegates, the controversy having been carried into the primaries selecting delegates to that convention. The committee also dissents from the position of the court of appeals in holding that Justice Edwards did not have jurisdiction. The report says:

The question of jurisdiction does not appear to have been argued before the court of appeals, and it does not appear that the court's attention was called to the fact that Mr. Fairchild had voluntarily appeared as a party to the proceedings in the court below, nor does it appear from the transcript of the record in the court of appeals, which is before us, that contestant did appear voluntarily. We therefore think that Justice Edwards had jurisdiction over the proceedings to review and over all the parties thereto and possessed full power and authority to make the order issued by him. It must follow that the order so made was binding on the contestant, the contestee, and the secretary of state.

The ballot was printed in accordance with this adjudication, and was therefore valid; at least so long as the adjudication remained in force. It did remain in force until after the election was held and the result declared. It seems to us that any reversal of it afterwards could not affect the election. We are strongly impressed that the legislature which enacted the law under which this election was held intended that all controversies as to who was the regular nominee of a party should be settled before the day of election.

The committee, however, do not admit that these preliminary questions are necessary to the decision of the case, and they consider it unnecessary "to decide which one of these parties was entitled to have his name on the ballot under the Republican emblem," for—

There was no deception practiced upon the Republican electors in the district. There is no proof but that all that had been done with reference to the printing of the ballot was fully known to all of them. The mean of obtaining this information was ample and within their reach.

It must therefore be presumed, in the absence of evidence to the contrary, that when they went into the polling places to vote they knew Mr. Ward's name was on the ballot as the regular nominee of the Republican party, and that if they voted the straight Republican ticket their votes would be counted for him. The evidence of several of these voters is in the record. They all say that, while they would have preferred to vote for Mr. Fairchild, yet they knew that Mr. Ward's name was on the ballot in the Republican column, that they supposed that the decision of Justice Edwards and the supreme court had settled that Mr. Ward was the regular nominee of the Republican party, and they voted for him accordingly.

If we were to assume that contestant was the regular nominee of his party, and that he had been deprived of the right to have his name go upon the official ballot in the Republican column by a decision

that was void, because of the want of jurisdiction in the justice of the supreme court who made the same, still we do not believe that we would be authorized to count for him the votes cast for Mr. Ward; nor do we think we could declare the election void.

It must be borne in mind that the order of Justice Edwards, after it was affirmed by the supreme court, was obeyed by the secretary of state, and that Mr. Ward's name went upon the ballot in the Republican column at the direction of this official. Information of this action was generally circulated throughout the district prior to the election. On several occasions the contestant, both in public and private talks to the Republican voters in the district, advised them to vote the straight Republican ticket, as it was then framed, with Mr. Ward's name upon it as a candidate for Congress.

Although the placing of Mr. Ward's name on the ballot might have been an unlawful act, yet it did not follow that such a ballot could not be used to express the honest and intelligent wish of the voter. The case of People ex rel. Hirsch *v.* Wood et al. (148 N. Y., 142) is quoted in support of this view, wherein it was held—

That while the action of the county clerk in inserting in the local party column the names of candidates who had not been nominated and certified by that party was, under the election law as amended in 1895 (chap. 810, Laws of 1895), unauthorized and without right, it was a latent defect and did not disfranchise qualified and innocent voters who had used the official ballots so furnished them; and that, where the local party column had been duly crossed by voters to express their choice, the county board of canvassers should not be required to reject the ballots from the count for candidates so improperly included in that column.

The report was debated at length in the House on April 11, and on that day, by a rising vote of ayes 162, noes 30, the House decided that contestant was not elected; and, by a vote of ayes 138, noes 42, it was decided that sitting Member was elected and entitled to the seat.

1107. The New York election case of Ryan v. Brewster, in the Fifty-fifth Congress.

Specifications in contestant's notice of contest criticised as too general.

Contestant's case should be limited to the allegations of his notice of contest.

Instance wherein the Elections, Committee examined a contest on the merits, although the pleadings were too imperfect to support a decision for contestant.

As to the use of a voting machine in one city of a district.

On March 30, 1898,[1] Mr. James G. Maguire, of California, from the Committee on Elections No. 2, submitted the report of the committee in the New York case of Ryan *v.* Brewster:

Contestant and contestee were the Democratic and Republican nominees, respectively, for Representative in Congress from the Thirty-first Congressional district of the State of New York at the general election held on November 3, 1890.

According to the official returns, 44,600 votes were cast at the election for Member of Congress, of which contestant, Ryan, received 17,109 and contestee, Brewster, received 25,399, giving contestee an apparent plurality of 8,280 votes.

The only question, so far as the merits of the case was concerned, was as to the legality of the use of the Myers voting machine in the city of Rochester; but a considerable portion of the report is occupied by discussion of an incidental question

[1] Second session Fifty-fifth Congress, House Report No. 892; Rowell's Digest, p. 563; Journal, p. 401.

relating to the notice of contest. The first two specifications of the reasons for contest were:

I. Because you were not the duly and legally elected Representative from said district to said Congress.

Il. Because I am the duly and legally elected Representative from said district to said Congress.

The report criticises the notices in this and other respects as follows:

The first and second allegations of the notice are too general to constitute specific statements of grounds of contest within the meaning of the United States statute requiring contestant to specifically state in his notice the grounds of contest; but in so far as testimony has been taken, without objection, concerning the number of votes cast for either of the parties, it will be considered.

All other issues made by the pleadings of the parties relate to the legality of the record of votes made by the Myers ballot machines, which it is alleged and admitted were used exclusively at all of the voting precincts in the city of Rochester as a substitute for tickets printed on paper.

There is no allegation in the notice of contest that contestant was deprived of any votes that were legally cast for him; nor that the exclusion of the votes alleged to have been unlawfully cast through the Myers ballot machines in the city of Rochester, and unlawfully counted, would, either alone or in connection with other facts, change the result of the election; nor that any of the electors of the city of Rochester, if they had been permitted to vote legally, would have cast their votes for contestant; nor that any elector of the city of Rochester, who would have voted for contestant or for any other person than contestee, sought to cast a legal ballot at such election, or to vote otherwise than through the Myers ballot machine.

It not only does not appear from the allegations of the notice of contest that contestee was, either directly or indirectly, guilty of any wrongful act in connection with the election in question, but it does not appear from such allegations that contestant was in any way injured or deprived of any votes; nor that contestee derived any advantage of any kind whatever by reason of all or any of the matters complained of.

In all contested election cases the notice of contest must show prima facie that the acts and conditions complained of were not only wrongful or unlawful, but that the elimination of the effects of the acts and conditions complained of would change the result of the election in question. In the absence of such prima facie showing, the notice of contest is insufficient to support a decision either that contestant was elected or that contestee was not elected.

The general rule is that a contestant's case is limited to the allegations of his notice of contest. While he may establish his case by proving less than he has alleged, he can not make a case by proving more than he has alleged. (McCrary on Elections, sec. 394; Paine on the Law of Elections, sec. 824.)

If, therefore, the evidence fails to establish either the first or the second allegation of contestant's notice-that is to say, either that contestant received a plurality of the votes actually cast, or that contestee did not receive a plurality of such votes—the contest should be dismissed because of the insufficiency of the remaining allegations (if conceded to be true) to constitute a cause of contest.

As to the merits of the case, the report points out that if all the votes cast in the city of Rochester should be held illegal, the sitting Member would still be elected by the votes of the remainder of the district. But it was in evidence that the law permitting the use of the voting machine, also provided paper ballots in case the electors should choose to use them. There had been a defect in the working of the machines, and there was a discrepancy of 1,696 votes between the total number of electors voting in the city of Rochester and the number recorded by the machine as voting for Representative in Congress, but there was no evidence to show that this discrepancy was caused by the failure of the machine. Had there been such evidence, the result of the election would not be changed by the discrepancy.

Therefore the committee concluded unanimously that sitting Member was entitled to his seat, and reported resolutions to that effect.

The case was not acted on by the House, sitting Member of course retaining the seat.

1108. The Virginia election case of Brown v. Swanson, in the Fifty-fifth Congress.

A return should not be rejected because the signatures of the election judges, by their direction and in their presence, were made by the clerk.

A slight discrepancy between the poll list and the ballots found does not justify its rejection.

The fact that a voter displays his Australian ballot to an election officer, no improper purpose being shown, is not necessarily a violation of the law of secrecy.

A ballot should not be rejected because an official marker has failed to mark it properly.

On April 13, 1898,[1] Mr. Edgar D. Crumpacker, of Indiana, from the Committee on Elections No. 3, submitted a report in the Virginia case of Brown *v.* Swanson. The sitting Member had been returned by a majority of 551 votes, and contestant attacked this majority, alleging fraud and irregularities. The report of the committee in this case was signed by only four of the nine members, and there was a question as to its presentation. The paper representing the opposition view actually represented a majority of the committee, and was entitled "Views of the majority." This paper is summed in the following extract:

> After listening to exhaustive arguments in this case, four members of the committee have filed a report in which they recommend that contestant be given a majority of 372 votes. They also direct attention to 147 other votes which, in their opinion, might justly be counted for contestant, making his majority 519.
>
> The undersigned agree with the conclusions of the said report, except so far as they relate to the so-called excluded vote at Stokesland, Ringgold, and Design precincts, and the 147 votes aforesaid, which we do not think should be counted for contestant.
>
> After a careful examination of the cases and authorities cited by contestant and a rigid analysis of the evidence contained in the record relating to these three precincts, we are constrained to conclude that, while the law is correctly stated by contestant, the facts, as disclosed in the record, do not warrant the counting for contestant of the 495 excluded votes.

As the decision of the case turned on the excluded vote of the three precincts, Stokesland, Ringgold, and Design, it is evident that the actual majority of the committee were opposed to the contestant, although the committee as a whole agreed as to the law applicable to the three precincts, and also as to the law and facts in regard to the other precincts treated in Mr. Crumpacker's report.

1. As to the precincts wherein the whole committee agreed, the issues were determined by the Australian-ballot law of Virginia. Under that law no sample ballots were allowed, and the voter knew little of the form and arrangement of the ballot until he attempted to vote. At the election in question the ballot was printed in a single column without emblems or party lines, and contained the names

[1] Second session Fifty-fifth Congress, House Report No. 1070; Rowell's Digest, p. 578; Journal, second session, p. 450, third session, pp. 87, 194.

of sixty-six candidates for various offices. The whole election machinery was controlled by sitting Member's party, but in making up the local boards of election judges they did not in this district generally disregard the provision of law allowing minority representation. In nearly every instance, however, the judge selected to assist illiterate voters was a member of sitting Member's party. Of the functions of this assisting judge the report says:

A voter who requires assistance in preparing his ballot is not permitted to select the judge he desires to assist him, but is bound to accept assistance from the judge selected by the board for that purpose. A large percentage of the voting population of Virginia is illiterate and the act of voting is surrounded with so many obstacles that all the illiterates require assistance in preparing their ballots. The judge selected to assist illiterates, as a rule, can perpetrate fraud with impunity, for the voter, by lack of education, is unable to know whether his ballot is marked so as to express his will or not. The only safeguard for the honesty of elections in this particular is the capacity and personal integrity of the assisting judge.

The instances of irregularities or fraud on which the committee reached a conclusion without differences fall under two heads:

(*a*) Returns improperly rejected by the board of canvassers and which should be counted. In Patrick County the board of canvassers rejected returns from three precincts which had given contestant an aggregate majority of 146.

At Court-House precinct two of the three judges were political supporters of sitting Member, one of the judges was not sworn, and this was the only irregularity. Counsel for sitting Member admitted that this return was improperly rejected.

At the second precinct the report concludes:

At Gates Store the return was in due form, but the signatures of the judges thereto were written by one of the clerks. The signatures were so written in the presence of and at the request of the judges. Two of the judges were Democrats and supporters of contestee and the other was a Republican and a supporter of contestant. There was no evidence that any fraud or irregularity occurred prejudicial to the interests of contestee, but the return was rejected on the sole ground that the signatures of the judges were written by the clerk. That was clearly an insufficient reason for rejecting the return. The rights of the innocent voters of the precinct should not suffer on account of such a slight irregularity, if it were an irregularity at all. The signature of each judge was written in his presence and at his request, and was, in the sense of the law, his own signature. An attorney in fact has no authority to sign the name of an election judge to official papers, it is true, for such signing would relieve the judge of some of the responsibilities of his trust, but in this case the signature was not by an attorney in fact, but by the judge himself, because it was made under the direction of his will. Each of the judges so signing the return could be prosecuted under the law for making a false return as fully as if he had written the signature with his own hand. The law requires the signature to be the act of the officer, but it does not prescribe the instrumentality he shall employ in making it.

Therefore the report concludes that contestant's majority in this precinct should be counted for him.

Of the third precinct the report says:

At Kings Store 177 ballots were found in the box and only 175 names appeared on the poll books, and for that reason the return was rejected. There was no other evidence of fraud or irregularity submitted, and two of the three judges were political friends and supporters of contestee. It was the duty of the election officers under the law to count the ballots without unfolding them as soon as the polls were closed, to ascertain whether the number of ballots was the same as the number of names on the poll books. If there were more ballots than names one of the officers should be blindfolded and draw the excess from the box. That seems not to have been done at this precinct. The board of county canvassers notified the election judges to appear during the canvass of the vote of the county and purge

the poll in accordance with the law, but they declined to do so. There were only 170 votes cast for candidates for Congress, so the number of Congressional ballots was 5 less than the number of names on the poll books. However, that slight discrepancy, in the absence of other evidence impeaching the poll, would not be sufficient to warrant its rejection. The possibility of an omission on the part of the clerks to record all of the names, or the possibility of voting a double ballot through inadvertence, may account for the discrepancy consistently with honest conduct.

Moreover, the vote at the precinct was proven by evidence aliunde. One of the election judges who assisted in canvassing the ballots testified that contestant received 113 votes and contestee received 57 votes. The testimony was based upon an actual inspection and count of the ballots, and it stands in the record wholly uncontradicted. The conclusion of the undersigned members of the committee is that the majority of 146 for contestant at the three precincts in Patrick County should be counted for him.

(*b*) Irregularities or frauds on the part of local election boards.

At Ridgeway precinct, in Henry County, 55 boots improperly marked for President were rejected altogether on that account and were burned at the close of the canvass, but it was proved without dispute that 48 of them were correctly marked for contestant and 5 for contestee. The election law expressly declared that ballots correctly marked for one candidate should be counted for him, although improperly marked for candidates for other offices. The board of officers was composed of two Democrats and one Republican. But sitting Member insisted that the whole poll should be rejected because of alleged fraud in another respect:

The evidence shows that a number of voters, after having their ballots marked, ready to be deposited in the box, showed them to the Republican judge. That is the only evidence of fraud at that precinct appearing in the record. It was not shown that the voters so displayed their ballots for improper purposes. The judge who assisted illiterate voters was a Democrat, and there was some solicitude on the part of the voters about the manner in which their ballots were being prepared. The Virginia law provides for secret voting, but the secrecy is for the protection of the voter and is not compulsory as to him. There is nothing in the law prohibiting the voter from displaying his ballot to the election officers after it has been prepared, provided he does not do it for corrupt purposes.

The law provided that the voter should fold his ballot after marking it and hand it to the judge of election, but legal opinion had been given by sixteen reputable lawyers before election and scattered broadcast over the State to the effect that the law did not require the voter to fold his ballot until he had left the booth, and that before folding it he might expose it to any person near enough to see its contents, and that such exposure was a legal method for the detection of possible fraud. "There can be no doubt." says the report, "under the Virginia law, that it is not improper for a voter to show his ballot to the election officers when he does it for proper purposes." Therefore the report counts the ballots proven.

At Hurt's store Election Judge East, who assisted illiterate voters a portion of the day, testified that he ignorantly mismarked ballots, 14 for contestant and 1 for sitting Member. All these ballots were rejected. The report says:

It is manifest that those votes should be counted. There is no dispute upon the facts, and it is well settled that an elector can not lose his right to vote by the mistake of one of the election officers. If the voter himself made the mistake the ballot should not be counted, but where he depends upon an officer whose duty it is to assist him in the preparation of his ballot and the officer, through ignorance or design, fails to mark the ballot properly it should be counted. Contestant should be credited with 14 and contestee with 1 vote at that precinct.

1109. The case of Brown v. Swanson, continued.

Returns impeached by the testimony of the voters themselves, and by an unofficial tally, were rejected.

In proving votes aliunde the testimony of the voters themselves was preferred to an unofficial tally.

Where a marking judge refused assistance to voters, the House did not reject the returns, but added votes proven aluinde.

In an inconclusive case the committee agreed that voters shown by parol proof to be qualified and to have attempted to vote should have their votes counted as if cast.

At Dry Forks contestant was credited in the returns with only 46 votes. A tally was kept of the Republican vote and the tally keeper testified that 116 Republicans voted. The depositions of 98 witnesses who voted, and whose names were on the poll books, proved 98 votes for contestant. The election judges tried to prevent the tally being kept, and the evidence showed that the judge who assisted voters was a man of bad reputation. Therefore the report concludes that the returns are vitiated by palpable fraud and should be rejected. In counting the votes proved aliunde the report allows the 98 proved by the voters themselves, and does not accept the tally as a "main reliance."

In a similar manner, by the testimony of voters, the returns of Mount Airy were impeached, and it was further shown that the election officers, all of whom were of sitting Member's party, had whisky during the day; that at noon they adjourned and took the ballot box to another room out of view of the voters and kept it there an hour. There was also evidence to show that the marking judge marked ballots wrong, and one of the judges was heard to declare that they intended to count contestee in. Therefore the return was rejected.

At Dickinson, where contestant received 58 votes and 45 were rejected, while 147 were returned for sitting Member, it was shown that the marking judge declined to furnish voters the necessary assistance. As 95 voters testified that they voted for contestant the report adds 37 to contestant's vote, although they intimate that the returns might be rejected altogether. This is evidently the precinct somewhat inaccurately referred to in the views of the opposing members of the committee.

(2) The above decisions in themselves were not sufficient to overcome the majority of the sitting Member, and an issue of fact, rather than law, was joined as to the precincts of Stokesland, Ringgold, and Design, in Pittsylvania County. The report asserts that 494 legally qualified voters went to the polls in those precincts on election day and made diligent and persistent efforts to vote, but were unable to do so. The report thus states the facts and law:

The total registered vote at Stokesland was 888, of which 173 were white and 715 were colored. The vote polled was 326, contestant receiving 200, contestee 116, and 10 were not counted. It is the duty of county courts in Virginia to establish voting precincts, and after they are once established those courts, upon the petition of 15 voters of a precinct, are authorized to change the boundaries and create new precincts if the convenience of the people seems to demand it. In September, 1895, 32 voters of Stokesland petitioned the county court to divide that precinct and create a new one, on the ground that there were too many voters for one. The petition was continued from term to term, and finally refused in September, 1896.

The total registration at Ringgold was 470 white and 362 colored. There were 504 votes cast, contestant receiving 87 and contestee receiving 316, and 101 ballots were rejected. The registration books were purged about ten days before the election and 95 names were stricken off, leaving the number as above noted. The judges and clerks were all Democrats at that precinct. At Design there was a registered vote of 530, of which 164 were white and 366 were colored. The number polled was 332, distributed as follows: Contestant received 165, contestee 141, and 16 were rejected.

There were 526 who testified that they attempted to vote at those three precincts and failed, and the undersigned members of the committee carefully examined the testimony of each witness and disallowed a number because of their failure to show satisfactorily their right to vote or that they were refused the privilege of voting. All that there was any question about were eliminated from consideration, leaving 494 who proved that they were registered voters of the precincts and made due effort to vote and failed, and that they would have voted for contestant.

The purpose of elections is to register the will of a majority of the voters, and it is the duty of the officers of the law to afford every qualified voter a reasonable opportunity to exercise the important right of suffrage. If that opportunity is afforded and the voter fails to avail himself of it, or if by some fault of his own he violates some regulation in attempting to exercise the right and thereby loses his vote, he can have no just cause of complaint. But if conditions exist, for which the voter is not responsible, that operate to defeat the rights of a substantial number of electors to vote, so that it can not be said that the result at a particular poll reflects the will of a majority of the voters, it discredits the entire poll.

After quoting McCrary on this point, the report goes on to say that it would aggravate the wrong to exclude the poll, and that the excluded votes should be counted for the candidate who would have received them. The case of Thorp *v.* Epes was cited in support of this contention. The report also asserts that the election officers were proven to have resorted to methods the purpose and effect of which was to discriminate against contestant's party and favor the party supporting sitting Member, while if they had honestly cooperated to facilitate voting, all voters could have had an opportunity.

The report further discusses parol evidence as competent to prove registration. Quoting McCrary and Thorp *v.* Epes, it says further:

Registration is designed to prevent fraud and to determine disputed questions that might otherwise arise at elections in advance, so as to avoid confusion and delay. Election boards do not have the time nor opportunity on election day to investigate critically questions that may arise respecting the qualifications of voters, and for the purposes of election the registration books are primary evidence; but when questions arise, as they do here, before a tribunal fully equipped to investigate for the truth, the qualifications, including the registration of voters, may be proved by parol.

Registration does not create the right to vote, but it is an official memorandum of an existing right, and parol evidence is as near the fact as the books. In fact, the books are made from parol evidence, and they are never regarded as more than prima facie evidence of the right to vote. In most of the States laws exist requiring a record to be made of marriages, but the record does not constitute the marriage; it is only an official memorandum of it; and in all the States marriage may be proven by parol evidence notwithstanding the record. A very liberal policy has always been followed in election cases respecting the admissibility of evidence. McCrary, in his work on elections, at section 467, says:

"It is undoubtedly the policy of the law not to throw too many obstacles in the way of investigating the correctness and bona fides of election returns. On this point the court in Reed *v.* Kneass very justly observe:

" 'The true policy to maintain and perpetuate the vote by ballot is found in jealously guarding its purity, in placing no fine-drawn metaphysical obstructions in the way of testing election returns charged as false and fraudulent, and in assuring to the people by a jealous, vigilant, and determined investigation of election frauds that there is a saving spirit in the public tribunals charged with such investigations, ready to do them justice if their suffrages have been tampered with by fraud or misapprehended through error.[3]

"It is in the spirit of this rule that questions respecting evidence in contested election cases should be solved."

In the recent case of Thorp *v.* Epes this House decided that parol evidence is admissible to prove registration, and that decision is in harmony with the best expression of writers and courts on the subject.

Under the long-settled practice of the House there is no doubt that the 494 votes excluded at the three precincts in Pittsylvania, County should be counted for contestant.

This report was never discussed in the House. On January 9, 1899, when it was called up, the House declined to consider it, yeas 79, nays 143. Again on February 23, when it was called up a second time, the House refused to consider, yeas 101, nays 133.

The sitting Member therefore retained the seat.

1110. The Louisiana election cases of Gazin and Romain v. Xeyer, in the Fifty-fifth Congress.

The fact that votes proven to have been cast by testimony of the voters do not appear in the count does not vitiate an election when not numerous enough to affect the result appreciably.

A question as to whether a candidate nominated by nomination papers may suggest the names of election officers under a law giving that function to the "nominating body."

The mere delay in the appointment of election officers does not vitiate an election held by them.

An election is not vitiated by unavoidable delay beyond the legal limit in arranging voting districts.

The premature opening of official ballots and failure to post cards of instruction at the polls do not vitiate an election held properly in other respects.

On June 6,1898,[1] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted the report of the committee in the Louisiana case of Gazin *v.* Meyer, from the First Congressional district. The report gives the conditions of the election as follows:

The election law of the State of Louisiana, under which the Congressional election in 1896 was held, is patterned after what is known as the Australian system. Upon the official ballot used on that occasion there appeared the names of four Congressional candidates, viz: Joseph Gazin, People's Party; A. E. Livaudais, Republican; Adolph Meyer, Democrat; Armand G. Romain, Independent Republican.

From the returns, as certified, it appears that the said candidates received, respectively, the following votes, viz:

Gazin	113
Livaudais	401
Meyer	10,776
Romain	4,022
Scattering	6

Adolph Meyer, having received a large majority of all t.ie votes cast, was returned as elected, and by virtue of such return now holds a seat in this House.

[1] Second session Fifty-fifth Congress, House Report No. 1520; Rowell's Digest, p. 564; Journal, p. 608.

Mr. Gazin in due time served notice of contest, relying upon the following grounds:

First. That the votes cast for me at various precincts in the city of New Orleans were not counted and returned by the commissioners of election as cast.

Second. That the commissioners of election, in violation of their oath of office, counted votes in your favor that were cast for me.

In support of the first proposition the contestant produced 31 witnesses who testified that they voted for him or attempted to do so, in various parts of the city. In some cases the votes of these witnesses appear to have been counted. But the committee found that 15 witnesses in various parts of the city testified that they voted for contestant, while the returns from the several precincts fail to show any votes counted for him. There is evidence that in some of these precincts votes were thrown out because improperly marked, but it was generally impossible to say whether any of the ballots so thrown out were those in which the voter had attempted or intended to vote for the contestant. In one precinct three or four ballots bearing contestant's name were thrown out because other names on the ballots were improperly marked; but the committee think this was the result of an honest mistake.

The committee conclude that contestant did not show over 20 votes cast or attempted to be cast for him, which were not counted for him.

The second proposition of the notice was found entirely unsupported by evidence. Therefore the committee recommended resolutions confirming the title of sitting Member to the seat, and these were agreed to without debate or division.

Also on June 6, 1898,[1] Mr. Olmsted, of Pennsylvania, presented the report of the committee in the case of Romain *v.* Meyer, from the same district and relating to the same election. The contestant's notice contained several specifications, which the committee consider at length:

(1) Contestant claimed that he was not personally permitted representation at the polls in the parish of Orleans, on the board of commissioners appointed to preside over the election at each polling precinct, in accordance with this provision of State law:

SEC. 12. *Be it further enacted, etc.,* That in the parish of Orleans it shall be the duty of the board of supervisors, at least thirty days prior to any election, to appoint six commissioners and two clerks to preside over the election at each polling precinct. Said commissioners shall be qualified voters in the ward of which such polling precinct forms a part, and shall be appointed from lists to contain not less than six names, furnished by each of the several political parties and nominating bodies. The commissioners shall be so apportioned as to equally represent all of the political parties or nominating bodies authorized under this act to make nominations, in so far as practicable.

The committee therefore consider whether Mr. Romain was the candidate of a political party or nominating body. The State law as to nominations provided:

SEC. 48. Any convention of delegates and any nominating body, and any caucus or meeting of qualified voters as hereinafter defined, and individual voters to the number and in the manner herein specified, may nominate candidates for public office, whose names shall be placed upon the ballots to be furnished as hereinafter provided.

SEC. 49. Any convention of delegates representing a political party or other nominating body which at the general election next preceding the holding of such convention polled at least 10 per cent

[1] House Report No. 1521; Journal, p. 608.

of the entire vote cast in the election district for which said convention is held, or any convention of delegates who have been selected in caucuses called and held in accordance with the provisions of this act, and any caucus so called and held in any such electoral district or division, may, for the State, or for the district or division for which the convention or caucus is held, as the case may be, by causing a certificate of nomination to be duly fled, making therein one such nomination for each office to be filled at the election. Every such certificate of nomination shall state such facts as may be hereinafter required for its acceptance, shall be signed by the presiding officer and by the secretary of the convention or caucus, who shall add thereto their places of residence, and shall add thereto their affidavit that the affiants were such officers and that said certificate is true to the best of their knowledge and belief.

SEC. 50. Nominations of candidates for electoral districts of the State, or for municipal or for parish or ward offices, may be made by nomination papers, signed for each candidate by qualified voters of such district or division, to the number of at least one thousand for any officers to be voted for by the electors of the State at large; one hundred for parish or municipal officers, members of the legislature or Congress, and twenty-five for ward officers.

The committee found that Mr. Livaudais was nominated at the convention of the Republican party, and that Mr. Romain was nominated by individuals who signed nomination papers as an "Independent Republican," a designation not belonging to a party that had polled the 10 per cent vote required by the law to give it convention standing. The committee therefore conclude:

The "nominating body," if it may be so called, which placed Mr. Romain in nomination, did not submit any list of names whatever nor claim representation in the appointment of election commissioners, nor did said body authorize Mr. Romain to submit any list on its behalf.

Furthermore, it will be noted that the list submitted by Mr. Romain was of citizens of "Republican faith" and to be selected as "Republican commissioners." Mr. Livaudais was at that time the candidate of the Republican party. Mr. Romain had no authority to represent it in any way, having been nominated as an Independent Republican in opposition to Mr. Livaudais, the regular Republican candidate. It is true that after the submission of this list by Mr. Romain, and before the selection of the election commissioners, Mr. Livaudais had practically retired from the field as a candidate, although he does not seem to have officially withdrawn, as provided by the election statute in section 57, otherwise his name would not have been printed on the official ballot, but that fact did not, and could not, change the status of Mr. Romain's claim to representation. As already stated, the act did not confer the right of representation upon each candidate, but only upon "each of the several political parties and nominating bodies." Candidates for other offices were as much interested in the election and in the selection of election officers as were the candidates for Congress.

Thomas A. Cage, as chairman of the executive committee of the Republican party, submitted to the board of supervisors a list of names as required by section 12. After the practical withdrawal of Mr. Livaudais the real contest was whether the executive committee or the candidate nominated by the Independent Republicans, but to whom the regularly nominated Republican candidate had given way, should be considered as representing the Republican party. The board of supervisors made their selections of Republican commissioners from the list submitted by Mr. Cage, and not from the list submitted by Mr. Romain. Your committee is unable to find that Mr. Romain was personally entitled to submit lists of commissioners, or that the board of supervisors committed any fraudulent or illegal act in recognizing the executive committee as the proper representative of the Republican party for the purpose of submitting such lists.

(2) The second objection considered by the committee is set forth in the report as follows:

It is further objected by contestant that some of these election commissioners were not selected as long as thirty days prior to the election, as required by the statute. The evidence shows that most of them were so appointed. But it is true that, owing to some omissions in Mr. Cage's original list, a supplemental list had to be furnished, causing some little delay, and a comparatively small number of the commissioners were appointed within thirty days of the election. Delay in appointing commissioners or inspectors does not vitiate an election held by them; otherwise it would be in the power of the board of supervisors to defeat every election by delaying such appointments. "Mandamus will

lie to compel the appointment after the time designated, which appointments, when made, will be as valid as if made at the proper time." (McCreary on Elections, 253.) There is no evidence that the delay in the appointment of the inspectors was the result of any fraudulent intent or purpose, nor that contestant was injured thereby.

(3) The Louisiana law of July 9, 1896, in its fortieth section provided for redistricting the city of New Orleans into a larger number of precincts through the agency of the city government, and further provided that "the boundaries and precincts to be fixed as above [are] not to be changed within three months prior to any general election." This statute of July 9 was promulgated July 25, 1896, and became operative twenty days thereafter. The time required for the arrangement of the precincts was so great that it was not fully accomplished until about one month prior to the election of 1896. Contestant's counsel contended that this delay was in violation of the statute and must be presumed to have been done with fraudulent intent. The report notes that no such charge was made in the notice of contest, and that the objection was not well taken in any event. The committee note that the purposes of the statute were good, as the multiplication of precincts was an important means of securing freedom of elections and providing against fraud. The new law, says the committee—

Repealed "all laws or parts of laws contrary to or in conflict with this act." If the city had not been redistricted it might well be held that the election of 1896 had been held in violation of the requirements of the statute.

Some inconvenience was doubtless caused by the redistricting of all the wards in the city and the multiplication of election precincts, and a few voters may have failed to deposit their ballots on that account. There is no evidence, however, from which we can determine the number, nor is there any evidence that in this regard the supporters of the contestant fared worse than those of the contestee, or that the result would have been in any way changed had every vote been cast.

(4) The contestant claimed that when the official ballots were sent out some of them were not sealed as the law directed, and also that many packages were delivered to the election officers before the day of election, although the law provided—

That the board of supervisors shall "send to the commissioners of each voting place, before the opening of the polls on the day of the election, cards of instruction, tally sheets, blank forms, and one set of ballots, sealed and marked by the secretary of state, for such voting place.

Objection was also made that in some voting places the cards of instruction were not posted as required. The committee found no substantial foundation for the charge that ballots were sent out unsealed. As to the other two charges, they say that in the absence of any evidence that votes were lost to contestant or the election in any way affected by the sending out of ballots earlier than the morning of election and the neglect to post the cards, these informalities could not tend to establish the election of Mr. Romain or invalidate the election. It was proven that one official ballot was passed about before election, contrary to law, but the report says:

Section 42 of the statute, read in connection with section 44, makes it an offense punishable by fine or imprisonment for any person charged with the duty of compiling, making up, or printing the official ballot to permit any person not so engaged to have access to or give any information with regard to the said official ballot or the form thereof, except as provided in the act. In the absence of evidence that any official ballot, fraudulently or otherwise obtained prior to the day of election, was voted or attempted to be voted, it can not be held that the existence of such outstanding ballots in any way affected the result of the election.

(5) Under the law of Louisiana one registration, for which the person registered receives a certificate, is good as long as the voter remains in the precinct. When he removes or dies there is no surrender of the certificate, although the registration lists are from time to time purged. As a result, upward of 14,000 names were stricken from the poll list of New Orleans, leaving that number of certificates outstanding. Contestant claimed that about 7,000 votes should be deducted from sitting Member's plurality on account of fraudulent voting on such outstanding certificates. The committee, however, found no evidence to support this contention, and deemed the charge improbable. A few other charges of fraud were likewise found wanting in proof.

The committee point out that the white population is largely predominant numerically in the district, that sitting Member's party was united, while contestant's was divided, and conclude to report resolutions confirming the title of sitting Member to the seat.

These resolutions were agreed to, without debate or division.

1111. The Virginia election case of Wise v. Young, in the Fifty-sixth Congress.

A general scheme to defraud being shown in all the precincts of a city, the entire return from the city was rejected.

Where election officers returned 12 votes for contestant and 17 electors swore they voted for him, the House rejected the entire return.

Instance wherein depositions given by voters at the time of voting were admitted in proof aliunde.

On February 1, 1900,[1] Mr. Edgar Weeks, of Michigan, from the Committee on Elections No. 3, presented the report of the majority[2] in the Virginia case of Wise *v.* Young. The returns are thus described in the minority views:

The certificate of the secretary of the Commonwealth of Virginia shows that at the election held in November, 1898, for Representative in Congress, Contestant Wise received 6,204 votes, and Contestee Young received 12,183 votes, and W. S. Holland received 3,445 votes. Young was the nominee of the Democratic party in that district, and both Wise and Holland were Republicans, each claiming to be the regular nominee of the Republican party in the district.

This case divides itself naturally into two branches—one concerning the city of Norfolk and other relating to other portions of the district.

(*a*) As to the city of Norfolk, the majority reported in favor of casting out the entire vote, considering that frauds proven fatally impeached the returns of all the eleven precincts. The report, after calling attention to what is alleged to be an abnormal vote for contestee, says in regard to the frauds:

The similarity of method with which it was put into effect in every precinct in Norfolk shows planning, forethought, and deliberation. It was in brief thus: To accept all votes offered, to make return of few defective ballots, and to add to the list of actual voters on the poll books of the several precincts enough names of fictitious voters to enable the judges to return for the contestee a false vote so large that the majority returned for him could not be overcome.

If this scheme had been worked adroitly it might have rendered the fraud practiced difficult of detection. The party thus defrauded does not complete his task by producing proof of the vote actually

[1] First session Fifty-sixth Congress, House Report No. 186; Rowell's Digest, p. 611; Journal, pp. 325, 338–340; Record, pp. 2686, 2741, 2786–2797.

[2] Minority views were presented by Mr. Robert E. Burke, of Texas.

cast for him; the burden is still upon him to show that the vote returned for his adversary is false. Where the fictitious names copied from the registration list onto the poll book are those of his political adversaries whom he can not approach, his difficulty in getting at the proof that they did not vote is great. But the friends of the contestee practiced the fraud so bunglingly in Norfolk that their own work convicts them. It has neither the merit of novelty nor clever execution. The contestee admits, touching two precincts of the Fifth Ward of Norfolk, from which nearly 1,000 of his 3,600 votes from Norfolk were returned, that the returns are unworthy of belief. The admission was unnecessary, for contestant proved it. He kept tally of the votes cast and proved that the returns made were absurdly large. He then proved who were the last voters at these precincts, and that being proved, the poll books show that these sworn officers, both before and after the voting ceased, added hundreds of fictitious names to those of genuine voters on the list and returned them as cast for the contestee.

The Democratic registrars were summoned for many precincts, and admitted that many of the names appearing on the poll books were not even upon the registration lists. Many persons appearing in those poll lists, some of them Democrats, came forward and testified that they had not voted. The names thus fraudulently placed on the poll lists were so inartificially made up that they are evidence of crime. They show numbers of persons whose names begin with A voting together, followed by numbers whose names begin with B and C, and so on throughout the alphabet. Dead men were voted, and men known to be absent in the service of the United States. Prominent citizens, about whom the judges could pretend no ignorance, were written down on these lists as having voted. Where the frauds permeated every precinct, and the evidence leaves no doubt of conspiracy, and the returns are absurdly large, and poll books forged, it seems idle to go into the details of these returns from Norfolk, precinct by precinct. Suffice it to say that we dismiss the returns from Norfolk as evidence of nothing but an organized effort to return a fraudulent vote for contestee.

In the course of his impeachment of the returns in Norfolk the contestant proved 437 votes to which he is entitled.

The minority, while admitting that the returns of two precincts which credited to sitting Member over 900 votes, should be entirely thrown out because evidently corrupted, contended that the extent of fraud shown in the other wards was not sufficient to cause the rejection of the entire returns. Their position as to the Sixth Ward is illustrative of their argument:

Sixth Ward.—Three hundred and eighteen votes were cast at this box, 22 being illegal ballots. We still believe that it would be fair and just both to the candidates and to the people that these 22 illegal ballots should be deducted from contestee's vote, it being more than probable they were cast for him, rather than to exclude the entire box. This being done would leave Young 225 votes and Wise 45 votes.

(b) As to the portions of the district outside the city of Norfolk, the principle on which the majority proceeded is illustrated by their decision in regard to the precinct of Longview, in Isle of Wight County:

The proofs from Longview present succinctly a point raised by the contestee, involving a principle which this committee must settle for its guidance.

It is admitted that the returns showed 99 votes cast, and that 4 were rejected, 12 returned for Wise, 60 for Young, and 23 for Holland. Contestant put upon the stand in due form 17 witnesses who swore they voted for him at Longview (pp. 66 and 72), and proved and filed the certificate of another voter (p. 66) and by another witness (p. 67), the father of an absentee, proved his son, who was then absent engaged in the business of oystering, voted for contestant.

We have concluded not to consider the evidence of two other voters at this precinct taken after contestant's forty days expired. To make the issue more pointed, we will confine it to the 17 voters at this precinct examined within the forty days. We consider every one of these votes well proved for contestant, and while certificates of the character of the one produced are admissible beyond question as proof of votes cast, let us ignore it also for the purpose of decision. If contestant received 17 of the 99 votes, the return is plainly false as to him. It is also demonstrably false as to 83 votes returned for Young and Hol-

land, for only 82 votes were in the box. Can the return stand? Is it any more possible to hold that a return stating that 82 men could cast 83 votes shall stand than it would be if a smaller number of men were returned as having cast that many? If the return is impossible can it be reconciled at all because it is nearly possible?

Therefore the majority proposed to reject the vote of Longview and leave to contestant the vote proven aliunde.

The minority say:

The contestant took the testimony of 17 witnesses who swore they voted for him. This gave him an excess of 5 over the returns. All 17 of these gave their depositions with their marks. They could not read, yet 6 of them, William Sheppard (p. 67), Wm. Newby (p. 68), John Kines (p. 69), Wm. Kelly (p. 70), Jos. A. Graves (p. 70), and Walter Glover (p. 71) prepared their own ballots. The ballots rejected because improperly prepared were 4, leaving an excess of 1 vote, claimed to have been proved over the returns, for contestant. Instead of rejecting the vote in this precinct it should stand, Young 60 as returned, Wise 12 as returned; Young lost in correction 1, Wise gained in correction 1—Young's true vote 59, Wise's true vote 13.

The majority contended that the certificates (papers "given by voters who came out of the polling booth, went to some partisan on the outside, and took an oath that they voted for Wise," in the language of a Member[1] who argued for the minority) were admissible in evidence; and they appear numerously in the proofs adduced to impeach the returns of various precincts. The minority argued that they were inadmissible to contradict the regular returns, and made the point that those giving them were not examined as witnesses.

The minority conceded that the returns of certain precincts were unworthy of credence. Thus, in Stonehouse, in James City County, the returns gave contestant but 29 votes, while he proved 86. No objection was made to rejecting the returns and giving contestant the vote he proved. In other precincts the majority and minority were at variance. Thus, of Suffolk, Nansemond County, the majority say:

At this precinct the poll book shows that 451 votes were cast, yet but 405 are returned. This is no return at all. Such a return is of itself a badge of fraud where but one office is voted for. Ten per cent of the vote cast is simply ignored.

Contestant proved 130 votes cast for him at this precinct. Contestee made no effort to account for the discrepancy of 46 votes cast or to show why the return was silent concerning them. He only examined two or three witnesses concerning the general good character of the judges. The committee think such a return worthless and allows contestant the vote he proved there.

While the minority say:

Contestant has examined 130 witnesses who say they voted for him. One hundred and fourteen votes were returned for him. There were, however, 106 ballots rejected as imperfectly marked. This large number of defective ballots was accounted for by the large number of ignorant voters who undertook to prepare their own ballots. This vote as returned, in our opinion, should stand: Young, 208; Wise, 114.

Thus, running through the district, the majority proposed the rejection of returns showing such discrepancies, while the minority contended for a correction merely.

The minority by their process reduced the majority of Young over Wise from the 5,979 given by the official returns to 3,735, if certificates were to be disregarded, or to 2,954, if certificates were to be accepted as valid proof. They contended that

[1] Record, p. 2787, speech of Mr. Hay, of Virginia.

even admitting the majority's rejection of Norfolk city entire the sitting Member would yet have 897 majority over contestant.

The majority, rejecting the returns entirely where they found the returns tainted fatally, in their opinion, and treating the certificates as valid in contestant's proof aliunde, found that contestant had a plurality of 2,434 over sitting Member in the district, and reported resolutions giving him the seat.

The report was fully debated on March 8, 10, and 12, 1900, and on the latter day a resolution of the minority declaring sitting Member duly elected was rejected when moved as a substitute—yeas 128, nays 132. Then a resolution declaring sitting Member not elected was agreed to—yeas 132, nays 127. A second resolution declaring contestant elected was then agreed to—yeas 131, nays 125. Mr. Wise then appeared and took the oath.

1112. The North Carolina election ease of Pearson v. Crawford, in the Fifty-sixth Congress.

The arrest of a witness for contestant on charge of perjury in testifying as to a precinct of a city does not justify, on the plea of intimidation, the rejection of the entire vote of the city.

In a report barely sustained by the House it was held that the making of a registration in disregard of the terms of law justified rejection of the returns.

Where the law requiring the ballot box to be empty at the beginning of the election was disregarded the House rejected the returns.

As to effect on the return of participation by an illegally appointed election officer.

On February 5, 1900,[1] Mr. Ernest W. Roberts, of Massachusetts, from Elections Committee No. 3, submitted the report of the majority of the committee[2] in the case of Pearson *v.* Crawford, of North Carolina. The official returns, after the correction of certain obvious errors, showed a plurality of 218 votes for the sitting Member. The contestant attacked this plurality on the ground of organized intimidation, fraud, forgery, and bribery. The majority of the committee intimate that, were there not more specific grounds, the House might be justified in declaring the seat vacant because of intimidation, mob violence, and the circulation of forged letters injurious to the contestant's cause. The minority strenuously denied the general charges, and the case may be said to turn entirely on specific rather than general conditions.

The majority, in their report, proposed to reject the entire vote of the city of Asheville, which gave sitting Member a plurality of 163 votes; but when the case was taken up the announcement was made that this portion of the report might be considered as withdrawn. The reasons for throwing out Asheville arose from the arrest for perjury, at the instigation of attorney for contestee, of a witness named Harrison, who had testified as to an alleged attempt at bribery on the part of the said attorney in one precinct of the city. The majority conceived that this

[1] First session Fifty-sixth Congress, House Report No. 199; Rowell's Digest, p. 608; Journal, pp. 555, 561, 562; Record, pp. 5328, 5381–5396.

[2] Minority views were presented by Mr. Robert W. Miers, of Indiana.

arrest was made to intimidate other witnesses who had been summoned, and, on the strength of the precedent in the case of Featherstone *v.* Cate, decided that the vote of the entire city should be thrown out. They say that in the case of Featherstone *v.* Cate there was nothing to show that other witnesses were to be examined on the same point, and conclude:

This shows that the case now under consideration is much stronger for the contestant, as it appears from the statement of the notary that other witnesses to prove the same allegation were not only under subpoena but were personally present when contestant's first witness was arrested, and that these other witnesses, when called next morning, failed to appear, and the inference is irresistible that these men had been intimidated by the arrest and incarceration of the first witness. It is also worthy of note in this case of Featherstone *v.* Cate that the majority report rejecting the entire vote of Independence Township—and on this point the whole case turned—was supported by many distinguished Representatives who are still members of this body.

The minority criticised this proposition as follows:

The testimony of Harrison charges Murphy with an indictable offense, and, if Murphy is to be believed, he had a right to have Harrison arrested, as he was guilty of a felony, and no just inference could be drawn that the purpose was to intimidate witnesses. Witnesses who testify in contested election cases do so under regulations of law, as in other cases, and men who rely upon the testimony of such witnesses have no right to have them protected in the violation of law. It does not appear that a single witness whose name was called, or any other witness, was absent on account of the arrest of Harrison, or that any effort was subsequently made to examine them or anyone else in Buncombe County or the city of Asheville.

The facts do not put this case even in the neighborhood of Featherstone *v.* Cate. In that case the returns were impeached, and the contestant was proving the votes cast, and the witness (Powell) was arrested on the charge of perjury by attorney of contestee after swearing that he saw 92 ballots cast for contestant; and the attorney threatened to arrest all other witnesses he thought were swearing falsely. Contestant in that case proved by a number of witnesses that the threats deterred other witnesses from testifying, and the committee held in that case that strict and technical proof is not required where testimony has been suppressed, and the evidence of Powell was sufficient to establish the number of votes received. He was not contradicted by the attorney and no votes were proven for contestee.

In the Featherstone case the committee applied the rule as to Powell's testimony to only one voting precinct, but in the pending case the majority of the committee reject not only the precinct No. 2, about which all those witnesses were to testify, but reject eight other precincts about which there can be no contention. We submit that this is the most sweeping and monstrous proposition ever submitted to the House of Representatives.

The debate indicates that the abandonment of the majority's contention in regard to Asheville was occasioned by a strong sentiment in the House against it.

One of the main issues of the case was joined over the precincts of Montezuma, South Waynesville, and Marble, where the majority held that the entire vote should be rejected because of defective registration. The report cites the statute of the State:

The language of the North Carolina statute on this point is as follows (sec. 8):

"Provided, That no registration shall be had except at the times and places hereinafter provided."

And in section 9:

"And such registrars shall also, between the hours of 9 o'clock a. m. and 4 o'clock p. m., for four consecutive Saturdays, and between the hours of 9 a. m. and 12 o'clock m. on the second Saturday preceding the election, at the voting place of said precinct, keep open said book for the registration of any electors residing in such precinct, etc."

The majority contend that this statute is mandatory, and that, as the registration in the precincts named was held at places other than the voting places, the vote should be rejected in each. In support of this contention the committee say:

It appears from the case of Eaves and Lambert *v.* Southern and Kerley, a contested election case in the general assembly of North Carolina, at the session of 1899, that that body construed the election law in force in North Carolina in 1898, and decided that the regulations as to time and place of registration were mandatory provisions; and for a violation of these provisions in this respect that body unseated two Republican senators and awarded the seats to two Democrats. Contestee says in his brief (p. 47):

"It will appear, by reference to the citation made by contestant from the minority report, submitted by Mr. Campbell, that the question passed upon was the effect of registration on days other than the Saturdays prescribed by law."

In the oral argument before this committee contestee's counsel admitted that the law of North Carolina was equally mandatory both as to time and place of registration; so that, if we admit contestee's demand that Montezuma be rejected on the ground that a mandatory provision of the statute was violated, we must reject both South Waynesville and Marble on the same ground.

The case of Quinn *v.* Lattimore (120 N. C., 426), which contestee cites in his brief, is not applicable to the law under which this election was held, for the reason that the election law construed in Quinn *v.* Lattimore was repealed by the act of 1895; and the only construction of this last act which we have been able to ascertain is the construction given by the legislature in 1899, in the case of Eaves and Lambert *v.* Souther and Kerley, declaring in effect that the provisions in respect of time and place of registration are mandatory. This interpretation made by the general assembly of North Carolina in the case above cited is in accord with a long and unbroken line of decisions in the national House of Representatives enunciating the same rule of construction. (Covode *v.* Foster, 2 Bart., p. 602; Coffroth *v.* Koontz, idem, p. 32.)

The minority views challenge the accuracy of the precedent of the North Carolina legislature, as cited by the majority, and say:

The report submitted by the majority erroneously states that the contestee's counsel admitted on the oral argument before the committee that the law heretofore quoted is "mandatory as to time and place." We positively deny that counsel made any such admission. On the contrary, the burden of their argument was to the effect that the statute is directory. They did admit that the same rule of construction would apply to time and place, repeatedly declaring that these statutory regulations are directory. In any view, the House will judicially determine for itself the proper construction of this statute.

The contention of the majority as to contestee's demanding that Montezuma precinct should be thrown out, on the ground that the statute is mandatory, is, to say the least, absurd. No such demand is made. The contestee simply set up a charge against this precinct in the nature of a counterclaim or set-off and only in the event that the charges against South Waynesville and Marble should first be sustained does he claim that any vote should be thrown out. This the majority do not seem to appreciate, from a legal standpoint, but is permissible under the statute.

The only warrant for rejecting South Waynesville on account of the irregular registration is the suggestion in the legislative minority report above cited. There is not even a hint that the precinct should be thrown out and innocent, legally qualified voters disfranchised, but only rejects the individual votes of those who were not registered on the days prescribed by law, and the burden was on the contestant to prove the illegal votes. Contestant has not put himself in a position to derive any benefit from the doctrine laid down in this purported report. Both of the registrars at South Waynesville precinct were on the stand, and were not, as it appears from the testimony, asked to produce the registration book and point out the names of those who were registered away from the polling place.

While the doctrine which may be inferred from the meager and unauthenticated statement of Mr. Campbell does not in the least support the recommendation of the majority to reject the entire precincts of South Waynesville and Marble, yet we do not approve the doctrine that even individual ballots should be rejected, after being cast, on the ground of inequalities in registration when the voters are otherwise qualified.

The minority cite, in support of their contention, these cases: Newsom *v.* Earnheart (86 N. C., 391), Quinn *v.* Lattimore (120 N. C.), People *v.* Wilson (62 N. Y., 186), State *v.* Wood (38 Wisconsin), and the cases of Smith *v.* Jackson and Foster *v.* Cavocle in the House of Representatives.

The majority of the committee furthermore attack the returns of South Waynesboro and Marble on other grounds. Evidence tended to show that the ballot box at Marble was stuffed, although the minority denied the effect of this testimony, pointing out that it did not apply to the Congressional box. As to South Waynesboro, a question arose over the findings of old ballots in the box after the election began, although the State law required the judges, before the opening of the polls, to examine the ballot boxes and see that there be nothing in them. The majority also impeached the legality of the appointment of one Stringfield as an election officer. The minority contended: "He was an officer de jure, but in any view certainly de facto," having been appointed by the board to take the place of a judge who was called away. The majority say:

> In addition to all this, Stringfield counted the ballots at this precinct, though he was neither judge, nor registrar, and, by the express terms of the law, no one but a judge or registrar is permitted to count the ballots.
>
> The provision of law requiring ballots to be deposited in empty boxes is in its nature just as mandatory as a provision requiring that the ballots shall be on white paper and without device. Under such a law a ticket printed on red paper, or containing a device, is void; and, by parity of reasoning, ballots deposited in a box one-third full of tickets at the opening of the polls, resulting in an incorrect count, as in this case, must vitiate the returns. It is axiomatic that laws designed to secure the accuracy of the count are mandatory. So the returns from this precinct must be rejected, whether we decide that the law in respect of time and place of registration be mandatory or directory.

The minority contended that the provision of law relating to examination of ballot boxes before the election, to see that there was nothing in them, was directory, not mandatory, and give the state of the returns of other boxes at this precinct to show that the Congressional vote was not affected by the old ballots, which were said to have been removed when discovered.

1113. The case of Pearson v. Crawford, continued.

An election officer being shown guilty of fraud at one ballot box no confidence was placed in another to which he had access at the same election.

Discussion as to what is valid testimony in rebuttal.

Instance wherein an entire precinct return was rejected because a few votes were proven to have been bribed.

Instance of rejection of a precinct return because of violation of an alleged mandatory law requiring ballots to be counted before adjournment of the election.

The majority reject Black Mountain precinct's vote because one of the judges, one of sitting Member's party, was shown by testimony to have stuffed one of the ballot boxes. The minority, while considering this testimony incredible, point out that it relates to the box in which the votes for county officers were received. But other testimony showed that the judge in question had assisted in counting the

vote from the Congressional box, although he testified that he did not. The majority say:

In Spencer *v.* Morey, the following text from McCrary is quoted, with approval:

"If, for example, an election officer having charge of a ballot box prior to or during its canvass is caught in the act of abstracting ballots and substituting others, although the number shown to have been abstracted is not sufficient to change the result, yet no confidence can be placed in the contents of the ballot box which has been in his custody."

This rule discredits all the acts of Martin, although he swears that he did not count the ballots in the Congressional box. His Democratic associate, T.P. Sutton, as well as other witnesses, swear positively that Martin did count some of the ballots in the Congressional box, and, of course, their testimony outweighs the testimony of Martin.

The effort of the contestee's counsel to show that the box which Martin was caught in the act of stuffing was the county box is of no avail, because it is clear that he stuffed one of the boxes and that he handled part of the tickets from the Congressional box, so that his touch tainted the entire returns, and they must be rejected.

At Old Fort precinct the committee found "nine distinct varieties of fraud and irregularity," the return being false, the number of ballots exceeding the number of voters, and the poll list introduced by contestee being forged. Also one of the judges of election, belonging to sitting Member's party, confessed that he was drunk on quinine. The report says:

Contestee makes no attempt to defend the false poll sheet, but claims that the proof in regard to its falsity was not strictly in rebuttal. After the taking of testimony at this precinct was concluded and contestant's witnesses had been discharged and had gone home this fictitious poll list was introduced in evidence by contestee's attorney; and, although contestee took no further testimony in the county of McDowell, the introduction of this poll list, which, if genuine, would have contradicted contestant's witnesses, had the same effect as the examination of witnesses in behalf of contestee, and would have justified contestant in offering evidence in rebuttal The testimony taken by contestant in rebuttal at this precinct was confined solely to the genuineness or falsity of this poll list.

The minority dispute the validity of this testimony in rebuttal, and say:

Such circumstances in a report is unjustifiable. What the remaining frauds and irregularities mentioned in the report are, it does not appear.

Contestant failed to allege or introduce testimony tending to show that he was in any way deprived of a single legal vote, or that contestee had the benefit of a single illegal vote, or that there was an illegal vote cast at this precinct, and we submit that to reject this precinct will violate every recognized principle of law pertaining to elections.

In Limestone and Ivy precincts the majority reject the whole returns because of bribery. Of Limestone, they say:

The returns from this precinct must be rejected, because the proof of bribery is clear and conclusive and taints the whole poll, so that it is impossible to purge the poll of the illegal votes. The testimony of J.H. Sumner, James Webb, and Paton Durham, of which extracts are given below, make this perfectly clear.

The minority say:

The evidence (p. 110 et seq.) shows that contestant examined twelve witnesses at this precinct and proved that 2 votes were bribed. The utmost that contestant can rightfully claim is the rejection of these 2 votes. The claim that the whole precinct should be rejected and 242 honest voters be disfranchised because James Webb received $1.50 from an unnamed man and Paton Durham, who had the promise by a Democrat of a steady job to "vote the Republican ticket," voted the Democratic ticket and got the job, violates every sentiment of fairness and is without precedent or authority. It is noticed that the majority cite no authority for their recommendation to reject this precinct.

In Ivy precinct the proof as to bribery and the criticism of the minority is similar. In addition, the majority found defective registration at this precinct and that false letters, injurious to contestant, had been distributed.

In the precinct of Herrell's, where the return gave contestant a plurality, there was a violation of the law claimed by the majority to be mandatory, requiring the ballots to be counted before adjournment of the election. The majority intimate that the ballots might be recounted as evidence aliunde, and the minority deny this. But, in fact, the majority reject the evidence aliunde and reject the Herrell's returns.

Before the abandonment of the proposition to reject the vote of Asheville the majority found a plurality of 318 for contestant as a result of their conclusions. But the abandonment of the Asheville proposition reduced this by 163 votes.

The report was fully debated on May 9 and 10, 1900, and on the latter day the resolutions of the minority confirming the title of sitting Member to the seat were disagreed to—yeas 127, nays 128. Then the resolutions of the majority, unseating the sitting Member and seating contestant, were agreed to—yeas 129, nays 127.

1114. The Kentucky election case of Evans v. Turner, in the Fifty-sixth Congress.

Circulation of a general circular proposing bribery, but of which contestee was not cognizant, did not vitiate an election although accompanied by acts of bribery.

On February 5, 1900, Mr. Romulus R. Linney, of North Carolina, from the Committee on Elections No. 1, submitted a report[1] in the Kentucky case of Evans *v.* Turner. The grounds of the contest alleged by the contestant were fraud and bribery, the specifications of which were denied by the sitting Member. The sitting Member had been returned by a pluralty of 568 votes, and the committee decided that contestant had not successfully attacked that vote, as it was not shown that enough votes were vitiated:

> The evidence offered by the contestant tends to prove the allegations of fraud and bribery, and much of it discloses the resort to methods that were disreputable. Among other things it is in evidence that on the morning of the election a circular was issued and generally distributed in the city of Louisville among the political workers of the contestant, printed on the paper of the Congressional campaign committee, on that date, and containing a proposition to place $100 in each precinct, and requesting captains of each ward, if they do not get the money by 6.30 on the morning of the election, to come to headquarters. This circular was issued by enemies of contestant. This is a novel method in the history of political struggles in the United States, and in the opinion of the committee demands the unqualified condemnation of the committee. This, with the evidence tending to prove fraud and bribery in other respects, in our opinion, tends strongly to establish the contention of contestant, but does not show that contestee was a party to such fraud.
>
> There is no evidence tending to show that the contestee had anything to do with this fake circular, and there is much evidence offered by the contestee tending to show that the propositions of bribery came from persons who had organized for the purpose of obtaining money from some one-Anyone from whom they could obtain it. Upon a careful consideration the committee is unable to determine the exact number of votes tainted and vitiated by fraud and bribery.

On February 5, 1900,[2] without debate or division, the House agreed to the resolutions confirming the title of sitting Member to the seat.

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[1] First session Fifty-sixth Congress, House Report, No. 198; Rowell's Digest, p. 596.

[2] Journal, p. 232.

1115. The Alabama election case of Aldrich v. Robbins, in the Fifty-sixth Congress.

Where a particular election board denies representation to the opposing party, the returns being impeached by evidence, are rejected.

Where voters of one party are compelled to remain away from the polls to thwart organized fraud, the other party is not permitted to avail himself of votes proven aliunde after returns are rejected.

On February 14, 1900,[1] Mr. James R. Mann, of Illinois, presented from the Committee on Elections No. 1, the report of the majority of that committee[2] in the Alabama case of Aldrich *v.* Robbins. The district in this case was composed of five counties. In four counties the white population predominated, and in three of the four the vote of contestant exceeded that of sitting Member. In the fifth county, Dallas, where the census of 1890 showed 8,531 colored population and 2,146 white population, the returned vote was 2,438 for Robbins and 392 for Aldrich, the Republican and Populist candidate. The official returns gave Robbins a majority of 1,230 over Aldrich.

The contest rested solely on claims of fraud in Dallas County, on the vote of which the sitting Member relied wholly for his majority.

After quoting the portions of the constitution and laws of Alabama relating to elections, the majority of the committee lay down the conditions governing the case:

It will be noticed that the Alabama law provides that the judge of probate, the sheriff, and the clerk of the circuit court must, at least thirty days before the holding of any election in their county, appoint three inspectors for each place of voting, two of whom shall be members of opposing parties, if practicable, and that it shall be the duty of the sheriff to notify such inspectors of their appointment within ten days after such appointment.

The three county officers of Dallas County who constituted this appointing board were all Democrats, and supported Mr. Robbins at the election.

It appears by the report of the committee in the Fifty-fifth Congress that in the Congressional election of 1896 the appointing board was composed wholly of Democrats, and that, although at that time lists were submitted to them of suitable men in each precinct by the Republican and Populist managers for Mr. Aldrich, they did not appoint a single Republican or Populist inspector of election.

There are 31 election precincts in Dallas County. In 1898, at the proper time, a request was submitted to the probate judge, sheriff, and circuit clerk of Dallas County by the chairman of the People's Party of Dallas County, the chairman of the Republican party of Dallas County, the chairman of the Aldrich campaign committee, and by Mr. Aldrich himself, all joining in the one request, asking for the appointment of a citizen named in the request for each of the precincts as an inspector to represent the Republican party and People's Party. In 20 of the precincts the respective inspectors asked for by the Republican committee were named by the appointing board. In 11 of the precincts, without any satisfactory reason or explanation, the persons requested by the Republican party managers were not appointed, but either some lame or illiterate person or Democrat appointed in their stead.

Of the 20 precincts in which the regular Republican inspectors were appointed, your committee has followed the official returns in all but 3. In the 11 precincts in which the persons regularly presented for Republican inspectors were unreasonably rejected, your committee finds sufficient fraud in 7 precincts to warrant the rejection of the official returns. In 2 other of these 11 precincts no election was held. As to 1 other, your committee disregards the evidence of fraud because offered as rebuttal and not as direct testimony.

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[1] First session Fifty-sixth Congress, House Report, No. 327; Rowell's Digest, p. 597; Journal, pp. 304, 316, 323, 324; Record, pp. 2490, 2594, 2665–2681.

[2] Minority views were presented by Mr. Charles L. Bartlett, of Georgia.

But not only did the appointing board refuse to give proper representation to Mr. Aldrich in the election officials, in 11 precincts, but they also neglected and refused to give him information prior to election day as to what election officers had been selected for any of the precincts. The chairman of Mr. Aldrich's campaign committee, by a registered letter, made application to the probate judge of Dallas County for a certified copy of the names of the inspectors and returning officers, and offered to pay the legal fees in order to get such copy. The only answer he could obtain from the appointing board was the ordinary postal-card receipt returned to the sender in cases of registered mail, and which in this case was signed by the probate judge.

The provision of law requiring the sheriff to notify the persons appointed inspectors within ten days of their appointment was generally disregarded. Mr. Aldrich and his campaign managers did not know, and had no way of ascertaining, who were to be the election officials in the various precincts prior to the day of election, and they did not know, and had no way of ascertaining, which of the names suggested by them for inspectors had been selected by the appointing board.

The majority of the committee conclude that "no just election is intended to be had where the appointing board selecting the election officials denies representation to the opposing party," and lay down a principle which was the subject of much contention during consideration of the case:

Although we do not find it necessary to rest our conclusion in this case upon the following proposition, yet we still affirm, as a matter of proper statement:

"That in view of past experience in Dallas County elections, Mr. Aldrich was entitled at the election of 1898 to notify his supporters to remain away from the polls at all precincts where he was not given representation among the election officers. To request his supporters to vote at such precincts would be only to increase the vote of his opponent. If his voters remained away from the polls and counted the persons who went inside of the polls, they had a check on the number of votes which could be returned for his opponent, but if they voted themselves, they would only add to the vote counted to the opponent without any satisfactory method of preventing the fraud. And in those precincts where Mr. Aldrich was entitled to request his supporters to remain away from the polls, because of proper and well-grounded expectation of intended fraud, we further think that it would be a travesty upon justice to permit his opponent to be allowed the votes which were cast at the election in his favor.

"It is the duty of this House to give some incentive to just elections in such districts (or rather in this district, because it has no equal), and the only way to give the incentive to fair elections in Dallas County is to compel the officers there to allow official representation to both parties, or to disregard the returns from such precincts in those cases where the Aldrich supporters, for sufficient reason, remained away from the polls."

For these reasons we think the official returns from Orrville precinct No. 8, Lexington precinct No. 9, Marion Junction precinct No. 28, and Kings precinct No. 30 should be entirely disregarded, because, without any excuse or without any reason, except the intention to commit fraud, the proper request of Aldrich for representation in the election officers was coolly disregarded by the appointing board; and we do not think that the contestee should be entitled to reap any active benefit from such fraud committed in his interest.

The minority of the committee in their report, and Members on the floor, contended that the sitting Member should be given the benefit of the votes which, by proof aliunde, he had shown to have been cast for him in the above-mentioned precincts; that legal, honest voters should not be deprived of their suffrages through alleged faults of election officers, etc. In reply a distinction was drawn between precincts where the contestant had felt constrained to keep his supporters from the polls and those where he had not.

In Orrville precinct the report shows the bad character of the election officers, they being in large part the same who had officiated in previous elections wherein fraud had been shown in the returns; also that these officers had disregarded the

provisions of law for the appointment of clerks of election, so that none had been appointed. It also appears (from the minority views) that there was testimony tending to show fraud in the return. From the evidence the majority considered that the vote in the precinct should be entirely disregarded; and they do not count the 5 votes for Aldrich and 75 for Robbins which were proven aliunde.

In the same way and for the same reasons, the majority reject entirely the election in Lexington, Marion, and King's precincts.

1116. The case of Aldrich v. Robbins, continued.

Where an election is not held, although there be no sufficient excuse for the failure, the House is reluctant to allow votes for either party.

Where the voters of one party left the polls for no just cause, the House counted the returns of the election held by the other party.

Evidence in chief taken in time of rebuttal evidence is not considered in an election case.

Failure to give one party lawful representation among election officers, accompanied by proof of fraud, justifies rejection of the returns.

In River and Pine Flat precincts no election was held. The reasons given for this were conflicting. The committee, while thinking that no sufficient reason had been given for not holding an election, found no sufficient evidence for allowing votes for either party. In Dublin precinct, however, where a dispute caused the Republicans to leave the polls in a body, and where later the polls were opened by the other party and an election held, the committee found that the vote should be counted as returned, the action of contestant's supporters not being justified.

In Smyley's precinct the committee find:

> The evidence in the record as to this precinct is sufficient to cause the returns to be disregarded if the evidence is to be considered at all. But this evidence which should have been offered in chief was offered for the first time in rebuttal, and we feel that it ought not to be considered. Hence we find that the vote should be counted as returned.

There remain six precincts wherein the majority of the committee found frauds sufficient to justify the rejection of the returns, leaving the vote to be proven aliunde by the parties.

In Valley Creek precinct representation on the board of inspectors was denied contestant's party, a portion of the officials had officiated in previous elections where frauds had been found, and there was evidence of fraud in the count. In the precinct 141 witnesses personally swore that they voted for Aldrich, "and the testimony showed that other voters had also voted for Aldrich." So the majority credit Aldrich with 152 votes and Robbins with 51. In Cahaba precinct the conditions as to appointment and character of election officers were similar, and there was evidence of fraud, besides the fact that a Republican election clerk was ordered from the polls during the count. In Union, Pence's, and Burnsville precincts evidence of fraud caused the rejection of the returns.

In the city of Selma, where contestant was allowed the appointment of an inspector whom he named, but where Republican clerks and markers were not appointed, and where there was violation of the law of Alabama providing that no

one could legally vote who had not been registered, the majority of the committee discarded the official return for the following reasons:

First. Because the poll list shows that more than 80 illegal votes were cast by unregistered persons.

Second. Because it is shown that a much larger vote was cast in favor of Mr. Aldrich than was returned by the inspectors.

Third. Because a number of the persons voting obtained their ballots illegally from various persons and at various places, contrary to the positive provisions of the law.

Fourth. Because several persons appear to have voted whose names are not on the poll list, and several persons whose names are on the poll list appear not to have voted, though we do not lay great stress upon this reason.

Fifth. Because, in absolute violation of the law, the inspectors of election refused to appoint a Republican clerk of election from the written list which was submitted according to the provisions of the statute. If there had been an intention to hold an honest election there could have been no objection to complying with this positive provision of the Alabama statute.

The contestee proved by witnesses 627 votes in this precinct, but there should be deducted from this number 28 votes which were proven, but which were illegal because the names of the voters were not on the registration lists. There should also be deducted 35 votes of persons who obtained their ballots illegally from various persons who were not entitled to handle them and at various places where the ballots were not entitled to be. The Australian ballot law should not be made a screaming farce.

The minority of the committee contend with much argument that the failure to appoint the clerk was a failure to perform a merely directory duty imposed by statute, and such failure could not vitiate the poll. Decisions in support of this doctrine are cited.

The majority of the committee, following out their conclusions, found that contestant had been elected by a majority of 206, and in accordance with this finding reported the proper resolutions.

The report was debated at length in the House on March 2, 6, and 8, 1900. On the latter day the proposition of the minority, to confirm the title of sitting Member to the seat, was rejected, yeas 134, nays 138. Then the resolutions of the majority were agreed to, yeas 141, nays 135; and the oath was administered to Mr. Aldrich.

1117. The Kentucky election case of White v. Boreing, in the Fifty-sixth Congress.

No surprise being practiced on the voters, who were free to vote for whom they pleased, alleged irregularities in placing a name under a party emblem do not vitiate the election.

Discussion as to use of proxies at meetings of political executive committees.

On March 29,1900,[1] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted a report in the Kentucky contest of White *v.* Boreing. The sitting Member in this case had received by the official returns a plurality of 4,462 over the contestant, who was his next highest competitor, and a clear majority of 1,021 votes over all opposing candidates. While there were various charges and countercharges, the only issue considered finally by the committee was the allegation that the Republican party of the district had failed to nominate Mr. Boreing lawfully; that therefore he was not entitled to the use of the party emblem (the log

[1] First session Fifty-sixth Congress, House Report No. 876; Rowell's Digest, p. 606; Journal, p. 417.

cabin) on the Australian ballot, and hence not being entitled to the votes which the people were deluded into giving him there was either no election or contestant was elected.

The committee, after explaining the ballot law of Kentucky and the use of party emblems, state that contestant was a "Free Republican," whose name was printed under his own emblem on the ballot, and who had not sought the regular Republican nomination. The law of Kentucky recognized three methods of placing a name on the ballot: (1) nomination by convention, (2) nomination at a primary election of the people, (3) nomination by petition.

The requirement of law in regard to primary election was as follows:

Whenever it shall be desired by the committee or governing authority of any political party to hold a primary election under the provisions of this article, said committee or governing authority shall, at least forty days prior to such primary election, give public notice thereof by posting such notice at the court-house door and at least twenty other public places in the county or district. Such notice shall state the date of such proposed primary election, the hours between which it will be held, the offices for which candidates am to be nominated, and the places at which polls will be opened at such primary elections.

The rules of the Republican party left it optional with the committee to call either a convention or primary election, except that on petition of 51 per cent of the votes cast at the last preceding election, if presented not less than twenty days prior to the time fixed for the convention, if a convention has been called, a primary election must be held.

The statute provides that the committee or governing authority of the political party holding the primaries may provide the manner in which the expenses of holding the same, the pay of officers, the cost of publishing and circulating notices of election, etc., shall be defrayed, and section 1561 enacts that any person who shall not have notified the committee or governing authority not later than fifteen days next preceding the primary election of the fact that he is a candidate, "and any person who has not given such notice to the committee or governing authority, or who has not complied with the conditions prescribed by the committee or governing authority for the government of candidates, shall not have his name printed on the ballots used in such primary election."

On June 14, 1898, the Republican district committee met and passed resolutions providing for a primary election on August 11, 1898, in accordance with the law, and providing:

That each of the candidates pay to the chairman of the district committee the amount assessed against him, to defray the expenses of the primary, not later than fifteen days next preceding the holding said primary election.

That in the event of there being no more than one candidate complying with the requirements herein, and upon notice of that fact by the chairman of the committee, the committee shall meet in the town of London on August 5, 1898, and declare the said candidate complying with the above requirements the Republican nominee for a seat in the Fifty-sixth Congress of the Eleventh Congressional district of Kentucky.

Mr. Boreing was the only person who qualified himself as a candidate within the time limit, so on August 5, 1898, in pursuance of a call of the chairman, the district committee met and passed a resolution declaring Mr. Boreing the nominee, since he was the only person announcing his candidacy and complying with the conditions, and directing the chairman and secretary to certify this fact to the several county clerks in the district, which was done.

The committee showed that the practice of dispensing with a primary election in such cases was well established in both parties in Kentucky, and was considered proper and legal. The report goes on:

Contestant claims, however, that the committee meetings of June 14 and August 5 were both illegal or at least irregular, because a number of those present and acting as members of the committee were not original members, but held proxies from original members, there not being enough original members actually present to constitute a quorum; or, in other words, if the proxies were thrown out there were not enough members present at either meeting to constitute a quorum. We are referred to rule No. 29 of the Republican organization of Kentucky, which is said to read as follows:

"No delegate elected to a State or district Republican convention shall be permitted to cast a vote by proxy."

This was not, however, a State or district Republican convention, and the parties present did not attend as delegates elected to said convention, but as members of the district committee of the Eleventh Congressional district of Kentucky, a standing committee. As this district committee or governing authority is recognized by statute, and is authorized in the case of a tie vote or contest at a primary election to hear and determine such contest and decide who shall be entitled to the nomination, the argument is made on behalf of contestant that its members are public officers and can not delegate their powers. But even as to public officers the distinction is always drawn between duties of a judicial nature and those which are purely ministerial. The evidence shows that not only in the State central committee, but also in the district committees of the Republican party the use of proxies is quite common.

Mr. White was not a candidate for the Republican nomination. He did not seek to become a candidate of that party. He obtained his own place upon the ballot, in his own column, and under his own picture, by petition signed by 400 or more persons as prescribed by the act of assembly. The committee meetings of June 14 and August 5 were held after due public notice. The action taken at each of said meetings was matter of public notoriety. The question of no quorum was not raised at either of said meetings, no objection was made by anybody to representation by proxy, and although it was publicly known at the meeting of August 5 Mr. Boreing was declared the nominee, and the chairman and secretary of the committee were directed to certify his nomination to the clerks of the several counties for the purpose of having his name printed upon the ballot, no effort whatever was made by Mr. White, or any other parties, to prevent such certification, or to prevent the clerks of the several counties in the district from printing Mr. Boreing's name upon the ballot in the Republican column and under the log cabin. If there was such gross irregularity or illegality as claimed, a restraining order or injunction might undoubtedly have been obtained from the court preventing the printing of Mr. Boreing's name upon the ballot until his right to have it so printed could be inquired into. But his name having been permitted to go upon the ballot without legal objection and be submitted to the people, who thereupon cast a majority of their votes in his favor, it would seem to be a case where any irregularity in the pleading must be considered as cured by the verdict.

The committee proceed to distinguish this case from that of Fairchild *v.* Ward, showing that a far stronger case was made out for Ward, who was nevertheless not seated.

The committee go on to show that no fact had been adduced to prove that the voters cast their ballots for Mr. Boreing simply because his name was under the log cabin emblem; and it was furthermore to be remembered that each person desiring to vote the party ticket might nevertheless write the name of another candidate for Congress in a blank space provided on the ballot. The committee quote the law of Kentucky, "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice," and conclude:

In order to sustain the contestant's position we should have to squarely reverse the decision of the House in Fairchild *v.* Ward, and go even much further in the opposite direction. We have here no difficulty whatever in determining the choice of a majority of the voters in the Eleventh Congressional district of Kentucky, and we are unable to find any irregularity of sufficient importance to warrant us in reversing that choice or even in setting it aside.

The House, following the recommendation of the committee, sustained the title of the sitting Member to his seat without debate or division.

1118. The Virginia election case of Walker v. Rhea, in the Fifty-sixth Congress.

The mere existence of frauds and irregularities does not vitiate an election if not shown to be sufficient to change the result.

On January 30, 1901,[1] Mr. R. W. Tayler, of Ohio, from the Committee on Elections No. 1, presented the report in the case of Walker *v.* Rhea, from Virginia. The sitting Member had received a vote of 17,344 according to the returns, and the contestant a vote of 16,595. The total population of the district was 166,699. The committee found:

> The conclusion arrived at as a consequence of the committee's investigation is that while the evidence shows that there were frauds and irregularities practiced, chiefly in the interest of the contestee, they fall very far short of being sufficient to justify a change in the result of the election.

Therefore they reported resolutions confirming the title of the sitting Member to the seat. There was no action by the House.

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[1] Second session Fifty-sixth Congress, House Report No. 2566; Rowell's Digest, p. 606; Journal, p. 175.