

Chapter XXXVIII.

GENERAL ELECTION CASES, 1895 TO 1897.

1. Cases in the first session of the Fifty-fourth Congress. Sections 1062–1094.¹

2. Cases in the second session of the Fifty-fourth Congress. Sections 1095, 1096.

1062. The Missouri election case of Van Horn v. Tarsney, in the Fifty-fourth Congress.

The returns and ballots of several precincts being tainted by a general conspiracy of election officers, the House rejected the entire returns of those precincts.

Discussion as to the wisdom of attempting to purge a poll whereof both returns and ballots are discredited by fraud of election officers.

Instance wherein a returned Member presented as a question of privilege a proposition to reopen his election case for further testimony.

When contestee submits an affidavit to justify his request that his election case be reopened, the affidavit must be definite and specific.

Where a State law does not provide for reinspection of ballots, may they be examined under authority of the law for taking testimony in election cases?

Evidence of voters as to their votes is of doubtful validity if taken several months after election.

On December 28, 1895,² Mr. John C. Tarsney, of Missouri, presented as a question of privilege a resolution authorizing the reopening of the contested-election case of Van Horn v. Tarsney, so that additional testimony might be taken

¹The following cases during this session are classified elsewhere:

Benoit v. Boatner, Louisiana. (Vol. I, secs. 337, 339.)

Beattie, v. Price, Louisiana. (Vol. I, sec. 341.)

McDonald v. Jones, Virginia. (Vol. I, sec. 436.)

Hoge v. Otey, Virginia. (Vol. I, sec. 724.)

Rosenthal v. Crowley, Texas. (Vol. I, sec. 684.)

Davis v. Culberson, Texas. (Vol. I, sec. 755.)

Goodwyn, v. Cobb, Alabama. (Vol. I, sec. 720.)

Chesebrough v. McClellan, New York. (Vol. I, sec. 723.)

Belknap v. McGann, Illinois. (Vol. I, sec. 744.)

Several Mississippi cases. (Vol. I, sec. 754.)

²First session Fifty-fourth Congress, Journal, p. 83; Record, pp. 401, 402.

and made a part of the record in the case. Mr. Tarsney presented to the House, to show the materiality of the additional testimony, an affidavit, which was read.

Then, after debate, the resolution was referred to the Committee on Elections No. 2.

The committee did not report directly on this resolution, but on February 13, 1896,¹ Mr. Henry U. Johnson, of Indiana, reported on the whole case, and at the same time minority views were presented by Messrs. R. W. Tayler, of Ohio, and James G. Maguire, of California, wherein the real issue of the case was presented—whether or not additional testimony should be taken.

Mr. Tarsney had been returned by an official plurality of 745 votes, which the contestant attacked on the ground of fraud and illegality.

The majority of the committee analyzed the vote of only four precincts of Kansas City, finding it so tainted with fraud that it should be rejected entirely, thereby eliminating the plurality of the sitting Member and giving to the contestant a plurality of 375 votes in the district. The minority of the committee admitted fraud and conspiracy in three of the four precincts and acknowledged that if the vote of these precincts should be rejected the contestant would be shown to be elected. But the minority urged that the case should be reopened, and presented resolutions recommitting the case with instructions—

that additional evidence be taken in said case, under such rules and in such manner as shall be adopted and prescribed therefor by the said committee, such additional evidence to be confined to the condition and custody of the ballots cast in the second, fifth, sixth, seventh, twenty-seventh, and fifty-second precincts² of Kansas City * * *; to the segregation of the illegal from the legal ballots in such precincts, and to the recount of the legal ballots cast in such precincts for Representative in Congress, and to include also duly certified copies of all poll books of such precincts not now in evidence.

Therefore the issue was joined on the question whether the vote of the four precincts should be entirely rejected or whether the ballots should be examined and the vote purged.

As bearing upon this issue the committee give details of an evident and acknowledged conspiracy to commit frauds led by an official known as the recorder of votes and participated in by election officials. In pursuance of this conspiracy the registration lists were padded with fraudulent names; the recommendations of contestant's party for representation on the election boards were disregarded so as to nullify the law guaranteeing representation; the challengers and witnesses which the law allowed to contestant's party were excluded from the polls. By precincts the details of the conspiracy were worked out as follows:

Fifty-second precinct: Here the returns gave Mr. Tarsney 363 votes and Mr. Van Horn 183. The testimony showed that the windows of the polling place were soaped to screen the manipulations of the election officers; that 115 ballots that had been cast for contestant's party were withdrawn and their registration and voting numbers were given to straight tickets of sitting Member's party, which were counted; that other ballots were taken from the box, and that others were burned. The names of 90 persons were found on the poll books who could not

¹ House Report No. 355; Rowell's Digest, p. 515.

² As reported in the minority views, this resolution included only the four precincts discussed in the report of the majority. The additional precincts were included afterwards. (Record, pp. 2131, 2234.)

be found in the precinct, and many of the names were registered from vacant lots. A witness who cast his ballot early in the morning nevertheless found that its consecutive number was 300. Another, who got a view through a clear space in the window, saw one of the judges putting votes into the ballot box when no one was voting. The committee find that—

The poll was perfectly saturated with corruption. As a consequence of this the returns and also the ballots, which passed through corrupt hands, are so tainted with it as to be inadmissible as evidence and unworthy of credit. They can not be looked to for the purpose of purging the poll and ascertaining the honest vote cast. Indeed, the ballots are not in the record at all, nor is there before the committee any satisfactory testimony to which they can resort in order to find out the true result. They therefore cast the entire precinct out of the count.

Seventh precinct: In this precinct 270 registered persons, who were marked as having voted, could not be found, and many were registered from vacant lots, vacant houses, etc. The total vote also was swelled beyond reasonable limits. Testimony showed that ballots cast by voters were withheld by Judges and others substituted and placed in the box. The law required each voter to be numbered on the poll book in the order in which he voted, and the first 200 voters appeared to have performed the astonishing feat of coming to the polls in the alphabetical order of their names; and three men who voted immediately after the polls were opened found themselves numbered, respectively, 205, 206, 207. Of these frauds the committee say:

Their extent baffles inquiry. It is not known at what point the corrupt officers of election stopped short in their dishonest practices. * * * The returns are tainted, the ballots are not in the record, and even if they were could not be received as evidence entitled to credit; nor is there any kind of evidence before the committee by which the poll can be purged and the honest vote be ascertained. It must therefore be thrown out entirely.

Sixth precinct: The testimony showed that 341 persons registered and marked on the poll book as voting could not be found, and many were registered from vacant lots. Persons who were marked as voting testified that they did not vote; the first 200 voters appeared as voting in alphabetical order, and the total vote of the precinct was swelled beyond reasonable limits. There was nothing in the record whereby the precinct could be purged.

Fifth precinct: The testimony showed that 400 of the persons registered as voters could not be found, many being registered from impossible places. Persons were recorded as voting in alphabetical order. There was testimony to show that large numbers of fraudulent ballots were put in the box on the night before election. The majority of the committee in this as in other cases favor throwing out the entire vote.

The entire committee substantially admitted the facts as to the frauds, but not the conclusion that the entire votes should be rejected.

The application of sitting Member for authorization to reopen the case, and the status of the ballots as evidence should the request be granted, were questions producing division.

The majority found that the affidavits of the sitting Member were too indefinite and insufficient to authorize the reopening of the case. As to the request that the ballots be inspected, the majority find that it was made too late, and that the excuse as to lack of a law of Missouri authorizing such inspection, the provisions of

State law being confined simply to inspection of ballots in contests for local offices, was not well founded. "He also cites," say the committee, "decision of the State court that even the grand jury could not inspect them in the investigation of election frauds." The Constitution of the United States, however, provides that each House shall be the judge of the elections, returns, and qualifications of its own Members, and to enable the House of Representatives the more readily to exercise this prerogative Congress passed a statute prescribing the methods to be observed in contests for a seat therein, under which statute this contest was being conducted. The Constitution and this statute enacted pursuant thereto are by the very provisions of the Constitution the supreme law of the land, and the judges in every State are bound thereby, anything in the constitution or the laws of the State to the contrary notwithstanding. The minority of the committee do not agree to this reasoning, and hold that the ballots might not have been exhibited "to any officer or commissioner other than a duly authorized representative of either of the Houses of Congress."

The majority of the committee, construing Mr. Tarsney's application for a recount to apply to 100 of the 200 alphabetical ballots in the Fifth precinct, show that the result could not be changed whatever might be shown by this limited recount. The minority deny that the application was so limited, and declare that it contemplated a general purging.

As to the admissibility of the ballots as evidence, the majority of the committee say:

The proposition is to offer these alphabetical ballots in evidence, or what is practically the same thing, prove their contents and condition by witnesses who saw them at the time of this recount, in October, 1895. Of course it is expected that such evidence will be received and considered by the committee and the House when so taken. It is submitted, however, that such evidence is not competent and credible, and ought not to be regarded, as hereinbefore stated in this report.

The ballots, like the returns, are tainted. They have passed through the hands of fraudulent and corrupt officers of election, and thus their credibility and integrity are destroyed.

This principle is one laid down in all the text-books on the subject, and has found frequent recognition in the determination of contested-election cases by the House, some of which authorities have been heretofore cited in this report. Being founded in reason and experience, this principle ought not to be disregarded in this instance.

The majority further find that in addition to the original taint, the ballots had been tampered with in the office of the corrupt recorder of votes. The minority did not agree to this, but contended that the testimony failed to show that the ballots preserved by the proper officer were not the identical ballots cast and counted.

Mr. R. W. Tayler, of Ohio, who submitted individual views, showed that by the law of Missouri the ballots were all preserved, each marked with the voting number of the voter. An examination of the poll book would reveal his voting number and his ballot would be found with the corresponding number. [The majority combatted this in debate by showing that the ballot offered by the voter was sometimes changed for a different ballot, which took its number and went into the box.] But Mr. Tayler contended that the precincts could be purged satisfactorily, saying:

We can thus, with reasonable definiteness, appraise the fraud and be relieved from the necessity of invoking the dangerous and mischievous doctrine that a poll, tainted with fraud and not purged, must be entirely disregarded. This drastic method is never to be resorted to except in case of absolute and

unavoidable necessity. The disfranchisement of honest voters thereby wrought is too grave a wrong to be permitted if, by any possibility, it can be averted. * * *

I am therefore convinced that, under these circumstances, it was the duty of the committee to take the testimony of the ballots and thereby, if the contestant was honestly elected, to say so with certainty. His title would no longer rest upon conjecture and inference, and the committee and the House would be forever relieved from the imputation of having acted in a partisan spirit.

The doctrine of throwing out entire returns by reason of fraud, while tolerable in theory and sometimes essential in practice, is, nevertheless, most vicious and unhappy in its application.

I doubt if a single instance will be found in a legislative contested-election case where a proposition to strike out an entire return, if of the substance of the case, was decided on any other than party lines.

A principle thus fostered and thus abused is not a principle to be invoked, except where the exigencies of the case absolutely demand it.

The minority report presented by Mr. Maguire conceded that the returns were discredited; but contended that the ballots were preserved as they were cast; that it was possible to separate the legal from the illegal, and purge instead of reject the votes of the precincts.

The majority of the committee also disapproved a proposition to take the testimony of voters. It might have been done immediately after the election, but "now, after the lapse of sixteen months, under changed circumstances, in a population shown to be shifting and migratory, when the facts have faded from the memory of the people, under the opportunity to commit perjury with immunity," the committee considered it useless and unwise.

On February 25, 26, and 27¹ the report was debated at length, the issue being joined principally on the question of a recount of the ballots. On the latter day, by a vote of yeas 110, nays 163, the House disagreed to the resolution of the minority proposing a reexamination of the case; and then, without division, the resolutions of the majority declaring contestee not entitled to the seat and that contestant was elected were agreed to. Mr. Van Horn, the contestant, was then sworn in.

1063. The New York election case of Campbell v. Xiner in the Fifty-fourth Congress.

Testimony which merely raises a presumption that money was used for bribery is not sufficient to affect the determination of an election case.

The Elections Committee declined to recommend the reopening of a case for further testimony on facts not set forth in the notice or substantiated by testimony.

The ordinary provisions of the Australian ballot system for placing names of candidates on the ticket is hardly a violation of section 1, Article XIV of the Constitution., relating to equal protection of the laws.

On January 22, 1896,² Mr. Henry U. Johnson, of Indiana, from the Committee on Elections No. 2, submitted a report on the case of Campbell v. Miner, from New York.

The sitting Member received by the official returns a plurality of 954 votes, and the contestant sought to attack this plurality, alleging bribery and intimidation.

¹Journal, pp. 243, 247, 250; Record, pp. 2131, 2172, 2214—2235.

²First session Fifty-fourth Congress, House Report No. 106; Rowell's Digest, p. 514.

The committee, after a careful examination of the evidence by which contestant sought to sustain the charges, found that while the testimony "raises a presumption that money was illegally used at this election to bribe the voters at one of the precincts, yet there is not sufficient evidence in the record to enable the committee to determine that it was actually so applied, or the extent to which it affected the result, and they are of the clear opinion that the contestant has wholly failed to establish any of the grounds of contest which were set out in the notice in the case."

After the reference of the case to the committee, and before the final hearing, the contestant moved the committee, under oath, for leave to reopen the case and to take further testimony therein to prove the matters alleged in his contest, and also to prove that by the act of the police commissioners of New York supplemented by a mandamus from Judge McAdams, his name had wrongfully been kept off the official ballot, and he was thereby deprived of 5,214 votes which were cast for John Simpson, whose name was placed on the ticket, and that he was prevented from proving these facts while he was taking his testimony in the case by reason of the misconduct of his attorney and his own arrest for contempt by Judge McAdams, on account of things said by him while testifying on his own behalf. This motion of the contestant was resisted by the sitting Member, who filed his affidavit in opposition thereto. The committee overruled this request, as the alleged facts were not set forth in the notice of contest; they were not substantiated by the testimony, which showed on the contrary that contestant had not improved the time allowed him by the law, and that his arrest was at a time not calculated to interfere with the preparation of his case.

One other feature of the case is thus set forth by the committee:

The committee also report that on the final hearing of the case before them the contestant urged that the election law of New York under which said election was held was unconstitutional and void, for the reason that the provision requiring the candidate for Representative in Congress to be nominated for the office by a party convention, or petitioned for by a certain per cent of the voters before his name can be placed upon the ticket to be voted for, constitutes an abridgment of the privileges and immunities of citizens of the United States, and is a denial by the State to persons within its jurisdiction of the equal protection of the laws, as guaranteed in section I of Article XIV of the Federal Constitution. For this reason he insisted that the election was a nullity, and that the seat in controversy in this contest should be declared vacant.

This provision of the New York election law, whose unconstitutionality is urged, is a conspicuous feature of what is known as the Australian ballot system, which system has been in force in a number of States of the Union for a considerable period of time, and the constitutionality of this feature has never, to the knowledge of your committee, been questioned in the courts. It is to them incredible that it should have gone so long without having been challenged if it is in contravention of the Constitution. If it is really open to this objection a large per cent of the Members now holding seats in this body are not entitled to retain the same. The committee themselves entertain no doubt of the constitutionality of the provision, but do not deem it advisable to prolong this report by giving the arguments in support of their views.

On January 21¹ the question was considered in the House, and the resolutions declaring contestant not elected and the sitting Member entitled to the seat were agreed to without division.

¹Journal, p. 137.

1064. The Alabama election case of Aldrich v. Robbins in the Fifty-fourth Congress.

The specifications, of a notice of contest are required to give a reasonable degree of information but not to have the precision of pleadings in the courts.

A notary taking testimony in an election case under the Federal law has jurisdiction within the district, although State law may restrict his functions to a county.

On February 20, 1896,¹ the Committee on Elections No. 1 reported in the case of Aldrich v. Robbins, of Alabama. Besides the merits of the case two preliminary questions were involved:

(1) The sitting Member objected that the notice of contest given by the contestant was not a sufficient compliance with the law of 1851, and the minority of the committee supported this objection on the ground that the notice was too general, there not being "the same precision in averments as is required in other proceedings in which courts decide as to law and the facts." It did not state how many votes the contestant received nor how many the contestee received, and was deficient in allegations as to conduct of election officers.

The majority of the committee considered the allegations in the notice sufficient, citing the following as a fair sample of all:

At precinct No. 12 in said county, commonly called "Old Town," there were actually cast at said election 35 votes. You were credited with and allowed 278 votes, and myself with none. Of the 278 votes allowed you at least 243 votes were in fact never cast, and of the 35 votes actually cast I claim and charge that I received a large portion thereof.

The majority consider that this notice did "specify particularly the grounds" even more amply than the statute required. What the law requires," says the report, "is a reasonable degree of information; and that, as to this and the other precincts, was given."

(2) The sitting Member also objected to the competency of the notary who took the testimony in Dallas and Calhoun counties, claiming that, as he was authorized by the laws of Alabama to act only in Shelby County, he had no authority to act in any other county. The minority of the committee argued in favor of this objection, denying the authority of the precedent in the case of Washburn v. Voorhees, and quoting decisions: American Land Company v. People et al. (102 Alabama), United States v. Curtis (107 U. S.), United States v. Hall (15 U. S.).

The minority conclude:

The true test to apply to this question is: If a witness who had been sworn before this notary public were indicted for perjury or false swearing before him in this case where the oath was administered and the testimony given in Dallas or Calhoun counties, could he be convicted? He could not, in either State or Federal court.

The majority of the committee held as follows:

It was also objected for the contestee that the notary before whom the evidence was taken was without authority to take that obtained out of the county for which he had been appointed to act under the laws of the State. But he was not acting within the restrictions imposed upon him by the laws of

¹First session Fifty-fourth Congress, House Report No. 572; Rowell's Digest, p. 502.

the State of Alabama in taking this evidence. The laws of the United States prescribed a special mode of proceeding for this class of cases, and aside from this authority no evidence in a contested election could be taken before the officers enumerated in the statute.

An object of the statute was to point out the persons who should be empowered to take the evidence, not to exercise their functions as State, city, or county officers, but to execute the full authority created for this purpose by Congress. The notary is one of these officers, selected, however, to act under Federal, not under State, authority, and the power to act has been given to him commensurate with the object to be attained.

By the language of the statute the contestant is empowered to apply for a subpoena to any notary, etc., who may reside within the Congressional district in which the election to be contested was held. The officer is also required to issue subpoena directed to all such persons as shall be named to him, requiring their attendance at some time and place mentioned in the subpoena. And the only restriction imposed is that the witness shall not be required to attend out of the county of his residence.

As to the power of the officer, he may act anywhere within the Congressional district. His authority has been restricted to no subdivision of it whatever. He may issue subpoenas for all such witnesses as shall be named to him, and the subpoenas must be returnable before himself. As that is the mode of proceeding which has been indicated, any officer mentioned in the statute may act, and in acting has been given complete authority to act wholly and effectually. The law further provides that the witnesses who attend shall be examined on oath by the officer who issued the subpoena, unless he may be absent, etc.

From the generality of these regulations it is clear that a single officer has been empowered to issue all the subpoenas and take all the evidence. They are quite explicit, and create a system in and of themselves in no measure dependent on the laws of the State (U.S. Rev. Stat., 19, 20, secs. 110, 115, 120), and this effect was accorded to the statute in the contest of Washburn against Voorhees (2 Bartlett, 54).

1065. The case of Aldrich v. Robbins, continued.

Instance wherein the color of the voters was taken into account as creating a presumption in relation to their votes.

Where testimony showed that fewer persons went to the polls than the total of returned votes, the excess of votes was deducted from the party profiting.

Discussion as to whether a poll should be purged or rejected when the returns give the total of votes far beyond the number of voters attending.

It not being shown that the ballots had been tampered with and State law requiring their preservation, secondary evidence of the vote was not considered.

Instance wherein evidence of declarations of voters and their affidavits; as to their votes were not accepted as showing the state of the poll.

The presumption in favor of the truthfulness of official returns disappears on proof that the election officers violated the law.

As to the merits of the case, it appeared from the official returns that the sitting Member received 10,492 votes and the contestant 6,756, a majority of 3,736 for the sitting Member.

The minority of the committee conceded frauds enough proven to reduce sitting Member's majority to 559 votes. A portion of the majority, differing from their associates as to the amount to be deducted in cases of fraud, found a majority of 601 votes for the contestant, while a second portion of the majority conceived that the contestant should be credited with a majority of 1,131 as a result of the purging of the polls.

There were six counties in the district, of which the contestant carried four. A fifth county, Calhoun, was carried by the sitting Member by less than 400 majority,

far below the number necessary to overcome contestant's majority in the other counties. But the sixth county, Dallas, returned for sitting Member 5,462 votes, and for contestant 72, thus giving sitting Member a majority of 3,736 in the district.

The voting population of Dallas County was shown to be about 10,000, of which 7,500 were colored and 2,500 white. With rare exceptions the colored voters were Republicans. The white voters were divided among Democratic factions, which were not unanimous in support of the sitting Member. The county contained 28 precincts. Of these, 13 returned 221 votes for Robbins and 42 for Aldrich. So it appeared that Mr. Robbins's returned vote of 5,462 from Dallas County came largely from the other 15 precincts; and it was only in relation to these precincts that evidence was taken in this county.

The supporters of contestant, who was a Republican, had feared that their votes in this county would be counted for the Democratic party, so they generally remained away from the polls. They generally kept watch on the polls, however, and were able to afford testimony as to the total number of voters who went to the polls in the various precincts.

Thus, at the Summerfield precinct, where the official return gave Robbins 160 votes and Aldrich 2, the testimony showed that only 31 persons went to the polls. This generally was the method adopted to show the fraudulent nature of the return. As to the conclusions to be derived from such a state of fact, there was a difference among the majority members of the committee. The larger portion of them say:

The certificate of the inspectors, therefore, can not be relied on, and since there is no evidence as to whether these persons voted after entering the polling place, or for whom the votes were cast, we are unable to count any for either candidate.

But two members considered it the safer practice to deduct from the sitting Member only 129 votes, the surplus of the returned poll over the actual number of voters who went to the polls.

This question of the amount of deduction is more fully considered in connection with the vote of the city of Selma, which was polled at one precinct. The official return gave Robbins 2,014 votes, Aldrich 5. The testimony showed that less than 800 voters went into the voting place during the election, and that there were not over 700 names on the poll list that represented qualified voters of Selma. Four members of the committee considered the return of Selma so saturated with fraud that they should throw it all out except the votes of 4 men who swore how they voted. It was urged that, although it might be shown that over 700 men entered the voting place, there was no testimony to show how many of them voted; and even if it should be assumed that all of them voted, there was no testimony to show for whom they voted. But five members of the committee considered that 767 votes should be allowed as cast, and that the surplus of 1,247 votes, evidently unlawfully added to the honest vote, should be deducted from the vote returned for the sitting Member.

As to the precincts of the Third Ward of Anniston and Montevallo, contestant made an effort to correct the official returns by introducing the testimony of citizens who swore that they voted for Aldrich. In Montevallo the return gave Robbins 208 and Aldrich 199. A witness swore that 273 persons publicly declared that they

voted for Aldrich, and the affidavits of 283 persons who swore that they voted for Aldrich were read. In the Third Ward of Anniston 14 votes were returned for Aldrich and 42 for Robbins. A witness swore that there were 85 colored voters in the ward, and that he recognized 23 of them on the poll list, all of whom were Republicans but 1. A majority of the committee held that, as the State laws required the preservation of the ballots, they should be resorted to in the first instance, and that secondary evidence could not be offered of the contents of the ballot boxes until it should be shown that they had been so tampered with as not to speak the truth. Two members of the committee, including the chairman, favored counting for the contestant the votes sworn to by uncontradicted testimony.

The sitting Member relied for his defense only on the presumption in favor of the truthfulness of the official returns. The majority say that this is only a presumption and disappears at once on proof that the election officers violated the law.

In the debate further facts in the record of the case were referred to—that the requirements of the Alabama law in relation to registration were violated; and that the contestant's party had not been treated fairly in the appointment of election inspectors.

The majority of the committee concurred in presenting resolutions declaring sitting Member not elected and the contestant elected and entitled to the seat.

On March 12 and 13,¹ the report was debated at length in the House, and on the latter day a vote was taken on a proposition of the minority to substitute resolutions declaring the sitting Member elected and entitled to the seat. This substitute was decided in the negative, yeas 58, nays 173. Then the resolutions of the committee were agreed to without division, and Mr. Aldrich was sworn in.

1066. The South Carolina election case of Moorman v. Latimer in the Fifty-fourth Congress.

A ballot is not invalidated by reason of an abbreviated designation of the office which omits the number of the Congress and the name of the State.

Where many persons are disfranchised by an unconstitutional election law, the House will not bring them into the account on the mere opinion of witnesses as to the number.

On March 4, 1896² Mr. Charles K. Bell, of Texas, from the Committee on Elections No. 3, submitted the report in the case of *Moorman v. Latimer*, from South Carolina.

In the first place contestant alleged that the ballots cast for Mr. Latimer were invalid. The committee say:

“The tickets voted for Latimer were printed thus: “Representative in Congress, third district, A.C. Latimer,” and contestant claims that they should not have been counted for him, because they did not state that they were voted for a candidate for the third district of the State of South Carolina, nor for a Representative to the Fifty-fourth Congress. In the case of *Blair v. Barrett* a ballot headed “For Congress, Francis P. Blair,” was held to have been properly counted for him. We think the ballots complained of were clearly sufficient, and that they were properly counted for contestee.

¹ Record, pp. 2739, 2783–2800; Journal, p. 306.

² First session Fifty-fourth Congress, House Report No. 626; Rowell's Digest, p. 530.

Contestant alleged that at the various precincts in the district the managers of election refused to allow from 6,000 to 7,000 voters of contestant's party to cast their ballots because they did not have registration certificates, as required by the laws of South Carolina, which laws, he contended, were unconstitutional, because in conflict with the Constitution of the United States and of said State. The contestant also alleged that a number of properly registered voters, who would have voted for him, were denied the privilege by the managers of election for various reasons.

Adopting the most liberal construction of the evidence and conceding the registration laws to be invalid the committee could find only 4,578 votes lost to the contestant for the above reasons, and the addition of these to his poll would still leave the sitting Member a plurality of 215 votes.

The committee do not, however, approve the proof by which contestant attempted to establish some of his allegations, and say:

Contestant has sought to introduce the testimony of witnesses who give their opinion as to the number of persons who would have voted for him at certain places without stating who they were or giving any other particulars, but the committee is of opinion that testimony of this character is not admissible.

The committee therefore recommended resolutions confirming the title of sitting Member to the seat, and on April 15, 1896,¹ the House concurred in the report.

1067. The Maryland election case of Booze v. Rusk, in the Fifty-fourth Congress.

The House counted the votes of persons who swore that they intended and tried to vote for contestant but were prevented because other persons had voted on their names.

The House declined to reject the poll of a precinct whereof the registration was impeached by a police census of doubtful weight.

On March 18, 1896,² Mr. George W. Prince, of Illinois, from the Committee on Elections No. 2, submitted the report of the committee in the case of Booze v. Rusk, of Maryland. On the face of the returns the sitting Member had a majority of 518.

The contestant, seeking to attack this majority, charged first that he was deprived of a large number of ballots cast for him at the election and that a number of ballots were improperly counted for sitting Member. The committee found, by a recount, a gain of 131 votes for contestant.

Secondly, contestant charged that a number of legal bona fide voters of the district who intended to vote for him at the election were refused the right by officers of the election. The committee found from the evidence of witnesses who testified that they were denied the right to vote at their respective precincts simply because some one had already voted on their names; that 40 persons were thus excluded and that they would have voted the ticket of contestant's party. So the committee credited 40 votes to him.

The committee, in respect to the third contention of the contestant, that illegal and fraudulent votes were cast for the sitting Member, found 161 such votes, and deducted them from his vote.

¹ Journal, p. 399.

² First session Fifty-fourth Congress, House Report No. 849: Rowell's Digest, p. 519.

In respect to other charges of fraud and intimidation the committee found the evidence too slight to sustain them.

As to the fact that there was a difference between the registration in the fifth precinct of the Second Ward of Baltimore and the police census, the committee found that under the law of Maryland the voter, in order to be registered, had to appear before the registration board, consisting of three members, two of the majority party and one of the minority party, and make oath that he had been a resident of the State for one year and of the voting district for six months, and that he had attained the age of 21 years. There was ample opportunity, under the law, to purge the registration list by applying, first, to the board of registration; should they refuse, then to the Maryland court of appeals. This court, in the case of *Langhammer v. Munter*, had decided:

The fact that a man's name does not appear upon the police census of registered voters is too uncertain to be entitled to much weight.

The court declined to strike names from the registration list because they did not appear on the police census returns. The committee did not consider that the vote of this precinct (against which other allegations were made but not sustained by the evidence) should be thrown out.

On March 18¹ the House concurred with the committee that the sitting Member was entitled to the seat, contestant not having proved enough to overcome the returned majority.

1068. The Alabama election case of Robinson v. Harrison in the Fifty-fourth Congress.

The House counted returns received by the State canvassers too late to be included in their summary.

Disorder before the opening of the polls and for the purpose of affecting the choice of election officers and not affecting the poll itself Was disregarded by the House.

Participation by an election judge in bribery did not justify rejection of the poll when the contaminated votes could be separated.

Friends of contestant not being represented on an election board and there being evidence of fraud in the registration and voting, the poll was rejected.

Although the boards of election officers may be constituted unfairly, the House will yet give full effect to legal votes.

On April 4, 1896,² Mr. Fred C. Leonard, of Pennsylvania, from the Committee on Elections No. 1, submitted a report in the case of *Robinson v. Harrison*, of Alabama. On the face of the official returns Mr. Harrison had a majority of 5,006. The contestant, Mr. Robinson, claimed that this majority was secured by intimidation of voters, bribery, illegality, and fraud; and attempted to overcome the sitting Member's majority by claiming the vote of Geneva County, which had not been included in the official canvass; and by demanding that the vote of certain precincts in other counties should be in whole or in part rejected.

¹Journal, p. 320.

²First session Fifty-fourth Congress, House Report No. 1121; Rowell's Digest, p. 505.

As to Geneva County, it was not disputed that the returns were not included in the official return of the Congressional district, for the reason that they were received too late to be canvassed. From the certificate of the probate judge the committee found that the county gave contestant 687 votes, and the sitting Member 285, a majority of 402 votes for the contestant. The committee determined that these votes should be allowed.

As to the precincts attacked by contestant, they were 10 in number, generally in the counties where colored voters predominated.

Intimidation and bribery were alleged in Opelika precinct, where 505 votes were returned for the sitting Member and 318 for the contestant. It was proved that there had been disorder at the polls, but the evidence proved—

that this occurred in the morning before the voting commenced, and the object of the disorderly demonstrations was to secure the proportionate appointment of election officers suggested in behalf of the contestee in place of those which had been selected under the authority of and by the friends of the contestant. That was finally conceded, and the disorder ceased, and the polls were opened and the election proceeded.

Therefore the committee did not find a case of loss of votes by intimidation. It was proven in this precinct, however, that one of the election officers so selected was engaged during part of the day in bribing colored voters, by handing to each a slip of paper showing that the bearer had voted as desired, and which, on presentation to a confederate outside, insured a sum of money to the bearer. The evidence showed about 25 votes bought in this way. The committee say:

It was a criminal proceeding, publicly and shamelessly carried on by the friends of the contestee. But the votes of legal voters, uninfluenced by mercenary motives, can not be lawfully sacrificed in consequence of this misconduct. It had no effect upon them, and is in no respect in conflict with their integrity. Their votes can be readily separated from those that were purchased, and land where that can be done the law demands that it shall be done.

The ballots appearing to have been counted as cast, the committee deducted from the sitting Member's vote the 25 votes obtained by bribery. With this correction the poll was counted.

In four precincts—Girard, Union Springs, Suspension, and Midway—the friends of the contestant had no representation on the election board. In two of them there was evidence of fraud, both in the registration and the poll, so that no dependence could be placed on the returns. Therefore, as no proof of votes actually given for the sitting Member was produced, the committee rejected the returns from these two precincts. In the other two precincts where the election officers were wholly of sitting Member's party, a certain number of votes appeared to have been legally thrown out, and the sitting Member was credited with his proportion of the legal votes.

The other impeached precincts were purged to the extent of the frauds shown by the testimony. But with all the purging made by the committee, there still remained a majority for the sitting Member. "It is true," say the committee, "that the conduct of the election in the controverted counties can not be otherwise than condemned, for frauds were committed, arising probably out of the discrimination in the personality of the election boards. That was a grave cause for complaint, but as the legal votes can be separated from the frauds, they are entitled to their full weight and effect."

Therefore the committee unanimously reported resolutions declaring contestant not elected and the sitting Member entitled to the seat.

On April 4¹ the report was agreed to by the House without division or debate.

1069. The Illinois election case of Rinaker v. Downing in the Fifty-fourth Congress.

Following the supreme court of the State the House counted a ballot marked as to two party columns, one of which did not contain the name of a candidate for Congress.

In construing a State ballot law the House followed the principle enunciated by the State supreme court as to giving effect to the voter's intent.

The House declined to count as cast the vote of a person kept from the polls by a bogus telegram sent by persons unknown.

On April 21, 1896,² Mr. Edward D. Cooke, of Illinois, from the Committee on Elections No. 1, reported in the case of *Rinaker v. Downing*, from Illinois. In this case the sitting Member had a plurality of 40 votes. The contestant alleged errors in interpreting, counting, refusing and rejecting ballots, and illegal votes.

In examining the case the committee passed on nine questions of law and fact. On the conclusions as to six of these questions the minority of the committee made no issue. On three questions, however, the minority report, presented by Mr. William H. Moody, of Massachusetts, joined issue with the majority, and to these three questions the first hearing in the House was devoted.

For convenience the controverted questions will be examined first:

(1) The testimony showed that 30 of the Australian ballots (which had party columns) were each marked with a cross in the Republican and Independent Republican circles at the head of the party column. Upon the latter ballot was the name of only one candidate, a candidate for the office of State treasurer. The committee allowed these 30 votes to the contestant, following the decision of the supreme court of Illinois in the case of *Parker v. Orr*, wherein it was expressly decided that in such cases it was proper and lawful under the election law of Illinois "to count the ballots so cast for the person or candidate against whom no candidate appears on the opposite ticket, thereby giving effect to the obvious intention of the voters so marking their ballots."

(2) The disposition of irregularly marked ballots: The committee in performing this duty followed the precedents laid down in the case of *Parker v. Orr*, wherein the supreme court of Illinois affirmed the principle "that if the intention of the voter can be fairly ascertained from his ballot, though not in strict conformity with law, effect will be given to that intention." In cases where the principles of *Parker v. Orr* did not apply, the committee say that "the language of the statute is followed where its terms are clear and unmistakable, and in all cases of doubt the ballots have been rejected entirely, either as being probably marked contrary to law or as being cases in which the intention of the voter could not be clearly ascertained."

(3) The committee rejected certain votes ascertained to have been cast illegally.

(4) Sitting Member demanded that he be credited with the vote of a supporter who had been prevented from casting his vote by the receipt of a false or bogus

¹ Journal, p. 370; Record, p. 3574.

² First session Fifty-fourth Congress, House Report No. 1400; Rowell's Digest, p. 506.

telegram which summoned him to a distant place. The delivery of the telegram was proven, but as there was no testimony or circumstances to connect the act with the contestant or either political party, and as testimony to show the true purpose of the delivery of the telegram might easily have been obtained, the committee did not consider the claim of sitting Member sustained.

(5) The sitting Member claimed that 14 votes should be credited to his poll in Greene County, an error of that amount being alleged in the official return. The testimony did not satisfy the committee that such an error had been made.

1070. The case of Rinaker v. Downing, continued.

No fraud or harm being shown, the House, following the spirit of a decision of the State court, declined to reject ballots irregularly printed, although the law seemed mandatory.

May a notary, acting under the authority of the law of 1851, require the production of ballots against the injunction of the State court?

In a case wherein an unofficial and ex parte recount was relied on, because the ballots themselves could be reached officially only by the House itself, the House reopened the case for examination of the ballots.

The House declined to overrule the election officers who counted votes of electors assisted in marking without taking the required preliminary oath.

Form of resolution by which the House ordered the production of ballots as evidence in an election case.

(6) The law of Illinois provided that on the ballots "the party appellation or title shall be printed in capital letters not less than one-fourth of an inch in height," and also that "none but ballots provided in accordance with the provisions of this act shall be counted." In Cass and Pike counties the word "Independent" in the party designation "Independent Republican" was printed in letters about an eighth of an inch in height, instead of the required quarter of an inch. The throwing out of these counties would deprive sitting Member of a total plurality of 340, and give the seat to contestant; but the committee conclude, after examining the cases of *Clark v. Robinson* (88 Ill., 500) and *Parker v. Orr*, that while the law seemed not merely directory but rather mandatory, yet the court of Illinois had laid down such a liberal rule of construction of the statute as to lead the committee to conclude that—

The supreme court of Illinois, if called upon to construe the misprinted ballots in Cass and Pike counties, would inquire whether the evidence disclosed any intention to commit a fraud upon the electors, and whether any fraudulent result would or did necessarily ensue from the misprinting of the ballots contrary to the express provision of the statute; and finding from the record in this case, as the undersigned have done, that there is no reason to infer or believe that the ballots in Cass and Pike counties were, by the officials, printed and provided with any intent whatever to perpetrate a fraud or deception upon the voters, or that any considerable number of Republican voters in this instance, by mistaking, the heading of the ballot, made the cross in the "Independent Republican" circle instead of in the "Republican" circle, that court would conclude, as the undersigned have concluded, that the votes on all those ballots were properly counted as cast, and should not now be rejected or thrown out. To now hold to the contrary would operate to disfranchise all of the voters of Cass and Pike counties, through no fault of theirs, but through the mere oversight and error of the officials whose duty it was to follow the law exactly or substantially in printing the ballots.

The correction of the returns in accordance with the decisions in the six questions just considered, did not result in any such changes as to overcome the plurality of the sitting Member; and the essential points on which the decision of the case turned, were involved in three additional questions:

(1) The law of Illinois had this provision:

In all cases of contested election the parties contesting the same shall have the right to have the package of ballots cast at such election opened, and to have all errors of the judges in counting or refusing to count any ballot corrected by the court or body trying such contest; but such ballots shall be opened only in open court, or in open session of such body, and in the presence of the officer having the custody thereof.

When subpoenas were served on behalf of the contestant on the county clerks of the counties in the district, requiring the production of the ballots voted, the clerks disobeyed the subpoenas because at the instance of the sitting Member the Illinois court had issued an injunction restraining the clerks—

from opening said ballots or permitting the same to be opened or recounted, or from removing or permitting said ballots to be removed from the place where they are now kept by the defendants until the same is ordered to be opened and recounted by a court of competent jurisdiction of the State of Illinois, or of the United States or by the House of Representatives in Congress of the United States after the 3d day of March, A. D. 1895.

As the time for taking testimony under the laws of the United States expired for the contestant on February 25, 1895, it is evident that the injunction procured by the sitting Member prevented an examination of the best possible evidence by the contestant.

Whether the subpoena of the notary acting under authority of a law of Congress might be rendered futile by the law and court of Illinois is a question discussed at length in this case. The minority of the committee, while not deeming it material to pass on the merits of the injunction, nevertheless quote *Ex parte Siebolt* (100 U. S., 371) as authority for the position that—

the power of Congress is paramount in respect of the manner of holding elections for Senators and Representatives where its power is exercised by legislation, yet it is clear that under the Constitution where national legislation is silent the State has the right to regulate such elections at will. It may well be argued that as Congress has not seen fit to pass any law with respect to the character of the ballot, its custody and preservation, the whole subject is left within the control of the States, and if the House of Representatives sees fit to seek the evidence of ballots cast under the authority of the State, it can only do so in accordance with the conditions prescribed in the laws of the State. Unquestionably the State has a great interest in the ballots, because they are the evidence not only of the election of Representatives in Congress, but of many State officers.

The committee cite the case of *Steward v. Childs* where in a similar case the refusal of an Illinois county clerk to produce the ballots had not been referred to. The minority denied that the injunction had suppressed the ballots as evidence, but that they were preserved intact and the House might have had them months ago. The right of the contestant to go to them was postponed, not denied.

The majority of the committee took the following view of the relations of the injunction to the Federal law:

The contestee, by his bill in chancery seeking the injunction, by direct language insists upon such a construction of the statute of Illinois regulating and restraining the opening and counting of the ballots as shall bring that statute in direct conflict with the statute of the United States, and which

latter statute plainly and clearly gives to both parties to an election contest over the seat of a Member of the House of Representatives the right to select any one of the officers mentioned in the Federal statute before whom to take the testimony, and clothes that officer, when so selected, with the full power to require the production of any paper or papers pertaining to the election, or to produce and deliver up certified or sworn copies of the same in case they may be official papers.

In view of the plenary and clear terms of the Federal statute it is the opinion of the undersigned that the statute of Illinois should be construed to mean that where the ballots cast at any election for Member of the House of Representatives are called for by a subpoena duces tecum issued by a notary public selected under sections 110, 111, and 123 of the act of Congress regulating the contests of seats in the House of Representatives the notary so selected fully represents the House of Representatives and constitutes a tribunal or body for the purpose and with the power of procuring and reducing to written form such evidence as the ballots may contain, so as to comply with the obvious intention of the State statute, inasmuch as it is obviously impossible for the ballots in a contested election case in the House of Representatives to be opened "in open session of such body and in the presence of the officer having the custody thereof."

The powers conferred by the Federal statute upon the notary public or other officers mentioned to call for and enforce the production of all the papers pertaining to the election are full and complete and render such officer to that extent a "body trying such contest," to the extent of his obtaining and recording the evidence in the case. That is plainly and clearly the meaning and effect of the act of Congress, and the State statute should be construed so as to be in harmony rather than in conflict therewith.

To construe the State statute so as to prohibit the notary or other officers taking the testimony in a Congressional election contest from obtaining the evidence contained in the ballots would be to give to the State statute the effect of repealing or nullifying the Federal law regulating Congressional election contests. Congress has the power to regulate the taking of testimony in case of the contest of the election of any Member of the House of Representatives. That power has been exercised by the enactment of the statute above quoted, and when in conflict with its provisions all conflicting State statutes or decisions to the extent to which they do conflict must be held to be nugatory and void. * * *

In the opinion of the undersigned, Congress has by statute made ample provision for an inspection, examination, and recount of the ballots far in advance of the meeting of Congress, and that it is not intended or to be tolerated that the time of the members of the Election Committee shall be consumed in the recounting of ballots covering an entire Congressional district during a session of Congress when each Member has a duty to perform in the everyday course of its proceedings; nor is it to be permitted that a device, such as that of obtaining an injunction, contrary to the act of Congress, shall operate to prolong a contest practically until near the end of the term for which the Member was elected.

The conclusion and finding of the undersigned, therefore, is that the injunction procured by the contestee prohibiting the opening and counting of the ballots in this case was illegal and wrongful, and that, as a consequence thereof, the contestant was at liberty to offer such secondary evidence of the contents of the ballots and of the facts shown by the evidence suppressed as would in a court of law be allowed in a case in which one of the parties had concealed or refused to produce legal and material evidence within his possession or control.

(2) The contestant, being kept from the best possible evidence by the injunction, proceeded to take secondary evidence in the form of a recount of the votes in Macoupin and Cass counties. In those counties contests had arisen over county officers and incident to those contests there was a recount of the votes before the county courts. During this recount Mr. L. C. Murphy, representing the contestant, was present unofficially and from a high seat overlooked the table at which the official recount for county officers was made. In Cass County Mr. E. M. Dale kept a similar tally of the Congressional vote. This unofficial count was not complete for all the precincts in either county, but showed as far as it went a deduction of 17 votes for the sitting Member in Macoupin and Cass counties and an addition of 22 votes for contestant in Macoupin County.

Both in the report and in the debate on the floor this unofficial count was assailed by those representing the minority views. It was contended that the result of the injunction did not authorize the reception of this unofficial count; that the circumstances attending the count showed that it could not have been accurate; that the ballots were shown to be in existence and carefully preserved for the whole district; that the unofficial count related to only two of the eight counties of the district, and was *ex parte*, the sitting Member not being represented. The minority quoted McCrary on elections to the effect that "the official acts of sworn officers are presumed to be honest and correct until the contrary is made to appear. It has accordingly been held that a return can not be set aside upon proof that a recount made by unauthorized persons, sometime after the official count has been made, showed a different result from the official count," etc.

(3) A sharp difference also arose between the minority and majority on the question of assisted voters. The law of Illinois provided:

Chapter 46, paragraph 311, section 14, Every voter who may declare upon oath that he can not read the English language, or that by reason of any physical disability he is unable to mark his ballot, shall, upon request, be assisted in marking his ballot by two of the election officers of different political parties to be selected from the judges and clerks of the precincts in which they are to act, to be designated by the judges of election of each precinct at the opening of the polls.

It appeared that 38 Republican votes and 6 Democratic votes were cast by voters who were assisted without being sworn as the law provides. The majority of the committee considered that the election officers had acted correctly in counting these votes, thereby construing the statute as directory merely, and not mandatory. The committee say that these assisted voters were qualified voters, and it had not been attempted to be shown that any fraud was perpetrated or attempted in this regard. The minority of the committee held that the law was mandatory and that the case was *res adjudicata* so far as the House was concerned. Little light was thrown on the question by the older decisions, since the recently introduced Australian ballot system not only permitted but enforced secrecy. The minority then quoted decisions on similar provisions of law: *People v. Canvassers* (129 N. Y., 345); *Attorney-General v. May* (99 Mich., 538); *State v. Gay* (60 N. W. Rep. 676); *Parker v. Orr* (Illinois). The minority also cite as a case directly in point the decision of the House in the case of *Steward v. Childs*.

The majority of the committee denied the authority of these decisions as bearing on the case under discussion.

The minority recommended the adoption of the following resolution:

Resolved, That the contested election case of John I. Rinaker *v.* Finis E. Downing be recommitted to the committee on Elections No. 1, with instructions either to recount such part of the vote for Representative in the Fifty-fourth Congress from the Sixteenth Congressional district of Illinois as they shall deem fairly in dispute, or to permit the parties to this contest, under such rules as the committee may prescribe, to recount such vote, and to take any action in the premises, by way of resolution or resolutions, to be reported to the House or otherwise, as they may deem necessary and proper.

On May 12 and 13¹ the report was debated at length in the House, the two points, as to the unofficial recount and as to the assisted voters, being the only subjects. If the majority of the committee was overruled as to either of these points, the contestant would fail to overcome the sitting Member's plurality.

¹Journal pp. 484-488; Record pp. 5127, 5185-5208.

The question being taken to substitute the resolution of the minority for those of the majority declaring the election of the contestant, the substitute was agreed to, yeas 139, nays 35. Then the resolutions of the majority as amended by the substitute were agreed to, yeas 137, nays 13, and 33 present and not voting being noted by the Speaker to form a quorum.

On May 19, 1896,¹ the Committee on Elections No. 1 unanimously reported the following resolution, which was agreed to by the House:

Resolved, That F. J. Robinson, county clerk of the county of Cass, State of Illinois [here follows names of the other county clerks], be, and they are hereby, each ordered to be and appear before Elections Committee No. 1, of this House forthwith, then and there to testify before said committee, or such commission as shall be appointed, and the truth to speak touching any matters then to be inquired of them by said committee in the contested election case of John I. Rinaker V. Finis E. Downing, now before said committee for investigation and report; and that they, and each of them, respectively, as such county clerks, bring with them all the ballots and packages of ballots cast in each of said counties at the general election held in said counties on the 6th day of November, A. D. 1894, for the election, among other officers, a Representative in the Fifty-fourth Congress from the Sixteenth district of Illinois, now in their custody, respectively; and that they each also bring with them, respectively, in addition to said packages of ballots, all poll books and tally sheets, and such other books and papers as relate to said election in their respective counties now in their custody or under the control of either of them, respectively; that said ballots be brought in the packages in which the same now are; that said ballots, poll books, and tally sheets be examined, and said ballots counted by or under the authority of said committee on elections in said case; and to that end, that subpoenas be issued to the Sergeant-at-Arms of this House, commanding him to summon said persons to appear with said papers as witnesses in said case, and that the expenses of executing such process, including necessary subsistence and mileage of said witnesses and all other expenses of this proceeding, be paid out of the contingent fund of this House; and that said committee be, and hereby is, empowered to send for all other persons and papers as it may find necessary to the proper determination of said controversy; and also be, and it is, empowered to select one or more competent committees to take the evidence and count said ballots or votes, and report the same to this committee on elections, under such regulations as shall be prescribed for that purpose; and that the aforesaid expenses be paid on the requisition of the chairman of said committee after the auditing and allowance thereof by the said Elections Committee No. 1.

On June 4² the Committee on Elections No. 1, submitted a report showing that the ballots of all the counties of the district had been recounted, except the county of Morgan." "In that county" say the committee, "although the custody of the ballots has been such as to prevent any unauthorized handling, they were returned and kept in so slovenly a manner that the committee deemed it wise in that county to accept the official returns instead of the recount, although the latter differed only slightly from the returns, and not enough to affect the result."

The recount showed such gains for the contestant as to give him a plurality of five votes, if the ballots of those voters, who were assisted without taking the oath, should be counted. The report submitted by Mr. Moody, who had submitted the minority views of the first report, says:

The minority of the committee, while still adhering to the opinion that the law requires the rejection of these ballots, which was fully expressed in a former report to the House, yet believe that the House would not adopt their opinion in that respect in the absence of a controlling decision by the court of final resort in the State of Illinois.

The majority of the committee, in this report as in the preceding report, contended that the ballots of the assisted voters should be counted.

¹ Journal pp. 507, 508; Record p. 5416.

² House Report No. 2247; Journal pp. 580-582; Record pp. 6168-6174.

The resolutions declaring the sitting Member not elected, and the contestant elected and entitled to the seat, were agreed to, yeas 167, nays 52.

Mr. Rinaker, the contestant, was sworn in the same day.

1071. The Virginia election case of Cornet v. Swanson in the Fifty-Fourth Congress.

Where the notice of contest does not claim sufficient to change the returns, the House does not think it necessary to examine the testimony.

Ordinarily a decision of the State supreme court that the State election law is constitutional is held conclusive by the House.

An argument that an election held under an unconstitutional State law might yet be considered by the House as an election de facto.

An argument that under certain conditions the House might be justified in overruling a State court's decision that a State election law is constitutional.

The committee did not consider it necessary to pass on the form of a notice of contest which did not relate to issues sufficient to change the result

On April 24, 1896,¹ Aft. William A. Jones, of Virginia, from the Committee on Elections No. 3, submitted the report of the majority of the committee in the case of *Cornet v. Swanson*, of Virginia. The sitting Member was returned by an official majority of 2,333 votes over the contestant.

Of the 144 precincts in the district the contestant took testimony in only 12, and the report of the majority says:

If the contestant is given the full benefit of every claim that can be made from the testimony in this case, as well as the benefit of every doubt that can arise therefrom, and if every claim that he makes or that may be made for him by the committee is conceded to him, he will still lack more than 1,600 votes with which to overcome the returned majority of the sitting Member. If he is given every vote concerning which there is a particle of testimony, contradicted or uncontradicted, in the record tending to prove that he received, or that he would have received but for the alleged unjust law under which the election was held, or that he was deprived of by reason of the alleged improper or illegal conduct of the managers of the election or the friends of the contestee, he will still fall far short of the requisite number to overcome the contestee's majority.

Therefore it is unnecessary to go into the examination of the 12 precincts, which the committee made perfunctorily. The minority of the committee in their views make no mention of these precincts, confining their arguments entirely to other questions.

These other questions were (1) as to the constitutionality of the election law of Virginia, and (2) as to the sufficiency of the notice of contest.

(1) As to the constitutionality of the election law:

The majority of the committee, after stating the fact that the supreme court of Virginia had, by a unanimous decision, affirmed the constitutionality of the law in every particular, declared that it was not necessary to pass on the question in order to reach a just conclusion in the case

But it is not deemed necessary, for the reason stated, to enter upon any extended discussion of these legal and constitutional questions, or to inquire to what extent the decisions of a State court should be regarded by the House of Representatives or by this committee. It would not necessarily follow,

¹First session Fifty-fourth Congress, House Report No. 1473; Rowell's Digest, p. 534

in the opinion of the committee, were it conceded that the Walton election law was unconstitutional, and therefore inoperative as to the particular features of that law here assailed, that no valid election had been held in the Fifth Congressional district of Virginia. The sections which are assailed by reason of their alleged unconstitutionality are not so essential to the operation of the law under which this election was held, or so inseparably connected with its other provisions and requirements, that even should they be thought to be inoperative this committee would be justified upon that ground in declaring that there had been no legal election.

In the course of the debate it was urged¹ that the election having been de facto, even conceding the law to be unconstitutional, the contestant must still make out a case to enable the House to seat him; and that to unseat the sitting Member would bring the House face to face with the proposition that all the Virginia Members, including at least one seated by the House, owed their seats to elections held under that law. Mr. Samuel W. McCall, of Massachusetts, in debating the case, admitted the power of the House to disregard the decision of the Virginia court as to the constitutionality of the law, but questioned the right of the House to do so.

The minority of the committee, in views presented by Mr. Henry F. Thomas, of Michigan, and subscribed to by Messrs. James A. Walker, of Virginia, and Jesse Overstreet, of Indiana, announced the following principle:

The House of Representatives having original jurisdiction as to the right of a person to a seat in its Chamber, and being a tribunal of last resort, it undoubtedly has the power to pass upon any question that it deems relevant to the issue. It has never been claimed by any political party in the history of the Republic that the power to act carries with it the right to act. On the other hand, it has been the uniform practice of the House of Representatives to base its action in all cases upon certain fundamental principles, and those principles have, and ought to have, the binding force of law. Among those principles is this:

That the decision of the supreme court of a State ought to govern in all cases, unless the constitutional rights of the citizen are clearly invaded. And it may be said that in all cases where the question is local to the State and relates purely to its domestic affairs the House of Representatives will always abide by the decision of its court of last resort. But it is clear that questions might arise in which not only the rights of the citizen but the interests of the nation at large would be involved, and in such case the House of Representatives would most certainly exercise its original jurisdiction.

For instance, suppose a State should, by its constitution, give to all illiterate persons over 21 years of age the right to vote; and suppose the legislature should provide that no elector should be permitted to know, by all customary means, the contents of his ballot (and that after it was handed to him no man should come near him, and that if any one gave him any information, either by word or sign or signal, it would be a crime), and that thereby all illiterate electors were disfranchised; and suppose the supreme court of the State should decide that such a law was constitutional, it would not, we think, be denied by any one that it would be the duty of the House of Representatives to declare such an election void, and to refuse to seat the man who had been elected by those only who could read their ballots. This would be a case of disfranchisement where an appeal would lie, so to speak, from the supreme court of a State to the House of Representatives.

The minority then proceeded to an examination of the law, concluding first that the decision of the supreme court of Virginia, not an entirely valid judgment, there being evidence that the case in issue had been collusive, and that the question of constitutionality had been incidental, and finally that the law itself was unconstitutional, for reasons summarized as follows:

Your committee is therefore of the opinion that this law is unreasonable, and therefore unconstitutional, because it withholds from the voter a timely and necessary knowledge of the arrangement

¹ By a member of the committee, Mr. John J. Jenkins, of Wisconsin, Record, p. 1495.

of the names of candidates on a mixed and consolidated ballot. It is void because it withholds from the voter all ordinary and customary means of knowledge.

Therefore the minority recommended a resolution declaring the seat vacant.

(2) As to the sufficiency of the notice:

The majority of the committee say:

The next question which presents itself for consideration is the objection raised by the contestee to the notice of contest. Without specifying the particulars in which it is insisted that this notice is defective, and without expressing any opinion as to whether or not it is wanting, as is alleged, in that particularity which is required by statute, the committee think it is not necessary, in view of the conclusion reached by them upon the merits of the case, to decide the question.

The minority give in full the portions of the notice objected to at length, and conclude that they were sufficient, saying:

While your committee recognize the rule of law that changes of fraud should be specific and certain, yet they are not of the opinion that any greater degree of certainty should be required than the nature of the case will admit, and that where the evidence of the alleged fraud is to be sought from those whose interests are adverse to the contestant a much less degree of certainty should be insisted upon than in other cases.

The case was debated at length in the House on February 3, 1897.¹ On the question of substituting the minority proposition that the seat be declared vacant, the substitute was rejected on viva voice vote, not enough Members rising to order the yeas and nays.

The resolutions confirming the title of sitting Member to the seat were then agreed to without division.

1072. The Virginia election case of Thorp v. McKenney, in the Fifty-Fourth Congress.

A general conspiracy of election officers to violate a merely directory law, combined with fraudulent acts in individual precincts, justified rejection of a series of polls.

A general disregard of a directory law as to party representation among election officers was held to constitute a reason for rejection of a series of polls.

Ballots printed in unusual style confusing to the voter may contribute to destroy confidence in the officers responsible therefore.

Instance wherein the returned Member in an election case took no testimony.

On April 29, 1896,² Mr. James A. Walker, of Virginia, from the Committee on Elections No. 3, submitted the report of the majority of the committee in the case of Thorp v. McKenney, of Virginia.

The sitting Member had received an official plurality of 864 votes; but he admitted that one precinct improperly rejected should be counted, and that the plurality should because of that be reduced to 785 votes.

In this case sitting Member took no testimony and the case was decided by the evidence produced by the contestant.

¹ Second session Fifty-fourth Congress, Record, pp. 1483-1501.

² First session Fifty-fourth Congress, House Report No. 1531; Rowell's Digest, p. 537.

The majority of the committee decided that the vote of ten election precincts in the district should be rejected because of a conspiracy “clearly and fully made out” to deprive contestant of his rights. In eight other precincts strong suspicion was raised.

The law of Virginia provided for an electoral board for each county and city, and these boards had complete, entire, and unlimited control of the elections and the election machinery in their respective counties and cities. These boards had the appointment of three judges of election for each voting precinct in their respective counties and cities. The law of Virginia has only the limitation that the judges thus appointed shall be competent citizens and qualified voters, who “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.” As to this provision the committee say:

The provision of law requiring judges of election to be able to read and write and selected from voters known to belong to different political parties is wise and salutary, as evidenced by its being recognized and incorporated in the election laws of all the States which claim to have honest election laws. It is a provision intended as a safeguard against fraud, and is in Virginia especially important to that end, because in this State the judges of election, after the polls are closed, and before any representatives of opposing candidates are admitted into the election room, open the ballot boxes, count the ballots to see whether they correspond with the number of names on the poll books, and if they exceed the number of electors on the poll books, withdraw enough ballots to reduce the number of ballots to the number of electors, which affords to partisan and unscrupulous judges the opportunity to substitute false ballots for true ballots.

This provision might ordinarily be considered as mandatory—it is such an important safeguard against fraud—but the Virginia statute further provides that “no election shall be deemed invalid when the judges shall not belong to different political parties, or who shall not possess the above qualifications;” i.e., as we understand it, an election fairly conducted without any charge or taint of fraud shall be valid though the judges do not belong to different political parties, etc. It was intended to cover the cases of a few isolated precincts where, by accident or otherwise, all the judges happened to belong to the same political party, or a judge happened to be appointed who did not possess the necessary qualifications, but the will of the voter was nevertheless fairly expressed and correctly and honestly returned. In such a case, there being no bad faith or intentional wrong on the part of the appointing power or the judges, the election ought to stand and the return be accepted.

But this statute was not intended to apply to a case like the one before the committee. It never was intended as a shield for fraud.

The charge here is that the election held at these 18 precincts by judges all of the same party was dishonestly conducted, and the returns made by these judges are false and utterly unreliable as evidence of what was the true vote cast.

The Virginia statute does not say that the returns of an election where the judges do not belong to different political parties, etc., shall be accepted, nor does it say what weight shall be given to this failure to appoint such judges in considering the question of fraud; but the report of the committee in the case of *McDuffie v. Turpin* (Fifty-first Congress), quoted in the brief, does say that in itself it raises a strong suspicion, if it does not fully prove, a conspiracy to falsify the returns.

The failure to comply with the law in this respect was not in a few isolated precincts.

It appeared that in 10 precincts the judges appointed were all partisans of sitting Member, although perfectly competent partisans of contestant were available to equalize the representation. In 8 other precincts the election board appointed to represent contestant’s party were educationally, morally, and physically unfit to represent it or men not regarded as representative of the party, when proper men were available.

The law and decisions of Virginia further provide for a secret ballot, printed officially, which is to contain the names of all the candidates, printed in black ink, and is to be kept under seal and secret as to form, style, arrangement, etc., until opened by the judges at the voting place. But in the 18 precincts in question the tickets were printed in an unusual style, some of them in script type and others in type of different sizes and styles, so as to confuse the voter.

The majority of the committee quote authorities to show that they would be justified in holding that the election officers by these acts had destroyed all confidence in their official acts. Such a view of the case would cause the rejection of the 18 precincts and leave to contestant a plurality of 1, 115.

The committee, however, defer to the possible contention "that more specific actual fraud and further acts of illegality on the part of election officers must be shown," and review the precincts individually, showing in each of 10 of them specific acts of fraud, such as ejection of tally keepers and discrepancies in the count of votes; fraudulent manipulation of ballots by a judge of election; illegal entries on the poll books; names of persons proved to have voted for contestant omitted from poll book; refusal of election officers to assist illiterate voters, etc.

The committee therefore determined to reject entirely the vote of 10 precincts, where the election officers were all of sitting Member's party, where the ballots were printed in a style apparently intended to mislead, and where other specific acts of fraud occurred. These rejections resulted in a plurality of 571 for contestant.

The committee reviewed other precincts which in their opinion might be thrown out, but considered such action unnecessary.

In conclusion they say:

The refusal of the electoral boards in the several counties and cities in this district to appoint Republican judges at precincts where it was possible to do so; the alternation of the names of the candidates upon the tickets, printing them in unusual type and in type of different sizes and styles; the appointment of Democratic officeholders as judges, constables, and clerks at many precincts; the appointment of illiterate, incompetent Republican judges at other precincts; the refusal of the special constables to assist illiterate voters, as the law required them to do; the illegal and arbitrary action of the judges and officers of election in driving away Republican tally keepers from the vicinity of the polls with threats of violence and imprisonment; refusing to permit a Republican to be present at the counting of the votes, and placing the name of an illiterate and obscure negro upon the tickets as a pretended candidate for Congress furnish conclusive evidence of a conspiracy on the part of the election officers to defraud the voters, which destroys the integrity of their act and taints the returns so as to render them wholly unreliable, and devolves upon the contestee the duty of proving what was the true state of the poll, which, as we have seen, he has not attempted to do.

Add to these evidences of fraud and conspiracy the many proofs of error, fraud, and irregularity at the various precincts, as above set forth in this report, and it is clear that the contestant was duly elected by a majority of the legal voters cast at said election, and that the contestee was not elected.

The minority views, submitted by Mr. David A. De Armond, of Missouri, concur in the conclusion that contestant was elected, but that what is considered wrong in the conduct of the election officers may be attributed to erroneous views as to the requirements of the election law.

On May 2¹ the House concurred in the report, and Mr. Thorp, the contestant, took the oath.

¹Journal, p. 447.

1073. The Colorado election case of Pearce v. Bell in the Fifty-fourth Congress.

A contestant giving no notice of contest as required by law and taking no testimony, the House without further examination confirmed returned Member's title.

On April 29, 1896,¹ Mr. James A. Walker, of Virginia, from the Committee on Elections No. 3, submitted a brief report in the case of Pearce v. Bell, from Colorado, accompanied by resolutions confirming the title of sitting Member to the seat. The resolutions were agreed to by the House on the same day.² The report describes the case fully:

In this case the contestant gave no notice of contest, as required by law, and has taken no evidence to sustain the allegations of fraud and intimidation claimed by him to have been committed.

The official returns show that the contestee received 47,703 votes, that Thomas M. Bowen received 42,369 votes, that W. A. Rice received 2,032 votes, and the contestant received 157 votes.

1074. The South Carolina election case of Murray v. Elliott in the Fifty-fourth Congress.

Specifications in the notice of contest being deemed sufficiently clear and direct to put the sitting Member on a proper defense and prevent surprise were upheld.

Voters may not be deprived of their ballots by the neglect of regularly qualified managers to qualify and act.

Where a true expression of the intention of qualified voters is had at an improvised poll the votes will be counted by the House.

A general conspiracy of registration and election officers to prevent a class of electors from voting was held to justify rejection of returns in a series of precincts.

Instance wherein the color of voters contributed to a presumption as to their votes.

Conduct of unauthorized challengers supplemented by the acts of partisan election officers may contribute to taint a return.

On May 1, 1896,³ Mr. Jesse Overstreet, of Indiana, from the Committee on Elections No. 3, submitted the report of the majority of the committee in the case of Murray v. Elliott, of South Carolina. The sitting Member in this case was returned by an official majority of 1,737 votes. The contestant enumerated 19 specific claims and charges, by which he sought to attack this plurality.

At the outset the sitting Member objected to certain of these specifications because of uncertainty and insufficiency. But the committee, referring to McCrary on elections, say:

It is the opinion of the committee that the objections to certain specifications in the notice made by contestee are not well founded, inasmuch as they are sufficiently clear and direct to put the sitting Member upon a proper defense and prevent any surprise being practiced upon him.

In considering the merits of the case the committee discuss only the city of Charleston and a precinct called "Haut Gap."

¹First session Fifty-fourth Congress, House Report No. 1529; Rowell's Digest, p. 540.

²Journal, p. 438.

³First session Fifty-fourth Congress, House Report No. 1567; Rowell's Digest, p. 543.

(1) As to Haut Gap the report of the majority says:

It is admitted that at Haut Gap, Berkeley County, the Federal polls were not opened by reason of the failure of the managers to qualify and act. At this precinct the voters at the polls, on the morning of the election, improvised an election board, following the rules of the election law, and under the conduct of such board 217 ballots were cast for George W. Murray and none for Elliott, and 156 ballots were offered by voters qualified in all respects except they held no registration certificates.

The committee is of the opinion that voters can not be deprived of their ballots by the neglect or failure of regularly appointed managers to qualify and act; and where a true expression of the intentions of such voters can be had, and the fact of their qualifications is undisputed, such ballots should be counted, and for that reason 217 votes should be added to the vote of George W. Murray.

The 156 ballots offered for Murray, and rejected because the voters did not hold registration certificates, should be counted for Murray, under the theory that the law of registration of the State of South Carolina is unconstitutional; but as such question is not raised in this case, the committee does not consider it, and therefore does not count these 156 ballots.

The minority views, presented by Mr. W. A. Jones, of Virginia, say:

To the action of the committee in counting for Murray the 217 Haut Gap votes there is no dissent by the undersigned.

(2) As to the returns from 24 precincts in the city of Charleston, which together returned for Murray 359 votes, and for Elliott 2,720 votes, the issue arises in the case. The majority of the committee concluded from the testimony that a conspiracy existed and was carried out to commit frauds in behalf of the sitting Member in the 24 attacked precincts of Charleston. According to the law in force in this district no elector was allowed to vote until he had registered, and the presentation of the registration certificate at the polls was necessary. The testimony disclosed that impediments had been put in the way of colored voters, who were supporters of contestant, when they attempted to register; and that in many cases where such voters did register the certificates issued to them contained errors. The committee concluded from the evidence that there was no reason why contestant should not have had the support of his party, and that this party numbered in its ranks nearly all the colored voters. Discussing this and other portions of the evidence the committee find the following indications of a conspiracy:

In the absence of some reasonable explanation it would indeed be strange that in a city of 65,000 population, with 8,000 colored voters and 6,000 white voters, the proportion of white voters to colored voters should be as 10 to 1.

But a study of the record discloses a reasonable explanation; and that is that the board of supervisors fraudulently impeded and prevented the registration of colored voters, and committed intentional errors in the execution of registration certificates for illiterate voters, and that challengers, unauthorized by law, and by the sanction of the managers at the various precincts, arbitrarily passed upon the qualifications of colored voters and directed who should vote and who should not, and that in some of the precincts the dead and absent were recorded as having voted.

The board of supervisors for the city of Charleston consisted of three men, to whom each voter was required to apply for a certificate of registration. This board was an arbitrary court, before which illiterate and ignorant voters were compelled to go and in which they had a right to place full confidence. If errors were made upon the certificates, the illiterate voters would not be able to discover them, and if an error proved fatal to his certificate the voter was helpless.

A common excuse for rejection of ballots was that certificates held by the voter failed to give the number of the precinct, or the correct number of the ward in which the voter lived, or the proper number of his residence. The fact that these errors appeared always with certificates held by colored voters is significant. That the voters holding such certificates were illiterate was sufficient excuse for their ignorance of the condition of the certificates, and plainly shows that the errors were made by the super-

visor of registration, and whether intentional or not should not operate against the voter. The common character of the apparent mistakes, and their frequency, strongly and conclusively indicate that they were intentional, and made for the purpose of depriving the holders of the certificates of their ballots.

The evidence strongly shows that the supervisors of registration in Charleston threw every possible obstacle in the way of a full and fair registration. By delay in the issuing of certificates, by seeming investigations, by excuses, by favoritism, and by discrimination against the colored voters, unquestionably many hundreds were prevented from registering.

There were also disclosed further instrumentalities of the alleged conspiracy. Thus a Democratic challenger was on duty in every precinct, a privileged character, although having no standing under the law. The committee say:

In many instances the challenger was the authority of the board upon the question of qualification, and in no case where the challenge was exercised was the voter allowed a hearing or permitted to vote.

The familiarity of the challengers with the registration books and the kind of certificates held by the voters evidenced their preparation for their part in the plan, which was to point out the defects in the certificates of registration because of which the election managers rejected the ballots.

The election managers in each precinct in the city of Charleston were Democrats. No other party was recognized upon the boards. And while the law of the State is silent as to party representation, all sense of justice and right, equity and fairness, would demand such recognition. It is, of course, possible for a board composed wholly of men of one party to properly and honestly discharge the duties of such board, and the law presumes that their duties were so discharged; but in this case the managers of election became the third side in the triangle of fraud that controlled the election in the city of Charleston. By their treatment of the Democratic challenger, whereby he was made the authority upon the qualification of voters, by their refusal in many cases to expose the inside of the box before the voting began, and the conduct of a private count at the close, and in some cases by the personal misconduct of the members of the board, the presumption of law in their favor is overthrown; and, construing their action in the light of the conduct of the supervisors of registration and Democratic challengers, a conspiracy, involving them all, to defraud the colored voters of their ballots in the interest of the contestee, is reasonably inferred.

The majority further find in five precincts that certain dead or absent voters appear on the poll lists. The number of these is not large, however, but are introduced as incidents in support of the majority's final conclusion.

These instances strengthen the claim that the entire election in the city of Charleston was tainted with fraud, and that gross irregularities occurred at nearly every precinct.

The conduct of the supervisors of registration and the managers of election, and the practice of swelling poll lists with the names of the dead and absent voters, was such as to cloud the result with uncertainty and doubt.

The presence of the challenger and his conduct, although unauthorized by law, would not in itself be sufficient to invalidate the election where such officer acted, but, considered as a circumstance in connection with the known misconduct of the supervisors of registration and the manners of election and the swelling of poll lists, it becomes of great importance in determining whether or not the will of the majority of the voters at such precincts is expressed by the returns. Fraud in the conduct of an election may be shown by circumstantial evidence. (McCrary on Elections, 3d ed., sec. 540; *English v. Peelle*, Forty-eighth Congress.)

It is not necessary, in order to set aside a return for fraud, that the officers of election participated in the fraud. But if the unlawful acts of third persons are connived at by the officers the effect is the same. (McCrary on Elections, 3d ed., sec. 543.)

It is the opinion of the committee that the conduct of these officers was such as to bear the badge of fraud at each of the election precincts of Charleston, except Nos. 1 in Ward 2, 1 and 2 in Ward 6, and 1 in Ward 10, and the question then arises whether the returns shall be purged or rejected.

The authorities are clear and complete that where fraud taints a return it can not be purged, but must be rejected; but a return can be purged only by rejecting ballots illegally cast or wrongfully counted. While in this case legal ballots were unquestionably kept from the box by the illegal and

wrongful acts of persons connected with the machinery of the election, it is impossible to determine the number of these ballots, and the only logical and equitable result is to reject such returns.

In accordance with their conclusions, the majority find for the contestant a plurality of 434 votes, and report resolutions declaring him entitled to the seat.

The minority dissented entirely from these conclusions as to the precincts in Charleston. They denied that the testimony showed the alleged conspiracy, or that there was fraud either on the part of the registration or election officers. The minority urge that the testimony, when analyzed, shows that only 41 persons are shown to have been rejected as voters, though properly registered. They also urge that contestant was shown not to have been popular with his party, and that he did not receive the party strength.

In conclusion the minority say:

So that taking the most extreme case against the contestee, there were not in the entire city of Charleston more than 41 registered voters who were refused the right to vote. It would require too much space to set forth in detail the testimony as to each of the persons, but the proof shows that the majority of them were not legally registered, and that as to all persons rejected by the managers, there was proof before the managers justifying them in rejecting the elector under the law of South Carolina, although it since may have been proved in this case that the elector had the right to vote.

A careful scrutiny of the whole evidence in this case convinces us that the contestee received a substantial majority of the votes cast for Representative in Congress, and that if every vote of those who offered to vote, with or without certificates of registration, in the city of Charleston, should be counted for the contestant the majority of the contestee would not be materially reduced.

The law upon this subject is tersely stated in McCrary on Elections, third edition, section 492:

“The fact that the right to register or to vote has been denied to any person or persons duly qualified to vote, may always be shown in a case of contested election whether such denial was fraudulent or not. The effect upon the rights of electors and upon the result of the election is the same whether such denial be the result of intentional wrong on the part of the officers of the election, or of accident, or an honest mistake as to the law. And if the number of voters whose rights have thus been denied is large enough to materially affect the result such denial will vitiate the election”

Upon the general subject of the impeachment of returns for fraud or illegal voting, attention is called to the following passages, also taken from McCrary on Elections:

“The return must stand until such facts are proven as to clearly show that it is not true. When shown to be fraudulent or false it must fall to the ground. This ruling is well settled by numerous authorities, including the following: *Blair v. Barrett*, 1 Bart., 308; *Knox v. Blair*, 1 Bart., 521; *Howard v. Cooper*, supra; *Washburn v. Voorhees*, 2 Bart., 54; *State v. Commissioners*, 35 Kans., 640.”

The following remarks concerning the dangers which may attend the application of this rule are here quoted, with emphatic approval, from the report of the Committee on Elections in the House of Representatives in *Washburn v. Voorhees*:

“In adopting this rule the committee do not lose sight, however, of the danger which may attend its application. Wholesome and salutary, not less than necessary in its proper use, it is extremely liable to abuse. Heated partisanship and blind prejudice, as well as indifferent investigation, may, under its cover, work great injustice. It is not to be adopted if it can be avoided.

“No investigation should be spared that would reach the truth without a resort to it, but it is not to be forgotten or omitted if the case calls for its application. If the fraud be clearly shown to exist to such an extent as to satisfy the mind that the return does not show the truth, and no evidence is furnished by either party to a contest, and no investigation of the committee enable them to deduce the truth therefrom, then no alternative is left but to reject such a return. To use it under such a state of facts is to use as true what is shown to be false. (Sec. 536.)

“But misconduct which does not amount to fraud, and by which no one is injured, does not vitiate the poll.” (Sec. 540.)

Unless the presumption is indulged that every man who has a dark skin is a Republican and votes the Republican ticket at all times and under all conditions and circumstances, even when he swears that he voted otherwise, it will be impossible to give to the contestant the seat which he claims.

The case was debated on June 3,¹ and on June 4² the substitute resolution of the minority, declaring sitting Member entitled to the seat was disagreed to, yeas 48, nays 144. The resolutions of the majority, declaring contestant elected and entitled to the seat, were then agreed to, yeas 153, nays 33.

Thereupon Mr. Murray, the contestant, appeared and took the oath.

1075. The South Carolina election case of Wilson v. McLaurin in the Fifty-fourth Congress.

An intelligible written notice of contest, in the hands of returned Member within the prescribed time, is sufficient, although served informally.

The House will count the votes of electors denied their right of suffrage by a registration law which it deems unconstitutional and not passed on by the State courts.

Where an unconstitutional State law disfranchises a large class, the House prefers to measure the wrong rather than declare a vacancy.

The House counts lists of wrongfully disfranchised qualified voters when sustained by other evidence that the voters were present near the polls to vote and would have voted for the party claiming had they not been prevented.

On May 1, 1896,³ Mr. James H. Coddington, of Pennsylvania, from the Committee on Elections No. 3, submitted a report in the case of Wilson v. McLaurin, from South Carolina.

A preliminary question was raised by the objections in the nature of a demurrer of sitting Member to the service of the notice of contest. The committee dispose of this objection as follows:

It is admitted that the notice was in writing and was addressed by registered mail to the contestee, one copy to his "home office" at Bennettsville, S. C., and the other copy to Washington, D. C. It is not denied that both copies were received by Mr. McLaurin within the statutory thirty days, nor is it alleged that he has been placed at any disadvantage by the manner of service. That the notice was in writing and that it reached the proper party are sufficient for this committee to hold the contestee to the necessity of his answer and proofs. In all such cases the rules as to service may naturally be somewhat flexible, according to the circumstances, provided that no clear right be thereby denied or infringed. An intelligent and intelligible notice in writing, actually in the hands of a contestee within the thirty days established by statute ought to be sufficient.

As to the merits of the case, the committee consider two charges made by the contestant:

(1) That he had been deprived of a large number of votes by the action of election officers in drawing votes cast for the contestant from the boxes and destroying the same, under color of a section of the election law relating to purging the boxes in cases where the number of ballots found therein exceeded the number upon the poll lists. The committee did not find that the ballots so withdrawn were in quantities affecting the final result.

(2) Contestant in several specifications charged that voters were prevented from casting their ballots for him. Several means were alleged to have been

¹ Record, pp. 6072-6078; Appendix, p. 445.

² Journal, P. 571

³ First session Fifty-fourth Congress, House Report No. 1566; Rowell's Digest, p. 541.

employed, but this was accomplished principally by the operation of a so-called registration law of South Carolina passed in 1882, and in force at the time of this election, whereby the various election officers of the district were enabled to reject the votes of several thousand voters.

The committee therefore proceed (*a*) to a consideration of the constitutionality of the law and the attitude of the House toward it; (*b*) to a determination of the method for correcting the wrong; and (*c*) to the application of a rule of evidence to the testimony and the ascertainment of a result. As follows:

(*a*) As to the registration law the report says:

A casual examination of the testimony discloses the fact that if the contestant is to overcome the majority returned against him his chief reliance must rest in being allowed to reverse the results of the registration law of 1882 and to ally with his certified vote the aggregate of such votes as were rejected under that law.

In taking up this question some surprise is not unnatural that during its career of more than twelve years the constitutionality of this law has not been urged to a decision before the highest tribunals. Disfranchising, it is alleged, many thousands of voters, the law appears before this House for construction at a period when it is approaching, or has reached through other legislation, a practical death in the State of its adoption. Under these circumstances no labored or extended argument will be attempted in this report. That law, by its specific terms, extended the period of residence required by the constitution of South Carolina. It placed in the hands of a supervisor of registration, an official holding by executive appointment, a power practically absolute of judging the rights of voters, and the testimony is abundant that the power was unsparingly used for the exclusion of at least one class. It is equally true that the same power so molded the details of many registration certificates that officers conducting elections were able, or assumed to be, to reject many voters on account of trivial or pretended defects in their certificates. Against the sweeping disfranchisement of this law the average voter was powerless when he tendered his ballot. Under color of law his exclusion was complete.

A majority of this committee has reached the conclusion that the voters of the district now in consideration who were qualified under the constitution of South Carolina and who were rejected under color of the enforcement of the registration law are entitled to be heard in this contest.

In this conclusion no violence is done to the doctrine that "where the proper authorities of a State have given a construction to their own statutes that construction will be followed by the Federal authorities." While the supreme court of South Carolina has not passed decisively upon the statute in question the people themselves, the highest authority in that State, have decreed its disappearance from the statute book.

(*b*) As to the correction of the wrong, the committee say:

From this standpoint we look for the course to be followed. Shall the election be set aside and the seat in question vacated? Under the authorities we think not.

Beyond doubt the usual formalities of an election were for the most part observed. No substantial miscount of votes actually cast is alleged. There are no charges of violence or intimidation seriously affecting the result which have been verified. If fraud be alleged, under sanction of legislative enactment, it was a general fraud, and the returns are in general unchallenged for correctness. The votes actually cast are not in controversy; the votes not cast are the ones presented for computation.

The report then quotes McCrary on Elections as follows:

The election is only to be set aside when it is impossible from any evidence within reach to ascertain the true result—when neither from the returns, nor from other proof, nor from all together can the truth be determined. * * * Nothing short of the impossibility of ascertaining for whom the majority of votes were given ought to vacate an election.

The report then says:

It is a matter of serious import and precedent to introduce into an election the count of a large disfranchised class. But if the principle is good as to 4 or 40 or 400 it should certainly be no less available for a larger number; or, briefly, the number is immaterial if capable of correct computation.

Therefore the committee determine to follow the doctrine laid down in the case of *Waddill v. Wise*:¹

If the fraudulent exclusion of votes would, if successful, secure 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 similar tactics, such practices would be at a great premium and an election indefinitely prevented. But if where such acts are done the votes are counted upon clear proof aliunde the wrong is at once corrected in this House and no encouragement is given to such dangerous and disgraceful methods.

(c) The contestant presented the names of several thousand alleged voters, whose votes he claimed should be counted for him although they were not actually cast. These names were generally presented in lists, drawn up in the form of petitions made in most of the election precincts on election day. One of these petitions would be addressed to the Congress, would represent that each of the subscribers was a citizen of South Carolina, over 21 years of age, a male resident of the county and election precinct, and qualified to register and vote; that on the election day in question the subscriber presented himself at the voting precinct, desiring and intending to vote for Joshua E. Wilson (the contestant) for Member of Congress, but that he was denied the right to vote; and that he had made every reasonable effort to become qualified to vote according to the registration law of the State, but had been denied an equal chance and the same opportunity to register as was accorded to other fellow-citizens.

These petitions were not generally verified by affidavit, but were usually supplemented by testimony of those who had them in charge, with such explanations and corroborations as the witnesses could give.

The report states the disposition made of these petitions:

It is considered by a majority of this committee that these lists are not per se evidence in the pending contest. They are declarations, important parts of which should be proven in accordance with usual legal forms. It is not impossible so to do, and consequently we think it is necessary for reaching trustworthy results.

Under the authority of *Vallandigham v. Campbell* (1 Bartlett, p. 31) these declarations might serve a use beyond a mere list for verification, for it was there held "the law is settled that the declaration of a voter as to how he voted or intended to vote, made at the time, is competent testimony on the point."

We propose to compute the ballots of those who were entitled to cast them, and there is ample support in a line of authorities and precedents. A few only are selected.

Delano v. Morgan (2 Bartlett, 170), *Hogan v. Pile* (2 Bartlett, 285), *Niblack v. Walls* (Forty-second Congress, 104, January, 1873), *Bell v. Snyder* (Smith's Rep., 251), are uniformly for "the rule, which is well settled, that where 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 shall be counted."

In *Bisbee, Jr., v. Finley* (Forty-seventh Congress) it was stated, "as a question of law we do not understand it to be controverted that a vote offered by an elector and illegally rejected should be counted as if cast."

In *Waddill v. Wise* (supra) the same doctrine was elaborately discussed and a further step taken by holding "that the ability to reach the window and actually tender the ticket to the judges is not essential in all cases to constitute a good offer to vote."

Referring to the evidence given in connection with the lists in this record, it seems proper to adopt some general principles as a standard for the examination, and the following have been used as suitable and in accord with the precedents quoted:

¹See section 1026 of this volume.

First. The evidence should establish that the persons named in the lists as excluded voters were voters according to the requisites of the constitution of South Carolina.

Second. The proof should show that said persons were present at or near the Congressional voting place of their respective precincts, for the purpose of voting, and would have voted but for unlawful rejection or obstruction.

Third. That said excluded voters would have voted for the contestant.

Using the greatest liberality in computing according to the above principles, the committee could find but 3,124 votes which should be added to contestant's returned vote of 2,455. This would make a total of 5,579 votes for contestant, not sufficient to overcome sitting Member's certified vote of 8,171.

Therefore the committee reported resolutions confirming the title of sitting Member to the seat, and the same were agreed to by the House on May 1.¹

1076. The Texas election case of Rearby v. Abbott, in the Fifty-fourth Congress.

As to the use of red ink for writing a name on a ballot when a mandatory State law requires black ink.

The mere fact of a slight discrepancy between the returns and the check list does not, in the absence of fraud, invalidate the election.

Neglect of election officers to place ballots, poll lists, and tally sheets in a fastened box, as required by law, does not, in the absence of fraud, invalidate the return.

Returns of a precinct not being questioned, failure to carry out the law as to preservation of other election papers does not justify rejection of the returns.

Where State officers estimated a return from the tally sheets, there being no formal returns, as required by a directory State law, the House did not require a recount of the ballots, there being no charge that the tally sheets were incorrect.

On May 4, 1896,² Mr. Charles K. Bell, of Texas, from the Committee on Elections No. 3, submitted a report in the case of *Kearby v. Abbott*, of Texas. The official returns gave to sitting Member a plurality of 344 votes, which contestant attacked on the ground of various illegalities and informalities. The examination and decision of the committee touched the following questions:

(1) In Morgan precinct, where the ballots had been preserved-as required by law, a recount showed that sitting Member had been credited improperly with one vote, and that four ballots had been rejected by the officers of election because the name of the contestant had been written in red ink, while the law of the State required that the name of the person voted for should be written or printed with black ink or a black pencil. The committee say:

The law of the State provides that no ballots not in accordance with the requirements of the statutes shall be counted, but as it is not necessary to a correct decision of this case, the committee does not decide the question as to whether the fact that this law is not complied with would justify the managers of election in refusing to count a ballot.

(2) In the county of Dallas, where the contestant had alleged that the returns in several precincts did not represent the state of the ballots, a recount was made, and

¹Journal, p. 443.

²First session Fifty-fourth Congress, House Report No. 1596; Rowell's Digest, p. 546.

the contestant, according to his contention, gained 139 votes. Some questions arose as to this recount, but the committee did not consider it necessary to go into them, and were willing to credit contestant with the 139 votes plus 5 at Morgan precinct, or 144 votes in all.

(3) At Pleasant Valley precinct one vote more was found in the ballot box than the poll list showed had been voted. The committee did not conceive that this circumstance raised any suspicion of fraudulent conduct on the part of the election officers, quoting Paine on Elections:

The mere fact that the number of votes returned exceeds the number of names checked on the voting list does not, in the absence of fraud or of a change in the result, affect the validity of the election.

(4) "As to contestant's complaint," says the report, "that the presiding officers at certain precincts in Kaufman County neglected to place the ballots as voted at said precincts, together with the poll lists and tally sheets, in a box, and securely fasten it as required by law, we find that in the absence of fraud, or, for that matter, of claim of injury, such failure, even if it had been established, would constitute no ground for rejecting the votes cast." In fact, however, the proof showed appearance of irregularity in only one precinct. About two months after election an examination of the ballot boxes—then in the custody of the county clerk—showed that the box of Pleasant Grove precinct was not shut tight, it being in fact an old cigar box, and that only one ballot remained in it. But the committee found that the returns from this precinct had been signed by an election officer representing contestant's party, that they were not in any way questioned, and that no effort was made to show that the vote was not actually as certified. The committee quote Paine:

Accidental loss of the ballots cast and affidavits used at a particular precinct before the county canvass affords no ground for the rejection of the entire returns of the precinct.

And McCrary:

The rule is that the evidence must stand until impeached, i. e., until shown to be worthless as evidence—so worthless that the truth can not be deduced from it. * * * The return is only to be set aside, as we have seen, when it is so tainted with fraud or misconduct of election officers that the truth can not be deduced from it.

The committee therefore decline to reject the returns from this precinct.

(5) At Terrell precinct some of the tickets of contestant's party were destroyed before they were voted; but the testimony did not disclose that contestant had been deprived of any votes thereby. In fact it indicated the contrary. There was some testimony as to improper influence at this precinct for sitting Member, but the committee conclude that there was nothing in the evidence to warrant the rejection of the returns, it not being contended that the election officers were guilty of any breach of propriety or fraudulent conduct.

(6) From certain precincts—where the plurality of sitting Member was about 300 votes and which if rejected would, with previous deductions, be decisive in favor of contestant—no formal returns were made in accordance with the statutes of the State of Texas, which required the managers of election to make out triplicate returns of the same, certified to be correct and signed by them officially, showing the number of votes polled for each candidate, one of which returns, together with the poll list and tally sheet, was required to be sealed up in an envelope and

delivered by the managers of election to the county judge of the county. Another similar package was required to be delivered to the clerk of the county court, and a third to be kept by the presiding officer of the election for twelve months.

But while the formal returns were not made, the poll lists and tally sheets were returned as required by law, and from the poll lists and tally sheets the county commissioners' court, which is a returning board, estimated the vote of the precincts.

The contestant alleged that this action was erroneous, although he did not allege and made no effort to show by evidence, that as a matter of fact the vote as estimated was not exactly in accordance with the vote as cast.

The committee admit that the law of Texas provides that no election returns shall be opened or estimated unless the same have been returned in accordance with the provisions of the law. But they quote *Fowler v. State* (68 Texas) to show that this statute is directory. "It is true," says the supreme court in that case, "that our present statute says that election returns shall not be opened or estimated unless the same have been returned in accordance with its provisions (Article 1706), but this applies to the opening and estimate provided for in the previous section to be made by the county judge. It does not prevent the district court from arriving at the true sense of the electors in a proceeding to test the title to an office. The county judge deals with returns only, but in a suit for the recovery of the office the district court may disregard any unimportant informality in making them, or set them aside altogether when they do not speak the truth as to the state of the ballot."

The committee quote McCrary:

The election is only to be set aside when it is impossible from any evidence within reach to ascertain the true result; when neither from the returns, nor from other proof, nor from all together can the truth be determined.

The committee then say:

The contestee took the testimony of one or more officers of each of the election precincts from which no returns were made, and it was proved that the failure to make the returns in each instance was occasioned by the fact that no blanks upon which returns should have been made were furnished; but as to each precinct proof was made from the tally sheet and from the memory of the officers of election exactly what the vote actually polled for each candidate was.

It was not contended by the contestant and no effort was made to prove that the vote was in any instance different from that shown by the tally sheet and as testified to by the witnesses. But he contends that it was necessary that there should have been a recount of the ballots cast at each of the voting precincts. Upon this point the committee are agreed that if the contestant had alleged that the vote at any of the precincts from which there were no formal returns was different from that shown by the tally sheet, or if he had charged that there was any fraud on the part of the election officers it would have been necessary for the ballots cast at such precincts to have been recounted, as they were in the precincts concerning which he made such charges, but it is to be observed that no such contention was made by the contestant, and no suspicion was raised as to the correctness of the vote as estimated by the commissioner's courts of the different counties and as proved by the contestee.

The committee quote Paine on Elections as to the application of the general rule requiring the production of the best evidence, cite *Howard v. Shields* (16 Ohio) to the effect that—

the tally sheet kept by the officers of the election was competent evidence in an election contest to show the true state of the vote, and that it was good until impeached,

with the explanation by McCrary that—

the rule stated presupposes that tally sheets are required to be kept by law, and where they are not required by law to be kept by the managers of the election they would not be admissible.

The committee call attention to the fact that in this case the tally sheets were required to be kept by law.

The committee concluded, in accordance with the above decisions, that the sitting Member was entitled to the seat, and reported resolutions in accordance therewith.

On May 4¹ the House concurred in the report.

1077. The Virginia election case of Yost v. Tucker, in the Fifty-fourth Congress.

Where the intention of the voter is clear the ballot will not be rejected for faulty marking by the voter unless a law undoubtedly mandatory so prescribes.

Where a voter inadvertently or ignorantly erases the designation of the office in marking, the character of the ballot as an official ballot is not destroyed.

Instance where blotted or blurred ballots were disposed of by agreement of parties.

Although contestent claimed in his notice that blurred ballots should not be counted for contestee, and did not ask that they be counted for himself, the committee counted them for both.

On May 6, 1896,² Mr. Samuel W. McCall, of Massachusetts, presented the report of Elections Committee No. 3 in the case of Yost v. Tucker, from Virginia. The sitting Member had been returned by an official plurality of 892 votes over the contestant.

The case involved construction of the newly enacted Australian ballot law of Virginia, and a review of the conduct of election officers under it. This law, besides describing the ballot and providing for its printing so that its form and arrangement should not be disclosed until presented to the voter, has this provision:

SEC. 11. Every elector qualified to vote at a precinct shall, when he so demands, be furnished with an official ballot by one of the judges of election selected for that duty by a majority of the judges present. The said elector shall then take the said official ballot and retire to said voting booth. He shall then draw a line with a pen or pencil through the names of the candidates he does not wish to vote for, leaving the name or names of the candidate or candidates he does wish to vote for unscratched. No name shall be considered scratched unless the pen or pencil mark extend through three-fourths of the length of said name; and no ballot save an official ballot above provided for shall be counted for any person. When, as to any office, more than one name remains unscratched, the ballot for that particular office shall be void, but the ballot as to any other office for which only one name remain unscratched shall be valid. He shall fold said ballot with the names of the candidates on the inside and hand the same to the judge of election, who shall place the same in the ballot box without any inspection further than to assure himself that the ballot is a genuine ballot, for which purpose he may, without looking at the printed inside of said ballot, inspect the official seal upon the back thereof: *Provided*, It shall be lawful for any voter to erase any or all names printed upon said official ballot and substitute therein in writing the name of any person or persons for any office for which he may desire to vote.

¹ Journal, p. 448.

² First session Fifty-fourth Congress, House Report No. 1636; Rowell's Digest, p. 547.

After the election, at the instance of the contestant, a recount of the ballots was had in all the cities and counties of the district. It also appeared that 1,021 ballots had been destroyed, and over these ballots arose one of the principal issues of the case.

It will be convenient to notice, first, the questions arising over the ballots recounted, and second, those arising over the destroyed ballots.

(1) The questions arising over recounted ballots.

(a) The election law of Virginia provided:

SEC. 3. The ballot shall be a white paper ticket containing the names of the persons who have complied with the provisions of this act, as hereinafter provided, and the title of the office printed or written as hereinafter provided. None other shall be a legal ballot.

At the election in question candidates for only one office were voted for, and the following question arose:

Upon 1,169 ballots cast for Yost and 114 cast for Tucker the name of the office as well as the names of all other candidates except Yost or Tucker, respectively, were erased. What disposition shall be made of these ballots? The general rule, doubtless, is to count those ballots which clearly express the intention of the voter, but the intention must be expressed as provided by law. We do not suppose it would be contended, in view of the requirement of this statute for an official ballot and an express prohibition against counting any other ballot, that a ballot provided by the voter himself and deposited by him should be counted, although it expressed his intention beyond all doubt. The question here is not one which rests on a supposed ambiguity of the ballot, but it is a question of what the laws of Virginia require.

The intention of the voter, if it can be clearly ascertained from the ballot, will generally be given effect to, and when it is not expressed according to the strict requirements of a statute, such requirements will often be regarded as merely directory, unless a failure to comply with them is declared to be fatal to the ballot. But where the statute itself provides that a certain thing shall be done by the voter or his vote shall not be counted, then there can be no question that a provision of that character is Mandatory, and that a failure to comply with it fatal to the ballot.

In the present case there is no question of the intention of the voter. There was only one office to be filled, and it is hardly conceivable that more than 1,200 voters in this district should have left their homes, gone to the polls, entered the booths, and gone through the act of voting with the intention of voting to fill no office whatever. This was the first election at which the Walton law was applied in Virginia, and undoubtedly the caption was marked out by reason of the failure on the part of the voter to understand this novel system. Unless clearly required to reject these ballots by the Virginia laws, the committee believes they should be counted.

The words "none other shall be a legal ballot" in section 3 refer to the Australian ballot provided for at the public expense, and the words in section 11 of the act, "no ballot save an official ballot above provided for shall be counted for any person," were in the opinion of the committee intended only as a prohibition of the counting of any other than the ballot provided for by the first sections of the act. The erasure of the caption did not destroy the character of the ballot as an official ballot, and since there could be no ambiguity or doubt as to what office the voter intended his candidate to fill, since only one office was named on the ticket, the committee is of the opinion that these so-called "caption-marked" ballots—114 for Tucker and 1,169 for Yost—should be counted.

(b) Certain ballots were blotted or blurred. The most difficult question was one of fact as to whether they were "scratched" within the meaning of the law quoted above or simply "blurred." The committee say:

This question is settled by agreement of the contestant and contestee. It is conceded that they were all properly marked, and in folding them before the ink was dry an impression was made on the names not marked. This is purely accidental, and not to be deemed the marking or scratching contemplated by the statute, which is to be done by drawing a line "with a pen or pencil" through the names of the candidates for whom the voter does not wish to vote. The contestant's notice of contest contends

that similar ballots cast for the contestee should not be counted, and does not claim that such ballots should be counted for himself. The committee are of opinion, however, that they should be counted—14 for Tucker, and 54 for Yost—as appears by the record.

1078. The case of Yost v. Tucker, continued.

Where the State law specifically required rejection of a ballot whereof the scratching of a name failed to mark two-thirds thereof, the House approved rejection.

Although the intent of the voter be entirely plain the House will follow a State law, arbitrary but mandatory, which requires rejection of the ballot.

Is the House, in its function of judging elections, to be precluded by an arbitrary State law from determining the intent of the voter?

Where the State prescribes the manner of election, may the House disregard an arbitrary State law which denies expression to the voter's intent?

Discussion of the distinction between directory and mandatory election laws.

(c) As to imperfectly marked ballots a sharp division arose in the committee and on the floor of the House. As shown by the extracts of law already given no name was to be considered scratched unless the pen or pencil mark extended through three-fourths of the length of the name, and it was further provided that “when, as to any office, more than one name remains unscratched, the ballot for that particular office shall be void.” The majority of the committee say:

It appears very clear that unless a name is marked through three-fourths of its length it is not, within the meaning of the law, to be considered as scratched at all, and therefore more than one name in the so-called “imperfectly marked” ballots remains unscratched upon the ticket, and the law expressly provides that in such a case the ballot shall be void. It is not for the committee to decide whether the provision as to the marking of the ballot is a wise or reasonable one or not. The voter has failed to express his will by the so-called “imperfectly marked” ballot, according to the requirement of the statute, and, failing in that, the statute declares that the ballot is void. In the judgment of the committee, therefore, these “imperfectly marked” ballots can not be counted.

The minority¹ contended strongly that these ballots, which if counted would, the minority contended, give contestant a plurality of 22 votes, were marked sufficiently to show the intent of the voter, and should be counted. The minority views cite legal authorities, including the Illinois case of *Parker v. Orr* (41 N. E. Reporter), and express surprise that there should be doubt as to so well an established principle that a ballot should be counted if it expressed the intention of the voter beyond a reasonable doubt.

In the debate this view was enforced on the floor, especially by the argument² of Mr. Charles Daniels, of New York, who contended that the Constitution, in making the House the judge of the elections, returns, and qualifications of its own Members, excluded any State from tying the House down to any arbitrary principle or rule in determining from the evidence the voter's intention. Mr. Daniels

¹Views presented by Mr. James A. Walker, of Virginia, and concurred in by Mr. Henry F. Thomas, of Michigan.

²Second session Fifty-fourth Congress, Record, pp. 998, 1000.

drew a distinction between this case, where the mark “had a natural and reasonable significance,” and those cases where the law of the State required what might be called an arbitrary mark, a cross before or after the name, and not naturally of significance. In reply¹ Mr. David A. De Armond, of Missouri, called attention to the clause of the Constitution under which the State prescribed the “times, places, and manner” of holding elections, and held that the law of Virginia, as to how the elections should be conducted, the returns ascertained, and the result declared, was the law of Congress, which the House might not, under the Constitution, disregard. The question was not as to the intention of the voter, but whether in fact the name was scratched. When a constitutional statute said that unless three-fourths of the name was marked through it was not scratched, the question was not as to what the voter intended, but as to what he did. And Mr. McCall, in concluding the case, dwelt² upon the fact—as he claimed—that the Virginia statute (sec. 11, quoted above) was clearly mandatory, and quoted McCrary and Paine on Elections, especially the following paragraph from the latter:

Statutes expressly declaring specified acts or omissions fatal to the validity of an election, or expressly prohibiting the performance or omission of specified acts, are mandatory. While statutory provisions prescribing acts which are in their nature absolutely essential to the validity of the election may be mandatory, in whatever phraseology expressed, the most unimportant requirements may be made mandatory by a clear expression of the legislative will.

Referring to the case of *Parker v. Orr*, Mr. McCall noted the fact that the court held, on the particular provision of the law it was considering, that it was not intended by the legislature to be mandatory, and he cited from that decision the following:

Wherever our statutes do not expressly declare that particular informalities do not avoid the ballot, it would seem best to consider their requirements as directory only.

1079. The election case of *Yost v. Tucker*, continued.

An illegal destruction of ballots, but apparently done in good faith, was not held as evidence contributing to a charge of conspiracy.

Rejected ballots being illegally destroyed by election officers who were partisans of contestee, and against protest, contestant was held entitled to the advantage of every doubt.

Ballots improperly rejected by election officers, and then illegally destroyed, were proven aliunde and counted.

Electors being at the polls a long time, and prevented from voting by obstructive challenges of others, their votes were counted by the House.

To count votes tendered but not cast, it is necessary to establish obstruction by election officers and due diligence on part of the elector.

Serious irregularities by election officers, the rejection of an undue proportion of ballots for imperfect marking, and illegal destruction of rejected ballots, vitiated the return.

(2) The questions arising over the 1,021 burned or otherwise destroyed ballots: It appeared that a former law of Virginia had provided for burning ballots, but that the law under which this election was held—in use for the first time—had no

¹ Record, p. 1020.

² Record, pp. 1037, 1038.

provision authorizing the burning of rejected ballots. In debate Mr. McCall stated that the precincts where the rejected ballots were burned numbered about 15 out of 175 in the whole district.

At the outset an issue arose as to the burned ballots. The majority or the committee took a view which allowed to be credited to contestant only such of those ballots as he could prove to have been properly cast for him and which threw out the entire vote of only such precincts as could be successfully attacked individually. The majority say:

With reference to these ballots, generally, it may be said, in most instances, that the Republican judges at the precincts where they were cast concurred with the other judges in treating them as absolutely void, and agreed that they should be burned or otherwise destroyed. At a few precincts the Republican or Populist judges objected to their destruction, but the record shows that in almost every case these judges agreed to the count and concurred in the conclusion of the other judges that these ballots were not marked, as required by the statute, and could not be counted.

While the committee is of the opinion that in no case should the defective ballots have been destroyed, yet it is of the opinion that in nearly all of the precincts their destruction was made in entire good faith, and that such destruction in most of the precincts does not prove an intention to commit fraud on the part of the election judges. The contestant attempts to prove that some of these ballots were intended for him and as by their destruction he was prevented from having a recount of them, it is clearly his right to prove by the testimony of the judges, or of any witness, the exact condition of the ballots, and he is entitled to the benefit of any that he can show were cast for him.

The minority take issue with this position. They find 2,711 defective ballots, burned and unburned, which could be counted for no one, and declare that these defective ballots were "the result of an illegal and fraudulent conspiracy, entered into by sworn officers of the law for the sole benefit of this contestee." The Minority say:

In violation of law, the election was practically in the hands of one political party. It is shown by the record that only 15 per cent of the election officers were Republicans. It is shown that at many precincts Republican had no representation whatever among the election officers, and that competent Republicans could have been appointed. It is conceded that the defective ballots were cast by illiterate electors. It is proven that in every instance the officer designated by law to assist the illiterate was a Democrat, and in many instances so partisan that no member of the opposite party had confidence in him. It is proven that, in violation of law, as construed by the supreme court of Virginia, special constables refused to mark the ballots for illiterates who were opposed to them. A willing and cheerful service was rendered to their political friends. To such an extent was this carried that it was practically impossible for an illiterate Democrat, with the eye of a jealous party friend upon him, to cast a defective ballot, and it was almost impossible, at many precincts, for an illiterate Republican to cast a perfect ballot.

It is proven that in order to qualify themselves for the discharge of their duty as suffragans, the illiterate Republicans diligently sought to familiarize themselves with the printed name of the candidate of their choice—that many of them had so mastered the letters contained in the name "J. Yost" as to enable them to recognize it when printed in plain roman. That the Republican committee had widely circulated a pamphlet giving extracts from the election laws and detailing the method of voting. They advised that at each precinct an intelligent Republican should vote early, carefully inspect the ballot, and after voting explain to the illiterates who had not voted the location of Yost's name on the ballot. With this information and his ability to recognize the name of "J. Yost," the illiterate voter could have properly marked and cast his ballot. Knowing this, the Democratic officials, in utter disregard of law, entered into a conspiracy to dupe and deceive the opposing illiterate voter by alternating the names on the official ballot, printing the ballot in German text and other type illegible to a man who could only read plain roman, instructing special constables not to assist the illiterates, and in other ways sought to so confuse and mystify the voter as to render his ballot defective. Their object was accomplished. The fraud they planned and executed was consummated.

Is it a wonder that under these circumstances thousands of ballots cast by honest men were thrown out as defective? The very guardians of the law became its violators; men sworn to render assistance to the illiterates considered it their duty to defraud that voter of his suffrage, and did defraud him. And this House is asked to put the seal of its approval upon such work.

If this contestant were given the same proportion of these 2,711 unconsidered defective ballots as he received of the 1,086, which were distributed upon recount and proof, his plurality would be over 2,000. His proportion of the 1,086 was 669 on recount and 292 on burned ballots proven, a total of 961, or over 88 per cent.

This proportionate distribution of the 2,711 ballots would give Yost 2,385; Tucker 326. Yost's plurality, 2,059.

The majority of the committee, proceeding on the basis announced, examined the various precincts. In the following cases they took action involving new principles:

(a) At Curdsville precinct there were returned 38 votes for Tucker, 54 for Yost, and 2 for Cocke, and 111 votes were rejected, of which 107 were destroyed. The testimony indicated that 90 destroyed ballots were intended for Yost. The majority say:

The burning of the ballots was illegal. It was done by the act of judges representing the contestee and against the protest of the judge representing the contestant. In view of the great number of ballots destroyed, of the clear proof that this number contained ballots which were legal, and further, that the evidence was destroyed by partisans of the contestee, the contestant is entitled to the benefit of every doubt in the situation, and the committee is of opinion that the contestant should be credited with his claim here of a gain of 90 votes.

Also at New Canton, under similar circumstances, the contestant proved 100 votes by the best evidence the case would admit and was credited with that number.

(b) At Court House precinct the contestant called 36 voters who testified that they were in line waiting and desired to vote for contestant and would have voted for him had they had the opportunity to do so. No question was raised as to their qualification as voters, nor as to their intention to vote for the contestant, but the testimony did not show how long the voters were in line. The committee intimate that, in view of the fact that the record did not show obstruction by election officers or whether the voters stood in line a reasonable time, there were doubts about counting the votes, and content themselves with saying that these votes would not affect the final result. But as to Jackson River precinct the majority say:

At this precinct 13 voters testify that they were at the polls during a considerable portion of election day, were in line and desired to vote, and would have voted for the contestant. There is also evidence showing that a supporter of the contestee, a Federal officeholder, was actively engaged in challenging Republican voters, and that he consumed a large part of the day in asking questions, and thus delayed the voting. It appears from the testimony of the contestee's witnesses that there were not sufficient voting facilities for all who wished to vote. According to the rule laid down in the case of *Waddell v. Wise*, and *McCrary on Elections* (3d edition, sec. 523), the contestant should be credited with 13 votes at this precinct.

At this precinct the contestant also proves (pp. 202 and 204 of the record) that Thadeus Jones, a legally qualified voter, offered to vote for him, but was illegally prevented by the judges of election. This vote should be counted for the contestant.

(c) At Brown's Church precinct, where the returns gave Tucker 131 votes, Yost 51, and Cocke 13, it appeared that 234 ballots were rejected and burned.

Two officers of elections were shown to have been drinking, and two judges and a partisan of contestee, who was not an election officer, kept account of the votes. The judges did not agree as to the result reported. The report says:

1080. The case of Yost v. Tucker continued.

Misconduct of the officer who assists illiterates to mark their ballots justifies correction but not rejection of the poll

The presumption arising from the fact of registration is not overthrown by the simple proof that the voters are students.

The House favored purging rather than rejecting the return of an entire county wherein a partisan county electoral board had so printed the ballot as to confuse voters.

Because the officer who assists illiterates to mark their ballots takes a narrow and technical view of his duties under the law does not justify rejection of the poll.

B. W. L. Blanton, the Democratic precinct chairman, was present at the count, and the judges apparently followed his directions as to which ballots should be counted. Blanton was the one who suggested that the ballots should be burned. He admits that the alternating of the names upon the ballot was done at his order. He also admits that he caused the initial "J" to be separated from the name "Yost" by a blank space of 2 inches for the charitable purpose of giving Yost "the same rights and privileges on that ticket that the rest of the candidates had." The irregularities at this precinct were of the most serious character, and these irregularities, taken in connection with the gross disproportion of the ballots rejected to the ballots counted and their destruction, are sufficient to destroy all faith in the official acts of the officers and to require the rejection of the returns.

(d) As to Milner's precinct the majority find:

The evidence is pretty strong that the constable at this precinct did not perform his full duty in aiding illiterate voters. He admitted that the Democratic county chairman had instructed him as to his duty in marking the ballots. Misconduct of this officer would not be sufficient to warrant the rejection of the whole poll and the disfranchisement of all the voters there, because its effect can reasonably be limited to the number of illegally marked ballots, of which there were 23. The evidence does not show such irregularity or fraudulent conduct on the part of the judges as would destroy the value of the returns as evidence. If the contestant were credited with the rejected ballots, his vote at this precinct would be increased by 23.

(e) In Lexington precinct 11 students voted, and the contestant claimed the deduction of these votes. The committee say:

These votes were cast by students of the university located there, and the contestant contends that they were nonresidents. McCrary on Elections, section 41, says:

"The question whether or not the student at college is a bona fide resident of the place where the college is located must in each case depend upon the facts. He may be a resident and he may not be; whether he is not depends upon the answer which may be given to a variety of questions, such as follows: Is he of age? Is he fully emancipated from his parents' control? Does he regard the place where the college is situated as his home, or has he a home elsewhere to which he expects to go and at which he expects to reside?"

The contestant furnishes evidence upon few, if any, of these important issues.

The presumption, from the fact of registration, is that these 11 students were voters at this precinct, and this presumption is not overthrown by the simple proof that they were students. Moreover, there is no evidence that they voted for the contestee. These votes, therefore, should not be deducted from the vote of the contestee.

The minority say:

In regard to the 11 student votes at Lexington, the testimony of R. A. Fulwider, a fellow student, shows:

“Q. 12. Are these students residents of Lexington in the Lexington precinct, or are they merely here from other sections of the State as students?—A. They are all entered upon the catalogue as being residents of other States except the two Mitchells, who are from Brownsburg, Rockbridge County, Va.

“Q. 13. Please state the politics of these students and for whom they voted at the last election—A. They all claim to be Democrats, and I know that personally, and I believe they cast their votes for Mr. Tucker.”

Not one of these students was placed on the stand by the contestee. The majority presumes “from the fact of registration” that these students were voters at that precinct, and this presumption is supposed to outweigh the positive testimony that these students appeared on the college roll and were recognized as residents of other States. It would have been an easy matter for contestee to have put these students on the stand and thus met evidence with evidence.

A leading issue in this case arose over the claim of the contestant that the entire votes of the counties of Amherst and Appomattox should be rejected. The minority give as reasons for rejecting the vote of Amherst County—

That the electoral board consisted entirely of members of sitting member’s party, and that one of them was also the chairman of the county committee of the same party. This partisan, after appointing the special constables for each of the precincts, called them together and, as chairman of the county committee of his party, instructed them as to their duties in assisting illiterate voters. The electoral board failed to give contestant’s party proper representation on the precinct boards, although such representation might have been allowed. The partisan chairman, who instructed the constables as to how to assist in marking the ballots, also as member of the county electoral board, had the official ballots printed, and he admitted that he alternated the names and used different styles of type, producing about seventy-five different kinds of ballots. In view of these facts the minority claim that the entire vote of the county should be rejected, saying:

It would indeed be an unfortunate precedent to hold that the crooked ways resorted to by the Democratic election officers in that county were legal and valid. It is admitted that at nearly one-half of the precincts in the county none of the judges were Republicans, contrary to the express provision of the statute; that the ballots were printed partly in German and partly in Roman text; that the names of the candidates were alternated; that the secretary of the electoral board instructed the special constables not to mark the ballots for the illiterate voters unless they were blind or physically unable to mark for themselves. It is proved that constables at many precincts in the county refused to give aid to Republican voters who requested them to do so.

For similar reasons the minority argued that the vote of Appomattox County should be rejected.

The majority of the committee condemn the action of the county board, but say:

If the officers guilty of such conduct had charge of the making up of the returns in the various precincts they would need to be scrutinized with the gravest suspicion, and they certainly would not be entitled to that weight and effect as evidence which are due to uncontaminated returns. But the elections were in charge of the election judges at the different precincts and, while the fact that these judges were appointed by the county electoral boards is a circumstance which would invite the most careful scrutiny of their conduct, it would be a daring conclusion to infer that the credibility of the returns at all the precincts in this county was destroyed and that all the voters should be disfranchised because the precinct officers had been appointed by a central county board which alternated the names on the ballot. Such a wholesale exclusion of votes would not be warranted; but the evidence of each

precinct should be considered separately, as it has been by the committee in the preceding portions of this report.

The committee is also under the necessity of considering whether and how much the contestant's vote suffered on account of this method of printing. There were 349 defective ballots in Amherst County out of a total of 2,705 (p. 124 of the record), a percentage not materially greater than the percentage of defective ballots throughout the whole district; and the relative strength of the parties, as shown at previous elections, appears to have been fairly maintained in this election.

Substantially the same observations may be made as to Appomattox County, where there were 153 defective ballots out of a total of 1,431, and the contestee received a plurality of 49. The committee is of the opinion that the evidence will not warrant the rejection of the votes of these two counties.

The minority of the committee also contended that the entire vote of the First Ward of Staunton should be rejected "because of the confessed violation of law by Constable J. Frank West."

The law of Virginia as construed by the supreme court was:

It is the duty of the special constable to render him who is blind, or unable by defective education to read, every assistance asked for and required by the elector to aid him in preparing his ballot.

Constable West testified that he told the voters he did not want to know how they intended to vote, but pointed out the names and let the voters mark them. He declined to mark the ballots for the voters, considering that he had no right to do so. The minority claimed that West's illegal construction, and the illegal acts committed under cover of that construction, rendered the returns from the precinct unworthy of credit.

The majority concluded, however—

A careful examination of the evidence in this precinct fails signally to show any actual fraud. One of the judges was a Republican, and he is not called to testify by the contestant, and the only evidence tending to show any misconduct is directed to the action of the special constable. The evidence does not show that he committed any fraudulent acts, but does show that he performed his duties, under the law, as he understood it. The constable took a narrow and technical view of his duty, but there is no primary or direct evidence to show that he failed to sufficiently assist any voter. He himself declares:

"In no instance where in elector, whenever it was lawful for me to assist, told me for whom he wanted to vote did I allow his ticket to be deposited unless it properly registered his vote for the candidate he had told me he wanted to vote for."

As appears from the recount, out of a total of 663 ballots cast in this ward, 76 were rejected as defective, which is a very little larger percentage of the total votes cast than the rejected ballots of Ward 2 were of the total number of votes in that ward, where the returns are not attacked; and doubtless a considerable number attempted to mark their own ballots without asking assistance. The evidence fails to disclose any ground for rejecting the whole vote of this poll and throwing out the returns themselves, the reliability of which is not assailed in the slightest degree. The principle on which returns are usually rejected is that when the officers of election have been guilty of such frauds or irregularities as to destroy the value of the returns as evidence the returns can not be relied upon to prove the result and must be disregarded. There is no evidence that the returns at this poll did not correctly show the result, and to throw out the whole poll would be to ruthlessly disfranchise honest voters. Including the so-called "caption-marked" ballots, the committee finds, upon the basis of the agreement between the parties, that the contestant received 227 votes at this precinct and the contestee 335.

In conclusion, the majority of the committee found that after all deductions there remained to sitting Member 161 plurality. The minority found for contestant 736 plurality.

On January 20 and 21¹ the report was debated in the House with much learning and at great length. The question being taken, the proposition of the minority, declaring contestant entitled to the seat, was decided in the negative, yeas 119, nays 127. A motion to reconsider this vote was laid on the table, yeas 120, nays 104. Then the question recurred on agreeing to the resolutions of the majority of the committee confirming the title of sitting Member to the seat, and there appeared, yeas 119, nays 47, answering present 15. A quorum responding, the resolutions of the majority of the committee were agreed to.

1081. The North Carolina election case of Thompson v. Shaw, in the Fifty-fourth Congress.

Irregularities in the conduct of an election do not in themselves justify rejection of a poll.

On May 6, 1896,² Mr. Warren W. Miller, of West Virginia, submitted the report of the Committee on Elections No. 2 in the case of Thompson *v.* Shaw, of North Carolina. The sitting Member had on the face of the returns a majority of 994 votes.

The county canvassers in three counties had rejected the vote of certain precincts, which had given a total of 371 for contestant and 254 for sitting Member; it having been admitted by both parties to the contest that the action of the canvassers was wrong, and therefore the committee counted the rejected vote. This reduced the majority of sitting Member to 877.

Contestant claimed that the whole vote of Cross Creek precinct, where the return was 1,120 votes for sitting Member and 15 for contestant, should be rejected for frauds committed and unlawful acts done by the partisans of sitting Member. The committee, while believing that there were irregularities in the conduct of the election and that perhaps illegal votes were cast and counted for sitting Member, yet did not feel warranted, upon the facts proved, in disregarding the whole of the votes cast at the precinct.

In conclusion the committee found that, conceding to contestant the benefit of every reasonable doubt and all legitimate presumptions, he fell far short of a sufficient number to elect him legally.

Therefore the committee recommended resolutions declaring Mr. Thompson not elected and Mr. Shaw entitled to the seat. On May 6, 1896,³ the House concurred in the report of the committee.

1082. The Louisiana election case of Coleman v. Buck, in the Fifty-Fourth Congress.

Although violence, intimidation, and fraud were extensive in a district, yet, as it did not appear that the result was affected by these means, the returned Member was confirmed.

On March 12, 1896,⁴ Mr. Warren W. Miller, of West Virginia, from the Committee on Elections No. 2, submitted the report of that committee on the case of Coleman *v.* Buck, of Louisiana. The sitting Member received on the face of the official returns a majority of 7,653 over the contestant.

¹ Second session Fifty-fourth Congress. Journal pp. 98, 100, 101; Record pp. 980–1001, 1019–1042.

² First session Fifty-fourth Congress, House Report No. 1636; Rowell's Digest, p. 520.

³ Journal, p. 460.

⁴ First session Fifty-fourth Congress, House Report No. 758; Rowell's Digest, p. 518.

The contestant attacked the returns from various precincts and parishes, in substance as follows:

That the Democratic officials had violated the election law in the appointment of election officers, registrars, and other persons; that any legal voters, who would have voted for contestant, were prevented from registering by acts of violence committed by Democrats; that hundreds of Republican who were entitled to vote, and who would have voted for contestant, were prevented from so doing by intimidation and other unlawful means used by Democrats in the interest of the contestee; that by means of murder, arson, false registration, the issuance of thousands of fraudulent registration certificates, ballot-box stuffing, forged returns, and destruction of ballots voted by Republican for contestant, the Democrats, in the interest of contestee, inaugurated and maintained before and at the time of said election such a reign of terror and committed such acts of lawlessness, with the knowledge and consent of the authorities, that no legal or fair election could be or was held in said district.

The committee, after explaining the election law of Louisiana, thus summarize their conclusions:

The record in this case shows a willful disregard by the Democratic officers of every one of the provisions of the election law above cited in the conduct of said election, except in the said parish of Orleans.

In Jefferson Pariah the watchers appointed by the Republicans were refused admission to the polling places by the Democrats. Republicans, mostly colored men and legal voters, who would have voted for contestant, were refused the right of suffrage; tally sheets, lists of voters, and poll books were altered and forged; ballot boxes were stuffed with fraudulent ballots and many other illegal acts done in the interest of contestee and against contestant.

For the foregoing reasons the vote of said parish of Jefferson must be thrown out and wholly rejected.

For like reasons the vote returned from the First, Second, and Fifth wards, respectively, of St. Charles Parish are also wholly rejected.

It is shown by the record that in the said wards in the city of New Orleans, in the parish of Orleans, large numbers of Republican voters were refused registration; that numerous unlawful assaults were made, and acts of violence committed upon colored Republicans who attempted to register as the law required; that mob violence prevailed in said wards of said city and parish before and at the time of said election, with the knowledge and, as the committee believe, with the assent of the authorities; that much fraudulent voting was done in favor of contestee, and that many of the colored Republicans were denied the equal protection of the law on account of their race and political opinions.

The committee is further of opinion that many Republicans who were entitled to vote, and who would have voted for contestant, were intimidated, and thus kept from voting; that some of the illegal votes cast for contestee in said wards of said city could be segregated and deducted from the number of votes returned and certified for him as aforesaid; but it does not appear that a sufficient number of legal voters who would have voted for contestant were refused the right of suffrage to change the general result of such election, as certified, after such correction should be made.

Neither is it shown that fraud, unfairness, violence, or intimidation prevailed in said election to such an extent as would warrant the committee in throwing out and rejecting the total vote of said wards in said city and parish of Orleans.

Unless this be done the contestee yet has a majority after deducting from his vote, as certified, the votes cast for him in the parish of Jefferson and wards 1, 2, and 5 in the parish of St. Charles as aforesaid, and any other illegal votes cast for him or legal votes rejected in his interest in the said wards in the city and parish of Orleans.

Therefore the committee reported resolutions declaring the sitting Member entitled to his seat, and the contestant not elected. On March 12, 1896,¹ the House concurred in the report without division.

¹Journal, p. 301.

1083. The North Carolina election case of Cheatham v. Woodard, in the Fifty-fourth Congress.

A contestant must sustain by evidence his claim that he was elected.

On May 14, 1896,¹ the Committee on Elections No. 2 submitted the report in the case of Cheatham *v.* Woodard, from North Carolina. The official returns from the district gave to Mr. Woodard 14,721 votes, Mr. Cheatham 9,413, and Mr. H.F. Freeman 5,314. The contestant alleged various objections to the returns, and contended that the colored voters in the district were in the majority and were for him. The committee did not find this or any of the other allegations sustained, and reported resolutions confirming sitting Member in his seat. On May 14² the House concurred in the report of the committee.

1084. The Georgia election case of Felton v. Maddox, in the Fifty-fourth Congress.

Where contestant's case did not overcome returned Member's majority the House did not consider the returned Member's counter charges.

Failure of county officers to verify formally a registration list did not invalidate the election, no voter being deprived of any right.

Where an unauthorized but not fraudulent erasure of names occurred on a registration list the House counted votes of electors harmed by this erasure.

Failure of registrar to appear when summoned to explain charges of illegal registration does not prove the charges.

An election is not affected by the fact that the registration lists are in writing when the law requires them to be in printing.

On May 11, 1896,³ Mr. Charles Daniels, of New York, from the Committee on Elections No. 1, submitted the unanimous report of the committee in the case of Felton *v.* Maddox, of Georgia. The contestant challenged the election in three counties, and the sitting Member in reply challenged the result in three other counties, which were favorable to the contestant.

The official return gave the sitting Member a majority of 1,562 votes. As the committee found from contestant's testimony that this majority could not be reduced by more than 350 votes, they did not find it necessary to consider the counter charges by the sitting Member, since the only effect would be to increase the sitting Member's majority—an unnecessary result.

The charges of the contestant related to several features of the election:

(1) Irregularities in the registration, whereby in some cases voters were deprived of their votes:

(a) In Bartow County the law required the registry list to be verified by the county commissioners. They failed as a board to verify the list, allowing that to be done by one of the members. The committee say:

This was an irregularity, but as long as it did not deprive the voters of their right to vote it did not invalidate the election in this county.

¹ First session Fifty-fourth Congress, House Report No. 1809; Rowell's Digest, p. 521.

² Journal, p. 490.

³ First session Fifty-fourth Congress, House Report No. 1743; Rowell's Digest, p. 510.

(b) In Bartow County, after the October election and before the election in November, 1894—the election in question—the tax collector erased, apparently without authority, 175 names from the registered list of voters which he, under the law, had made as collector. The committee found that they were made in good faith, and that it would be sufficient to allow to contestant the votes of 9 of his supporters who had in fact paid their taxes, but whose votes were refused because their names had been erased.

(c) In Cobb County it was charged that the registration list contained the names of fictitious and unqualified persons, and the register, when subpoenaed to attend and give his evidence for the contestant, failed to do so. But the committee found that his absence did not prove the truth of the charge, and testimony given failed to prove that names added were of unqualified persons.

(d) The law directed that the registration lists sent to the election managers should be printed, but in Cobb County were written. The report says:

This was an irregularity, but it was not proven to have influenced in any manner the vote of any person or to have permitted any person to vote who was not entitled to do so. Accordingly, under the well-settled principle of the law, as well as of a positive enactment of the State of Georgia, this omission to print the lists can not be allowed to affect the result of the election, which seems to have been the same as though the lists had been printed.

(e) In Floyd County three persons were irregularly registered by their firm names, but as it did not appear for whom these persons voted, no special consideration was given the matter.

1085. The election case of Felton v. Maddox continued.

Returns are not vitiated simply because election officers lack certain qualifications required by law.

Failure of election officers to subscribe their names in full to their affidavits and returns does not vitiate the returns.

Election officers who have not taken the required oath are still de facto officers and their acts are valid.

It not being shown for whom a few paupers voted, the Elections Committee did not give the charge consideration.

Ballots deposited by error in a ballot box other than the Congressional box, and in charge of other officers, should be counted as if deposited aright.

The election for Congressman, being lawfully held, is not vitiated by another election on a local matter held unlawfully at the same place.

The entire poll may not be rejected because an unascertained number of electors were corruptly influenced by tickets to a barbecue.

(2) Irregularities as to qualifications or acts of election officers in these instances:

(a) In Cobb County the qualifications of certain superintendents of elections were alleged not to be in accordance with the requirements of the law of the State. It was also charged that they had failed to subscribe their names in full to their affidavits and returns. The committee found, however, that these were no more than “irregularities, not in fact changing or affecting in the least degree the election or its results, and the returns can not be set aside or disregarded because of these defects. They were of no materiality, and the statute prescribing them was in no respect mandatory.”

(b) In Livingston district the report says “the managers may not have taken the oath prescribed for them by law; but if they did not, they were still de facto officers without taking the oath, and their acts are legal,” quoting Paine and McCrary on Elections in support of this doctrine.

(3) As to illegal and informal votes in the following instances:

(a) In Floyd County 5 or 6 inmates of the almshouse were permitted to vote; but as it did not appear for whom the votes were cast, the committee gave the question no special consideration.

(b) In Livingston district a local county election was held at the same time, there being two boxes differently labeled and different election managers. At the close of the election a few Congressional votes were found in the local issue box. “But says the committee, “the fact that they were mistakenly so deposited did not legally deprive the candidate of those votes. They should still have been counted as they appeared by the managers of the Congressional election. But the failure to count them seems to have deprived the contestant of no more than one vote over those in the same box for the contestee.”

(4) In Livingston precinct the committee found that “the failure to deliver a package of * * * votes, as they should have been, was a breach of confidence, but there is no reliable evidence that the contestant in the end lost any votes by that circumstance.”

(5) At the same time and places that the Congressional election was held in Floyd County there was also an election to authorize an issue of county bonds. For that reason the election in this county was objected to as illegal. The committee say:

But as the election for Members of the Fifty-fourth Congress was most certainly lawfully held it could not be deprived of that character because another election for another object held at the same time and place was held without authority. Each could well be held without the one interfering in the least degree with the other. As a matter of fact the bond (county) election was authorized by the law of the State, and it was represented by a manager and box different from that of the Congressional election box. the boxes were differently labeled and voters were required to state for which election their votes were offered.

(6) In Floyd County a barbecue was held to promote the county election on the bond question, and contestant charged that tickets to the barbecue were used to induce colored voters to vote for sitting Member. The committee found no sure means of determining how many votes were thus influenced, and that the evidence would in no way justify the rejection of the entire vote of the county.

The committee, in accordance with their findings, reported resolutions declaring contestant not elected and sitting Member entitled to the seat.

On May 11¹ the resolutions were agreed to by the House without debate or division.

1086. The New York election case of Mitchell v. Walsh in the Fifty-fourth Congress.

Testimony in an election case being taken before a person who had ceased to be a notary, but none of the parties or witnesses being aware of this until nearly all the evidence was in, the House considered it.

As to the evidence required to show a conspiracy to bribe.

¹Journal, pp. 475, 476; Record, p. 5088.

Where a conspiracy to bribe is shown, and an indefinite number of tainted votes are cast, the entire poll is rejected.

Where a conspiracy to bribe for the benefit of one party causes rejection of the return, should the innocent opposing party be credited with his unimpeached vote?

Discussion of the value in proving bribery of testimony as to statements of voters after they have voted.

On May 15, 1896,¹ Mr. Chester I. Long, of Kansas, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the case of *Mitchell v. Walsh*, from New York.

At the outset of this case a preliminary question of importance was passed upon. The law of Congress provides that a contestant may apply for a subpoena to any notary public—among others—who may reside in the Congressional district in which the contested election was held. It is also provided that all witnesses who attend the examination shall be examined under oath. William A. Hoar, the notary before whom the testimony in this case was taken, was in 1893 a resident of Kings County, N. Y., and, as a resident of that county, was appointed a notary public. The statutes of New York provide that a notary public, appointed for the county of Kings—as well as for some other counties—upon filing a certified copy of his appointment, etc., in the clerk's office of New York County, may exercise all the functions of his office in that county, as well as in the "county in which he resides and for which he was appointed." In compliance with this provision Hoar filed a certified copy of his appointment in the clerk's office of New York County.

Prior to the taking of testimony in this case Hoar removed from Kings County and took up his residence in the Congressional district in which this contested election was held, which is in the city and county of New York. The law of New York provided that an office shall become vacant when an incumbent, if he is a local officer, ceases to be an inhabitant of the political subdivision of which he is required to be a resident when chosen. The courts of New York have held that a notary public is an officer within the meaning of the statute. The sitting Member made no objection to the qualifications of the notary until the taking of testimony in rebuttal began. The majority of the committee conclude as follows:

We are of opinion that the testimony taken before William A. Hoar ought to be considered by the committee and the House, for the reasons following:

1. Because it is too late for the contestee to be permitted to object on this ground. He knew, or, what is the same in legal effect, he was charged with knowledge of the fact as to whether Hoar was a notary authorized to administer oaths. He knew that the notary was described in the notice as residing in the Eighth Congressional district, and in his signatures to the transcript of testimony as notary of Kings County, with certificate filed in New York County. To say the least, he was put upon inquiry.

The contestee is in the same position as if he and the contestant had agreed that the testimony might be taken before a person who was not, by any law, authorized to administer oaths. It is true that such an agreement might not be recognized by the House of Representatives. It might abrogate that, as it might any other agreement between parties. But it does not lie in the mouth of either party who has, either in fact or constructively, so agreed to object to the validity of testimony so taken.

2. But we are constrained to put our conclusion on still broader grounds. The House of Representatives, with its broad and, indeed, limitless powers respecting the settlement of contested election cases,

¹First session Fifty-fourth Congress, House Report No. 1849; Rowell's Digest, p. 521.

is only desirous of arriving at the truth. While it will not depart from wise and well-settled rules of law, it will not hedge itself about with technical rules which do manifest wrong.

In this case it is apparent that the parties to the contest, their attorneys, and every witness who was summoned, supposed that Hoar was a notary public, with full power to administer oaths, and that a prosecution for perjury could as certainly be based upon a false statement before him as upon a false statement made on oath in a court of justice. We have therefore considered the evidence.

The minority did not dissent from the law and facts as stated by the majority; but declined to assent "to the proposition that, under any circumstances, unsworn statements of persons called as witnesses can be substituted for evidence taken under oath duly administered as required by laws governing contested elections. Such a course of procedure, whether agreed to by the parties or not, would reduce the taking of testimony in contested election cases to a farce." The minority further argue:

We can not assent to the proposition that, under any circumstances, unsworn statements of persons called as witnesses can be substituted for evidence taken under oath duly administered as required by laws governing contested elections. Such a course of procedure, whether agreed to by the parties or not, would reduce the taking of testimony in contested election cases to a farce unworthy of a moment's consideration in the determination of an election contest. * * *

We think the acceptance and consideration of testimony so taken without the sanction of an oath would be an exceedingly dangerous precedent in contested election cases. The temptation to perjury, exaggeration, and evasion for partisan purposes, or through more unworthy motives, is already great enough in such cases without adding the encouragement of the assurance that Congress will accept and consider testimony taken by persons not authorized to administer oaths, in the giving of which the witnesses are assured of their absolute immunity from punishment for perjury. If the contestant and his witnesses, knowing, as stated, that Mr. Hoar was a notary public for Kings County and that he had changed his residence from Kings County to New York County, were ignorant of the legal effect of those facts, it may be a hardship upon him to exclude from consideration the testimony taken on his behalf before Mr. Hoar, but it is a misfortune for which he alone is responsible, and it is a misfortune for which no relief can be given at this time without causing a public injury infinitely greater than the private injury which might thereby be avoided.

Contestant had a remedy for his mistake in taking the testimony in question before an unauthorized person to which he might have resorted after discovering Mr. Hoar's incapacity.

He might have applied to the House or to this committee for leave to retake the testimony before an authorized person, and such a request, if made in reasonable time and in apparent good faith, would certainly have been granted.

The testimony being admitted, the merits of the case were considered. The sitting Member had been returned by an official majority of 367. All the portions of the Congressional district except the second assembly district gave contestant a majority of 1,328, while the second assembly district gave sitting Member 1,695 majority. Contestant attacked five election districts in this second assembly district. These five districts gave sitting Member 729 votes on the official return, and 286 to contestant.

The majority of the committee were satisfied from the evidence that a well organized system of bribery was carried on in the five districts on behalf of the sitting Member by the Tammany organization (of which sitting Member was a vice-president), in collusion with the keepers of lodging houses. After quoting the testimony of certain witnesses, the report says:

Contestee attempted to discredit the testimony of the above witnesses by showing that they had been entertained by contestant and his attorneys, and for this reason were unworthy of belief.

They were not impeached in any instance, and we believe that, taking into consideration the surrounding circumstances, they are entitled to credence.

Fraud can rarely, if ever, be proven by direct evidence, and the rule is that whenever a sufficient number of independent circumstances which point to its existence are clearly established a prima facie case of its existence is made, and if this case is not met with explanation or contradiction it becomes conclusive.

In *Paine on Elections* the following rule is announced: "When evidence of bribery by an active supporter of the respondent is shown, the court will draw unfavorable conclusions from the neglect or refusal of the person so charged to explain his conduct in the witness box."

Contestee did not introduce any evidence to disprove the charges of bribery. Not a Tammany captain on whom the bribery was fastened by the testimony was put upon the stand to contradict the statements made by the witnesses, nor to assert his innocence, nor to disprove what the testimony so clearly proves—namely, the existence of a conspiracy to procure votes by bribery.

The majority of the committee then go on to say that—

It is impossible to determine the number of bribed voters or the names of the voters. These five election districts were thoroughly saturated with fraud and corruption. The case of *Platt v. Goode* furnishes the only rule that can safely be followed in this case. In that case, where it was shown that 500 voters who had been bribed voted in three precincts which polled in the aggregate 1,619 votes, the whole returns of those precincts were rejected upon the ground that when the record showed that illegal votes had been cast, and furnished no method for their elimination, the vote of the entire precinct should be rejected.

Contestant insists that only the vote of the contestee in these five districts should be rejected, for the reason that there is no evidence of bribery in the interest of contestant. This is true. It is not necessary in the decision of this case to determine which rule should be adopted, and we do not decide which is correct. The result is the same whichever is followed. If the vote of contestee only in these five districts is rejected, contestant will be elected by 362. If the entire vote in these five districts is rejected contestant will be elected by 76.

Contestee insists that he should only lose those votes where individual instances of bribery are proven. We can not accept this theory of the law when the evidence shows the existence of a conspiracy to corrupt voters by bribery. The case of *Noyes v. Rockwell* clearly establishes the doctrine that where a conspiracy to corrupt voters by bribery is shown to exist, and it is established that one voter of a class was bribed, that the votes of all persons belonging to the class who cast similar ballots should be rejected.

In this case the existence of the conspiracy is clearly shown in these five election districts, and as it is impossible to determine the number of votes affected, and also impossible to eliminate the bribed votes from the legal, we have reached the conclusion that the vote from these five districts should be eliminated from the count.

Therefore the majority submitted resolutions declaring that sitting Member was not elected, and that contestant was elected.

The minority in views submitted by Mr. James G. Maguire, of California, denied the sufficiency of the testimony to justify the conclusions of the majority. They criticized the testimony as insufficient, as corrupt, and as hearsay. In respect to the latter class of testimony they say:

Nearly all of the testimony relied upon by contestant to prove bribery and corruption * * * consists of statements made by alleged voters to the witnesses after having voted. Such testimony is as worthless in an election contest as in any other judicial proceeding, and must be disregarded. In the case of *Ingersoll v. Naylor*, in which extensive frauds were alleged to have been committed, the committee refused to consider hearsay evidence much like that introduced in this case.

The minority also quote on this point *Dodge v. Brooks*, *Cessna v. Myers*, *Gooding v. Wilson*, and *Littell v. Robbins*.

On June 2, 1896,¹ the report was debated in the House. Without division the resolution of the minority declaring sitting Member entitled to the seat was dis-

¹Journal, p. 563; Record, pp. 6012-6021.

agreed to. The question then recurring on the resolutions of the majority, they were agreed to, yeas 162, nays 39. Thereupon Mr. John Murray Mitchell, the contestant, appeared and took the oath.

1087. The Kentucky election case of Denny, jr., v. Owens, in the Fifty-fourth Congress.

The House declined to count the votes of witnesses who failed to show that they were illegally refused registration or that they had tried to vote.

It is as important that the registration be kept free from disqualified persons as that every legal voter shall be registered.

The House confirmed a canvass made by a local board later than the date prescribed by law, the explanation of the delay being sufficient.

The House may canvass the returns and declare the result although the required State canvass may not have been made.

On May 19, 1896,¹ Mr. S. S. Turner, of Virginia, from the Committee on Elections No. 1, submitted the report of the committee in the case of Denny, jr., v. Owens, of Kentucky. There were four candidates, two of whom received small votes. Mr. Owens's plurality over Mr. Denny was officially returned at 101 votes. The notice of contest and answer thereto alleged frauds and irregularities.

The committee found considerable irregularity, but it appeared in general to affect both parties so as not to influence the result. The following questions were particularly considered:

(1) In Fayette County contestant alleged that he was deprived of between 200 and 300 votes for the reason that voters to that number were illegally refused registration. He produced 117 witnesses who swore that they were refused registration, and that they were legal voters and should have been registered. Another witness swore that 328 persons reported to him that they had been refused registration, and that 212 of them gave their streets and the numbers of their homes. The committee say:

There is no evidence, except in two or three instances, tending to show that any of these persons went to the polls on election day and offered to vote and were refused. In each instance when a person was refused registration it was done so on the ground that the person seeking to be registered was unknown to the registration officers or for the reason that the registration officers entertained doubts as to the right of such person to register. The person was required to produce some one who could identify him and swear that he was a legal voter of the precinct where he sought registration.

The report quotes the Kentucky statute:

If the officers of registration entertain any doubt as to whether or not any person offering for registration is entitled to such registration, or if anyone's right to register is challenged, citizens may be called in not exceeding three in number, who shall be examined touching the qualifications of such persons who offer to register.

"In no case where a person was refused registration" say the committee, "did he offer to produce three citizens by which to establish his right to register. Neither did the registration officers refuse to hear such citizens if they were produced. It is not made evident to us but what the officers refusing registration in each case had doubts about the right of such person to register. It is impossible for us to say,

¹First session Fifty-fourth Congress, House Report No. 1877; Rowell's Digest, p. 511.

therefore, that these persons were wrongfully refused registration. The officers of registration may have applied the rule very strictly in many cases, but this alone would not be sufficient to establish a wrongful refusal." The committee conclude:

It is just as important that the registration lists be kept free from the names of persons which are not entitled to be there as it is that every legal voter shall be registered when he makes such application. In order that registration lists be kept pure the officers of registration are required to take the precaution prescribed by these sections, and they can not be charged with wrongdoing if they do this, though it may put legal voters to inconvenience.

(2) Contestant asked the rejection of the entire returns of Franklin County for the reason that they were not canvassed on the day prescribed by law. The report explains that

Under the Kentucky statute, the judge of the county, the clerk thereof, and the sheriff constitute the canvassing board. Any two of them may constitute such board, but if either one of the three is a candidate he shall have no voice in the decision of his case. If it should happen that two of them can not act in whole or in part in such canvass, their places shall be supplied by two justices of the peace, who may reside near the county seat. It happened that in Franklin County the judge, the clerk, and the sheriff were candidates for election. They therefore were not authorized to canvass the returns. Disregarding the provisions of the statute, these officers did canvass the returns one day earlier than the law prescribed. A few days after this two justices of the peace, residing nearest the county seat, also canvassed the returns of the county, and the result of their canvass was certified to the Secretary of State. This canvass, however, was had some days later than the one designated by law.

It is admitted by both parties that the first board had no authority to canvass the returns of the county.

Contestant, while admitting that the second board was properly constituted, maintains that as its canvass was had on a day not designated by law, it was illegal and void.

We can not agree with him in this contention. We think that the proper board could be compelled to make this canvass by a mandate from any court of competent jurisdiction. If this be true, then the board may do the same thing without the mandate to a court. The mandate does not give the right to canvass the returns, but requires it to be done; because, as a matter of right, it ought to be done. Certainly it would be a good return to the alternative writ if the board were to say they had already done what the court was asking them to do.

Aside from this, we are of the opinion that we would have the right to canvass the returns in this contest and declare the result, though there had never been a canvass.

1088. The case of Denny, Jr., v. Owens, continued.

The House made no correction for a limited number of persons registered at an illegal time, there being no proof of how they voted.

It being impossible to determine for whom informal ballots (issued because the regular ones had failed) had been cast, the House did not correct the return.

There being no evidence that either party had suffered especial harm, the House did not count votes excluded by closing the polls, although negligence of election officers was alleged.

The State law prohibiting rejection of a ballot for a technical error which did not obscure voter's intent, the House counted ballots marked with a pencil instead of a stencil.

The House rejected ballots marked publicly in presence of the election officers.

(3) The committee found that in one precinct 15 persons were allowed to vote who had registered on election day or the day prior. Such registration was wholly unauthorized; but the proof did not satisfy the committee as to how the unauthorized persons voted.

(4) In some precincts the ballots gave out before all persons had voted. In some of these cases ballots from other precincts were borrowed and used. In other cases blanks on which to make return of the votes were used. The committee considered it unnecessary to determine whether such devices were legal or otherwise, for the reason that they could not tell for whom such irregular ballots were cast.

(5) In one precinct the hour for closing the election arrived before all the voters had had an opportunity to cast their ballots. Contestant claimed that this occurred on account of the negligence of the election officers and that he lost many votes by reason of it. The committee left the vote to stand, as the testimony did not indicate to them that the contestant lost more votes for this reason than did the sitting Member.

(6) Certain ballots were not counted by the canvassers for the reason that the cross mark was made with a lead pencil instead of a stencil, as the statute required. The committee say:

We are inclined to think, but without definitely deciding it, that these ballots ought to have been counted, for in section 1471 of the Kentucky statutes we find the following provision: "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice." We have made a computation of these ballots and find that 31 were rejected which should have been counted for Mr. Denny, and 3 that should have been counted for Mr. Owens. The committee accordingly made the correction.

(7) Two voters stamped their ballots publicly in the presence of the election officers. They voted for Mr. Owens and the ballots were deposited and counted for him. The committee found that they should not have been deposited or counted, and deducted them from Mr. Owens's vote.

(8) Various other irregularities were found by the committee; but they benefited both parties, and as they neutralized one another, were not taken into account by the committee.

The result of the committee's conclusions were to reduce sitting Member's plurality to 61 votes. So sitting Member was still entitled to retain his seat, and the committee recommended resolutions to this effect.

On May 19¹ the report of the committee was concurred in by the House without debate or division.

1089. The North Carolina election case of Martin v. Lockhart, in the Fifty-fourth Congress.

Both the registration and election being permeated with irregularities, fraud, and intimidation, the returns of the precinct affected were rejected.

A presumption arising from the previous good character of election officers is destroyed by uncontradicted and positive testimony as to their fraudulent conduct at the election.

¹Journal, p. 508; Record, p. 5416.

Where election officers purposely put ballots in the wrong box and then rejected them, and did other illegal acts, the House rejected the poll.

Where a voter offered his tickets in a bundle and lawfully requested that the election officers deposit them in the proper boxes, the House rejected the poll because the election officers declined so to do.

On May 26, 1896,¹ Air. Jesse B. Strode, of Nebraska, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the case of *Martin v. Lockhart*, of North Carolina. The official returns showed a majority of 444 for the sitting Member. The contestant's charges were summarized by the committee as follows:

That the contestant, Charles H. Martin, was unlawfully deprived of a large number of votes to which he was entitled; that these votes were fraudulently rejected upon the pretense of irregularities in the registration; that the voters were not in fault with regard to such irregularities, but that they were committed by the election officers; that the votes of a large number of voters who would have voted for contestant were rejected by the poll holders on frivolous challenges; that the poll holders in many voting precincts purposely placed votes cast for contestant in the wrong boxes and afterwards rejected them because they were deposited in the wrong boxes; that poll holders in many voting precincts refused to put the ballots of voters in the ballot boxes, and that many voters who could not read and who cast their votes for contestant were compelled to deposit their own ballots and by mistake deposited them in the wrong boxes, and that they were rejected by the poll holders, when counting the vote, because they were found in the wrong boxes; that ballots for contestant were rejected because they were not printed, the regularly printed tickets of contestant having been stolen; that boxes were not used in some of the precincts as repositories for the ballots, as the law required; that the ballot boxes in some of the precincts were not labeled with roman letters, as the law required; that poll holders in some of the precincts purposely changed the positions of ballot boxes so as to disarrange them in their order, in order to entrap unlettered Republicans and Populists who desired to vote for contestant into putting their tickets in the wrong boxes; that at one voting place the election officers refused to count the ballots or make any returns of the election, where the contestant claims to have received a large majority of the votes cast; that many who were unlawful electors cast their ballots and they were counted for contestee.

The sitting Member also alleged irregularities and illegalities by which the official returns of contestant's vote had been increased. Among these was the alleged erroneous rejection of votes cast for sitting Member in the county of Columbus.

The committee examined the poll in the light of the evidences rejecting the vote of certain precincts, and in others purging the poll.

(1) Rejected precincts.

(a) Stewartville precinct returned 295 votes for sitting Member and 14 for contestant. All the election officers but one were of sitting Member's party, and that one was not of those recommended by the opposition. The Constitution of the State provided that there should be a registration of voters, and that "no person shall be allowed to vote without registration." And the law required the registration to specify certain things in order to be valid. It was admitted by one of the election officers in this precinct, a partisan of sitting Member, that during the registration he allowed ignorant voters to give defective particulars, not such as the law required, and wrote those particulars as given, when he knew that by registering them in such a way he was giving an excuse for the rejection of their votes when challenged. Thus, an ignorant voter, when asked his residence, would give the name of the plantation where he was employed instead of the township.

¹First session Fifty-fourth Congress, House Report No. 2002; Rowell's Digest, p. 524.

The registrar knowingly recorded this defective description. In this precinct 307 white men and 414 colored men were registered, and of these, the votes of 1 white man and 167 colored men were rejected, some on grounds absolutely frivolous. According to the law and usage in North Carolina there was a ballot box for each class of officers, and the law provided that "each box shall be labeled in plain and distinct roman letters, with the name of the office or offices to be voted for," etc. The evidence showed that the markings on the boxes were changed from the plain letters required by law to indistinct letters. The only election officer opposed to sitting Member's party was put in charge of the box in which votes for constable were received. The room where the boxes were placed was partitioned off into what was called a "bull pen," and marshals, partisans of sitting Member, kept strict guard and discouraged by intimidation those citizens who were disposed to protest at the conduct of the election. There was evidence of other intimidation, and also that bribery was carried on by partisans of sitting Member in presence of the election officers. The majority of the committee conclude:

It is impossible to ascertain what would have been the true vote of this precinct had a fair and honest election been held. Contestee's counsel, in their brief, call attention to the fact that the contestant's witnesses testified to the good character of the registrar and judges of election. But the past good character of these election officers is not sufficient to overcome, wipe out, and destroy the positive and uncontradicted testimony of numerous witnesses, which shows that this election was barnacled with fraud and corruption. The ballots were destroyed as soon as they were counted, so that no examination of them could have been made after the returns were made up. It is impossible to ascertain with certainty the true vote of this precinct. The conduct of the election officers was such as to destroy the integrity of their returns. The entire vote of this precinct should be thrown out. This deducts 295 from contestee and 14 from contestant.

The minority views, presented by Mr. Joseph W. Bailey, of Texas, held that the rejection of this vote was an injustice to more than 300 voters whose votes were properly cast and counted; that there was no evidence of fraud and intimidation, and that the errors in registration were not chargeable to the registrar."The supreme court of North Carolina, say the minority, "has declared, in construing the law, that if the registrar read over these headings [indicating questions to be asked] in the form of an interrogatory to the candidate for registration this was a sufficient compliance with the law, and if the voter did not give the proper answers the fault was his, and if proper answer was not given the person should not be allowed to vote." The minority were convinced that the registrar went only so far as the court allowed him to go. The minority also note that contestant did not introduce the rejected voters to prove that they endeavored to register properly, or to contradict the registrar, or to explain their conduct, or show that they were entitled to vote.

(b) Alfordsville precinct, where the returns gave sitting Member 98 votes and contestant 44, was entirely rejected, because it was impossible to ascertain with certainty the true vote, for the following reasons: The election board was not satisfactory, one of the two representatives of contestant's party being a person of doubtful politics who had been once in the penitentiary and pardoned therefrom; the undoubted representative of contestant's party was placed at the box wherein were placed votes for constable, an office for which there was but one candidate; poll holders of sitting Member's party placed the tickets of a large number of con-

testant's party in wrong boxes and then for that reason refused to count them; contestant's party kept a list of those who claimed to have voted the ticket of that party, and there were 169 names on the list; about 190 ballots were thrown out because in the wrong boxes, and no ticket of sitting Member's party was among them; the name of contestant appeared on all the tickets thrown out because deposited in wrong ballot boxes; the poll book showed that 239 voted, while the return accounted for only 142 of these. The majority of the committee concluded that the conduct of the election officers was such as to destroy the integrity of their returns.

(c) Maxton precinct, which returned 160 votes for sitting Member and 15 for contestant, was thrown out entirely. The election officers were all of contestant's party, although the law of the State evidently contemplated a representation of both parties; and no representative of contestant's party was allowed to assist in the voting or the count. The voting was done in a closely guarded room, with darkened windows. Unsworn partisans of sitting Member assisted in the count. The voters of contestant's party tendered their ballots to the poll holders and requested that each ticket be deposited in the proper box. This request being refused, because the voters would not select them and present them one at a time, the ballots were laid on the table and afterwards brushed to the floor. The law of the State provided that the voter "shall hand in his ballot to the judges, who shall carefully deposit the ballots in the ballot boxes," and again that the ballot "shall be put into the proper box or boxes by said voter or by the judges at the request of the voter." The majority of the committee held that the voters were not compelled to select and deliver their ballots to the poll holders separately. The minority considered that the partisans of contestant were unreasonable, and that the offering of the ballots in bundles was not a proper tender of them. The partisans of contestant at this polling place kept a list of those who took the tickets of their party and went into the polling place to cast them. Most of these persons afterwards returned and declared that they had voted the tickets. The persons who issued the tickets and kept the lists were sworn as witnesses, and their lists were produced, identified, and incorporated in the evidence. More than 200 names appeared on the list. About 25 of them appear to have been challenged; but there is nothing to show how many challenges were sustained.

The majority of the committee concluded that the return from this precinct was so tainted with fraud and the misconduct of the election officers that the truth could not be deduced from it.

1090. The case of Martin v. Lockhart, continued.

The House counted lawful ballots rejected by election officers on frivolous and technical challenges.

The House counted lawful votes rejected by election officers because deposited in wrong boxes through confusion created by election officers.

As to the use of tin buckets instead of the "ballot boxes" prescribed by law.

The House counted votes rejected by election officers because the initials instead of the full name of the candidate were written thereon, there being no doubt of the voter's intent.

Where the tally list was kept by an unsworn person not an election officer and the poll list and testimony as to the tally list showed discrepancies, the return was rejected.

(2) Precincts in which the returns were corrected.

(a) In Rockingham precinct contestant was credited with 70 votes wrongfully rejected because of frivolous challenges, or challenges based on technicalities arising from imperfect registration similar to that described in Stewartsville precinct.

(b) In Lumberton precinct the contestant is credited with the addition of 111 votes rejected by the election officers because deposited in the wrong box. In this precinct there were six ballot boxes, and the poll holders were two representing sitting Member's party and two representing contestant's party. But the two latter (both colored) were made to keep the constable's box, where only, one candidate was voted for, while their associates managed the other boxes. One of the colored poll holders refused to serve, and his place was filled by a partisan of sitting Member. The poll holders refused to receive the tickets of contestant's supporters and deposit them in the proper boxes, unless the electors first selected the tickets and designated the box into which each was to be put. But the votes of partisans of sitting Member were taken and placed in the proper boxes readily. No votes for sitting Member were rejected because placed in the wrong box. The majority of the committee considered that the fraudulent action of these election officers might justify the rejection of this entire precinct; but that those who honestly cast their ballots might not be disfranchised, recommended that the 111 votes definitely proven to have been cast for the contestant and rejected be counted.

(c) In Lilesville precinct the majority of the committee increases contestant's vote by adding 40 votes alleged to have been rejected because not deposited in the right boxes. In this precinct contestant's party was denied representation on the board of election officers. Tin buckets were used instead of the "ballot boxes" specified in the law, but it also appeared that buckets had been used for boxes for many years in this precinct. They were not, however, labelled plainly as directed by the law. The minority denied that the testimony warranted the conclusion reached by the majority.

(d) In Ansonville precinct the majority of the committee add 53 votes to the return of the contestant. The printed ballots for contestant having disappeared, written ballots were used, and were written "C. H. Martin, for Congress," instead of "Charles H. Martin, for Congress." These were rejected to the number of 53, although there was no other man named Martin running for Congress. The law of the State provided that ballots "shall be on white paper, and may be printed or written." The majority had no doubt that these votes were intended to be cast for contestant and the minority conceded that they should be counted for him.

(e) At Red Springs precinct the returns gave sitting Member 143 votes and contestant 110. The majority of the committee considered that these returns were impeached by the fact that the poll books showed that 275 persons voted, while the total for contestant and contestee was but 269; that two uncontradicted witnesses who counted and made a memorandum of the Congressional tally sheet found it gave contestant 126 votes instead of 110; and that 143 voters were shown to have called for the full ticket of contestant's party and to have entered the polling

place. A regular election officer was poll holder at the Congressional box, and he read the tickets as they were taken out of the box, while the tally sheet was kept by one not an election officer and not sworn. Therefore the majority of the committee found that the return could not be said to have been made by an officer of election, and that it was impeached. So they added 16 votes to contestant's returns.

(f) At Blue Springs, Lanesboro, and Wadesboro precincts there were irregularities, but the proof was not of such a nature as to enable the committee to make any substantial change in the official returns.

(3) At Thompson's Township, in Robeson County, the election officers, after receiving votes all day, abandoned the count and the ballots and refused to make any returns. The testimony indicated that the partisans of contestant had carried the election, and although riotous conduct by partisans of contestant was alleged, the majority of the committee concluded that the count had been abandoned without sufficient reason. "But," concludes the committee, "as there is no way of ascertaining the exact number of votes cast in this precinct for the parties to this contest, and because it is not necessary to do so to determine this contest, we do not make any finding as to the number of votes cast for either of the parties at this township."

As to the allegations of sitting Member in regard to the return of Columbus County, the majority of the committee make no mention in their return. The minority consider that 54 legal votes should be added to sitting Member's return in this county.

In conclusion the majority found that as a result of the corrections there was a majority of 330 for contestant, and accordingly reported the resolutions to perfect his title to the seat.

The report was debated June 4 and 5,¹ and on the latter day the minority substitute declaring sitting Member elected was disagreed to, yeas 57, nays 156. After a motion to recommit had been disagreed to the resolutions of the majority were agreed to, ayes 113, noes 5.

Mr. Martin then appeared and took the oath.

1091. The Alabama election case of Aldrich v. Underwood, in the Fifty-fourth Congress.

A report sustained by a vote of a majority of the committee is not impeached by the fact that a less number sign it.

A contestant was found to be an actual inhabitant of the State and district, although for sufficient reason his family resided in another State.

Where the law required the voter's mark to be placed before the candidate's name, the House sustained a rejection of ballots whereon it was placed after.

A voter having written his own name under the name of the candidate on the Australian ballot, the House counted the ballot in the absence of a State law making it illegal.

¹Journal, pp. 575, 579, 580; Record, pp. 6112, 6166-6168.

On May 26, 1896,¹ Mr. Charles Daniels, of New York, from the Committee on Elections No. 1, submitted a report in the case of *Aldrich v. Underwood*, of Alabama.

The minority, in their views, called attention to the fact that the report was signed by only four members of the committee, and that this number was not a majority of the committee, which consisted of nine members. In debate it was explained that four members voted for the report in committee, and three against, while two did not vote. One of these two, Mr. Romulus Z. Linney, of North Carolina, spoke for the report in debate.

The majority, in their report, find this preliminary fact:

That the contestant at the time of the election on the 6th day of November, 1894, was an actual inhabitant of the Ninth Congressional district of the State of Alabama, although his family, on account of the inability of his wife to reside in Alabama, resided in the State of Ohio.

The official returns gave the sitting Member 1,166 votes. Frauds and intimidation were alleged, and as a result of the examination of the vote of 23 precincts, the majority so purged the poll as to leave a majority of 220 votes for the contestant. The minority of the committee, dissenting from the conclusions of the majority, found for returned Member a majority of 1,038 votes, Mr. Charles L. Bartlett, of Georgia, presenting the views.

Before proceeding to an examination of the ground on which the sitting Member's vote was reduced, notice may be made of two precincts in Blount County where votes for the contestant were wrongfully rejected by the official canvassers. In Remlap, beat precinct the returns were not canvassed, because the inspectors of election failed to sign their certificate of the vote. Therefore the committee, credit sitting Member with his majority of 15 in this precinct. In Blountsville precinct certain votes improperly marked had been rejected by the canvassers. As to 5 of these, where the voter placed his mark after the name of the candidate the rejection was upheld, since the law required the mark to be placed before the name. Other rejected ballots were counted, one affording a case where the voter had written his own name under the name of the candidate, which was properly marked. "This, under the Alabama election law," says the report, "did not affect the legality of the ballot."

1092. The case of *Aldrich v. Underwood*, continued.

Where returns showed a large vote for contestee and a merely nominal vote for contestant, the House deducted from contestee where persons recorded on the poll list testified that they did not vote.

Where many votes were returned for contestee and one or two for contestant, and the total was larger than the number of persons shown to have entered the polling place, the excess was deducted from contestee.

Where election officers were all of contestee's party and certain electors voted twice, the excess was deducted from contestee.

In a rural precinct from which one vote was returned for contestant, and wherein names not known to old residents were found on the poll list, deduction was made from contestee's poll.

¹First session Fifty-fourth Congress, House Report No. 2006; Rowell's Digest, p. 509.

The poll being virtually under control of contestee's friends, who acted fraudulently, the committee rejected contestee's vote, but apparently not contestant's.

In 21 precincts the report makes a reduction or completely throws out the vote of the sitting Member, or increases the vote of the contestant.

(1) As to precincts where the vote of sitting Member was reduced. In twelve precincts the vote of the sitting Member was reduced for the following causes:

(a) The poll lists of several precincts, Cunningham, Walthole, Gallion, Pope's, etc., showed the names of men as voting who testified that they did not vote at all. In these precincts, as a general rule, the returns showed a large vote for sitting Member and no votes, or a merely nominal number, 1, 3, 5, etc., for contestant. The majority report reduces the poll of sitting Member by the number of citizens proven to have been recorded as voting when they did not vote.

(b) In certain precincts, as Greensboro, Gallion, Newbern, Evans, Cedarville, etc., where the returns showed large votes for sitting Member and few or none for contestant, witnesses testified that they had watched the polls and counted the number of persons who entered the polling places during the day. The majority of the committee deducted from the poll of sitting Member all votes in excess of the number who entered the polling places.

(c) In Havana precinct, where all the election inspectors belonged to the party of the sitting Member, two persons were found recorded on the poll list as having voted twice each. The majority of the committee deducted 2 votes from poll of sitting Member on the ground that it was not probable that the election officers would have allowed double voting to the opposition.

(d) For the same reason, at Hollow Square precinct, where the election board was similarly partisan, the votes of 2 strangers were recorded on the poll. These 2 votes were deducted from the poll of sitting Member.

(e) On the poll list of Whitsitt precinct, where sitting Member received 70 votes and contestant 1 according to the return, and where 7 persons on the poll list swore that they did not vote, there were found on the poll list 38 persons unknown to old residents who were acquainted with the people of the precinct. One of the witnesses also went through the precinct four times and could not find any of the 38 persons. The majority of the committee considered that these facts justified a reduction of 45 votes from sitting Member's poll.

1093. The case of Aldrich v. Underwood, continued.

Testimony that a certain man belonged to a certain club and a certain party was held insufficient proof aliunde of his vote.

The poll list containing the names of dead and absent persons, and the returns not showing votes presumed to have been cast, the returns were rejected.

The House added to contestant's return rejected lawful votes, on the testimony of persons who saw the votes rejected and knew the political preferences of the electors.

Where electors were intimidated by local officers, the House counted votes thus prevented, on testimony establishing a "strong probability" as to the number.

(2) As to precincts where the vote of sitting Member was entirely rejected.

(a) In Marion precinct, where the returned vote was 257 for sitting Member and 45 for contestant the committee found that the election officers had violated the law of Alabama by arranging the booths in one room and the ballot box in another. The voter, after marking his ballot, delivered it to an election officer who was supposed to place it in the ballot box. But the voter could not see him do this, and there was testimony impeaching the integrity of this officer, who did not deny the impeachment. Contestant was allowed one inspector, an ignorant man who was not the choice of contestant's friends. While admitting that in all cases the presumption is against crime and misconduct, yet the majority considered the infraction of law by the election officers such that—

Both the secrecy and integrity of the ballots were so far impaired that no one can certainly say that the ballots of the voters, unless it may be the 45 just mentioned (for contestant) ever went into the ballot box. The election and the returns in this precinct are beyond that deprived of every source of confidence, and the 257 votes returned for contestee must be deducted.

The sitting Member had endeavored to prove a portion of the returned vote, but the majority of the committee did not consider the testimony adequate, as it consisted of testimony that certain men belonged to a certain club and a certain party.

(b) In Uniontown precinct, where the returned vote was 177 for sitting Member and none for contestant, the majority of the committee found the poll list false in several particulars. Persons dead, absent and not known to reside in the precinct were recorded as voting. Twelve colored persons, supposed to be friendly to contestant, entered the voting place; but no votes were returned for contestant. The majority of the committee concluded that no reliance could be placed on the poll list, and rejected the entire vote.

(3) Votes added to the poll of the contestant.

(a) At Elyton precinct, where the returned vote was 190 for sitting Member to 68 for contestant, the evidence convinced the majority of the committee that votes of colored men who intended to vote for contestant were refused unless voters were identified by white men or "boss" men, the law requiring no such identification. Testimony of each individual whose vote was so refused was not resorted to; but sundry persons who saw men refused testified as to the number of such men and that they were supporters of contestant. The majority for the committee considered that there was no justification for excluding the whole vote; but added nineteen votes to the poll of the contestant.

(b) In two precincts of Birmingham the majority of the committee found that deputy sheriffs intimidated colored voters by arrests not justifiable. In one of these precincts there was not sufficient testimony to show how many of contestant's voters were intimidated, but in the other the majority of the committee considered that the testimony established a "strong probability" (words emphasized by the minority) that 69 voters were prevented from casting votes for contestant, and so added that number to his vote.

1094. The case of Aldrich v. Underwood, continued.

Official ballots being destroyed in furtherance of a conspiracy of election officers, the House corrected the return on testimony of witnesses who estimated the amount of resulting injury.

Instance wherein the House took into account the votes of electors not actually at the polls.

Official returns may be impeached successfully by testimony of voters as to how they cast their ballots.

Where polls are not opened, even on frivolous excuses, it is difficult to correct the wrong.

(c) In Bessemer the night before election all but 127 of the ballots were stolen and burned. The election officers were of sitting Member's party, except one, who was not the choice of friends of contestant. It was also in evidence that the friends of sitting Member were notified to be on hand early to vote and that when the ballots had given out a deputy sheriff advised voters to go home. From 8.30 a. m. to 2.20 p. m. there were no ballots. There were also causeless challenges of voters. The majority of the committee were convinced that there was a conspiracy on the part of friends of sitting Member to deprive friends of contestant of their votes. The evidence satisfied the majority that 365 votes were in this manner kept from the contestant and added that number to his poll. The testimony on this point was not of those actually prevented from voting, but of various persons who saw and heard the persons turned away.

(d) At Five-mile precinct, for some unexplained reason, the ballots gave out at 1 p. m. The election officers were all of sitting Member's party, and when the tickets gave out one of them announced that there would be no more voting. The testimony convinced the majority of the committee that 32 supporters of contestant were thus deprived of their votes and added that number to contestant's poll. It does not appear that all the 32 were actually at the polls. A portion appear to have refrained from coming after starting, hearing that the ballots had given out. Eight persons testified that they would have voted for contestant.

(e) At Carthage the official return gave contestant 32 votes, but 76 witnesses testified that they voted for him. Therefore the majority of the committee added 44 votes to contestant's poll. There was some evidence that some of contestant's friends might have been misled into marking their ballots wrong, but the committee did not consider that this should reduce the allowance to contestant. Also at Dover precinct the evidence proved that 4 votes were cast for contestant where only 2 were allowed him. Therefore 2 were added to contestant's poll.

Furthermore, at Hillman precinct the polls were not opened and no election was held. The precinct, which had a small vote, usually gave a majority for contestant's party. Although the only excuse for not opening the polls was that the day was cold and there were no facilities for a fire, the committee concluded that no addition to the poll of contestant could be made, as they had no means of knowing what his majority might have been.

The minority views declined to give credence to the testimony adduced in the several precincts.

The report was debated at length on June 9¹ (legislative day of June 6), and the resolution declaring sitting Member not elected was agreed to, yeas 119, nays 98. The resolution declaring contestant elected was then agreed to, yeas 116, nays 107; and then the contestant, Mr. Trueman H. Aldrich, was sworn in.

¹Journal, pp. 594-596; Record, pp. 6329-6354.

1095. The Kentucky election case of Hopkins v. Kendall in the Fifty-fourth Congress.

Instance wherein the House extended the time of taking testimony in an election case.

Form of resolution for extending the time of taking testimony in an election case.

A county official having, with intent to deceive voters, changed the party emblems on the official ballot, the House overruled its committee and rejected the entire returns.

In estimating harm done by fraud of officers, judicial cognizance was taken of the general prevalence of certain political sentiments.

The House, in judging the harm done by a fraudulent ballot, took account of the opinions of witnesses.

Discussion as to the mandatory or directory nature of a law providing that a ballot prepared in a certain way, and no other, shall be used.

The House purged the poll rather than to declare a vacancy when a fraudulent ballot was used in a decisive county.

On June 6, 1896¹ (calendar day of June 10), Mr. William H. Moody, of Massachusetts, from the Committee on Elections No. 1, reported the following resolution relating to the Kentucky election case of Hopkins v. Kendall:

Resolved, That the parties in the contested election case of N. T. Hopkins v. J. M. Kendall be permitted to take additional testimony touching the election in Clark County up to the 1st day of August, 1896, according to the rules for taking testimony in contested election cases prescribed in the Statutes of the United States, said testimony to be confined to the issues made by the notices of contest and the answer thereto.

On June 11² the time was extended from August 1 to November 1, 1896, by resolution agreed to by the House.

On February 5, 1897,³ Mr. Charles Daniels, of New York, submitted the report of the committee, and at the same time Mr. L. W. Royse, of Indiana, on behalf of himself and Mr. Romulus Z. Linney, of North Carolina, submitted minority views.

The statement of facts shows that the result of the election depended on the disposition of illegal and fraudulent ballots used in Clark County, which returned for the sitting Member a plurality of 253 votes. In the other counties of the district, except Clark, the contestant had a plurality of the votes.

The difference between the majority and minority of the committee arose as to the effect which should be given to the fraudulent ballots; whether the vote of the whole county should be rejected, or whether the contestant should simply be credited with the number of votes actually shown to have been lost to him by the fraud. The majority of the committee found that 79 votes were lost to the contestant; and as this number was not sufficient to overcome the returned plurality of the sitting Member the majority concluded that the sitting Member was entitled to his seat. The minority contended for the rejection of the entire vote of the county.

¹ First session Fifty-fourth Congress, Journal, p. 600; Record, p. 6395.

² Journal, p. 611; Record, pp. 6447, 6448.

³ Second session Fifty-fourth Congress, Howe Report No. 2809; Rowell's Digest, p. 512.

The ballot for Clark County, as required by the law of Kentucky, was prepared by the county clerk in the Australian form. By law the clerk was required to place over each party column the party emblem prescribed by the party convention. In Kentucky the Democratic convention had selected as its emblem the rooster; the Republican convention an eagle, described as "the eagle about to fly." The clerk of the county placed over the Democratic column the emblem required by law, but willfully and knowingly placed over the Republican column the picture of a raccoon. The eagle symbol was placed over an independent ticket for local county officers, nominated by petition. The name of the contestant did not appear on this ticket at all. The minority call attention to the additional fact that this independent ticket was not legally entitled to a place on the ballot at all, since it was a requirement of law that no petitioner should be counted to make up the required number of 100 unless his residence and post-office address should be designated. Only 94 of the 104 petitioners for the independent ticket were designated by residence or address.

Both majority and minority of the committee agreed that the action of the county clerk in making up the ballot was illegal and fraudulent, done with the motive of deceiving supporters of the contestant.

A difference of opinion arose as to the method of measuring the extent of the wrong resulting from the fraud.

The majority of the committee found that there was no provision of Kentucky law providing for the rejection of ballots because of the displacement of party emblems; and that this displacement was the extent of the wrong done. To rectify the act required no more than to transpose the 79 votes under the device of the eagle to the ticket headed by the raccoon. The majority found that this would correct the fraud of the clerk, and that there was "no justification in going further, and by way of penalty on all the legal voters who voted the first ticket [the rooster ticket] to deprive them of their votes. To do that would be no less than to impose a punishment on innocent persons for no wrong of theirs, but for the misconduct of the county official." In the course of the debate¹ Mr. Daniels cited in support of this view the case of *People v. Wood*, 148 N. Y. The majority were satisfied that beyond the 79 votes no votes were lost to the contestant, this view being especially fortified by the fact that, compared with other years, the vote for contestant, was the normal Republican strength.

The minority of the committee dissented thus:

We do not think that the injuries which flow from a wrong of this kind are capable of anything like an accurate measurement. Such injuries are not capable of being weighed, and if they were we would not feel justified in using apothecary's scales for such purpose. From such a bold and unscrupulous transaction the presumption must flow that a grievous wrong has been done, resulting in serious injury to contestant.

Contestant is the innocent victim of this fraud of the clerk of Clark County. We do not believe it right to throw upon him the burden of making an accurate measurement of the extent of his injuries. Even if we should require him to furnish any evidence upon this subject it should only be slight, and then shift the burden of proof upon him who has received the benefit of this fraud.

¹Record, P. 1958.

The minority found that the corrected returns for Clark County gave sitting Member only 203 plurality, not a large amount to overcome. While not pretending to prove absolutely the loss of this number of votes to the contestant as a result of the fraud, they found facts indicating such an effect

1. An uncontradicted witness declared that contestant lost between 300 and 400 votes by the fraud, because Republicans left the polls without voting when they found the ticket fraudulent. One party leader testified that he so advised 75 or 100 voters. In a precinct where there was a registration, only 64 out of 104 of contestant's party voted.

2. In every county of the district except Clark the vote of contestant's party increased in comparison with previous years; and had the ratio of increase prevailed also in Clark contestant would indisputably have been elected. Furthermore, the minority thought it proper to take judicial cognizance of the fact that all over the nation, except in Clark County, Ky., contestant's party was the recipient of an increased vote.

The minority furthermore insisted that the clerk of the county had violated a mandatory provision of the Kentucky ballot law, and therefore that the vote of the county should be rejected. The Kentucky constitution provided that "all elections by the people shall be by secret official ballot, furnished by public authorities to the voters at the polls, and then and there deposited," and directed the legislature to enact the necessary laws. Accordingly the legislature enacted that "the voting shall be by secret official ballots, printed and distributed as hereinafter provided, and no other ballots shall be used." The law then went on to provide how the ballots should be prepared, and the county clerk had no authority outside that law. And as he had willfully and corruptly disregarded that law the ticket he produced was not legal and not the official ticket. It was not the ticket prescribed by the constitution. Laws might be held merely directory, but constitutional provisions were mandatory. But the minority held also that the statute was mandatory, quoting Paine on Elections.

Statutory provisions prescribing acts which are in their nature absolutely essential to the validity of an election may be mandatory in whatever language expressed. The language of the law was that "no other ballots shall be used."

The counting of a ballot was as much its use as the casting of it. The old law of Kentucky did not provide for voting by ballot. The new statute was a remedial one, and it was well settled that such laws should be construed broadly. The statute, also, in express language, provided that "this chapter shall be liberally construed, so as to prevent any evasion of its prohibitions and penalties by shift or device." The minority consider that this removes all doubt as to what the construction of the law should be, and that the ballot voted in Clark County was void and should be thrown out. The minority quoted several authorities, including *Field v. Osborn*, 21 Atl. Rept. (Conn.), 1070.

Therefore the minority reported resolutions declaring Mr. Hopkins, the contestant, elected and entitled to the seat.

The report was debated on February 17 and 18, 1897,¹ and on the latter date the resolutions of the minority were substituted for those of the majority by a vote

¹Journal, pp. 187, 191; Record, pp. 1956, 1969-1982.

of 197 yeas to 91 nays. Then the resolution of the majority as amended was agreed to without division; and Mr. Hopkins, the contestant, appeared at the bar and was sworn in.

1096. The Georgia election case of Watson v. Black, in the Fiftyfourth Congress.

No law preventing the use of more than one ballot box at a precinct, the use of several did not justify rejection of the poll in the absence of proof of harm therefrom.

On December 8, 1896,¹ the Clerk transmitted by letter to the House the evidence in the contested election case of Watson *v.* Black, from Georgia. The communication was referred to the Committee on Elections No. 1, and on February 11, 1897,² Mr. Charles L. Bartlett, of Georgia, submitted the report of the committee.

In the election in question the sitting Member received on the face of the returns a majority of 1,556 votes. Contestant alleged fraud in both registration and voting in various portions of the district, but his attorney admitted that he could not overcome sitting Member's majority unless the entire vote of the city of Augusta and Richmond County should be thrown out. Therefore the committee did not consider at length the objections to other portions of the district. It did appear, however, that both parties were represented on the registration boards, and that there was not evidence to show the illegality charged.

As to Richmond County and the city of Augusta, on which the result hinged, the committee failed to find evidence sufficient to justify the throwing out of the whole vote. On the boards of election and registration officers both parties were represented, and there was no satisfactory evidence to sustain the contestant's charges of bribery, fraudulent counting, and illegal registration and voting.

The claim of the contestant that the votes of four wards of Augusta should be rejected because two ballot boxes were used at each voting place, and of a fifth ward because three ballot boxes were used at a voting place, was examined at greater length, and was settled on the basis of the report on a contest between the same individuals in the preceding congress.³ The committee found no evidence to show that fraud resulted from the use of the additional boxes, and that such use was not prohibited by law. Therefore they found that the vote of those wards should not be rejected.

On March 2, 1897,⁴ the report favorable to the sitting Member was agreed to by the House without division.

¹ Second session Fifty-fourth Congress, Journal, p. 15; Record, p. 35.

² House Report, No. 2892; Rowell's Digest, p. 513.

³ See sections 1054, 1055 of this volume.

⁴ Journal, p. 234.