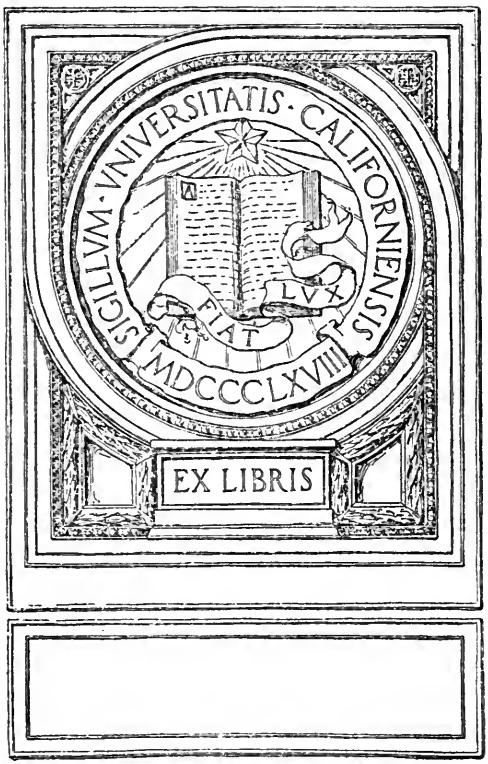
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A TREATISE

ON THE

AMERICAN LAW OF ELECTIONS

BY

GEORGE W. McCRARY,

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FOURTH EDITION

EDITED BY

HENRY L. McCUNE,

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DEDICATION

TO THE HONORABLE

SAMUEL F. MILLER, LL. D.,

ASSOCIATE JUSTICE SUPREME COURT UNITED STATES, THIS TREATISE IS MOST RESPECTFULLY DEDICATED.

HIS GREAT LEARNING AND ABILITY AS A LAWYER, AND AS A JUDGE; HIS HIGH CHARACTER AS A MAN AND AS A CITIZEN; AND THE LASTING OBLIGATIONS I AM UNDER TO HIM FOR GENEROUS AID AND INSTRUCTION AS MY TEACHER IN THE LAW, AND FOR AN EARNEST FRIENDSHIP CONTINUING THROUGH MANY YEARS, ALL COMBINE TO MAKE THIS RECOGNITION AND ACKNOWLEDGMENT BOTH A DUTY AND A PLEASURE, ON THE PART OF HIS FRIEND AND PUPIL.

THE AUTHOR.

PREFACE

TO THE THIRD EDITION.

This work, as originally published in 1875, was the first attempt in this country to bring together, arrange and consider, in convenient form, and under proper heads, the scattered adjudications relating to the law of elections. The purpose was not only to aid the bar and bench in the preparation, trial, and decision of cases of contested elections, but also to diminish the number of such contests by furnishing information both to election officers and to voters, as to their respective powers, rights and duties. The work has been received with greater favor than was anticipated. The first and second editions having been exhausted, it has been thought expedient to prepare a third, much enlarged, and, it is believed, more conveniently arranged. As this is the only work of this character extant in this country, there would seem to be good reason for its revision, enlargement and republication, notwithstanding the prevailing and generally well founded prejudice against the multiplication of books of law.

The subject treated is of great importance especially to the people of the United States. In a country like ours, where most of the powers of government reside with the people and are delegated to representatives chosen by means of the ballot and who generally serve only for short periods, making necessary a frequent appeal to the popular will; and where the decisions reached by this means are often so important, it is inevitable that controversies growing out of elections must be numerous, and it is manifestly a matter of great consequence, that the principles which are to control in their determination should be understood, not only by the legal profession, but also as far as possible by the people generally.

The work was originally undertaken in view of the fact that the law upon this subject, as determined by the decisions of courts and other tribunals having jurisdiction of such questions, was only to be found by searching through many hundreds of volumes of reports, thus rendering the task of collecting and examining them very tedious and laborious. Under these circumstances it was thought that a brief and clear statement of the principles and rules touching this subject which have been settled, and a citation of the authorities where they may be found more fully discussed, would prove very acceptable; and the rapid sale of the first and second editions would seem to show that this expectation has been realized.

The work is entitled THE AMERICAN LAW OF ELECTIONS. The authorities cited are chiefly American authorities. Upon this subject we are, from the very necessities of the case, building up an American common law.

It is not asserted that the English authorities are of no value upon this branch of the law. On the contrary they have been freely cited whenever deemed applicable and useful. It was deemed proper, however, to keep steadily in view the fact that the genius of our institutions, the character of our political system, and the principles upon which the right of suffrage in this country is founded, all differ so radically from those of England as to diminish very greatly the value of English precedents in election cases; and the effort has been to show that our own tribunals have by a long course of judicial decisions, settled the law of this country, as it relates to the questions treated, upon a firm and lasting basis.

The thanks of the author are due to Fred P. Barnett, Esq., for valuable assistance in the arrangement of the matter for this edition, and in editing the same, as well as in the preparation of the table of contents, table of cases, and index.

KANSAS CITY, MISSOURI, 1887.

EDITOR'S PREFACE.

Shortly after the death of Judge McCrary in June, 1890, there came into my possession certain memoranda which he had intended for use in preparing a new edition of this work. The thought of preserving this material led me to consider the propriety of supplementing it with my own work sufficiently to produce an acceptable new edition. That which was at first a sentiment has since seemed a necessity, partly on account of the natural accumulation of decisions bearing upon this subject, but chiefly because of the general adoption by the different states (since the issuance of the third edition) of the Australian Ballot System. This subject has of necessity been treated in a new chapter. A chapter has also been added in which will be found a consideration of the origin and nature of suffrage in this country, and the doctrine of sovereignty as it exists in the United States. The new matter has been carefully distinguished from the original text. New sections when inserted in old chapters bear the number of the last preceding section with a small italic letter (*a*, *b*, etc.) added. All new matter, whether in the text or notes, except new chapters I and XXII, is distinguished by inclosure in brackets.

It affords me pleasure to acknowledge here my obligation to Mr. James De Witt Andrews, of the Chicago bar, for valuable assistance in the preparation of the first chapter, and to George H. McCrary, son of the author, for constant and intelligent co-operation.

H. L. McC.

FEBRUARY 18, 1897.

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Westbrook v. Roseborough (14 Cal. 180), 181.
West Virginia Cases (Smith, 108), 194.
Wheat v. Smith (50 Ark. 266), 176.
Wheeler, In re (2 Abb. Pr., N. S., 361), 661.
Wheeler v. Board of Canvassers (94 Mich. 448), 377.
Wheeler v. Brady (15 Kan. 26), 63.
Wheelock's Case (82 Pa. St. 297), 225.
Whipley v. McKune (10 Cal. 352), 251.
White, Contested Election of (4 Pa. Dist. Rep. 363), 107.
White, Ex parte (33 Tex. Cr. R. 594), 176.
White v. Hart (13 Wall. 646), 13.
White v. Multnomah County (13 Oreg. 317), 4, 132.
Whitney v. Blackburn (17 Oreg. 564), 426, 440.
Whitney v. Canique (2 N. Y. 93), 339.
Whittemore's Case (41st Cong.), 362.
Whittman v. Zahorek (91 Iowa, 93), 720.
Wigginton v. Pacheto (1 Ells. 5), 542.
Wilcocks, Ex parte (7 Cow. 402), 645, 647.
Wildman v. Anderson (17 Kan. 544), 534.
Williams v. State (69 Tex. 368), 539.
Williams v. Stein (38 Ind. 89), 548.
Williams v. Whiting (11 Mass. 424), 88.
Williamson v. Lane (52 Tex. 335), 392.
Williamson v. Shandy (12 Wash. 362), 178, 222.
Williamson v. Sickles (1 Bart. 288), 373.
Wilson, Ex parte (114 U. S. 417), 121, 332.
Wilson v. Central Bridge (9 R. I. 590), 649.
Wilson v. Hines (Ky., 35 S. W. Rep. 627), 441.
Wilson v. State (42 Ala. 299), 612.
Wilson v. Town Council of Florence (39 S. C. 397; 40 S. C. 290), 210.
Wimmer v. Eaton (72 Iowa, 374), 529, 531.
Winthrop, Case of (1 Bart. 607), 360.
Wolcott's Case (35th Cong.), 637.
Wolcott v. Holcomb (97 Mich. 361), 104, 296.
Wood v. Fitzgerald (3 Oreg. 569), 129.
Wood v. Peters (Mob. 79), 326.
Wood, etc. Mining Co. v. King (45 Ga. 35), 658.
Woodley v. Clio (44 S. C. 374), 63.
Woods, In re (5 Misc. 575), 261.
Woodward v. Fruitable San. Dist. (99 Cal. 554), 178.
Worthington v. Post (Mob. 647), 101.
Worthy v. Barrett (63 N. C. 199), 306*a*.

References are to sections.

Wright v. Commonwealth (109 Pa. St. 560), 666.
Wright v. Fuller (1 Bart. 152), 429.
Wyman v. Lemon (51 Cal. 273), 539.

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Yancy, In re (28 Fed. Rep. 445), 364.
Yarbrough, Ex parte (110 U. S. 651, 663), 37, 46, 145.
Yeates v. Martin (1 Ells. 52, 484), 165, 251, 539*a*.
Yell, Case of (1 Bart. 92), 348.
Yester v. City of Seattle (1 Wash. St. 308), 208.
Yonkin's County Election (2 Pa. Co. Ct. 550), 94.
Young v. Deming (9 Utah, 204), 174.
Young v. Simpson (Colo., 42 Pac. Rep. 666), 97, 222.
Yulee v. Mallory (1 Bart. 608), 148.

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Zeis v. Passwater (142 Ind. 375), 537.
Zeiter v. Chapman (54 Mo. 502), 135.

AMERICAN LAW OF ELECTIONS.

CHAPTER I.

THE RIGHT TO VOTE.

§ 1. Suffrage defined.
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35. Exercise of the elective franchise by a portion of the community a fair and useful restriction.

§ 1. Suffrage has been defined by Webster as "a voice given in deciding a controverted question, or in the choice of a man for an office or trust." According to Worcester it is "a voice or opinion of a person in some matter, which is commonly to be determined by a majority of voices or opinions of persons who are empowered to give them."

In the United States suffrage is a privilege, franchise or trust conferred by the people upon such persons as it deems fittest to represent it in the choice of magistrates or in the performance of political duties which it would be inexpedient or inconvenient for the people to perform in a body. The person upon whom the franchise is conferred is called an elector or voter. No community extends suffrage to all persons, but places such restrictions upon it as may best subserve the ends of government.[1]

[1] Burch *v.* Van Horn, 2 Bart., 205; Jamison's Const. Con., sec. 337; 2 Wilson's Works, Appendix, p. 570.

§ 2. The object of suffrage is the continuity of government and the preservation and perpetuation of its benefits.[1]

In the United States the object of suffrage is twofold: First, to select representatives of the people for their government; and second, to determine the will of the people upon such questions as may be submitted to them. Viewing suffrage as a means of selecting representatives, it has been defined as "the delegation of the power of an individual to some agent." [2]

§ 3. The right to vote is not of necessity connected with citizenship.[3] The rights of the citizen are civil rights, such as liberty of person and of conscience, the right to acquire and possess property, all of which are distinguishable from the political privilege of suffrage. This has been expressly held by the Supreme Court of the United States[4] and by the courts of last resort in California[5] and in the District of Columbia,[6] where women, though conceded to be citizens within the meaning of the Fourteenth Amendment of the Federal Constitution, have nevertheless been denied the right of suffrage as an incident thereto. The history of the country shows that there is no foundation in fact for the view that the right of suffrage is one of the "privileges or immunities of citizens." In some of the States only such citizens as were freeholders or owners of personal property were originally allowed to vote.[7]

[1] Cyc. of Political Science, vol. 3, p. 822.

[2] Webster's Works, vol. 6, p. 221.

[3] Anderson *v.* Baker, 23 Md., 531.

[4] Minor v. Happersett, 21 Wall., 162.

[5] Van Valkenberg *v.* Brown, 43 Cal., 43.

[6] Spencer *v.* Board of Registration, 1 MacArthur, 169, 29 Am. Rep., 582.

[7] There have been in force at different times in the history of the American Colonies and States, three restrictions on the right of suffrage: First, an educational qualification; second, a property or economic qualification; and third, a moral qualification.

The original colonists, with unimportant exceptions, all had a voice in public affairs, but the influx of men of other blood, religion and

In New York and North Carolina, negroes, who were not citizens, and who were, in fact, incapable of becoming such, were granted the privilege under certain conditions. In Wisconsin and Michigan, Indians were permitted to vote, and

social standing soon led them to introduce certain restrictions upon the right of suffrage, commonly based on possession of property or on profession of religion.

The first legislative body that ever sat in America, and which convened at Jamestown, July 30, 1619, was elected by all the male inhabitants. In Virginia from the first years to 1665, all settlers had a voice in public affairs. After various changes in the law, the franchise was in 1670 restricted to freemen and housekeepers, the freehold requirement excluding all who were not possessed of a freehold of fifty acres, or a town lot. A similar requirement was made in North Carolina of voters for senators. The first legislative body in New England met at Plymouth in 1620, and was composed of all male inhabitants, and this township type and school of government was adopted in other New England settlements.

The Massachusetts charter of 1691 restricts suffrage to the possession of an estate of freehold in land of the value of forty shillings per annum, or other estate of the value of forty pounds. In Maryland the right of suffrage was limited, in 1681, to freemen possessing a freehold of sixty acres, or having a visible personal estate of forty pounds.

At the beginning of the eighteenth century, a freehold qualification had become common in the colonies, and in some cases pecuniary qualifications were required. In the colonies of Massachusetts, New Haven, and Connecticut, church membership was required. In New Hampshire, Pennsylvania, Delaware and South Carolina, the right of suffrage was given to all resident tax-paying freemen. In Pennsylvania, the eldest sons of freeholders, over twenty-one, could vote without payment of taxes. In other States, a pecuniary qualification was required, except that in North Carolina resident tax-paying freemen could vote for members of the House of Commons. In New York, none could vote for Governors or Senators unless possessed of unincumbered real estate worth $250, or for members of the Assembly unless they had freeholds worth $50, or paid $10 annual rent. In Rhode Island, voters were required to own freeholds worth $120, or their eldest sons must be possessed of an estate worth that amount. In the other States, property, real or personal, worth from $30 to $200, was sufficient to qualify a voter.

The Revolution of 1776 brought about an extension of the electoral franchise. The last survival of a religious test appears in the Consti-

in Illinois, Indiana and Minnesota unnaturalized foreigners were admitted.[1]

In no State have all citizens ever been permitted to vote, there having always been a requirement, at least, as to age.[2]

§ 4. The right to vote is not a natural right, such as the right to personal security, personal liberty, and the right to acquire and enjoy property. It is not such a right as belongs to a man in a state of nature, and even in the organized government he receives it as a conferred franchise. In the United States the people are the source of all political power, and it is within their power to give, refuse or restrict the elective franchise. And when conferred, it is not

tution of South Carolina (Article XIII), in force from 1778 to 1790, limiting suffrage "to every free white man who acknowledges the being of a God, and believes in a future state of rewards and punishments." When the Federal Constitution was adopted, each State was left to prescribe its own qualifications for voters. Since 1789, freehold suffrage has given away to manhood suffrage. Eleven of the thirteen original States have abolished the tax and property tests, as follows: New Hampshire, Maryland, Massachusetts, New York, Delaware, New Jersey, Connecticut, South Carolina, North Carolina and Virginia.

The only new States that have required a property or tax qualification are Tennessee, admitted in 1796, with freehold qualifications, abolished in 1834; Ohio, admitted with tax qualification in 1802, abolished in 1857; Louisiana, admitted in 1812, with tax qualification, abolished in 1845; and Mississippi, admitted in 1817, with a tax qualification, abolished in 1832.

For further historical information, and for a philosophical treatment of the subject, see the following authorities:

Lalor's Cyc. of Political Science, p. 822 *et seq.*
Frothingham's Rise of the Republic, p. 25.
Cook's Virginia, p. 222.
Hildreth's History of the United States, vol. 3, p. 381.
De Tocqueville in America, vol. 1, ch. 5.
Mills' Representative Government, ch. 7.
Lieber's Civil Liberty, ch. 16.
Woolsey's Political Science, vol. 1, p. 299; vol. 2, p. 111.
Cooley's Constitutional Limitations, ch. 17.
Bancroft's History of the United States, vol. 1, p. 537; vol. 2, p. 7.

[1] Van Valkenburg *v.* Brown, *supra;* Minor *v.* Happersett, *supra.*

[2] "The right to vote is not conferred by the mere act of naturalization." Spragins *v.* Houghton, 3 Ill., 377.

a vested right, but may be taken away by the power that gave it.[1] In *Blair* v. *Ridgely*,[2] it is said by the court that "the right to vote is not vested, it is purely conventional, and may be enlarged or restricted, granted or withheld, at pleasure, and without fault." The only rights connected with the exercise of suffrage are the right of the Commonwealth or aggregate body of the governed to determine who the electors shall be, and the right of every citizen to be rightly and fairly represented by electors.[3] Some authorities may be found in which the right of suffrage is referred to as a vested right,[4] but in these cases the word "vested" is used as meaning incapable of being taken away, except by the power which gave it. No exception can be taken to the use of the word in this sense, but certainly no authority can be found in this country for the proposition that the right to vote is *vested*, in the sense that any proprietary or permanent right attaches to it.[5]

§ 5. In *Anderson* v. *Baker*,[6] it is said: "The right of suffrage is not an original, indefeasible right, even in the most free of republican governments; but every civilized society has uniformly fixed, modified and regulated it for itself, according to its own free will and pleasure, and in these United States every constitution of government has assumed, as a fundamental principle, the right of the people of a State to alter, abolish and modify the form of its own govern-

[1] Blair *v.* Ridgely, 41 Mo., 161 and 175; Luther *v.* Borden, 17 U. S., 15; Webster's argument in Luther *v.* Borden, Webster's Works, vol. 6, p. 221; State *v.* Dillon, 23 Fla., 545; Spencer *v.* Board of Registration, 1 MacArthur, 169, 29 Am. Rep., 582; Desty's Fed. Const., 282, note 21; Anderson *v.* Baker, 23 Md., 531.

[2] 41 Mo., 178.

[3] Jamison on Const. Conventions, sec. 337.

[4] White *v.* County Commissioners of Multnomah Co., 13 Oreg., 317; Rich *v.* Flanders, 39 N. H., 385; Eakin *v.* Raub, 12 Serg. & R., 485.

[5] It cannot in a confined sense be called property. It is not assets to pay debts, nor does it descend to the heir or administrator. Brown *v.* Hummell, 6 Pa. St., 86; White *v.* County Commissioners of Multnomah Co., *supra.*

[6] 23 Md., 596.

ment, according to the sovereign pleasure of the people. The right to vote, like the right to hold office, being thus conferred upon the voter by the sovereign will of the people, in their organic law or constitution of government, the question, upon whom it ought to be conferred, and what should constitute its boundaries and limits — in other words, what should qualify and what should disqualify — is one which the people themselves are to settle."

§ 6. In *Blair* v. *Ridgely*,[1] the question at issue arose out of the provision of Article II, Section 3, of the Constitution of 1865 of the State of Missouri. By this section it was provided that no person should be deemed a qualified voter who had ever been in armed hostility to the United States, or to the government of the State of Missouri; that every person should, at the time of offering to vote, take an oath that he was not within the inhibition of this section, and that any person declining to take such oath should not be allowed to vote. The plaintiff, at an election held in the city of St. Louis on November 7, 1865, offered to vote, but refused to take the oath prescribed by the Constitution. His vote being rejected, he brought his action against the judges of the election for damages. The case was taken to the Supreme Court of Missouri, where it was argued exhaustively, and with much learning, by eminent counsel, and the argument is to be found in full in the reports of the Supreme Court of Missouri, volume 41. It was contended by the plaintiff that the section of the Constitution in question was in violation of the Constitution of the United States, being a bill of attainder and an *ex post facto* law within the meaning of that instrument, and, in consequence, null and void. But the Court held against this contention, drawing the distinction between laws passed to punish for offenses in order to prevent their repetition, and laws passed to protect the public franchises and privileges from abuse by falling into unworthy hands. It is said by the Court that "the State may not pass laws in

[1] 41 Mo., 161.

the form or with the effect of bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts. It may and has full power to pass laws, restrictive and exclusive, for the preservation or promotion of the common interest as political or social emergencies may from time to time require, though in certain instances disabilities may directly flow in consequence. It should never be forgotten that the State is organized for the public weal as well as for individual purposes; and while it may not disregard the safeguards that are thrown around the citizen for his protection by the Constitution, it cannot neglect to perform and do what is for the public good."

§ 7. It was argued in *Blair* v. *Ridgely* that the decision of the Supreme Court of the United States in *Cummings* v. *Missouri*,[1] where it was held that this section of the Missouri Constitution, so far as it provided an oath to be taken by preachers, was in the nature of pains and penalties, and consequently void, was decisive of the Blair case. But the distinction between the right to practice a profession or follow a calling, and the right to vote, is clearly stated in the opinion of Judge Wagner, as follows: "The decision of the Supreme Court of the United States in the Cummings case proceeds on the idea that the right to pursue a calling or profession is a natural and inalienable right, and that a law precluding a person from practicing his calling or profession on account of past conduct is inflicting a penalty, and therefore void. There are certain rights which inhere in and attach to the person, and of which he cannot be deprived, except by forfeiture for crime, whereof he must be first tried and convicted, according to due process of law. These are termed natural or absolute rights. * * * But is the right to vote or to exercise the privilege of the elective franchise a right either natural, absolute or vested? It is certain that in a state of nature, disconnected with government, no person has or can enjoy it. That the privilege of participating

[1] 4 Wall., 277.

in the elective franchise in this free and enlightened country is an important and interesting one is most true. But we are not aware that it has ever been held or adjudged to be a vested interest in any individual."

§ 8. Suffrage in the United States not being a vested right, it results that persons who have enjoyed and exercised the privilege, and who have been qualified electors, may be entirely disfranchised and deprived of the privilege by constitutional provision, and such persons are entirely without a remedy at law.[1]

§ 9. It is important in this connection to distinguish the American theory of the elective franchise from that which prevails in England. In the latter country the right to vote is a vested right attached to and inseparable from an estate of freehold. It is held from the King as an incident of the freehold, and the right can no more be taken away than the freehold itself. The origin and character of the right is best stated in the opinion of Chief Justice Holt, in *Ashby* v. *White et al.*[2] The plaintiff in that case, being a "burgess" and an inhabitant of the borough of Aylesbury, was refused permission to vote by the constables of the borough, whereupon he brought his suit to recover damages. Justices Powell, Powys and Gould held that the action could not be maintained, but Holt, C. J., dissented and gave an opinion for the plaintiff. An appeal was prosecuted to the House of Lords, where the judgment of the King's Bench was reversed and Justice Holt's views sustained and adopted.

The Chief Justice, maintaining the right of the plaintiff to vote, shows that the Commons of England have a right to participate in the government, which right is exercised by representatives chosen by themselves; that this representation is exercised either in the quality of knights of shires, citizens of cities, or burgesses of boroughs. The origin and

[1] "Every man has a right to be governed justly, but it does not follow that every man has a right to be a governor." Alden's Science of Government, p. 19.

[2] 2 Ld. Raymond, 938 (1 Smith's Leading Cases, p. 472).

character of suffrage in England is then stated as follows: "The election of knights belongs to the freeholders of the counties, and it is an original right vested in and inseparable from the freehold, and can no more be severed from the freehold than the freehold itself can be taken away. Before the statute of 8 Hen. 6, ch. 7, any man that had a freehold, though never so small, had a right of voting; but by that statute the right of election is confined to such persons as have lands or tenements to the yearly value of forty shillings at least, because, as the statute says, of the tumults and disorders which happened at elections by the excessive and outrageous number of electors; but still the right of election is an original right incident to and inseparable from the freehold. As for citizens and burgesses, they depend on the same right as the knights of shires and differ only as to the tenure; but the right and manner of their election is on the same foundation. Now, boroughs are of two sorts: first, where the electors give their voices by reason of their burgership; or, secondly, by reason of their being members of the corporation. Littleton, in his chapter of Tenure in Burgage, 162 C. L., 108 b, 109, says: 'Tenure in burgage is where an ancient borough is, of which the king is lord, of whom the tenants hold by certain rent, and it is but a tenure in socage;' and in section 164 he says, 'and it is to wit that the ancient towns called boroughs be the most ancient towns that be within England, and are called boroughs because of them come the burgesses to parliament.' So that the tenure of burgage is from the antiquity, and their tenure in socage is the reason of their estate, and the right of election is annexed to their estate."

§ 10. It will be seen from the foregoing that while the right to vote in England is a political privilege granted by the King, in the American States it depends upon the will of the people themselves. This distinction is directly traceable to the difference between the English idea of an original compact or agreement, by which the people consented to surrender to the King all political sovereignty, he in

turn granting suffrage to the freeholders as a vested right, and the American theory that all sovereignty resides in the people and is only delegated by them. The Constitution of the United States and of the several States rests upon the principle of a representation by the people, and upon the further principle that no power is exercised of personal right but by delegation.[1]

§ 11. Granting that the sovereignty in this country, viz., the supreme power — the right to make or change the form of government — resides in the people, the question, "Who are the people?" becomes of importance, and its solution, in the light of opinions of the courts, is not free from difficulty. An examination of the cases bearing upon the question will show, however, that what appears to be a difference of opinion is really a disagreement caused by a consideration of the question from different standpoints; those cases in which the question has been considered theoretically leading to the conclusion that the sovereignty resides in the entire community, irrespective of age or sex, while a portion of the cases, which have considered the question from a practical point of view, have reached the conclusion that the sovereignty is in the voters.

In the present consideration of the question, it is proposed to determine first who were regarded as the people at the time of the founding of the government. The answer to this inquiry is to be found in the preambles to constitutions, the opinions of the founders of the government as expressed in their writings and public addresses, and in the opinions of the courts.

§ 12. So long as the American colonies remained subject to Great Britain, there were, in a constitutional sense, no people, Parliament being the body politic. But when the colonies renounced allegiance to George III., every citizen of the colonies became equal with every other citizen, civilly and politically. The Declaration of Independence declared

[1] 2 Wilson's Works, note A, Appendix; 1 Sharswood's Blackstone, 49, note 12.

that all men are created equal; that governments derive their just powers from the consent of the governed; and that when any form of government becomes destructive of the proper ends of government, that it is the right of the people to alter or abolish it. The framers of the Declaration of Independence declared that the legislative power, incapable of annihilation, had returned to the people at large for their exercise. The preamble to the Constitution of the United States announces peremptorily and with authority that "We, the people of the United States, do ordain and establish this Constitution."

The Constitution of the State of New York, adopted in 1777, contained this clause: "This convention, therefore, in the name of and by the authority of the good people of this State, doth ordain, determine and declare that no authority shall, on any pretense whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them." The preamble of the Constitution of Massachusetts contains this declaration: "The body politic is formed by voluntary association of individuals. It is a social compact by which the whole people covenants with each citizen, and each citizen with the people, that all shall be governed by certain laws for the public good." Similar declarations are found in the Constitution of Maryland, of 1776; in that of Delaware, of 1792; in that of New Hampshire, of 1784; in that of North Carolina, of 1776, and in that of Vermont, of 1777. The Constitution of Connecticut, of 1818, provides, "That all men, when they form a social compact, are equal in rights; that all political power is inherent in the people, and all free governments are founded on their authority; that they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient."

§ 13. The speeches and writings of the founders of the government are pregnant with the idea that the sovereignty was at the beginning in the entire people. Daniel Webster, in his argument in *Luther* v. *Borden*, said that the only

source of political power is the people, and that the people are sovereign.[1] Mr. Hallett, in his argument in the same case, said: "All the American writers use the term 'people' to express the entire numerical aggregate of the

[1] In Daniel Webster's celebrated argument in Luther *v.* Borden, *supra*, growing out of the Dorr rebellion, is found a clear and concise statement of the political system of the American States. An analysis of the statement is as follows: The only source of political power is the people. The people (viz., the entire community) are sovereign, but this is not the sovereignty which acts in the daily exercise of sovereign power. The exercise of legislative power, and the other powers of government, directly by the people, is impracticable. They must be exercised by the representatives of the people; and this sovereign power having been delegated and placed in the hands of the government, that government becomes what is popularly called the State. The basis of this representation is suffrage. The right to choose representatives is every man's part in the exercise of sovereign power. To have a voice in it, if he has the proper qualifications, is the portion of political power belonging to every elector. This is the beginning. That is the mode in which power emanates from its source and gets into the hands of conventions, legislatures, courts and executive officers. It begins in suffrage. Suffrage is the delegation of the power of an individual to some agent. This being so, then follow two other great principles of the American system: First, the right of suffrage must be guarded, protected and secured against force and against fraud; and second, its exercise must be prescribed by previous law. That every man entitled to vote may vote, and that his vote may be sent forward and counted, and so he may exercise his part in sovereignty in common with his fellow-citizens.

There is another principle, equally true, that the people often limit themselves and set bounds on their own power to secure the institutions which they have established against the sudden impulses of mere majorities. They also limit themselves in regard to the qualifications of electors, and in regard to the qualifications of the elected. In every State the people have precluded themselves from voting for every one they might choose to vote for, and have limited their own right of choosing. Webster's Works, vol. 6, pp. 221–227.

It will be noticed that Mr. Webster here refers to the government as being the State. It is not to be presumed, however, that he intended this in other than a narrow sense suited to the purposes of the argument he was at the time making. The case involved the question which of two factions constituted the constitutional government of the State of Rhode Island. Webster was maintaining the authority of the charter government, which it was claimed had been regularly established

community, whether State or National, in contradistinction to the Government or Legislature; that in the people, as thus defined, resides the ultimate power of sovereignty."[1] James Winthrop, in his letter to the Massachusetts convention, February 5, 1788, said: "In the original state of gov-

by the people and to which the people had delegated the powers of government. Such a government, rather than any other, was the State, or, more accurately speaking, the duly accredited and authorized representative of the State. In addition to the idea of the State as synonymous with the government, the word has sometimes been used as denoting a territorial region, as where the Federal Constitution requires that a Representative in Congress shall be an inhabitant of the State in which he shall be chosen. In other parts of the Constitution the word "State" contains the combined idea of people, territory and government. Texas *v.* White, 7 Wall., 721. But in a primary sense the State is the civil community independent of the civil government. 1 Wilson's Works, 271; Texas v. White, *supra.* The government is established by the State as a mere agency for the exercise of those powers that reside in the people. So that the authority of the State is original or inherent, while the authority of the government is delegated. Sharswood's Blackstone, p. 49, note 12. A State is not the legislature of a State, nor the executive, nor the judiciary, but it is the people themselves altogether forming a body politic. Penhallow *v.* Doane's Administrators, 3 Dall., 93; State *v.* Young, 29 Minn., 536. Cicero defined a State to be a body political or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength. Such a body or society when once organized as a State is not destroyed by any change or modification of its system of government, but has a wholly separate and independent existence. Keith *v.* Clark, 97 U. S., 454; 1 Wilson's Works, 271. So it has been held that the obligation of contracts and treaties of a State are in nowise impaired by a change in the State's form of government, so long as the body politic remains the same. Keith *v.* Clark, *supra;* Texas *v.* White, *supra;* White *v.* Hart, 13 Wall., 646. Where the ownership of a territory is transferred from one nation to another, the relations of the inhabitants of such territory with each other remain unchanged; and while there is a transfer of allegiance from one government to another and a consequent change in the political law of the territory, still that law which regulates the intercourse and general conduct of individuals remains in force until altered by the new authority. American Ins. Co. *v.* Canter, 1 Pet., 540. See, also, Wilson's Works, Appendix, note A.

[1] Luther *v.* Borden, 7 How. (U. S.), 19–27.

ernment the whole power resides in the whole body of the Nation, and, when a people appoints certain persons to govern them, they delegate their whole power."[1]

It was said by Elbridge Gerry that "The origin of all power is in the people, and they have an incontestable right to check the creatures of their own creation."[2]

Similar expressions are to be found in the writings and addresses of many other statesmen of the Revolutionary period.[3]

§ 14. It must be apparent from the foregoing that *the people* who declared their independence, and who adopted constitutions, were the individuals who made up the citizenship of the new States, irrespective of age or sex. These were "the governed," from whom the government derived its powers. These were "the people or members of the State." It would seem, therefore, that the people of the Constitution were the citizens of the State, male and female, old and young. This is made even more certain by the early decisions of the Supreme Court of the United States in cases where the question has been considered.

§ 15. In the great case of *Chisholm, Executor*, v. *The State of Georgia*,[4] decided in 1793, Justice Wilson, one of the chief architects of our system of government, said: "The well-known address of Demosthenes, when he harangued and animated his assembled countrymen, was: 'O, men of Athens!' With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object which the Nation could present. 'The people of the United States' are the first personages introduced. Who were those people? They were the citizens of the thirteen States."

[1] Federalist (Fed. Statesmen Series), p. 553.

[2] Federalist (Fed. Statesmen Series), p. 717.

[3] John Quincy Adams' Eulogy on Monroe, Lives of Madison and Monroe, p. 236. See, also, Mr. Porter in N. Y. Convention (Deb. N. Y. Con., 1846, pp. 249–50); Storey's Com. on Const., sec. 215.

[4] 2 Dall., 463.

In the opinion of Chief Justice Jay in the same case is to be found the following language: "It is remarkable that in establishing it [the Constitution] the people exercised their own rights and their own proper sovereignty, and, conscious of the plenitude of it, they declared with becoming dignity, 'We, the people of the United States, do ordain and establish this Constitution.' Here we see the people acting as sovereigns of the whole country, and in the language of sovereignty establishing a constitution. * * * At the Revolution the sovereignty devolved on the people; and they are truly the sovereigns of the country; but they are sovereigns without subjects, unless the African slaves among us may be so called, and have none to govern but themselves; the citizens of America are equal as fellow-citizens, and as joint-tenants in the sovereignty."

§ 16. Again, in 1795, in the case of *Penhallow* v. *Doane's Administrators*,[1] it is said by Justice Iredell: "A distinction was taken at the bar between a State and the people of the State. It is a distinction I am not capable of comprehending. By a State forming a republic, speaking of it as a moral person, I do not mean the legislature of the State, the executive of the State, or the judiciary, but all the citizens which compose that State, and are, if I may so express myself, integral parts of it; all together forming a body politic. The great distinction between monarchies and republics, at least our republics, in general is, that in the former the monarch is considered as the sovereign, and each individual of his nation as subject to him, though in some countries with many important special limitations; this, I say, is generally the case, for it has not been so universally. But in a republic, all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another but in virtue of a power constitutionally given by the whole community, and such authority when exercised is, in effect, an act of the whole community which forms such body pol-

[1] 3 Dall., 93.

itic. In such governments, therefore, the sovereignty resides in the great body of the people; but it resides in them not as so many distinct individuals, but in their politic capacity only."

§ 17. In *Dred Scott* v. *Sanford*,[1] decided in 1856, Judge Taney, in delivering the opinion of the Court, said: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of these people, and a constituent member of this sovereignty."

§ 18. In the light of the foregoing it may be said with certainty that at the time of the Declaration of Independence and of the formation of the Union the people were the citizens, irrespective of age or sex, and that the sovereignty in this country inhered originally in this broad class. It is next important to determine whether the sovereignty has been delegated or surrendered by the original people, and if so how, and to what extent, and to ascertain who are, in a political sense, the sovereign people in this country to-day.

§ 19. It being wholly impossible for the entire body of the people to participate in the exercise of sovereignty, they have constituted different agencies to represent and act for them in maintaining the government, the chief of which is the electoral body, or the voters, who act as the immediate representatives of the people in the daily affairs of government, and who choose from among themselves those who are to fill those other agencies of the people, the legislative, executive and judicial departments of the government.[2] The body of the people never has and never

[1] 19 How., 373.

[2] Jamison on Constitutional Conventions, § 24.

can assemble. True, the constitutional convention is popularly regarded as an assembly of the people, and its proceedings are considered as the utterances of the people, direct from the lips of sovereignty. Yet, in fact, a limited number of individuals either assume or are delegated to represent the people in such conventions, and a large majority of the people never participate therein.[1] How then do the constitutions adopted by such conventions become binding upon the people. This question may be properly considered here, in so far as it aids in a determination of the character of the right of suffrage as fixed by constitutional provision.

§ 20. It is upon the theory of affirmance or ratification of acts done in the name of the people that the provisions of constitutions, including the provisions prescribing the qualifications of voters, become binding upon the body politic. The Declaration of Independence and the Constitution of the United States, and of the respective States, purport to be the acts of the whole people, done in their name, by their agents or representatives. The individual, therefore, who continues to live without objection under the provisions of or changes in a constitution, made by one claiming to act for him and in his name, is deemed as ratifying such provisions or changes, and as subscribing thereto, and by such ratification it becomes his as fully as though he had actually voted for its adoption. It was by the enforcement of this theory that the Constitution of the United States first became binding upon the inhabitants of the new States. All persons, whether natives or mere inhabitants, were considered entitled to make their choice either to remain and become citizens of one or other of the States, or to remove from the country and continue British subjects. By remaining a certain length of time, fixed in some cases by statute, they were presumed to have elected to become American

[1] 1 Sharswood's Blackstone, 47, note 11; Blair *v.* Ridgely, 41 Mo., 161; Wilson's Works, vol. 1, p. 14, and vol. 2, Appendix, p. 570; Jamison on Const. Con., sec. 237.

citizens.[1] Thus, the Constitution, which before its adoption was a mere proposition, promulgated by a convention, became the instrument of the people, either by virtue of their votes, or by their acquiescence.[2]

§ 21. In the case of *Inglis* v. *Trustees of Sailor's Snug Harbor*,[3] it was said by Justice Story: "Under the peculiar circumstances of the Revolution, the general, I do not say the universal, principle adopted, was to consider all persons, whether natives or inhabitants, upon the occurrence of the Revolution, entitled to make their choice, either to remain subjects of the British crown or to become members of the United States. This choice was necessarily to be made within a reasonable time. In some cases that time was pointed out by express acts of the Legislature; and the fact of abiding within the State after it assumed independence, or after some other specific period, was declared to be an election to become a citizen. That was the course in Massachusetts, New York, New Jersey and Pennsylvania. In other States no special laws were passed, but each case was left to be decided upon its own circumstances, according to the voluntary acts and conduct of the party. That the general principle of such a right of electing to remain under the old or to contract a new allegiance was recognized is apparent from the cases of *Commonwealth* v. *Chapman*, 1 Dall., 53; *Caignet* v. *Pettit*, 2 id., 234; *Martin* v. *Commonwealth*, 1 Mass., 347, 397; *Palmer* v. *Downer*, 2 id., 179, n.; *S. C.*, Dane's Abridg., c. 131, art. 7, sec. 4; *Kilham* v. *Ward*, 2 Mass., 236, and *Gardner* v. *Ward*, 2 id., 244, n., as explained and adopted in *Inhabitants of Cummington* v. *Inhabitants of Springfield*, 2 Pick., 394, and note; *Inhabitants of Manchester* v. *Inhabitants of Boston*, 16 Mass., 230, and *M'Ilvaine* v. *Coxe's Lessee*, 4 Cranch, 209, 211. But what is more directly in point, it is expressly declared and acted upon by the Su-

[1] Ware *v.* Hylton, 3 Dall., 232; Sharswood's Blackstone, p. 47, note 11.

[2] Federalist (Federal Statesmen Series), No. 39, 212; Federalist (Federal Statesmen Series), No. 40; Wilson's Works, vol. 2, p. 571.

[3] 3 Pet., 160.

preme Court of New York, in the case of *Jackson* v. *White*, 20 Johns., 313."

§ 22. In *Ware* v. *Hylton*,[1] the powers of Congress, prior to the ratification of the Articles of Confederation, were upheld by the Supreme Court upon the ground of ratification. The Court say: "It has been inquired what powers Congress possessed from the first meeting in September, 1774, until the ratification of the Articles of Confederation on the 1st of March, 1781? It appears to me that the powers of Congress during that whole period were derived from the people they represented, expressly given, through the medium of their State conventions or State Legislatures; or that after they were exercised they were impliedly ratified by the acquiescence and obedience of the people. After the Confederacy was completed, the powers of Congress rested on the authority of the State Legislatures and the implied ratifications of the people."[2]

§ 23. It is to be concluded from the foregoing that the provisions of the Constitutions of the different States defining who shall exercise the right to vote are binding upon all citizens, irrespective of age or sex. It remains to be ascertained whether the people, by establishing the qualifications of electors and delegating the right of suffrage to the persons possessed of the enumerated qualifications, have thereby surrendered irrevocably the sovereignty to the electors. Who are now the people? Do the inhabitants of the Commonwealth still retain the sovereignty as at the beginning, or is it now vested in a new and restricted class — the voters?

§ 24. It is here that we encounter some difference of opinion among the authorities, brought about, evidently, by the fact that in some cases the question has been viewed from a theoretical standpoint, while in others the practical phase of the matter alone has been considered. So far as the theory of suffrage is concerned, there is no reason to believe that, by delegating the privilege to the voters, the peo-

[1] 3 Dall., 232.

[2] McCullough *v.* Maryland, 4 Wheat., 404.

ple at large have done more than to create a trust of which they remain the beneficiaries. In many, if not in all, of the States, the Constitutions which create the voters contain in some form an expression of the sentiment that all government is founded on the consent of the people.[1] Thus, in the Constitution of Pennsylvania, there is the declaration that the people have *at all times* an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper, and "the people" here meant have been declared by the Supreme Court of Pennsylvania to be those who constitute the entire State, male and female citizens, infants and adults.[2] If the people can abolish their government, they can also abolish the voters, who are but an agency of government. Had it been the intention to surrender the sovereignty into the hands of the voters, it is improbable that a grant of such importance would have been left in any manner to implication. It is safe to say that in no State has any express grant been made by constitutional provision or otherwise.

§ 25. Considering the question further, from a legal as well as a theoretical standpoint, there is abundant authority at hand to show that the voters have no power except as the delegates of the people, and that in exercising the franchise it has always been as the representatives of the entire citizenship. In the comparatively recent case of *Wells* v. *Bain*[3] (decided in 1874), the Supreme Court of Pennsylvania, in discussing who are the people who possess the right to alter or reform the government, say: "The people here meant are the whole — those who constitute the entire State, male and female, infants and adults. A mere majority of these persons who are qualified as electors are not the people, though when authorized to do so they may represent the whole people. * * * Three and a half or four

[1] Story on the Constitution, ch. 9, § 581; Anderson *v.* Baker, 23 Md., 620.

[2] Wells *v.* Bain, 75 Pa. St., 47.

[3] 75 Pa. St., 47.

millions of people cannot assemble themselves together in their primary capacity. They can act only through constituted agencies. No one is entitled to represent them, unless he can show their warrant, how and when he was constituted their agent. The great error of the argument of those who claim to be the people or the delegates of the people is in the use of the word *people*. Who are the people? Not so many as choose to assemble in a country or a city, or a district, of their own will, and to say, We are the people. Who gave them power to represent all others who stay away? Not even the press, that wide-spread and most powerful of all subordinate agencies, can speak for them by authority. The voice of the people can be heard only through an authorized form, for, as we have seen, without this authority a part cannot speak for the whole."

§ 26. In *Anderson* v. *Baker*,[1] the Supreme Court of Maryland had before it for consideration the test-oath provision of the Constitution of Maryland, and the registry law of 1865 of that State, it being contended by the petitioner that these were null and void, by reason of the prohibitions of the Constitution of the United States. The Court in this case took occasion to investigate carefully where the sovereignty resides, and its conclusions, as expressed by Judge Cochran, are so clear and satisfactory as to entitle them to be incorporated here at some length.

"The people in their original sovereign character," he says, "are the fountain-head of governmental authority, and all the powers necessary to be exercised in the continued administration of a representative government originate in and are delegated by an exertion of their sovereign will. These propositions, founded in necessity, and illustrated by long continued practice, have become the received doctrines of the American people. * * * The people, in clothing a citizen with the elective franchise for the purpose of securing a consistent and perpetual administration of the government they ordain, charge him with the performance

[1] 23 Md., 577–80.

of a duty in the nature of a public trust, and in that respect constitute him a representative of the whole people. This duty requires that the privilege thus bestowed should be exercised, not exclusively for the benefit of the citizen or class of citizens professing it, but in good faith and with an intelligent zeal for the general benefit and welfare of the State. * * * The elective franchise, within the purview of this case, is a privilege conferred on the citizen by the sovereign power of the State to subserve a general public purpose, and not for private or individual advantage; that, as against the power conferring it, the citizen acquires no indefeasible right to its continuance or enjoyment; and that the people of the State, in the exercise of their sovereign power, may qualify, suspend or entirely withdraw it from any citizen or class of them, providing always that representation of the people, the essential characteristic of a republican government, be not disregarded or abandoned."[1]

§ 27. Following this investigation of what we have called the theoretical side of the question, we come to a consideration of those authorities which hold that the sovereignty in this country, for all practical purposes at least, has been made over to and is now vested in the voters. The distinguished jurist, David Dudley Field, in a paper read before the Congress of Jurisprudence and Law Reform in 1893, intimates that the people are the voters.[2] A no less eminent authority, Judge Cooley, in his work on Constitutional Limitations,[3] says: "The political maxim, that the government rests upon the consent of the governed, appears, therefore,

[1] United States *v.* Cruikshank, 92 U. S., 542; Jamison on Const. Con., sec. 51 and sec. 332.

[2] "What is meant by the people? At the time of the great declaration, the people meant adult white men. After the Civil War, and for some years, the people meant adult men, white or black. What is meant now? In the State of Wyoming, by the people is meant adult men and women, white or black. In that most advanced of all the States in this respect, a woman as well as a man votes for the representatives of the people." Extract from Address by David Dudley Field, as printed in Chicago Legal News, vol. 25, p. 438.

[3] 2 Cooley, Const. Lim. (6th ed.), p. 40.

to be practically subject to many exceptions. And when we say the sovereignty of the States is vested in the people, the question very naturally presents itself, What are we to understand by 'the people,' as used in this connection? What should be the correct rule upon this subject it does not now fall within our province to consider. Upon this men will theorize, but the practical question precedes the formation of the Constitution, and is addressed to the people themselves. As a practical fact, the sovereignty is vested in those persons who are permitted by the Constitution of the State to exercise the elective franchise."

§ 28. In *Blair* v. *Ridgely* it is said: "Ordinarily it may be said, when we speak of the people, the entire body of the inhabitants of the State are comprehended. But this cannot be so in a political sense. It can only mean that portion of the inhabitants who are intrusted with political power. Neither in this nor any of the American States did the inhabitants, other than qualified voters, ever exercise political power, and it is only through the instrumentality of ballots that such power is or can be exercised. This truth is exhibited by the fact that, while the Constitution declared that all power resided in the people, less than one-fourth of the inhabitants exclusively exercised the political power, and more than three-fourths were always disfranchised."[1]

§ 29. It is to be observed that Judge Cooley states that the sovereignty is *vested* in the voters as a *practical* fact. It is fair to presume that he attaches to the word *vested* the meaning accorded to it in *Calder* v. *Bull*,[2] viz., possessed of the power to do certain acts or to possess certain things ac-

[1] Blair *v.* Ridgely, 41 Mo., 161. The distinction attempted to be drawn here between the people in an ordinary or general sense as including the entire body of the inhabitants, and the people in a political sense as including only the inhabitants who are intrusted with political power, is, it is respectfully suggested, unsound. The term "The people" can have but one meaning, and an attempt to confound the people with the voters in any sense is to apply to the trustee a title which belongs only to the *cestuis que trust.*

[2] 3 Dall., 394.

cording to the law of the land, and not as possessed of an inalienable and indefeasible right. Again, in saying that the sovereignty is vested in the voters as a *practical* fact, he expressly excludes from his discussion a theoretical consideration of the question. But with due respect for such eminent authority the writer believes that this view is incorrect, even from a practical standpoint, and that the body politic is sovereign not only in theory, but that it has power as an actual fact to assume and exercise at will the attributes of sovereignty.

§ 30. Sovereignty is exercised in two ways: first, regularly or indirectly through the agencies established by the sovereign power; and second, irregularly or directly by the people acting as a political unit without the intervention of agencies. It must be conceded that so long as the exercise of sovereignty is confined to the regular or indirect method, the exercise of sovereignty is practically in the hands of the voters. But its exhibition is by no means confined to this method. Aside from the revolutionary exercise of power, which though unsanctioned by law is possible under all forms of government, and which, when exercised successfully, must be considered as the direct act of the aggregate people, there is an additional important method, in which the entire people exercise the sovereign power, viz., in the force of public opinion, which is wielded directly by the body politic, and which must be acknowledged as a potent and constant factor in the affairs of government. What can withstand the consensus of opinion of the entire people? The government and all its agencies, including the electors themselves, yield to it and conform to its demands. This is well illustrated by the remarks of David Dudley Field, already referred to, in which attention is called to the change which has taken place in the *personnel* of the voters since the establishment of the government. First, adult white males, then adult males, black and white, and now, in some instances, adult males and females, white and black. What has brought about this change? Is it due primarily to the action of the

voters? It must be admitted that, so far as the extension of the elective franchise to women is concerned, it has been brought about in obedience to a public sentiment, shaped to a great degree by the women themselves, who prior thereto formed the bulk of the disfranchised portion of the community. If woman's suffrage becomes general in the United States, as now seems probable, and as is advocated and predicted by Mr. Field, it will be as the result of the opinions of the whole body of the citizens, and an example of the practical exercise of sovereignty by the community at large.[1] May it not be said, therefore, as a practical fact that the will of the entire citizenship is still sovereign in the United States?

§ 31. It is unnecessary for the purposes of this work to determine whether the sovereignty in this country resides in the people of the United States as a Nation, or in the people as divided into groups by States. It is sufficient to note that so far as the right to fix the qualifications of voters is concerned, the sovereignty is in the people of the respective States, by virtue of the provisions of the Federal Constitution, subject only to the limitations contained in the Fifteenth Amendment, that the right of citizens of the United States to vote shall not be abridged on account of race, color or previous condition of servitude.[2]

§ 32. It being within the power of the people to confer the right of suffrage, the qualifications of electors are determined by the representatives of the people in convention assembled, and are defined by the Constitution adopted or recommended in such conventions, and afterwards ratified by the voters.[3]

§ 33. It is within the power of the people by constitutional provision to limit the discretion of the voters in the choice of persons to fill public offices. The Constitutions of all the States define the qualifications of the persons to

[1] Jamison on Const. Con., secs. 23 and 56.

[2] See authorities cited in connection with section 1 of following chapter.

[3] McCulloch *v.* State of Maryland, 4 Wheat., 404.

be chosen to the more important official positions, the usual requirements pertaining to nativity and age. When the qualifications of office-holders are thus prescribed, the voters are precluded from choosing any one to office who is not possessed of the enumerated qualifications.[1]

§ 34. The sovereign power having been delegated by the electors to the other agencies of government, the people can only withdraw, abridge or alter the power so delegated in the manner provided by their own Constitutions, and not in any manner nor at any time that may please a majority.[2] Nor can the people assume to exercise power which they have delegated. "If the entire population of a State could, as it is often expressed, 'meet upon some vast plain,' so long as that population was organized under a Constitution like those with which we are familiar, though it would be physically able to carry into execution such ordinances as should get themselves passed at its tumultuous parliament, it clearly would have no *constitutional* or *legal* right to pass an ordinance at all. Such an assemblage would not constitute, in a political sense, the people. The people of a State is the *political body — the corporate unit* — in which are vested, as we have seen, the ultimate powers of sovereignty; not its inhabitants or population considered as individuals. It is never to be forgotten that the *individuals* constituting a State have, *as such*, no political, but only civil *rights*. Except as an *organized body*, that is, *except when acting by its recognized organs*, the entire population of the State already constituted, were it assembled on some vast plain, could not constitutionally pass a law or try an offender."[3]

[1] Jamison on Const. Con., 351.

[2] Koehler *v.* Hill, 60 Iowa, 543; *In re* Duncan, 139 U. S., 461; Van Horn's Lessee *v.* Dorrance, 2 Dall., 308; State *v.* Cunningham, 81 Wis., 497; Anderson *v.* Tyree (Utah), 42 Pac. Rep., 201. An election must be conducted by an authority constituted by law, and the mere fact that it is conducted honestly is not sufficient. Van Amringe *v.* Taylor, 108 N. C., 196.

[3] Jamison on Const. Con., sec. 237.

§ 35. While the true theory of a representative government requires that the elective franchise should be extended to every citizen who is competent and free to form an intelligent opinion upon questions affecting his own welfare as a member of the Commonwealth, the same principle requires that those who are not thus qualified, either from lack of education or intelligence, or because of dependence on the will of others, should be represented by deputies competent to act for them.[1] A fair and adequate representation of the whole people by the electors is equivalent in point of usefulness to universal suffrage, for it accomplishes all the purpose of the entire people as effectually as if each citizen were to cast his ballot; nor does it do violence to any right of the people, for their rights are adequately and fully protected when in the hands of an intelligent body of voters impelled by self-interest to faithfully execute the trust reposed in them.[2]

[1] The exclusion of lunatics, felons and idiots from the right to vote rests on obvious grounds. Infants are doubtless excluded because of a lack of intelligence and freedom of will essential to a proper exercise of the right. The exclusion of women originated in the common-law idea of the merger of a married woman's existence in that of her husband, and in her unfitness by nature for the occupation of civil life. Cooley on Const. Lim., p. 38; Bradwell *v.* State, 17 Wall., 140.

[2] 2 Wilson's Works, pp. 14–16.

CHAPTER II.

THE RIGHT TO VOTE—HOW PRESCRIBED AND REGULATED.

§ 36. Power of the States and of the United States to fix qualifications.
36. Power of the State limited by the Fifteenth Amendment to the Constitution of the United States.
37. State regulations followed by Federal government.
37. Except such as conflict with Federal Constitution or laws.
38. Qualifications of voters for Presidential electors.
39. Nature and extent of power of Congress over suffrage.
40–41. Rights conferred by Fifteenth Amendment.
40–41. Power of Congress thereunder.
42. Decisions of United States Supreme Court.
42. Regulation of Federal elections; power of Congress.
43–44. Punishment of fraud in Federal elections.
45. Regulation of Territorial elections.
46. Nature of right of suffrage and whence derived.
47. Legislature cannot add to or alter constitutional qualifications.
47. Change of election districts.
48–49, 51–52. Right to representation in government cannot be impaired or taken away.
50. Voter may be questioned as to qualifications.
52–56. Validity of acts prescribing test oaths.
57. Act authorizing Governor to impair right of suffrage void.
58. Regulations must be reasonable.
58–62. Distinction between regulation and impairment of the right to vote.
62. Casting vote in case of tie.
63. Right may be limited to male citizens.
63. But may by constitutional provision, or sometimes by legislative act, be extended to females.
63. But only upon same terms and conditions as are applied to males.
63*a*. And cannot be extended by statute to females when constructively limited to males by constitutional provision.
64. Construction of Fourteenth Amendment to the Constitution of the United States.
64*a*. In what States women may vote.
64*b*. Constitution of New Jersey of 1776 permitting female suffrage.

§ 36. Subject to the limitation contained in the Fifteenth Amendment to the Constitution of the United States, the

power to fix the qualifications of voters is vested in the States.[1] Each State fixes for itself these qualifications, and the United States adopts the State law upon the subject as the rule in Federal elections, as will be seen by reference to Section II of Article I of the Constitution, which provides as follows:

"The House of Representatives shall be composed of members chosen every second year by the people of the several States, *and the electors in each State shall have the qualifications required for electors of the most numerous branch of the State Legislature.*"

The qualifications of voters for Presidential electors are also to be fixed by the States, as will be seen by reference to Section I of Article II of the Constitution, which provides that "each State shall appoint, *in such manner as the Legislature thereof may direct,* a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

Inasmuch as Representatives in Congress, and Presidential electors, are the only Federal officers to be chosen by popular ballot, it is manifest that all controversies concerning the right of individuals to vote, whether at a State or a Federal election, must be determined by reference to the local or State law upon this subject; provided, of course, that such local or State law is not in conflict with any provision of the Constitution of the United States, or with any constitutional act of Congress.

§ 37. As already intimated, the power of the State government to prescribe the qualifications of voters is limited by the terms of the Fifteenth Amendment to the Constitution of the United States, which provides as follows:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any

[1] [Kinneen *v.* Wells, 144 Mass., 497; Minor *v.* Happersett, 21 Wall., 178; United States *v.* Reese, 92 U. S., 214; United States *v.* Cruikshank, 92 U. S., 542; United States *v.* Crosby, 1 Hughes, 448; Anthony *v.* Halderman, 7 Kan., 50.]

State, on account of race, color, or previous condition of servitude.

"The Congress shall have power to enforce this article by appropriate legislation."

The effect of this constitutional provision most clearly is to render absolutely null and void all provisions of a State constitution or State law which come in conflict with the amendment itself, or with any appropriate act of Congress passed to enforce it or for the purpose of regulating the election of Federal officials.[1] Speaking of the clause of the Constitution first above quoted, the Supreme Court of the United States has said:[2]

"The States, in prescribing the qualifications of voters for the most numerous branch of their own Legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications for voters for those *eo nomine*. They define who are to vote for the popular branch of their own Legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress."

§ 38. With respect to the qualifications of voters for Presidential electors, it is proper to observe that the whole subject is committed to the States respectively by the provisions of Section I, Article II, of the Constitution, above quoted. Each State is to appoint electors in "such manner as the Legislature thereof may direct." This authorizes, of course, the Legislature to provide for the choosing of electors by popular vote (which is the usual mode); but it also authorizes the Legislature to provide for their appointment or election by the Legislature itself, or perhaps by the executive; though this latter mode would be a wide departure from the practice of the States, and would remove the choice so far

[1] For further discussion of power of Congress to regulate Federal elections, see Chapter VI.

[2] *Ex parte* Yarbrough, 110 U. S., 663.

from the people that it is not to be expected that any State will adopt it.

§ 39. Before proceeding to the consideration of the qualifications of voters as prescribed by State laws, let us consider the nature and extent of the power of Congress over the subject. This order of discussion is most convenient because, as already intimated, all power to legislate respecting the right of suffrage not expressly or by necessary implication conferred by the Constitution upon Congress resides with the States; and therefore, when we have fixed the limits of the power of Congress, it may be assumed that all laws not falling within those limits are to be enacted by the States.

It must, however, be borne in mind that we are for the present considering the question of the qualifications of voters simply, and that we are not, in this connection, to deal with the subject of the mode and manner of conducting elections, or the prescribing of regulations to secure a fair and free expression of the popular will. This latter subject will be considered in another connection,[1] and it will be seen that Congress may prescribe such regulations applicable to what may be called Federal elections — that is to say, elections for Representatives in Congress and electors for President and Vice-President; but such regulations cannot go to the extent of defining the qualifications of voters. They must relate to the time, place or manner of holding or conducting such elections.

§ 40. The Fifteenth Amendment to the Constitution does not confer the right of suffrage, but it does nevertheless confer upon citizens of the United States a very substantial right which Congress may protect and enforce by appropriate legislation, viz., the right of exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude. The power of Congress to legislate upon the subject of the qualifications of persons voting at State elections rests solely upon this

[1] Chapters VI and VII.

amendment. This, for the reason that Congress has power to legislate for the protection of such rights and immunities only as are created by or dependent upon the Constitution of the United States.[1]

In the case here cited it was held that the power of Congress in legislating for the enforcement of the Fifteenth Amendment is limited to the enactment of such statutes as are appropriate to prevent discrimination on account of race, color, or previous condition of servitude, and that those provisions of an act of Congress passed in pursuance of said amendment which are not confined in their operation to such discrimination are beyond the power of Congress, and therefore unconstitutional and void. It was accordingly held that the third and fourth sections of the act of Congress of May 31, 1870,[2] not being confined in their operation within the required limit, as above stated, were unauthorized and invalid. Upon an examination and construction of these two sections the court reached the conclusion that their operation was not intended to be confined to cases of unlawful discrimination on account of race, etc.; and it appearing that the statute, by its terms, was broad enough to cover offenses without as well as others within the power of Congress, the question arose whether it could be made available for the punishment of persons who may have been guilty of such acts of discrimination as Congress might have prohibited and punished. Upon full consideration, the Court held that the sections named could not be limited by judicial construction so as to make them operate only on that which is within the jurisdiction of Congress, and that therefore they must be set aside as not "appropriate legislation" for the enforcement of the amendment.

§ 41. The statement in the opinion of the Supreme Court of the United States just referred to, that the Fifteenth Amendment conferred no affirmative right to vote, was

[1] United States *v.* Reese, 92 U. S., 214.
[2] 10 Stat., 140.

qualified in the subsequent case of Yarbrough.[1] It is there shown that in all the States which did not remove from their Constitutions and laws the provisions limiting the right to vote to white men, this amendment did substantially confer upon colored citizens the right to vote, by annulling those discriminating provisions. The Court said:[2]

"In such cases this fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right. In the case of *United States* v. *Reese*, so much relied on by counsel, this court said, in regard to the Fifteenth Amendment, that 'it has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.' This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination. The exercise of the right in both instances is guarantied by the Constitution, and should be kept free and pure by Congressional enactments whenever that is necessary."

§ 42. The question of the constitutional power of Congress to enact statutes regulating Federal elections, and particularly as to the constitutionality of the aforesaid act of May 31, 1870,[3] has been considered by the Supreme Court of the United States, and will be further noticed hereafter.[4] In this connection, however, it may be said that the decisions of the Supreme Court have settled the question of the

[1] 110 U. S., 651.
[2] P. 665.
[3] *Ante*, § 40.
[4] Chapter VI.

power of Congress under the Constitution, either to take into its own hands the entire matter of regulating elections for representatives in Congress and electors for President and Vice-President, or to supplement by way of amendment, alteration or addition, any regulation upon that subject which the States may have enacted.[1] Such regulations, however, when prescribed by Congress, do not interfere with the laws of the several States which prescribe the qualifications of voters, except in so far as they are founded upon the distinction of race, color or previous condition of servitude, or are of such a character as to interfere or conflict with such lawful regulations as Congress may enact.[2]

§ 43. In the case of *United States* v. *Quinn*,[3] Judge Woodruff, of the United States Circuit Court for the southern district of New York, had occasion to discuss the constitutionality of the twentieth section of the act of Congress of May 31, 1870, punishing a fraudulent registration for the purpose of voting for a member of Congress. In a very clear and able opinion he demonstrates that Congress has power to punish frauds perpetrated in an attempt to prevent a fair election of a member of that body. This is not an attempt to fix the qualifications of electors for Representatives in Congress. These are fixed by the State, and are the same as those belonging to electors for members of the most numerous branch of the State Legislature. It only provides in effect that "it shall be an offense against the laws of the United States to contribute, by fraud or violation of the State registry laws, to the sending of a Representative to the Congress of the United States who is not clothed with the authority which a true expression of the popular will would give; and that is all." It would indeed be a strange anomaly if the Government of the United States could be obliged to look upon commission of frauds and

[1] *Ex parte* Seibold, 100 U. S., 371; *Ex parte* Clark, Id., 399.

[2] See cases last cited; also *Ex parte* McIlwee, 3 Am. Law Times, 251; S. C., Bright. Elec. Cas., 65; McKay *v.* Campbell, 2 Abb. U. S. Rep., 120.

[3] Bright. Elec. Cas., 592.

crimes perpetrated for the purpose of putting into the halls of Congress men who have no right there, and who owe their seats to corruption, and yet remain powerless to prevent or punish it. If it be said that it is the exclusive prerogative of the States to punish election frauds, whether committed on the effort to elect State officers simply, or members of the National legislature, or Presidential electors, the answer is that the States have the power, but not the exclusive power, to punish frauds appertaining to the election of Federal officers. The power to punish such frauds against itself belongs to the United States Government, and is nothing more nor less than the power of self-protection.

§ 44. The power of the Legislature is limited to prescribing such regulations as do not substantially impair the constitutional privileges of citizens.[1]

In accordance with this doctrine it has been held by the House of Representatives of the United States that where, just prior to the election, certain voting precincts were abolished, thus leaving large numbers of voters from twenty-five to thirty-five miles from the nearest polls, votes lost by this means could not be counted as if cast.[2] The correctness of this ruling is not doubted; but it is believed to be equally clear that if the number of persons who are by such means deprived of the right to vote is so large that if cast they might have changed the result, the election ought to be set aside.

Legislation of this character may be carried to the point or disfranchising large bodies of voters, and where such appears to be the case it is the duty of the courts of justice to interfere.

§ 45. Congress has power to legislate for the Territories upon all subjects, including the right of suffrage therein;

[1] Monroe *v.* Collins, 17 Ohio St., 665. [A statute prohibiting electioneering in the vicinity of any polling place is a reasonable police regulation to secure good order about the polls, and does not infringe the constitutional rights of the citizen to express his sentiments on public men and measures. State *v.* Black, 53 N. J., 462.]

[2] Lawrence *v.* Sypher, 43d Congress.

and, in the exercise of this power, may abridge the right of voting as by the act of Congress of March 22, 1882, prohibiting bigamists, polygamists, etc., from voting.[1]

§ 46. The right of suffrage is not a natural right, nor is it an absolute, unqualified personal right.[2] It is a right derived in this country from constitutions and statutes. It is, as we have seen, regulated by the States, and their power to fix the qualifications of voters is limited only by the provisions of the Fifteenth Amendment to the Constitution, which forbids any distinction on account of "race, color, or previous condition of servitude," and by the general power of the Federal government to regulate its own elections.[3]

§ 47. Where election districts are changed by legislative enactment, or other proper authority, questions of importance sometimes arise as to the effect of such change upon the rights of the electors thereof. It is of course clear that when the boundaries of a district within which a voter has the right to vote are changed and such provision is made as to preserve his right of suffrage, the change will be held valid.[4] It has, however, been held that an act of the Legislature assuming to establish a second election district in an organized town, in the absence of a provision of law under which an election can be held in the new district, is unconstitutional and void.[5] The Constitution of Minnesota under which this case arose provided that the right of voting should be exercised in the election district in which the elector resided; and it was accordingly held that an act which took him out of the district in which he had a right to vote,

[1] Murphy *v.* Ramsey, 114 U. S., 15.

[2] [Bloomer *v.* Todd, 1 L. R. A., 111, note. See, also, Ch. I, Sec. 4.]

[3] Huber *v.* Riley, 53 Pa. St., 112; Ridley *v.* Sherbrook, 3 Cold., 569; Anderson *v.* Baker, 23 Md., 531; Bright. Elec. Cas., 27. See, also, 1 Story, Const., Ch. 9, §§ 581, 582; Rison *v.* Farr, 24 Ark., 161; United States *v.* Reese, 92 U. S., 214; *Ex parte* Yarbrough, 110 Id., 651; Spencer *v.* Board, etc., 1 MacArthur, 169.

[4] People *v.* Holihan, 29 Mich., 116; [Duncan *v.* Shenk, 109 Ind., 26.]

[5] State *v.* Fitzgerald (Sup. Ct. Minn., 1887), 32 N. W. Rep. 788.

and placed him in another in which he had not such right, could not be upheld.[1]

§ 48. The right to vote for and be represented by county and State officers being a constitutional right, it cannot be impaired or taken away by legislation.[2] Hence it has been held upon constitutional ground that if an act for the organization of a new county was so framed that the inhabitants of such new county could not participate in the election of judges and State senators, the same was unconstitutional and void. And the fact that a future Legislature was expected to remedy this difficulty by incorporating such new county in a senatorial and judicial district does not cure the defect in such an act.[3]

§ 49. It is not competent for a State Legislature, in providing for a special election to determine the location of a county seat, or to determine any other matter, to require any other qualifications for voters at such election than those prescribed by the Constitution. Constitutional provisions concerning the qualifications of voters apply to all elections, whether general or special.[4]

[1] See, also, Perkins *v.* Caraway, 59 Miss., 222.

[2] [Pearson *v.* Supervisors, 91 Va., 322.]

[3] Lanning *v.* Carpenter, 20 N. Y., 447; People *v.* Maynard, 15 Mich., 463, 471; Cooley's Const. Lim., 616.

[4] State *v.* Williams, 5 Wis., 308; State *v.* Lean, 9 Id., 279. A city ordinance which requires as a qualification for voting anything more than is required by the Constitution of the State is void. McMahon *v.* Savannah, 66 Ga., 217; S. C., 42 Am. Rep., 65. And the words "electors of said cities," used in the statute respecting elections of city, town and village officers, mean residents within the city, town or village who have the qualifications of electors prescribed by the Constitution. State *v.* Tuttle, 53 Wis., 45. But it has been held in Kentucky that where a town charter provided that town trustees shall be elected by the votes of voters who shall have paid their taxes, although the Kentucky Constitution contained no such provision concerning the qualifications of the voters generally, yet the town charter was valid, and only those who paid their taxes could vote for town trustees. The constitutional provision was held inapplicable to municipal elections. Bookner *v.* Gordon, 81 Ky., 665. [All persons who are within the class designated by the Constitution are entitled to vote for all offices elective by the people, whether

§ 50. It is, however, competent for the Legislature to prescribe questions to be propounded to voters calculated to draw from them the proof of their qualifications to vote at an election, and require the voter to answer thereto before he can vote. This does not add to the qualifications of voters; it only provides the means of testing the voter's right.[1]

§ 51. In accordance with the principle that the Legislature cannot add to the constitutional qualifications of voters, it has been held that where the Constitution requires that a person shall have a residence in the township where he offers to vote, without prescribing any period of residence, a statute which undertakes to require a residence in the township of twenty days is unconstitutional and void.[2] A residence *bona fide*, for a time however short, satisfies the constitutional requirement, and it is fair to presume that it was intended that a person having all the other qualifications, and removing from one township to another at any time prior

the offices to be filled are created by the Constitution or by Legislature. Consequently, a statute cannot confine the right to vote for road commissioners to the freeholders of the district where the Constitution does not contain a property qualification, nor extend it to females or to non-residents of the district in the absence of a constitutional provision granting the right of suffrage to such persons. Allison *v.* Blake, 57 N. J., 6. The word "electors," as used in Section 1, Article 7, of the Constitution of Colorado, is used in its restricted political sense, and means public electors for the choice of public officers. A statute requiring the question of the annexation of a town or city to be submitted to the determination of such electors as have in the year next preceding paid a property tax therein is not unconstitutional as imposing an additional qualification for electors. Mayor of Town of Valverde *v.* Shattuck, 19 Colo., 104. The provisions of the Constitution of Florida, prescribing the qualifications of electors at all elections under it, do not apply to elections for municipal officers in that State, but such elections are subject to statutory regulation. State *v.* Dillon, 32 Fla., 545.]

[1] State *v.* Lean, *supra*. [Where the Legislature has the right to prescribe the qualifications of voters at a municipal election, it may also provide the means of ascertaining the persons who possess the qualifications prescribed. State *v.* Dillon, 32 Fla., 545.]

[2] Quinn *v.* State, 35 Ind., 486.

to the day of election, should retain the right to vote. If twenty days' residence in the township may be required under such a Constitution, a longer period may be, and thus the Constitution might be rendered meaningless or nugatory.

§ 52. The Legislature of a State cannot add to the qualifications of an elector, as prescribed by the State Constitution, and of course cannot deprive any citizen of any right conferred either by the State or Federal Constitution. Where the Constitution prescribes the qualifications, whoever possesses them has a constitutional right to vote, and of this right he cannot be deprived by legislative enactment.[1] This rule has been applied in the construction of the Constitution of Pennsylvania, which declares affirmatively that all persons possessing certain qualifications shall be entitled to vote. The Legislature of that State, in 1866, passed an act declaring, in substance, that no person should be permitted to vote who, having been drafted in the military service and duly notified, had failed to report for duty. But it was held by the Supreme Court of that State that this was an attempt of the Legislature to disfranchise those to whom the Constitution had given the rights of electors, and that the act was therefore unconstitutional and void.[2]

It has been held by the Supreme Court of Arkansas[3] that while a State law requiring that a voter shall swear to support the Constitution of the United States does not restrict the right to vote or add to the qualifications required, yet

[1] The General Assembly cannot in any way change the qualifications of voters in State, county, township, city or town elections. The qualifications of voters, as fixed by the Constitution, are the same in all elections. People *v.* Canaday, 73 N. C., 198.

[2] McCafferty *v.* Guyer, 59 Pa. St., 109; S. C., Bright. Elec. Cas., 44. [An act of the Legislature of Indiana, which makes the exercise of the right of suffrage by one who has been absent from the State six months or more, on business of the State or the United States, depend upon proof that he is a tax-payer of the county, is unconstitutional, as it requires a property qualification of this class of voters, in addition to the qualifications prescribed by the Constitution. Morris *v.* Powell, 125 Ind., 281.]

[3] Rison *v.* Farr, 24 Ark., 161, and note to same case in 87 Am. Dec., 64.

to add to the qualifications prescribed by the Constitution a provision that the voter shall purge himself, by oath, of all crimes, or of any particular crime, is beyond the power of the Legislature. Upon this ground it was held that an act of the Legislature of Arkansas, approved May 31, 1864, prescribing as a qualification for voting an oath that the voter had not voluntarily borne arms against the United States, nor aided directly or indirectly the so-called Confederate authorities, was unconstitutional and void.[1]

The same doctrine has been laid down by the Supreme Court of North Carolina.[2]

It will be observed that these cases relate to the constitutionality of acts of State Legislatures which are supposed to affix conditions or impose burdens not permitted by the State Constitution. Where the qualifications of voters are prescribed by constitutional provision, and the right is limited to a particular class of persons, no distinction being made on account of race or color, it is well settled that no provision of the Federal Constitution is violated.[3]

§ 53. The Amended Constitution of Missouri required such an oath to be taken as a prerequisite to exercising the right to vote, as well as to the exercise of the duties of certain callings in life, such as that of attorney at law, minister of the gospel, etc. In *Cummings* v. *Missouri*,[4] the Supreme Court of the United States, by a bare majority of the judges, held this provision of the Constitution of Missouri to be void, as being in the nature of pains and penalties, so far as it related to the oath required to be taken by ministers of the gospel. Mr. Justice Miller, however, for the minority of the court, delivered a dissenting opinion which has been well characterized as "an opinion which for ability, logic, and admirable judicial criticism has rarely been excelled even in that august tribunal." The question of the validity

[1] But see Randolph *v.* Good, 3 W. Va., 551.
[2] People v. Canaday, 73 N. C., 198.
[3] Blair *v.* Ridgley, 41 Mo., 63.
[4] 4 Wall., 277.

of this test oath, as applied to voters, came before the Supreme Court of Missouri in *Blair* v. *Ridgley*,[1] and that Court, in an elaborate and able opinion, held it valid.

§ 54. This decision was not in conflict with *Cummings* v. *Missouri*, *supra*. In the latter case the Supreme Court of the United States held that the right to adopt and follow the calling or vocation of a preacher, or minister of the gospel, was a natural right — a right absolute and vested; and that it was therefore not within the power of the State to prescribe a test oath to be taken as a condition precedent to its enjoyment. But the right to vote is not a natural right; it is not such a right as belongs to man in a state of nature. It follows that the reasoning of the Court in *Cummings* v. *Missouri* does not apply to the question of the validity of the test oath as applied to a voter. And it also follows that, inasmuch as the right to vote is derived from and regulated by the State Constitution and laws, it is competent for the State in its Constitution, or by statute if its Constitution permits, to prescribe loyalty as a qualification, and to enforce the requirement by exacting of every voter an oath of loyalty.

§ 55. This question arose in the House of Representatives of the United States in *Burch* v. *Van Horn*,[2] and the decision of the committee, and of the House, was in accordance with the view just expressed. The committee use the following language in their report:

"The ninth section of the same article provides that after sixty days from the time the Constitution takes effect, no person shall be 'permitted to practice as an attorney or counselor-at-law, nor after that time shall any person be competent as a bishop, priest, deacon, minister, elder or other clergyman of any religious persuasion, sect, or denomination, to teach or preach, or solemnize marriages, unless such person shall have first taken, subscribed, and filed said oath.'

[1] 41 Mo., 63.
[2] 2 Bart., 205.

"Under this ninth section of the Constitution arose the case of *Cummings* v. *Missouri*,[1] in which it was held by a majority of the Supreme Court of the United States that this provision, having the effect to deprive persons of the right to practice professions and pursue vocations lawful in themselves, in consequence of acts done prior to the adoption of the Constitution, could only have been intended as punishment for such acts, and was therefore in essence and substance an *ex post facto* law, and therefore forbidden by the Constitution of the United States. The contestant claims that the same application of principles requires the same decision in relation to voters; that the virtual disfranchisement of persons who were voters under the previous Constitution and laws of the State, but who are prevented from voting under the new Constitution, by reason of their inability to take the oath it requires, can only be regarded as a punishment for the act which stands in the way of taking the oath, and that the Constitution of the United States prohibits the infliction of punishment by subsequent legislation. If such disfranchisement must be regarded as established for the purpose of punishing the persons thus deprived of the right of voting, it must be admitted to come entirely within the reasoning by which the above-cited judgment of the court is supported.

"Your committee believe that the provisions of the new Constitution of Missouri may be supported, so far as they require this oath of voters, without at all trenching upon the decision of the Supreme Court.

"Each of the States of the Union have hitherto regulated suffrage within their own limits for themselves, and in such a manner as the people of the State deemed most conducive to their own interests and welfare. Suffrage is a political right or privilege which every free community grants to such number and class of persons as it deems fittest to represent and advance the wants and interests of the whole. No State

[1] 4 Wall., 277.

grants it to all persons, but with such limitations as the interests of all and the interest of the State require. When once granted it is not a vested, irrevocable right, but it is held at the pleasure of the power that gave it, and the State may, by a change of its fundamental law, restrict as well as enlarge it. When, therefore, the State of Missouri, in changing its Constitution, saw fit to declare that the interests of the State and of the people of the State would be promoted by withholding the right of voting from all persons who could not take the prescribed oath, they exercised no greater or higher power than exists in every State."

§ 56. The object of prescribing an oath to be taken by an elector who is challenged at the polls, or before registering officers, is to test the right of such person to vote or register. It is doubtful whether a statute requiring a challenged person to take an oath, the nature of which is such as not in any degree to test his right, would be held valid. It would probably be held to be not a proper regulation of, but an unnecessary and unwarranted restriction upon, the exercise of his right to vote. Thus, in Nevada it was held that a statute requiring an oath to be taken by an applicant for registration, to the effect that he has not, since arriving at the age of eighteen years, voluntarily been engaged in rebellion against the government, is void, because the Nevada Constitution provides that persons who were engaged in the rebellion, and who were afterwards pardoned, may vote.[1]

§ 57. An act purporting to authorize the Governor of a State to set aside the registration of the voters of a county, and thus deprive them of the right to vote, is unconstitutional and void. It is not doubted that the people of a State, expressing their will in the form of a constitutional provision or otherwise, may prescribe the qualifications of voters, whereby the elective franchise may be bestowed upon persons not before entitled to it, and may be taken away from persons before entitled to it, subject to restrictions

[1] Davies *v.* McKerky, 5 Nev., 368.

upon this power contained in the Constitution of the United States. But the right of suffrage once conferred by a Constitution, the Legislature has no power to divest it. It follows that where a person, entitled under the Constitution to vote, has complied with such law in regard to registration and the like as the Legislature may prescribe by way of regulating the exercise of the right, the Legislature cannot authorize the Governor, or any other official, to take the right away from him.[1]

§ 58. Where the Constitution confers upon the electors the right to choose an officer, it is, as we have elsewhere seen, often a difficult question to determine how far the Legislature may go in the way of providing the necessary regulations for the regular and orderly expression of that choice.[2] Thus, in Pennsylvania the Constitution provided that vacancies in judicial offices, happening by death, resignation or otherwise, should be filed "by appointment by the Governor, to continue until the first Monday of December *succeeding the next general election.*" Under this provision it was doubtless intended that an election by the people to fill any such vacancy should be held at the next general election after its happening; but the General Assembly provided by law that all such vacancies should be filled at the first general election happening "*more than three calendar months*

[1] State *v.* Staten, 6 Cold., 233; Sheafe *v.* Tillman, 2 Bart., 907.

[2] [The Constitution of Tennessee does not require an educational qualification of voters. The provisions of the act of the Legislature of Tennessee (Acts of 1890, ch. 24), which makes it a misdemeanor for any one to remove ballots from the voting place or to aid a voter in the selection or marking of his ticket, and which requires all voters, including illiterates, to select and mark their own tickets with such assistance only as the election officers may lawfully afford, are valid and constitutional. These provisions do not require such educational qualifications on the part of voters as render them obnoxious to the State Constitution. They are the just and reasonable exercise of the legislative power to enact laws to secure the freedom of elections and the purity of the ballot-box. Nor do they impose oppressive or impossible conditions upon the exercise of the elective franchise. Cook *v.* State, 90 Tenn., 407.]

after the vacancy shall occur." The question of the constitutionality of this act arose in *Commonwealth* v. *Maxwell*,[1] and it was held to be constitutional. It was conceded by the court in that case, as indeed it must be by all, that a law intended to take away or *unnecessarily and unreasonably postpone and embarrass* the right of election would be set aside as unconstitutional. But it was held that a provision requiring three months for deliberation in the choice of a successor in case of a vacancy fixes only a reasonable time, and is, therefore, a valid and proper regulation. This decision goes upon the sound principle that a Constitution cannot enforce itself; it lays down fundamental principles according to which the several departments it calls into existence are to govern the people; but all auxiliary rules which are necessary to give effect to these principles must, of necessity, come from the Legislature.

§ 59. The doctrine that the Legislature cannot add to the constitutional qualifications of voters is founded upon the well-settled rule of construction that when the Constitution specifies the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition or to extend the penalty to other cases.[2] And upon precisely the same ground it is held that, where the Constitution defines the qualifications of an officer, it is not within the power of the Legislature to change or superadd to them, unless the power to do so is expressly, or by necessary implication, conferred by the Constitution itself.[3]

§ 60. In Ohio it has been held that an act of the State Legislature authorizing the election of four members of a police board at each election, but denying to the elector the right to vote for more than two, was in violation of that provision of the Ohio Constitution which provides that each elector "shall be entitled to vote at all elections."

[1] 27 Pa. St., 44.

[2] Cooley's Const. Lim., 64; Rison *v.* Farr, 24 Ark., 161; [Allison *v.* Blake, 37 N. J., 6.]

[3] Thomas *v.* Owens, 4 Md., 189.

§ 61. While the Legislature cannot add to, abridge or alter the constitutional qualifications of voters, it may, and should, prescribe proper and necessary rules for the orderly exercise of the right resulting from these qualifications. The Legislature must prescribe the necessary regulations as to place, time, manner, etc. But such regulations are to be subordinated to the enjoyment of the right itself.[1]

It has been held under the authority of the rule in *McCafferty* v. *Guyer*,[2] that an act of the Legislature, declaring that a voter who has removed from his district within ten days of the election may vote in the district removed from, is unconstitutional and void. This, for the reason that the Constitution of Pennsylvania requires that the voter should have resided in the election district "ten days immediately preceding the election."[3] As remarked by the Supreme Court of Alabama, no department of the government, nor all of them combined, have the power to divest an individual of his constitutional right to suffrage.[4]

§ 62. A statute providing that, "when two persons shall have an equal number of votes, the returning officer shall have the casting vote, but shall not vote in any other case whatsoever," is a constitutional and valid statute.[5] It is well settled that a citizen by accepting an office may waive a constitutional privilege. The Constitution of each State grants the right of suffrage to all electors, and no elector can be deprived of this right otherwise than as prescribed by law.[6] But the citizen can refuse to exercise this privilege, and he may also relinquish it for a time, in order to secure to himself a greater advantage, and therefore he may waive his right to vote, in common with other citizens, to

[1] Page *v.* Allen, 58 Pa. St., 338, 347; Patterson *v.* Barlow, 60 Id., 54.

[2] 59 Pa. St.; S. C., Bright. Elec. Cas., 44.

[3] Thompson *v.* Ewing, 1 Brewst., 103.

[4] State *v.* Adams, 2 Stew. (Ala.), 239.

[5] State *v.* Adams, 2 Stew. (Ala.), 231; Bright. Elec. Cas., 286.

[6] [The Supreme Court of Rhode Island has jurisdiction of a petition of *mandamus* to a town council to order an election as required by statute. State *v.* Town Council of South Kingston, 18 R. I., 258.]

secure the honors and emoluments of an office, and the power to give the casting vote in case of a tie.[1]

§ 63. It is competent for a State, in the exercise of its power to fix the qualifications of voters, to limit the right of suffrage to male citizens; and to do so is no violation of the Fourteenth Amendment to the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[2]

It is equally within the power of the State, by constitutional provision, or by legislative enactment where the power of the Legislature is not restricted by the Constitution, to confer the right of suffrage upon women.[3]

Where the law authorizes female suffrage it has been held that the right of women to vote must be extended upon the

[1] In case of a tie no official can give a casting vote unless expressly authorized to do so; and where in such cases no mode of determining the result is expressly prescribed, there will be no election. Olive *v.* O'Reily, Minor (Ala.), 410.

[2] United States *v.* Anthony, 11 Blatchf., 200; Miner *v.* Happersett, 53 Mo., 58. [Women are not entitled to vote by virtue of the Fourteenth and Fifteenth Amendments to the Federal Constitution. Van Valkenburg *v.* Brown, 43 Cal., 43; Spencer *v.* Board of Registration, 1 MacArthur, 169, 29 Am. Rep., 582; Note to Bloomer *v.* Todd, 1 L. R. A., 111; Mudge *v.* Jones, 59 Mich., 165.]

[3] Wheeler *v.* Brady, 15 Kan., 26; [Plummer *v.* Yost, 144 Ill., 68; Woodley *v.* Town Council of Clio, 44 S. C., 374; Ackerman *v.* Haenck, 147 Ill., 514, and Belles *v.* Burr, 76 Mich., 1. The organic act of Washington Territory provided that the qualifications of voters shall be prescribed by the Legislative Assembly, *provided* that the right of suffrage shall be exercised only by adult citizens of the United States (R. S., § 5506). By the act of the Legislative Assembly of the Territory, approved January 18, 1888, the privilege of suffrage was conferred upon women. It was held by the Supreme Court of Washington, in Bloomer *v.* Todd, 1 L. R. A., 111, that the latter act was void, as being in conflict with the portion of the organic act above quoted; the words "adult citizens," as used in the organic act, meaning adult *male* citizens only. Where a constitutional provision conferring the elective franchise upon women is submitted to the qualified voters of the State for ratification or rejection, women are not entitled to vote upon such question of ratification or rejection. Anderson *v.* Tyree (Utah), 42 Pac. Rep., 201.]

same terms and conditions as are applied to men, and that therefore a provision that all male voters shall be tax-payers is void, the same provision not being applied to female voters.[1]

[§ 63*a*. Where the Constitution of a State provides for the election of a school officer, and also requires voters at "any election" to be males, and no intent appears to allow different qualifications for voters for such officer, it is beyond the power of the Legislature of the State to extend to women the right to vote for such officer.[2]]

§ 64. By the first clause of the Fourteenth Amendment of the Constitution of the United States, all persons born in the United States are citizens thereof, and therefore capable of becoming voters. The Constitution does not, by its own terms, confer the right to vote. It does not execute itself. Legislative action is necessary to authorize any particular class of persons to vote. It has accordingly been held that within the District of Columbia, the laws of Congress on this subject extend only to male citizens.[3]

[§ 64*a*. Woman are allowed to vote in the States of Wyoming, Utah and Colorado in all State, county and Federal elections. They may vote at elections of school officers, or on questions connected with schools, in the States of Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New York, New Jersey, Oregon, Vermont, Washington and Wisconsin. In the State of Kansas women may vote, in all cities having an inhabitance of more than five hundred, for the election of city or school officers, or for the purpose of authorizing the issuance of school bonds. In Arkansas and Mississippi they

[1] Lyman *v.* Martin, 2 Utah, 136. As to the right of women to vote at school elections under the statute of Nebraska, see State *v.* Crosby, 15 Neb., 444.

[2] [People *v.* English, 29 N. E. Rep., 678 (Ill.); *In re* Cancellation from Register List, 141 N. Y., 112; *In re* Inspectors of Election, 25 N. Y. Sup., 1063.]

[3] Spencer *v.* Board of Registration, 1 MacArthur, 169; [State *v.* Board of Elections of City of Columbus, 9 Ohio Cir. Ct. Rep., 134].

may vote on the question of granting license for the sale of liquors.]

[§ 64*b*. It seems that under the Constitution of New Jersey, framed in 1776, women were entitled to vote. This Constitution provided that all inhabitants of a certain age and residence, and in possession of a certain amount of property, could vote. An act to regulate elections, passed in 1793, provides that "every voter shall deposit his or *her* ballot, which will be a simple written ticket, containing the names of the persons for whom he or she votes." This is probably the first law authorizing female suffrage in this country, and the provision was abolished in 1807.[1]]

[1] [Minor *v.* Happersett, 21 Wall., 177 (Note Ford's American Citizens' Manual, p. 90).]

CHAPTER III.

QUALIFICATIONS OF VOTERS.

§ 65. Usual qualifications enumerated.
66. Meaning of word "inhabitants."
66–68. Citizenship.
69. Effect of Treaty with Mexico upon *status* of inhabitants of acquired territory.
70–83. Naturalization.
70. Power of Congress exclusive.
71. Summary of naturalization laws.
72–74. What courts may grant naturalization.
75. Proceedings in court required.
76. Judgment final.
77–79. How fact of naturalization may be proved.
79*a*. Where no record of naturalization can be produced.
80–81. Who may be naturalized.
82. Residence required.
83. Also good moral character.
84–85. Construction of act of Congress of April 14, 1802, as to rights of certain minors.
85*a*. Collective naturalization.
85*b*. *Status* of child of alien parent who has filed declaration but neglected to perfect his naturalization.
86. Children born abroad whose parents are citizens.

§ 65. The qualifications of voters are not uniform in all the States, but they are similar. Among those which are generally required are the following:

1. Citizenship, either by birth or naturalization.[1]

2. Residence for a given period of time in the State, county and voting precinct.

3. Age. In all the States it is required that a voter shall have reached the age of twenty-one years.

[1] [Registration acts, making unjust discrimination between the rights of native-born and naturalized citizens and electors, are unreasonable and void. Atty. Gen. *v.* City of Detroit, 78 Mich., 545.]

4. In most of the States the right to vote is limited to males.[1]

5. In some States the payment of taxes is made a qualification.

6. And in some States ownership of land.

7. Mental capacity.

§ 66. In several of the States the elective franchise is given by constitutional provision to "all male *inhabitants* above the age of twenty-one years," having resided in the State for a given period. An important question has arisen as to whether unnaturalized aliens, otherwise qualified, have the right to vote under a provision of this character. The controversy is as to the meaning of the term "inhabitant," when used in this connection. Does it embrace the idea of citizenship? In *Spragins* v. *Houghton*,[2] it was held that the question of citizenship does not enter into the qualification of a voter in such a case, and the question is there discussed at great length and with much ability. And this doctrine is sustained by the Supreme Court of Pennsylvania in *Stewart* v. *Foster*.[3]

§ 67. In *Harvard College* v. *Gore*,[4] the Supreme Court of Massachusetts express a different view of the meaning of the word "inhabitant." The question there was as to what constitutes an inhabitant of a county, within the meaning of the statute, for taking the probate of wills and granting administration on the estates of persons deceased "being inhabitants of or residents in the same county at the time of

[1] [Where women are allowed to vote in all elections "pertaining to school matters," the mere fact that a city, county or State officer, as incident to his office, is required to do some act (as where a mayor appoints school commissioners), does not make the election of such an officer one in which females would be entitled to vote. Brown *v.* Phillips *et al.*, 71 Wis., 239. Where, by legislative enactment, females are allowed to vote for special purposes, such right must not conflict with any constitutional provisions prescribing the qualifications of electors. *In re* Cancellation from Registry List, 141 N. Y., 112.]

[2] 3 Ill. (2 Scam.), 377.

[3] 2 Binn., 110.

[4] 5 Pick., 370.

their decease." And the Court, in construing this statute, say: "The term 'inhabitant,' as used in our laws and this statute, means something more than a person having a domicile. It imports citizenship and municipal relations, whereas a man may have a domicile in a county to which he is alien, and where he has no political relations."[1]

§ 68. Notwithstanding the conflict of authority above referred to, it seems very manifest that where the term "inhabitant" is used especially in describing the qualifications of voters, it does not mean the same thing as citizen. It must be conceded that while the two terms may to a certain extent mean the same thing, the term "citizen" has a more extensive signification than the term "inhabitant," and it is therefore entirely fair to presume that when the framers of a law intend to express this larger meaning they will use the larger term.

§ 69. By the terms of the treaty of peace of 1848 between the United States and Mexico, it was provided that the inhabitants of the territories annexed to the United States, and detached from Mexico, might elect to remain citizens of Mexico by making known such election within one year from the date of the treaty; but the manner of making such election was not prescribed either by the treaty or by any act of Congress. *Held*, that a declaration in writing, signed by persons so electing to remain Mexican citizens, and filed in one of the courts of the Territory of New Mexico, in pursuance of a proclamation from the Governor of the Territory, was sufficient, and that the persons signing such declaration remained citizens of Mexico, and could, after making such declaration, become citizens of the United States, only by the ordinary process of naturalization, and that the votes of such persons for delegate in Congress were illegal, and should be rejected.[2]

§ 70. Inasmuch as naturalization is in nearly all the States necessary to qualify an alien to vote, it is proper in

[1] And see Opinion of Judges, Cushing's Elec. Cas., 120; Malden's Case, Id., 377.

[2] Otero *v.* Gallegos, 1 Bart., 177.

this connection to state briefly the general requirements of the law upon that subject. Congress has power "to establish a uniform rule of naturalization."[1] And the power of Congress under this clause of the Constitution, whether originally exclusive or not, having been exercised by the enactment of a general system of naturalization, has become so; and it is clear that no State can now pass a naturalization law.[2]

§ 71. The following is a summary of the naturalization laws:

1. The first step to be taken by an alien desiring naturalization is the declaration, under oath, of his intention, *bona fide*, to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign power, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may at the time be a citizen or subject. This declaration may be made before the Supreme, Superior, District or Circuit Court of some one of the States, or of the territorial districts of the United States, or a Circuit or District Court of the United States.[3]

2. Such declaration of intention must be made at least two years prior to the time when such alien is admitted to citizenship, and may be made before the clerk of any of the courts above mentioned.[4]

3. After having resided in the United States five years, and in the State or Territory where he applies for admission one year at least, such alien may apply to any court authorized to grant naturalization, and upon satisfying such court that he has complied with the law in these respects — that

[1] Const., Art. 1, Sec. 8.

[2] Chirac *v.* Chirac, 2 Wheat., 259; United States *v.* Vallejo, 2 Dall., 372; License Cases, 5 How., 504, 585; Passenger Cases, 7 How., 518, 556.

[3] [The certificate of declaration of intention to become a citizen is the only competent evidence of such fact. Berry *v.* Hull (N. M.), 30 Pac. Rep., 936.]

[4] [The declaration, if made before a clerk, need not be made in his office. Andrews *v.* Judge Circuit Ct., 74 Mich., 278. *Contra*, *In re* Langtry, 31 Fed. Rep. 879.]

he has made his declaration more than two years previously, and that he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same — he may be admitted to citizenship by taking the oath of allegiance required by the statute. But the applicant can in no case prove his residence by his own oath alone.

4. In addition to the Federal courts, "Every court of record in any individual State having common-law jurisdiction and a seal and clerk or prothonotary" may grant naturalization.

5. The naturalization of the parent also naturalizes all children of such parent under twenty-one years of age, and dwelling in the United States.[1]

6. Children of citizens of the United States, though born out of the limits and jurisdiction of the United States, are to be considered as citizens of the United States.

7. If an alien, who declares his intention to become a citizen, and continues to pursue the directions prescribed for perfecting his naturalization, shall die before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States.

8. An alien minor who has resided in the United States three years next preceding his arriving at the age of twenty-one years, and who has resided therein five years continuously, may apply for, and obtain, naturalization without any previous declaration of intention.

9. Aliens honorably discharged from the military service of the United States are allowed to be naturalized without any previous declaration, and on proof of only one year's residence.[2]

[10. Aliens of the age of twenty-one years or upward, who have enlisted in the United States navy or marine

[1] [Where a widow and her minor son, both of foreign birth, came to the United States, and during the son's minority his mother married a citizen of the United States, such marriage made both mother and son citizens. Gumm *v.* Hubbard, 97 Mo., 312.]

[2] See naturalization laws, Rev. Stat. U. S., p. 380; [Cowan *v.* Prowse, 93 Ky., 156].

corps, and have served five consecutive years in the United States navy or one enlistment in the United States marine corps and have been thereafter honorably discharged, may be naturalized without any previous declaration on proof of good moral character.[1]]

11. Aliens of African nativity or descent may become citizens by naturalization.[2] But Indians and Mongolians or Chinese are not entitled to naturalization.[3]

§ 72. Under the provisions of the Revised Statutes of the United States,[4] naturalization may be allowed before "any court of any of the United States having common-law jurisdiction and a seal and a clerk." Under this section it has been held that it is not necessary that the court granting naturalization should have full and complete common-law jurisdiction. It is enough if such court has power to exercise any part of common-law jurisdiction. And so it has been held that the City Court of Yonkers, New York, can naturalize.[5]

§ 73. A court of record without any clerk or prothonotary or other recording officer distinct from the judge of such court, is not competent to receive an alien's preliminary declaration of his intention to become a citizen.[6]

§ 74. A State law restricting the State courts and their clerks from receiving applications, or entertaining jurisdiction for the naturalization of aliens under the acts of Congress, is not contrary to the Constitution of the United States.[7]

[1] [Sup. Rev. Stat., vol. 2, p. 206.]

[2] Rev. Stat., Sec. 2169.

[3] *Re* Ah Yup, 5 Sawy., 155; S. C., 6 Cent. L. J., 387; Act of Congress, May 6, 1882, Chap. 126, Sec. 14, 22 Stat., 51; [*In re* Gee Hop (D. C.), 71 Fed. Rep., 274. Indians may, however, become citizens by complying with the provisions of the act of February 8, 1887, Chapter 119, Section 6 (Sup. Rev. Stat., vol. 1, p. 536).]

[4] Sec. 2165.

[5] United States *v.* Powers, 14 Blatchf., 223. See, also, upon this subject, Glandbill, Petitioner, 8 Met., 168; 2 Curt., 98; State *v.* Whittemore, 50 N. H., 245; Parsons *v.* Bedford, 3 Pet., 433, 446.

[6] Butterworth's Case, 1 Woodb. & M., 323. And see *Ex parte* Cregg, 2 Curt., 98.

[7] [*In re* Gilroy, 88 Me., 199.]

Congress can confer jurisdiction upon State courts to grant naturalization, but it cannot compel such courts to exercise that jurisdiction in violation of a State law. The "powers given to the State courts by the naturalization laws are naked powers, which impose no legal obligation on courts to assume and exercise them, and such exercise is not within their official duty, or their oath to support the Constitution of the United States."[1]

§ 75. Application for naturalization must be made in open court, and evidence of residence, etc., must be taken by the oral examination of witnesses, and not by previously prepared affidavits. Certificates of naturalization issued by the clerk of a court, without any hearing before the judge in open court, are void, and confer no right of citizenship upon the holder.[2]

§ 76. The courts having power to grant naturalization are the final and exclusive judges as to all questions arising in naturalization cases. They are to receive testimony, to compare it with the law, and to determine all questions both of law and fact. The judgment and order of such a court, duly entered on record in legal form, granting naturalization, closes all inquiry as to the testimony on which it has been pronounced, and, like every other judgment, is complete evidence of its own validity, and can be attacked only on the ground of fraud or want of jurisdiction.[3]

§ 77. A certificate of naturalization in due form, issued by a court possessing the jurisdiction to grant the same, is

[1] Case of Stephens, 4 Gray, 550; Morgan *v.* Dudley, 18 B. Mon., 696; Rump *v.* Commonwealth, 6 Casey, 475.

[2] People *v.* Sweetman, 3 Parker, C. R., 358; [Behrensmeyer *v.* Kreitz, 135 Ill., 591.]

[3] Spratt *v.* Spratt, 4 Pet., 393; The Acorn, 2 Abb. U. S., 434; People *v.* Welsh, 9 Abb. (N. Y.) N. Cas., 465; Preston *v.* Culbertson, 58 Cal., 198. [Where a certificate of naturalization is granted by a court of competent jurisdiction, it cannot be impeached by proof that it was improperly granted, or was obtained by false or perjured testimony. Behrensmeyer *v.* Kreitz, 135 Ill., 591. It seems that the United States can sue in a Federal court for the cancellation of a certificate of naturalization which has been obtained by fraud in a State court. United States *v.* Norsch, 42 Fed. Rep., 417.]

prima facie evidence of naturalization, and an election officer cannot go behind it.[1] If a voter could be obliged to bring proof *aliunde* to sustain such a certificate, and the judges of election could be obliged to hear evidence *pro* and *con*, the value of the boon of citizenship, which we confer upon foreigners who come to our shores, would be greatly lessened. Besides, in many localities where the number of naturalized voters is very large, this mode of proceeding would be impossible, since a few cases would consume the whole of the day of election, and the many would remain unheard.[2] Election officers cannot question the citizenship of one naturalized by a court of competent jurisdiction.[3]

§ 78. In the absence of a statute requiring a naturalized citizen to produce his naturalization papers, and especially where it is alleged that such papers have been lost, his own oath may be received upon the question of his right to register, and such oath proves *prima facie* the truth of the statements sworn to.[4]

§ 79. It is not necessary that the record of proceedings

[1] Parol evidence to prove the fact of naturalization is inadmissible; the record or a certified copy must be produced. State *v.* O'Hearne, 58 Vt., 718; 6 Atl. Rep., 606.

[2] Commonwealth *v.* Lee, 1 Brewst., 273; Commonwealth *v.* Sheriff, Id., 183; Commonwealth *v.* Leary, Id., 270.

[3] People *v.* Walsh, 9 Abb. (N. Y.) N. Cas., 465; Preston *v.* Culbertson, 58 Cal., 198.

[4] People *v.* McNally, 9 Abb. (N. Y.) N. Cas., 648; and see § 287. [It seems that where the clerk has neglected to record the order of naturalization, or where the court records are destroyed by fire, parol proof may be introduced to prove the fact of naturalization. Lowry *v.* White, Mob., p. 623. In case of loss or destruction of record of naturalization, the fact may be established by secondary evidence. Kreitz *v.* Behrensmeyer, 125 Ill., 141. But in the case of Lowry *v.* White, *supra*, the question arose whether Mr. White was eligible to election under the provisions of Section 2, Article I, of the Constitution of the United States, requiring a Representative to have been a citizen of the United States for a period of seven years prior to his election. No record of his naturalization was offered before the committee, but he sought to prove such naturalization by parol evidence. This he was not permitted to do, the distinction being drawn between the admission of parol evidence to prove the contents of a court record and the proof of an order of court never recorded.]

for naturalization shall be entirely full and accurate in its statements and recitals. These constitute no part of the judgment. Thus, though the record may not state that the court heard evidence of the good character of the applicant, or of his attachment to the Constitution, the judgment will not be impaired by this omission. It will be presumed that the court was satisfied upon these questions by sufficient evidence. Nor is it necessary that there should be a formal order of the court admitting the applicant to citizenship. The oath, when taken, confers the rights of a citizen.[1]

[§ 79*a*. Where no record of naturalization can be produced, evidence that a person having the requisite qualifications to become a citizen did, in fact, for a long time vote and hold office and exercise the rights belonging to citizenship, is sufficient to warrant a jury in inferring that he has been duly naturalized as a citizen.[2]]

§ 80. Formerly the right of naturalization was limited to any alien being a free white person; but by act of July 14, 1870,[3] the privilege was extended "to aliens of African nativity and to persons of African descent." Subsequently, by an act approved February 18, 1875,[4] the law was amended so as to "apply to aliens being free white persons and to aliens of African nativity," etc.; and by an act approved May 6, 1882,[5] it was enacted that "hereafter no State court or court of the United States shall admit Chinese to citizenship."

§ 81. It has been earnestly contended that an Indian, born a member of one of the Indian tribes within the United States which still exists and is recognized as a tribe by the government of the United States, who has voluntarily separated himself from his tribe and taken up his residence among the white citizens of a State, but who has not been

[1] Matter of Coleman, 15 Blatchf., 486; *Re* McCoppin, 7 Sawy., 630; United States *v.* Reading, 18 How., 1.

[2] [Boyd *v.* Thayer, 143 U. S., 135; Hogan *v.* Kurtz, 94 U. S., 773; Blight *v.* Rochester, 9 Wheat., 535.]

[3] 16 Stat., 256, Sec. 7.

[4] 18 Stat., 318.

[5] Chap. 126, Sec. 14, 22 Stat., 51.

naturalized or taxed, or recognized as a citizen either by the United States or by the State, is a citizen of the United States within the meaning of the first section of the Fourteenth Article of Amendments of the Constitution, which declares that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside." And it has also been earnestly contended that such Indians were entitled to vote under the Fifteenth Amendment of the Constitution, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude." But these propositions have not been sustained by the Supreme Court of the United States. According to the decision of that court in *Elk* v. *Wilkins*,[1] the members of Indian tribes are not to be regarded as a part of the people of the United States, but as occupying an alien and dependent condition, and therefore not falling within the terms of general acts of Congress, unless so expressed as to clearly manifest an intention to include them. It was accordingly held that Indians born members of their tribes were not made citizens by the Fourteenth Article of Amendment above quoted.[2]

[1] 112 U. S., 94.

[2] [Since the above text was written, the right of such Indians to citizenship has been expressly conferred by United States statute. In the act of Congress dated February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," it is enacted, "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits,

§ 82. The five years' residence required by the law prior to naturalization must be a residence within the United States. It is not enough that the applicant has continued within the jurisdiction of the United States during that period; and therefore a person who had followed the sea constantly, sometimes in the merchant and at other times in the United States service, but had had no residence in any part of the United States other than by employment on board of American vessels, had not been a resident within the meaning of the act.[1]

§ 83. An applicant for naturalization must show that he has behaved as a man of good moral character during all his residence in this country. It has accordingly been held that evidence of his conviction for a crime committed since he came to this country to reside will bar his application, notwithstanding it occurred more than five years previous to the application.[2]

§ 84. Some difference of opinion has been expressed as to whether under the provisions of section 4 of the act of Congress of 14th of April, 1802,[3] the minor children of parents naturalized since the passage of that act are entitled to the rights of citizenship; in other words, whether that section, in so far as it conferred such rights upon the minor children of naturalized citizens, was prospective. That section, omitting such portions as are immaterial to this question, may be quoted as follows: "That the children of

his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." In the case of State *v.* Norris, 37 Neb., 299, Indians were held to be qualified electors by virtue of the above statute.]

[1] Anonymous, 4 N. Y. Leg. Obs., 98.

[2] Matter of Spenser, 5 Sawy., 195; 18 Alb. Law Jour., 153; 6 Reporter, 293.

[3] 2 Stat. at L., 155; R. S. U. S., § 2172.

persons duly naturalized * * * being under the age of twenty-one (21) years at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States."[1]

It has been supposed by some that this section applied only to such minor children as were dwelling within the United States at the time of the passage of the act.[2] And even Chancellor Kent regarded the question as doubtful.[3] The case of *Campbell* v. *Gordon*,[4] decided in 1810, presented the question of the *status* of a minor child of a person naturalized prior to the passage of the act, the minor not being a resident of the United States at the time of the naturalization, but having become a resident thereof prior to the passage of the act. The Court said:

"This act declares that the children of persons duly naturalized under any of the laws of the United States, being under the age of twenty-one (21) years at the time of their parents being so naturalized, shall, if dwelling in the United States, be considered as citizens of the United States. This is precisely the case of Mrs. Gordon. Her father was duly naturalized, at which time she was an infant; but she came to the United States before the year 1802, and was at the time when this law passed dwelling within the United States."

From what is here said, it has been argued that the words "if dwelling in the United States" qualify the whole section, and render the provision which declares that the naturalization of the parent shall confer the rights of citizenship upon his minor child, retrospective only. [The Supreme Court has, however, in *Boyd* v. *Thayer*,[5] settled all con-

[1] [The naturalization of a father does not affect the citizenship of his minor son, who did not come to this country until after his father had been naturalized. Behrensmeyer v. Kreitz, 135 Ill., 591.]

[2] Peck *v.* Young, 26 Wend., 613, 622; Vint *v.* Heirs of King (U. S. Dist. Ct. West. Dist. of Virginia, 1853), 2 Am. Law Reg. (O. S.), 712.

[3] 2 Kent's Com., 52.

[4] 6 Cranch, 176.

[5] [143 U. S., 135.]

jecture on this question by holding that the act of April 14, 1802, should have a prospective operation, and that the naturalization of a parent after the passage of the act would confer the rights of citizenship upon his minor child dwelling in the United States at the time of such naturalization.] Other courts have [also], since the decision of *Campbell* v. *Gordon*, held the act to be in this respect prospective.[1] In the case last cited, the opinion was delivered by Mr. Justice Harlan. If the question were *res nova*, to be determined upon the terms employed in the statute, it would seem to be easy enough of solution. Congress was enacting a permanent system of naturalization, and it is, therefore, fair to presume that the provisions of the act were intended to be prospective, except as the contrary was plainly expressed. The provision in question is not by its terms plainly retrospective only. On the contrary, it may very well be construed to be both retrospective and prospective. The language is: "The children of persons duly naturalized * * * being under the age of twenty-one (21) years at the time of their parents' being so naturalized * * * shall, if dwelling within the United States, be considered as citizens of the United States." This language is quite as applicable to the future as to the past. If the past alone had been intended, Congress would have said, "the children of persons *heretofore* duly naturalized," etc.; and if the future alone had been intended, Congress would have said, "the children of persons *hereafter* duly naturalized," etc.; but inasmuch as a permanent system was being established, designed to fix the *status* of persons then in being, as well as to provide for the naturalization of those who should come after them, the words were so chosen as to be both retrospective and prospective. This is made more evident by the terms employed in the latter clause of the same section, which declares that "the children of persons who *now are or have been* citizens of the

[1] West *v.* West, 8 Paige, 433; State *v.* Penny, 10 Ark., 621; O'Connor *v.* State, 9 Fla., 215; State *v.* Andriano, 92 Mo., 70; United States *v.* Kellar, 13 Fed. Rep., 82.

United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States."

§ 85. In the case of *State* v. *Andriano*, *supra*, the Supreme Court of Missouri considered very fully the question of the force and effect of the decision of the Supreme Court of the United States in *Campbell* v. *Gordon*, and reached the conclusion, reversing the court below, that there is nothing in the opinion in the latter case to justify the claim that the Supreme Court intended to hold the fourth section of the act of 1802 to have been only temporary and retrospective.

[§ 85*a*. In addition to the method of naturalization prescribed by the naturalization laws already referred to, Congress may, in the exercise of its power to establish an uniform rule of naturalization, provide by treaty or statute for the collective naturalization of the inhabitants of a district or territory.[1] Notable examples of the exercise of this power are found in the Jay treaty,[2] conferring citizenship upon British subjects residing at Detroit,[3] the treaty of Paris extending citizenship to the inhabitants of the ceded territory,[4] the treaty with Mexico of 1848,[5] by which Mexicans remaining in the ceded territory were to be deemed citizens of the United States, and the enabling acts under which the State governments of Ohio, Michigan, Indiana, Illinois and Nebraska were formed, where the rights of citizenship were conferred upon others than those who were prior thereto citizens of the United States.]

[§ 85*b*. The statutory provisions with reference to naturalization do not clearly define the *status* of minor children of fathers who have declared their intention to become cit-

[1] [Desbois Case, 2 Martin, 185; United States *v.* Laverty, 3 Martin, 733; Boyd *v.* Thayer, 143 U. S., 135.]

[2] [8 Stat. at L., 116, 117.]

[3] [Crane *v.* Reeder, 25 Mich., 303.]

[4] [8 Stat. at L., 200–202; Dred Scott *v.* Sanford, 19 How., 525.]

[5] [9 Stat. at L., 930.]

izens of the United States but who have failed to carry out the directions prescribed for perfecting their naturalization, nor do they sufficiently define the *status* of such children after arriving at full age by reason of such declaration of intention where the father neglects to perfect his naturalization. It has, however, been recently held by the Supreme Court of the United States in *Boyd* v. *Thayer*,[1] that minors acquire an inchoate *status* by the declaration of intention by their parents, which entitles them, upon arriving at majority, to elect whether they will repudiate the *status* impressed upon them and accept allegiance to some foreign power or accept the citizenship which has been initiated for them by the parent. That while such election is usually made by application on their own behalf, this is not absolutely necessary, and that a long-continued exercise of the rights and performance of the duties of citizenship should be considered as an equivalent of technical compliance with the rule.

The facts in this case were: James E. Boyd was, in November, 1888, elected Governor of the State of Nebraska, and in due time qualified and entered on the duties of his office. In January, 1891, an information was filed in the Supreme Court of Nebraska to oust him from the office for the reason that at the time of his election he was not a citizen of the United States, and was not therefore eligible to the office of Governor.

In March, 1891, the Supreme Court of Nebraska entered a judgment of ouster against Boyd, and the relator, Thayer, was put in possession of the office; whereupon the case was taken to the Supreme Court of the United States by writ of error.

James E. Boyd was born in Ireland of Irish parents in 1834, and brought to this country in 1844 by his father, who settled in Ohio, and who, in 1849, declared his intention to become a citizen of the United States.

In 1855 the son, who had been assured by his father that he had completed his naturalization by taking out his sec-

[1] [143 U. S., 135, 178.]

ond papers in 1854, voted in Ohio as a citizen. In 1856 he removed to the Territory of Nebraska. Here he was elected County Clerk, entered the military service of the United States and served as a soldier; was elected a member of the Nebraska Legislature; served as a member of the State Constitutional Convention; was elected Mayor of the City of Omaha, and voted at every National, Territorial, State and Municipal election since 1856. For over thirty years he had actually enjoyed all the rights, privileges and immunities of a citizen. Upon these facts the Court held as follows:

"We are of the opinion that James E. Boyd is entitled to claim that, if his father did not complete his naturalization before his son had attained majority, the son cannot be held to have lost the inchoate *status* he had acquired by the declaration of intention, and to have elected to become the subject of a foreign power, but, on the contrary, that the oaths he took and his action as a citizen entitled him to insist upon the benefit of his father's act, and placed him in the same category as his father would have occupied if he had emigrated to the Territory of Nebraska; that, in short, he was within the intent and meaning, effect and operation of the acts of Congress in relation to citizens of the Territory, and was made a citizen of the United States and of the State of Nebraska under the organic and enabling acts and the act of admission."]

§ 86. Under the acts of Congress, children born abroad, not only of citizens by birth, but also of naturalized citizens, are citizens of the United States.[1]

[1] Las Portas *v.* De La Motta, 10 Rich. Eq. Rep., 38. [See article on "Citizenship by Naturalization in the United States," 24 Am. Law Rev., 616.]

CHAPTER IV.

QUALIFICATIONS OF VOTERS — *Continued.*

§ 87. Residence always required.
88. Residence defined.
89. Residence at United States Navy Yard, Arsenal, or the like.
90-91. Residence of soldiers.
92-93. Residence within Indian or military reservation.
94-95. Change of residence.
96-100. Temporary removal.
98. Residence and domicile synonymous.
101-103. Residents of students at college.
102-103. Importance of the question of intention.
104. Paupers abiding in a public almshouse.
104*a*. A prison not a place of residence.
105. The intention to remain at a particular place.
106. Rules of evidence.
107. Payment of tax.
108-9-12-13. Mode of assessing tax.
110. Payment by agent.
111. Persons exempted from payment of taxes.
114. Definition of phrase "housekeepers and heads of families."
115-116. Mental capacity required.
117. Rule in Kentucky as to deaf mutes.

§ 87. As residence in a particular place and for a definite period of time is required by the laws of all the States as a qualification for voting, it is important to note the adjudications touching this qualification.

§ 88. In the case of *Williams* v. *Whiting*,[1] the question was as to when the plaintiff ceased to be a resident of Roxbury, and became a resident of Dedham. On the 28th day of October, 1811, being then a resident of Roxbury, "he received," says the court, "an appointment which rendered it convenient, if not necessary, for him to dwell in Dedham; and he then began to prepare for his removal; from that

[1] 11 Mass., 424.

time until the 12th of November he passed almost every day in Dedham, where he transacted his business, and returned to his family each night, except three, on which he slept in Dedham, rather by accident than design; he had also on the 29th of October engaged a house in Dedham, but he did not occupy it until the 12th of November, on which day he removed his family and became domiciled in Dedham." And the court held upon these facts that he remained an inhabitant of Roxbury *until the day of his removal with his family.*

In the same case it is held that under the statute of Massachusetts, to entitle a person to vote for a representative in Congress he must have resided one whole year previous to the election in the town where he offers to vote, and that it made no difference that the person offering to vote had removed inside of a year from another town in the same Congressional district. The Constitution of the United States requires that the electors for representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State Legislature, and one of these qualifications in Massachusetts was one year's residence in the place of voting.[1]

§ 89. Where a State has ceded a given tract of land to the United States for a navy yard, arsenal or the like, and where there is no reservation of jurisdiction to the State other than the right to serve civil and criminal process on such lands, persons who reside upon such lands do not acquire any elective franchise as inhabitants of such State.[2]

[1] [As to what constitutes residence, see Langhammer *et al. v.* Munter, 80 Md., 518; Silvey *v.* Lindsay, 107 N. Y., 55; Blankenship *v.* Israel, 132 Ill., 514; Moffett *v.* Hill, 131 Ill., 239; Behrensmeyer *v.* Kreitz, 133 Ill., 591; McLean *v.* Hobbs, 74 Md., 116; Berry *v.* Hull (N. M.), 30 Pac. Rep., 936; Warren *v.* Board of Registration, 72 Mich., 398; 2 L. R. A., 203, and note; Merrill *v.* Whitemire, 110 N. C., 367; Tullos *v.* Lane, 45 La., 333; Kemp *v.* Owens, 76 Md., 235; State *v.* Dennison, 46 Kan., 359; Berry *v.* Wilcox, 44 Neb., 82.]

[2] Opinion of Judges, 1 Met. (Mass.), 580; Sinks *v.* Reese, 19 Ohio St., 306; Commonwealth *v.* Clary, 8 Mass., 72. [Since the State of New York

But this rule does not apply to persons residing upon a tract of land in a Territory of the United States which has been reserved or set apart by the Executive for military purposes. It was so held in *Burleigh* v. *Armstrong*,[1] in which case the committee said in their report:

"But with regard to the election held within the military reservations of Fort Sully and Fort Randall [or the Ellis precinct], the committee have reached the conclusion that there is nothing in the terms of the organic act, nor in the general policy of the law, forbidding an election to be held at such places. The contestants have insisted that the rule which disqualifies persons from voting within any State, who reside within forts or other territory to which the title and jurisdiction has been ceded by the State to the Federal Government, applies to the military reservations which have been designated by the Executive within the Territories belonging to the United States. But forasmuch as there is no conflict of sovereignty between the Government and the Territory, and the latter holds all its jurisdiction in subordination to the controlling power of Congress, and the military reservations are not permanently severed from the body of the public lands, but are simply set apart and withheld from private ownership by an executive order to the Commissioner of the Land Office, and may be, and often are, restored to the common stock of the public domain when the occasion for their temporary occupancy has ceased, at the pleasure of Congress, and which requires no concurrent act of any State authority to give it efficacy, the residents upon such reservations, although abiding thereon by the mere sufferance of the United States authorities, do

has ceded to the United States the territory comprising the West Point reservation, reserving nothing except the right to serve process therein, such territory has ceased to be subject to State jurisdiction, or to be a part of the State; and persons having no other qualifications as residents than a residence in such territory are not residents of the State and have no right to vote. *In re* Town of Highlands, 22 N. Y. Sup., 137.]

[1] 42d Congress [Smith, 89].

not in any just sense cease to be inhabitants or residents of the Territory within which such military reserve may be situate. Such residents seem to the committee to have that same general interest in the welfare of the community in which they live, and the same right to vote there, as any of the workmen at the arsenal or navy yard in Washington City, who may be allowed to sojourn within their limits, have to vote at elections within the District of Columbia for officers of its territorial government, or for a delegate in Congress from that District."

§ 90. The fact that an elector is a soldier in the army of the United States does not disqualify him from voting at his place of residence; but he cannot acquire a residence, so as to qualify him as a voter, by being stationed at a military post whilst in the service of the United States.[1] And a statute attempting to authorize soldiers to vote out of the State is unconstitutional.[2]

§ 91. Soldiers in the United States army cannot acquire a residence by being long quartered in a particular place, and though upon being discharged from the service they remain in the place where they have previously been quartered, if a year's residence in that place is required as a qualification for voting, they must remain there one year from the date of discharge before acquiring the right to vote.[3]

§ 92. Persons residing within the bounds of an Indian reservation, in the Territory of Dakota, have no right to vote at an election for delegate in Congress. But it is otherwise with persons residing within the limits of a military reservation. It was so held by the House of Representatives in the case of *Burleigh and Spink* v. *Armstrong*.[4]

§ 93. The House of Representatives of the United States has frequently held that residents upon an Indian reserva-

[1] People *v.* Riley, 15 Cal., 48; Hunt *v.* Richards, 4 Kan., 549; Biddle *v.* Wing, Cl. & H., 504; *Re* Election Law, 9 Phil., 497.

[2] Day *v.* Jones, 31 Cal., 261; Twitchell *v.* Blodgett, 13 Mich., 127.

[3] Biddle and Richard *v.* Wing, Cl. & H., 504, 512.

[4] 42d Congress [Smith, 89].

tion have no right to vote.[1] In the latter case the House sustained this doctrine against the report of the Committee. These cases, however, were all from the Territory of Nebraska, and were decided upon the ground that the organic act of the Territory provided that "territory occupied as an Indian reservation shall not be considered a part of Nebraska Territory, but that all such territory shall be excepted out of the boundaries until, by arrangement between the United States and the Indians, the title of the latter shall be extinguished." A similar provision will be found in the organic acts of most and probably of all the Territories.

§ 94. We have already seen that a residence within a place over which the United States has exclusive jurisdiction is not a residence within the State, county or township for voting purposes. It has, however, been held in Ohio that a constitutional requirement of residence for a prescribed time within the State, county or township, as a qualification for voters, is satisfied if, at the time of the election, the voter has a residence within the proper political division, and has resided there for the prescribed length of time, although there may have been a change of jurisdiction, as where, during part of the time, the United States has had exclusive jurisdiction over the place, but has ceded it back to the State.[2]

§ 95. Electors cannot be residents of one district and vote in another;[3] and it has therefore been held that a statute transferring voters from one district to another by a change of city boundaries is, in effect, an alteration of the district, as much as it would be if the same result were brought about in a different way.[4]

[1] Daily *v.* Estabrook, 1 Bart., 299; Morton *v.* Daily, Id., 402; Bennett *v.* Chapman, Id., 204.

[2] Renner *v.* Bennett, 21 Ohio St., 451; [Yonkins' Contested Election, 2 Pa. County Ct., 550].

[3] [State *v.* Alder, 87 Wis., 554.]

[4] People *v.* Holihan, 29 Mich., 116. See Perkins *v.* Carraway, 59 Miss., 222.

§ 96. Where a voter removed from the State of Illinois to another State with his family, with intent not to remain there unless suited, and returned because not satisfied to make his removal permanent, never having fully decided to change his residence, he was held not to have lost his right to vote in Illinois.[1]

A person who removes with his family from one town to another does not retain the right to vote in the former until he acquires it in the latter.[2]

§ 97. Domicile or residence in a legal sense is determined by the intention of the party;[3] he cannot have two homes at the same time; when he acquires the new home he loses the old one; but to effect this change there must be both act and intention.[4]

When a man removes with his family into a county with the intention to make that his residence, that is the county where he should vote so long as his family remains there, though he may himself pass his time and engage in business or work in another county.[5] The temporary absence of a person or his family from his usual place of residence, though extending over a series of years, does not necessarily, without regard to his intention, cause him to lose his residence

[1] Beardstown *v.* Virginia, 81 Ill.. 541. [The statutes of Maryland provide that all persons who shall vacate or remove from the place of their actual abode within the State, and shall take up their abode out of the State, shall be conclusively presumed to have lost their residence in the State, unless at or within ten days after the time of their removal they shall make an affidavit before the clerk of the Circuit Court for the county from which they shall so remove that they do not intend to change their legal residence, but that they have a fixed and definite purpose to return to the State on or before six months preceding the next election in November. (Acts of 1890, Ch. 513, Sec. 14.) This statute construed in Bowling *v.* Turner, 78 Md., 595, and in Sterling *v.* Homer, 74 Md., 573.]

[2] McDaniel's Case, 3 Pa. L. J., 310; Thompson *v.* Ewing, 1 Brewst., 103; *Infra*, § 64.

[3] [Young *v.* Simpson (Colo)., 42 Pac. Rep., 666.]

[4] State *v.* Frest, 4 Harr., 558; McDaniel's Case, 3 Pa. L. J., 310; Sturgeon *v.* Korte, 34 Ohio St., 625; Johnson *v.* People, 94 Ill., 505.

[5] People *v.* Holden, 28 Cal., 124.

or deprive him of his rights as an elector.[1] Residence once acquired, by birth or habitancy, is not lost by a temporary absence for pleasure or business, or while attending to the duties of a public office, with an intention of returning.[2]

§ 98. Residence, within the meaning of the Constitution of Pennsylvania, as applied to the qualification of an elector, means the same thing as domicile — the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights.[3] Such residence must have been with intent to become a citizen of the State and to abandon the citizenship he may have had in another State. Mere residence for the purpose of business or pleasure, unaccompanied with an intention to abandon the former citizenship, is not sufficient.[4] To constitute residence there must be an intention to remain; but this intention is entirely consistent with a purpose to remove at some future indefinite time.[5]

§ 99. It was held by the Supreme Court of Massachusetts in 1814, that a person having a permanent home in one town

[1] Harbaugh *v.* Cicott, 33 Mich., 241.

[2] State *v.* Judge, etc., 13 Ala., 805; Lincoln *v.* Hapgood, 11 Mass., 350; Dennis *v.* State, 17 Fla., 389; Harbaugh *v.* Cicott, 33 Mich., 241; Beardstown *v.* Virginia, 81 Ill., 541; State *v.* Grizzard, 89 N. C., 115.

[3] Chase *v.* Miller, 41 Pa. St., 404. See also Sturgeon *v.* Korte, 34 O. St., 625.

[4] [Thompson *v.* Warner (Md.), 34 Atl. Rep., 830; Lower Oxford Con. Elec., 2 Pa. County Ct., 323. One in the employment of the United States mail service, whose established home is with his father, cannot, by reason of his boarding at a hotel in another township, vote there. Lankford *v.* Gebhart, 130 Mo., 621.]

[5] Miller *v.* Thompson, 1 Bart., 118; Pigott's Case, Id., 463; State *v.* Aldrich, 14 R. I., 171. One who lives in a boat alongside a pier may acquire a residence for voting purposes. *Re* Collins, 64 How. Pr. (N. Y.), 63; [Pedigo *v.* Grimes, 113 Ind., 148. Residence does not mean one's permanent place of abode where he intends to live all of his days, or for an indefinite or unlimited time. Nor does it mean one's residence for a temporary purpose, with the intention of returning to his former residence when that purpose shall have been accomplished, but means one's actual home in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time. Shaeffer *v.* Gilbert, 73 Md., 66].

within that State, and being a legal voter in such town, is not disqualified by a temporary absence in another town, and being there admitted to vote.[1] The general doctrine laid down in this case is doubtless correct.[2] If a person is clearly a resident of, and a legal voter in, one place, and is improperly and illegally permitted to vote at another, that fact alone will not disqualify him from continuing to vote at the place of his actual residence. But it is proper to observe in this connection that, if there is any doubt as to which of two places is the home or residence of a voter, the fact that he has within a recent period voted at one of such places would be very strong evidence that he had decided for himself to make his home where he cast his vote. And if a person is residing at a particular place, and there is doubt as to whether he is residing there temporarily and claiming another place as his home, if he claims and exercises the right to vote at the place where he is for the time residing, that fact ought to be regarded as evidence well nigh conclusive that he has abandoned his former residence and determined to make his home where he claims his vote. The question of residence or domicile is a question largely of intention, and the fact of voting is very strong evidence of the voter's intention to claim a domicile at the place of voting.

§ 100. The Constitution of Pennsylvania requires, among other qualifications of a voter, that he shall have resided one year in the State, "and in the election district where he offers to vote, ten days immediately preceding such election."

It was held in *McDaniel's Case*[3] that an election district was any part of a city or county having fixed boundaries within which the citizens residing therein must vote, as, for example, a ward in the city of Philadelphia. It was also held that a person who removed from one election district

[1] Lincoln *v.* Hapgood, 11 Mass., 350.

[2] [O'Hair *v.* Wilson, 124 Ill., 351; Carter *v.* Putnam, 141 Ill., 133.]

[3] 3 Pa. L. J., 310; S. C., Bright. Elec. Cas., 238.

to another, within the ten days immediately preceding an election, lost his right to vote in the district removed from, and did not gain a right to vote at that election in the district removed to. The right to vote in the former does not continue until the same right is acquired in the latter, but is lost as soon as the removal is complete. There is therefore always a period following a change of residence during which the citizen has no right to vote at any place. It is sometimes laid down as a general proposition, that, in case of a removal by a person from one place to another, his first residence is not lost until the second is acquired. And this is true for some purposes, but not for the purpose of determining the right of such person to vote. That right ends in the place removed from, as soon as the voter completes his removal.[1] It is acquired in the place removed to, only after such a residence therein as the law requires; and as no man can have two residences at the same time, it follows that he cannot *acquire* the right to vote in the new, by residing there, until he has ceased to have a residence in the old.[2]

§ 101. It will be found from an examination of the authorities, and from a full consideration of the subject, that the question whether or not a student at college is a *bona fide* resident of the place where the college is located must in each case depend upon the facts.[3] He may be a resident and he may not be. Whether he is or not depends upon the answer which may be given to a variety of questions, such as the following: Is he of age? Is he fully emancipated from his parents' control?[4] Does he regard the place where

[1] Preston *v.* Culbertson, 58 Cal., 198.

[2] Thompson *v.* Ewing, 1 Brewst., 103; *ante*, § 97.

[3] Cessna *v.* Myers, Smith, 60; Putnam *v.* Johnson, 10 Mass., 488; Farlee *v.* Runk, 1 Bart., 87; Opinion of Judges, 5 Met., 587; Cushing's Elec. Cas., 436; [Schaffer *v.* Gilbert, 73 Md., 66; Posey *v.* Parrett, Row., 187; Hall *v.* Schoenecke, 128 Mo., 661].

[4] [Where a person of mature years severs his connection with the home of his parents, relying upon his own efforts and means, and with no fixed determination as to future residence, being otherwise qualified,

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? In a word, it is necessary from a survey of all the facts to determine whether while at college he is at his home, his residence, or temporarily absent from it.[1]

A student residing at college, having no intention of remaining permanently, has no residence there and no right to vote.[2]

§ 102. In accordance with the rule that residence is determined largely as a question of intention, it has been held that the undergraduates of a college who are free from parental control and regard the place where the college is situated as their home, having no other to which to return in case of sickness or domestic affliction, are residents of the place where the college is situated and entitled to vote therein.[3] But the simple fact that such students paid a road tax in labor while in attendance at the college should have no weight in determining the question of residence, where the law under which such road labor was performed did not require residence to render the party liable, but simply inhabitancy.[4]

§ 103. Although it may be provided by statute or constitutional provision that residence of a student at a seminary of learning shall not entitle him to the right of suffrage at the place where such seminary is situated, yet he may gain a right to vote there if he *bona fide* intends to make that place his permanent abode independent of his sojourn as a student.[5]

he is a legal voter wherever he may be attending college. Wortlington *v.* Post, Mob., 647.]

[1] See Dale *v.* Irwin, 78 Ill., 170; [Pedigo *v.* Grimes, 113 Ind., 148, and note to same case in 20 Am. & Eng. Corp. Cases, 43].

[2] Vanderpool *v.* O'Hanlon, 53 Ia., 246; S. C., 36 Am. Rep., 216; Sanders *v.* Getchell, 76 Me., 158; S. C., 49 Am. Rep., 606; [Goodman *v.* Bainton, 84 Hun, 53; Campbell *v.* Morey, Mob., 215].

[3] [Berry *v.* Wilcox, 44 Neb., 82.]

[4] Dale *v.* Irwin, 78 Ill., 170.

[5] Sanders *v.* Getchell, 76 Me., 158; S. C., 49 Am. Rep., 606; [*In re* Ward,

[§ 104. It has been held in a number of early contested elections in Congress that in the absence of statute regulations a pauper abiding in a public almshouse, locally situated in a different district from that where he dwells when he becomes a pauper, and by which he is supported, does not acquire a residence in the almshouse for the purpose of voting.[1] But in the decision in the case of *Cessna* v. *Myers*, *supra*, a different view was expressed, and in the later case of *Le Moyne* v. *Farwell*[2] all the cases in the House of Representatives are reviewed, and the rule is laid down that paupers at a poor-house do acquire there a residence within the meaning of the election laws prescribing a residence as a requisite to suffrage.]

[§ 104*a*. It has been held by the Court of Appeals of New York that a vagrant committed to prison on his own appli-

20 N. Y. Sup., 606; Stewart *v.* Kyser, 105 Cal., 459. A student's intention to change his residence must be manifested by acts independent of his presence as a student in the new locality. Matter of Garvey, 147 N. Y., 117. A constitutional provision of this character is not retroactive, and an inmate of an almshouse who had gained a residence and voted in the district prior to the adoption of such a provision does not thereby lose his right to vote. *In re* Batterman, 14 Misc. Rep., 213.]

[1] Monroe *v.* Jackson, 1 Bart., 98; Covode *v.* Foster, 2 Bart., 600; Taylor *v.* Reading, 2 Bart., 661; Dale *v.* Irwin, 78 Ill., 170; *Re* Election Law, 9 Phila., 497. A party does not forfeit his residence in a precinct in which he was a voter merely by becoming a county charge and an inmate of the poor-house. Dale *v.* Irwin, 78 Ill., 170.

[2] [Le Moyne *v.* Farwell, Smith, 406; Stewart *v.* Kyser, 105 Cal., 459. Domicile in sailors' and soldiers' home is not residence. Silvey *v.* Lindsay, 107 N. Y., 55. The fact that a student, for the purpose of pursuing his studies, applies for and obtains aid in the nature of a loan from his college, in no way makes him an applicant for public aid. *In re* Ward, 20 N. Y. Sup., 606. Where a soldier, at the time of his admission as an inmate of the Michigan Soldiers' Home, has a legal residence in a township other than that in which the home is situated, he does not lose such residence while he remains such inmate and is not a legal voter in the latter township. Wolcot *v.* Holcomb, 97 Mich., 361; People *v.* Hanna, 98 Mich., 517. The inmate of a county infirmary who has adopted the township in which the infirmary is situated as his place of residence, having no family elsewhere, is entitled to vote in the township where the infirmary is situated. Sturgeon *v.* Korte, 34 Ohio St., 525.]

cation and being maintained at public expense cannot gain a residence in the prison for the purpose of voting, although not strictly confined, but permitted to go in and out on errands.[1]]

§ 105. For a thorough discussion of the question of residence, as applied to voters, see the report of the Committee of Elections in the House of Representatives of the Forty-second Congress, in the case of *Cessna* v. *Myers*, to be found in full in the appendix to this volume. This report presents forcibly and clearly the important consideration that no definition of "residence" or "domicile" can be made sufficiently comprehensive to apply to all conceivable cases and circumstances. Tests which are satisfactory in some cases cannot be applied as inflexible rules in all. Thus, it is a *general* rule that in order to gain a residence in a particular place a man must fix his domicile there with the intention of remaining an indefinite time, and with no fixed purpose of making that place a temporary abiding place only. But there are persons whose lives are necessarily migratory, whose business is to travel from place to place. As, for example, a Methodist minister, who, by the law of his church, cannot remain permanently and pursue his calling in any one place; or a school-teacher who resides wherever he can get employment, and removes when his business requires it; or a laborer who lives where there is an iron-furnace, or a coal-mine, or a railroad in process of construction, to furnish him employment and a livelihood, and when these fail him in one place, goes to another. With reference to these and other similar classes a different rule must be applied. As to what that rule is, nothing need be added to what is said in *Cessna v. Myers;* and let it be understood that the authorities cited in this chapter upon the general question of residence are to be read with reference to the qualifications expressed in that report.[2]

[1] [People *v.* Cady, 143 N. Y., 100.]

[2] [And see, to the same effect, Kreitz *v.* Behrensmeyer, 125 Ill., 141.]

§ 106. The rule that every man is presumed to have a fixed domicile somewhere applies as well to a single as to a married man; and though the domicile of the former may be more difficult to find and prove, yet the rules of evidence by which it is ascertained are the same as those applicable in determining the domicile of other persons.[1] And in the same case it was held that upon a question of domicile, evidence of the conduct or declarations of a party, afterwards as well as before a given day, may be received to ascertain his intentions as to his place of abode on that day. This is upon the ground, of course, that the question of domicile generally turns upon the question of *intent*, and thus can, in the nature of the case, be shown only by circumstances.

§ 107. Under a constitutional provision requiring, as a qualification for voting, the payment of a tax which had been *assessed* at least six months before the election, it has been held that an assessment upon the voter individually, six months before the election, was necessary, and that it is not enough that it be laid upon the county of which he is a resident. It seems, however, that it is not necessary that it be a personal or poll tax. It is sufficient if it be a tax assessed either upon his person or his property within the time required.[2]

§ 108. The Constitution of Massachusetts in force in 1837 vested the right to vote "in every male citizen otherwise qualified, who shall have paid, by himself or his master, parent or guardian, any State or county tax, which shall within two years next preceding the election in question have been assessed upon him in any town or district in this Commonwealth." Under this clause it was held that after any general assessment of a tax has been made by the assessors of a town, and committed to the proper officer for collection, and before another tax is committed to the assess-

[1] French *v.* Lightly, 9 Ind., 478.

[2] Catlin *v.* Smith, 2 Serg. & R., 267; [*In re* Hughes, 3 Lack. Jur., 313; *In re* Contested Elec. of White, 4 Pa. Dist. Rep., 363; Maddendorf's Case, 4 Pa. Dist. Rep., 78].

ors to assess, they have no authority to assess a poll or other tax on any person for the purpose of enabling him to vote at an election, nor is any person, on the payment of a tax so assessed upon him, qualified to vote, under the above constitutional provision.[1]

§ 109. In some of the States it is provided by constitutional provision that, to entitle a man to vote, he must, as a prerequisite, have paid, within two years next preceding the time of the election at which he claims a right to vote, a State or county tax. In Massachusetts it has been held under a provision of this character that the payment of a State tax within the proper period of time, by one who is in other respects a qualified voter, entitles him to vote, although such tax was illegally assessed upon him.[2]

§ 110. Though a tax which is assessed upon one person is paid for him by another without his previous authority, yet if he recognizes the act, and repays or promises to repay the amount on the ground that such person acted as his agent, he thereby acquires the same right to vote as if he had paid the tax with his own hand.[3]

[1] Opinion of Judges, 18 Pick., 575. As to the payment of taxes as a qualification for voting, see, also, *Re* Voting Laws, 12 R. I., 586; State *v.* Livingston, 1 Houst. Crim. C., Del., 109. [In drainage districts where the right of voting upon drainage questions is conferred upon "land owners," deeds of conveyance, while colorably giving title, not made, however, for the purpose of changing ownership in the land, but merely for the purpose of giving the grantees the apparent right to vote, and with an implied understanding that they should vote as desired by the grantors, do not make the holders of such deeds legal voters. Murdock *v.* Weimer, 55 Ill. App., 527.]

[2] Humphrey *v.* Kingman, 4 Met., 162.

[3] Humphrey *v.* Kingman, *supra;* Draper *v.* Johnson, Clark & Hall, 702. Taxes required to be paid by the voter may be paid by his agent, and a subsequent ratification is equivalent to previous authority. *Re* District Attorney, 11 Phila., 645; Gillin *v.* Armstrong, 12 Phila., 626. [An act of the Legislature of Florida which requires the voter to himself pay his poll-tax before participating in a city election does not deprive him of the privilege of paying the same by an agent. State *v.* Dillon, 32 Fla., 548.]

§ 111. In Massachusetts it has been held that persons who have the requisite qualifications as to residence, but who have been exempted from taxation on account of their poverty two successive years before their arrival at the age of seventy years, are not entitled to vote, under that clause of the Constitution of that State which gives the right of suffrage to persons otherwise qualified, and who "shall be by law exempted from taxation."[1]

§ 112. A provision of the Constitution of Virginia gave the right to vote to those who, possessing certain other qualifications, "shall have been assessed with a part of the revenue of the Commonwealth within the preceding year, and actually paid the same." Under this provision it was held by a majority of the committee, that where taxable property is owned and possessed by the son, and is assessed in the name of the father, but the tax is actually paid by the son, he having all the other qualifications required, is entitled to vote; but that if the property is both assessed to and paid by the father, the vote is to be rejected.

Also, that where a revenue tax is duly assessed, and the sheriff has paid the tax himself, and has not returned the party delinquent, that this is to be deemed a payment by the party so as to entitle him to vote.[2]

§ 113. In Pennsylvania the general rule is that no person shall vote without having been assessed and having paid a tax. Persons not assessed are by the law of that State required, in order to vote, to answer certain questions under oath as to tax, age, residence, etc., and in addition to prove their residence by the oath of a qualified voter of the division; and the statute made it the duty of the inspectors to require such proof whether the voter be challenged or not. Under this law it has been held by the House of Representatives that persons who were not assessed, and who voted without answering any of the questions required to be answered, and without producing the testimony of a qualified

[1] Opinion of Judges, 5 Met., 591. See, also, 11 Pick., 538.

[2] Draper *v.* Johnson, Cl. & H., 702.

voter as to their residence, are presumed to be illegal voters. And where the number of such votes was large enough to destroy the reliability of the return, there being no proof upon which the poll could be purged of such illegal votes, it was rejected.[1]

This decision is not in conflict with the general rule that a person who has voted is presumed, until the contrary is shown, to have been qualified. The contrary was presumptively shown by proof that these voters had failed to comply with the statute which required this evidence to be produced by them before voting. When it is thus shown that persons have voted without proving their qualifications as required by positive statute, it is incumbent upon the party claiming the benefit of the votes of such persons to show affirmatively that they were qualified voters.

§ 114. Under a provision in the Constitution of Virginia giving the right to vote to those who for twelve months have been housekeepers and heads of families, it was held that unmarried persons who are living with their mothers or with younger brothers and sisters, having charge of the family, the father being absent or dead, are to be deemed "housekeepers and heads of families." Also, that in determining whether a person is a voter within the meaning of this provision of the Constitution it is not proper to inquire whether he is legally married to the woman with whom he lives and keeps house.[2]

§ 115. The vote of an idiot or person *non compos mentis* ought not to be received; and if such a person has voted, his vote may be rejected upon a contest, without a finding in lunacy.[3] But the vote of a man otherwise qualified, who is neither a lunatic nor an idiot, but whose faculties are merely greatly enfeebled by old age, is not to be rejected.[4] When a vote is attacked on the ground that the voter who cast it

[1] Myers *v.* Moffatt, 2 Bart., 564; Covode *v.* Foster, 2 Bart., 600.
[2] Draper *v.* Johnson, Cl. & H., 702.
[3] Thompson *v.* Ewing, 1 Brewst., 68, 69.
[4] Sinks v. Reese, 19 Ohio St., 307.

was *non compos mentis*, it is necessary to establish satisfactorily, by competent evidence, the alleged want of intelligence, and the test would probably be about the same as in cases where the validity of a will is attacked on the ground that the testator was not of sound mind when it was executed. If the voter knew enough to understand the nature of his act — if he understood what he was doing — that is probably sufficient.[1]

§ 116. The better opinion seems to be that idiots and lunatics are by the common political law of England and this country disqualified from voting.[2] But these unfortunate persons are expressly excluded from the right to vote by the Constitutions of Delaware, Iowa, Kansas, Maryland, Minnesota, Nevada, New Jersey, Ohio, Oregon, Rhode Island, West Virginia, Wisconsin, and perhaps by other States. Paupers are excluded in New York, California, Louisiana, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina and West Virginia. Persons under guardianship are excluded in Kansas, Maine, Massachusetts, Minnesota and Wisconsin. Persons excused from paying taxes at their own request are excluded in New Hampshire. Capacity to read is required in Connecticut, and capacity to read and write in Massachusetts.[3]

§ 117. The Constitution of Kentucky provided that votes "shall be personally and publicly given *viva voce*." In

[1] Clark *v.* Robinson, 88 Ill., 498; [Smith *v.* Jackson, Row., 9].

[2] Cooley's Const. Lim., 599.

[3] [In Pennsylvania and Massachusetts the voter must have paid within two years a State or county tax, and the payment of some tax is required in Rhode Island, Delaware, Tennessee and Georgia. The Constitutions of Alabama, Arkansas, California and Mississippi expressly forbid a property tax, and the Constitutions of Alabama and Mississippi forbid an educational test. Belgium has an electoral law conferring the right of suffrage on those who contribute a certain amount to the revenue, to every man who has taken honors at a high school or college, or any one who can pass a prescribed examination with credit, and to foremen of workshops and factories. The experiment is confined to provincial and communal elections. Code Electoral Belge, 289; Main's Popular Government, p. 110.]

Letcher v. *Moore*,[1] it appeared that three persons had voted for Mr. Letcher, who, though intelligent and able to read and write, were deaf and dumb. Of course these persons could not literally vote *viva voce*, and the question was raised whether they were legal voters under the Constitution. The committee held that their votes should be received, as clearly within the spirit of the Constitution, although in reaching this conclusion a previous decision of the Senate of Kentucky, in the case of *William* v. *Mason* (not reported), was overruled. No doubt is entertained as to the correctness of the ruling of the committee.

[1] Cl. & H., 749.

CHAPTER V.

DISQUALIFICATIONS OF VOTERS.

§ 118. Disfranchisement as a punishment for crime not cruel or unusual.
119–121. Infamous crimes.
119, 120. Dueling.
119, 120. Sending or accepting a challenge to fight a duel.
120. Effect of sentence of fine under act authorizing fine, or imprisonment in the penitentiary.
120. Conflicting decisions.
121. Discussion as to meaning of "infamous crime."
121. Decisions of United States Supreme Court.
122. Desertion from military service.
122. Effect of act of Congress of March 3, 1865.
123. Judgment of a court of competent jurisdiction after trial necessary.
124. The question is judicial and must be decided by the courts.
124. Record of conviction must be produced before election officers.
125. Effect of pardon.

§ 118. The punishment of disfranchisement is not a cruel and unusual one, and it is competent for the Legislature, unless restrained by the State Constitution, to inflict it as a penalty for crime; but when the Constitution provides that a law may be passed excluding from the right of suffrage persons who have been or may be convicted of *infamous* crimes, it would seem that it is not in the power of the Legislature to inflict this penalty for any other than infamous offenses.[1]

§ 119. In the case last named, it was held that the right of voting, and being voted for, are not convertible terms. It is there said that "a great class of voters are not required to be freeholders, and yet it is necessary (in New York) to the qualification of a Senator or a Governor that he should

[1] Barker *v.* People, 20 Johns., 457.

be a freeholder, and with respect to the Governor he must be a native citizen of the United States, thirty years of age, and a resident within the State for five years. The right of suffrage is therefore distinct from the right of being eligible to an office." It was accordingly held that an act of the Legislature of New York to suppress dueling, passed in 1816, and which declared that any person convicted of sending or accepting a challenge to fight a duel "shall be incapable of holding or being elected to any post of profit, trust or emolument, civil or military, under this State," is constitutional; and a conviction and judgment of disqualification under it are legal and valid. In the same connection, however, the court discuss the question whether the Legislature is not restrained from excluding from the right of suffrage persons convicted of a crime which is not infamous, within the legal signification of that term, and the conclusion is that it is only upon the conviction for an infamous crime that a voter can be disqualified. The court was of the opinion that infamous crimes are treason, felony and every species of the *crimen falsi*, such as perjury, conspiracy and barratry.

Sending or accepting a challenge to fight a duel was not, therefore, in the opinion of the court, an infamous crime, but inasmuch as the right of suffrage does not necessarily imply the right of being voted for, it was held that the latter right might be forfeited by conviction for a crime not infamous, if so provided by statute.[1]

§ 120. Under a constitutional provision declaring that an elector shall forfeit his privilege by "a conviction of any crime which is punishable by imprisonment in the penitentiary," it has been held that the conviction of a defendant, under a plea of guilty, of a crime punishable by a fine, or imprisonment in the jail or penitentiary, and where in fact the punishment was simply by fine, deprived the party convicted of the right to vote.

Under such a constitutional provision it was held that the privileges of an elector are forfeited by the conviction of any

[1] *Ante*, § 118.

crime "punishable" by imprisonment in the penitentiary, whether that punishment is actually inflicted or not, and that the liability to punishment, rather than the actual punishment administered, determines the question.[1]

But the opposite doctrine was laid down by the Supreme Court of Nebraska in *Gandy* v. *State*[2] and by the Supreme Court of California in *People* v. *Cornell*.[3] In these latter cases it is held that the punishment which the court, in the exercise of its discretion, actually inflicts must determine the question of disfranchisement under the statute.

§ 121. It has been held by the Supreme Court of the United States that a crime punishable by imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous crime within the provisions of the Fifth Amendment of the Constitution, which provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."[4] These cases lay down the rule that crimes are to be regarded as infamous, within the meaning of said constitutional provision, if they are such as are subject to an infamous punishment, whether they are such as are in their nature infamous or not; and punishment by imprisonment in a penitentiary is held to be infamous punishment.

There were two kinds of infamy known to the law of England before the Declaration of Independence; one founded in the opinions of the people respecting the mode of punishment, and the other in the construction of law respecting the future credibility of the delinquent. The infamy which at common law disqualifies the convict to be a witness depended upon the character of the crime, and not upon the nature of the punishment. A conviction of such crimes as treason, felony, forgery, perjury, bribery, etc., rendered the convict

[1] United States *v.* Watkins, 7 Sawy., 85.

[2] 10 Neb., 243.

[3] 16 Cal., 187.

[4] *Ex parte* Wilson, 114 U. S., 417; Mackin *v.* United States, 117 U. S., 348.

incompetent to testify as a witness; but it was held that incompetency to be a witness was not the only test for determining the application of the Fifth Amendment. How far this ruling will be followed in the construction of State laws providing for the disfranchisement of persons convicted of infamous crimes remains to be seen. It is, however, believed that, in the absence of any statutory definition of "infamous crimes," it will be found most agreeable to the general understanding, both of the legal profession and of the people, to hold that they are such only as are punishable by imprisonment in the penitentiary — a punishment which by common understanding is regarded as infamous. Such seems to be the opinion prevalent in most of the States, as evidenced by their statutes, for a large majority of them have adopted statutes dividing all crimes into felonies and misdemeanors, and providing for the punishment of persons guilty of the former by imprisonment in the State prison or penitentiary.[1]

§ 122. By the 21st section of the act of Congress approved March 3, 1865, it was provided that, "in addition to the other lawful penalties of the crime of desertion from the military or naval service of the United States, all persons who have deserted the military or naval service of the United States, who shall not return to said service or report themselves to a Provost Marshal within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken

[1] See Mackin *v.* United States, 117 U. S., 353. A statute of a State disqualifying as a voter any person who has been convicted of an infamous crime deemed by the laws of the State a felony does not deprive of the right of suffrage a person who has been convicted in the courts of the United States of a mere statutory offense against the United States. United States *v.* Barnabo, 14 Blatchf., 74. A conviction for a conspiracy to commit an offense against the United States, created by the United States Revised Statutes, Section 5440, is not a conviction of a felony such as to disqualify the party convicted from voting as provided in the Nebraska Constitution, Article 8, Section 2. Gandy *v.* State, 10 Neb., 243. [A conviction of a crime in a Federal Court has the effect to exclude the person convicted from office and suffrage in this State (Kentucky), as if convicted in a court of this State of a crime against its statute. A pardon by the President of the United States restores such a person his rights. Cowan *v.* Prowse, 93 Ky., 157.]

to have voluntarily relinquished and forfeited their rights of citizenship, and their right to become citizens, and such deserters shall be forever incapable of holding any office of trust or profit under the United States, *or of exercising any right of* citizens thereof." The constitutionality of this act was brought in question before the Supreme Court of Pennsylvania in the case of *Huber* v. *Reily*.[1] The case was that of a citizen whose vote was refused by the judge of election, upon the ground that, having been regularly drafted, he had failed and refused to report, and never did report for muster.

It did not appear, nor was it alleged, that the person whose vote was rejected had ever been tried or convicted upon the charge of desertion. The officers of the election assumed the right to consider and decide, upon such evidence as was presented to them at the polls, the question of the voter's guilt or innocence, and having tried that question in their own way, and held the accused to be guilty, they refused his vote. It is manifest that such a proceeding as this is open to very grave objections aside from any questions as to its constitutionality.

The constitutionality of the act was assailed upon these grounds, viz.:

1. That it was an *ex post facto* law, imposing additional punishment for an offense committed before its passage.

2. That it was an attempt on the part of Congress to regulate suffrage in the States, or to impair it.

3. That the act proposed to inflict pains and penalties upon offenders without a trial and conviction by due process of law, and that it was therefore prohibited by the bill of rights.

Upon the first point it was held that the penalty of forfeiture of citizenship imposed upon those who had deserted the military or naval service prior to the passage of the act was not a penalty for the original desertion, but for persistence in the crime, and a refusal to report for muster and

[1] 53 Pa. St., 112; Bright. Elec. Cas., 69.

duty when commanded so to do. Upon the second point the Court held that the act was not an attempt to regulate suffrage in the States, but simply an exercise on the part of Congress of its power to "deprive an individual of the opportunity to enjoy a right that belongs to him as a citizen of a State," which was held to be a different thing from taking away or impairing the right itself. The Federal Government, in an exercise of its right to imprison a citizen of a State for crime, or to impress him into the military service and remove him from the State, may deprive him of the opportunity to vote; and no doubt the forfeiture of citizenship and of all its rights may be affixed as a penalty for the commission of a crime against the United States.

Upon the third point the Court held that the act could not be upheld as constitutional, if it did in fact impose penalties before and without a trial by due process of law; and by due process of law is meant "the law of the particular case administered by a judicial tribunal, authorized to adjudicate upon it;" and the Court say that "a judge of elections, or board of election officers, constituted under State laws, is not such a tribunal." The Court, however, conclude that the act of Congress was intended to apply, and does apply, only to those cases of desertion in which there has been a conviction by court-martial, and that thus construed it is constitutional.[1]

§ 123. Whether "a citizen has been guilty of an offense forfeiting his right to vote" is necessarily a judicial question which must be decided by the courts on a full and fair trial on an indictment or a presentment by a grand jury, or perhaps on information where that mode of proceeding is authorized. That question cannot be rightfully adjudged collaterally or incidentally by the officers of an election.[2] It has been held in Kentucky that a test oath cannot be constitutionally required in such a case, and that the refusal to

[1] To the same effect is State *v.* Symonds, 57 Me., 148.

[2] [Garrison *v.* Mayo, Mob., 55.]

take such an oath cannot be deemed a judicial trial and conviction of the imputed offense.[1]

§ 124. We have elsewhere seen[2] that the act of Congress of March 3, 1865, denying rights of citizenship to deserters from the army, must be held to apply to such persons only as have been duly convicted of the crime of desertion. It follows that, to exclude a person from voting upon this ground, evidence must be produced before the proper officers holding the election that such person has been so convicted. It is the duty of such election officers to ascertain who are citizens, not to adjudge and enforce forfeitures of citizenship. In all cases where it appears that a person possesses the requisites as to birth or naturalization, age and residence, of a voter, he must be presumed to be an elector until the contrary is shown by the best evidence, which, in the case of a conviction for crime, must be the record, or a duly authenticated copy thereof.[3]

§ 125. A general and absolute pardon, granted by the Governor of a State by virtue of power conferred upon him to grant the same, relieves the person to whom it is granted not only from the punishment provided by his sentence, but from all the consequential disabilities of the judgment of conviction, and restores such person to the full enjoyment of his civil rights, including the right to vote.[4]

The constitutional provisions conferring upon the Executives of the several States the pardoning power are generally modeled after, and are analogous to, the provision in the Constitution of the United States which empowers the

[1] Burkett *v.* McCarty, 10 Bush (Ky.), 758.

[2] *Ante*, § 122.

[3] Goetchens *v.* Matheson, 58 Barb., 152; 40 How. Pr., 97. See Burkett *v.* McCarty, 10 Bush (Ky.), 758 [People *v.* Bell, 54 Hun, 567].

[4] Wood *v.* Fitzgerald, 3 Oreg., 569; 4 Black. Comm., 402; 8 Bacon's Ab., Title Pardon; The People *v.* Pease, 3 Johns. Cas., 333–4; *In re* Deming, 10 Johns., 233; Perkins *v.* Stevens, 24 Pick., 277; *Ex parte* Garland, 4 Wall., 333; United States *v.* Paddleford, 9 Wall., 531; United States *v.* Klein, 13 Wall., 128; Carlisle *v.* United States, 16 Wall., 147; Knote *v.* United States, 95 U. S., 149; Jones *v.* Board of Registers, 56 Miss., 768.

President "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[1] In construing this provision in *Ex parte Garland*, *supra*, the Supreme Court of the United States said:

"The power thus conferred is unlimited with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

[1] Const., Art. 2, Sec. 2.

CHAPTER VI.

REGULATIONS.

§ 126. Must be reasonable.
126. Must regulate, and not impair, the right to vote.
127–134. Registration laws constitutional.
128. May operate only in certain cities and villages.
129. Distinction between regulation and subversion of right.
130, 131. Validity of acts requiring registration prior to day of election.
132. Conflicting decisions.
132. Weight of authority sustains validity of such acts.
133. All regulations must be reasonable.
134. Decision in Massachusetts.
135. Provisions of registry law cannot be disregarded.
136–138. Denial of right of registration.
139. Mode of conducting registration.
139. Notice.
139. Change of place.
140. Statutes prescribing mode of proceeding generally directory.
140. Legal voter not prejudiced by irregularities.
141. Proof required of unregistered voter.
142. Nature and extent of power of Congress to prescribe regulations.
143, 144. Constitutionality of Enforcement Act.
145, 146. Implied power of Congress over Federal elections.

§ 126. It is within the province of the Legislature to prescribe reasonable rules and regulations for the conduct of elections, including reasonable provisions for the registration of voters.[1] But it is manifest that under color of regulating the mode of exercising the elective franchise, it is quite possible to subvert or injuriously restrain the right itself; and a statute that clearly does either of these things must, of course, be held invalid on the ground that it seeks to deprive the citizen of his constitutional right.[2]

[1] [Slaymaker *v.* Phillips (Wyo.), 42 Pac. Rep., 1049; Com. Council of Detroit *v.* Rush, 82 Mich., 532; State *v.* Old, 95 Tenn., 723.]

[2] [Mills *v.* Green, 67 Fed. Rep., 818; *In re* Appointment of Supervisors,

For example, a registry act which should undertake to require a longer residence prior to the time of voting than that required by the Constitution,[1] or which should require the payment of taxes not required to be paid by constitutional provision,[2] or which should impose upon a particular class of citizens conditions and requirements not required of all others, or which should require all voters in the State to register at the State capital, or which should impose any other unreasonable, unjust and onerous conditions precedent to the right to vote, would be void. The right to vote must not be impaired by the regulation. It must be regulation purely, and not destruction or substantial impairment of the right.[3]

52 Fed. Rep., 254. While the Legislature of a State may prescribe an official ballot and prohibit the use of any other, it cannot restrict an elector to vote for some one of the candidates whose names have been printed upon the official ballot. He must be left free to vote for whom he pleases. This is a right guaranteed to him by the Constitution of the State. State *v.* Dillon, 32 Fla., 545.]

[1] [The statute which requires residents of a State who have been absent therefrom for six months or more to register ninety days before the election is unconstitutional, as the Constitution of the State requires a fixed residence of only sixty days in a county and thirty days in a precinct by persons otherwise qualified to vote. Where the Constitution of the State provides for the registration of "all persons entitled to vote," it is an implied prohibition against providing for the registration of any one class or part of the voters, and an act of the Legislature which provides for the registration of only such persons as have been temporarily absent from the State for six months or more, and such as have not resided in any one county for six months, is unconstitutional. Morris *v.* Powell, 125 Ind., 281. For a synopsis of the constitutional and statute provisions of the several States respecting registration, see note to Morris *v.* Powell, 29 Am. Law Reg., 872.]

[2] [Bew *v.* State, 71 Miss., 1.]

[3] [Gooding *v.* Brown, 22 Fla., 437; City of Madison *v.* Wade, 88 Ga., 699. An act of the Legislature which makes it a misdemeanor for any one to remove ballots from the voting place, or to aid a voter in the selection or marking of his ticket, and which requires all voters, including illiterates, to select and mark their own tickets with such assistance only as the election officers may lawfully afford, is not in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, forbidding any State to make or enforce any law which

§ 127. The power to provide for the orderly exercise of the right of suffrage, which we have seen belongs to the State Legislature, includes the power to enact registry laws, and to prohibit from voting persons not registered.[1] It is now generally admitted that these laws do not add to the constitutional qualifications of voters, and are therefore not invalid.[2]

§ 128. An election and registration act which operates only in such cities, villages or towns as may adopt it is not, according to the ruling of the Supreme Court of Illinois, therefore a local or special act, and, as such, violative of the Constitution of that State forbidding the passage of such acts.[3] A law is here held to be general if by its terms it applies to all cities, towns and villages that may accept its provisions. It is held to be enough if every person who may be within the relations and circumstances described is brought within its operation.[4]

§ 129. The rule above stated as a test of the constitutionality of a registration act, viz., that it shall provide for regulation simply, and must not impair the constitutional right of suffrage, is generally accepted as correct; but some difference of opinion has very naturally arisen upon the

will abridge the privileges or immunities of citizens of the United States. The Legislature of the State has the organic authority for the passage of such laws as will secure the purity of elections, and it cannot be urged that such laws abridge the privileges or immunities of the citizen. Cook *v.* State, 90 Tenn., 407.]

[1] [Cowan *v.* Prowse, 93 Ky., 156.]

[2] Capen *v.* Foster, 12 Pick., 485; Bright. Elec. Cas., 51; Hawkins *v.* Carroll Co., 50 Miss., 735; State *v.* Baker, 38 Wis., 71; *Re* Polling Lists, 13 R. I., 729; State *v.* Butts, 31 Kan., 537; McMahon *v.* Mayor, 66 Ga., 217; S. C., 42 Am. Rep., 65; Patterson *v.* Barlow, 60 Pa. St., 54; People *v.* Hoffman, 116 Ill., 587; S. C., 3 West. Rep., 522; [Appeal of Cusick, 136 Pa. St., 439; *In re* Elect. of McDonough, 105 Pa. St., 488. See article on constitutionality of registry laws, 28 Cent. Law J., 210].

[3] People *v.* Hoffman, 116 Ill., 587; S. C., 3 West. Rep., 522; [Commonwealth *v.* McClelland, 83 Ky., 686].

[4] See, also, upon this subject, Guild *v.* Chicago, 82 Ill., 472; Town of Fox *v.* Town of Kendall, 97 Ill., 72; Hundley *v.* Comm'rs, 67 Ill., 559; State *v.* Butts, 31 Kan., 537.

question, what will amount to an impairment of that right? How far may the Legislature go without passing the boundaries of reasonable regulation?

The Bill of Rights of Illinois provides that "all elections shall be free and equal."[1] In *People* v. *Hoffman*, *supra*, the Supreme Court of Illinois held that the declaration that all elections must be equal does not necessarily mean that there must be uniformity of regulation in regard thereto in all portions of the State. Certain regulations may be prescribed for the conduct of elections in cities and villages, though they may have no application to the country places.[2]

§ 130. A question of great practical importance and of some difficulty has of late been much discussed in the courts, and conflicting views have been expressed. It is this: Is an act which denies the right to vote to all persons not registered on or before a fixed day prior to the day of election, and which makes no provision for registration after the time limited, so onerous and unreasonable as to be justly regarded an impairment of the constitutional right to vote?[3] According to the great weight of authority, and of reason also, this question must be answered in the negative, though the contrary doctrine has, as we shall presently see, been asserted. The case of *People* v. *Hoffman*, *supra*, presents a full and able discussion of this question. The statute of Illinois then under consideration required registration to be com-

[1] Const. of Ill., Art. 2, Sec. 18. [The statute of Pennsylvania regulating the use of an official ballot is not in violation of the constitutional provision that all elections shall be free and equal, and that all laws regulating elections shall be uniform throughout the State. De Walt *v.* Bartley, 146 Pa. St., 529.]

[2] [City of Owensboro *v.* Hickman, 90 Ky., 629; Commonwealth *v.* McClelland, 83 Ky., 686. Where a registration law applies only to cities and towns, and a city of the second class is within the limits of an election precinct containing a number of voters residing outside the corporate limits of the city, the country voters of the precinct are entitled to vote at any polling place within the precinct without having registered, even if such polling place is inside the city limits. State *v.* Leavett, 33 Neb., 285.]

[3] [*In re* Smith, 3 N. Y. Sup., 107.]

plete by the third Tuesday before the election, and it was held to be constitutional, the Court saying:

"If it be admitted that the Legislature can require a voter to establish his qualifications before election, it is difficult to see why, upon principle or as a question of power, it cannot require such proof to be made as well three weeks before the day of voting as ten days, or five days, or even one day prior thereto. The real question involved in the objection is whether any man can be prevented from voting who proves, or offers to prove, on the day on which he seeks to cast his ballot, that he is a legal voter. If cases can be supposed where the 'three weeks' requirement will deprive qualified electors of the privilege of depositing their votes, cases can also be supposed where one day's requirement will work the same result. This mode of reasoning, carried out to its logical sequence, will make any kind of a registry law unconstitutional. For it would be a physical impossibility for the judges of election to receive the votes and make up the registry at the same time and on the same day. If the Legislature has the power to direct the registry to be completed before election day, and if, in its wisdom and under a sense of its responsibility to the people, it has said that three weeks before election is a reasonable date for the completion of the registry, shall this court substitute *its* judgment for that of the law-making power, and say that a shorter time would have been more reasonable?

"'The moment a court ventures to substitute its own judgment for that of the Legislature, in any case where the Constitution has vested the Legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority and where its discretion alone will measure the extent of its interference.'[1]

"'The judiciary cannot run a race of opinions upon points of right reason and expediency with the law-making power.'"[2]

[1] Cooley, Const. Lim., 168.
[2] Id.

And after citing a number of cases in point, the Court continues:

"If closing the registry three weeks before election may deprive a few persons becoming qualified during that period of the privilege of casting their ballots, keeping it open until a late date may admit to the polls hundreds of persons who should never have been allowed to vote. When the ballot-box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed. 'That election is free and equal where all of the qualified electors of the precinct are carefully distinguished from the unqualified, and are protected in the right to deposit their ballots in safety and unprejudiced by fraud. That election is not free and equal where the true electors are not separated from the false, where the ballot is not deposited in safety, or where it is supplanted by fraud. It is therefore the duty of the Legislature to secure freedom and equalty by such regulations as will exclude the unqualified and allow the qualified only to vote.'[1] Where the law-making department of the government, in the exercise of a discretion not prohibited by the Constitution, has declared that a certain period of time is needed for a specified investigation, it is not the duty of this court to declare that such period is unreasonably long."

The authorities cited in note below sustain the doctrine of the Supreme Court of Illinois upholding the constitutionality of an act requiring registration to be completed on a day named prior to the election.[2]

§ 131. Aside from the great weight to be given to the authorities which support the rule above laid down, the reasons upon which it rests seem to be strong and satisfactory. The purpose of all such legislation is to ascertain beforehand, by proper proof, who are entitled to vote and who should on the day of election be permitted to exercise that right; and it is obvious that any fair, just and reasonable provision

[1] Patterson *v.* Barlow, 60 Pa. St., 54.

[2] Capen *v.* Foster, 12 Pick., 485; *Re* Polling Lists, 13 R. I., 729; State *v.* Butts, 31 Kan., 537; Patterson *v.* Barlow, 60 Pa. St., 54.

for determining these questions in advance should be upheld, "Requiring a party to be registered," says Brewer, Judge, in *State* v. *Butts*, *supra*, "is not in any true sense imposing an additional qualification, any more than requiring a voter to go to a specific place for the purpose of voting; or to require him to prove by his own oath or the oaths of other parties his right to vote when challenged; or than requiring a naturalized foreigner to present his naturalization papers. Each and all of these are simply matters of proof — steps to be taken in order to ascertain who are and who are not entitled to vote."

It also seems apparent that the duty of considering all questions of qualification — of determining who are legal voters — can be discharged by a suitable tribunal with greater care, deliberation and propriety under a law which requires that the registration shall be completed before the day of election than under one which requires such questions to be considered and determined in the hurry and confusion attending the conduct of the election at the polls. There is nothing in the Constitution of any of the States which gives to a citizen the right to have his qualifications considered and determined on the day of election and not at any time prior thereto.

§ 132. The leading case upon this subject is undoubtedly that of *Capen* v. *Foster*, *supra*, in which the question was exhaustively considered by Chief Justice Shaw, and the conclusion established that an act which requires registration prior to the day of election is constitutional. The same opinion is strongly expressed by Judge Cooley in his Constitutional Limitations.[1]

The opposite view has, however, been expressed by the Supreme Court of Wisconsin in *Dell* v. *Kennedy*,[2] by the Supreme Court of Ohio in *Daggett* v. *Hudson*,[3] and by the Supreme Court of Oregon in *White* v. *County of Mult-*

[1] 5th Ed., p. 756.
[2] 49 Wis., 555.
[3] 43 Ohio St., 548; S. C., 1 West. Rep., 789.

nomah.[1] In the first named case there was a strong dissenting opinion by Taylor, J., and in the last by Thayer, J. In the case of *Daggett* v. *Hudson* much stress is laid upon the fact that by the Constitutions of many States registration laws are either authorized or required to be enacted. The inference is drawn that in those States where the Constitutions are silent upon the subject the power to enact such a statute as we are now considering does not exist. But it is to be observed that the Constitution of no State defines the character of the registration law which may be enacted, or provides that registration prior to the day of election may or not be required. It is believed that no case goes so far as to deny the power of the Legislature of a State to pass a registration act, when the Constitution is silent upon the subject. This being so, the question we are considering is not affected by the presence or absence of a constitutional provision authorizing the Legislature to pass such an act. The power exists in either case, and in either case the question must be the same, viz.: whether the act when passed merely regulates the exercise of the right to vote, or goes further and impairs it.

§ 133. The rule which governs in determining the question of the validity of a registration act must, we think, be the same which determines the validity of any other act relating to the subject of the regulation of elections. Thus, for example, it is of course clear that the right to vote given by the Constitution is subject to the power of the Legislature of the State to prescribe reasonable regulations respecting the time, place and manner of exercising that power. The Legislature may fix the time, but it must be a reasonable time; and if such a time be fixed as to exclude from the right of voting any portion of the electors, the act would doubtless be held void. It is likewise true that the Legislature may fix the places at which the right of suffrage is to be exercised; but the places must not be so fixed as to nec-

[1] 13 Oreg., 317. [The same view has been adopted by the Supreme Court of Nebraska. State *v.* Corner, 22 Neb., 265.]

essarily exclude any of the electors from exercising their rights. In other words, whether legislation of the State relates to registration, to time, to place, or to any other matter respecting the mode of determining the qualifications of voters or of conducting the elections, the power of the Legislature is limited to the prescribing of such regulations as do not substantially impair the constitutional privileges of citizens.[1]

§ 134. A recent decision of the Supreme Judicial Court of Massachusetts affords an apt illustration of the true distinction between a statute which provides for a regulation of the exercise of the right to vote and which is therefore valid, and one which imposes an unreasonable restriction or burden upon the exercise of such right and must therefore be held void. The Constitution of that State gives the right to vote upon certain conditions to all male citizens "who have resided within the Commonwealth one year and within the town or district in which he may claim a right to vote six calendar months preceding any election," etc. By an act of the Legislature adopted in 1885, it was provided that "no person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization." The question arose as to the constitutionality of this statute, and it was held to be unconstitutional, as imposing an additional and unreasonable requirement not warranted by the Constitution. The Court, by Devens, J., said:

"The plaintiff, according to the allegations of his declaration, possessed, when he offered himself for registration, all the qualifications of a voter required by the Constitution. Any legislation by which the exercise of his rights is postponed diminishes them, and must be unconstitutional, unless it can be defended on the ground that it is reasonable and necessary in order that the rights of others (which are to be protected as well as his own) be guarded against the danger of illegal voting."

[1] Monroe *v.* Collins, 17 Ohio, 665.

And after showing that the right to prescribe reasonable regulations includes the right to provide by registration laws for ascertaining the qualifications of voters in advance of the day of election, the learned judge proceeded to show that the statute in question did not fall within this class of acts, and in concluding the opinion said:

"The regulation which it assumes to make is partial and calculated injuriously to restrain and impede in the exercise of their rights the class to whom it applies, in that it denies them for the period of thirty days the exercise of a right which the Constitution has conferred upon them. There is no warrant for this within the just and constitutional limits of the legislative power which permits reasonable and uniform regulations to be made as to the time and mode of exercising the right of suffrage, and as to the ascertainment of the qualifications of voters."[1]

§ 135. It being conceded that the power to enact a registry law is within the power to regulate the exercise of the elective franchise and preserve the purity of the ballot, it follows that an election held in disregard of the provisions of a registry law must be held void.[2] In *Ensworth* v. *Albin*,[3] an election was set aside upon the ground that there was no registration whatever, although the statute required registration as an indispensable prerequisite to an election.[4] It has been suggested that this doctrine puts it in the power of the board of registration to defeat an election by failing to meet,

[1] Kineen *v.* Wells (1887), 144 Mass., 497. [See, also, McLean *v.* Broadhead, minority report, Mob., 388. In Miller *v.* Elliot, the House of Representatives declared the registration law of South Carolina unconstitutional because unreasonable and restrictive of the right to vote. Row., 504.]

[2] [State *v.* Scarboro, 110 N. C., 232; Smith *v.* Board County Commissioners, 45 Fed. Rep., 725; Platt *v.* Good, Smith, 650.]

[3] 44 Mo., 347.

[4] [The Supreme Court of the State of Washington has held, however, that the failure of the Legislature of that State to make provision for registration in accordance with a requirement of the State Constitution will not operate to invalidate an election held without such registration. Stallcup *v.* Tacoma, 13 Wash., 141.]

and refusing altogether to discharge their official duties. But it is hardly safe to attempt to test the validity of a statute by presupposing a case so extreme and so improbable as the refusal of a sworn officer of the law to act. Should such a case occur, of course a *mandamus* would lie to compel the recusant officer to discharge his duties, and severe penalties ought to, and it is believed generally do, follow any such failure to discharge an official duty so grave and important.[1]

Upon this point the Supreme Court of Missouri, in the case referred to, say: "We are referred to no case where a law has been held unconstitutional for the reason that the officers required to execute it had neglected their duty, or abused their trust, nor are we aware of any principle on which to base such a decision."[2]

§ 136. A case may occur where a portion of the legal voters have, without their fault, and in spite of due diligence on their part, been denied the privilege of registration. In such a case, if the voter was otherwise qualified, and is clearly shown to have performed all the acts required of him by the law, and to have been denied registration by the wrongful act of the registering officer, it would seem a very unjust thing to deny him the right to vote.[3] In elections for State officers, however, under a Constitution or statute which imperatively requires registration as a qualification for voting, it may be that the voter's only remedy would be found in an action against the registering officer for damages.[4]

Where, however, a portion of the voters of a given precinct are thus unjustly denied the privilege of registration, and another portion are duly registered and permitted to

[1] See chapters on Duties and Liability of Officers of Election.

[2] See to the same effect, Nefzger *v.* Railroad Co., 36 Ia., 642; Zeiter *v.* Chapman, 54 Mo., 502.

[3] [Stinson *v.* Sweeney, 17 Nev., 309; Sessinghaus *v.* Frost, 2 Ells., 381.]

[4] People *v.* Koppelkam, 16 Mich., 342; State *v.* Stumpf, 23 Wis., 630; State *v.* Hilmantel, 21 Wis., 566. An irregularity in the registration of voters or in holding an election will not deprive the electors of their rights or render the election invalid, unless it is shown that it would have changed the result. Barnes *v.* Supervisors, 51 Miss., 305.

vote, no doubt is entertained but that the entire poll should be rejected, if the votes of the former class cannot be counted, and if they are sufficiently numerous to affect the result.

§ 137. In the absence of any positive law making registration imperative as a qualification for voting, it is a very plain proposition that the wrongful refusal of a registering officer to register a legal voter who has complied with the law, and applies for registration, ought not to disfranchise such voter. The offer to register in such a case is equivalent to registration. This would be held to be the law upon the well-settled principle that the offer to perform an act which depends for its performance upon the action of another person, who wrongfully refuses to act, is equivalent to its performance. The Congress of the United States has, however, provided against injustice of this kind by a positive statute, which must, of course, control all Federal elections. By the third section of the Act of May 31, 1870,[1] it is provided as follows:

"That whenever, by or under the authority of the Constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, or offer to perform, or acting thereon, be deemed and held as a performance in law of such act, and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had in fact performed such act."

It is undoubtedly necessary that a person who, having been refused registration, seeks to have his vote counted under this statute, should prove that he actually and personally applied to the proper board or officer for registration,

[1] 16 Stat. at Large, p. 140.

and offered to make such proof, or perform such acts, as the law required of him; that he was in fact legally qualified to vote and entitled to registration, and that registration was refused. In other words, it must appear that the voter did, or offered to do, all that the law required at his hands, and that his failure to be registered was the fault of the board or officer of registration.[1] Nor is it enough that he demanded registration of the proper officer or board and was refused. It must also appear, before his vote can be counted as if cast, that he offered his vote at the proper time and place, or used proper diligence in endeavoring to do so.[2]

§ 138. The statute of Michigan of 1851 provided that "if any person offering to vote shall be challenged as unqualified, etc., the chairman of the board of inspectors shall declare to the person so challenged the constitutional qualifications of an elector," after which, if he insists upon his right to vote, the inspectors are required to tender him the statutory oath. Subsequently, in 1859, the Legislature of the same State passed a registry law which, among other things, provided "that the vote of no person shall be received whose name is not registered." Under these two statutes it was held that the inspectors were not bound to administer the oath to an unregistered voter, though he demanded it.[3]

§ 139. Registration must be made at the time and in the manner substantially as prescribed by the statute.[4]

It is also in general essential to the validity of a registration that it be conducted at the place fixed in the notice given; but it has been held that where notice was given by a registrar that the registration of voters would take place at his residence, and where he kept the books and actually registered the voters at his store some three hundred yards

[1] [State *v.* Scarborough, 110 N. C., 232.]
[2] [*Post*, Sec. 162.]
[3] People *v.* Wattles, 13 Mich., 446.
[4] State *v.* Commissioners, 20 Fla., 859.

distant, he having left word at the house for persons applying there to come to the store, the irregularity did not vitiate the registration or the election held under it.[1]

The rule is undoubtedly the same in such cases as that which prevails respecting the place of holding an election. The removal to another place near by, of which all the voters have due notice, and upon which they act, is not fatal. But the removal to a place some distance away, of which sufficient notice is not given, and by means of which a portion of the electors are deprived of their rights, will render the registration void.

§ 140. The provisions of the registration act, in so far as they direct the mode of proceeding in the matter of registration, are generally to be regarded as directory, and not as mandatory.[2] It is not to be presumed that the Legislature in prescribing the mode of proceeding intended to make the right to vote of persons whose names are on the registers depend upon the observance by the registration officers of all the minute directions respecting the preparation of the list of registered voters. To consider such provisions as mandatory would render the constitutional right of suffrage liable to be defeated without fault of the elector by the fraud, caprice or negligence of the inspectors.[3] The same doctrine is strongly asserted in *State* v. *Baker* and *State* v. *Kromer*.[4] It is held that the voters are not bound to supervise the process of registration, or to see to the correction of irregularities and defects in the proceedings of the registration board. Although such supervision is authorized, it is merely voluntary and is not imposed as a duty or as a burthen on the right of suffrage. It was accordingly laid

[1] Newsom *v.* Earnheart, 86 N. C., 391.

[2] [Campbell *v.* Weaver, Mob., 455. The House of Representatives of Congress, in case of Curtin *v.* Yocum, 1 Ells., 416, declared the registration laws of the State of Pennsylvania to be directory merely. The Supreme Court of Pennsylvania, however, in the case of Cusick's Appeal, 136 Pa. St., 459, has pronounced these laws to be mandatory.]

[3] People *v.* Wilson, 62 N. Y. 186; reversing Same Case, 3 Hun, 437.

[4] 38 Wis., 71.

down in those cases that voters whose names are on the register *de facto* used by the inspectors at the election as official and valid need not inquire further. "They may accept the registers *de facto* as they accept the inspectors *de facto;* and they are no more bound to inquire into the qualifications *de jure* of the registers than into the qualifications *de jure* of the inspectors. It is enough for voters to find at the election acting inspectors using actual registers, *virtute officii.* They need look no further to see if their votes be challenged by statute. A statute cannot challenge them without notice. Their constitutional right cannot be baffled by latent official failure or defect; and the registry law sets no such trap — authorizes none such — for the constitutional right which it was passed to protect."

§ 141. Where the registry act requires that a voter who has not been registered shall, before being permitted to vote, make proof by his own oath and that of a householder and registered voter that he is an inhabitant of the district in which he offers to vote, the election officers are not required to accept any other or different proof, or to act upon their own knowledge in the premises.[1]

§ 142. We have thus far considered for the most part regulations established by State legislation. It remains to consider to what extent Congress is authorized to prescribe

[1] Byler *v.* Asher, 47 Ill., 101; [Appeal of Cusick, 136 Pa. St., 459; Middendorf's Case, 4 Pa. Dist. R., 78. Nor have they any power to waive statutory proofs. *In re* Election of McDonough, 105 Pa. St., 488. But if the officers of an election permit a person to vote who has not registered and without any proof of right, and it does not appear that he was challenged or any objections made to his vote, the presumption must be that he was a legal voter. Lowe *v.* Wheeler, 2 Ells., 61; Perry *v.* Ryan, 68 Ill., 172; Dale *v.* Irwin, 78 Ill., 171; Clark *v.* Robinson, 88 Ill., 498. For a contrary rule, see *In re* Election of McDonough, *supra.* It was held by the House of Representatives of Congress, in case of Campbell *v.* Weaver, Mob., 455, that where an elector, acting in good faith, and honestly supposing himself to be registered, deposits his vote and the same is received by the judges, it is a valid vote. But where the elector does not act in good faith, and knows he is not registered, his vote should be rejected].

such regulations, bearing in mind that except where the paramount authority of Congress intervenes, the whole subject is committed to the States. The jurisdiction of Congress in the premises is derived from its implied power to guard the purity and freedom of all elections of members of any department of the Federal government, and from Section 4, Article 1, of the Constitution, which declares that "the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators." This clause of the Constitution came before the Supreme Court of the United States for construction in the case of *Ex parte* Siebold,[1] and it was upon full consideration held that Congress has power at any time to alter or add to such regulations as may have been prescribed by the State without taking into its hands the exclusive or complete control of the whole subject. It was held that Congress has a supervisory power, and may either make, by entire new regulations, or add to, alter or modify the regulations made by the State.[2] The Court, construing the constitutional provision, said:

"It seems to us that the natural sense of these words is the contrary of that assumed by the counsel of the petition-

[1] 100 U. S., 371.

[2] [By the act of February 2, 1872 (R. S. U. S., Sec. 25), it is provided that the Tuesday after the first Monday in November, 1876, is established as the day in each of the States and Territories of the United States for the election of Representatives and Delegates to the Forty-fifth Congress; and that the Tuesday next after the first Monday in November in every second year thereafter is established as the day for the election in each of said States and Territories of Representatives and Delegates to Congress, commencing on the 4th day of March thereafter. The power to thus regulate the time for the election of members of the House of Representatives is vested, as has been shown, in Congress, by the provisions of Article 1, Section 4, of the Federal Constitution. By Section 6 of the act of March 3, 1875, Section 25 is modified so as not to apply to any State whose Constitution must be amended in order to effect a change in the day of election of State officers in such State. In

ers. After first authorizing the States to prescribe the regulations, it is added, 'The Congress may *at any time*, by law, *make or alter* such regulations.' '*Make or alter.*' What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the State and National governments, we should not have any difficulty in understanding them. There is no declaration that the regulations shall be made either wholly by the State Legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to 'make or alter.'

"Suppose the Constitution of a State should say, 'The first Legislature elected under this Constitution may by law

the case of Patterson *v.* Belford, 1 Ells., 52, it was held that the provisions of Section 25 were not repealed by the enabling act for Colorado, except as to the election of the first Representatives from that State, and that the time for the election of all subsequent Representatives for Colorado was fixed by said statute. In Holmes *v.* Wilson, 1 Ells., 322, it was decided that said section, by reason of the amendment of March 3, 1875, did not apply to elections in the State of Iowa. It was the opinion of the majority of the committee in the latter case that the Federal statute would not apply in a State whose Constitution had fixed the date of the election of any State officer, and that it was not necessary that the Constitution should fix the day for the election of every State officer in order to except the State from the operation of the said statute.]

regulate the election of members of the two houses; but any subsequent Legislature may make or alter such regulations,'—could not a subsequent Legislature modify the regulations made by the first Legislature without making an entirely new set? Would it be obliged to go over the whole subject anew? Manifestly not; it could alter or modify, add or subtract, in its discretion. The greater power, of making wholly new regulations, would include the lesser, of only altering or modifying the old. The new law, if contrary or repugnant to the old, would so far, and so far only, take its place. If consistent with it, both would stand. The objection so often repeated, that such an application of Congressional regulations to those previously made by a State would produce a clashing of jurisdictions and a conflict of rules, loses sight of the fact that the regulations made by Congress are paramount to those made by the State Legislature; and if they conflict therewith, the latter, so far as the conflict extends, cease to be operative. No clashing can possibly arise. There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same Legislature."

§ 143. It was accordingly held that Congress had power by the Constitution to enact Section 5515 of the Revised Statutes, which makes it a penal offense against the United States for any officer of election, at an election held for a Representative in Congress, to neglect to perform or to violate any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such law, with intent to affect such election, or to make a fraudulent certificate of the result, etc. Also that Congress had power to enact Section 5522 of the Revised Statutes, which makes it a penal offense for any officer or other person, with or without process, to obstruct, hinder, prohibit or interfere with a supervisor of election, or marshal, or deputy marshal, in the performance of any duty required of them by any law of the United

States, or to prevent their free attendance at the places of registration or election. It was also held that the several sections of the Revised Statutes authorizing the circuit courts to appoint supervisors of such elections, and the marshals to appoint special deputies to aid and assist them, and prescribing the duties of such supervisors and deputy marshals, were constitutional and valid.[1]

§ 144. The Court in the same case[2] considered the question of the constitutionality of the provision of the Enforcement Act which authorizes deputy marshals to keep the peace at the polls, and held the same to be valid. The National Government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution. Counsel had earnestly contended that Congress could not constitutionally compel said officers of an election to observe such State laws of election as were not altered by Congress; but the court overruled the point, and held that the duties to be performed by State officers of

[1] See, also, United States *v.* Nicholson, 3 Woods, C. C., 215. [Sections 5515, 5520 and 5522, together with all other sections providing for the appointment of supervisors of elections and of deputy marshals to serve at elections, were abolished by act of Congress, February 8, 1894. The power of Congress to provide for the punishment of any State officer of elections who shall, at an election held for choosing a Representative in Congress, violate a State statute regulating his duties, was again recognized in *Ex parte* Coy, 127 U. S., 731. It is there held that the authority of Congress to protect the poll-books which contain the vote for a Member of Congress, from the danger which might arise from the exposure of these papers to the chance of falsification or other tampering, is beyond question. And a conspiracy to induce the officers of the election having charge of such poll-books to deliver them to persons who have no authority to receive them may be punished by indictment in the Federal Court, under the provisions of sections 5440, 5511, 5512 and 5515 of Revised Statutes of the United States. And it was further held that it makes no difference that the intent may have been to defraud some person or persons who were candidates for State offices. The report of the same case in the United States Circuit Court may be found in 31 Fed. Rep., 794.]

[2] [*Ex parte* Siebold.]

election in connection with the election of Representatives in Congress were duties due to the United States as well as to the State, and that their violation is an offense against the United States, which Congress may rightly inhibit and punish. This, as the Court held, necessarily follows from the direct interest which the National Government has in the due election of its Representatives, and from the power which the Constitution gives to Congress over this particular subject.[1] And the same doctrine was laid down in *Ex parte* Clark,[2] in which case the judgment of the Circuit Court of the United States, whereby an officer of election had been convicted, under Section 5515 of the Revised Statutes of the United States, for a violation of the law of Ohio in not conveying the ballot-box, after it had been sealed and delivered to him for that purpose, to the county clerk, and for allowing it to be broken open, was affirmed.[3]

§ 145. Such is the law as finally determined by the Supreme Court respecting the power of Congress to regulate Federal elections, in so far as that power is derived from the express grant found in Section 4, Article 1, of the Constitution. It remains to consider the nature and extent of the implied power of Congress in the premises, growing out of its right and duty to provide for the fairness and purity of the election of Senators and Representatives in Congress, and electors for President and Vice-President. This subject has also been fully considered by the Supreme Court in the case of *Ex parte* Yarbrough.[4] In that case the rule is laid down that, in construing the Constitution of the United States, the doctrine that what is implied is as much a part of the instrument as what is expressed is a necessity by reason of the inherent inability to put all derivative powers into

[1] [Under the provisions of the Enforcement Act deputy United States marshals had no authority to mark ballots nor to see them marked. Attorney-General *v.* Mars, 99 Mich., 538.]

[2] 100 U. S., 399.

[3] [Upon the right of the Federal courts to punish offenders against the ballot-box, see 29 Am. Law Reg., 337.]

[4] 110 U. S., 651.

words. And speaking of the general power of Congress to enact laws for the regulation of Federal elections, the Court said:

"That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the Legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

"If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.

"If it has not this power, it is left helpless before the two great natural and historical enemies of all republics — open violence and insidious corruption.

"The proposition that if it has no such power is supported by the old argument, often heard, often repeated, and in this court never assented to, that, when a question of the power of Congress arises, the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no *express* power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers — a difficulty which the instrument itself recognizes by conferring on Congress the

authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the Constitution.[1]

"We know of no express authority to pass laws to punish theft or burglary of the treasury of the United States. Is there therefore no power in Congress to protect the treasury by punishing such theft and burglary?

"Are the mails of the United States and the money carried in them to be left to the mercy of robbers and of thieves who may handle the mail because the Constitution contains no express words of power in Congress to enact laws for the punishment of those offenses? The principle, if sound, would abolish the entire criminal jurisdiction of the courts of the United States and the laws which confer that jurisdiction."

§ 146. It was accordingly held that Section 5508 of the Revised Statutes, which provides for the punishment of persons guilty of conspiracies formed for the purpose of depriving any citizen of any right or privilege secured to him by the Constitution or laws of the United States; and Section 5520, which provides for the punishment of conspiracies formed for the purpose of preventing by force, intimidation or threat any citizen who is lawfully entitled to vote from giving his support or advocacy in a legal manner toward or in favor of the election of any qualified person as an elector for President or Vice-President, or as a member of the Congress of the United States, or to injure any citizen in person or property on account of such support or advocacy, are constitutional and valid.

[1] Art. 1, Sec. 8, Clause 18.

CHAPTER VII.

REGULATIONS — *Continued.*

§ 147. Statutory regulation necessary.
148, 149. Regulation of election of Senators in Congress.
150. Mode of conducting such election.
151, 152. Act of July 25, 1866.
153. Time and place of all elections must be prescribed.
153–157. Invalidity of statutes authorizing a soldier to vote while absent from his residence.
158, 159. Change of voting place.
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161. Premature closing of polls.
162–165. Keeping polls open after lawful hours.
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171. Fraudulent organization of election board.
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173, 174. Mode of voting where separate boxes are provided by law for State officers and members of Congress.
175. Voting by proxy unknown at common law, but allowed in certain corporate elections.
176. Time and place are of the substance.
177–188. Notice.
178–181. When the prescribed notice is necessary and when not.
182–185. Distinction between regular and special election as to notice required.
186. Power of Governor to fix time and place of holding election for Representative in Congress.
186, 187. Time and place of such election must be fixed by a competent authority.
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191, 192. Power of Congress to require election by districts.
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194, 195. "General election," meaning of phrase considered.
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243. Illustrations of rule that mere irregularities will not vitiate an election.
244. Holding of elections in territory acquired from foreign government.
245. Holding an election in a Territory in anticipation of admission into the Union.
246. Formation of State Government out of part of organized Territory.
247. Effect upon remainder.

§ 147. In the case of *McKune* v. *Weller*,[1] it was laid down that an election cannot take place without statutory regulation. All the efficacy given to the act of casting a ballot is derived from the law-making power and through legislative enactment, and the Legislature must provide for and regulate the conduct of an election, or there can be none.[2]

[1] 11 Cal., 49.

[2] [*Ex parte* Kennedy, 23 Tex. App., 77. Where an act of the Legislature, authorizing the holding of an election, did not take effect until the lapse of sixty days after its passage, an election held under the act, but before the expiration of the sixty days, was held void. Santa Cruz

This case was followed in *People* v. *Martin*.[1] See, also, *Sawyer* v. *Haydon*,[2] and *State* v. *Collins*,[3] where it is held that there is no inherent right in the people to hold an election. A volunteer election held without authority of law is void.[4]

§ 148. The manner of electing United States Senators is, in the absence of Congressional action, to be prescribed in each State by the Legislature thereof. A rule adopted by such a Legislature, providing that "a majority of all the members elect composing the two houses of the General Assembly shall be necessary to determine all elections devolving upon that body," is a legitimate exercise of its power to regulate the manner of such elections. Under this rule, where there were twenty-nine votes cast in the joint convention for David L. Yulee, and twenty-nine blank, it was held that there was no election.[5]

§ 149. The Legislature of a State having once elected a Senator in Congress cannot reconsider its action and elect another person afterwards. The moment the result is declared and the certificate of election signed, jurisdiction passes from the State Legislature to the Senate of the United States, which latter body is to judge of all questions touching the election, returns and qualifications of its members. On the 19th of January, 1833, Mr. Robbins was elected a Senator from Rhode Island, for the term of six years from March 4, 1834. His credentials were in due form. In October, 1833, the General Assembly of Rhode Island undertook to set aside this election, and to elect Mr. Potter Senator, alleging that the body which had elected Mr. Robbins was not the Legislature of Rhode Island. It was held, after much debate, that Mr. Robbins held the proper *prima facie*

Water Co. *v.* Kron, 74 Cal., 222. Where the Legislature has the right to prescribe the qualification of voters at a municipal election, it may also provide the means of ascertaining the persons who possess the qualifications prescribed. State *v.* Dillon, 32 Fla., 545.]

[1] 12 Cal., 409.

[2] 1 Nev., 75.

[3] 2 Id., 351.

[4] State *v.* Robinson, 1 Kan., 17; State *v.* Jenkins, 43 Mo., 261.

[5] Yulee *v.* Mallory, 1 Bart., 608.

evidence of title to the seat, his credentials being in due form and of prior date to those of Mr. Potter, and he was accordingly sworn in pending the investigation. Mr. Robbins was ultimately confirmed in his seat.[1] Where, however, two bodies, each claiming to be the Legislature of a State, have each chosen a Senator in Congress to represent such State, it is the duty of the Senate, in deciding between such claimants, to consider and determine which body was, in fact and in law, the Legislature.[2]

§ 150. Under that clause of the Constitution providing that Senators may be "chosen by the Legislature" of each State, an election of Senator, to be valid, must be participated in by both houses of the Legislature in their organized capacity. It is not enough that a majority of the members of each should participate.[3]

§ 151. By an act of Congress approved July 25, 1866,[4] it is provided that the "Legislature of each State which shall be chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress in place of such Senator so going out of office."

The power to pass this act is derived from Section 4, Article 1, of the Constitution, which authorizes Congress to make or alter regulations concerning the time and manner of holding elections for Senators. Senators must be chosen by the Legislature which shall have been "chosen next preceding the expiration of the term" of the Senator elected to represent the State in Congress, and a person chosen as Senator by any other Legislature can have no right to the seat.[5]

§ 152. It is not necessary under the act of Congress of July 25, 1866, to regulate the time and manner of holding elections for Senators in Congress, that the election by the

[1] Potter *v.* Robbins, Cl. & H., 877.

[2] Spencer's Case, 43d Congress [Smith, 473].

[3] Case of Harlan, 1 Bart., 621; Case of Bright and Fitch, Id., 629.

[4] 14 Stat. at Large, 243.

[5] Norwood's Case, Senate Report, No. 10, 42d Congress.

Legislature should actually take place on the "second Tuesday after its organization." It is enough if on that day the Legislature takes action on the subject, and actually votes, though unsuccessfully, for a person to fill the office of Senator.[1] The Legislature must, however, continue to meet in joint convention until a choice is reached. The principal purpose of the act of Congress was to deprive one house of the Legislature of the power to prevent an election by refusing to go into a joint convention for that purpose.

§ 153. It is, of course, essential to the validity of an election that it be held at the time, and in the place, provided by law.[2] An interesting and important question arose, however, in many of the States of the Union, during the progress of the great rebellion, as to the validity of certain statutes authorizing persons in the military service of the United States to vote while absent from their States, engaged in such service.

The constitutionality of these statutes generally turned upon the question whether it was competent for a State Legislature to authorize a citizen to vote elsewhere than at the place of his residence. In the Constitutions of most of the States there were provisions requiring that each elector should vote at the place of his residence, and not elsewhere. The Constitution of Michigan provided that the voter should have resided "in the township or ward *in which he offers to vote, ten days next preceding such election.*" The Legislature of that State enacted that persons in the military service possessing the qualifications provided by the Constitution should be allowed to vote wherever they might be, whether within the limits of the State or not. In the case of *Bald-*

[1] Case of Abijah Gilbert, 41st Cong.

[2] [Sawyer *v.* State, 45 Ohio St., 343. It is essential to the validity of an election that it be held at the time and in the place provided by law. When the time and place are not fixed by law but are fixed by some authority named in the statute, it is essential to the validity of the election that the time and place be fixed by the very agency designated by law and none other. Snowball *v.* People, 147 Ill., 260; Stephens *v.* People, 89 Ill., 337. Upon the question of the time and place of holding elections, see article in 24 Cent. Law Journal, 487.]

win v. *Trowbridge*,[1] the House of Representatives held this statute to be constitutional, in so far as it related to the election of Representatives in Congress. The decision was placed by the majority of the committee of elections, in their report, upon the ground that where there is a conflict between the State Constitution and a legislative act, in regard to fixing the place of an election for such Representatives, the power of the Legislature is paramount. This was held as the necessary effect of Article 1, Section 4, of the Constitution of the United States, which provides as follows:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators." [2]

§ 154. It was held that by this provision the power is conferred upon the Legislature of the State, and that in fixing the place of the election for Representatives in Congress it acted under and derived its authority from the Constitution of the United States, and not from the Constitution of Michigan. This view of the subject was ably presented in the report made to the House by Mr. Scofield of Pennsylvania. The reasoning of the report may be thus stated: The place of the election for Representative in Congress is to be fixed by the Legislature of the State. So declares the National Constitution. But in Michigan the convention which framed the State Constitution undertook to determine the place where all such elections should be held. This was an attempt to take from the Legislature the power plainly conferred by the Federal Constitution. In so far, therefore, as the constitutional convention undertook to fix the "place" for

[1] 2 Bart., 46.

[2] [The Legislature may make reasonable changes by amendments to existing laws in respect to the time for holding the election of officers. Such change will not be deemed unreasonable, nor the act making it unconstitutional, unless so great as to raise the presumption of a design substantially to deprive the office of its elective character. Jordan *v.* Bailey, 37 Minn., 174.]

"holding elections for Representatives," it went beyond its authority, because it was not "the Legislature of the State."

§ 155. A very similar question arose in *Shiel* v. *Thayer*.[1] In that case the Constitution of Oregon had fixed the time of holding the election for Representative in Congress, and the Legislature had not acted upon the subject. The case is, therefore, to be distinguished from *Baldwin* v. *Trowbridge*, in this, that the former was not, like the latter, a case of conflict between the State Constitution and any act of the State Legislature. It is true that the committee, in their report, expressed the opinion that the Constitution of the State had fixed "beyond the control of the Legislature" the time for holding the election for Representative in Congress; but this point was not necessarily involved in the case, and it is evident from the debate in the House that there was a wide difference of opinion upon it. The case does decide that where a State is admitted into the Union with a Constitution which fixes a time for holding the election for Representatives in Congress, the time thus fixed will be regarded as the proper and legal time, but it does not decide, because it does not involve the question, whether that time can be subsequently changed by the Legislature of the State.

§ 156. But the reasoning in *Baldwin* v. *Trowbridge*, whether sound or not, applies, of course, only to elections for Representatives in Congress, since it was within the province of the constitutional convention to fix the times and places for holding all other elections; and it would seem quite clear that under the Constitution of Michigan the act in question, in so far as it applied to State elections, was unconstitutional. Where a constitutional provision clearly requires the citizen to vote at the place of his residence, it is certainly not within the power of the Legislature to provide that he may vote elsewhere; and that a soldier has no residence in the field or camp is also a clear proposition.[2]

[1] 1 Bart., 349.

[2] Chase *v.* Miller, 41 Pa. St., 403; Bourland *v.* Hildreth, 26 Cal., 161; Opinion of Judges, 30 Conn., 591; Opinion of Justices, 44 N. H., 633; Twitchell *v.* Blodgett, 13 Mich., 127; Day *v.* Jones, 31 Cal., 261.

In Iowa a statute of this character was held constitutional, upon the ground that a district residence was not required by the Constitution of that State.[1]

§ 157. In the Constitutions of some of the States we find provisions not only fixing the qualifications of voters, but also fixing the place of voting. Where the Constitution stops with an enumeration of the qualifications of an elector, and does not expressly declare that the elector must vote at the place of his residence, it is competent for the Legislature to provide for the reception of votes out of the precinct or county of his residence.[2] So that the question must turn upon the language employed in the particular Constitution to be construed.

§ 158. The removal of the place of voting a short distance from that fixed by law, but to a place near by so that no one was misled, is not fatal to the election.[3] In *Chadwick* v. *Melvin*,[4] the Supreme Court of Pennsylvania held that, to remove the place of election three miles from that designated by law, or from a village to a place a half mile therefrom, and across a considerable stream, or from a designated school-house to a vacant house more than half a mile distant therefrom, without authority or any absolutely controlling circumstances, must render the election therein void; and in the course of the opinion Thompson, C. J., says: "A fixed place, it seems to me, is as absolutely requisite, according to the election laws, as is the time of voting. The holding of elections at the places fixed by law is not directory; it is mandatory, and cannot be omitted without error. I will not say that, in case of the destruction of a designated building on the eve of an election, the election might not be held on the same or contiguous ground as a matter of neces-

[1] Morrison *v.* Springer, 15 Ia., 304. See, also, Lehman *v.* McBride, 15 Ohio St., 573; Chandler *v.* Main, 16 Wis., 398.

[2] Morrison *v.* Springer, *supra.*

[3] Preston *v.* Culbertson, 58 Cal., 198; Simons *v.* People, 119 Ill., 617; [*Ex parte* Segars, 32 Tex. Crim. Rep., 533; Smith *v.* Jackson, Row., 9].

[4] Brightly's Elec. Cas., 251; S. C., 68 Pa. St., 484.

sity — *necessitas non habet legem.* But then the necessity must be absolute, discarding all mere ideas of convenience."[1] The same rule prevails where the place of holding the election is fixed by the court, or by a board or officer, thereunto duly authorized by law. When once legally fixed by proper authority, it can only be changed by proper authority, and in the manner provided by law.

§ 159. In Illinois it has been held that the removal of the place of holding an election not more than one hundred feet from the building designated as the proper place did not vitiate the poll, it appearing that all the voters knew where the poll was opened, as it was readily seen from the lawful place, and made manifest by the crowd going and returning therefrom. No fraud or improper motive was shown to produce the change, nor did any voter complain that he was deprived thereby of an opportunity to vote.[2]

§ 160. A statute of the State of New York provided that the citizens of the several towns qualified to vote are required annually to assemble and hold town meetings in their respective towns, *at such place in each town as the electors thereof in their town meeting shall from time to time appoint;* and if at any annual town meeting no place is fixed by the electors for the next annual town meeting, such town meeting shall be held at the place of the last annual town meeting. The electors of the town of Northfield, at their annual town meeting in 1847, omitted to fix the place for the annual town meeting in 1848, and by reason of this omission the law fixed the place at the Bull's Head tavern, where the previous

[1] Journal of House of Representatives of Pennsylvania, 1856, 204. See, also, Beck *v.* McGhee; Miller *v.* English, 1 Zab. (N. J.), 317; Commonwealth *v.* Commissioners, 5 Rawle, 75; Marshall *v.* Kerns, 2 Swan, 68; Foster *v.* Scarff, 15 Ohio St., 532; [Walker *v.* Sanford, 78 Ga., 165. When it is provided that county commissioners must construct a temporary room to be used as a polling place, if there is no room of adequate size at the place which the voters of the district have designated for the election, the commissioners are not at liberty to rent a room at any other place within the district. *In re* Egly, 158 Pa. St., 65].

[2] Dale *v.* Irwin, 78 Ill., 170.

annual meeting was held. On the proper day, in 1848, the electors assembled at that place and organized, when a motion was made, in the presence of the electors assembled, "that the annual town meeting for the year 1848 be held at the place aforesaid, until twelve o'clock at noon of that day and then be adjourned to the house of W. C. Martin, within the town, where it shall be held for the remainder of the day." This motion was carried, and the election was accordingly held at one place until twelve o'clock, and then adjourned to the other, and there held the remainder of the day. The Court of Appeals of New York held, not without some hesitancy, that this action was legal.[1] Page, J., in delivering the opinion in this case, says: "I confess that I have had some difficulty in coming to this conclusion, and I think that the power of adjourning a town meeting to another time and place may, under peculiar circumstances, be oppressively exercised, and lead to a defeat of the popular will. This power ought not to be exercised except in a case of extreme necessity." Under the same statute above referred to, the Supreme Court of New York held that the electors, on the town meeting being opened, had a right to adjourn the meeting to the next day, to be held at another place, and that the electors were the exclusive judges of the necessity of the adjournment.[2] In both these cases, however, the question was upon the construction of a statute, and it is very clear that neither the time nor place of holding an election can be changed after being once legally fixed, unless such change is authorized by statute; and it may also be observed that statutes which authorize an adjournment to another place after the election has been opened are very objectionable and inexpedient. Some of the electors may not attend in the early part of the day, and may, therefore, have no notice of the change. Statutes ought to be, and generally are, provided to allow a change of the place of opening the polls, or holding an election, in case of necessity,

[1] The People *v.* Martin, 5 N. Y., 1 Seld., 22.
[2] Goodell *v.* Baker, 8 Cow., 286.

such as might arise from the destruction of the building designated for that purpose; but, aside from cases of this kind, adjournments or changes are not as a general rule permitted.

§ 161. Those provisions of law which fix the time or place of holding elections are to be construed as mandatory, and not as merely directory. The reason for this is obvious. Every voter is presumed to know the law, and to be thereby informed as to the time when and the place where he may deposit his ballot; but if that time or place be changed without proper authority and due notice, no voter can be held as legally bound to take notice of the change, and it can never be known how many voters have been deceived thereby, unless, indeed, all the persons entitled to vote should actually attend and vote at the illegal place, which might, perhaps, be held as a waiver of all objection thereto, provided the place was within the voting precinct. As to the time of the election, of course the day cannot be changed even by the consent of all the voters, and the general rule is, that if the polls are not kept open for as many hours as the law directs, and if legal voters in numbers sufficient to change the result, or to render it doubtful, are thereby deprived of the privilege of voting, the election must be set aside. A few minutes' delay in opening the polls will make no difference, but several hours' delay may render the election void, and certainly will have that effect if the party complaining of it can show that he has been injured thereby.[1]

§ 162. In *Newcum* v. *Kirtley*,[2] it was held that the votes of two electors who, according to the testimony of several witnesses, would have voted for contestant if the polls had not been closed too soon, could not be counted as if cast. It did not appear that the electors in question had presented themselves at the proper voting place, within the

[1] Melvin's Case, 68 Pa. St., 333; Juker *v.* Commonwealth, 20 Pa. St., 484; Dickey *v.* Hurlburt, 5 Cal., 343; People *v.* Murray, 15 Cal., 321; Knowles *v.* Yeates, 31 Cal., 82.

[2] 13 B. Monroe, 515.

hours during which the law required the polls to be kept open, for the purpose of voting for contestant, and that *after doing all that was in their power* they were prevented by the fault of the election officers from so voting. If these facts had appeared the question would have been very different from the one decided. The court seems to have placed great stress upon the fact that "their votes were not *offered* to, nor taken by, the officer intrusted by law with the office of receiving and recording them," and very properly, as that was a controlling fact. The true rule upon this subject has been stated in another connection[1] and is this: In order that a ballot not actually cast shall be counted as if cast, it must appear that the voter actually offered to cast it, and was prevented from so doing without fault on his part; or if he does not actually present his ballot to the officers of the election, that he endeavored to approach the polls for that purpose, and used due diligence in endeavoring to reach the polls, but was prevented from so doing. Doubtless a rule much more lax than this has occasionally been adopted in legislative bodies, but every departure from this rule as here stated is, and must be, both erroneous and dangerous.

§ 163. It appears that a statute requiring that the polls shall be opened at sunrise, and kept open until the setting of the sun, is so far directory that, before an election can be set aside because of a deviation from the statute in this respect, it must be shown that legal votes were excluded, or illegal votes received in consequence thereof.[2] Whether the fact of closing the polls before the hour fixed by statute, or keeping them open after such hour, will of itself vitiate the election, must depend upon the terms of the statute. A slight deviation from the direction of the statute in this respect will not render void the election, unless it is fraudulent, and operates to deprive legal voters of their rights, or unless the statute in express terms makes the hour of open-

[1] Sec. 137.

[2] People *v.* Cook, 8 N. Y., 67; [Soper *v.* Board Co. Com'rs, 46 Minn., 274].

ing and closing the polls of the essence of the election. See *Cleland* v. *Porter*.[1]

The better opinion seems to be, however that a *considerable* deviation from the hours fixed by law for keeping open the polls must render the election void. Thus, in Pennsylvania, it has been determined that where the law required the polls to be kept open until ten o'clock, and they were closed at eight, the election must be set aside.[2] So also if they be opened at a much later hour than the time prescribed by law.[3] And it was at one time held in Ohio that if the polls were closed for any purpose within the hours fixed by law for holding the election, it would render it illegal and void.[4] But this doctrine was overruled in *Fry* v. *Booth*,[5] where it was held that the statute requiring the polls to be kept open between the hours specified during the entire day was so far directory that to close the polls during the dinner hour does not vitiate the election.

§ 164. Where the polls were kept open after the proper hour for closing, and it appeared that enough votes had been cast after the legal hour for closing the polls to have changed the result, the election was set aside.[6] In Illinois it has been held, under similar circumstances, that it must be shown affirmatively that votes were received after the proper hour which *did* change the result.[7]

§ 165. From all the somewhat conflicting authorities upon the subject, the following may be gathered as the governing rules:

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

[1] 74 Ill., 76.
[2] Penn. Dist. Election, 2 Pars., 526; S. C., 68 Pa. St., 33.
[3] Chadwick *v.* Melvin, Bright. Elec. Cas., 251.
[4] State *v.* Ritt, 7 Am. Law Reg., 88.
[5] 19 Ohio St., 25.
[6] Locust Ward Election, 4 Penn. Law Journal, 341.
[7] Piatt *v.* People, 29 Ill., 54.

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

3. If the deviation from the legal hours is great, or even considerable, the presumption will be that it has affected the result, and the burthen will be upon him who seeks to uphold the election to show affirmatively that it has not.[1] But if the deviation from the legal hours is but slight, the presumption will be that it has not affected the result, and the burthen will be upon him who attacks the validity of the election to show affirmatively the contrary.

4. If the number of votes illegally cast after the legal hours, and the persons for whom cast, can be shown, they may be rejected from the count.[2]

§ 166. A statute of Virginia in force in 1832 authorized the sheriff, in case the electors were so numerous that all could not be polled before sunsetting, or in case by rain, or the rising of water-courses, many of the electors are hindered from attending, to adjourn the election "*until the next day*, and *so from day to day for three days*, Sundays excluded, giving public notice thereof by proclamation," etc. Under this provision it was contended that the polls might be adjourned from day to day for three days, and that the first day is to be excluded in computing the three days. But it

[1] [Yeates *v.* Martin, 1 Ells., 52.]

[2] [Where the Constitution of Kentucky provided, "all elections by the people shall be held between 6 o'clock in the morning and 7 o'clock in the evening," one was held elected who had received the most votes at 7 P. M., though the polling place was kept open until 10, and when closed the other party had the majority. Varney *v.* Justice, 86 Ky., 896. But where the notice of the election published by the clerk of a school district notified the electors that the polls would be open until 7 P. M. instead of 8 P. M., as the statute required, the clerk, being himself a candidate for re-election, cannot take advantage of his own error and urge the illegality of the election. State *v.* Smith, 4 Wash. St., 661. Even though the result may not have been affected, yet, if a radical change is made in the hours, the election is void. Hutchinson *v.* Woodruff, 57 N. J. L., 530.]

was held otherwise, the committee being of the opinion that the election could not be kept open for any purpose more than three days. Votes cast on the *fourth* day after an adjournment from the third were accordingly excluded.[1]

§ 167. If an election is held according to law and a fair opportunity is afforded for all legal voters to participate, those who do not vote are bound by the result.[2] It has been held that if the majority expressly dissent, and do not vote, the election of the minority is good.[3]

§ 168. Votes must be cast in the manner provided by law. Under a statute requiring that the manner of voting shall be by ballot, votes given *viva voce* cannot be counted. In the case of an election by a board of county commissioners, of a county treasurer, it was held in *Commonwealth* v. *Read*, *supra*, that the only lawful mode of voting, under the statute of Pennsylvania governing the election, was by ballot; and that inasmuch as the majority voted *viva voce*, the minority voting by ballot would elect, even if that minority consisted of but one member of the board. It seems, however, that in case of an election by a corporation or a board composed of a definite and fixed number of persons, a quorum should vote. Where the elective body consists of an indefinite number of persons, the principle of *Commonwealth* v. *Read* can be applied. Accordingly in *State* v. *Binder*[4] it was held that, in the absence of any evidence to the contrary, it will be presumed that the voters voting at an election were all the legal voters of the city, or that those who did not see fit to vote acquiesced in the action of those who did vote, and consequently are equally bound and concluded by the result.

[1] Draper *v.* Johnson, Cl. & H., 702.

[2] First Parish, etc. *v.* Stearns, 21 Pick., 148; Trustees, etc. *v.* Gibbs, 2 Cush. 39; [Patterson *v.* Belford, 1 Ells., 52; Biddle *v.* Wing, Cl. & H. 507].

[3] Oldknow *v.* Wainwright, 1 Wm. Bl., 229. And see Commonwealth *v.* Read, 2 Ashmead, 261; S. C., Bright. Elec. Cas., 126.

[4] 38 Mo., 450.

§ 169. This doctrine, however, must be taken with some qualifications. If, for example, the election is held under such circumstances as to preclude the possibility that a majority of the persons entitled to vote could have had the opportunity to do so, it is void, although held at the time and place provided by law.[1] It was accordingly held in a number of cases arising in the Southern States during the rebellion, that where the larger part of the district was at the time of the election in the armed occupation of rebel forces, an election attempted to be held in a portion of the district not so occupied was void.[2]

§ 170. The true rule is this: If the opportunity to vote is given to all alike, and if those who abstain from voting do so of their own fault or negligence, then those who do attend and vote have the right to decide the result; but in a case where those who fail to vote constitute a large proportion of the voting population, and where they did not have the opportunity to vote, there can be no valid election. Elections in the South during the progress of the rebellion were accordingly held valid, where there was an opportunity for the great body of the electors to participate.[3]

§ 171. A statute of Kansas regulating the conduct of an election held for the purpose of determining the location of a county seat provided that the voters might assemble at 9 o'clock A. M. of the day of election, in each precinct, and

[1] [Where legal voters are present at the polling place, but are unable to reach the window and actually tender their ballots on account of fraudulent challenges unduly prolonged by the connivance of the judges, their votes should be counted upon a contest. So far as Congressional elections are concerned, the offer of a voter otherwise legally qualified to perform any act necessary as a prerequisite to voting will be considered as performance of the act. Waddill *v.* Wise, Row., 203, and cases there cited.]

[2] Case of Upton, 1 Bart., 368; Case of Beach, 1 Bart., 391; Case of Segar, 1 Bart., 414; Case of Segar, 1 Bart., 426; Case of Segar, 1 Bart., 577; Case of Cloud & Wing, 1 Bart., 455; Case of McKenzie, 1 Bart., 460; Case of Grafflin, 1 Bart., 464; Case of McKenzie *v.* Kitchen, 1 Bart., 468; Case of Chandler, 1 Bart., 520.

[3] Flanders *v.* Hahn, 1 Bart., 438; Case of Clements, Id., 366.

select from among themselves their judges and two clerks of election, who, after being duly qualified, should conduct the election. Under this statute it was decided by the Supreme Court of Kansas that a meeting held with closed doors by the adherents of one of the towns to be voted for, and from which meeting all the adherents of the other town to be voted for were excluded, was fraudulent and its proceedings void. And an election held by the people who were excluded from said meeting, conducted by the officers freely chosen in a fair and public manner, was held valid.[1]

§ 172. The fact that ballots are received and deposited in the ballot-box in an irregular manner will not cause their rejection, if it appears that they were cast in good faith by legal voters.[2] Thus, in Kentucky a case arose where two persons who were qualified voters appeared at the polls before the judges had been sworn, and while one of the judges was absent. The two voters cast their votes and they were deposited in the ballot-box by the judge who was present, with the understanding that when the absent judge arrived and all had been sworn they would ratify the act. This the two judges and the clerk afterwards did, and it was held that the votes were valid and were properly counted.[3]

§ 173. Under a statute requiring that separate boxes shall be kept for the deposit of ballots for State officers and for members of Congress, the voter must hand in both his tickets at one and the same time, and having once voted for State officers, and been recorded as voting, he cannot afterwards come forward and claim the right to vote for Representative in Congress.[4]

§ 174. A statute providing that two ballot-boxes shall be kept at each poll, one for the reception of ballots for Repre-

[1] State *v.* Harwood, 36 Kan., 588; 13 Pac. Rep., 212.

[2] [Lankford *v.* Gebhart, 130 Mo., 621. The fact that election officers place a ballot in the wrong ballot-box by mistake will not vitiate the ballot nor authorize its rejection. Parvin *v.* Wimberg, 130 Ind., 561; People *v.* Bates, 11 Mich., 362; Same Case with note, 83 Am. Dec., 745.]

[3] Anderson *v.* Winfree, 85 Ky., 597; 4 S. W. Rep., 351.

[4] Draper *v.* Johnson, Cl. & H., 711.

sentative in Congress, and the other for the reception of ballots for State officers, was held to be directory only, in the case of *Boyden* v. *Shober*,[1] in which case the report of the committee has this language:

"It is said that the law of North Carolina, rightly construed, required that two ballot-boxes should have been kept at each poll, and that all ballots for members of Congress should have been deposited in one, and all ballots for electors for President and Vice-President in the other.

"There seems to be some doubt as to the true construction of the statute of North Carolina, but assuming that the construction contended for by contestant is correct, we are of opinion that the statute is directory only, and that the failure to provide two ballot-boxes, and the deposit of all the ballots in one box, did not render the election void, in the absence of fraud. If the ballots were freely cast, if they were honestly and fairly counted, and correctly returned, we should be unwilling to hold that a mere mistake of the election officers as to whether the ballots should go into one box or two should be allowed to defeat the will of the majority."[2]

§ 175. At common law voting by proxy is unknown, and every vote, whether given by a stockholder of a corporation, or by a freeman for his representative, must be personally given. A corporation may, however, by a provision in its charter, provide for voting by proxy, though it is, to say the least, very doubtful whether a provision in the *by-laws* of a corporation, providing for voting by proxy, could be upheld. Upon this general subject see authorities cited below.[3]

§ 176. It must be conceded by all that time and place are of the substance of every election, while many provisions which appertain to the manner of conducting an election

[1] 2 Bart., 904.

[2] [Young *v.* Deming, 9 Utah, 204.]

[3] State *v.* Tudor, 5 Day, 329; Taylor *v.* Griswold, 2 Green (N. J.), 222; Angell & Ames on Corp., Ch. 4, 57; Brown *v.* Commonwealth, Bright. Elec. Cas., 282; Phillips *v.* Wickham, 1 Paige, 590. See, also, Ch. XX.

may be directory only.[1] It does not, however, follow that formal notice of the time and place of holding an election is always essential to its validity. Whether it is so or not depends upon the question whether the want of formal notice has resulted in depriving any portion of the electors of their rights.[2] In Indiana it was held that an election for county auditor was not void by reason of an omission to give public notice that it would take place.[3]

§ 177. In the case of *Foster* v. *Scarff*,[4] it was held that where notice was not given, according to law, of an election to fill a vacancy in the office of probate judge, and where it was also apparent that the great body of the voters had in fact no notice, and were not aware that the office was to be filled, and where a small number cast their votes for a single candidate, and no votes were cast for any other, the election was void. But the Court, Brinkerhoff, J., says: "In deciding this case, however, we do not intend to go beyond the case before us as presented by its own peculiar facts. We do not intend to hold, nor are we of opinion, that the notice by proclamation, as prescribed by law, is *per se*, and in all supposable cases, necessary to the validity of an election; if such were the law, it would always be in the power of a ministerial officer by his malfeasance to prevent a legal election. We have no doubt that where an election is held in other respects as prescribed by law, and *notice in fact* is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election will be valid. But where, as in this case, there was no notice, either by proclamation or in fact, and it is obvious that the great body of electors were

[1] Dickey *v.* Hulburt, 5 Cal., 343.

[2] [City of Lafayette *v.* State, 69 Ind., 218; *Ex parte* White, 33 Tex. Crim. Rep., 594; Smith *v.* Crutcher, 92 Ky., 586; Berry *v.* McCullough, 94 Ky., 247; Wheat *v.* Smith, 50 Ark., 266.]

[3] State *v.* Jones, 19 Ind., 356. See, also, People *v.* Cowles, 13 N. Y., 350; People *v.* Brenham, 3 Cal., 477; People *v.* Hartwell, 12 Mich., 508.

[4] 15 Ohio St., 532.

misled for want of the official proclamation, its absence becomes such an irregularity as prevents an actual choice by the electors, prevents an actual election in the primary sense of that word, and renders invalid any semblance of an election which may have been attempted by a few, and which must operate, if it operate at all, as a surprise and fraud upon the rights of the many." [1]

§ 178. While it is true that notice is essential to the validity of an election, it is not always essential that the particular form or manner of giving notice which may be prescribed shall be followed.[2] It is essential that the electors should have notice of the time, place and objects of the election — that is, they should have knowledge of them; but an omission to follow the particular mode provided by statute for publishing such notice may not render the election void, and will not, if the electors have actual notice, and do, in fact, take part in the election.[3] This doctrine was laid down very broadly by the Supreme Court of Iowa, in *Dishon* v. *Smith*.[4] The Court in that case say: "The courts have held that the voice of the people is not to be rejected for a defect or even a want of notice, if they have, in truth, been called

[1] [At an election held in the defendant village the official ballots contained no reference to the office of police justice, although an election to fill such office was to be had at that time in accordance with the statute and resolution of the board of trustees; nor was such office named in the notice of election, no nomination having been made therefor. Notwithstanding this, forty-four votes were cast for the relator by pasters upon the official ballots. *Held*, that relator's election was valid and he was entitled to the office. People *v.* Village of Wappinger Falls, 83 Hun, 130.]

[2] [People *v.* Avery, 106 Mich., 572.]

[3] An election will not be set aside because the law requiring the giving of notice thereof has not been strictly followed, if such notice was given as that the great body of the electors were in fact informed of the time, place and purpose of the election. Commonwealth *v.* Smith, 132 Mass., 289; [Welsh *v.* Wetzel, 29 W. Va., 63; Seymour *v.* City of Tacoma, 6 Wash., 427; Woodward *v.* Fruitable Sanitary Dist., 99 Cal., 554; *In re* Mitchell, 81 Hun, 401; State *v.* Carroll, 17 R. I., 591; Williams *v.* Shoudy, 12 Wash., 362].

[4] 10 Iowa, 212.

upon and have spoken. In the present case, whether there were notices or not, there was an election, and the people of the county voted, and it is not alleged that any portion of them failed in knowledge of the pendency of the question, or to exercise their franchise."

§ 179. It is doubtless perfectly true that where the election has been held at the proper time and the proper place, and the electors have had notice and participated in it, the want of such notice as the law provides will not render it void. But if appear that due notice has not been given, and that a portion of the electors have been thereby deprived of their right to vote, and particularly if the number thus deprived is sufficient to have changed the result if they had voted on one side or the other, in such a case the election is clearly void.[1]

§ 180. The general rule upon this subject is given by Judge Cooley, as follows: "Where, by the express provision of the statute, the election is to be held after proclamation, or notice, announcing the time or the place, or both, and where no such proclamation has been made, or notice given, the election is void. But where both the time and the place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty.[2] The right to hold the election in such a case is derived from the law, and not from the notice.[3] And this rule will apply to an election to fill a vacancy, if the same occurs long enough before the election to have become generally notorious, and if it was in fact generally known."[4]

§ 181. The doctrine that want of formal notice of an election will not render the election void unless it appear that

[1] [Where a posted notice states in one place that the election will be held in the school-house of the town, and states in another place that it will be held at the town hall, an election held in pursuance thereof is void. People *v.* Caruthers School Dist., 102 Cal., 184.]

[2] [Strobach *v.* Herbert, 2 Ells., 5; State *v.* Lansing, 46 Neb., 514.]

[3] [Patterson *v.* Belford, 1 Ells., 52.]

[4] Cooley, Const. Lim., 603.

the failure to give such notice has, in fact, either changed or rendered doubtful the result was recognized as early as 1796, by the House of Representatives of the United States in *Lyon* v. *Smith*.[1] In that case it appeared that no notice had been given of the time and place of holding the election in two towns of the district; but as it did not appear that the votes of all the freemen of those towns could have changed the result if duly given, the House refused to set aside the election.[2]

§ 182. It is, of course, more important and essential that due and regular notice be given of an election to fill a vacancy than that such notice be given of the regular election provided by law, for the obvious reason that there is less probability that the electors will be informed of the former without such notification.[3] Accordingly, we find in the decisions of the courts some conflict as to the validity of a special election to fill a vacancy which is held without the

[1] Cl. & H., 101.

[2] The following additional cases may be consulted on the general subject of notice and as to when it is essential to the validity of an election: Matthews *v.* Board, 34 Kan., 606; People *v.* Crissey, 91 N. Y., 616, 634; Jones *v.* Gridley, 20 Kan., 584; Morgan *v.* Board, 24 Kan., 71; Cooley's Const. Lim., 758; State *v.* Skirving, 19 Neb., 497; S. C., 27 N. W. Rep., 723; People *v.* Wetherell, 14 Mich., 48; Secord *v.* Foutch, 44 Mich., 89; People *v.* Canvassers, 11 Mich., 111; State *v.* McKinney, 25 Wis., 416; Bolton *v.* Good, 41 N. J. Law, 296; Barry *v.* Lauck, 5 Cold. (Tenn.), 588; Westbrook *v.* Rosborough, 14 Cal., 180; Kenfield *v.* Irwin, 52 Cal., 164; People *v.* Thompson, 67 Cal., 627; Morgan *v.* Gloucester, 44 N. J. L., 137; Stephens *v.* People, 89 Ill., 337; Marshall Co. *v.* Cook, 38 Ill., 44; Force *v.* Batavia, 61 Ill., 99; Hubbard *v.* Williamstown, 61 Wis., 397; Pratt *v.* Swanton, 15 Vt., 147; Hadoux *v.* County of Clarke, 79 Va., 677.

[3] [If an election is held to fill a vacancy for the office of a justice of the peace in a city of the second class, at any other election than at the regular city election for the election of justices of the peace, and no official proclamation or public notice is given of the election to fill the vacancy, and less than one-third of the electors of the city vote for a person to fill the vacancy, held, that the omission to give any official or public notice of the election to fill the vacancy, and the failure of the electors to participate generally in the election, vitiates the same, and the person claiming the office of justice of the peace under such an election is not entitled to it. Cook *v.* Mock, 40 Kan., 472.]

notice provided by law. In *People* v. *Cowles*,[1] it was held that in case of the death of a judge of the Supreme Court after it was too late to give the notice required for filling the vacancy at the next ensuing election, it was competent for the electors to take notice of the vacancy, and to fill it at that election.

§ 183. This case, however, was decided upon the ground that the Constitution of New York required that, in the event of a vacancy in the office of judge of the Supreme Court, it should be filled "at the next general election of judges * * * by election for the residue of the unexpired term." And under this provision, the majority of the Court seemed to be of the opinion that all electors were bound to take notice of a vacancy in that office without any formal notice, and that such voters as did so had the right to fill such vacancy, although it occurred but a very short time prior to the election. Such may be the true construction of the Constitution of New York, but ordinarily, and in most if not in all the other States, there must be either formal notice of the vacancy and of the time of filling it, or such general notoriety as will amount to notice to the great body of the electors.

§ 184. In Michigan it was held that the default of a clerk, in publishing notice of an election, to make mention of an existing vacancy, will not invalidate the election; but the decision was put upon the ground that there was in fact such publicity as to amount to notice.[2]

But in Indiana it has been held that an election to fill a vacancy cannot be held where such vacancy did not occur long enough before the election to enable the proper notice to be given.[3] And the same point has been repeatedly ruled in California.[4]

[1] 13 N. Y., 359.

[2] People *v.* Hartwell, 12 Mich., 508. And see State *v.* Orris, 20 Wis., 235; State *v.* Goetz, 22 Id., 363; State *v.* Jones, 19 Ind., 218.

[3] Beal *v.* Ray, 17 Ind., 554.

[4] People *v.* Porter, 6 Cal., 26; People *v.* Weller, 11 Id., 49; People *v.* Martin, 12 Id., 409; People *v.* Roseborough, 29 Id., 415.

§ 185. In the case of *McKune* v. *Weller*,[1] the question whether a proclamation giving notice of the holding of a special election held to fill a vacancy caused by the death of the incumbent was necessary to the validity of such election is discussed at length. The authorities upon the subject are there reviewed with care, and the conclusion is reached that there is an important distinction to be observed between general and special elections.[2] The time, place and manner of holding the former being fixed by law, the electors may, and indeed must, take notice of them, and as to such elections the statutory requirement of public notice by proclamation or otherwise may be regarded as directory only. But it was held that the statute requiring the Governor to issue his proclamation of election *to fill vacancies* which occur not in the ordinary way by the expiration of the term, but by death or resignation before the term expires, is mandatory and an essential prerequisite to all such elections.

§ 186. It was held by the House of Representatives of the United States, after an exhaustive discussion, that where the Legislature of a State has failed to provide the time, place and manner of holding an election to fill a vacancy occurring in the House, that the Governor of such State, upon being informed of the vacancy, may issue a writ of election and therein fix the time and places of holding such election.[3] The power given to the Governor by the second section of the first article of the Constitution of the United States to issue writs of election to fill vacancies carries with it the power to fix the times and places of holding such election in cases where such times and places are not fixed by law.

It is of course desirable, and indeed necessary, that proc-

[1] 11 Cal., 49.

[2] [In *special* elections the notice called for by the law is absolutely essential to the validity of the election. State *v.* Tucker, 32 Mo. App., 620.]

[3] Case of John Hoge of Penn., Cl. & H., 135.

lamation be made of such election, or that it appear that it was generally known for a reasonable length of time, though in the case just referred to it was held that a very short notice (only two or three days) was sufficient, when it appeared that the election was fixed for the same day as the election for President and Vice-President of the United States, and where it was evident that the great mass of the electors were in fact apprised of it, and participated in it.[1]

§ 187. If a case should arise where no authority, either State or Federal, has fixed either the time or place of electing a Representative in Congress, no election could be legally held. And yet if in such an event the electors by common consent should come together and choose a Representative, the House might validate their action and admit their chosen Representative. Such action would be within the power, and therefore within the discretion, of the House.

§ 188. But whether a *military* Governor may, under any circumstances, order or fix the time of an election for Representatives in Congress, has been much discussed. The better opinion seems to be that if the government of a State has been disorganized by insurrection and rebellion, or otherwise, so that there are no State officials, and can be none until an election occurs, the United States may take military control of the territory of such State and appoint a military Governor, who may perform such acts as may be required of the Executive of such State, as a prerequisite to the holding of an election. The reason for this doctrine was thus stated by the report of the Committee of Elections in *Flanders* v. *Hahn*, in the Thirty-seventh Congress,[2] and again repeated in case of *M. F. Bonzano*,[3] as follows:

"Representation is one of the very essentials of a republican form of government. and no one doubts that the United States cannot fulfill this obligation without guaranteeing that representation here. It was in fulfillment of this obligation

[1] State *v.* Berg, 76 Mo. 136.
[2] 1 Bart., 446.
[3] 2 Bart., 1.

that the army of the Union entered New Orleans, drove out the rebel usurpation, and restored to the discharge of its appropriate functions the civil authority there. Its work is not ended till there is representation here. It cannot secure that representation through the aid of a rebel Governor. Hence the necessity for a military Governor to discharge such functions, both military and civil, which necessity imposes in the interim between the absolute reign of rebellion and the complete restoration of law." The report further shows that inasmuch as the Confederate Governor could not be expected to call an election, either the military Governor must call it or no election could be had; and the committee said: "The people must remain unrepresented, or some one must *assume* to fix a time to hold these elections. Which alternative approaches nearest to republicanism, nearest to the fulfillment of our obligations to guarantee a republican form of government to that people — closing the door of representation, or recognizing as valid the time fixed by the military Governor? Are this people to wait for representation here till their rebel Governor returns to his loyalty and appoints a day for an election, or is the government to guarantee that representation as best it may? The committee cannot distinguish between this act of the military Governor and the many civil functions he is performing every day, acquiesced in by everybody. To pronounce this illegal, and refuse to recognize it, is to pronounce his whole administration void and a usurpation. But necessity put him there and keeps him there."

§ 189. In the case of *Jared Perkins of New Hampshire*,[1] the following facts appeared: On the 2d day of July, 1846, the State of New Hampshire was divided by an act of her Legislature into four Congressional districts, and in March, 1849, a Representative in Congress was chosen from each of said districts, and the gentlemen so chosen took their seats as members of the Thirty-first Congress. In July,

[1] 1 Bart., 142.

1850, by another act of the Legislature, said State was redistricted, and the boundaries of the several districts changed. In September, 1850, Hon. James Wilson, who was the Representative from the *old* third district, resigned. A vacancy having been thus created, the Governor ordered an election to be held by the *new* third district to fill it. At this election Mr. Perkins was chosen. There was a majority report from the Committee of Elections in his favor, and after debate in the House he was admitted to the seat by the very close vote of 98 to 90. There are grave reasons for questioning the soundness of this decision. Let us suppose, for example, that after an election by a district it is divided into two equal parts, and one half placed in one new district and the other half in another. If under these circumstances a vacancy occurs, by which of the new districts shall it be filled? Or we may suppose that the territory composing a district may be distributed among three, four, or half-a-dozen new ones. In such cases there is no sound principle upon which to determine which, if any, of the new districts shall fill a vacancy which may occur from the old. The true rule, therefore, must be that a district once created, and having elected a Representative in Congress, should be allowed to continue *intact* for the purpose of filling any vacancy which may occur, until the end of the Congress in which it is represented. And if a State Legislature shall abolish such district after it has elected its Representative, and shall make no provision for filling a vacancy, it may, in the event of a vacancy, be obliged to go unrepresented for the time being.

§ 190. The case of *Jared Perkins*, *supra*, was expressly overruled in the more recent case of *Hunt* v. *Menard*.[1] In this latter case the committee said:

"The act of the Legislature of Louisiana of August 22, 1868, making a new division of the State into its five Congressional districts, by its terms purports to repeal all laws and parts of laws in conflict with said act, but is silent on

[1] 2 Bart., 477.

the subject of vacancies that might occur in the districts as then existing.

"The language of the minority report in the case of *Perkins* on the New Hampshire statute is appropriate on this point as well as on this case generally, and we quote from it as follows:

"'It does not purport to provide for any method of filling vacancies that might occur in the future, and, beyond all question, it was understood as providing only for the election of members of future Congresses. Such are the terms of the act, and such must also be its spirit. A vacancy in the House of Representatives is the occurrence of an event by which a portion of the people are left unrepresented, and the filling of that vacancy is directed by the Constitution in such explicit language as requires no aid from State enactments to perfect the right. The second section of the first article of the Constitution contains the following provision: "When vacancies occur in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." This is the only provision of law on the subject of vacancies, and it is ample and sufficient. No act of the Legislature of New Hampshire purports to interfere in the matter, and the act of July ought not, in our belief, to be understood as requiring the vacancy occasioned by General Wilson's resignation to be filled by any other people than those whose Representative he was. Had such been the purpose of the act, we believe it was incompetent for the law-making power of that State to accomplish the object while this House hold the right to judge of the election of its members.

"'It would not be preservation of the purity of the elective franchise, nor would it be a just guardianship of the republican principle that all shall have a right to be represented, to admit the power of a State Legislature to provide that a portion of the people should have two Representatives in Congress, while another portion should have none, or not be represented by the man of their choice. * * * It is,

besides, in disregard of the law of Congress of June, 1842, which declares that no one district shall be entitled to two Representatives. If the people who choose a Representative are not entitled to fill the vacancy happening by his resignation, it is impossible to tell what portion of the population may most properly exercise this privilege. It seems to be assumed in this case that the new district made by the act of July 11, 1850, and numbered three, has the right to send a Representative in place of General Wilson, because the number corresponds with that which General Wilson represented. But the order of numbering is an unimportant circumstance, and the first or the fourth district might have been as properly called the third as any other; yet it would be a strange assertion that, on this account, such district would be authorized to have two Representatives during the remainder of the Thirty-first Congress.'

"This reasoning, which your committee consider as sound and pertinent, applied to the case under consideration seems to be conclusive against this election; and it may also be added that whatever power a State Legislature may have in the matter, it is absurd to say that a district, when once established and a Representative chosen therein, is not to continue for the whole Congress for which the election has once been operative. No election to fill the vacancy caused by the death of Mr. Mann appears to have been notified or held in the whole of said district as represented by him."[1]

§ 191. A question of great importance arose in the Twenty-eighth Congress, as to the constitutionality of the second section of "An act for the apportionment of Repre-

[1] [In Pool *v.* Skinner, Mob., 65, it was held that under the Constitution of the United States the Governor of a State is the tribunal to determine when and where to hold an election to fill a vacancy, and that the House of Representatives will not interfere with his actions. Consequently, when the Governor of North Carolina designated in the writ of election the counties in the new district entitled to vote to fill a vacancy occasioned by the death of a member elected from the old district, the House of Representatives acquiesced in the Governor's action without inquiring into its correctness.]

sentatives among the several States, according to the sixth census," approved June 25, 1842. That section provided as follows:

"That in each case where a State is entitled to more than one Representative, the number to which such State shall be entitled under this apportionment shall be elected *by districts composed of contiguous territory*," etc.

The laws in force in many of the States prior to the passage of this act provided for the election of Representatives upon a general ticket, to be voted for by the people of the State at large; and the States of New Hampshire, Georgia, Mississippi and Missouri refused to change their system in obedience to the act of Congress, and elected their Representatives to the Twenty-eighth Congress in the old way, by a general ticket. The question was as to the power of Congress to abrogate a State law providing for an election of Representatives upon a general ticket, and to require the State to divide its territory into districts, and to choose Representatives by districts; and the decision of this question depended upon the construction of the fourth section of the first article of the Constitution of the United States, which is in these words:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

The majority of the Committee of Elections held the second section of the apportionment act above quoted to be unconstitutional and void, and this view was ably supported in an elaborate report submitted by Hon. Stephen A. Douglas of Illinois.[1] But the contrary view was maintained with scarcely less ability, and, in the opinion of the writer of this treatise, with better logic, by the minority of the committee, whose views were presented by Hon. Garrett Davis of

[1] 1 Bart., 47–55.

Kentucky.[1] The House did not pass upon the resolutions submitted by the committee, but the members who had been elected in disregard of the act of Congress, upon a general ticket, were allowed to serve out their time. It seems quite clear that the Constitution confers upon Congress power:

1. To *make* regulations concerning the time, place and manner of holding elections for Representatives. This power can be exercised, and was doubtless intended to be exercised, in the absence of any regulations by the State Legislature, but the language of the Constitution does not permit us to say that it can only be exercised in the absence of State regulations.

2. To *alter* such regulations as may have been prescribed by the States concerning the time, place and manner of holding such elections. This power is legitimately exercised when a regulation requiring Representatives to be chosen by the people of a State at large is so *altered* as to require that such Representatives be chosen by districts.[2]

§ 192. The House of Representatives, however, in the more recent case of *Phelps and Cavanaugh of Minnesota*,[3] followed the ruling of the majority of the committee in the case last cited, and held that the election of those members by the State at large in disregard of the act of Congress was valid. The weight of authority, so far as the action of the House is concerned, is therefore in favor of this view, and yet it is manifest that these rulings have been influenced largely by the consideration that to have decided the other way would have left States for the time being unrepresented.

§ 193. A statute providing for a special election to be called on ten days' notice will be construed as not coming within the provisions of a previously enacted registry law,

[1] Id., 55–69.

[2] Such is the effect of the rulings of the Supreme Court of the United States in *Ex parte* Siebold, 100 U. S., 371, and *Ex parte* Clark, Id., 399.

[3] 1 Bart., 248.

for the reason that it would be impossible to make the registry, give the statutory notice and revise the lists within ten days. Such at least was the ruling in Illinois in the case of *People* v. *Ohio Grove*,[1] and it is probable that under the provisions of none of the registry acts in this country could a registration be legally perfected within so short a period. Of course where a registry act is by its terms to be applied to all elections by the people, it must be applied to an election subsequently authorized, unless the act authorizing such subsequent election contains provisions which make it impracticable so to apply it, in which case the subsequent act must stand and be held as modifying the registration act.

§ 194. It sometimes happens that a statute is passed providing that a particular officer named shall be chosen each year "at the general election," without further provision as to the time. In most, and it is presumed in all the States, the time for holding the general election is fixed by a constitutional provision, and there can be no room for doubt but that a statute fixing the election of an officer "at the general election" should be construed to mean on whatever day the proper authority may fix as the day for that election. And hence if, after the passage of such an act, the time for holding the general election is changed, the time for holding the election of the particular officer named would be changed with it. The purpose of selecting the day of the general election in such cases is not to select a *particular* day of the month or year, but to provide for the convenience of the people by holding one instead of several elections.[2]

§ 195. A different rule prevails, however, where a statute provides that an election shall occur on a given day of the month every year, or in given years, even though the day is also described as the day of the general election. Thus, for example, a statute of Illinois provided that certain commis-

[1] 51 Ill., 191.

[2] See West Virginia Cases, 43d Congress [Smith, 108]. Also Sawyer *v.* Haydon, 1 Nev., 75.

sioners should be elected "at the next general election, on the first Monday in August, 1874, and every year thereafter," and it was held that the change of the time for holding the general election did not change the time for the annual election of said commissioners. In the former case the statute should be construed as fixing the day of the general election, and not a particular day of the month; but in the latter, the particular day of the month and week in each year being specified, it must be presumed that the term "general election" was used as descriptive of the election, the time of holding which was fixed "on the first Monday in August" in each year.[1]

§ 196. Where a statute authorizes an election to be held by a county, city or township for the purpose of determining a given question — as, for example, whether such municipality shall subscribe to the stock of a railroad company — and where such statute points out no mode for conducting such election, it has been held that it should be conducted in the manner prescribed by law for other elections by the same body. For example, if an election in a township is held for such a purpose under a statute silent as to the manner of proceeding, it should be held in the manner township elections are required to be held, in the election of their town officers, and not under the general election laws of the State.[2] The doctrine of this case is that where the Legislature authorizes a township or other corporate body to hold an election, and has prescribed no mode, it is to be presumed that it was designed to authorize it to be conducted in the manner usually adopted and authorized by the law governing the action of the body.

§ 197. There has been of late years much earnest discussion in the courts of this country as to what questions may be submitted to a popular vote. It is a well-settled principle that legislative power cannot be delegated or transferred from the Legislature to the people at large. Our gov-

[1] **People *v.* Sloan, 14 Ill., 476.**

[2] People *v.* **Dutcher, 56 Ill., 144.**

ernments are republican and not democratic. Laws must be enacted by the representatives of the people, and not by the people themselves. Nor can any State change this. Every State must have a "republican form of government," — this is the requirement of the National Constitution, and it is complied with only by that form of State government which vests the law-making power in the representatives of the people.[1]

§ 198. While the correctness of the general rule above stated is not questioned by any of the authorities, there is a conflict among them as to its application to a species of legislation now becoming very common in this country. In several of the States acts have been passed to confer upon the voters of cities or municipalities the power to decide, by ballot, whether the sale of intoxicating liquors shall be licensed or not. In several of the cases above cited, acts of this character are held to be unconstitutional and void.

Such was the ruling in the cases cited from Delaware, Pennsylvania and Iowa, and they were afterwards followed by the Supreme Courts of Indiana[2] and California;[3] but later decisions in Pennsylvania and Indiana are the other way,[4] and such laws are generally upheld in the other States.[5]

In the latter State, however, the decision is put, partly, upon the ground that all laws are required by the Constitution to "have a uniform operation," and, inasmuch as some towns or cities might adopt license, and others vote it down, the operation of the law was held not to be uniform. But,

[1] Rice *v.* Foster, 4 Harr. (Del.), 479; S. C., Bright. Elec. Cas., 3; Parker *v.* Commonwealth, 6 Pa. St., 507; Barto *v.* Himrod, 8 N. Y., 483; Cincinnati, etc., R. R. Co. *v.* Commissioners, 1 Ohio St., 77, 84; Geebrick *v.* State, 5 Ia., 491. See, also, authorities cited in note to case of Rice *v.* Foster, Bright. Elec. Cas., 24.

[2] Maize *v.* State, 4 Ind., 342.

[3] *Ex parte* Wall, 48 Cal., 279.

[4] Locke's Appeal, 72 Pa. St., 491; S. C., 13 Am. Rep., 716; Groesch *v.* State, 42 Ind., 547.

[5] For citation of authorities supporting the validity of local-option laws, see Cooley's Const. Lim. (5th Ed.), p. 148, note 8.

on the other hand, there are decisions holding laws of this character to be valid. Of this class are the cases cited below.[1]

§ 199. These cases proceed upon the theory that the legislation referred to does not vest the law-making power in the people at large, but only confers upon cities or municipalities such powers as may properly be conferred by legislative act. It is enough to say here that in every case the real question is, does the act in question attempt to confer upon the people at large the power to make laws, or the power to say whether or not an act of the Legislature shall have the force of law? If it does plainly attempt to do this, it is null and void. Upon this general subject the reader is referred to the authorities below in addition to those already cited.[2]

§ 200. An examination of all the cases will show that the rule as established by the great weight of authority and reason is this: In any case where the Legislature could authorize a municipality to adopt a particular measure as a local police regulation, it may enact such a regulation subject to the adoption or rejection thereof by the people of the several municipalities in the State. Judge Cooley expresses the rule thus:

"Such laws are known in common parlance as local-option laws. They relate to subjects which, like the retailing of intoxicating drinks, or the running at large of cattle in the highways, may be differently regarded in different localities, and they are sustained on what seems to us the impregnable ground that the subject, though not embraced within the ordinary power of the municipalities to make by-laws and ordinances, is nevertheless within the class of police regulations in respect to which it is proper that the local judgment should control."[3]

[1] Hammond *v.* Haines, 25 Md., 541; State *v.* Noyes, 10 Fost. (N. H.), 279; State *v.* O'Neall, 24 Wis., 149.

[2] State *v.* Morris, Common Pleas, Am. Law Reg. (N. S.), Vol. 12, page 32; State *v.* Parker, 26 Vt., 357. See, also, an able discussion of the subject in American Law Register (N. S.), Vol. 12, page 129.

[3] Cooley's Const. Lim. (5th Ed.), p. 148.

§ 201. In the case of *Brockenbrough* v. *Cabell*,[1] it was held that where the State law required votes given for a Representative in Congress to be returned to the Secretary of State within thirty days from the day of the election, the statute was directory only, and that legal votes returned by the proper officers after that day should be counted. The same rule has been laid down in many cases presenting kindred questions, and the point is well settled.[2] In the case last cited it was distinctly held that, inasmuch as the House is made, by the Constitution, the exclusive judge of the election and returns, as well as of the qualifications of its own members, the returns from the State authorities must be regarded as *prima facie* evidence only of what they contain, and are not conclusive on the House.

And in *Mallary* v. *Merrill*[3] it was held that votes fairly given to a party may be counted in his favor, *though they have never been returned to the proper State authorities*, the failure to make such return not being chargeable upon such party.

This is the true rule as applied to the trial of contested election cases, but, of course, has no application to the mere matter of canvassing votes by election officers, as such officers must be governed by the returns. And it should also be understood that votes cast, but not returned, must be clearly proven by evidence other than the return before they can be counted even by a tribunal trying a contest.

§ 202. As will be seen in another connection, a certificate of election which shows that it is based upon a partial canvass is fatally defective, because a full canvass might show a different result.[4] A similar rule is sometimes applied to the return from a county which embraces a number of precincts or voting places. Thus, in *Niblack* v. *Walls*[5] a

[1] 1 Bart., 79.

[2] §§ 225, 282; Case of John Richards, Cl. & H., 95; Spaulding *v.* Mead, Cl. & H., 157.

[3] Id., 328.

[4] § 272.

[5] 42d Congress [Smith, 101].

county return was rejected because the county canvassers rejected the votes of three precincts, and counted that of two only. Each party was required to prove his vote by evidence other than the return.

§ 203. In most of the States the law requires that county returns shall be forwarded to the Secretary of State by mail. The question has been raised whether under such a statute a return can be received and counted if sent by private conveyance. In *Niblack* v. *Walls*[1] the return from one of the counties which should have been sent by mail was not only forwarded by private conveyance, but was addressed to, and received by, one of the candidates, and by him handed to the Secretary of State. Under these circumstances, the House ordered further evidence to be produced to show the true state of the poll. And in *Chavis* v. *Clever*[2] it appeared that the statute required returns to be sent to the Secretary of State "by special messenger." This provision of the statute was violated, and the return delivered to one Moore, an army sutler, and by him sent, *by express*, to the Governor of the Territory, who delivered it to the Secretary. These facts, together with some evidence tending to show that the return was tampered with on the way, were deemed sufficient to exclude it. If, however, it be made to appear on the trial of a contested election case that a return which has been sent in an irregular and unlawful way has not been tampered with, but is in fact the genuine return without alteration or amendment, duly signed and certified, it will not be rejected because of its irregular transmission. It is the policy of the law to discountenance everything which affords an opportunity for evil-disposed persons to tamper with ballot-boxes or returns, and for this reason the sound rule would probably be to require proof of the genuineness of all such returns as are transmitted through private and unauthorized channels.[3]

[1] 42d Congress [Smith, 101].

[2] 2 Bart., 467, 469.

[3] [The statute of Massachusetts required the presiding officer at the

§ 204. Where the statute directed the returns of an election for Representatives in Congress to be filed with the county judge, and an abstract forwarded to the Secretary of State, and the county officers, mistaking their duty, forwarded the original returns to the Secretary of State, it was held that this did not vitiate the election, or furnish proper ground for throwing out the vote of the entire county. In the absence of fraud, an irregularity of this character not affecting the result in any way cannot be regarded as sufficient cause for rejecting the vote of a county or even of a voting precinct.[1] The statute in question clearly belonged to that class of statutory provisions concerning the conduct of elections which are directory merely.

§ 205. The failure or refusal of the proper officer to issue a certificate of election to a person duly elected to an office cannot operate to deprive such person of his rights. The certificate or commission is the best but not the only evidence of an election, and, if that be refused, secondary evidence is admissible.[2] Where, therefore, the Governor of Tennessee, claiming that the State had seceded from the Union, refused to certify the result of an election for Representatives in the Congress of the United States, it was held that other proof of such election was admissible, and that the House being satisfied from such proof that claimant was elected, he should be admitted.[3]

§ 206. In the absence of any statutory provision expressly requiring more, a plurality of the votes cast will elect. It

election to immediately, after the ballots were counted, transmit them by the constable in attendance at the election to the city clerk. In Abbot *v.* Frost, Smith, 594, the ballots were placed in the hands of a police officer and were by him turned over to a night watchman, who held them until the morning after the election, when they were again returned to the police officer, and were by him delivered to the city clerk. No effort was made to show that the ballots were not tampered with while thus in the possession of authorized persons. *Held*, that the vote must be excluded.]

[1] Bennett *v.* Chapman, 1 Bart., 204. See, also, Clark *v.* Hall, Id., 215.

[2] Richard's Case, Cl. & H., 95, 97, 166.

[3] Clement's Case, 1 Bart., 366.

is only in cases where the statute so provides that a majority of all the votes cast is necessary to the choice of an officer. In this country, where candidates may be numerous, and the votes of the electors divided among a number of different persons, to require a majority to elect would be to prevent a choice in very many cases; hence it is that a majority is seldom required in a popular election.[1] In those States where a majority is required to elect (and such is the requirement in Vermont and perhaps in a few other States), provision is made by statute for a second election in case there is no choice at the first.

§ 207. Under Article 1, Section 2, Constitution of the United States, which requires each State to appoint Presidential electors at proper times in such manner as the Legislature thereof may direct, the State Legislature may lawfully enact that a plurality of the electors voting shall be sufficient to elect a Presidential elector.[2]

§ 208. Where a statute requires a question to be decided or an officer to be chosen by the votes of "a majority of the voters of a county," this does not require that a majority of all persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be decided by

[1] Augustin *v.* Eggleston, 12 La. Ann., 366; Cooley's Const. Lim., 619, 620.

[2] *In re* Plurality Elections (R. I.), 8 Atl. Rep., 881; 15 R. I., 617. [In Rhode Island the Constitution provided that in all elections held by the people under this Constitution, "a majority of all the electors voting shall be necessary to the election of the person voted for." In *Re* Plurality Elections, *supra*, the query was, could the election of a Representative to Congress be called one "under this Constitution" so as to necessitate a majority election to such office? The court held that it could not, or, if it could, then the provision was void as being in conflict with Section 4, Article 1, of the Constitution of the United States; for it "would assume to impose a restraint upon the power of prescribing the manner of holding elections which is given to the Legislature by the Constitution of the United States without restraint, so long as and to the extent that Congress refrains from making regulations in the same matter." The Constitution of Rhode Island was changed in 1895 and a plurality is now sufficient to elect in that State.]

the majority of the votes cast, provided always that there is a fair election and an equal opportunity for all to participate. In such a case the only proper test of the number of persons entitled to vote is the result of the election as determined by the ballot-box, and the courts will not go outside of that to inquire whether there were other persons entitled to vote who did not do so. The "voters of the county" referred to by all such statutes are necessarily the voters who vote at the election, since the result in each case must be determined by a count of the ballots cast and not by an inquiry as to the number not cast. This doctrine is well settled by the authorities.[1]

§ 209. When the Constitution refers a question to popular vote to be determined by "a majority of the legal voters of the county voting at a general election," the requirement calls for the majority of those who vote on any ticket, nomination or question at that election, not merely a majority of those who vote on the particular question presented. Where a question of township organization was submitted at an election at which about two thousand five hundred votes were cast for officers, but many did not vote at all on the township question, so that the vote on that stood nine hundred in favor to six hundred against. *Held*, that the requisite majority was not obtained.[2]

[1] People *v.* Warfield, 20 Ill., 163; People *v.* Garner, 47 Ill., 246; People *v.* Wiant, 48 Ill., 263; Railroad Co. *v.* Davidson Co., 1 Sneed, 692; Angell & Ames on Corp. (9th ed.), secs. 499, 500; Bridgeport *v.* Railroad, 15 Conn., 475; Talbot *v.* Dent, 9 B. Mon., 526; State *v.* Mayor, 37 Mo., 270–272; St. Joseph Township *v.* Rogers, 16 Wall., 644. And see County *v.* Johnson, 5 Otto, 369, where it is held that all qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. See, also, to the same effect, Everett *v.* Smith, 22 Minn., 53; [Yester *v.* City of Seattle, 1 Wash. St., 308; Richardson *v.* McReynolds, 114 Mo., 641; State *v.* Barnes, 3 N. Dak., 319].

[2] State *v.* Commissioners, 6 Neb., 474; [State *v.* Bechel, 22 Neb., 158; State *v.* Babcock, 17 Neb., 188; People *v.* Wiatt, 48 Ill., 263; State *v.* Winkelmeir, 35 Mo., 103. But see Walker *v.* Oswald, 68 Md., 146; Same

§ 210. Where the Constitution prohibited counties and cities from incurring certain debts except upon "a vote of the majority of the qualified voters therein," it was held by the Supreme Court of North Carolina that the term "qualified voters" refers to the class of persons whose competency to vote has been passed upon in their admission to registration, and that such persons as have been lawfully registered constitute the qualified voters of a given county. In such a case, as was further held, a mere majority of the votes actually cast is not sufficient.[1]

Case with note, 27 Am. Law Reg., 509, where it is held that the adoption of a high-license law did not depend upon a majority of all the votes cast at that election upon some other subject. but upon its receiving a majority of the votes cast specifically for or against it. The provisions of the enabling act of February 22, 1889, under which the Dakotas, Montana and Washington became States, authorized the adoption of Constitutions by said States if such Constitutions received "a majority of the votes cast." It was held in State *v.* Barnes, 3 N. D., 319, that where a vote was taken upon the adoption of a Constitution at an election where a Governor was also to be elected, that the Constitution was adopted if it received a majority of the votes cast on the question of its adoption, and that it was not necessary that it should receive a majority of the votes cast for Governor].

[1] McDowell *v.* Rutherford Const. Co., 96 N. C., 514; 2 S. E. Rep., 351; [State *v.* Francis, 95 Mo., 44; Mayor of the City of Madison *v.* Wade, 88 Ga., 699; Chester R. R. Co. *v.* Caldwell Co., 72 N. C., 486; Hawkins *v.* Carroll Co., 50 Miss., 736; State *v.* Sutterfield, 54 Mo., 391; State *v.* Bassfield, 67 Mo., 331; People *v.* Brown, 11 Ill., 478. By an act of the Legislature of South Carolina, incorporating the town of Florence, it was provided that the town might issue bonds for internal improvements upon a vote of the people approving it. All persons owning $100 worth of taxable property in the town could vote and were entitled to one vote for each $100. The court held that unless a majority of the taxable property was voted the election was void. Wilson *v.* Town Council of Florence, 39 S. C., 397; and Id., 40 S. C., 290. Where the Constitution provides that certain classes of municipal bonds shall not be issued unless a majority of the "qualified voters of the town" shall vote therefor, *held*, that a statute providing for the issue of such bonds if a majority of the persons voting shall vote for such issue was unconstitutional. Duke *v.* Brown, 96 N. C., 127. As to the meaning of the phrases "qualified voters," "majority of the voters of the town," and other similar phrases, see note to case of McDowell *v.* Rutherford Const. Co., 17 Am. & Eng. Corp. Cases, 412].

§ 211. The case of *Reed v. Corden*[1] presented the important question whether a State has the constitutional power to provide that, in case of a tie between two candidates for Representative in Congress, the question which of the two shall be the Representative may be determined by lot. It was held that the statute of Maryland authorizing the Governor and Council, in such a case, to proceed to decide by lot which of the two shall receive the certificate and be entitled to the seat was unwarranted by the Constitution, and that the record of such a decision was not admissible in evidence.[2] This decision was put upon two grounds:

1. That the House of Representatives is composed of members chosen every second year by the *people* of the United States, and that the law of Maryland in effect gave the choice to the Governor and Council of that State, in case of a tie; and

2. That the House being by the Constitution "the judge of the election, returns and qualifications of its own mem-

[1] Cl. & H., 353.

[2] [It has been held by the Supreme Court of Indiana that a statute of that State (Sec. 4736, R. S. 1881) which provides that, where an election results in a tie vote for opposing candidates, the judges of election shall determine by lot the person entitled to the office, is not in conflict with the constitutional provision that all elections shall be by ballot, and is valid (Johnson *v.* State, 128 Ind., 16); and that election boards may be compelled by mandate to re-assemble and determine by lot which of the candidates for a township office who have received an equal number of votes shall be entitled to the office. Kimmerer *v.* State, 129 Ind., 589. After several inaffectual attempts to elect a temporary chairman of a nominating convention, a like number of votes being cast for the opposing candidates, the vote of one of the delegates was challenged on the ground that the vote in the caucus at which he claimed to have been elected was a tie, and that thereupon the matter was determined by the contesting delegates as follows: A bystander drew from his pocket a handful of coins, the candidates made their choice of "odd" or "even," and a counting of the coins resulted in favor of the sitting delegate. The chair thereupon appointed a committee on credentials, which reported that the sitting delegate was not entitled to a seat in the convention. *Held*, that the appointment of such committee was proper and their determination sustained by authority. Beck *v.* Board of Election Commissioners, 103 Mich., 192.]

bers," it can never sanction the doctrine that any State can confer upon any officer or tribunal power to decide a question of this kind. The committee seemed to be of opinion that in case of a tie there is no election by the people, and no certificate of election should be given by the State authorities to any one. It was held that the Representative must be chosen by the people; and that if an equal number of votes are given to each candidate there is no choice, and the only remedy is in a new election.

§ 212. The State of Illinois has provided by a provision of its Constitution for minority representation in the State Legislature. This is accomplished by what is known as cumulative voting, the provision being as follows:

"In all elections of Representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are Representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit; and the candidates highest in votes shall be declared elected."[1]

In New York and Ohio an attempt has been made to provide for minority representation by statute, in the absence of express constitutional authority; but in the former State the constitutionality of the act has been seriously questioned, and in the latter altogether denied.[2] In the Ohio case the rule is laid down that, where an office is to be filled by an election, the election must conform to the requirements of the Constitution, one of which is declared to be that each elector of the district is entitled to vote for a candidate for each office to be filled at the election. It was accordingly held that a statute of that State providing for the election of four members of a police board at the same election, but which denied to an elector the right to vote for more than two members of such board, was in conflict with the Constitution of Ohio and void.

A somewhat different question is presented by a statute which permits without requiring a voter to concentrate more

[1] Constitution of Illinois, 1870, Art. 4, Secs. 7, 8.

[2] People *v.* Kenney, 96 N. Y., 294; People *v.* Cissey, 91 Id., 616; State *v.* Constantine, 42 Ohio St., 437.

than one vote upon a less number of candidates than the whole number to be chosen; but it is believed that the same principle is involved; for in either case the result is to permit the minority of the voters to choose part of the officers to be elected. If this be unconstitutional in the one form it is likewise so in the other. It would seem, therefore, that minority representation and cumulative voting can be provided for only by constitutional provision.[1]

[1] See note to case of State *v.* Constantine, 9 Am. & Eng. Corp. Cas., 39 to 42. See, also, People *v.* Perly, 80 N. Y., 624.

[GENERAL NOTE ON SUBJECT OF MINORITY REPRESENTATION.—It is a very just criticism of the present system of elections that it does not afford to the minority a right to participate in the administration of the public affairs, nor a voice in declaring the policy to be adopted as representative of the community in which the election is held.

This obvious defect in the elective or popular scheme of government has not yet been corrected. Numerous attempts have been made to secure to minorities their just and proportionate representation, and various schemes have been devised whereby this result could be accomplished.

These schemes for voting have been enumerated as follows:

1st. The *limited* vote, *i. e.*, the vote for a less number than there are places, as for two when three persons are to be chosen. This method was introduced into the bill of 1867 for reforming representation in England.

2d. The *cumulative* vote, where the voter is allowed to cast as many votes as there are persons to be elected, and to distribute them among the various candidates as he may desire. This plan is especially applicable where the practice of voting by general tickets prevails.

3d. The election by lists, a plan originated by Mr. Gilpin, and said to work satisfactorily in Switzerland. By this plan each party puts in nomination a complete ticket, and each voter has the right to cast one ballot. Upon ascertaining the total number of ballots cast, that sum is divided by the number of places to be filled, and each ticket secures places for its candidates in proportion to the number of votes cast by it, taking the persons elected from the head of the tickets. This scheme is said to be the most practical of any yet devised.

4th. *Preferential* voting, a plan devised by Mr. Thomas Hare, and advocated by him in a book upon the subject published in 1859. This plan is too complicated and intricate to be useful in popular elections, and its theory need not be explained here.

5th. *Substitute* voting. By this method the number of votes necessary to constitute what is known as the "electoral quota" is first

§ 213. A statute of New York provided that it should not be lawful for any person "*to contribute money for any purpose intended to promote the election of any particular*

ascertained. This electoral quota is arrived at by dividing the number of votes polled by the number of persons to be elected. This being known, candidates may cast surplus votes, or those over the electoral quota, and insufficient votes, or those under, and may thus fill up the places which have not been filled by the voting of the electors.

6th. *Proxy* voting, by which a representative may cast as many votes as he receives multiples of the electoral quota. Lieber's Civil Liberty, p. 177, note.

In several States efforts have been made to put some of the plans in operation, principally to secure minority representation in State Legislatures, but with very little success. This failure has been due partly to inherent deficiencies and objections, which are found in every one of the schemes outlined, and partly to the irregularity and impropriety of the proceedings taken to incorporate the systems into the State election laws where their introduction would be repugnant to the existing Constitution.

As instances of such failures due to this second reason, three cases may be cited. In Ohio an act was passed authorizing and providing for elections under the restrictive plan. That law was declared by the Supreme Court to be unconstitutional, it being held that every elector had the right to vote for every candidate or person to fill the offices provided by law to be elected by the vote of the elector, and a law which denied an elector the right to vote for more than two out of four persons to be elected took away from him a substantial right guaranteed by the Constitution. State *v.* Constantine, 42 Ohio St., 437.

A second instance is found in the case of Maynard *v.* Board of District Canvassers, 84 Mich., 228. This case arose under an act of the Legislature of Michigan providing for the election of members of that body by the "cumulative" method of voting. The act was declared unconstitutional by the Supreme Court of the State, which ruled that, when the Constitution declared that a person possessing the prescribed qualifications of an elector should be entitled to vote at all elections, it prohibited by implication any elector from casting more than one vote for any candidate for office, as such had been the practical construction of the Constitution ever since its adoption.

Again, in 1891 the Legislature of New Jersey passed an act providing for the election of members of the assembly in assembly districts, allowing each voter to vote for but one member instead of voting for all. This was also held unconstitutional. State *v.* Wrightson, 56 N. J. L., 126.

In Pennsylvania, however, the courts seem to have adopted a different rule of construction. The late case of Commonwealth *v.* Reeder, 33 L. R. A., 141 (Pa.), is one upholding such a restriction placed upon the

person or ticket, except for defraying the expenses of printing, and the circulation of votes, hand-bills and other papers, previous to any such election." Under this statute it was

voter. The law there in question provided that one might vote for six out of seven officers to be elected, and this was held to be no violation of the constitutional rights of the elector in that State. The views expressed in this decision, however, were not concurred in by the full court, and a strong dissenting opinion was written by Williams, J., which was approved by Chief Justice Sterrett.

In Illinois a provision in an act for the election of trustees of a sanitary district, that the voter may vote for as many candidates as there are trustees to be elected, or may cumulate his vote on a smaller number, is held not in conflict with the Constitution of that State (Art. 7, Sec. 1), which provides that "every male citizen of the United States, over twenty-one years of age and possessing certain qualifications, shall be entitled to vote at all elections," as it does not make cumulative voting compulsory and leaves voters free to vote for the whole number of candidates to be elected if they desire to do so. People *v.* Nelson, 133 Ill., 565.

Turning now to an inspection of the schemes with regard solely to their intrinsic merits or defects, we find that they are open to objection. Most of them are too tedious and complex to be generally practicable.

Space will not permit of an extended discussion here of the several plans, but as the scheme of voting on the "cumulative" plan seems to have attracted the most interest, and has been experimented with more than any other, let us observe one result of its operation, which, when it occurs, demonstrates a fatal weakness in its theory.

This method, of course, cannot be of service when there is only one representative from a district to be elected. It reaches its greatest efficiency when there is a large number of candidates and offices and numerous divisions of public sentiment.

But take the case where an electoral district sends two representatives to the Legislature, and let us suppose that the election be made through cumulative voting. Each of the two parties nominates two candidates, and the party in the minority, by casting all of their votes for one of their candidates, secures his election. This the majority cannot prevent, and it is thus found that the majority and the minority are on a par, as far as representation is concerned, each having elected a representative.

It is the very essence of a republican form of government that the majority should rule, and this policy pervades every election held under such a form of government. In the case above put this policy is entirely thwarted. In Illinois, where this system is in use for the election of representatives to the State Legislature, the foregoing criticism

held in *Jackson* v. *Walker*[1] that a contract to pay the plaintiff $1,000 for erecting and keeping open a building known as a log cabin for the use of the Whig party during the campaign of 1840, and for the use and benefit of the candidates of that party, was void. The court held that it was not necessary to show fraud, as the statute clearly forbade the contract, by declaring that with two specified exceptions money intended to promote an election shall not be contributed.

§ 214. In *Hurley* v. *Van Wagner*,[2] however, it was held, under same statute, that an action will lie to recover compensation for services rendered to another, under a contract, in putting up and taking down a tent used by the employer as a place for holding public meetings of the friends of a particular candidate for the Presidency during a canvass preceding a Presidential election. And in this latter case the Court expressed the opinion that the ruling in *Jackson* v. *Walker* went too far, and could not be reconciled with the spirit or the letter of the statute of which it is an exposition. The

does not apply, as each district elects three representatives. Its operation in that State seems to be attended with the most beneficial results.

The cumulative method is of considerable value, also, for use in the voting of stock in corporations.

By legislative enactment in the States of Nebraska, West Virginia, Missouri and California, cumulative voting for such purpose has been expressly permitted.

These questions are ably and exhaustively discussed in Maynard *v.* Board of District Canvassers, *supra.*

As regards cumulative voting in corporations, it has been held that constitutional provisions providing for this method in corporations existing at the time the Constitution was adopted are void as to these corporations. These decisions were made on the theory that such provisions impaired the obligation of the contract between the State and the corporation, represented by the latter's charter. Hayes *v.* Commonwealth of Pennsylvania, 82 Pa. St., 518; State *v.* Green, 78 Mo., 188. See, also, Am. & Eng. Cyc. of Law, vol. 4, p. 954.]

[1] 5 Hill, 27.
[2] 28 Barb., 109.

true rule, independent of any statute, doubtless is, that all contracts entered into for the purpose of improperly or corruptly influencing the voters at an election are void, because against public policy and contrary to sound morality.

§ 215. All votes obtained by paying or agreeing to pay money, or property, or anything of value, to electors therefor, are to be rejected upon proper proof by the court or tribunal trying a case of contest.[1]

This rule rest upon principles of great public importance, which are thus stated by the Supreme Court of Wisconsin in *State* v. *Olin:*[2]

"In our form of government, where the administration of public affairs is regulated by the will of the people, or a majority of them, expressed through the ballot-box, the free exercise of the elective franchise by the qualified voters is a matter of the higest importance. The safety and perpetuity of our institutions depend upon this. It is therefore particularly important that every voter should be free from any pecuniary influence. For this reason the attempt by bribery to influence an elector in giving his vote or ballot is made an indictable offense by statute. * * * The payment or promise of money or other valuable consideration for the giving of a vote no doubt constitutes the offense of bribery or attempt to bribe within the meaning of the statute. Can a vote thus obtained in direct violation of the statute be considered a valid or legal vote? If it can, then the very object of the statute, which is that it shall not be so obtained, is defeated. We are of the opinion that such votes are illegal, and that the judge was right in directing the jury to disregard them."

§ 216. It has never been seriously doubted that a vote obtained by an offer to the voter direct of a pecuniary or other valuable consideration therefor, is a bad vote, and

[1] State *v.* Olin, 23 Wis., 327; State *v.* Purdy, 36 Id., 218; [Cowan *v.* Prowse, 93 Ky., 156].

[2] *Supra.*

should be rejected.[1] In *Dishon* v. *Smith*[2] it was held that the offer to give facilities for the public convenience of the whole county as an inducement to the people to vote for the removal of the county seat does not constitute bribery, and will not render void an election held to decide the question of such removal. This rule was re-affirmed in the case of *Hawes* v. *Miller*,[3] where it appeared that certain citizens had executed a bond obliging themselves to remove the county jail and to purchase and furnish a site for county buildings, and offering other inducements to the public, all upon condition that the county seat should be removed by vote of the people. This was held not to invalidate the election.[4] There is, however, a clear distinction between an

[1] [In Abbott *v.* Frost, 2 Bart., 594, the question arose as to the effect of giving employment to persons in the United States navy yard at Boston for the purpose of inducing them to vote for the sitting member. It was held that the votes of persons so employed, and accepting the employment with knowledge of what was expected of them, should not be counted. The committee say: The rules of law which we think should govern in the consideration of this case are embodied in the following declarations: 1. If the giving of employment to the voters immediately prior to the election was for the purpose of inducing them to vote for the contestee, and such object was in any manner made known to the voter, and he accepted or continued in such employment after obtaining such information, he thereby became a party to the transaction, accepted its terms, and the *onus* of showing that he did not carry it out in good faith is on the contestee. 2. If it be shown that an elector enters into an agreement or understanding, direct or indirect, for a consideration to vote a specified party ticket or for a particular candidate, it is fair to presume that he casts his ballot in accordance with such agreement or understanding, and, unless the contrary be made to appear, such presumption becomes conclusive. Ballots thus obtained we hold to be illegal and ought to be disregarded. To count them in the general canvass is to place them on the same footing with the votes cast by the honest, free and independent voter. To seat a member upon majorities obtained through such influences is to defeat the very object for which the statute was created. See, also, Platt *v.* Good, Smith, 650.]

[2] 10 Iowa, 212.

[3] 56 Iowa, 397.

[4] [Douglass *v.* County Commissioners, 23 Fla., 419. An election determining that a county building shall be built is not invalidated on the

election held for the purpose of locating the site for a public building, and an election held to choose a public officer to whom, for the time being, is to be confided some of the functions of government. This distinction is recognized by the Supreme Court of Iowa in *Carrothers* v. *Russell*,[1] where it is held that a candidate for public office, who, for the purpose of influencing voters, pledges himself, if elected, to pay into the treasury all the fees of the office allowed by law in excess of a certain sum annually, is guilty of offering a bribe, and that such pledge not only invalidates the votes influenced thereby, but disqualifies him to hold the office if otherwise legally elected. The same doctrine, in substance, has been laid down in Wisconsin,[2] in Missouri,[3] in New Hampshire,[4] in Indiana[5] and in Massachusetts.[6]

§ 217. The doctrine of the cases last cited, that a candidate for a public office cannot lawfully attempt to influence votes by an offer of public benefits and advantages to be granted in the event of his election, is no longer open to question. Such a transaction amounts to a sale of the office to the candidate making the most favorable offer to the public. Such a practice, receiving judicial sanction, would undoubtedly tend, as was said by the Supreme Court of New Hampshire in *Tucker* v. *Aikin*, "to divert the attention of the electors from the qualifications of candidates to the terms on which they will consent to serve, and make the choice turn upon considerations which ought not to have an influence."

ground of corruption because workingmen were urged to vote for it on the ground that it would furnish them employment. Bd. of Sup. Wayne Co. *v.* Judges Wayne Co. Ct. Court (Mich.), 64 N. W. Rep., 42.]

[1] 53 Iowa, 346.

[2] State *v.* Purdy, 36 Wis., 213.

[3] State *v.* Collier, 15 Mo., 293.

[4] Tucker *v.* Aikin, 7 N. H., 140.

[5] Hall *v.* Gavitt, 18 Ind., 390.

[6] Alvord *v.* Collins, 20 Pick., 428. And see note to State *v.* Collier, Am. Law Reg. (N. S.), vol. 18, p. 768; Neal *v.* Shinn, 49 Ark., 227, 4 S. W. Rep., 771; Wells *v.* Taylor, 3 Montana, 202; S. C., 3 Pac. Rep., 255.

§ 218. It is now well settled that a wager upon the result of an election is wholly void as being contrary to public policy, and that no action can be maintained for its recovery.[1] In a few of the older English cases actions upon wagers were allowed to be maintained.[2] In none of these early cases, however, was the question of the immoral tendency of such transactions raised or considered.[3] The more recent decisions in Great Britain show a great desire and tendency, on the part of the judges, to get rid of the rule thus inadvertently adopted by their predecessors, and they show how much the more enlightened jurists of a later period have been trammeled by it. They have endeavored to make a distinction between those wagers the subject-matter of which is perfectly innocent, and those in which it is not; and they seek to apply the early decisions sustaining the validity of a wager to those cases where the subject-matter is of the former kind. But they forget that it is the *wager* itself which is immoral, and can never be innocent, and that, therefore, the subject-matter of the bet can make no difference in its moral quality.

§ 219. But in this country the decisions are uniform, and all adverse to the validity of any bet or wager of any kind or character whatever.[4] In *Lansing* v. *Lansing*, cited in note 4, the court held that if the loser had given his negotiable note for the amount of the wager the invalidity of the contract was a good defense against the indorsee of the note. But in that case the indorsee of the note took it with notice, and the question as to the rights of an innocent purchaser of such paper is not considered. Where the amount of the wager has been deposited with a third party as stakeholder, an

[1] Loyal *v.* Myers, 1 Bailey, 486.

[2] Andrews *v.* Herne, 1 Lev., 33; Da Costa *v.* Jones, Cowp., 729; Lord March *v.* Pegot, 5 Burr., 2802.

[3] 16 East, 158; Id., 162.

[4] Bunn *v.* Riker, 4 Johns., 426; Lansing *v.* Lansing, 8 Id., 454; Vischer *v.* Yates, 11 Id., 23; Smyth *v.* McMasters, 2 P. A. Browne, 182.

action will lie against him by the loser to recover back the amount of the deposit.[1]

In Illinois it is held that, if a negotiable note be given for an illegal wager, the illegality of the consideration is no defense to a suit by an indorsee for value.[2] And there seems to be no reason to doubt the correctness of these decisions.

§ 220. The principles of public policy, which forbid and make void all contracts tending to the corruption of elections held under authority of law, apply equally to what are called primary or nominating elections, or conventions, although these are mere voluntary proceedings of the voters of certain political parties. It is quite as much against public policy to permit contracts to be made for the purpose of corrupting a convention or primary election as to permit the same thing to be done to corrupt voters at a regular election. The buying and selling of votes or of influence at a nominating convention or election is quite as injurious to the public, and quite as abhorrent to the law, as the same corrupt practices when employed to influence an election provided for by statute. The too common practice of providing liquors to be used to influence voters in a convention, primary election, or regular legal election, is a practice which the law will not tolerate. A contract made for such a purpose is utterly void.[3]

§ 221. In *Nichols* v. *Mudgett*[4] the following were the facts: The defendant being indebted to plaintiff, who was

[1] Vischer *v.* Yates, *supra.* See, also, Johnson *v.* Russell, 37 Cal., 670; Reynolds *v.* McKinney, 4 Kan., 94; Jennings *v.* Reynolds, Id., 101.

[2] Adams *v.* Woodbridge, 4 Ill., 255; Sherlty *v.* Howard, 3 Chic. Leg. News, 230; Gregory *v.* King, Id., 349.

[3] Strasberger *v.* Burk (Md., 1874), 13 Am. Law Reg. (N. S.), 607; Nichols *v.* Mudgett, 22 Vt., 546; Duke *v.* Asbee, 11 Ired., 112. And upon the general question of the invalidity of contracts made in violation of the established policy of the law, see Spaulding *v.* Preston, 21 Vt., 9. In Pennsylvania it is held that an act of the General Assembly providing for the punishment of frauds and bribery at nominating elections and conventions is constitutional and valid. Leonard *v.* Commonwealth, 112 Pa. St., 607, 16 Am. & Eng. Corp. Cas., 136.

[4] *Supra.*

a candidate for town representative, the parties agreed that the former should use his influence for the plaintiff's election, and do what he could for that purpose, and that, if the plaintiff was elected, that should be a satisfaction of his claim. Nothing was specifically said about the defendant's voting for the plaintiff, but he did vote for him, and would not have done so, nor favored his election, but for this agreement. The plaintiff was elected. *Held*, that the agreement was void, and constituted no bar to a recovery upon the demand. And in *Meacham* v. *Dow*[1] it was held that a note given in consideration of the payee's agreement to resign a public office in favor of the maker, and to use his influence in favor of the latter's appointment as his successor, was void in the hands of the payee. An agreement between two voters to "pair off" and both abstain from voting is void, and the officers of the election cannot refuse to receive the vote of one of the two on account of such an agreement.

§ 222. In a contested election case, very little attention should, ordinarily, be paid to mere irregularities in the proceedings of the election officers which do not affect the real merits of the case.[2] Thus, it was held by the Court of Appeals of New York, in *People* v. *Cook*,[3] that where the evidence goes only to show an irregularity without fraudulent intent, and by which nobody is injured, the Court is not bound even to submit it to the jury as an open question.

[1] 32 Vt., 721.

[2] [Stockton *v.* Powell, 29 Fla., 1; State *v.* O'Day, 69 Iowa, 368; State *v.* Nicholson, 102 N. C., 465; Behrensmeyer *v.* Kreitz, 135 Ill., 591; Ackerman *v.* Haenck, 147 Ill., 514; Soper *v.* County of Sibley, 46 Minn., 274; San Louis Obispo Co. *v.* White, 91 Cal., 432; Lehlbach *v.* Haynes, 54 N. J. L., 77; Hannah *v.* Shepherd (Tex. Civ. App.), 25 S. W. Rep., 137; Stemper *v.* Higgins, 38 Minn., 222; Dial *v.* Hollandsworth, 39 W. Va., 1; Sprague *v.* Norway, 31 Cal., 173; State *v.* Weed, 60 Conn., 18; Grelle *v.* Pinney, 62 Conn., 478; Fowler *v.* State, 68 Tex., 30; Williams *v.* Shoudy, 12 Wash., 362; Curtin *v.* Yocum, 1 Ells., 416; Sterrett *v.* McAdams (Ky.), 34 S. W. Rep., 903; Young *v.* Simpson (Colo.), 42 Pac. Rep., 666; Houston *v.* Steele (Ky.), 34 S. W. Rep., 6; Tebbe *v.* Smith, 108 Cal., 101; People *v.* Wood, 148 N. Y., 142.]

[3] 8 N. Y., 67.

The question in that case was whether ballots cast for Benjamin C. Welch, Jr. and Benjamin Welch should be counted for Benjamin Welch, Jr. Evidence was admitted to show the voters' intention, and it was such as to leave no room for doubt that all these ballots were intended for the latter, and the court below instructed the jury to find accordingly. This rule was affirmed in the Appellate Court.

§ 223. And in *Borleau's Case*, tried before the Court of Common Pleas of Philadelphia, it appeared that in the afternoon of the day of election one of the clerks of the election became so much intoxicated as to be unfit for his duties, and, at the request of the inspectors, one Samuel C. Coxe acted as clerk for the balance of the day, and until about 3 o'clock in the morning of the succeeding day, when the clerk, having recovered from his debauch, appeared and signed the returns. Mr. Coxe was not sworn and was a candidate for assessor at this election. *Held*, that these facts were not such as should induce the Court to set the election aside, and the ground of the decision was, that the evidence did not disclose any bad faith on the part of the officers, nor any fraud.[1]

§ 224. In the same case it further appeared that one John Haines, a candidate for judge, was occasionally in the room where the election was held during its progress and after the polls closed; that he opened a few of the tickets, but, being admonished, desisted. Several witnesses testified to his handling tickets and to his intermeddling, and it is clear that his conduct was improper in the extreme. But the Court say that "it has not been pretended that this election is in any particular tainted with actual fraud; no evidence has been adduced either showing legal votes to have been rejected, or illegal votes received; the election seems to have been honestly conducted," and for these reasons the court declined to set it aside.

§ 225. While it is well settled that mere irregularity on the part of election officers, or their omission to observe some

[1] 2 Pars., 503; Bright. Elec. Cas., 268.

merely directory provisions of the law, will not vitiate the poll, there has been some confusion and conflict as to what we are to understand by irregularities, and as to what provisions of statute are to be regarded as directory and what mandatory.[1] A few remarks upon this subject will be proper in this connection. The language of the statute to be construed must be consulted and followed. If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the Legislature. But if, as in most cases, that statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.[2]

§ 226. Thus, it has been held in Missouri that a statute making it the duty of judges of election to cause to be placed on each ballot the number corresponding with the number of the voter offering the same, and providing that no ballot not numbered shall be counted, is mandatory and must be enforced.[3] Although this doctrine may sometimes result in very great hardship and injustice by depriving the voters of their rights by reason of the negligence or misconduct of the officers of election, it is nevertheless difficult to

[1] [Votes cast by qualified voters at a polling place outside the district in which they should have voted is at most an irregularity. Peard *v.* State, 34 Neb., 372.]

[2] See Barnes *v.* Supervisors, 51 Miss., 305; Wheelock's Case, 82 Pa. St., 297; [Allen *v.* Glynn, 17 Colo., 338, 29 Pac. Rep., 670; Parven *v.* Wineberg, 130 Ind., 561; Bowers *v.* Smith, 111 Mo., 45; State *v.* Van Camp, 36 Neb., 91; State *v.* Russell, 34 Neb., 116. *Contra*, Doores *v.* Varnon, 94 Ky., 507].

[3] Ledbetter *v.* Hall, 62 Mo., 422; West *v.* Ross, 53 Mo., 350.

see how any different construction could have been placed upon such a statute. Statutes which simply direct the judges of election to number the ballots, without declaring what consequences shall follow if this be not done, may well be held directory only;[1] but where the statute both gives the directions and declares what the consequences of neglecting their observance shall be, there is no room for construction. Such statutes are intended to prevent fraudulent voting; and if the Legislature is of the opinion that the general good to be derived from their strict enforcement will more than counterbalance the evils resulting from the occasional throwing out of votes honestly cast, the courts cannot reconsider the mere question of policy. The legislative will upon such a subject, when clearly expressed, must prevail.[2]

§ 227. The rule of construction to be gathered from all the authorities was thus stated in *Jones* v. *The State*,[3] and approved in *Gilleland* v. *Schuyler:*[4] "Unless a fair consideration of the statute shows that the Legislature intended compliance with the provisions in relation to the manner to be essential to the validity of the proceedings, it is to be regarded as directory merely."[5] And in the latter case the court said: "Questions affecting the purity of elections are in this country of vital importance. Upon them hangs the experiment of self-government. The problem is to secure, first, to the voter a free, untrammeled vote; and secondly, a correct record and return of the vote. It is mainly with

[1] [People *v.* Bidleman, 69 Hun, 596; State *v.* Thayer, 31 Neb., 82.]

[2] [Major *v.* Barker (Ky.), 35 S. W. Rep., 543; Slaymaker *v.* Phillips (Wyo.), 42 Pac. Rep., 1049; State *v.* Connor, 86 Tex., 133; Russell *v.* McDowell, 83 Cal., 70. The statutes of a State relating to the manner of stamping a ballot are mandatory and not merely directory. Sego *v.* Stoddard, 136 Ind., 297. The presumption of the law is that election officers have discharged their duties, and if the statutes require them to number the ballots cast, and ballots are found in the box which are not numbered, the presumption will be that they are not legally cast. Kreitz *v.* Behrensmeyer, 125 Ill., 141.]

[3] 1 Kan., 273, 279.

[4] 9 Id., 569.

[5] [Blankenship *v.* Israel, 132 Ill., 514; Hodge *v.* Linn, 100 Ill., 397.]

reference to these two results that the rules for conducting elections are prescribed by the legislative power. But these rules are only means. The end is the freedom and purity of the election. To hold these rules all mandatory and essential to a valid election is to subordinate substance to form, the end to the means. Yet, on the other hand, to permit a total neglect of all the requirements of the statute, and still sustain the proceedings, is to forego the lessons of experience and invite a disregard of all those provisions which the wisdom of years have found conducive to the purity of the ballot-box.[1] Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officials, should not be permitted to disfranchise a district. Yet rules and uniformity of procedure are as essential to procure truth and exactness in elections as in anything else. Irregularities invite and conceal fraud."

If we keep in view these general principles, and bear in mind that irregularities are generally to be disregarded, unless the statute expressly declares that they shall be fatal to the election, or unless they are such in themselves as to change or render doubtful the result, we shall find no great difficulty in determining each case as it arises under the various statutes of the several States.[2]

[1] [Provisions of registry law mandatory. Appeal of Cusick, 136 Pa. St., 459.]

[2] This doctrine is illustrated by the case of Fowler *v.* State, 68 Tex., 30, 3 S. W. Rep., 255. It is here held that a failure to comply with the law in such matters as the following will not necessarily invalidate the election:

1. No tally-sheets or poll-lists being kept or returned.
2. Where the election returns contain no more than a mere statement of the result of the voting.
3. Ballot-box containing the tickets being sent to the county judge and clerk through the United States mail instead of by the presiding manager of the election.
4. The returns not being made in triplicate.
5. The ballot-box used not being a proper one.

Such irregularities as these will not vitiate the election provided that it is made to appear that the neglect or misconduct of the officers has

§ 228. Those provisions of a statute which affect the time and place of the election, and the legal qualifications of the electors, are generally of the substance of the election, while those touching the recording and return of the legal votes received, and the mode and manner of conducting the mere details of the election, are directory.[1] The principle is that irregularities which do not tend to affect results are not to defeat the will of the majority; the will of the majority is to be respected even when irregularly expressed.[2] The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents.[3]

§ 229. This doctrine was again recognized and enforced in the case of *Arnold* v. *Lea*,[4] a case which affords an apt

not prevented an honest and fair election. For an example of a mandatory statute see West *v.* Ross, 53 Mo., 350. See, also, Secs. 225, 228, 282. [The removal of the ballot-box from the place where the election was held before the vote was counted, such removal being in violation of a statute, will be sufficient ground for rejecting the return. Spencer *v.* Morey, Smith, 437.]

[1] People *v.* Shermerhorn, 19 Barb., 540. [A statute prescribing the establishment of precincts at the regular meeting of the county commissioners held immediately preceding the election is directory rather than mandatory, and a designation of precincts by the commissioners at another time will not invalidate the election. Botkin *v.* McGinnis, Mob., 377. The failure to number the ballot of a voter at an election, while an irregularity, is not of such a character as to deprive the voter of his vote. O'Hair *v.* Wilson, 124 Ill., 351.]

[2] Juker *v.* Commonwealth, 20 Pa. St., 493; Carpenter's Case, 2 Pars., 540; Morris *v.* Van Laningham, 11 Kan., 269; [State *v.* Norris, 37 Neb., 299; Adsit *v.* Secretary of State, 84 Mich., 420; People *v.* Deverman, 83 Hun, 181].

[3] See upon this general subject the following authorities: Piatt *v.* People, 29 Ill., 54; Hardenburgh *v.* Farmers' & Merchants' Bank, 2 Green (N. Y.), 68; Day *v.* Kent, 1 Oreg., 123; Taylor *v.* Taylor, 20 Minn., 107; People *v.* Bates, 11 Mich., 362; McKinney *v.* O'Connor, 26 Tex., 5; Jones *v.* State, 1 Kan., 273, 279; Gorham *v.* Campbell, 2 Cal., 135; Sprague *v.* Norway, 31 Cal., 173; Keller *v.* Chapman, 34 Cal., 635; Bright. Elec. Cas., 448, 449, 450; [Gilkey *v.* McKinley, 75 Wis., 543, 44 N. W. Rep., 762].

[4] Cl. & H., 601.

illustration of the rule. In this case it appeared that at one of the voting places the inspectors who were required by law "to take charge of the ballot-box," between the adjournment on the first and the opening of the polls on the second day of the election, delivered it to the sheriff, and directed him to lock it up in some place where it would be safe. The sheriff locked the box up in a trunk and left the trunk in a store-house which was also locked. It was clear from the proof that the box was not tampered with, and that no person had been injured by the irregularity, and the House, therefore, refused to reject the vote.

It also appeared that, at one of the precincts, "a large *gourd* was made use of by the inspectors for the reception of the ballots, and upon the closing of the polls on the evening of the first day the gourd was carefully stopped and tied up in a handkerchief, and delivered to one of the inspectors for safe keeping; that the same was taken by him to his home and locked up until next morning, and then returned and used the second day." There was no evidence of fraud or mismanagement in any other way. This was in clear violation of the statute, which required that the ballots be "placed in a box, which shall be locked or otherwise well secured." It also appeared that some of the officers of the election were not sworn as the law required. But the committee were of the opinion that, "notwithstanding some irregularities in conducting the election in a number of precincts," it was "managed by the officers appointed to hold the same, honestly and fairly and impartially, and according to the spirit and meaning of the law of the State of Tennessee, if not strictly within the letter of the statute, and that a fair expression of public opinion has been obtained at the several places referred to," and for these reasons the committee reported against excluding the vote of these precincts, and the House adopted the report.

§ 230. Under the laws of some of the States it is necessary to keep separate boxes for the reception of ballots for State officers and for members of Congress. In cases where

by mistake ballots have been dropped into the wrong box, as, for instance, ballots for a member of Congress placed in the box for State officers, some question has been made as to the right of the judges of the election to correct such mistake by removing such ballots from the wrong box to the right one. In the lower House of Congress it has been held that ballots once deposited in the wrong box were lost and could not be changed to the right one either by the voter or the officers of the election.[1] But the same question arose again in the House in the more recent case of *Newland v. Graham*.[2] In that case one of the judges of the election testified that he and the other judges, finding that a few ballots had been by mistake placed in the wrong box, had them changed. There was no doubt as to the mistake, nor that the judges acted fairly and in good faith. The committee submitted to the House the question whether these ballots should be counted — at the same time, however, intimating very clearly their opinion that they should be. In this case the recommendation of the committee was not adopted by the House, or at least was adopted only in part, the seat being declared vacant while the committee recommended the seating of the contestant.[3]

§ 231. The question, therefore, being unsettled by the decisions of the House, let us inquire what is the safe and sound rule upon the subject. A little reflection will satisfy any one that the doctrine of the report in *Washburn* v. *Ripley*[4] is open to grave objections. In the first place it puts

[1] Washburn *v.* Ripley, Cl. & H., 679.

[2] 1 Bart., 5.

[3] [Ballots cast at an annual town meeting containing only the names of candidates for excise commissioners, separate from the ballots containing the names of the candidates for the other town offices, and deposited in a different box from that in which the ballots for the other town officers were deposited, should not be counted under the ballot law of 1890 (New York), which required that the names of all candidates for town offices, including the commissioners of excise, should be upon one ballot, and that all ballots cast should be deposited in one box. Montgomery *v.* O'Dell, 67 Hun, 169.]

[4] *Supra.*

it within the power of a corrupt election officer to deprive the voter of his ballot, by *designedly* placing it in the wrong box,[1] and, in the second place, it accomplishes the same result in case the ballot is placed in the wrong box by accident or mistake. It is a rule well grounded in justice and reason, and well established by authority and precedent, that the voter shall not be deprived of his rights as an elector, either by the fraud or the mistake of the election officer, if it is possible to prevent it.[2] It does not appear from the report in *Washburn* v. *Ripley* that any proof was offered to establish the mistake, beyond the simple fact that the ballots were found in the wrong box. It is evident that the proof should go farther than this. It should be shown that the ballots were handed in by legal voters, and deposited in the wrong box by the mistake, accident or fraud of the officer, and any facts and circumstances tending to establish or to disprove this proposition should be brought out in evidence.

§ 232. It is safe to say that a mistake should always be corrected, if it can be corrected, and, therefore, the purpose of the party seeking to get the benefit of ballots cast into the wrong box should be to prove that they were good and honest ballots, and were placed there by mistake or without his fault. Wherever this is clearly shown, the mistake may be corrected, if not by the officers of election, at least by the tribunal trying the contest; but if it is not a clear case of mistake, or if there is any appearance of fraud on the part of the voter, the ballot should be rejected. In other words, the party who, in case of a contest, claims that ballots found in the wrong box should be counted, should be put to the proof that such ballots were fairly and honestly cast by legal voters. It is unjust that the voter should be disfranchised because the officer receiving his ballot deposited it in the wrong box. In determining this and similar questions, in cases of contested elections, it should be kept constantly in mind that the ultimate purpose of the proceeding is to

[1] [Pennington *v.* Hare, 60 Minn., 146.]

[2] [Moyer *v.* Van de Venter, 12 Wash., 377.]

ascertain and give expression to the will of the majority, as expressed through the ballot-box and according to law. Rules should be adopted and construed to this end, and to this end only.

§ 233. The view here expressed is fully confirmed by the decision of the Supreme Court of Michigan in *People v. Bates*.[1] In that case it was held that an elector is not to be deprived of his vote either by the mistake or fraud of an inspector in depositing it in the wrong box, if the intention of the voter can be ascertained with reasonable certainty.[2] Nor should ballots be rejected because of being put in the wrong box by the honest mistake of the voters themselves.[3] In that case a State and city election were both held at the same time and place, under the charge of the same officers, and seven ballots for city officers were found at the closing of the poll in the State box. The circumstances of the case made it, in the opinion of the court, reasonably certain that these ballots were in good faith put in by electors, and they were accordingly counted.

§ 234. Inspectors of election have no authority, on the assertion of one who claims to have voted by mistake in the wrong precinct, to withdraw from the ballot-box and destroy a ballot which he identifies as the one or similar to the one he had voted. The officers of election have no control over ballots once deposited which will enable them to take any such action; and if they, under a mistaken idea of their authority, withdraw and destroy a ballot supposed to have been deposited by mistake, the person who claims to have voted such ballot cannot vote at the same election at another place.[4]

§ 235. It sometimes happens that the officers of election, though acting in good faith, commit errors which will vitiate the election. Thus, if they have adopted an erroneous rule

[1] 11 Mich., 362.

[2] [The same view adopted in State *v.* Horan, 85 Wis., 94.]

[3] [Peard *v.* State, 34 Neb., 372.]

[4] Harbaugh *v.* Cicott, 33 Mich., 241.

in regard to the qualifications of voters, by which legal votes were excluded, or illegal votes admitted, in numbers sufficient to change or to render doubtful the result, the election is void, unless there is proof upon which the poll can be purged of illegal votes and the true result shown.[1] And in such a case, if the erroneous rule affects a class of voters, and it has become generally known to the persons who are excluded by it, they may submit to it, without waiving any rights, although they do not present themselves at the polls and offer their ballots. They have the right to take notice of the decision of the board in other cases precisely like their own. To require each voter belonging to a class of excluded voters to go through the form of presenting his ballot, and having a separate ruling in each case, would be an idle and useless formality. We are to look at the substance and not the formality.[2]

§ 236. In accordance with the rule that the errors of a returning officer shall not prejudice the rights of innocent parties, it has been held that where it was the duty of the presiding officer to return the votes *sealed up*, a return of them *unsealed*, in the absence of any proof or suspicion of fraud, is good. Also, that where the statute prescribes the form of a certificate of the votes given to be executed by an officer of the election, it is sufficient if the certificate is substantially according to such form, and a literal following of the form is not required.[3] Also, that if the presiding offi-

[1] [Where a village and a town in which it is situated are separate and independent municipalities, the votes of the villagers, to be legal, must be cast at the proper polling place of the village, and not at that of the town, even though the places are near together, and by mistake of the officers no separate election is held at the village polling place. State *v.* Alder, 87 Wis., 554.]

[2] § 276.

[3] [Stinson *v.* Sweeney, 17 Nev., 309. Where the election officers of a township were furnished by the county clerk with official ballots printed on white paper, and also with sample ballots printed on colored paper, in a separate package, and where by mistake the sample ballots were used by all the voters of that township, and the official

cer, by mistake, insert the wrong name in his return of persons voted for, the error may be corrected.[1] And in the same case it was held that votes fairly given, and not returned at all, may be proven and allowed.[2]

§ 237. The same principle was recognized and enforced by the House of Representatives of the United States in *Root* v. *Adams*,[3] where it was held that the error of a clerk in incorrectly spelling the name of one of the candidates in making the return of the election should be corrected by the House as soon as ascertained. And when, by such correction, it was made apparent that the contestant had a majority of the legal votes, he was admitted to the seat.

§ 238. And in *Guyon* v. *Sage*[4] the House corrected a mistake in the inspectors' return, by which the word "junior" was omitted when it ought to have been inserted. There are, of course, two kinds of errors and mistakes, which may occur in making up the returns of an election, viz., such as may be corrected from what appears upon the face of the record, without a resort to extrinsic evidence, and such as cannot be so corrected. In the case of a mistake of the former kind, it may be corrected by the court or tribunal trying the contest, as soon as discovered; but if a mistake occur which cannot be corrected by the record — that is to say, one which is not apparent upon the face of the record,— evidence *aliunde* is admissible, and should always be resorted to to correct it, and to establish the very truth of the matter.

§ 239. A statute of Kentucky required all votes to be given in the *presence* of the high sheriff of the county or his

ballots on white paper were all returned unused by the judges of election, and the election in such township was conducted regularly in every other respect, and the ballots used by the electors of all political parties were of the same color, *held*, that such ballots were rightly counted. Boyd *v.* Mills, 53 Kan., 594.]

[1] Mallary *v.* Merrill, Cl. & H., 329.

[2] See, also, Colden v. Sharpe, Cl. & H., 369.

[3] Cl. & H., 271.

[4] Cl. & H., 348.

deputy. In *Letcher* v. *Moore*[1] it appeared that at one of the polls both the high sheriff and his deputy were absent for several hours. The sheriff had been called away by sickness in his family, and after he left, and before the arrival of his deputy, a number of votes were cast by legal voters. The only objection to these votes was that they were not given in the presence of the sheriff or his deputy. A majority of the committee reported in favor of rejecting these votes, but the House, upon principles perfectly sound, reversed this decision, and ordered the votes to be counted. The House in the same case and upon similar grounds overruled the decision of the committee rejecting certain votes, otherwise legal, for the reason that they were cast while one of the judges of the election was not present, and while one Moses Grant was acting under an illegal appointment by the sheriff.

§ 240. An election will not be held void and set aside on the ground that the mere police regulations of the election law under which it was held were unconstitutional. The citizens possess the prerogative of voting, and the Legislature cannot take that right away by encompassing an election law with unconstitutional provisions. If the voters think proper to go forward and vote under a defective law, those who were candidates ought to be the last to complain when the result has been affected by neither the unconstitutionality of the law, fraud, error nor collusion.[2] But, of course, where, by reason of the enforcement of unconstitutional and void regulations, even of a police character, the result is affected, the rule is different; and in such a case the election cannot stand.

§ 241. A statute of Pennsylvania provides that upon the petition of at least five citizens of the county, stating under oath that frauds are apprehended in any election district of such county, the Court of Common Pleas may appoint two judicious, sober and intelligent citizens of the county to act

[1] Cl. & H., 843.

[2] Andrews *v.* Lancier, 13 La. Ann., 301.

as overseers of said election, said overseers to have the right to be present with the officers of the election during the whole time the same is held, the votes counted and the returns made out and signed by the election officers. They are to keep a list of voters, if they see proper, to challenge voters, and generally to aid in preventing or detecting frauds. The statute further provides that if the officers of the election "shall refuse to permit said overseers to be present and perform their duties as aforesaid, or if they shall be driven away from the polls by violence or intimidation, all the votes polled at such election district may be rejected by any tribunal trying a contest under said election." In *Re Duffy*[1] it was held that where overseers duly appointed under this statute were not permitted to serve, but were driven away by threats and intimidation, there is necessarily such a violent presumption of fraud that, in the absence of a perfect showing of legality, fairness and regularity, the whole poll should be invalidated. "In the absence of any improper conduct on the part of overseers appointed by the Court in conformity with plain statutory requirement," says the Court in that case, "we can hardly conceive of an excuse for not permitting them to serve, or for driving them away, which ought to find favor or apology."

§ 242. In the case of *Duffy*, *supra*, the Court laid down the rule that incompetency, inefficiency, and a reckless disregard of essential requirements of the law on the part of officers conducting an election, to such an extent as that their acts become unreliable, must of necessity work the same result as actual fraud. No doubt this is so, for it may be regarded as a fundamental principle of the law of elections that whatever renders the returns or certificates of election officers unreliable, or which, in other words, destroys their value as evidence, is sufficient to set them aside and to make it necessary to prove the fairness and legality of the election by other evidence. Speaking of this rule, however, the Court, in the case just cited, well says: "While this is

[1] 4 Brewst., 531.

the only safe and true doctrine, still, a construction might be given to the statutes relating to elections so strict as to foster and encourage fraud, rather than to crush it and stamp it out."[1]

§ 243. The opinion of the Judges of the Supreme Court of Maine,[2] in answer to questions submitted by the Governor, growing out of the election and return of members of the Legislature of that State, is important as illustrating the doctrine that statutes regulating elections are to be construed, if possible, so as to give full effect to the will of the electors as expressed by their ballots. The following, among other propositions, were, in substance, laid down by the judges:

1. If it appears to the House of Representatives that there was an election of Representatives from any district, in fact, they should admit the persons elected to their seats, though no return thereof was made to the Secretary of State. The Representative is not to be deprived of his rights because election officers have neglected their duty.

2. The Constitution of Maine calls for a return that is regular in essential forms, and which truly represents the facts to be described by it; but much of the constitutional requirement is directory merely. It does not aim at depriving the people of their right of suffrage or of their right of representation for formal errors, but aims at avoiding such a result. The object of the constitutional provisions respecting elections is to furnish as many safeguards as may be against failure, either through fraud or mistake, correctly to ascertain and declare the will of the people as expressed in the choice of their officers and legislators.

3. A statute which permits the correction of an error or

[1] [The return of a poll by the commissioners of an election is *prima facie* correct, and will not be reversed because of the misconduct of election officers or other persons, unless it plainly appears that such misconduct changed the result of the election. Dial *v.* Hollingsworth, 39 W. Va., 1; Minear *v.* Tucker, 39 W. Va., 627.]

[2] Justices' Opinion, 68 Me., 587.

omission in the return by reference to the duplicate statement on record must be construed as mandatory, being within the well-known rule which requires permissive words to be so construed when public rights are concerned. Such a statute imposes a duty to the public that must be performed.

4. Where the board of aldermen of a city act as the returning board to certify the result of an election in such city, the return must be made by a quorum of the board; but a quorum (or majority) of the board being present, a majority of that quorum may decide any question arising, and if the return is signed by the majority of a quorum it is sufficient. Bodies composed of a definite number of persons act by the majority of those present, provided those present constitute a majority of the whole number.[1]

5. The law of Maine provides that returns shall be made, signed and sealed up in open town meeting. Where such returns are presented to the Governor and Council, and purport to have been made, signed and sealed up as this law requires, they constitute the basis of action by the canvassing board, and they have no power, in the absence of express authority, to receive evidence to negative the facts therein set forth. The statement of the election officers is, in this respect, conclusive upon the canvassing board.

6. Where in a return the name of one person is written out with the number of votes given him opposite to his name, and other names are written under his with little dots or marks placed under the figures or words of the first candidate's vote, the returns should be counted where it appears by the letters or figures in the first line, and by ditto marks or by dots in the following lines, that the same class of candidates have received the same vote. There can be no ground for the rejection of the word "ditto" and its abbreviation "do;" and dots or marks that stand for the word "ditto" are in common use and have a perfectly well-defined

[1] 5 Dane's Abridgment, 150; 1 Dill. Mun. Corp., Secs. 216, 217.

meaning known to persons generally, and which should not be disregarded.

7. The Governor and Council may inquire into a charge that the signatures of the officers who sign a return are not genuine, or that the returns have been altered; but in considering any such charge due notice should be given to the parties in interest, and all witnesses examined should be duly sworn. The genuineness of the returns in these particulars is to be presumed, and this presumption remains until overcome by evidence.

8. Where two lists of votes are returned from the same town and materially differ from each other, the return first received must be the basis of the action of the canvassing board.

9. Upon the general subject of the spirit in which election laws should be interpreted and executed, the judges use the following strong but appropriate language:

"This government rests upon the great constitutional axiom that all power is inherent in the people. 'It is a government of the people, by the people and for the people,' and, if administered in the spirit of its founders, 'it shall not perish from the earth.' Its Constitution was formed, to use the apt expression of one whose memory is embalmed in the hearts of his countrymen, 'by a plain people,' and a 'plain people' must administer it. The ballot is the pride as well as the protection of all. It is the truest indication of the popular will. The official returns required from the municipal officers of the several plantations, towns and cities are and will be made by 'plain people,' and made, too, in the hurry and bustle and excitement of an election. They are not required to be written with the scrupulous nicety of the writing-master or with the technical accuracy of a plea in abatement. A sentence may be ungrammatical, the spelling may deviate from the recognized standard, but the returns are not brought to naught because the penmanship may be poor, the language ungrammatical, or the spelling erroneous. It is enough if the returns can be understood,

and, if understood, the full effect should be given to their natural and obvious meaning. They are not to be strangled by idle technicalities, nor in their meaning to be distorted by carpings and captious criticisms. When that meaning is ascertained there should be no hesitation in giving it full effect." [1]

§ 244. In case a foreign State is acquired or annexed to the United States, it does not come to us with its political organization *intact*, but upon the acquisition it is incumbent upon the United States to establish a government for such State. Hence, it was held upon this ground that the Territory of New Mexico, which had been a duly organized Territory of the Mexican Republic, could not, upon being acquired by the United States, proceed to elect a delegate to Congress in advance of the establishment of a Territorial government therein.[2] The same rule would doubtless apply to any Territory of the United States, and an act of Congress organizing the Territory and authorizing the inhabitants to choose a delegate will in all cases be held indispensable to the validity of an election for delegate in Congress.[3]

§ 245. When the people of an organized Territory have been empowered by Congress to form a Constitution preparatory to admission into the Union, they may, in anticipation of such admission, elect Representatives in Congress, who, in the event of the admission of such Territory as a State, will be entitled to their seats. The act of admission relates back to and legalizes every act of the Territorial authorities exercised in pursuance of the enabling act.[4] But if the Territory is not organized at the time of the holding of an election for delegate, the same is void.[5]

§ 246. Whether, when a State government is formed of a part of an organized Territory, the remainder of such Ter-

[1] [Fowler *v.* State, 68 Tex., 30.]

[2] Case of Hugh N. Smith, 1 Bart., 107.

[3] See, also, Case of A. W. Babbitt, of Deseret, 1 Bart., 116; Case of W. S. Messervy, Id., 148.

[4] Case of Phelps and Cavanaugh, of Minnesota, 1 Bart., 248.

[5] Case of J. S. Casement, 2 Bart., 516.

ritory continues to enjoy the benefits of the original Territorial organization, and among them the right to be represented in Congress by a delegate, seems to be an unsettled question. In *Fuller* v. *Kingsbury*[1] the House held, against the report of the majority of the committee, that upon the admission of the State of Minnesota the Territory of Minnesota ceased to be, and that so much of the Territory as lay outside of the limits of the State was left without any legally organized government, and that the people thereof were not entitled to elect a delegate in Congress until that right was conferred upon them by statute. And this ruling would seem to accord with reason; and yet it appears that the opposite rule was adopted in the case of *Paul Fearing*, of Ohio Territory, in 1802, and in the case of *Henry H. Sibley*, of Wisconsin Territory, in 1848.[2] There may be a distinction between a case where the Territory is very large and a State is formed out of it, leaving yet a large territory and considerable population within the original territorial limits, and one where the State, when formed, embraces the principal part of the Territory and its population, and this may explain the apparent conflict.

[1] 1 Bart., 251.

[2] See report of majority of committee in Fuller *v.* Kingsbury, *supra*.

CHAPTER VIII.

ELECTION OFFICERS — QUALIFICATIONS, POWERS AND DUTIES.

§ 247–252. Validity of acts of officers *de facto*.
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273. Governor of State not an election officer within meaning of act of Congress of May 31, 1870.
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274, 275. Adjournment of an election by order of proper officer presumed to be valid.
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277. Effect of division of election precinct.
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280. Duty of town clerk under law of New Hampshire.
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284. Number of voting places.
285, 286. Fraudulent refusal to establish voting places.
287. When judges may refuse to administer oath to voter.
288. Failure to appoint inspectors of election within time required.

§ 247. In the House of Representatives of the United States there is a conflict of decisions touching the validity of the acts of a person acting as an officer of election, and who is such *de facto* only, and not *de jure*. In some of the earlier cases in that body it was held that an election conducted by persons not duly qualified was void. Thus, in *Jackson* v. *Wayne*,[1] it was held that where the law required three magistrates to preside at an election, a return by three persons, two of whom were not magistrates, was fatally defective.[2] And in *McFarland* v. *Culpepper*,[3] it was held, without much consideration or discussion, that a failure on the part of election officers to take the required oath vitiates the election; and this ruling was followed in *Easton* v. *Scott*,[4] and in *Draper* v. *Johnson*.[5] In *Howard* v. *Cooper*,[6] the vote of a precinct was thrown out because the election was presided over by but two inspectors, when the statute required three; and in *Delano* v. *Morgan*,[7] the vote of one township was thrown out, upon the ground that one of the three judges was a deserter from the Union army, and therefore not capable of taking or holding the office.

§ 248. On the contrary, however, the cases of *Mulliken* v. *Fuller*,[8] *Clark* v. *Hall*,[9] *Flanders* v. *Hahn*,[10] and *Blair* v. *Barrett*,[11] all seem to recognize the doctrine that, in the absence of fraud, the acts of an officer *de facto* of an election are valid as to third parties and the public. It is, however, undeniable that prior to the 41st Congress the weight of authority in the House of Representatives was on the side of *Jackson* v. *Wayne*, and the other cases cited in the

[1] Cl. & H., 47.

[2] [The same rule has been adopted in Georgia. Walker *v.* Sanford, 78 Ga., 165.]

[3] Cl. & H., 221.

[4] Cl. & H., 272.

[5] Id., 702.

[6] 1 Bart., 275.

[7] 2 Bart., 168.

[8] 1 Bart., 176.

[9] Id., 215.

[10] Id., 438, 443.

[11] Id., 313.

last preceding section, which followed that ruling, down to and including *Delano* v. *Morgan.*

§ 249. But in the case of *Barnes* v. *Adams,*[1] which arose in the Forty-first Congress, the question was reviewed at length, and most of the cases arising both in Congress and the courts, were cited and examined, and the conclusion was reached both by the Committee and by the House, that in order to give validity to the official acts of an officer of elections, so far as they affect third parties and the public, and in the absence of fraud, it is only necessary that such officer shall have *color* of authority. It is sufficient if he be an officer *de facto*, and not a mere usurper.[2] The report in this case, after quoting from numerous decisions, both in the House and in the courts of this country, continues as follows:

"The question, therefore, regarded in the light of precedent or authority alone, would stand about as follows: The judicial decisions are all to the effect that the acts of officers *de facto*, so far as they affect third parties or the public, in the absence of fraud, are as valid as those of an officer *de jure.* The decisions of this House are to some extent conflicting; the point has seldom been presented upon its own merits, separated from questions of fraud; and in the few cases where this seems to have been the case the rulings are not harmonious. In one of the most recent and important cases, *Blair* v. *Barrett*, *supra*, in which there was an exceedingly able report, the doctrine of the courts, as above stated, is recognized and indorsed. The question is therefore a settled question in the courts of the country, and is, so far as this House is concerned, to say the least, an open one."

"Your committee feel constrained to adhere to the law as it exists and is administered in all the courts of the country, not only because of the very great authority by which it is

[1] 2 Bart., 760.

[2] [Smith *v.* Jackson, Row., 9.]

supported, but for the further reason, as stated in the outset, that we believe the rule to be most wise and salutary. The officers of election are chosen of necessity from among all classes of the people; they are numbered in every State by thousands; they are often men unaccustomed to the formalities of legal proceedings. Omissions and mistakes in the discharge of their ministerial duties are almost inevitable. If this House shall establish the doctrine that an election is void because an officer thereof is not in all respects duly qualified, or because the same is not conducted strictly according to law, notwithstanding it may have been a fair and free election, the result will be very many contests, and, what is worse, injustice will be done in many cases. It will enable those who are so disposed, to seize upon mere technicality in order to defeat the will of the majority."[1]

§ 250. The report of the committee in this case was adopted by the House, *nem. con.*, after a full discussion,[2] and the doctrine there asserted may now be regarded as the settled law of the House. The same point was decided in the same way, and by the same House, in the case of *Eggleston* v. *Strader*,[3] and an admirable discussion of the question will be found in the report of the committee in that case made to the House by Mr. Hale, of Maine. It is true that the writer of the report in the case of *Reid* v. *Julian*,[4] asserted the contrary doctrine, but the case was decided independently of that question. It turned upon a question of fact, as to whether fraud was proven, so that this case can not be regarded as an authority against *Barnes* v. *Adams*, and *Eggleston* v. *Strader*. The doctrine of the latter cases was reaffirmed in the case of *Gooding* v. *Wilson*, 42d Congress.

§ 251. In the courts of the country the ruling has been uniform, and the validity of the acts of officers of election

[1] [Thobe *v.* Carlisle, Mob., 523.]
[2] Cong. Globe, July, 1870, pages 5179 to 5193.
[3] 2 Bart., 897.
[4] 2 Bart., 822.

who are such *de facto* only, so far as they affect third persons and the public, is nowhere questioned. The doctrine that whole communities of electors may be disfranchised for the time being, and a minority candidate forced into an office, because one or more of the judges of election have not been duly sworn, or were not duly chosen, or do not possess all the qualifications requisite for the office, finds no support in the decisions of our judicial tribunals.[1] We here refer to some of the leading cases. In *People* v. *Cook*,[2] the Court says:

"The neglect of the officers of the election to take any oath would not have vitiated the election.[3] It might have subjected those officers to an indictment if the neglect was willful. The acts of public officers being in by color of an election or appointment are valid, so far as the public is concerned."

Again:

"An officer *de facto* is one who comes into office by color of a legal appointment or election. His acts in that capacity are as valid, so far as the public is concerned, as the acts of an officer *de jure*. His acts in that capacity can not be inquired into collaterally."

The same doctrine was laid down by the Supreme Court of Minnesota, in the case of *Taylor* v. *Taylor*.[4] One ground of contest in this case was that "in certain towns at said election the judges and clerks of said election did not take the prescribed oath or any oath." The Court say:

"If the votes of the citizens are freely and fairly deposited at the time and place designated by law, the intent and design of the election are accomplished. It is the will of the electors thus expressed that gives the right to the office, and the failure of the officers to perform a mere ministerial duty in relation to the election can not invalidate it if the electors

[1] [Quinn *v.* Markoe, 37 Minn., 439.]
[2] 4 Seld., 67.
[3] [Yeates *v.* Martin, Ells., 484.]
[4] 10 Minn., 107.

had actual notice and there was no fraud, mistake, or surprise."

Again the Court say:

"If the officers of election fail to perform their duty, the law provides a penalty; but the election is not necessarily rendered void."

Also, by the Supreme Court of Pennsylvania, in the case of *Baird* v. *Bank of Washington.*[1] We quote a sentence from the opinion in this case:

"The principle of colorable election holds not only in regard to the right of electing, but of being elected. A person *indisputably ineligible* may be an officer *de facto* by color of election."

Also, by the Supreme Court of Illinois, in *Pritchett* v. *The People.*[2] In the course of the opinion the Court say:

"It is a general principle of the law that ministerial acts of an officer *de facto* are valid and effectual when they concern the public and the rights of third persons; although it may appear that he has *no legal or constitutional* right to the office. The interests of the community imperatively require the adoption of such a rule."

The same Court, in *The People* v. *Ammons,*[3] hold the same doctrine, and state it in this language:

"The proof offered would have shown that he was an officer *de facto*, and as such his acts were as binding and valid when the interests of third persons or the public were concerned, as if he had been an officer *de jure*."

The Supreme Court of Missouri, in *St. Louis County Court* v. *Sparks,*[4] says:

"When the appointing power has made an appointment, and a person is appointed who has not the qualifications required by law, the appointment is not therefore void. The

[1] 11 S. & R., 411.
[2] 1 Gilm., 525, 529.
[3] 5 Gilm., 107.
[4] 10 Mo., 117, 121.

person appointed is *de facto* an officer; his acts in the discharge of his duties are valid and binding. * * * A statute prescribing qualifications to an office is merely directory, and although an appointee does not possess the requisite qualifications his appointment is not therefore void, unless it is so expressly enacted."

The Supreme Court of California, in the case of *Whipley* v. *McKune*,[1] hold the same doctrine. In this case the election of McKune to the office of district judge was contested upon the ground that "the officers conducting the election in a given district were not sworn as the election laws require." No fraud being shown the election was held valid, notwithstanding such failure of the officers to be sworn.

The Supreme Court of New York discusses this question in an elaborate opinion in the case of *The People* v. *Cook*,[2] from which we quote a few sentences:

"It becomes important in this case to determine whether the objections which are taken to the inspectors of elections in the several cases presented in the bill of exceptions, are of that character which should be held to invalidate the canvass in these several localities. These objections are of a twofold character, extending to the regularity or legality of their appointment and to their omission to qualify by taking the proper oath of office. * * * It is sufficient that they were inspectors *de facto*. The rule is well settled by a long series of adjudications, both in England and this country, that acts done by those who are officers *de facto* are good and valid as regards the public and third persons who have an interest in their acts, and the rule has been applied to acts judicial, as well as to those ministerial in their character. This doctrine has been held and applied to almost every conceivable case. It can not be profitable to enter into

[1] 10 Cal., 352.
[2] 14 Barb., 259.

any extended discussion of the cases. The principle has become elementary, and the cases are almost endless in which the rule has been applied."

So, in the case of *Greenleaf* v. *Low*,[1] it was held that a person elected to the office of justice of the peace, who neglected to take the oath of office and to give the security required by law, is nevertheless in office by color of title, and his acts are valid as regards the public and third persons. The Court say:

"Sufficient facts appeared to show that Jones was a justice of the peace *de facto* at the time he rendered the judgment in question. He came into his office by color of title. It is a well settled principle that acts done by such an officer are as valid, so far as the public or the rights of third persons are concerned, as if he had been an officer *de jure*, and that the title of the office can not be collaterally inquired into."

Exactly the same point was decided in the same way in the case of *Weeks* v. *Ellis*,[2] where a justice of the peace had entered upon the duties of his office without taking the oath prescribed by law.

And so, likewise, in the case of *Keyser* v. *McKissan*,[3] it was held that the failure of county commissioners to take the oath prescribed by the Constitution of Pennsylvania did not invalidate their acts as such, where the public or third persons were concerned.

So, in the case of *McGregor* v. *Balch*,[4] it was held that, although a person could not legally hold the office of justice of the peace at all while holding the office of assistant postmaster under the United States, yet, having entered the former office under the forms of law, he was a justice of the

[1] 4 Denio, 168.
[2] 2 Barb., 324.
[3] 2 Rawle, 139.
[4] 14 Vt., 428.

peace *de facto*, and his acts as such were valid as to third persons and the public.[1]

§ 252. A mere usurper in an office can have no authority, and can perform no valid official act. It is enough if he possess color of authority; but without this, his acts are void even as to third parties and the public. It was accordingly held that where certain persons were chosen county officers in an unorganized county in a territory, by a public meeting without the shadow of legal right or authority, and commissioned as such by the governor, who also acted without any color of right or authority, they were usurpers, and that an election held under their authority was void.[2] In the same case the rule was laid down that no valid election can be held in an unorganized county—and that a county can not be considered as organized until there has been an election of county officers.[3]

§ 253. Sometimes the question may arise, which of two claimants is the officer, *de facto*; and in determing that question, it is only necessary to ascertain which is in possession of the office exercising the functions thereof, under color of authority. By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer.

§ 254. It has been held that where an office is in dispute between two persons, and the one in actual possession temporarily leaves the place where the business of the office is usually transacted, with no intention of abandoning the office or of giving place to his competitor, the latter can not, with full knowledge of these facts, take possession of the office and by proceeding with the performance of its duties, make himself the officer *de facto*. As between such claim-

[1] See, also, People *v.* Staton, 73 N. C., 546; [State *v.* Goowin, 69 Tex., 55].

[2] Daily *v.* Estabrook, 1 Bart., 299.

[3] And see Sawyer *v.* Haydon, 1 Nev., 75, and State *v.* Collins, 2 Id., 351, where it is decided that no valid election can be held except under statutory authority. [Van Amringe *v.* Taylor, 108 N. C., 196.]

ants, and under such circumstances, the one previously in possession must be regarded as the officer *de facto*.[1]

§ 255. It is manifest that the acts of one claiming to be an officer *de facto* may be assailed on the ground that the office itself did not lawfully exist. The doctrine we are considering applies to the officer and not to the office. There can be no such thing as an office *de facto*. The doctrine respecting the validity of the acts of officers *de facto* presupposes an office which the law recognizes.[2] An officer who by law holds for a fixed term and until his successor is qualified is *ad interim* an officer; if not *de jure*, at least *de facto*.[3]

[§ 256. Under the act of Congress, now repealed, providing regulations for the conduct of elections for Representatives in Congress and electors for President and Vice-President, it often happened that there were present at the same election both State and Federal officials charged with duties connected therewith. In such case it has been held that each official should be permitted to perform such duties as were required of him by the law under which he acted, unless a conflict of jurisdiction arose, in which case the paramount authority was in the officer who acted for the United States and under and within the provision of an act of Congress. This for the reason that in so far as Congress had prescribed regulations for the control of Federal elections, they superseded and annulled all conflicting regulations prescribed by the States.[4] It has accordingly been held that a local police officer had no power to arrest a deputy United States marshal while on duty under the act of Congress in keeping the peace at a Federal election, nor to obstruct him

[1] Braidy *v.* Theritt, 17 Kan., 468.

[2] *Ex parte* Snyder, 64 Mo., 58; [Norton *v.* Shelby Co., 118 U. S., 425; Carlton *v.* People, 10 Mich., 250; People *v.* White, 24 Wend., 539; Petition of Hinkle, 31 Kan., 712; Burt *v.* Winona, 31 Minn., 472; 36 Alb. Law J., 506].

[3] Threadgill *v.* Railroad Co., 73 N. C., 178.

[4] *Ex parte* Siebold, 100 U. S., 371; *ante*, § 142 *et seq.*

in the performance of his duties.[1] In that case it was held that such an arrest constituted an offense under the act of Congress, and that no provision of a State law could authorize a local policeman to obstruct a deputy marshal in the discharge of the duties imposed upon him by act of Congress.[2]]

[§ 257. By virtue of Sections 5511–5515 of the Revised Statutes of the United States, it was made an offense against the United States for an officer of election at which a Representative in Congress was voted for, to violate any duty in regard to such election imposed by the State law, but these provisions of the Federal statute did not embrace any act which had exclusive reference to the election of State and county officers, and which did not affect the choice of such Representative.[3] If, however, the act charged was a violation of a State law regulating the conduct of an election held for the purpose of choosing Representatives in Congress and State officers, it was not necessary for the United States to charge in the indictment nor prove that the intent was to affect the election of the former.[4]]

§ 258. Where a statute imposes specific duties upon an officer of election, it is necessarily implied that he shall have a full and fair opportunity to discharge such duties, and that he shall not be hindered, impeded or interfered with in the

[1] United States *v.* Conway, 18 Blatchf., 566.

[2] In the absence of the marshal and his deputies, it has been held that a United States supervisor has a right to arrest without warrant any one who interferes with him in the discharge of his duty at and in connection with a Federal election. The use of opprobrious and offensive language may constitute such interference. *Ex parte* Geissler, 9 Biss. Cir. Ct., 492. It seems that under the Revised Statutes of the United States (Sec. 2021, now repealed), special deputy marshals might have been appointed by the marshal to keep the peace at Federal elections, whether supervisors of elections have been appointed or not. *Re* Deputy Marshals, 22 Fed. Rep., 153. (Treat, J., dissenting.)

[3] *Ex parte* Perkins, 29 Fed. Rep., 900, reversing ruling of United States District Court for Indiana.

[4] [*In re* Coy, 127 U. S., 731; United States *v.* McBosley, 29 Fed. Rep., 897.]

performance thereof. It has accordingly been held that under Section 2018 of the Revised Statutes of the United States, which provided that the supervisors of election must "personally scrutinize, count and canvass each ballot," a supervisor had the right not only to be present in the room where the ballots were counted, but also to have each ballot in his hands for a reasonable time to enable him intelligently to discharge this duty.[1] The supervisor could not be confined to the act of watching the canvassers while they canvassed and counted the ballots.

§ 259. Where the law requires an inspector to sign and certify election returns, he is not at liberty to accept the decision of the poll clerks and to sign and certify the returns as prepared by them. He is charged with the duty to examine, investigate, and thus to inform himself, for the intelligent exercise of his duty. If necessary he may correct the returns or require their correction before signing. He cannot shield himself by pleading the errors or misconduct of the poll clerks.[2]

§ 260. Where a statute required the judges of election in canvassing the vote to read and announce each ballot by itself, it was held to be a departure from its provisions to divide the ballots into lots of ten or twenty, and then read and announce them in the aggregate, and that a recount should be ordered by proper authority in such a case.[3]

In the same case it was also held that a statute requiring election judges to *seal up* the ballots is merely directory, and is sufficiently complied with if the ballots are kept intact. No objection can be found to this ruling provided it be understood that the party asserting the validity of the return is bound in such a case to show affirmatively that the ballots have been kept intact. If they are, in disregard of the stat-

[1] United States *v.* Clark, 22 Fed. Rep., 387.
[2] Bolano *v.* People, 25 Hun (N. Y.), 423.
[3] O'Gorman *v.* Richter, 31 Minn., 25.

ute, returned open and unsealed, there should be a showing that they have not been tampered with.[1]

§ 261. It is well settled that the duties of canvassing officers are purely ministerial, and extend only to the casting up of the votes and awarding the certificate to the person having the highest number; they have no judicial power.[2] In *State* v. *Steers*,[3] which was a case in which the canvassing board had undertaken to throw out the returns from one voting precinct for an alleged informality, the Court said: "When a ministerial officer leaves his proper sphere, and attempts to exercise judicial functions, he is exceeding the limits of the law, and guilty of usurpation." And again: "To permit a mere ministerial officer arbitrarily to reject returns, at his mere caprice or pleasure, is to infringe or destroy the rights of parties without notice or opportunity to be heard — a thing which the law abhors and prohibits."[4]

§ 262. But of course it does not follow from this doctrine that canvassing and return judges must receive and count whatever purports to be a return, whether it bears upon its face sufficient proof that it is such or not. The true rule is this: they must receive and count the votes as shown by the

[1] [Where the law required the canvassing officers to count the ballots before the ballot-box was removed from the place where the election was held, a disregard of this provision was held to be a sufficient reason for excluding the returns. Spencer *v.* Morey, Smith, 437.]

[2] Dalton *v.* State (Ohio), 1 West. Rep., 773; Justices' Opinions, 58 N. H., 621; People *v.* Wayne Co. Canvassers, 12 Abb., N. Y., New Cases, 7; S. C., 64 How. N. Y. Pr., 334; Kortz *v.* Greene Co. Canvassers, 12 Abb., N. Y., New Cases, 84; Leigh *v.* State, 69 Ala., 261; [Page *v.* Letcher, 11 Utah, 119; 39 Pac. Rep., 499; State *v.* Van Camp, 36 Neb., 91; People *v.* Board of State Canvassers, 129 N. Y., 360; Mead *v.* Carroll, 6 D. C., 338].

[3] 44 Mo., 223.

[4] [McKinney *v.* Peers, 91 Va., 684; *In re* Woods, 5 Misc. Rep., 575; State *v.* Wilson, 24 Neb., 139. A common council sitting as a board for the canvassing of election returns of members elected to that body is bound by the returns, and cannot go behind the returns and inspect the ballots in order to determine the result. State *v.* Trimbell, 12 Wash., 440.]

returns, *and they cannot go behind the returns for any purpose*, and this necessarily implies that if a paper is presented as a return, and there is a question as to whether it is a return or not, they must decide that question from what appears upon the face of the paper itself.[1] Thus, in New York, it has been held that the duties of the canvassers were "to attend at the proper office and calculate and ascertain the whole number of votes given at any election and certify the same to be a true canvass; this is not a judicial act, but merely ministerial; they have no power to controvert the votes of electors.[2]

§ 263. And in *Morgan* v. *Quackenbush*,[3] we find this language: "They (the canvassers) are not at liberty to receive evidence of anything outside of the returns themselves; their duty consists in a simple matter of arithmetic."[4] In the case of *People* v. *Head* the Court say "they may probably judge whether the returns are in due form,[5] but after that they can only compute the votes cast for the several candidates and declare the result." But in determining as to the

[1] [State *v.* Hill, 20 Neb., 119; State *v.* McFadden, 46 Neb., 668. The duties of the Secretary of State of the State of Louisiana in promulgating the returns of election held to be purely and exclusively ministerial. State *v.* Mason, 44 La. Ann., 1065. A board of canvassers cannot inquire into the validity of a certificate of nomination of a nominee for office. State *v.* Board of Canvassers of Cascade Co., 12 Mont., 537.]

[2] People *v.* Van Slyck, 4 Conn., 297, 323. To the same effect is the ruling in *Ex parte* Heath, 3 Hill, 47. See, also, Commonwealth *v.* Emminger, 74 Pa., 479; Moore *v.* Jones, 76 N. C., 182. For discussion of the duties of canvassing officers in Ohio, and of the powers of courts making a judicial review of the proceedings, see Phelps *v.* Schroder, 26 Ohio St., 549; [McKinney *v.* Peers, 91 Va., 684].

[3] 22 Barb., 72, 77.

[4] See, also, Thompson *v.* Ewing, 1 Brewst., 77, where it is laid down that the return judges cannot inquire into a question of fraud. See, also, State *v.* The Governor, 1 Dutch. (N. Y.), 348; Brown *v.* O'Brien, 2 Ind., 423; State *v.* Jones, 19 Ind., 356; People *v.* Kilduff, 15 Ill., 492; People *v.* Head, 25 Ill., 325, 328.

[5] [A canvassing board should reject the return made by the judges of election if not accompanied by the certificate required by statute. Lawrence *v.* Schmaulhausen, 123 Ill., 321.]

form of the returns they must consider the substance, and not be too technical. If there is a substantial compliance with the law it is enough.

§ 264. The doctrine that canvassing boards and return judges are ministerial officers possessing no discretionary or judicial power is settled in nearly or quite all the States.[1]

In *Attorney-General* v. *Barstow*, *supra*, the Supreme Court of Wisconsin say that the canvassing officers "are to add up and certify by calculation the number of votes given for any office; they have no discretion to hear and take proof as to frauds, even if morally certain that monstrous frauds have been perpetrated."[2]

§ 265. In *Morgan* v. *Quackenbush*[3] this doctrine was again asserted. It was there held that it was the duty of the canvassing board to canvass the returns and declare the result, and that this was a purely ministerial act. They are judges of nothing, and not allowed to receive evidence of anything outside of the returns themselves, and hence they acted illegally in receiving affidavits of fraudulent practices at the polls and acting upon such evidence. It was, however, also held that their determination, although based upon

[1] Dishon *v.* Smith, 10 Ia., 212; State *v.* Cavers, 22 Ia., 343; Attorney-General *v.* Barstow, 4 Wis., 749; People *v.* Van Cleve, 1 Mich., 362; Thompson, Circuit Judge, 9 Ala., 338; Mayo *v.* Freeland, 10 Mo., 629; State *v.* Harrison, 38 Mo., 540; State *v.* Rodman, 43 Mo., 256; State *v.* Steers, 44 Mo., 228-9; Bacon *v.* York Co., 26 Me., 491; Taylor *v.* Taylor, 10 Minn., 107; O'Farrall *v.* Colby, 2 Minn., 180; Marshall *v.* Kerns, 2 Swan (Tenn.), 66; People *v.* Wayne Co. Canvassers, 12 Abb. (N. Y.) New Cases, 7; S. C., 64 How. N. Y. Pr., 334; Leigh *v.* State, 69 Ala., 261; Bull *v.* Southwick, 2 N. M., 321; [Brown *v.* Rush, 38 Kan., 436].

[2] A board of canvassers sitting to correct voting lists, sometimes exercises judicial functions. Thus, a statute of Rhode Island regulating the functions of such officers provided that "unless they shall be furnished with sufficient evidence of the omission and qualifications as a voter of the person omitted," etc. It was held that this statute imported that the canvassers were to judge of the sufficiency of the evidence. Keenan *v.* Cook, 12 R. I., 152.

[3] 22 Barb. (N. Y.), 72.

illegal evidence, must be received as *prima facie* evidence that the person declared elected was entitled to the office,[1] and that in attempting afterwards to re-canvass the vote and set aside their first certificate they transcended their authority, and assumed a power belonging only to a tribunal authorized to try cases of contested elections under the law.[2]

§ 266. There are statutes in some of the States which expressly confer upon a board of canvassing officers the power to revise the returns of an election, to take proofs, and in their discretion to reject such votes as they deem illegal. Such a statute exists in Texas,[3] in Alabama,[4] [in West Virginia[5]], and in Louisiana and in Florida. Although this is an extraordinary and a dangerous power when placed in the hands of a board of this character, with such inadequate facilities for obtaining legal evidence and deciding upon questions of fraud, yet it seems that such statutes are not unconstitutional. And it has been held by the House of Representatives of the United States that the action of such a board, in pursuance of the power thus conferred, is *prima facie* correct and to be allowed to stand until shown by evidence to be illegal or unjust.[6]

§ 267. A canvassing board having once counted the votes, and declared the result according to law, has no power or authority to make a recount. When this duty is once fully performed, it is performed once and forever, and cannot be repeated.[7] In *Bowen* v. *Hixon* the Court say, "To

[1] [State *v.* Calvert, 98 N. C., 580.]

[2] [State *v.* Boone, 98 N. C., 573.]

[3] See Giddings *v.* Clark, 42d Congress.

[4] See Norris *v.* Handley, Id.

[5] [Smith *v.* Jackson, Row., 9.]

[6] See cases last above cited.

[7] Bowen *v.* Hixon, 45 Mo., 340; Gooding *v.* Wilson, 42d Congress. [But see Roemer *v.* Board of City Canvassers of Detroit, 90 Mich., 27; McKinney *v.* Peers, 91 Va., 684. The same rule applies to the duties of returning officers. It has been decided in New York that where inspectors of election returned two statements at different times, the second showing a different result from the first, that the inspectors had no power

suppose that it could be renewed — that the canvass of one day could be repeated the next, and counter certificates be issued to different contestants as new light or influence was brought to bear upon the mind of the clerk — would render the whole proceeding a farce." And in *Gooding* v. *Wilson* the report of the committee has this language:

"On examination of precedents it does not appear that this House favors the setting aside of official and formal counts, made with all the safeguards required by law, on evidence only of subsequent informal and unofficial counts, without such safeguards. No instance was cited at the hearing where the person entitled by the official count was deprived of his seat by a subsequent unofficial count. On principle it would seem that if such a thing were, in the absence of fraud in the official count, in any case admissible, it should be permitted only when the ballot-boxes had been so kept as to be conclusive of the identity of the ballots, and when the subsequent count was made with safeguards equivalent to those provided by law. In the absence of either of these conditions, the proof, as mere matter of fact and without reference to statutory rules, would be less reliable and therefore insufficient."[1]

§ 268. In Minnesota it has been held, in accordance with the principle just stated, that if the board of canvassers, after canvassing the votes, adjourn without day, their power in the premises is at an end, and they cannot reassemble; neither can a court by *mandamus* compel them to reassemble, or give them any power in case of their so doing.[2]

or jurisdiction to change their first statement, and that the second was wholly invalid. People *v.* Albany Co. Canvassers, 46 Hun, 390].

[1] And see, also, Hadley *v.* City of Albany, 33 N. Y., 603; Hartt *v.* Harvey, 32 Barb., 55; Ramsay *v.* Calaway, 15 La. Ann., 464; Chrisman *v.* Anderson, 1 Bart., 328; State *v.* Dunneworth, 21 Ohio, 316. And it is clear that canvassing or returning officers have no authority after the canvass is closed to recount the ballots. Kane *v.* People, 4 Neb., 509.

[2] Clark *v.* Buchanan, 2 Minn., 346; [*In re* Board of Canvassers, 12 N. Y. Sup., 174; Rice *v.* Board of Canvassers, 50 Kan., 149; Rosenthal *v.* State Board of Canvassers, 50 Kan., 129].

The same doctrine was strongly asserted in *State* v. *Dunneworth*,[1] where it was held that the officers of an election board after its regular dissolution are *functus officio*, and their subsequent acts in that character unauthorized; and that where a municipal election board had regularly dissolved and the box in which the canvassed ballots were placed had remained five days in an exposed place of easy access, a subsequent tally-sheet made on the fifth day on recount of ballots then found in the box, by four officers of the municipality, some of whom were members of the election board, will not be received to impeach the original canvass and tally-sheet.

§ 269. Although it is true, as a general rule, that an election board, having completed its duties and dissolved, is *functus officio* and can perform no official acts thereafter, yet there may be cases where such a board has improperly adjourned without performing its duties, in which the courts may by *mandamus* compel it to reassemble and complete its work according to law.[2] Thus, it has been held by the Supreme Court of Kansas that where a board of canvassing officers has adjourned after making only a partial canvass of the votes cast, *mandamus* will lie to compel them to reassemble and complete the canvass.[3] Upon this question the authorities are not uniform. In New York[4] and Ohio[5] there are decisions holding to some extent the contrary doctrine. But the ruling in the Kansas case is supported by the Iowa decisions.[6] And we think the reasoning of the Supreme Court of Kansas is sound. The Court, by Brewer, Judge, said:

[1] 21 Ohio, 216.

[2] [State *v.* Board of Canvassers of Choteau Co., 13 Mont., 23; Steele *v.* Meade (Ky.), 33 S. W. Rep., 944.]

[3] Lewis *v.* Commissioners, 16 Kan., 102.

[4] [People *v.* Reardon, 49 Hun, 425;] People *v.* Supervisors, 12 Barb., 217.

[5] State *v.* Berry, 14 Ohio St., 315.

[6] State *v.* County Judge, 7 Ia., 186; State *v.* Bailey, Id., 390.

"The view taken by the Iowa Court seems to us the correct one. It is the duty of the canvassers to canvass all the returns, and they as truly fail to discharge this duty by canvassing only a part, and refusing to canvass the others, as by refusing to canvass any. And it is settled by abundant authority, that where the board refuses to canvass any of the votes it may be compelled to do so by mandamus, and this though the board has adjourned *sine die*.[1] *Hagertg* v. *Arnold*[2] is a case in point. The canvass is a ministerial act, and part performance is no more a discharge of the duty enjoined than no performance. And a candidate has as much right to insist upon a canvass of all the returns as he has of any part, and may be prejudiced as much by a partial as by a total failure. The adjournment of the board does not deprive the court of the power to compel it to act, any more than the adjournment of a term of the district court would prevent this court from compelling by mandamus the signing of a bill of exceptions by the judge of that court, which had been tendered to him before the adjournment. As a general rule, when a duty is at the proper time asked to be done, and improperly refused to be done, the right to compel it to be done is fixed, and is not destroyed by the lapse of the time within which in the first place the duty ought to have been done."

§ 270. A very similar rule was laid down by the Supreme Court of Missouri in *State* v. *Berg*,[3] where it appeared that the board of canvassers of election returns had completed the canvass and made up an abstract of the votes before the expiration of the time limited by law for the performance of those duties, but the abstract was still in the possession of a member of the board when the mandamus proceedings were instituted and when the alternative writ was served requiring them to count certain votes which they had illegally rejected. It was held that the writ was properly issued and

[1] [State *v.* Trimbell, 12 Wash., 440.]
[2] 13 Kan., 367.
[3] 76 Mo., 136.

that the board could be required to obey its mandate although it had finally adjourned prior to the service of the writ.[1]

§ 271. By a statute of Massachusetts "the Mayor and Aldermen and Clerk of each city" are required forthwith after an election to examine the returns from each ward, and if any error appears therein, "they shall forthwith notify" the ward officers, "who shall forthwith make a new and additional return under oath in conformity to truth." It is manifest, however, that it was not intended by this statute to authorize an amended return, unless made "forthwith," and before the ballots, records, and election papers have passed out of the hands of the returning officers. These amended returns are required by the statute to be "received by the Mayor and Aldermen and City Clerk, at any time before the expiration of the day preceding that on which they are required by law to make their returns or declare the result of the election in said city." They can not be made after the result is declared, and their value must depend upon their being made by the returning officers, without delay.[2]

§ 272. A statute of Kentucky in force in 1833, required the certificate of election of representatives in Congress, to be signed by all the sheriffs of the counties composing the district. In the case of *Letcher* v. *Moore*,[3] the credentials presented were signed by the sheriffs of four out of five of the counties in the district, and the question whether this was sufficient to give the holder of it the right to the seat *prima facie*, was debated in the House at great length, but was not decided, because, pending its discussion, both parties agreed to waive their claim to a seat until the case could be heard upon the merits. It would seem that the vote of one county was not canvassed at all by the sheriffs, it having

[1] And see State *v.* Trigg, 72 Mo., 365; State *v.* Commissioners, 23 Kan., 264; Kisler *v.* Cameron, 39 Ind., 488; Clark *v.* McKenzie, 7 Bush (Ky.), 523; Dew *v.* Sweet Springs District Court, 3 Hen. & Mun., 1; Elisha Strong, Petitioner, 20 Pick., 484.

[2] Sleeper *v.* Rice, 1 Bart., 472; See Opinion of Justices, 117 Mass., 599.

[3] Cl. & H., 715.

been withheld by the sheriff having it in charge, without any sufficient cause, and it is evident that the House had good reasons to believe that the vote of that county, if it had been canvassed by the board of sheriffs, would have changed the result and given the credentials to Letcher, instead of Moore. Under such circumstances, the House hesitated, and very properly, to accept the certificate of a majority of the sheriffs, based upon a canvass of but four of the five counties of the district. The case did not come properly within the rule that the certificate of the majority of the board, is the certificate of the board, for while it is true, ordinarily, that less than the whole number may make a valid certificate in such a case, *it must be upon a canvass of the whole vote of the district.* If a part of the vote is omitted and the certificate does no more than to show that a canvass of *part* of the vote cast shows the election of a particular person, it is not even *prima facie* evidence, because *non constat* that a canvass of the *whole* vote would produce the same result.

§ 273. The act of Congress of May 31, 1870[1] [since repealed], provided for the punishment of "any officer of election" who shall "fraudulently make any false certificate of the result of any election in regard to a representative" in Congress. In the case of *United States* v. *Clayton*,[2] in the Circuit Court of the United States for District of Arkansas, the question arose whether the governor of a State was liable to indictment and punishment under this act. By the statute of Arkansas it was the duty of the governor to grant a certificate to the person duly elected representative in Congress, and the indictment in this case charged the defendant, as Governor of Arkansas, with having falsely and fraudulently issued a certificate declaring John Edwards elected Representative in Congress in the Forty-second Congress, from the third district of that State, when in truth and in fact the returns then on file in his office showed that one Thomas Boles was duly elected.

[1] 13 Stat. at Large, 145, Sec. 22. [Sec 5515 Rev. Stat.]
[2] Am. Law Reg. Vol. 10, 737–739; S. C., 2 Dill., 219.

A demurrer was interposed which raised the question above suggested, and it was sustained, the Court (Dillon J.) being of the opinion that the governor of a State is not an "officer of election" within the meaning of the said act of Congress. It was deemed by the Court highly improbable that Congress would (even if its power to do so be conceded,) provide for the trial and imprisonment of the governor of a State for omitting or fraudulently performing, duties imposed upon him by State laws.

§ 274. The doctrine that the acts of an officer of election, within the scope of his authority, are presumed to be correct, is strongly stated and ably argued in *Littell* v. *Robins*.[1] The rule is here placed upon two grounds, viz.: *first*, that the presumption is always against the commission of a fraudulent or illegal act; and, *secondly*, that the presumption is always in favor of the official acts of a sworn officer.[2]

In accordance with this rule it has been held that where the law allows the officers of the election, upon the happening of certain contingencies, to adjourn the election for one or more days; and if it be shown that they did in fact so adjourn the election, it will be presumed that the adjournment was proper; and so if the law empowers a board of returning officers to revise the returns, and it appears that they have exercised such authority, their action must as we have seen, stand until shown to have been wrong.

In *Goggin* v. *Gilmer*,[3] it was further held, and very properly, that were the officers of the election were authorized in case of inclement weather, the rise of water courses by rain, or the assembling of a body of voters too great to be accommodated in one day, to adjourn the election for not more than three days,—and where there was such an adjournment, even if the officers were mistaken as to the happening of any of these contingencies, the election should not be declared illegal and void in the absence of fraud. The officers of the

[1] 1 Bart., 138.

[2] [Thobe *v.* Carlisle, Mob., 323; Lowe *v.* Wheeler, 2 Ells., 61.]

[3] 1 Bart., 70.

election in such a case are the judges of the necessity for an adjournment, and their decision upon that point, in the absence of fraud is final. The power of adjournment in such cases is *discretionary* with the officers of election, and an honest error in its exercise is not fatal to the election.

§ 275. This is unquestionably the sound doctrine, notwithstanding a contrary decision in one of the earlier cases, from the same State.[1] In this latter case the committee went into inquiry as to whether in point of fact the contingency did or did not happen on which rested the authority of the sheriff to adjourn the election, and finding that in their opinion it did not happen, they ruled that the adjournment was illegal and rendered the subsequent proceedings illegal. The case, however, did not turn upon this question, and for this reason, perhaps, it was not more carefully considered. A similar question arose in the case of *Trigg* v. *Preston*,[2] and it was there held that an adjournment of an election by the sheriff under a statute giving him discretionary power to adjourn in case of rain, was presumed to be a valid adjournment.

§ 276. If the officers conducting an election adopt and enforce an erroneous rule as to the qualification of voters, which prevents certain legal voters, who offer to vote, from giving in their votes, and being made known, prevents other legal voters similarly situated from offering to vote, the election may be set aside, especially if it appear that such votes if offered and received would have changed, or rendered doubtful, the result.[3] After a decision has been made by the election officers affecting the right of a class of persons to vote, and that decision becomes known, it is not necessary that every voter belonging to such class should offer his vote and have it formally rejected.[4] Nor is it

[1] Bassett *v.* Bayley, Cl. & H., 254.
[2] Cl. & H., 78.
[3] Scranton Borough Election, Bright. Elec. Cas., 455.
[4] § 235.

necessary to prove in such a case how each person whose vote was excluded would have voted, if permission had been given; to require this, would be to take away the secrecy of the ballot.[1]

Where a class of persons are unlawfully excluded from the right to vote by the regular election officers, they have no right to organize independent or outside polls and cast their ballots thereat and have them counted. Their remedy is to proceed to contest the validity or result of the election; and they can, if they choose, institute proper proceedings against the election officers.[2]

§ 277. Where an election district is, by the enactment of a law, divided in to two separate districts, with two separate places of holding an election, the functions of the election officers of the old district are destroyed, and they can not act in either of the new districts into which the old one is divided. It would be otherwise if part of an old district was formed into a new one, and if provision was only made for the new one. That would not annihilate the old district, but only change its boundaries. The forming of one old district into two complete new ones, does annihilate the old, and it is well settled, that the official functions of local officers fall with the political annihilation of the locality for which they were chosen or appointed.[3]

§ 278. The law is well settled that statute certifying officers can only make their certificates evidence of the facts which the statute requires them to certify, and when they undertake to go beyond this, and certify other facts, they are *unofficial*, and no more evidence than the statement of any unofficial person.[4] This rule of course applies to election returns, and to all certificates which are by law required to

[1] See § 488 et seq.

[2] Gauze *v.* Hodges, Contested Election Cases in Congress, 1871 to 1876, page 89; Ward *v.* Sykes, 61 Miss. 649.

[3] Penn. Dist. Election Case, Bright. Elec. Cas., 617; North Whitehall *v.* South Whitehall, 3 S. & R., 116.

[4] Switzler *v.* Anderson, 2 Bart., 374; State *v.* Berg, 76 Mo., 176.

be made by officers of election, or of registration, or by returning officers. They can only certify to such facts as the law requires them to certify. The certificate of such an officer is not, however, vitiated by the fact that it contains the certification of facts outside of those which the officer has a right to certify. If it in fact certifies the proper facts it is good, and the remainder of the certificate is to be rejected as surplusage.

§ 279. The inspectors of an election having received the vote of a person, and deposited the same in the box, can not afterwards enter into any inquiry as to the right of such person to vote. There are two sufficient reasons for this rule. In the first place, the voter is a necessary party to any such investigation, and in the second place, the inspectors can not be presumed to know how any person voted, and, therefore, can not know which ballot to exclude. The rule is, therefore, that the moment the ballot is deposited, all control over it, and all power to inquire as to its legality, by the officers of the election, is ended.[1]

§ 280. A statute of New Hampshire required the town clerk to record the vote for representative in Congress, as counted and announced in his presence by the selectmen, and to send a copy thereof to the Secretary of State. The statute further provided as follows: "If the clerk of any town shall make an incorrect or insufficient record or return of the votes given therein, at any meeting for any officer, the tribunal by whom said votes are opened and corrected may require said clerk, at his own expense, to come in and amend said record or return, according to the facts of the case."

It was held by the Supreme Court of that State that this statute only authorizes town clerks when required, to make

[1] Hartt *v.* Harvey, 32 Barbour, 55. Inspectors of election have no authority, on the assertion of one who claims to have voted by mistake in the wrong precinct, to withdraw from the ballot box and destroy a ballot which he identifies as the one or similar to the one he had voted. Harbaugh *v.* Cicot, 33 Mich., 241. See also §§ 230–234.

their record to correspond with the declaration of the vote as publicly made by the moderator, and does not authorize them to make by amendment a record which they could not have made in the first instance.[1]

§ 281. Where the law requires that the polls shall be kept open until sunset, this is probably equivalent to declaring that they shall be closed at sunset, though upon this point the committee in *Hogan* v. *Pile*,[2] refrained from expressing an opinion. It was, however, held in that case that the polls having been regularly closed at sunset, they could not be legally opened again during the evening; and there is no doubt but that if the polls are once regularly closed, the officers of the election can not again open them. It is to be presumed that all voters who have not voted will have notice of the closing of the polls; that being a proceeding according to law they are bound to know it, and act upon it; but the re-opening is a proceeding of which no one will be bound to take notice, and if some do take notice of it, and deposit ballots, they are void as being both unlawful and a fraud upon the rights of other voters.

§ 282. In general, where a statute requires an official act to be done by a given day, for a public purpose, it must be construed as merely directory in regard to the time. Accordingly, it is uniformly held that a statute requiring an officer or board to certify the result of an election, or in any way to make known the result, or to issue a commission on or before a given day, or within a given number of days after the election, is directory and not mandatory. Such acts are valid though performed after the expiration of the time.[3]

This doctrine has been uniformly maintained by the courts, and nothing is better settled.[4]

[1] Opinion of the Justices, 53 N. H., 640.

[2] 2 Bart., 281.

[3] *Ex parte* Heath, 3 Hill, 42.

[4] People *v.* Allen, 6 Wend., 486, and cases there cited; Colt *v.* Eves, 12 Conn., 242, 253–255, and cases cited.

§ 283. Likewise statutes directing the mode and manner in which the officers of an election shall proceed in the conduct thereof are, as shown elsewhere, generally to be regarded as directory unless the contrary plainly appears upon the face of the statute.[1] It has accordingly been held that the fact that the officers of an election caused the names on the registration list to be copied and arranged alphabetically, so that the names might be more readily found as the voters presented themselves to vote, and that they used this alphabetical copy in connection with the original, will not affect the validity of the poll.[2]

§ 284. When the law designates a place for holding an election for a given precinct, and provides a set of officers to conduct the same, and makes no provision for more than one voting place or ballot-box within such precinct, it has been held that it is not lawful for the officers of election to provide two or more ballot-boxes at different places within such precincts.[3] It is plain that the power to multiply voting places would be an exceedingly dangerous power, and one which might be used for purposes of corruption and fraud.[4]

§ 285. In the case last cited one of the grounds of contest was, that the county court being authorized to fix the places of voting, and arrange the voting precincts, had performed this duty so unfairly and improperly as to prevent a full vote for contestant. Upon this point the committee say:

"The Legislature had the power to fix the voting districts or provide by law that the county court should do so, and

[1] §§ 225–228; [Smith *v.* Jackson, Row., 9. A statutory provision requiring the result of a vote to remove a county seat to be certified separately from the vote upon other matters submitted at the same election is mandatory. Welch *v.* Wetzel, 29 W. Va., 63].

[2] Hogan *v.* Pile, 2 Bart., 281.

[3] [*Contra*, Bowers *v.* Smith, 111 Mo., 45.]

[4] Sloan *v.* Rawles, 43d Congress; [Smith *v.* Shelley, 2 Ells., 18].

the law of Missouri having imposed upon the county court the duty of establishing voting places, that court had the right to fix the number in its own discretion, and the exercise of that diseretion can not be reviewed. If, indeed, the court should fraudulently refuse to establish voting places, in such a manner as to disfranchise the citizens for partisan purposes, it might be necessary to set aside the entire election."

No doubt the true rule is here indicated, and it is this. If the board or officer having the power to fix the voting places, shall *fraudulently* so arrange them as to disfranchise a portion of the voters, and thus defeat the will of the electors, it would become necessary to set aside the election. If the fraudulent purpose must, in such a case, be proven, it may be established by circumstances.

§ 286. But the question may arise whether, even in the absence of proof of a fraudulent purpose, the fixing of the voting places in such a manner as to prevent a full and free election, must not render the election void? As for example, if all the voters of a county or city are required to vote at a single polling place, and if it should appear that the voters were so numerous that it was impossible for them all to vote, and that a part were in fact, for this reason, prevented from voting, in such a case, we think, the election should be held void without further proof. Perhaps, from these facts, a fraudulent purpose on the part of the board or officers, whose duty it was to fix suitable and convenient voting places, would be presumed; but if not, then the election should be held void, upon the ground, that whatever in point of fact prevents a fair and free election, whether so intended or not, must render the election null and void.[1] A different question would arise in cases where the legislature by statute has fixed the places of voting, and where no other

[1] [State *v.* Harwood, 36 Kan., 236.]

authority has power to alter or change them. Probably it would not be competent to show that in the exercise of this power the legislature has been actuated by improper motives. The only question which could arise would be as to the constitutionality of the legislation, and it would be necessary to show that the statute was of such a character as to impair the constitutional rights of the electors, in order to hold it void.

§ 287. If a voter, upon being challenged and questioned, admits that he has not been naturalized, or, that his naturalization certificate was issued by some court which the judges know had no jurisdiction of that subject, they may well decline to administer the oath, or to accept the vote. But the judges have no right, in California, to require the production of the certificate of naturalization.[1] And a similar rule prevails in most of the States.

The true rule no doubt is, that if the judges believe that the person offering to vote has not been legally naturalized, they may, at their peril, refuse to receive his ballot or to administer the oath; but the offer on the part of the person desiring to vote to take the prescribed oath raises a presumption that he is a legal voter, and if the officers of election refuse his vote notwithstanding such offer, it would probably be held, in a proceeding against them for such refusal, that they must show affirmatively that such person was not entitled to vote.[2]

[1] People *v.* Gordon, 5 Cal., 235.

[2] [People *v.* Burns, 75 Cal., 627. It has been held by the Court of Appeals of New York that under a statute which provides that each elector shall deliver his ballot to one of the inspectors in presence of the board; that if challenged the inspector shall administer an oath to him and ask him certain prescribed questions; and that if the challenge shall not be withdrawn the inspectors shall administer to the elector a general oath, in which he states in detail that he possesses all the legal and constitutional requirements; and that if he refuse to take such oath his vote shall be rejected,—the inspectors, being minis-

§ 288. A board of commissioners authorized by law to appoint inspectors of elections before a certain date cannot defeat the election by failing or refusing to make such appointment. *Mandamus* will lie to compel the appointment after the time designated, which appointments when made will be as valid as if made at the proper time.[1]

terial officers, have no discretionary power to reject the vote of an elector who has answered the statutory questions and taken the prescribed oaths, even though he has failed to satisfy them as to his qualifications. People *v.* Bell, 119 N. Y., 175.]

[1] People *v.* Commissioners, 57 How. (N. Y.) Prac., 445.

CHAPTER IX.

ELECTION OFFICERS — CIVIL LIABILITY FOR MISCONDUCT IN OFFICE.

§ 289. Wilful and corrupt denial of right of voter.
289. In what cases malice must be shown.
289, 290. Rule in Massachusetts and Ohio.
291. Rule in Pennsylvania.
292. Rule where duty is *quasi-judicial.*
293, 294. Honest mistake by registering officer.
295–297. Statutes prescribing specific duties must be obeyed.
295, 296. Duty of election board where voter offers to take statutory oath.
297. What will amount to seasonably placing voter's name upon the list.
298. Duty of voter to furnish evidence of his right.
298. Statements of voter as to his place of residence may be proven.
299. Malice not presumed.
300. Evidence that officers of election knew that plaintiff differed from them in his political sentiments.
301. Exemplary damages, when allowed.

§ 289. The general rule is that an officer of election, or of registration, who shall wilfully and corruptly refuse to any citizen who is duly qualified, the right to vote, or to register, is liable in damages to the person injured. In several of the States, as we shall presently see, it is regarded as sufficient to show that the plaintiff has been unlawfully deprived of his right, without proof of a malicious or corrupt purpose on the part of the officer, but the general doctrine is as above stated. In Massachusetts, where it is not necessary to show malice, it has been held that the officer is not liable, if he acted under a mistake, into which he was led by the conduct of plaintiff.[1]

In England, and in most of the States of the Union, the

[1] Humphrey *v.* Kingman, 5 Metc., 162.

rule above stated is regarded as well settled, and no action is held to be maintainable against an officer of election for rejecting the vote of a citizen, without proof that such rejection was wilful and malicious. In Massachusetts, by a series of decisions, the law is settled otherwise.[1] But in the latter case it was held that in order to recover, the plaintiff in such an action must allege and prove that he furnished defendants with sufficient evidence of his having the legal qualifications of a voter, before defendants refused to receive his vote. This decision comes almost up to the rule as it exists in most of the other States, because if the voter furnished sufficient evidence of his right, that fact would go far to prove wilfulness on the part of the officer, who, in the face of such evidence, refuses him the privilege of voting.

The rule laid down in the Massachusetts cases has been followed in Ohio,[2] and also in Wisconsin.[3] But the weight of authority is decidedly the other way.[4] Even in those States where the Massachusetts rule prevails, it is believed that no more than nominal damages is ever allowed, in the absence of proof of a corrupt purpose. The action in those States is regarded rather as one for the determination and settlement of the plaintiff's right to vote, than as a suit to recover damages.[5] In *Jeffries* v. *Ankeney*, *supra*, the Supreme Court of Ohio said:

[1] Kilham *v.* Ward, 2 Mass., 236; Lincoln *v.* Hapgood, 11 Mass., 350; Henshaw *v.* Foster, 9 Pick., 312; Capen *v.* Foster, 12 Pick., 485; Blanchard *v.* Stearns, 5 Metc., 298.

[2] Jeffries *v.* Ankeney, 11 Ohio, 372; Anderson *v.* Milliken, 9 Ohio St., 568.

[3] Gillespie *v.* Palmer, 20 Wis., 544.

[4] Jenkins *v.* Waldron, 11 Johns., 114; Weckerly *v.* Geyer, 11 S. & R., 35; Moran *v.* Rennard, 3 Brewst., 601; Commonwealth *v.* Sheriff, 1 Brewst., 183; State *v.* Smith, 18 N. H., 91; State *v.* Daniels, 44 N. H., 383; State *v.* McDonald, 4 Harr., 555; State *v.* Porter, Id., 556; Carter *v.* Harrison, 5 Blackf., 138; State *v.* Robb, 17 Ind., 536; Peavey *v.* Robbins, 3 Jones (Law), 339; Caulfield *v.* Bullock, 18 B. Mon., 494; Morgan *v.* Dudley, Id., 693; Miller *v.* Rucker, 1 Bush., 135; Rail *v.* Potts, 8 Humph., 225; Bevard *v.* Hoffman, 18 Ind., 479; Anderson *v.* Baker, 23 Md., 531.

[5] Bright. Elec. Cas., 194.

"It is generally true that no suit lies against an officer for a mistake in the exercise of his judicial discretion; but when we reflect how highly the privilege of voting is generally valued, and that the legislature has provided, and the forms of law admit, no other remedy than this action, we unite in the opinion that a necessity exists for entertaining this remedy. In the absence of malice, where the suit is brought merely to assert the right, the damages will be nominal and small."

§ 290. And the Supreme Court of Massachusetts, while maintaining the rule that election officers are liable for rejecting a legal vote without proof of malice, seems to have endeavored to so administer the law under that rule as to take away much of its severity. Thus in *Lincoln* v. *Hapgood*,[1] the Court said:

"But, notwithstanding we deem it necessary that this action should be supported as the only mode of ascertaining and enforcing a right which has been disputed, we do not think it ought to be a source of speculation to those who may be ready to take advantage of any injury, and turn it to their profit, to the vexation and distress of men who have unfortunately been obliged to decide on a question sometimes intricate and complicated, but who have discovered no disposition to abuse their power for private purposes. And we, therefore, think that juries should always, in estimating the damages, have regard to the disposition and temper of mind discoverable in the act complained of, and probably the Court would determine that a sum, comparatively not large, would be excessive damages, in a case where no fault but ignorance or mistake was imputable to the selectmen." And in *Henshaw* v. *Foster*,[2] the same Court assessed a fine of only one dollar against an election officer who had rejected a

[1] 11 Mass., 357.
[2] 9 Pick., 312.

legal vote, but who had done so in the honest discharge of his supposed duty.[1]

§ 291. The Supreme Court of Pennsylvania, in *Weckerly* v. *Geyer*,[2] laid down as the law of that State the rule that malice must be shown to sustain an action on the case against an officer of an election for refusing the plaintiff's vote, and enforced it as follows:

"We have no doubt that malice is an ingredient without which the action can not be supported. By malice, I mean the refusal of a vote from improper motives and contrary to the inspector's own opinion. It is not necessary that this should be expressly proved; the jury may infer it from circumstances; direct and positive proof in a case of this kind is hardly to be expected. But a man who is placed in public station as an officer of the commonwealth, or of a corporation, in which, though not strictly a judicial office, he must necessarily exercise his judgment (such as inspector or judge of an election), is not liable to an action, provided, he act with purity and good faith; but, that he is responsible if he act wilfully and maliciously, was decided in the English House of Lords in the case of *Ashby* v. *White*,[3] and has been held for law ever since."

§ 292. It has been recently held by the Supreme Court of Connecticut that a board of registration clothed with power to decide upon the qualifications of an elector, in the exercise of that power acts in a *quasi* judicial character, and that public policy demands that the rule which exempts judicial officers from personal liability for mistakes or errors of judgment in the exercise of their functions should be applied

[1] The later cases in Massachusetts seem to establish the rule that the officers of election are liable to an action of tort brought by a voter who, having produced proper and sufficient evidence of his qualifications, has nevertheless been refused the privileges of an elector. Lombard *v.* Oliver, 7 Allen, 155; Harris *v.* Whitcombe, 4 Gray, 433; Larned *v.* Wheeler, 140 Mass., 390.

[2] 11 S. & R., 35.

[3] 1 Bro., P. C., 49; [1 Smith's Leading Cases, 472].

to such boards.[1] In this case the Massachusetts rule is criticised and dissented from, the Court saying:

"We have no disposition to question the validity or strength of the reasoning in those cases, theoretically considered. It is sufficient to say that with nearly seventy years' experience under our Constitution, it is believed that the evils apprehended have not existed to any considerable extent. Indeed, it is believed that if the Massachusetts rule prevailed here, the evils that would arise from increased litigation, subjecting men who, it must be presumed, endeavor honestly and fairly to discharge their official duties, to annoyance and expense, would be greater than any we have heretofore experienced. Viewed in the light of experience, we can not regard those reasons as sufficient to induce us to depart from the general rule.

"For two thirds of a century our system has been in operation, and we are not aware that the records of our courts show any cases of this description. This circumstance, though not in itself a decisive argument, tends strongly to show the almost universal sense of the profession during that time, that such an action can not be maintained.

"As a rule we think the duties devolving upon boards of registration are fairly and honestly discharged. Doubtless it occasionally happens that a man entitled to vote is excluded or one not entitled to vote is admitted; but so far as such cases result from mistakes it is hard to subject the members of the board to an action.

"We think it not politic or wise to expose those upon whom the law casts the burden of ascertaining the qualifications of electors to the annoyance of private suits for errors in judgment. If they act wantonly or maliciously, there may be a private remedy; but that is not this case, as there is no allegation of wanton or malicious conduct.

"We think that the general rule which exempts judicial

[1] Perry v. Reynolds, 53 Conn., 527; 13 Am. & Eng. Corp. Cas., 114.

officers from liability should continue to apply to boards of registration, so long as they act in good faith and within their jurisdiction."

§ 293. It has been held in Missouri that registering officers are not responsible, in damages, for refusing to register an elector however erroneous their refusal may be, if produced by an honest mistake or error of judgment,[1] but if they act corruptly or maliciously, they are liable to the person injured.[2]

§ 294. In the case cited in support of the preceding section the doctrine is laid down by the Supreme Court of Missouri that a judicial officer is in no case to be held liable in damages for an error of judgment, and where there is no malice; and this doctrine is supported by the citation of numerous authorities. The Court further inquires whether the officers of registration, under the statute of Missouri, were judicial officers, and upon this point the Court say:

"Their duties were partly ministerial and partly judicial; that is, they were required to exercise a discretion and judgment when determing the qualifications of those presenting themselves for registration;" and while holding that these officers were not in a strict sense, judicial officers, the Court yet held that they were, like judges of election, clothed with discretionary power, and acted *quasi* judicially, and that it was therefore necessary to allege and prove that their official action was knowingly wrongful, malicious or corrupt, in order to hold them liable in damages therefor.

§ 295. The duties of election officers are generally clearly defined by statute, particularly as to the manner of conducting the election and of determining disputed questions as to the right of individuals to vote. In some of the States if the voter will make an affidavit, the form or sub-

[1] [The same rule obtains in Washington and North Dakota. Isaacs *v.* McNeil, 44 Fed. Rep., 32; Alden *v.* Hinton, 6 N. D., 217.]

[2] Pike *v.* Magoun, 44 Mo., 491.

stance of which is prescribed, his vote is to be received without further evidence or inquiry. Such is the law of Illinois;[1] and also of New York.[2]

It is the policy of the law upon this subject to leave as little as possible to the discretion of election officers. In the statutes of most, if not of all, of the States there are numerous and minute provisions framed for the purpose of anticipating questions, which may arise at the polls, and the manner of their determination. These statutes are wisely so framed as to prevent uncertainty and debate as to the proper decision of questions arising amid the confusion and excitement of an election. For example, the statute of Illinois under which the case of *Spragins* v. *Houghton* arose, prescribed the form of the oath to be taken by a voter when challenged and provided that "if the person so offering his vote shall take such oath or affirmation, his vote shall be received, unless it shall be proved by evidence satisfactory to a majority of the judges, that such oath or affirmation is false." And it was held that under this statute the judges had no discretion; they were bound to receive the vote of a person who took the oath, unless proof was offered to show that the oath was false. And this construction of the Illinois statute was doubtless correct in its application to the case decided, for it is beyond question that if the officer obeys such a statute he can not incur any of its penalties. But a case may arise where the officer knows, or has reason to believe, that notwithstanding the oath taken by a person offering to vote, he is not a legal voter, where in fact the officer knows, or has reason to believe, that the oath is false. May not the officer reject such a vote notwithstanding the person offering it takes the oath, and justify his act by proving that the oath was false? In such a case, of course, the officer takes upon himself the burden and the risk of proving the oath of the alleged voter to be false.

[1] Spragins *v.* Houghton, 3 Ill., (2 Scam.) 377; S. C. Bright. Elec. Cas., 162.
[2] People *v.* Pease, 30 Barb., 588.

Thus in *State* v. *Robb*,[1] it was held that the election board, whose duty it was to decide upon the qualifications of voters, may refuse the vote of a person who takes or offers to take the oath prescribed by law as to his qualifications, but they do so at the peril of being able to show that he was not a legal voter, upon a prosecution for refusing the vote. It was further held, however, that when the person offering to vote takes the prescribed oath, the board are justified in receiving the vote, unless it can be shown that they acted corruptly, and were cognizant of the fact that he was not a legal voter. The doctrine of this case seems to be that if the board know that the voter swears, or offers to swear falsely, and that he is not entitled to vote, it is not only their right, but their duty to refuse the vote, notwithstanding such offer to swear.[2] The statute of Indiana, under which this case arose, unlike that of Illinois, *supra*, was intended to, and did preclude the election board from taking testimony relative to the right of any person to vote who might offer to take the oath therein prescribed. The plaintiff offered his vote, and offered to take the oath prescribed, but the defendant, who was an inspector of the election, refused to administer said oath, or to permit him to vote, and he was permitted to prove as his justification, that the plaintiff was not a legal voter, and that if he had taken the oath, he would have sworn falsely.

§ 296. Subject to the qualification above stated, the general rule is that a statute prescribing the form of oath to be taken by a person offering to vote, and requiring the vote to be received if the oath be taken, leaves no discretion in the judges of election, and takes from them all power to decide upon the qualifications of a voter.[3] Thus in New York it is held that, except in certain special cases, (as where the party has been convicted of a crime, or has made a bet on the election), the voter is made the judge of his own qualifications

[1] 17 Ind., 536.

[2] [United States *v.* Egan, 30 Fed. Rep., 498.]

[3] [Wolcott *v.* Holcomb, 97 Mich., 361.]

and his conscience, for the occasion, takes the place of every other tribunal. If there is any doubt as to the voter's qualifications, the inspectors are required to examine him on oath, touching the same, and if, in their opinion, he be not duly qualified, they are to admonish him as to the points in which they consider him deficient; nevertheless, if after this he persists in his claim to vote, they are compelled to administer to him the general oath in which he affirms the possession in himself of all the legal qualifications, and if he takes the oath, his vote must be received; the inspectors have no discretion in the matter; they can only reject the vote, if he refuses to answer the interrogatories put to him touching his qualifications, or to take the general oath.[1]

§ 297. In *Bacon* v. *Benchley*,[2] which was an action to recover damages against selectmen, for refusing to place the plaintiff's name on the list of voters, it appeared that the plaintiff was duly qualified, that he applied to the selectmen to place his name on the list, and that they refused the application. It further appeared, however, that afterward, and before the close of their session, the selectmen reconsidered their refusal, and did place plaintiff's name on the list, but of this he was not informed. *Held*, that plaintiff could not recover, and that it was his duty to ascertain after the close of the "list," that his name was not on it, before he could hold the selectmen liable. This, for the reason, that the selectmen had the right to alter or correct the list, and to insert a name on it, up to the close of the session for revising. The Court was of opinion that the defendants did seasonably place the plaintiff's name on the list.

§ 298. We have already seen, that according to the decisions in Massachusetts, it is incumbent upon a person offering to vote to furnish to the selectmen sufficient evidence of his having the legal qualifications of a voter. It seems that where a voter, before offering his vote, makes

[1] People *v.* Pease, 30 Barb., 588; S. C., 27 N. Y., 45.
[2] 2 Cush., 100.

statements not under oath, to the selectmen, relating to his residence, in an action against such selectmen for refusing his vote, the plaintiff may prove that he made such statements, and what they were.[1] But it would doubtless be otherwise if the plaintiff had been requested by the selectmen to make his statement under oath, and had not done so. In determining the question of a party's right to vote, the statements of such party concerning his residence, can not be overlooked or disregarded, but the party must, if required, make oath to his statement.

§ 299. Where an officer of election has decided a difficult and doubtful question against the right of a person claiming a vote, he will be deemed, until the contrary appears, to have acted without malice, even though his decision may have been erroneous. Thus, in New York, the inspectors refused the vote of a registered citizen, who had been challenged on the ground that he was a deserter from the U. S. military service, it appearing that by the act of Congress, deserters were rendered incapable of exercising the rights of citizens. In a suit against these inspectors for refusing this vote, it was held that they were not liable without proof of malice notwithstanding the fact that the act of Congress was afterward construed to refer only to deserters who had been properly convicted as such.[2]

§ 300. And it was held in *Goetchens* v. *Matthewson* that in an action for damages against judges for corruptly refusing the vote of the plaintiff, the fact that the defendants knew that plaintiff differed from them in his political sentiments is admissible as an element of proof to be considered by the jury together with other facts, to determine how far they were influenced by bias, prejudice, or corrupt motives in rejecting

[1] Lombard *v.* Oliver, 7 Allen, 155.

[2] Goetchens *v.* Matthewson, 5 Lans., N. Y., 214. As to what will amount to an unreasonable refusal by election officers to receive the vote of a qualified elector, see Sanders *v.* Getchell, 76 Me., 158; Pierce *v.* Getchell, Id., 216; [Hannon *v.* Grizzard, 96 N. C., 293].

his vote. This ruling was probably correct, and yet such proof should have little or no weight, unless it appears from the acts, declarations, or conduct of the defendants, that they were not disposed to treat fairly and honestly the claims of a political opponent. The fact that the defendants and the plaintiff differed in politics standing alone, should be held as a fact of no moment. If it were otherwise the judges of an election would not be safe in deciding against the right of a political opponent to vote except in the clearest case. It would destroy that independence that is requisite to judicial fairness.

§ 301. If a registered voter tenders his vote at an election, and the judges willfully, corruptly and fraudulently refuse to receive it, he is entitled to recover in an action against them, such exemplary damages as the jury may consider proper under the circumstances.[1] But in no case can a party recover exemplary damages unless willful and corrupt action on the part of the officers charged is proven, and indeed, as we have already seen, in most of the States, the officers of election are not liable at all—not even for actual damages—unless a corrupt purpose is shown. It was also held in the same case, that where the defendant claimed to have rejected plaintiff's vote upon the ground of his disloyal sentiments, it was proper for plaintiff to show that the defendant, as register, had permitted another person, known to hold the same disloyal sentiments, to be registered as a voter. This was admitted as tending to show malice as against the plaintiff.[2]

[1] Elbin *v.* Wilson, 33 Md., 135.

[2] In determining the actual and not vindictive damages of a party injured by the making and returning of a false abstract of votes by the county clerk, the good faith and honest intentions of the latter are no protection to him or to the sureties on his official bond for such breach of official duty. Thomas *v.* Hinkle, 35 Ark., 450.

CHAPTER X.

OF THE PRIMA FACIE RIGHT TO AN OFFICE.

§ 302. Importance of the subject.
302. The person holding ordinary credentials presumed elected and allowed to act pending contest.
303. Credentials, form of.
304. Certificate of majority of certifying board sufficient.
305. Credentials of members of Congress.
306. Who may issue.
306–308. Certificate of election confers vested right, but does not oust jurisdiction of proper tribunal.
306*a*. The rule in North Carolina.
307. Power of Governor to revoke commission.
309–313. Power of Lower House of Congress when no certificate has been issued to either claimant.
314. Effect of certificate showing only partial canvass.
315, 316. Certificate of election cannot be collaterally attacked.
317. Courts of equity will not interfere with contested election case.
318–321. Further discussion as to effect of certificate of election.

§ 302. Where two or more persons claim the same office, and where a judicial investigation is required to settle the contest upon the merits, it is often necessary to determine which of the claimants shall be permitted to qualify and to exercise the functions of the office, pending such investigation. If the office were to remain vacant pending the contest it might frequently happen that the greater part of the term would expire before it could be filled; and thus the interests of the people might suffer for the want of the services of a public officer. Besides, if the mere institution of a contest was to be deemed sufficient to prevent the swearing in of the person holding the usual credentials, it is easy to see that very great and serious injustice might be done. If this were the rule, it would only be necessary for

an evil disposed person, to contest the right of his successful rival, and to protract the contest as long as possible, in order to deprive the latter of his office for at least a part of the term. And this might be done, by a contest having little or no merit on his side, for it would be impossible to discover, in advance of an investigation, the absence of merit. And again, if the party holding the ordinary credentials to an office, could be kept out of the office by the mere institution of a contest, the organization of a legislative body, such for example as the House of Representatives of the United States, might be altogether prevented, by instituting contests against a majority of the members, or what is more to be apprehended, the relative strength of political parties in such a body might be changed, by instituting contests against members of one or the other of such parties. These considerations have made it necessary to adopt, and to adhere to, the rule, that the person holding the ordinary credentials shall be qualified, and allowed to act pending a contest and until a decision can be had on the merits.[1]

§ 303. No particular form of credentials is required. It is sufficient if the claimant to an office presents a certificate signed by the officer or officers authorized by law to issue credentials, and stating generally the fact that the election

[1] [In the case of Chalmers *v.* Manning, the contestee in his answer to the notice of contest stated that he would not take his seat in Congress nor ask to have his name enrolled as a member thereof until his right thereto had been vindicated. Acting in accordance with this statement he failed to present his certificate of election to the clerk prior to the organization of the House, but subsequently caused his certificate, which was in due form, to be presented, and claimed his right to be sworn in as a member pending the contest. Because of Mr. Manning's admissions and refusal to present his certificate, the House of Representatives refused to seat him upon his *prima facie* title, and his district remained unrepresented throughout the contest. Chalmers *v.* Manning, Mob., 7.]

was duly held and that the claimant is duly elected to the office in question. If several officers or persons are by law required to join in such a certificate, it is generally sufficient if a majority have signed it.[1]

§ 304. Where the statute requires the votes of several counties composing a congressional district to be canvassed by one judge from each county, and that the result shall be certified by a board composed of one judge from each county, the certificate of four out of five such judges, based upon a full canvass of the vote, is *prima facie* sufficient. The refusal of the fifth judge to join in the certificate will not invalidate it.[2]

§ 305. In the absence of any express provision of law authorizing any officer to certify to the due election of members of Congress, it is presumed that under the usages of the House a certificate under the great seal of the State, signed by its chief executive officer, would constitute sufficient credentials.[3]

§ 306. It is enough for a *prima facie* case if the certificate comes from the proper officer of the State, and clearly shows that the person claiming under it has been adjudged to be duly elected by the officer or board on whom the law of the State has imposed the duty of ascertaining and declaring the result.[4] In *Kerr* v. *Trego*,[5] it is held that the certificate of election sanctioned by law or usage is *prima facie* evidence of title to the office, and can only be set aside by a contest in the form prescribed by law. In this latter case will be found also an elaborate and able discussion of the general subject of the organization of legislative bodies, to which the reader who may desire to investigate that subject is referred.

[1] *Post*, § 314.
[2] Coffroth *v.* Koontz, 2 Bart., 25.
[3] W. T. Clark's Case, 42d Congress [Smith, 6].
[4] Id.
[5] 47 Pa. St., 292.

[§ 306*a*. It has been held in North Carolina that while the result of a vote for a county office is conclusively settled, so far as the county commissioners are concerned, by the certificate of the board of canvassers, still, if the commissioners rightly refuse to administer the oath of office to one elected but ineligible to the office, a court will not compel them to do so.[1]

And it has been held in a later case in the same State that where county commissioners, prompted by the protests of a considerable number of electors, and after honest and diligent examination of facts, have refused to induct a claimant into an office to which he has been elected, on the ground that he is disqualified, they will not be held liable to such claimant in damages, although he is in fact eligible to the office.[2]]

§ 307. Where the statute gives the Governor of a State the power, and makes it his duty, to commission the person elected to an office, the issuing of a commission by him confers a vested right upon the person commissioned, which nothing but a judicial decision can take away or authorize the Governor to recall. It was accordingly held in *Ewing* v. *Thompson*,[3] that where the Governor in 1861 commissioned Ewing as sheriff of the city and county of Philadelphia, and afterwards undertook to commission Thompson as duly elected at the same election to the same office, the latter commission was void and the former valid, until set aside by a contest. "The power of the Governor," says Strong, J., in that case, "to revoke a commission once issued to an officer, not removable at the pleasure of the Governor, may well be denied; even where he has the power of appointment of such an officer, an appointment once made is irrevocable; much more, it would seem, is a commission issued by him

[1] [Worthy *v.* Barrett, 63 N. C., 199.]
[2] [Hannon *v.* Grizzard, 96 N. C., 293.]
[3] 43 Pa. St., 372.

incapable of being recalled or invalidated by himself, when the appointing power is located elsewhere, and where his act in issuing the commission, is not discretionary with him, but is only the performance of a ministerial duty."[1] No doubt the appointing officer may reconsider his action in the matter of making an appointment at any time before the appointment is complete; but the appointment, when fully executed by the performance of the last act made necessary in its execution, is not revocable without the consent of the appointee.[2]

§ 308. But, of course, a commission given by the governor, or other competent authority, does not oust the jurisdiction of the proper tribunal, in a contested election case. It is simply evidence of the right to hold the office; gives *color* to the acts of the incumbent, and constitutes him an officer *de facto*.[3] The election being set aside, or the person holding the commission being held not elected, by a tribunal of competent jurisdiction, the commission falls to the ground. The person duly commissioned must exercise the functions of the office until, upon an investigation *upon the merits*, it is judicially determined otherwise.[4]

§ 309. In the case of *Morton* v. *Daily*,[5] there were two certificates of election issued by the same governor; first, a certificate declaring Mr. Morton duly elected, and, at a later date, a certificate declaring Mr. Daily duly elected. The second certificate was issued upon the alleged discovery by the governor, of fraud in the vote counted for Mr. Morton, and by the second certificate the governor revoked, as far as

[1] And see the important case of Marbury *v.* Madison, 1 Cranch, 137.

[2] State *v.* Van Buskirk, 4 N. J. L., 463.

[3] [Dean *v.* Field, 1 Ells., 190.]

[4] Upon the subject of the effect of a commission, see Ewing *v.* Filley, 43 Pa. St., 384; State *v.* Johnson, 17 Ark., 407; Hunter *v.* Chandler, 45 Mo., 452.

[5] 1 Bart., 402.

he was able, the first. The House allowed the holder of the last certificate to be sworn in, and to occupy the seat pending the contest. By so doing, however, the House assumed that the governor might go behind the returns, investigate questions of fraud, and, assuming a judicial character, determine such questions; and it also assumed that the governor possessed the power to revoke a certificate once issued by him. But there seems to be no doubt but that, in the absence of a statute authorizing the governor to institute a judicial inquiry into the manner of conducting an election, he is bound by the returns, and has no power beyond the certification of the result, as shown thereby. The duty of investigating charges of fraud, and deciding upon them can never be justly assumed by an executive officer, but belongs exclusively to such judicial or *quasi* judicial tribunal, as the law may designate for that purpose.[1]

§ 310. The case of *Morton* v. *Daily*, *supra*, was followed by the House in *Hoge* v. *Reed*.[2] But it must have been without due consideration, for the same House held the contrary doctrine in *Wallace* v. *Simpson*.[3] In that case the board of State canvassers, being by law required to certify the result of the election, gave their certificate declaring that W. D. Simpson "was duly elected by a majority of votes, representative in the Forty-first Congress," and upon that certificate the governor issued to Mr. Simpson the usual commission or certificate of election. By another certificate the board of canvassers declared that Alexander Wallace had "received a majority of the *legal* votes" cast for representative, and as explanatory of this contradiction on their part, they made and signed a "statement" addressed to the House of Representatives, detailing certain alleged irregularities and frauds committed in the conduct of this election, and de-

[1] Switzler *v.* Dyer, 2 Bart., 777; State *v.* Rodman, Sec'y of State, 43 Mo., 256; State *v.* Steers, 44 Mo., 223–228; Switzler *v.* Anderson, 2 Bart., 374.

[2] 2 Bart., 540.

[3] 2 Bart., 552.

claring that, although they had felt themselves in duty bound to issue the certificate of election to Mr. Simpson, yet they were convinced that he was not duly elected. Upon these papers the majority of the committee of elections reported that Mr. Wallace was entitled, *prima facie*, to the seat, and they submitted a resolution that he be sworn in, pending the contest, upon the merits. But the House, after debate, adopted the minority report, which decided the *prima facie* case against Mr. Wallace. This decision of the House appears to have been based upon the following grounds:

1. That the certificate of election signed by the governor was in due form and declared the election of Simpson, and that the House should not look beyond it in deciding the *prima facie* case.

2. That the subsequent statement was an unauthorized and unofficial paper of no value as evidence, and could not be properly considered; but if considered, it showed upon its face that the board of canvassers had gone outside of their province, in order to investigate charges of fraud and violence in the conduct of the election.

3. That the board having made a certificate of the result, and transmitted the same to the secretary of State, had no power thereafter to make another and different certificate.

The correctness of these propositions is, as we have had occasion to show elsewhere, well established by judicial decisions, as well as by frequent decisions of the House of Representatives itself.

§ 311. In the case of *Sheafe* v. *Tillman*,[1] a like question was again considered, and the sound rule that a ministerial or executive officer can exercise no judicial functions, was adhered to. In the report in that case the doctrine is laid down as follows:[2]

"There is no law of the State of Tennessee that gives authority to the Governor to reject the vote of any county

[1] 2 Bart., 907.
[2] P. 910.

or part of a county; his duty is only to compare the returns received by him with those returned to the office of the Secretary of State, and upon such comparison being made, to "deliver to the candidate receiving the highest number of votes in his district the certificate of his election as Representative to Congress."[1] If illegal votes have been cast, if irregularities have existed in the elections in any of the counties or precincts, if intimidation or violence has been used to deter legal or peaceable citizens from exercising their rights as voters, to this House must the party deeming himself aggrieved, look for redress. This great power of determining the question of the right of a person to a seat in Congress, is not vested in the executive of any State, but belongs solely to the House of Representatives.[2] The action of the Governor, so far as he has thrown out the votes of counties or parts of counties, is to be disregarded, and the matters in dispute are to be settled upon the actual returns and the evidence introduced, independent of the doings of the executive."

And this ruling is according to the weight of authority in the House, while it has the support not only of reason and sound policy, but of an almost unbroken line of judicial decisions, extending far back through our history as a nation.

§ 312. There is still another class of cases which have arisen in the lower house of Congress, in which neither party holds credentials, the governor or other returning officer having refused to declare either party elected. In some of these cases the House has undertaken upon such documentary evidence as it has been able to bring before it, without delay, to decide the *prima facie* claim, and order one or the other to be sworn in, pending the contest.[3]

§ 313. Of course the House must, in each case of this

[1] Code of Tennessee, Sec. 935, page 239.

[2] Constitution United States, Art. 1, Sec. 5.

[3] Coffroth *v.* Koontz, 2 Bart., 25; Foster *v.* Covode, Id. 519.

character, judge whether there is before it sufficient *prima facie* evidence of the election of either one of the claimants; but as a general rule, it is believed that in the absence of credentials, no one should be admitted to the seat in advance of an investigation upon the merits. And if this general rule is to be departed from in any case, it should be only after a special investigation by a committee, into the *prima facie* case, and after a report thereon. And such special inquiry and report can scarcely be possible, unless there is something in the nature of credentials or of written evidence of the election of one or the other claimant. If the returns are duly certified, the House may act upon these; or if there is an informal certificate, the House may order an inquiry into its effect. But if there is no record or other documentary evidence to show what the result of the election was, it is believed that a full investigation upon the merits should precede the swearing in of either applicant. If the House finds itself obliged to take testimony generally to decide the *prima facie* case, it will generally find that it can not stop short of hearing all the evidence and deciding upon the merits.

§ 314. It is to be observed in this connection that while in determining the *prima facie* right to a seat, the House of Representatives will not look behind the certificate, if it be signed by the proper officers, and if it contains a statement in unequivocal terms of the result of the election; yet something may appear upon the face of the certificate itself to destroy or impair its value as *prima facie* evidence.

If, for instance, the certificate states that the vote of one county out of five has not been canvassed, it seems that this would make it necessary even to the determination of the *prima facie* case to inquire what the vote was in the county omitted.[1] And if it appear that the vote of the county omitted would have changed the result, the value of such a

[1] § 302.

certificate is destroyed. But if it appear that the vote of the omitted county was not material to the result, then according to the ruling of the House in *Coffroth* v. *Koontz*,[1] the certificate is good, although based only upon the four counties canvassed. Whenever, therefore, it appears upon the face of a certificate of election, that one or more of the counties composing the district have been omitted from the canvass, it is the duty of the House, before determining the *prima facie* case, to inquire into the effect of such omission upon the result of the canvass, and to treat the certificate as *prima facie* good only in case it appears that the omitted vote would not change the result, or contradict the certificate, if admitted.

§ 315. The principal, and almost the only case, in which the lower house of Congress has ever denied to a person holding regular credentials, the right to be sworn and to take his seat pending the contest, is the celebrated *New Jersey Case.*[2] In that case one set of claimants held the regular certificate of election signed by the Governor, and another set held the certificate of the Secretary of State, that they had received a majority of the votes cast in their respective districts. After a long and angry debate the house, (being yet unorganized,) refused to admit either set of claimants to their seats. Subsequently, and after a partial investigation, the holders of the Secretary's certificates were admitted to seats pending the contest, and at the end of the contest these persons were confirmed in their seats. This precedent has never since been followed in a single instance. It is so clearly wrong and as a precedent, so exceedingly dangerous, that the House has not hesitated to disregard it entirely on every occasion since when the question has arisen.

§ 316. The effect of the returns of an election is not open for consideration in a proceeding in which the title to the office comes up collaterally. Hence it was held in New

[1] 2 Bart., 25.
[2] 1 Bart., 19.

York that the law having committed to the common council of a city, the duty of canvassing the returns and determining from them the result of the election for mayor, and the council having performed that duty, and made a determination, the question as to the effect of the returns could not be considered, in an action where the person declared elected was not a party, and in which the question of his right to the office arose collaterally. "If," says *Denio, J.*, "the question had arisen upon an action in the nature of a *quo warranto* information, the evidence would have been competent," and the evidence referred to was that offered to impeach the canvass made by the common council. "But," he continues, "it would be intolerable to allow a party affected by the acts of a person claiming to be an officer, to go behind the official determination to prove that such official determination arose out of mistake or fraud.[1] The true rule is, that the certificate of the board of canvassers declaring the result of the election is, in a controversy arising between the party holding it and a stranger, conclusive; but in a proper action, properly entitled, to impeach it and try the title to the office, it is only *prima facie* evidence of the right.[2]

§ 317. The merits of a contested election can not be taken from the proper tribunal authorized by law to try it, and brought for adjudication into a court of equity, upon a bill to enjoin the party holding the certificate of election from using it, upon the ground that it was procured by fraud. This doctrine is strikingly illustrated by the decision of the Supreme Court of Pennsylvania in *Hulseman* v. *Rems*,[3] which was a petition for an injunction upon this

[1] Hadley *v.* City of Albany, 33 N. Y., 603. And see also Peyton *v.* Brent, 3 Cr. C. C., 424; Hunter *v.* Chandler, 45 Mo., 452.

[2] See People *v.* Cook, 8 N. Y., 67; People *v.* Vail, 20 Wend., 12; People *v.* Jones, 20 Cal., 50; Commonwealth *v.* Co. Commissioners, 5 Rawle, 75.

[3] 41 Pa. St., 396.

ground. The court, although satisfied that the officer in question held a certificate based upon the grossest of frauds, amounting even to the actual forgery of some of the returns, yet refused to interfere by injunction, and for the following among other reasons: "If," says the court, "in this way we suffer a gross fraud to pass through our hands without remedy, it is not because we have any mercy on the fraud, but because we can not frustrate it by any decree of ours without an act of usurpation. Another tribunal is appointed to administer the remedy and we believe that on proper application, it will administer it rightly according to the evidence it may have; and if we had any doubts of this we should still not be justified in interfering."[1] There can be no doubt but that a certificate of election regular in form, and signed by the proper authority, constitutes *prima facie* evidence of title to the office, which can only be set aside by such proceedings for contesting the election as the law provides.[2] The certificate whether rightfully or wrongfully given, confers upon the person holding it, the *prima facie* right to the office.[3] If, however, the certificate contains upon its face a recital of facts, and these facts show affirmatively that the party holding it was not duly elected, it may be disregarded.[4]

§ 318. The regular certificate of election properly signed is, as we have seen, to be taken as sufficient to authorize the person holding it to be sworn in. It is *prima facie* evidence of his election and the only evidence thereof which can be considered in the first instance, and in the course of the organization of a legislative body. But there are questions which may be raised, touching the *qualifications* of a person

[1] And see Moulton *v.* Reid, 54 Ala., 320.

[2] Commonwealth *v.* Baxter, 35 Pa. St., 263; Kerr *v.* Trego, 47 Pa. St., 292; State *v.* The Governor, 1 Dutch (N. J.), 331.

[3] People *v.* Miller, 16 Mich., 56; Crowell *v.* Lambert, 10 Minn., 369; State *v.* Sherwood, 15 Minn., 221; State *v.* Churchill, Id., 455.

[4] Hartt *v.* Harvey, 32 Barb., 55, 61.

elected, which may be investigated and decided as a part of the *prima facie* case, and as preliminary to the swearing in of the claimant. Thus, if a specific and apparently well grounded allegation be presented to the House of Representatives of the United States, that a person holding a certificate of election is not a citizen of the United States, or is not of the requisite age, or is for any other cause inelligible, the House will defer action upon the question of swearing in such person, until there can be an investigation into the truth of such allegation. It is necessary, however, that such allegation should be made by a responsible party; it is usually made, or vouched for at least, by some member or member elect of the House. It is to be presented at the earliest possible moment after the meeting of the House for organization, and generally at the time that the person objected to presents himself to be sworn in. The person objected to upon grounds such as these is not sworn in with the other members, but stands aside for the time being, and the House through its committee with all possible speed proceeds to inquire into the facts.

§ 319. The certificate of election does not ordinarily, if ever, cover the ground of the due qualification of the person holding it. It may be said that by declaring the person "duly elected," the certificate, by implication, avers that he was qualified to be elected, and to hold the office. But it is well known that canvassing officers do not in fact inquire as to the qualifications of persons voted for; they certify what appears upon the face of the returns, and nothing more. The certificate, therefore, must be regarded as evidence of the *election* of the person named therein, so far conclusive, that it can not be attacked except in the ordinary mode provided for contesting; but it is not evidence of the *qualifications* of the person named. The presumption always is, that a person chosen to an office is qualified to fill it, and it is never incumbent upon him to prove his eligibility. The

certificate of election does not add to this presumption, but simply leaves it where the law places it, and he who denies the eligibility of a person who is certified to be elected, must take the burthen of proving that he is not eligible. During the rebellion the House of Representatives repeatedly decided that a disloyal person should not be sworn in as a member of that body, and it was also decided that a charge of disloyalty against a member elect should be investigated and decided, previous to his being allowed to take his seat. In the case of the *Kentucky Election*,[1] this was the ruling of the House. The doctrine was thus stated in the committee's report:

"The committee are of opinion that no person who has been engaged in armed hostility to the government of the United States, or who has given aid and comfort to its enemies during the late rebellion, ought to be permitted to be sworn as a member of this House, and that any specific and well-grounded charge of personal disloyalty made against a person claiming a seat as a member of this House ought to be investigated and reported upon before such person is permitted to take the seat; but all charges touching the disloyalty of a constituency in a State in which loyal civil government was not overthrown during the late rebellion, or the illegality of an election, are matters which pertain to a contest in the ordinary way, and should not prevent a person holding a regular certificate from taking his seat."

§ 320. The case of *Hunt* v. *Chilcott*,[2] is one of the very few cases in which a certificate of election signed by the proper authority, has been held insufficient to entitle the holder to be sworn in a member of the House of Representatives of the United States, and to occupy the seat, pending a contest. The reason for this action, however, was that the party holding the certificate had voluntarily offered evidence which impeached it. The committee said in their report:

[1] 2 Bart., 32.
[2] 2 Bart., 164.

"But Mr. Hunt did not rest his case upon that paper alone. He introduced Governor Cummings in its support. The Governor informed the committee, that on the said 5th of September a canvass of the votes cast for delegate was had in his presence, by the board of canvassers; that two of said board found that a majority of all the votes had been cast for George M. Chilcott, and that one of said board dissented from this conclusion, and that he, the governor, considering himself one of the board, agreed with the dissenting member, making a tie, whereupon he determined the election himself, and made a certificate in opposition to the conclusion of two members of the board. In addition to the Governor's statement, among the papers submitted by the House, is a report of the board of canvassers, signed by Frank Hall, Secretary of the Territory, and Richard E. Whitsitt, Auditor of the Territory, and addressed to the Governor, in which they state that at the canvass held in his presence, according to law, they find that Mr. Chilcott had 3,529 votes, and A. C. Hunt had 3,421 votes, by which it would appear that Mr. Chilcott was elected delegate by 108 majority. The certificate of the Governor thus appears to have been issued in violation of the laws of the Territory, in order to reverse the facts of the canvass. Under this state of facts the committee do not feel authorized to report that Mr. Hunt is entitled, *prima facie*, to a seat as delegate."

While, therefore, it was conceded that the House should not insist upon looking beyond the certificate in determining a *prima facie* case, it was held that if the party holding the certificate saw fit to offer evidence in addition to the certificate, the House might take notice of it.

§ 321. While it is true, as we have seen, that where a certificate of election is confined to a statement that the person to whom it is given is duly elected, or words to that effect, it is *prima facie* evidence that such person is entitled to the office, it is also true that where it recites the facts,

upon which the certifying officer relies as his justification for issuing it, and where, from those facts, it clearly appears that the person named was not elected, the certificate destroys itself.[1]

[1] Hartt *v.* Harvey, 32 Barb., 55.

CHAPTER XI.

OF ELIGIBILITY TO OFFICE, AND OF TENURE.

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322, 323. Qualifications for State offices.
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324. Meaning of the term "inhabitant" as used in the United States Constitution.
325. Residing abroad as representative of the Government of the United States.
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327–331. Effect of votes cast for ineligible candidate.
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333. Effect of an offer by candidate for office in the nature of a bribe.
334. Effect of absence while engaged in discharge of duties of public office.
335. Holding an incompatible office.
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340. Acceptance of incompatible office equivalent to resignation.
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347. Legislature cannot add to constitutional qualifications.

§ 348. Abandonment of an office.
349–351. Holding over until successor is chosen and qualified.
352. Resignation, acceptance not necessary.
353. Tenure during good behavior.
354. Right to hearing before removal.
354. Commission of crime does not *ipso facto* vacate office.
355. Power of removal.
356–358. When judicial declaration of vacancy is necessary.
359. Vacancy cannot be anticipated.
360. Vacancy in office of United States Senator.
361. Filling such vacancy by executive appointment.
362. Member of Congress may resign without notice to the House.
363. Declaration of vacancy by Governor.
364. Vacancies that may happen "during recess of the Senate."
364. Discussion as to construction of Article 2, Section 2, Clause 2, Constitution of the United States.
365. Power to fill vacancies generally.
365. Construction of Article 1, Section 3, United States Constitution.
366. In what cases Legislature may fill offices.
367. Right of incumbent to fees and emoluments.
368. In this country appointment or election creates no contract for any particular period.

§ 322. The qualifications for Federal offices are fixed by the Federal Constitution or Federal law, and the qualifications for State offices are fixed by State Constitutions or State laws. It is not competent for any State to add to or in any manner change the qualifications for a Federal office, as prescribed by the Constitution or laws of the United States. Nor can the United States add to or alter the qualifications for a State office, as fixed by State regulations.

§ 323. The Constitution of the United States fixes the qualifications of Representatives in Congress in the following words:

"No person shall be a Representative who shall not have attained the age of twenty-five years and have been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."[1] A State law requiring that a Representative in

[1] Constitution, Art. 1, Sec. 2. [The record of a court admitting a person to citizenship is conclusive upon Congress in a contested election, and cannot be questioned collaterally. Cannon *v.* Campbell, 2 Ells., 604.]

Congress shall reside in a particular town and county within the district from which he is chosen is unconstitutional and void.[1]

§ 324. It will be seen by reference to the Constitution of the United States, Article 1, Sections 2 and 3, that no person can be a Representative "who shall not, when elected, be an *inhabitant* of the State in which he shall be chosen," and that no person shall be a Senator who shall not, "when elected, be an *inhabitant* of that State for which he shall be chosen." The meaning of the term "inhabitant," as employed in these provisions, has been somewhat discussed. That it was intended to express something different from the word "resident" is apparent from the fact that the latter word was in the original draft of the Constitution, and was stricken out by the convention, and "inhabitant" inserted. It would seem that the framers of the Constitution were impressed with a deep sense of the importance of an actual *bona fide* residence of the Representative among the constituency — a residence in the sense of actual living among them and commingling with them,— and therefore employed the term "inhabitant" in the sense of living or abiding, and not in the sense of technical residence. This view of the subject was sustained in an elaborate report made to the House of Representatives, in 1824, in case of John Bailey of Massachusetts, who was elected a Representative from that State while he was a clerk in the Department of State at Washington, D. C., and temporarily residing in that city while in the discharge of his official duties. He was held not entitled to the seat.[2] The conclusion reached in that case was that an inhabitant of a State, within the meaning of these clauses of the Constitution, is one who is *bona fide* a member of the State, subject to all the requisitions of its laws, and entitled to all the privileges and advantages which they confer.

§ 325. The case of one who is abroad, representing the government at a foreign Court, was held to be different from

[1] Barney *v.* McCreery, Cl. & H., 167, 169.
[2] Electors *v.* Bailey, Cl. & H., 411.

that of a person employed in the *domestic* service of the government, out of the limits of his own State. The foreign representative carries with him the sovereignty of the government to which he belongs; his rights as a citizen are not impaired by his absence; children born in the house he occupies are considered as born within the territory and jurisdiction of the government in whose service he is; he does not possess the capacity, by residence in the foreign country, to become one of its citizens, or to lose his allegiance to the country from which he comes. None of these things attach to those persons who are employed in the home service of the government. It was accordingly held by the Committee of Elections, in the case of *John Forsyth of Georgia*,[1] that a person can be chosen a Representative in Congress while absent from the country, as a minister to a foreign Court, and that this case did not conflict with the case of John Bailey, *supra*.

§ 326. The Constitution of Illinois of 1848 provided as follows:

"The judges of the Supreme and Circuit Courts shall not be eligible to any other office or public trust of profit in this State, *or the United States*, during the term for which they are elected, nor for one year thereafter. All votes for either of them for any elective office (except that of judge of the Supreme or Circuit Courts) given by the General Assembly or the people shall be void."

The House of Representatives held that this clause of the Constitution of Illinois, so far as it related to the election of members of Congress, was void, because in conflict with the Federal Constitution, and also because it was an unauthorized attempt on the part of the State of Illinois to fix or to change the qualifications of Representatives in Congress. Mr. Marshall and Mr. Trumbull of Illinois were elected Representatives in the Thirty-fourth Congress. They had previously been elected, respectively, judge of the Supreme and Circuit Court of that State, for terms which had not expired.

[1] Cl. & H., 497.

This was held to be no objection to their holding the office of Representative in Congress.[1] The United States Senate adopted the same rule in Trumbull's case.[2]

§ 327. We come now to a question which has been much discussed, and upon which the authorities are somewhat conflicting; it is this: suppose the candidate who has received the highest number of votes for an office is ineligible, and that his ineligibility was known to those who voted for him before they cast their votes, are the votes thus cast for him to be thrown out of the count, and treated as never cast, and should the minority candidate, if eligible, be declared elected in such a case?[3] No doubt the English rule is, that where the majority candidate is ineligible, and sufficient notice of his ineligibility has been given, the person receiving the next highest number of votes, being eligible, must be declared elected. Great stress is laid upon the fact of notice having been given, and the reason of the English rule is said to be "that it is wilful obstinacy and misconduct in a voter to give his vote for a person laboring under a *known* incompetency."[4] An examination of the English cases will show that in some of them the election was declared void, and sent back to the people, on the ground that there was not sufficient notice of the incapacity of the successful candidate, while in others the minority candidate was declared elected, on the ground that due notice of the ineligibility of the person receiving the majority was given. Some of the principal English authorities upon the subject are cited in the note.[5]

[1] Turney *v.* Marshall, 1 Bart., 167; Fouke *v.* Trumbull, 1 Bart., 167; [Wood *v.* Peters, Mob., 79].

[2] 1 Bart., 619.

[3] Where the candidate receiving the majority is ineligible for a cause not known to the voters, there must be a new election. Dryden *v.* Swinburne, 20 W. Va., 89; Swepston *v.* Barton, 39 Ark., 549.

[4] Southwark on Elections, p. 259.

[5] Rex *v.* Monday, Cowp., 537; Rex *v.* Coe, Heywood, 361; Rex *v.* Bissell, Id., 360; Rex *v.* Parry, 14 East, 549; Regina *v.* Coaks, 28 Eng. L. and Eq., 304; S. C., 7 Q. B., 406; Heywood on County Elections, 535; Male on

§ 328. Although the law of the British Parliament, as well as that administered in the courts of that country, recognizes the rule as laid down in the cases just cited, the House of Representatives of the United States has refused to adopt it. See the case of *Smith* v. *Brown*,[1] in which, in an able report, submitted by Mr. Dawes, chairman of the Committee of Elections, the authorities are reviewed, and the conclusion is reached, "that the law of the British Parliament, in this particular, has never been adopted in this country, and is wholly inapplicable to the system of government under which we live." And the courts of this country generally take the same view.

§ 329. Thus, in *Commonwealth* v. *Cluley*,[2] the Supreme Court of Pennsylvania held that where, at an election for sheriff, a majority of the votes are cast for a disqualified person, the next in vote is not to be returned as elected; and the Supreme Court of California, in *Saunders* v. *Haynes*,[3] holds the same doctrine and enforces it, by cogent reasoning. And in Wisconsin we have the same ruling in *State* v. *Giles*,[4] and in *State* v. *Smith*;[5] and see *Opinion of Judges*,[6] *State* v. *Boal*,[7] *State* v. *Vail*,[8] *State* v. *Anderson*,[9] *People* v. *Clute*,[10] [and *In re Corliss*].[11] But in Indiana the doctrine of the English authorities has been followed,[12] in *Carson* v. *Mc-*

Elections, 336; King *v.* Hawkins, 10 East, 210; Claridge *v.* Evelyn, 5 B. & A., 8; Clarke on Election Committees, p. 156; Southwark on Elections, p. 259.

[1] 2 Bart., 395. [And see, also, Cannon v. Campbell, 2 Ells., 604.]

[2] 56 Pa. St., 270.

[3] 13 Cal., 145.

[4] 1 Chand., 112.

[5] 14 Wis., 497.

[6] 32 Maine, 597.

[7] 46 Mo., 528.

[8] 53 Mo., 97; Cushing, Elec. Cas., 496, 576.

[9] 1 Coxe (N. J.), 318.

[10] 50 N. Y., 45.

[11] [11 R. I., 638.]

[12] Gulick *v.* New, 14 Ind., 93.

Phetridge,[1] *Price* v. *Baker*,[2] [and *Cope* v. *State*;][3] and see *Stewart* v. *Hoges*, in Circuit Court of Stephenson County, Illinois.[4]

§ 330. Thus, it will be seen that the weight of authority in this country is decidedly against the adoption here of the English doctrine. And we think that sound policy, as well as reason and authority, forbids the adoption of that doctrine in this country. It is a fundamental idea with us that the majority shall rule, and that a majority, or at least a plurality, shall be required to elect a person to office by popular vote. An election with us is the deliberate choice of a majority or plurality of the electors. Any doctrine which opens the way for minority rule in any case is anti-republican and anti-American. The English rule, if adhered to, would in many cases result in compelling very large majorities to submit to very small minorities, as an ineligible person may receive, and in many cases has received, a great majority of the votes. It is enough, in such a case, to hold the election void.[5]

§ 331. This question was elaborately discussed and settled, so far as the Senate of the United States is concerned, in the case of Joseph C. Abbott, of North Carolina. The decision of that case was against the adoption of the English rule in this country, and Abbott, who, notwithstanding he received only a minority of the votes cast, claimed a seat, upon the ground that he was the only eligible person voted for, was declared not elected. And it was distinctly asserted, in the report of the committee, that the fact that the voters have notice of the ineligibility of the candidate at the time they cast their votes for him makes no difference. The remark of Judge Strong, in *Commonwealth* v. *Cluley*,[6] that

[1] 15 Ind., 327.
[2] 41 Ind., 572.
[3] [126 Ind., 51.]
[4] 3 Chicago Legal News, 117.
[5] [Lowry v. White, Mob., 623.]
[6] *Supra.*

"the disqualified person *is a person still*, and every vote thrown for him is formal," is quoted with approbation. The broad doctrine was asserted that in this country an election, by a minority of the persons voting, is not to be tolerated under any circumstances. Mr. Carpenter, from the minority of the committee, submitted an elaborate report maintaining the right of Mr. Abbott to the seat, and the debate was exhaustive, but the Senate sustained the majority of the committee.[1]

[§ 331*a*. The Supreme Court of Kentucky in *Howes* v. *Perry*[2] applied this rule to the following case: The appellant and one Bayes were candidates for the same office. Bayes died on the afternoon of the election before the polls had closed. The count showed that Bayes had received a majority of the votes cast, but it was impossible to determine how many votes had been cast for him at the time of his death. The Court in passing upon appellant's claim to the office held that he was not the choice of a majority of the qualified voters who had cast their votes in good faith at the election and that he was not entitled to a certificate of election.]

§ 332. The Supreme Court of Pennsylvania has held that the trial and conviction of a sheriff of the offense of bribing a voter, previously to his election, does not constitutionally disqualify him from exercising the duties of his office, because it is not a conviction of "any *infamous* crime," within the meaning of the Constitution of that State.[3] In the opinion in this case will be found an elaborate discussion of the meaning of the term "infamous crime," and a reference to many authorities upon that subject. It was held that infamous crimes are treason, felony, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, etc.[4]

[1] Senate Rep. No. 58, 42d Congress, Second Session.

[2] [92 Ky., 260.]

[3] Commonwealth *v.* Shaver, 3 W. & S., 338; S. C., Bright. Elec. Cas., 134.

[4] See *ante*, §§ 108–111. [In the opinion of the Supreme Court of the

§ 333. While it is now well settled that an offer by a candidate for office to discharge the duties for less than the lawful salary or compensation is in the nature of a bribe, and vitiates all the votes influenced by such offer, yet it has been held that the person making the offer is not thereby rendered ineligible to hold the office in the absence of a constitutional or statutory provision declaring such ineligibility.[1] It was therefore held that, in order to oust the incumbent of an office on this ground, it was necessary to show that the number of votes in his favor cast under the influence of such promise was greater than the majority received by him. The rule that a disqualification to hold office on account of having committed an offense against the law, or public morals, must be declared by constitutional or statutory provision is believed to be well settled. In England, and in many of the States of the Union, it is expressly provided by law that bribery in procuring an office creates a disability to hold it. Such is the case especially in Iowa, in Kansas, in Oregon and in Wisconsin, and this fact should be kept in view in considering decisions based upon the laws of those States, some of which have been referred to.[2]

§ 334. The acceptance for a term of years of an office, the duties of which require the incumbent to reside outside the limits of a given place, does not necessarily render him

United States an infamous crime is one which subjects the offender to an infamous punishment, as, for example, imprisonment in the penitentiary. *Ex parte* Wilson, 114 U. S., 417; Mackin *v.* United States, 117 U. S., 348.]

[1] People *v.* Thornton, 25 Hun (N. Y.), 456.

[2] Upon the general subject of selling offices and of the bidding for offices see the following cases: Hall *v.* Gavitt, 18 Ind., 390; Carrothers *v.* Russell, 63 Iowa, 346; State *v.* Purdy, 36 Wis., 213; Walsh *v.* The People, 66 Ill., 58; State *v.* Dustin, 5 Oreg., 375; State *v.* Collier, 72 Mo., 12; S. C., 18 Am. Law Reg. (N. S.), 768; State *v.* Stevens, 23 Kan., 456; Tucker *v.* Aiken, 7 N. H., 113; Carleton *v.* Whitcher, 5 Id., 196; Meredith *v.* Ladd, 2 Id., 517; Alvord *v.* Collin, 20 Pick., 418; King *v.* Plympton, 2 Lord Raym., 1377; Rex *v.* Vaugh, 4 Burr., 2494; Waldo *v.* Martin, 2 Carr. & Payne, 1.

ineligible to another office, one of the qualifications of which is residence within such place. If the office accepted is for life, the law presumes that upon its acceptance the incumbent elects to make his residence permanently where its duties are to be discharged; but if it be an office only for a term of years, or for an indefinite period, the presumption is that no change of residence is intended, and none of the rights or privileges of his residence are lost by the acceptance of it.[1]

§ 335. Whether the incumbent of one office becomes disqualified by accepting another depends upon the question whether the law forbids the holding of the two offices by the same person,[2] and if not, then upon the further question whether the functions and duties of the two offices are incompatible.

The incompatibility between two offices which upon the acceptance of the one by the incumbent of the other operates to vacate the latter is not simply the physical impossibility to discharge the duties of both offices at the same time; but it is an inconsistency of the functions of the two offices, as where one is subordinate to the other, or where a contrariety

[1] Commonwealth *v.* Jones, 12 Pa. St., 365.

[2] [United States *v.* Saunders, 120 U. S., 126. An act of the Legislature making it the duty of a sheriff of a certain county to discharge the duties of city marshal in a certain town is not obnoxious to a clause of the Constitution which provides that "no person shall hold or perform the functions of more than one office under the government of the State at the same time." Attorney-General *v.* Connors, 27 Fla., 329. By the laws of the State of New Hampshire the offices of selectman and collector of taxes are incompatible. It has been held in that State that a collector of taxes of a previous year who has not completed the collection of taxes on his list, nor been discharged from liability to the town as collector, is within the prohibition and disqualified to hold the office of selectman. Attorney-General *v.* Marston, 66 N. H., 485. But in North Carolina there is a decision "that where the statute imposes certain duties to be performed by an officer after the expiration of the term of office, their performance does not constitute a place or office of trust or profit so as to disqualify the former officer from holding another office at the same time." State *v.* Somers, 96 N. C., 467.]

and antagonism would result from the attempt of one person to faithfully and impartially discharge the duties of both.[1]

§ 336. If there is a statutory or constitutional provision prohibiting the same person from holding both offices at the same time, then of course the question of their incompatibility does not necessarily arise;[2] for in such a case the acceptance of the second is *ipso facto* the abandonment and resignation of the first, though the duties of the two may be entirely compatible. But if the statute and constitution are silent upon the subject, then the question whether the two offices can be held at the same time by the same person depends upon their compatibility.[3]

§ 337. The sixth section of the first article of the Constitution of the United States provides that "no person holding any office under the United States shall be a member of either House during his continuance in office." Under this provision it has been frequently held that the acceptance of a commission as an officer of volunteers in the United States army is the acceptance of an office under the United States, and that the acceptance of such commission by a member of Congress vacates his seat.[4] While it is true that the commissions of officers of volunteers are ordinarily issued by the State authorities, it does not follow that they are State officers. They serve the United States, they are paid by the United States, and subject to the orders of the President. They are responsible only to Federal authority for the faithful performance of their duties. These tests show them to be officers of the United States.

§ 338. But an important question has arisen, as to whether a member of Congress *elect*, who has not yet been qualified as such, may be an officer of volunteers. In the case of

[1] People *v.* Green, 58 N. Y., 296.

[2] [Adam *v.* Mengel (Pa.), 8 Atl. Rep., 606.]

[3] [State *v.* Goff, 15 R. I., 505.]

[4] Case of Van Ness, Cl. & H., 122; Cases of Baker and Yell, 1 Bart., 92; Byington *v.* Vandever, Id., 395; Stanton *v.* Lane, Id., 637.

Robert C. Schenck, of Ohio, this identical question arose in the House of Representatives of the thirty-eighth Congress. In that case it was held that if a "member of Congress, *after he has qualified or entered upon the discharge of his duties as such member*, accepts or enters upon the discharge of any office under the United States, he, *ipso facto*, vacates or forfeits his seat as a member of Congress." Gen. Schenck was elected to the thirty-eighth Congress in October, 1862. That Congress did not organize until December, 1863. On the 16th of March, 1863, he was commissioned a Major General of volunteers, and entered upon the discharge of his duties as such, but resigned prior to the meeting of Congress in December, 1863, and did no act as a Representative in Congress and indicated no acceptance of it, until after his resignation as Major General, nor until the meeting of Congress at the time above named.

§ 339. The case of Gen. Blair, of Missouri, decided at the same time, was precisely similar to that of Gen. Schenck in all respects except one. Gen. Blair continued to exercise the functions of the office of Major General *after Congress met and organized*, having resigned his commission January 1, 1864, in order to take his seat in the House. The two cases were alike in this: each held another office under the United States after his *election* to the thirty-eighth Congress, and after the legal existence or constitutional term of that Congress commenced, to-wit, March 4, 1863; they were unlike in this: Gen. Schenck resigned his commission in the army before Congress met, and consequently before he had an opportunity to *elect* between the two offices, whilst Gen. Blair continued to hold his commission in the army and to exercise his functions under it, after Congress met and *after* he had such option or election. Because of this important difference between the two cases, the seat of Gen. Blair was declared vacant, while that of Gen. Schenck was declared not vacant. So far as Gen. Schenck's case was concerned the question presented had been previously decided by the House,

it having been held that a person may continue to exercise the functions of an office under the United States, after he is elected a member of Congress, and after the constitutional term of Congress commences, and prior to his taking his seat.[1] But Gen. Blair's case presented a new question. An able and interesting report upon these two cases was made from the committee of elections, by its chairman, the Hon. Henry L. Dawes, of Massachusetts.[2] From this report, which contains an elaborate discussion of the whole subject, it is deemed proper here to quote as follows:

"The authorities are equally clear that the mere appointment or election to an office, the duties of which are incompatible with those of one already held, will not vacate such office. This is true even in England, where the appointment to office can not always be avoided, and where once assumed it can not, as we have seen, be always voluntarily resigned by the incumbent.[3] And in this country, where the acceptance of office is purely voluntary, and its resignation equally so, the reason of the thing as well as authority clearly leads to the same conclusion. The incumbent is free to choose in which of the two offices he will serve. He can not be compelled to serve in the one or forced to vacate the other, except in some manner provided in its tenure. The mere appointment or election to one office, unaccompanied with consent or acceptance, can not force a man out of an office he already holds. Anciently it was tried in England. A man who was town clerk was elected alderman without his consent, in order to turn him out of his former office, they being incompatible, and thereupon he prayed a writ of restitution to the office of town clerk, which was granted.[4] So that consent and acceptance create the vacancy. And Willcock, in his Treatise upon Municipal Corporations,

[1] Hammond *v.* Herreck, Cl. & H., 287; Case of Elias Earle, Id., 314.
[2] Report No. 110, 1st Sess. Thirty-eighth Congress.
[3] Willcock on Mun. Corp., 243, 248.
[4] Dyer, 332, 6, in the notes.

before cited, states that the election of an officer to an incompatible office does not vacate the former before acceptance by the officer.[1] In this country, *Angel and Ames* in their work *on Corporations*,[2] adopt this same language, and incorporate it into the text of their treatise. In *Whitney* v. *Canique*, before cited,[3] the same doctrine is clearly stated in the following words: 'The appointment of a person to a second office incompatible with the first is not absolutely void, but on his subsequently *accepting* the appointment and *qualifying*, the first office is *ipso facto* vacated.' And Mr. Cushing, in his *Law and Practice of Legislative Assemblies*,[4] lays down the same rule, in stating a case which is the converse of the one involved in this reference. He says: 'It may be considered as a rule founded in the reason of the thing, and corresponding with the practice, as far as it is known, of all our legislative assemblies, that in order to vacate the seat of a member by the acceptance of the disqualifying or incompatible office, the election or appointment thereto alone is not sufficient, but the member must either have signified his acceptance of the office in a formal manner, or have done what is incumbent on him to qualify him to discharge its duties, or have actually entered upon its discharge.'

"The common law has been shown to be clear that the election alone to an incompatible office will not vacate one already held. The language of the Constitution is, that 'no person holding any office under the United States, shall be a member of either House during his continuance in office.' The words are, 'shall be a *member*,' not 'shall be elected.' No one can be made a 'member' against his will. He may be *elected* without his consent or knowledge, for he may be in a foreign land; but to 'become a member' he must not

[1] P. 243.
[2] Sec. 434.
[3] 2 Hill, 9[illegible]
[4] Sec. 479.

only be elected, but he must take the oath of office. The Constitution says: 'Each house shall be the judge of the elections, returns, and qualifications of its own *members;*' that is, of those who have qualified and taken seats. Again: 'A majority of each shall constitute a quorum, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent *members.*' But the attendance of a representative elect was never yet compelled. And, again: 'Each house may determine the rules of its proceedings, punish its *members* for disorderly behavior, and with the concurrence of two-thirds, expel a *member.*' The committee are not aware of any attempt to punish a representative elect, and of but one instance of an attempt to expel one. A resolution was adopted by the last House, under the previous question, to expel a person who was a representative elect, but had never signified his acceptance of the office, or qualified, or even appeared in Washington for the purpose of taking his seat. But when the Constitution uses the word '*representative,*' it is in this connection: 'The times, places, and manner of holding elections of Senators and *Representatives*, shall be,' etc. 'No person shall be a *Representative* who shall not have attained to the age of twenty-five years.' In the clause now under consideration, the language is: 'No person holding any office under the United States shall be a *member* of either House during his continuance in office.' No one doubts that the object of the constitutional inhibition was to guard the *House* against Executive influence. This object is attained, so far as it can be by this provision, if the inhibition attaches the moment the member enters upon the discharge of his duties as such, and nothing is gained by an earlier application of it.

"The committee are, therefore, of opinion that the reasons in which this constitutional provision originated, as well as its express language and the practice of the House under it, are in harmony with the rule of law which existed before the formation of the Constitution, that the acceptance and enter-

ing upon the discharge of the duties of an office, which, from the nature of its duties, or from express legal or constitutional prohibition, is incompatible with another previously held, vacated the former office from the time of such acceptance and entering upon the duties assigned to the latter office.

"And, consequently, when a person elected to Congress accepts that office, or qualifies and enters upon the discharge of its duties, he vacates or forfeits any office he may then hold under the United States, and when any member of Congress, after he has qualified or entered upon the discharge of his duties as such member, accepts or enters upon the discharge of the duties of 'any office under the United States,' he, *ipso facto*, vacates or forfeits his seat as a member of Congress."

"But this record raises another question which, so far as the committee can learn, has not before arisen, and which it becomes necessary to examine. Mr. Blair was appointed a Brigadier General, August 7, 1862, and a Major General, November 29, 1862, the duties of which latter office he discharged till January 1, 1864, when he tendered his resignation, which was accepted January 12, 1864. On this latter day he was qualified, and took his seat in the House of Representatives. The first regular session of the thirty-eighth Congress, fixed by law, commenced on the first Monday of December, 1863. It therefore appears that Mr. Blair held and discharged the duties of the office of Major General for more than a month after the commencement of the session fixed by law of the Congress in which, after resigning that office, he subsequently took his seat. Now, if the reasoning already submitted, and the conclusions which the committee have drawn therefrom, be correct, viz., that the acceptance of an office incompatible with one already held must be deemed and treated as the resignation of the former, then does it not follow that the continuance in the discharge of the duties of the former office, after the time at which the law requires the

entering upon and discharge of the incompatible duties of the latter, must be deemed and treated as a declination of this office? If two offices are tendered at the same time to the same person, and he is at liberty to choose between the two, but either the nature of the offices, or the requirements of the law or Constitution, forbid the acceptance of both, no one will doubt but that, after an election between them is made and the duties of one have been entered upon, it is too late then to take the other. As both can not be taken, the one is declined in the acceptance of the other. Does the fact that these two offices are tendered at the same time, make any difference in the principle? A man in the discharge of the duties of one office is tendered another, whose duties he is required to enter upon at a certain time, but the functions of both he can not perform. When the time arrives at which the duties of the latter office commence, he is at liberty to choose. If he takes the latter, the functions of the former, *ipso facto*, cease as the result of his choice. If he determines to continue to hold the former, does he not of necessity decline the latter, as a like result of that choice? When he accepts one office, the law interprets the act as a surrender of any incompatible office. Shall it not put a like interpretation upon a continuance to discharge the duties of the other? If he may be permitted to keep vacant the one office one month by continuing in the incompatible one during that time, he may two or twelve, or during its whole term. If those *acts* are not to be taken as an election on his part, then that election is yet to be made; and what interposes to require it to be made till the day before the term expires, or then? And thus may the people of any district, or any number of districts, be deprived altogether of representation. The committee can not arrive at any conclusion fraught with such results, but are of opinion that, when the time arrives at which the duties of two incompatible offices are by law to be discharged, a man at liberty to choose between the two, as effectually declines one not entered upon, by continuing in

the one already held, as he would vacate the former if he did enter upon the latter.

"It therefore follows that Mr. Blair, by voluntarily continuing to hold and discharge the duties of the office of Major General till January, 1864, declined and disqualified himself for the office of Representative, the duties of which, by law, commenced on the first Monday of the December preceding.

[§ 339*a*. In the case of *Massey* v. *Wise*,[1] it was held that an attorney who is employed or retained by the Attorney-General of the United States to assist in a given case or cases, and for a compensation to be fixed by the Attorney-General, does not hold an office within the meaning of Article 1, Section 6, of the Constitution, and is not disqualified on that account from holding the office of Representative in Congress.]

§ 340. A person who held a Federal office after being elected to Congress, but who had ceased to discharge its duties before taking his seat as a member of Congress, is qualified for the latter office without having formally resigned the former.[2] And there can be no doubt but that the accepting of the office of Representative in Congress and entering upon the discharge of its duties amounts to a resignation and abandonment of any incompatible office previously held, and hence a formal resignation is not necessary in any such case. Acceptance by an officer of a second and incompatible office *ipso facto* vacates the first office, and no proceedings to declare a vacancy are necessary.[3]

[§ 340*a*. The rule which disqualifies one from holding two incompatible offices at the same time does not prohibit a person from becoming a candidate or being voted for, for two incompatible offices at the same election. Should he be

[1] [Mob., 365.]

[2] Case of George Mumford, Cl. & H., 316.

[3] Shell *v.* Cousins, 77 Va., 328; State *v.* Dellwood, 33 La. Ann., 1229; State *v.* West, Id., 1261.

elected to but one of the offices for which he was a candidate, the votes electing him would not be invalid because another portion of the voters saw fit to vote for him for the other. If elected to both offices he would be compelled to elect which he would accept.[1]]

§ 341. The office of councilman in a city is not a lucrative office, within the meaning of a constitutional provision which provides that no person shall hold more than one lucrative office at the same time.[2]

§ 342. Where the qualifications required for office are "a residence in the State of one year," and that one shall be "a citizen of the United States," if a person elected has resided in the State for the time required, it is not essential that he shall have been a *citizen* during the whole of that time; it is sufficient if he were naturalized at the time of the election. "It is not the citizen who is required to have resided in that quality for one year next preceding the election. It is the person, the individual, the man, who is spoken of, and who is to possess the qualifications of residence, age, freedom, etc., at the time he offers to vote, or is to be voted for."[3]

§ 343. The Constitution, Article 1, Section 3, provides, "no person shall be a Senator who shall not have attained the age of thirty years and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State for which he shall be chosen." Mr. Shields, of Illinois, who was an alien by birth, and who was elected Senator before he had been a citizen of the United States the term of years required, was held not entitled to a seat under said election. Such an election is entirely void.[4]

§ 344. The Constitution of Kentucky provides that "any person who shall, after the adoption of this Constitution, either directly or indirectly, give, accept, or knowingly carry

[1] [Misch *v.* Russell, 136 Ill., 32.]
[2] State *v.* Montgomery, 25 La. Ann., 138.
[3] Biddel *v.* Richard, Cl. & H., 407.
[4] Case of James Shields, 1 Bart., 606.

a challenge to any person or persons to fight in single combat with a citizen of this State, with any deadly weapon, either in or out of the State, shall be deprived of the right to hold any office of honor or profit in this Commonwealth, and shall be punished otherwise in such manner as the General Assembly may prescribe by law." It has been held by the board for the determination of contested elections in that State, that this constitutional provision does not require a conviction of the crime of giving, accepting or carrying a challenge in order to disqualify the offender.[1] It was held in this case that under the constitutional provision above quoted, the doing of any of the acts named therein disqualifies the person so acting for any office of honor or profit under the State, besides subjecting him to such punishment as may be prescribed by law; that the disqualification and the offense against the laws are separate subjects; and that the contested election board has jurisdiction to decide the former, without reference to the latter. This decision is based upon the theory that the Constitution does not declare the giving, accepting or carrying a challenge a penal offense: that it does not make these acts crimes, but simply prescribes as among the qualifications for office that persons who have so acted shall not be eligible.

This view of the effect of the constitutional provision was, however, expressly overruled by the Court of Appeals of Kentucky, in the case of *Commonwealth* v. *Jones*,[2] and it was there held that the provision was not self-executing, except so far as it prevents those who cannot or will not take the requisite oath from entering upon office. It has no other effect until after trial and conviction in the course of a regular judicial proceeding. The disqualification imposed is a punishment. It in fact deprives the citizen of a most valuable right, and one which has been classed as inalienable by

[1] Cochran *v.* Jones, 14 Am. Law Reg. (N. S.), 222.
[2] 10 Bush (Ky.), 725; S. C., 14 Am. Law Reg. (N. S.), 374.

the Supreme Court of the United States.[1] If held to be self-executing, it would authorize the trial of a citizen without accusation, his condemnation without proof or opportunity for defense, and his punishment without notice or a hearing.

§ 345. It may be stated as a well-settled proposition, that statutes and constitutional provisions making ineligible to office any persons who have been guilty of a crime or breach of trust, always presupposes that the fact of the commission of such a crime or breach of trust has been ascertained and adjudged by the judgment of a court of competent jurisdiction. Such a fact can only be established by trial and judgment in due course of law, in which the accused shall be entitled to a full and fair hearing.[2]

§ 346. As we have seen, the question of eligibility to be elected to or to hold an office is generally to be determined by the construction of some statutory or constitutional provision fixing the qualifications therefor. But cases have arisen where both the Constitution and statute are silent. Thus, in Wisconsin, there is no statutory or constitutional provision to determine whether an alien may be elected to or hold office. In *State* v. *Smith*,[3] the question arose whether an alien could hold the office of sheriff. In that case the defendant was an alien, and had entered upon the discharge of the duties of his office without having become an elector, which he might have done by declaring his intention to become a citizen. Up to the time of the commencement of the action he had not become a voter, so that the case presented simply the question of the right of an alien, not a voter, to *hold* the office. The Court held that he could not hold it, and the decision was put upon the ground that a person cannot lawfully hold such an office unless he is a qualified elector of the State. The Court, by Dixon, C. J., said: "It

[1] Cummings *v.* State of Missouri, 4 Wall., 277.
[2] Cawley *v.* People, 95 Ill., 249.
[3] 14 Wis., 497.

is an acknowledged principle, which lies at the very foundation, and the enforcement of which needs neither the aid of statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens for their liberty and protection, and that it is to be administered and its powers and functions exercised only by them and through their agency." This case, however, went no farther than to hold that a person not an elector is ineligible, in the absence of any statutory or constitutional provision on the subject, to *hold* an office. It left open the question whether a person not an elector may, in the absence of such statutory or constitutional provision, be *elected* to an office, and be entitled to enter upon and discharge its duties, provided his disability is removed before the commencement of the term for which he is elected. This latter question, however, did arise in the same State, in the more recent case of *State* v. *Murray*,[1] and was decided affirmatively. In this case the distinction is clearly made between ineligibility to *hold* an office and ineligibility to be elected to an office for a term to commence in the future, and for the duties of which the person chosen may qualify himself before the term begins. It may here be added that it has been the constant practice of the Congress of the United States since the rebellion, to admit persons to seats in that body who were ineligible at the date of their election, but whose disabilities had been subsequently removed. [The contrary rule has been adopted by the Supreme Court of Minnesota, which holds that where one is ineligible to an office at the time of his election, he cannot hold the office, even though, after being so elected and before the official term begins, the disqualification is removed.[2]]

§ 347. Where the Constitution prescribes the qualifications for an office, the Legislature cannot add others not therein prescribed. It was accordingly held that where the Constitution provided that "all civil officers of the Common-

[1] 28 Wis., 96.

[2] [State *v.* Sullivan, 45 Minn., 309.]

wealth at large shall reside within the State, and all district, county or town officers within their respective districts," it was not competent for the Legislature to require the Secretary of State to reside at the seat of government.[1] In the same case it was further held that, by the common law, ministerial officers may generally appoint deputies to act in the name and place of the principal, and whose acts within the scope of their appointment will be held valid.

§ 348. An office may be abandoned by removal from the State, county or district to which the officer is restricted by the law of his office; or by accepting an incompatible office; or by the relinquishment of any express qualification; or by the assumption of any absolute disqualification, or by resignation.[2] It is well settled that the acceptance by a member of Congress of a disqualifying office, after he has taken his seat, operates as a forfeiture of it, and creates a vacancy in the House to which such member belongs.[3]

§ 349. If the official term of a public officer is limited by law or constitutional provision to a given term of years, without the right expressly or impliedly given of holding until his successor is chosen and qualified, then in case of the failure to choose a successor a vacancy must occur which may result in serious public inconvenience and injury. According to the common law public offices were granted by

[1] Page *v.* Hardin, 8 B. Mon., 648.

[2] Id. A deputy collector of customs has an absolute right to resign his office, and after his resignation is final it cannot be withdrawn; but a prospective resignation may be withdrawn at any time before acceptance, and after acceptance it may be withdrawn, if the authority accepting consents, and if no new rights have intervened. Bunting *v.* Willis, 27 Gratt., 144. And see to the same effect, State *v.* Hauss, 43 Ind., 105; State *v.* Boecker, 56 Mo., 17. In the latter case it was held that a resignation to take effect in the future could be withdrawn at any time before the date at which it takes effect. [People *v.* Leonard, 73 Cal., 230.]

[3] Case of Van Ness, Cl. & H., 122; Cases of Baker and Yell, 1 Bart., 92; Byington *v.* Vandever, Id., 395; Stanton *v.* Lane, Id., 637; §§ 337–339.

the crown to a man in fee or for life as well as for years.[1] They were regarded as a species of incorporeal hereditaments, and consisted in a right and corresponding duty to execute a public or private trust. It seems to be clear that at common law a public officer appointed for a term of years possessed no implied right to hold over after the end of his term until his successor should be chosen and qualified.[2] But there is both reason and authority to support the proposition that in the United States there is an implied right to hold over unless the contrary appears to be the plain requirement of the statute.[3] In this country nearly all public offices are held for a brief, limited time, and the term is frequently for only a single year. If the English rule were applied in all its strictness to official tenures here, it might very often happen that vacancies would occur by reason of a failure to elect, or to qualify a successor, or by reason of the death or disability of the person so chosen, or other similar causes.[4] It is at least clear that an officer holding over pending the election or qualification of a successor will, for the protection of third parties and the public, be regarded as an officer *de facto*, and his official acts will be upheld on this ground.[5] The question here suggested is probably not of very great importance, for the reason that it is believed that in nearly or quite all of the States there are statutory or constitutional provisions to the effect that all public officers shall hold for a specified time and until their successors are duly qualified.

Such a clause is to be found in the Constitution of Pennsylvania, and under it the Supreme Court of that State held that where the person elected to an office dies before being

[1] 3 Kent's Com., 54.

[2] People *v.* Tieman, 8 Abb. (N. Y.) Pr., 359.

[3] [Bath *v.* Reed, 78 Me., 276.]

[4] Cordeill *v.* Frizell, 1 Nev., 130; State *v.* Wells, 8 Nev., 105; Walker *v.* Ferrell, 58 Ga., 512.

[5] People *v.* Tieman, *supra;* State *v.* Williams, 5 Wis., 308.

qualified, the previous incumbent holds over.[1] In such a case the death of the person elected creates no vacancy. Never having occupied the office, his death made no change in it. Therefore, though the Governor be authorized to fill all vacancies by appointment, he had no power in such a case to appoint.

§ 350. An officer commissioned to hold office for the term of four years from March 2, 1845, was held to have been in office on that day. The word "from" includes the day of date.[2]

§ 351. Where the Constitution of a State fixes the tenure of an office at four years, an act of the Legislature of such State providing for an election to that office, and limiting the term of the person to be elected to two years, is void in so far as it relates to the length of the term. But in other respects it is constitutional and valid, and the person chosen under it will be entitled to hold the office for the constitutional term of four years.[3]

§ 352. Where the law requires an officer resigning to do so by a written resignation, to be sent to the Governor, it is not necessary that the Governor should signify his acceptance of a resignation to make it valid. The tenure of office, in such a case, does not depend upon the will of the executive, but of the incumbent. It has been held that a civil officer has the absolute right to resign his office at pleasure, and it is not within the power of the executive to compel him to remain in office.[4]

This, however, was not the rule at the common law, by which an office was regarded as a burden which the ap-

[1] Commonwealth *v.* Hauley, 9 Pa. St., 513.

[2] Batesville Institute *v.* Kauffman, 18 Wall., 151.

[3] People *v.* Roseborough, 14 Cal., 180.

[4] People *v.* Porter, 6 Cal., 26. See, also, United States *v.* Wright, 1 McLean's Reports, 512; Gates *v.* Delaware County, 12 Ia., 405; State *v.* Clark, 3 Nev., 566; State *v.* Fitts, 49 Ala., 402; Bunting v. Willis, 27 Grat., 144.

pointee was bound in the interest of good government to bear, and which he was not allowed to lay down without the consent of the appointing power.[1] The Supreme Court of the United States has recently said that "In this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices, and in some States with regard to offices in general, may have obtained; but we must assume that the common-law rule prevails unless the contrary be shown."[2]

§ 353. Where an officer is commissioned for a certain term of years "if he shall so long behave himself well," he cannot be removed for misbehavior without notice and a trial. The conviction of misbehavior in our government implies a right to notice, defense and proof, on the part of the officer, and is a judicial question. The executive, therefore, cannot determine that the Secretary of State, or any other officer holding during good behavior, has been guilty of misbehavior and thereupon remove such officer.[3]

§ 354. The doctrine of *Page* v. *Hardin*[4] was approved and adopted by the Supreme Court of New Jersey, in the case of *The State* v. *Prichard*.[5] And in this latter case the Court went further, and held that even if the incumbent of an office be convicted of an infamous crime, this does not, *ipso facto*, work such a forfeiture of his office as to make it

[1] Kyd, Corp., Chap. 3, Sec. 4; Grant, Corp., pp. 221, 223, 268; 1 Dill., Mun. Corp., Sec. 163; Rex *v.* Burder, 4 T. R., 778; Van Orsdall *v.* Hazzard, 3 Hill (N. Y.), 243; State *v.* Ferguson, 31 N. J. L., 107.

[2] Edwards *v.* United States, 103 U. S., 471, 474. And see to the same effect, State *v.* Clayton, 27 Kan., 442; Rogers *v.* Sloanaker, 32 Id., 191; [Coleman v. Sands, 87 Va., 689].

[3] Page *v.* Hardin, 8 B. Mon., 648. But see State *v.* Doherty, 25 La. An., 119, where the power of the executive to decide in such a case, uncontrolled by any other branch of the government, is maintained.

[4] *Supra.*

[5] [36 N. J. Law, 101]; 12 Am. Law Reg. (N. S.), p. 514.

vacant. It was determined that in the absence of any statute expressly declaring that such conviction shall create a vacancy in the office, it is not within the power of the executive to give it this effect, and to appoint a successor to the person convicted. The right to remove a public officer for misbehavior in office does not appertain to the executive, but such is a judicial act, and belongs to a Court,— in New Jersey to the Court of Impeachments. Because the conviction of an officer of an infamous crime deprives him of the right to testify as a witness and of the right to vote, it does not follow that it also deprives him of his office. Says the Court in the case just cited: "Because as a punishment the law has denounced a loss of two of the rights of citizenship, it does not follow that a third right is to be withheld from the delinquent. Indeed, the reverse result is the reasonable deduction, because it is clear on common principles that no penalty for crime but that which is expressly prescribed can be exacted. The fact that severe penal consequences are annexed by statute to the commission of a breach of law cannot warrant the aggravation, by the judicial hand, of the punishment prescribed." It may not be out of place here to remark that, while the law is no doubt as laid down in the case just cited, it would, as the judge delivering the opinion clearly intimates, be well for the legislatures of the several States to provide by statute that the conviction of a public officer of any official delinquency, or of the commission of any infamous crime, shall *ipso facto* work a forfeiture of his office, and that the record of such conviction by a court of competent jurisdiction shall be sufficient to authorize the proper authority to declare and to fill the vacancy. For it is plain that in the absence of such legislation, according to the law, which seems well settled, a convicted felon may, for a time at least, continue to exercise the functions of a public office, unless indeed by imprisonment he be deprived of the power to do so.

§ 355. It seems to be settled that the power of removal from office is incident to the power of appointment in those cases only where the tenure is not fixed by law,[1] and where the office is held at the pleasure of the appointing power;[2] and where the appointing power may remove for cause, he is the sole judge of the existence of the cause.[3]

§ 356. The record of the proceedings of a City Council, removing an officer for misconduct, must state the specific acts complained of, so far as necessary to show the jurisdiction of the Council. The jurisdiction must appear, and it will not be presumed.[4]

§ 357. The Constitution of Kansas provides that, "in case of any vacancy in any judicial office, it shall be filled by appointment by the Governor, until the next regular election that shall occur more than thirty days after such vacancy shall have happened." Where the Governor, acting under the power here conferred to fill a vacancy, appointed a person to the office of justice of the peace, made vacant by the resignation of the incumbent, it was held that the person appointed could hold only until the first election thereafter, which occurred more than thirty days after the happening of the vacancy, and if that election occurred before the expiration of the original term, the person chosen thereat could hold only for the remainder of the original term. Where the law fixes the term of an office, and provides when it shall be filled, as, for example, at the regular election in each alternate year, the term is not affected by the death, resignation or removal of the incumbent. The regular election for the full term must take place precisely as if no vacancy had occurred. The recitals in a certificate of election, as to the

[1] Territory *v.* Askenfelter, 4 New Mex., 85.

[2] Collins *v.* Tracy, 36 Tex., 546; [Carr *v.* State, 111 Ind., 101].

[3] Patton *v.* Vaughn, 39 Ark., 211; [Lynch *v.* Chase, 55 Kan., 367; S. C., 40 Pac. Rep., 666; McMaster *v.* Herald, 56 Kan., 331; S. C., 42 Pac. Rep., 697].

[4] State *v.* Lupton, 64 Mo., 415.

duration of the term, are at best but *prima facie* evidence of such duration, and can always be overthrown by competent testimony. It has been therefore held that where a person was elected at an election occurring in the middle of the original term of two years, the fact that he received a certificate declaring that he was chosen for two years, made no difference as to his rights.[1]

§ 358. In *State* v. *Jones*,[2] the following propositions were laid down:

1. "Where it appears *prima facie* that acts or events have occurred subjecting an office to judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed before procuring a judical declaration of the vacancy, and appoint or elect, according to the forms of law, a person to fill such office; but if, when such person attempts to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try his title and oust such incumbent, or fail to oust him, in some mode prescribed by law.

2. If such elected or appointed person finds the office in fact vacant, and can take possession uncontested by the former incumbent, he will be an officer *de facto*, and should the former incumbent never appear to contest his right he will be regarded as having been an officer *de facto* and *de jure;* but should such former incumbent appear after possession has been taken against him, the burden of proceeding to oust the then actual incumbent will fall upon him, and if in such proceeding it is made to appear that facts had occurred before the appointment or election, justifying a judicial declaration of a vacancy, it will be then declared to have existed and the election or appointment be held to have been valid."

And it is doubtless true, as here stated, that no judicial

[1] Hale *v.* Evans, 12 Kan., 582.
[2] 19 Ind., 356, 359.

declaration of a vacancy is absolutely necessary, and that if a vacancy *in fact* exists, the proper authority may fill it. But where the whole body of the electors constitute the proper authority to fill a vacancy, if they proceed upon the idea that its existence is a matter of general notoriety and without any notice or proclamation of the same, it must appear that it was notorious and that the whole body of the electors, or at least the principal part of them, were aware of it, and took part in the election to fill it, or had an opportunity to do so.

§ 359. It seems that the power given by the Constitution of the United States to the executive of any State, to make temporary appointments to fill vacancies which may happen during the recess of the legislature, does not empower such executive to *anticipate* a vacancy, and make an appointment to fill it, before it happens.[1] Such appears to have been the ground upon which Mr. Lanman was refused a seat in the Senate, although it does not very clearly appear, either from the report of the committee or the debate in the Senate, what were the reasons for the decision. The record, however, discloses no objection to the validity of the appointment, other than the fact that it was made before the vacancy happened. And in the course of the discussion of a subsequent case in the Senate[2] this case was frequently referred to as having been decided upon the ground above stated. In the latter case Mr. Bibb, Senator from Kentucky, said, referring to the case of Mr. Lanman: "The Governor had thought fit to appoint Mr. Lanman to a vacancy which *would* occur, not one which *had* occurred. This (the Governor's) act was consequently declared void."[3]

It has, however, as we shall see,[4] been held by the United States Senate, in the case of Bell, of New Hampshire,[5] that

[1] Case of James Lanman, Cl. & H., 871.
[2] Potter *v.* Robbins, Cl. & H., 877, 886.
[3] See Potter *v.* Robbins, Cl. & H., *supra*.
[4] § 365.
[5] Forty-ninth Congress.

an executive of the State may appoint a Senator to fill the vacancy happening at the beginning of a term, as well as one that occurs by death, resignation or otherwise, after the office has once been filled.

§ 360. A member of the Senate of the United States holding an office under executive appointment, has a right to occupy the seat until the vacancy is filled by the legislature, or until the adjournment of the next session of the State legislature, as held in the case named in the succeeding section.[1]

§ 361. In the case of *Phelps of Vermont*,[2] it was held by the United States Senate that an executive appointment made to fill a vacancy expires with the adjournment of the next session of the legislature of the State, after such appointment is made, so that if the legislature meets after such appointment is made and adjourns without electing a senator, the seat becomes vacant. The appointee of the executive can not hold over after the failure of the legislature to elect. The language of the constitution, "until the next *meeting* of the legislature," was construed to be equivalent to the words, "until the next *session*," etc., and the appointee was held entitled to hold the seat until the adjournment of the legislature without action, when his term of service was held to have expired. The case of Senator Phelps, in which these propositions may be said to have been finally settled, was decided by the Senate after full discussion, and against the majority of the judiciary committee and sustaining the views of the minority. This minority report has become the law of the Senate upon the subject. It is an able and exhaustive discussion of the whole subject, and contains a citation of all the precedents.

§ 362. As early as the year 1791, it was decided in the lower House of Congress that a member of that body may tender his resignation to the governor of his State, and that

[1] Case of Winthrop, 1 Bart., 607.
[2] 1 Bart., 613.

such governor may issue a writ for a new election, without any notice to, or action by the House of Represeniatives.[1] The Constitution provides that, "when vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies."[2] It is now well settled that the consent of the House is not necessary to the resignation of a member. The right to resign is absolute, and may be exercised even by a member when under charges or pending a resolution for his expulsion.[3] Such being the law, it is of course not essential to the validity of a resignation that it be addressed to the House, or to its Speaker. If addressed to the executive of the State, it is sufficient, and creates a vacancy for the filling of which he may issue a writ in accordance with the law of the State. It is however highly proper, that the House be informed of the resignation of one of its members, at the earliest moment practicable, and if the House be in session at the time of such resignation, it is the uniform custom for the member resigning to address a letter to the Speaker, informing him and the House of the fact, that he has sent his resignation to the executive of the State.

§ 363. Where the constitution of a State authorizes the governor to fill vacancies that may happen in certain offices during the recess of the Senate, by granting commissions, etc., such governor has no power to create a vacancy by a declaration that one exists, and granting a commission to fill it. The decision of the governor in such a case that a vacancy exists, is not conclusive as to the rights of others, and if, upon a judicial investigation, by a court of competent jurisdiction, it is determined that no vacancy existed, the appointment by the governor is void, and must be set aside.[4]

[1] Case of John J. Mercer, Cl. & H., 44; Case of Benj. Edwards, Id., 92.
[2] Const. Art. 1., Sec. 2.
[3] Case of Matteson, Thirty-eighth Congress, and of Whittemore, Forty-first Congress.
[4] Page v. Hardin, 8 B. Mon., 648.

The judiciary must, where individual right is involved, decide upon the legality of an act of the supreme executive power, as well as upon the validity of legislative acts.[1]

§ 364. It is provided by the Constitution of the United States,[2] that "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session." Suppose a vacancy first happens during a session of the Senate, but continues to exist during the subsequent recess, can the President fill it? This question has been much discussed. It will be seen by reference to the authorities that a difference of opinion prevails.[3] The practice of the Executive Department, as will be seen by reference to the Opinions of the Attorneys General, has been to regard the power of appointment as extending to all vacancies that may happen *to exist* during a recess of the Senate; while of the judges who have considered the question, Cadwallader, District Judge, and Jackson, Circuit Judge, hold the view that a vacancy which first happens while the Senate is in Session, can not be filled by appointment by the President after the adjournment of the Senate; while Mr. Justice Wood agreeing with the Attorneys General whose opinions are cited above, sustains the power. While the weight of these opinions undoubtedly sustains the power of appointment in all cases where a vacancy happens to exist during a recess of the Senate, it is apparent that the question can only be finally put at rest by a decision of the Supreme Court of the United States.

§ 365. There are authorities of great weight, holding that the power to fill a vacancy, occurring in an office can

[1] Id.

[2] Art. 2, Sec. 2, clause 2.

[3] Case of the District Attorney, 7 Am. Law Reg., N. S., 786; S. C., 8 Int. Rev. Rec., 138; *In re* Farrow and Bigby, 4 Woods, 491; S. C., 3 Fed. Rep., 112; 1 Op. Att'ys Gen., 631; 2 Id., 525; 3 Id., 673; 4 Id., 523; 7 Id., 186; 10 Id., 356; 11 Id., 179; 12 Id., 32; Id., 449; 14 Id., 538; *In re* Yancy, 28 Fed. Rep., 445.

not be exercised, until the office has once been filled during the term thereof; and that therefore no such power exists in a case where there has merely been a failure to elect within the time required by law. Or, in other words, it has been held, that where power is vested in the executive to fill vacancies, reference is had to such vacancies as occur from death, resignation, promotion or removal.[1] A different rule was, however, laid down by the United States Senate, in the case of Senator Bell of New Hampshire.[2] That case involved the construction of Article 1., Section 3, of the Constitution of the United States, which provides that if vacancies in the United States Senate "happen by resignation or otherwise, during the recess of the legislature of a State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

It was contended that the authority of the governor to appoint is limited to filling vacancies which happen in a term which had been previously filled by the legislature, and this was the view taken by the majority of the committee. But the report of the minority, which was adopted by the Senate, took the ground that the governor may also fill a vacancy which happens when the legislature has failed to make the election, or the person chosen declines the appointment, as well as when the office, once filled, is vacated by death, resignation, or otherwise. The minority report in this case, submitted by Senator Hoar, of Massachusetts, and which may now be regarded as the law of the Senate, will be found in the *Congressional Record* of April 3, 1879, and an elaborate discussion is recorded in succeeding pages.

§ 366. The question whether the legislature of Michigan has power by legislative enactment to appoint certain municipal officers was much discussed in the case of *The People* v.

[1] Sargent on Constitutional Law, 373; Schenk v. Peay, 1 Dill., 267; Story on The Constitution, Sec. 1559.

[2] Forty-ninth Congress.

Hurlbut.[1] The act in question was one whereby the legislature provided for the creation of a board of public works of the city of Detroit, and undertook to name ten persons who should compose such board. Independently of any constitutional limitation upon the power of the legislature, it was insisted that this was an exercise of executive power as contradistinguished from legislative. It was also insisted that the act was in violation of that provision of the Constitution of Michigan which declares that "judicial officers of cities and villages shall be elected or appointed at such time and in such manner as the legislature shall direct." The Court was agreed in holding that the legislature had no power to make a permanent appointment by statute naming the incumbents. Upon the question whether the appointment of such officers by the legislature as was attempted by the act in question could be sustained as provisional or initiatory only, for the purpose of a primary organization of the board and to put it in full operation, the judges were evenly divided, Christiancy and Cooley, Judges, holding the affirmative, and Campbell, Chief Justice, and Graves, Judge, the negative.[2]

§ 367. It seems to be settled that the title to an office confers upon the person elected a right to the fees and emoluments thereof, from the commencement of his legal term. And, accordingly, it has been frequently held that an action for money had and received will lie by the officer *de jure* against one who has intruded into the office by color of a certificate of election, to recover fees received during the time of such intrusion.[3]

[1] 24 Mich., 44, 113.

[2] The following cases may be consulted upon the general subject of legislative appointments to office: People *v.* Lothrop, 24 Mich., 235; People *v.* Common Council, 29 Mich., 108, 110; People *ex rel. v.* Draper 15 N. Y., 532; People *ex rel. v.* Albertson, 55 N. Y., 50; People *ex rel. v.* Palmer, 52 N. Y., 83; People *ex rel. v.* Bull, 46 N. Y., 57; People *ex rel. v.* McKinney, 52 N. Y., 374; People *ex rel. v.* Common Council, 28 Mich., 228; and see other cases cited in People *v.* Hurlbut, *supra.*

[3] Arris *v.* Stukely, 2 Mod., 260; S. C., 1 Selw., N. T., 68; Crosbie *v.* Hurley, 1 Ale & Nap., 431; Mayfield *v.* Moore, Bright. Elec. Cas., 605.

The fees and emoluments "are incident to and as clearly connected with the office as are rents and profits to real estate, or interest to bonds and such like securities."[1] In *Mayfield* v. *Moore*,[2] it was held, however, that if the incumbent received his commission *bona fide*, he will be allowed in such action his reasonable expenses in executing the duties of the office, but otherwise if his intrusion was without pretense of legal right.

§ 368. In this country, however, the appointment or election of a person to a public office creates no contract between the government and the officer to permit him to perform the duties and receive the compensation for any particular period of time. The office may be abolished or the compensation increased or decreased,[3] or the duties changed by law at any time.[4] A vested right to fees or compensation arises only from the actual rendition of services.[5]

[1] Glascock *v.* Lyons, 20 Ind., 1; Petit *v.* Rosseau, 15 La., 239; People *v.* Smyth, 28 Cal., 21; People *v.* Tieman, 30 Barb., 193; People *v.* Pease, 27 N. Y., 45, 56; Hunter *v.* Chandler, 45 Mo., 452; United States *v.* Addison, 6 Wall., 291; Mott *v.* Connolly, 50 Barb., 516.

[2] *Supra.*

[3] [People *v.* Kings, 105 N. Y., 180.]

[4] [Smith *v.* Waterbury, 54 Conn., 174.]

[5] Smith *v.* New York, 37 N. Y., 518; O'Conner *v.* Mayor, 1 Seld., 285; Warner *v.* People, 2 Den., 272; Swan *v.* Buck, 40 Miss., 263, 302; Coffin *v.* State, 7 Ind., 157; Benford *v.* Gibson, 15 Ala., 521; Barker *v.* Pittsburg, 4 Barr (Pa. St.), 49.

CHAPTER XII.

CONTESTED ELECTIONS — TRIBUNALS AND REMEDIES.

§ 369. Quo warranto, common-law jurisdiction.
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§ 369. Jurisdiction to hear and determine cases involving the right to an office is vested by the common law in courts having general common-law jurisdiction, and is exercised, as we shall hereafter see, through the agency of proceedings in quo warranto. By the statutes of the several States, numerous special tribunals have been created, and a special mode of proceeding is often prescribed. There are besides many constitutional and statutory provisions making legislative bodies the judges of the election and qualifications of their own members.[1]

It is often a question whether the jurisdiction of such legislative bodies is exclusive, but this question will be determined in each case by a careful consideration of the language of the constitutional or statutory provision by which it is conferred, the rule being, as we elsewhere

[1] [Baltimore *v.* Flederman, 67 Md., 161; Andrews *v.* Judge of Probate, 74 Mich., 278.]

show,[1] that the jurisdiction of the courts is not ousted unless such appears to have been the plain purpose.[2]

The jurisdiction to determine the right of a person exercising the office of governor may be by statute or constitution vested in the legislature; and where it is thus vested exclusively, the courts will of course have no jurisdiction in the premises.[3]

§ 370. The mode of proceeding when a contested election case is before a legislative body, is generally prescribed by statute, or by the rules of such body. In the absence of any such statutory regulation, and in the absence of any standing rule upon the subject, the proceedings will be such as the body itself may prescribe for each particular case, and they must include due and reasonable notice to the incumbent of the office, and a fair opportunity for adducing proofs and being heard on both sides. And no notice can be considered "due and reasonable," which does not inform the incumbent with sufficient certainty, to prevent any surprise upon the trial, of the grounds of the contest. The incumbent will also be required to answer, so that the issue may be understood, both by the parties themselves and by the body which is to try the case.

§ 371. The House of Representatives of the United States, may in its discretion proceed to inquire into the validity of the election of one of its members, without any formal contest having been instituted. A contestant is not absolutely necessary.[4] If circumstances arise which, in the opinion of the House, make it their duty to investigate the right of a member to a seat, the House may proceed upon its own motion. The public interests being involved and not merely the personal interests of the incumbent and contestant, it follows of course that the death of the contestant or his withdrawal

[1] § 380.

[2] O'Farrall *v.* Colby, 2 Minn., 180; [State *v.* Tissot, 40 La. Ann., 598].

[3] State *v.* Baxter, 28 Ark., 129.

[4] Reeder *v.* Whitfield, 1 Bart., 185, 189.

from the contest, or an attempt to compromise between the contestant and incumbent, will not make it obligatory on the House to discontinue the investigation.

§ 372. The House of Representatives has shown a disposition to give a liberal construction to the acts of Congress in relation to the mode of conducting cases of contested elections. They are construed with reference more to the substantial rights of the parties, than to the exact wording of the statute. And it may be expected that the House will continue so to construe these statutes, for as we have elsewhere shown, they are not absolutely binding upon the House in any case. They are adopted only as wholesome rules of practice, and of course a tribunal could hardly be expected to construe with great strictness a statute which it may in its discretion disregard altogether. It was accordingly held in *Kline* v. *Verree*,[1] that where the contestant failed to specify with *particularity* the grounds of his contest, he might be permitted to specify such grounds orally. This, however, should never be allowed in a case where the *substantial* rights of the sitting member might thereby be prejudiced. As for example, if the notice is so vague as not to put the sitting member upon his proper defense, and as not to inform him with reasonable certainty of the nature of the case, which he is expected to meet, it would be altogether improper to allow such notice to be amended and perfected by an oral or even by a written specification, made at the trial and after the closing of the evidence on both sides. If in such a case any amendment could be allowed, it would necessarily follow that an extension of time within which to take testimony should be ordered. To spring a *new issue* upon the sitting member, of which he has had *no notice*, and to try the same without permitting him to take testimony touching such new issue, would be a course of proceeding not to be tolerated.

[1] 1 Bart., 381.

§ 373. The Houses of Congress when exercising their authority and jurisdiction to decide upon "the election, returns and qualifications" of members, are not bound by the technical rules, which govern proceedings in courts of justice. Indeed the statutes to be found among the acts of Congress regulating the mode of conducting an election contest, in the House of Representatives, are directory only, and are not and can not be made mandatory under the Constitution. In practice these statutory regulations are often varied and sometimes wholly departed from. They are convenient as rules of practice, and of course will be adhered to, unless the House in its discretion shall in a given case determine that the ends of justice require a different course of action. They constitute wholesome rules not to be departed from without cause.[1] It is not within the constitutional power of Congress by a legislative enactment or otherwise, to control either house in the exercise of its exclusive right to "be the judge of the election, returns and qualifications of its own members."[2] The laws that have been enacted on this subject, being therefore only directory and not absolutely binding, would have been more appropriately passed as mere rules of the House of Representatives, since by their passage it may be claimed that the House conceded the right of the Senate to share with it in this duty and power conferred by the Constitution. It is presumed, however, that the provisions in question were enacted in the form of a statute, rather than as a mere rule of the House in order to give them more general publicity and place such directions as were thought proper within the reach of whomsoever they might concern. And the constant practice on the part of the House of varying these regulations has been regarded, no doubt, as a sufficient protest against the power or right of the Senate in the premises.

§ 374. In all legislative bodies which have the power to

[1] Williamson *v.* Sickles, 1 Bart., 288.
[2] Constitution, Art. 1, Sec. 5.

judge as to the election and qualifications of their own members, the rule is well settled that when the right of the sitting member is called in question, the body will look beyond the certificate of the returning officers, and determine the question upon the actual merits. The certificate is *prima facie* evidence only in such a controversy. The rule is the same in the Courts, and in trials of contested election cases before a jury.[1] But it is, as elsewhere shown,[2] equally well settled that the returning board or officer whose duty it is to open returns, ascertain the result, and issue commissions, can not go behind the returns. And if a party wishes to go behind the returns and set them aside, he must in his pleading make specific allegations, showing wherein they are false.[3]

§ 375. On the trial of a contested election before a board or legislative body, the members returned as elected are not competent to vote upon the question of the validity of their own election.[4] This rule grows out of the doctrine that no man should have a voice in deciding his own case. At common law it is held that even an act of parliament can not require anything so repugnant to natural justice, as that the same person may be a party and a judge.[5] Out of this principle grows also the parliamentary rule which forbids a member of a parliamentary body to vote upon any question in which he is directly interested. The Court in *Commonwealth* v. *McKloskey*,[6] does not put it too strongly when it says "for a man to constitute himself a judge in his own cause is indelicate and indecent."[7]

§ 376. A similar question arose upon the trial of Andrew

[1] §§ 201, 385, 503, 508, 513, 515; The People *v.* Vail, 20 Wend., 12.
[2] §§ 261, 262, 265, 266.
[3] State *ex rel. v.* Townsley, 56 Mo., 107.
[4] Commmonwealth *v.* McKloskey, 2 Rawle, 369; Bright. Elec. Cas., 196.
[5] Davy *v.* Savadge, Hobart, 87; S. C., 12 Mad., 687.
[6] *Supra.*
[7] To the same effect are the following authorities: Rice *v.* Foster, 4 Harr., 485; Carson's Case, 2 Lloyd's Debates, 23; Stockton's Case, U. S. Sen., Cong'l Globe, 1865–6, page 1635; Cushing's Elec. Cas., 97.

Johnson, President of the United States, upon articles of impeachment, where the Senate of the United States permitted Hon. B. F. Wade, Senator from Ohio, to sit as one of the judges, and vote upon the articles, notwithstanding the fact that being President *pro tempore* of the Senate, and ex-officio Vice-President of the United States, he would have become President, had the President been convicted.[1] The question of Mr. Wade's right to be sworn as a member of the Court of Impeachment was raised by Senator Hendricks, of Indiana, and was debated at some length, and then withdrawn, so that it was not formally decided. If, however, it had been decided in his favor, it could only have been upon the ground that it did not come within, or that it constituted an exception to, the rule we have stated. It was contended that the State of Ohio, in the persons of her two Senators, had a right to be heard in the decision of the great case of impeachment then pending, notwithstanding the contingent interest which one of the Senators had in the result, and that the importance of giving to each State an equal voice in that decision, was sufficient to justify what was at least an apparent departure from, or an exception to, that rule. Whatever may be thought of the soundness of this argument, it is sufficient for our present purpose to say that it does not involve any question as to the correctness of the general rule, that no man shall be a judge in a matter in the decision of which he is directly and personally interested.

§ 377. Where the law creates a board of canvassers with power to determine from the returns who is elected representative in Congress, the only remedy open to a person aggrieved by the decision of such board is by a contest before the House of Representatives. Mandamus is not available in such a case.[2] [Nor will mandamus be available for one claiming a seat in a State Legislature where the Legislature is empowered to judge of the election of its members.][3]

[1] 2 Johnson's Trial, 486–7, 496; 3 Id., 360.

[2] O'Hara *v.* Powell, 80 N. C., 103.

[3] [Wheeler *v.* Board of Canvassers, 94 Mich., 447.]

§ 378. In many of the States there are, as we have seen, statutes creating special tribunals with limited jurisdiction authorized to hear and determine cases of contested election. Such tribunals, though not courts of general jurisdiction, are necessarily empowered to hear and determine all questions touching the regularity and legality of the acts of the officers and persons conducting the election and making and certifying the returns thereof.[1] In the exercise of such jurisdiction, such courts should recognize the presumption that all officers and other persons engaged in conducting elections or in making returns and certifying the results thereof, acted in accordance with the law, until the contrary shall be specifically alleged and fully proved.[2]

§ 379. Where the statute creates a board for the purpose of determining election contests, and confers upon such board exclusive jurisdiction in such cases, the courts are deprived of jurisdiction to pass upon the results of any such contests. But in such a case the proper court may, by mandamus, compel such board to organize and proceed according to law to the discharge of its official duties.[3] The statute of Kentucky, under which this case arose, provided for a board to be composed of the presiding judge of the County Court, the clerk thereof, and the sheriff. It also provided as follows: "but if either is a candidate, he shall have no voice in the decision of his own case. If from any cause two of the before named persons can not, in whole or in part, act in comparing the polls, their places shall be supplied," etc. Under this statute it was held that the board must be composed of persons entirely free from any interest, and that the sheriff and coroner, both being candidates, could not act. It would be a dangerous practice to permit two candidates to act upon such a board, for although neither one of them could vote for himself, yet they might vote for each other.

[1] [State *v.* Slover (Mo.), 34 S. W. Rep., 1102.]

[2] Loomis *v.* Jackson, 6 W. Va., 613.

[3] Batman *v.* Megowan, 1 Met. (Ky.), 533; [People *v.* Board of Aldermen of Buffalo, 65 Hun, 300].

They might thus have a common interest to subserve, or they might combine together to aid each other. The policy of all such legislation is to guard against improper combinations, and to secure just and impartial decisions.

§ 380. The charters of most municipal corporations contain a provision to the effect that the council or other legislative body thereof shall be "the judge of the election and qualification of its own members." And an important question has arisen as to whether the jurisdiction of a city council, or other similar body, is, under such a charter, exclusive of that given to the courts of justice or only concurrent with it. In *State* v. *Funck*,[1] it was held that inasmuch as the city had passed no ordinance defining the method by which an election of one of its members may be contested, the claimant could resort to the proceeding provided by statute for trying title to a public office, but no opinion was expressed as to what the law would be in a case where provision is made by ordinance for such trial. An examination of the adjudged cases in this country will, however, show that the jurisdiction of the courts to inquire into the regularity and validity of elections—a jurisdiction which belongs to all courts of general and original jurisdiction—is not to be regarded as taken away by any merely negative words. Their jurisdiction remains unless it "appears with unequivocal certainty that the legislature intended to take it way."[2] It follows that a charter provision that the council of a city "shall be the judge of the election, qualifications and returns of its own members," does not oust the courts of justice of their jurisdiction. The two tribunals have concurrent jurisdiction in such a case; but if the provision be that no court shall take cognizance of cases of this character, or that the council shall be the *sole* or the *exclusive*, or final judge, etc., then the courts are shorn of their power in the premises.[3]

[1] 17 Iowa, 365.

[2] Dill. on Mun. Corp., § 144.

[3] Upon this general subject see the learned and exhaustive discussion by Judge Dillon, in his work on Municipal Corporations, §§ 139 to 142. See also State *v.* Fitzgerald, 44 Mo., 425; Commonwealth *v.* Garrigues,

The true doctrine seems to be that a special remedy given by statute is cumulative, and not exclusive of the ordinary jurisdiction of the courts, unless the manifest intention of the statute be to make such special remedy exclusive, and such intention must be manifested by affirmative words to that effect.[1]

§ 381. As has been stated, in the absence of special constitutional and statutory provision to the contrary, the common law courts have jurisdiction of all cases of contested election.[2] This jurisdiction has been held in Virginia not to be limited to cases of contest between competing candidates. Under the law of that State an election may be contested, although but one person was voted for at the election.[3]

§ 382. It matters not how high and important an office may be, an election to it must be by the majority or plurality of the legal votes cast. And if any one without having received such majority or plurality intrudes himself into an office, whether with or without a certificate of election, the courts have jurisdiction to oust him, unless some other tribunal has been clothed with this power to the exclusion of the courts. The question arose in the case of *Governor Barstow of Wisconsin*, whether the person occupying the office of chief executive of a State can be required to appear before the courts and defend against another claimant for that office. It was contended that the three departments of the State government were equal, co-ordinate, and independ-

28 Pa. St., 9; Ewing *v.* Filley, 43 Pa. St., 384; Commonwealth *v.* Leech, 44 Pa. St., 332; Cooley on Const. Lim., 276, 623, 634, note; Smith *v.* New York, 37 N. Y., 518; People *v.* Mahaney, 13 Mich., 481; *Ex parte* Heath, 3 Hill, N. Y., 42, and cases cited by Cowan, Judge; Palmer *v.* Foley, 36 Superior Court, (N. Y.), 14; Baxter *v.* Brooks, 29 Ark., 173. See also Selleck *v.* Common Council 40 Conn., 359, citing the following cases: 2 Rawle, 369; 16 Iowa, 369; 35 Pa. St., 263; 44 Id., 332, 336, 341; 2 Ala., 31; 15 Ohio St., 114; 14 Mich., 48; 1 Metc., (Ky.), 533; 9 Texas, 295.

[1] See People *v.* Holden, 28 Cal., 123; People *v.* Jones, 20 Cal., 50; [State *v.* Kempf, 69 Wis., 470; S. C. with note, in 17 Am. & Eng. Corp. Cases, 388–394].

[2] § 369.

[3] *Ex parte* Ellyson, 20 Grat., 10.

ent of each other, and that each department must be the judge of the election and qualifications of its own members, subject only to impeachment and appeal to the people; that therefore the question as to who is entitled to the office of Governor, can in no case become a judicial question. But this doctrine received no countenance from the Court to which it was addressed, and it is believed to be without the support of any judicial authority. If adopted, it would leave no peaceable and constitutional means for ousting a successful usurper from either of the departments of the State government.[1]

§ 383. In the case of *Dennett, Petitioner*,[2] it is held that under a statute which requires that "the Governor and Council shall open and compare the votes returned," etc., the act of opening and comparing such votes is an official duty to be performed by the executive department. And it was accordingly held in that case that the courts of the State could not entertain the inquiry whether that duty had been correctly or incorrectly performed, and a mandamus to compel the Governor and Council to certify the election of the petitioner to the office of county commissioner, was refused, upon the ground that the judiciary could not control the executive department of a State, in the performance of its official functions.[3] It is very clear that this ruling was correct, for mandamus will not lie to control the action of any board or officer, in determining the result of an election. But it does not follow that, because the executive of the State and the council are constituted the returning board, their conclusions are final. If a board composed of the governor and council shall commit an error either by accident or design, or by a misconstruction of the law, in determining the result of an election, the party injured can undoubtedly have his remedy in the courts of justice, the same as if the result had been declared by a board composed of other persons.

[1] Cooley's Const. Lim., 624–5, note 1.

[2] 32 Maine, 508.

[3] [Corbitt *v.* McDaniel, 77 Ga., 544.]

§ 384. In a proper case the Supreme Court of Wisconsin will require the board of State canvassers to determine in accordance with law which one of the candidates at an election in that State, for the office of representative in the Congress of the United States, is entitled to the certificate of election. This does not contravene the constitutional power of the House to determine its members' right to the office; the court merely deciding whether the return made to such board, of votes cast in a county, should be included in their canvass and statement.[1]

§ 385. The courts will not undertake to decide upon the right of a party to hold a seat in the legislature, where by the constitution each house is made the judge of the election and qualifications of its own members; but a court may by mandamus, compel the proper certifying officers to discharge their duties and arm the parties elected to such legislative body with the credentials necessary to enable them to assert their rights before the proper tribunal.[2] And, inasmuch as canvassing and returning officers act ministerially and have no power to go behind the returns, or inquire into the legality of votes cast and returned, a court will by mandamus compel them to declare and certify the result *as shown by the returns*, because that is their plain duty; but the award of a certificate of election under such mandate, will not conclude the legislative body in determining the election.[3]

§ 386. Unless especially authorized by statute a court of chancery has no power to enjoin the holding of an election;[4] and it has also been held that such a court has no

[1] State *v.* Board of State Canvassers, 36 Wis., 498.

[2] [State *v.* Van Camp, 36 Neb., 91.]

[3] O'Farrall *v.* Colby, 2 Minn., 180. As to the power of courts of justice to compel, by mandamus, a complete and legal canvass, by the proper canvassing officers, of the votes cast at an election, see People *v.* Nordheim, 99 Ill., 553. [The registrar of elections under the Code of Louisiana is a constitutional executive officer and not exempt from judicial authority to compel him by mandamus to perform the specific duties imposed on him by statute. State *v.* Houston, 40 La. Ann., 393; 4 S. Rep., 50.]

[4] People *v.* Galesburg, 48 Ill., 485.

power to try a contested election even where the statute has provided no mode of contesting.[1] And the same court has held that a writ of injunction issued to restrain the officers of an election from holding an election, or to restrain a board of canvassers from canvassing the returns of an election, and declaring the result, is absolutely void for want of power in the court, and that such officers can not be punished for disobedience thereto.[2] The doctrine announced is that courts of equity have no inherent power to try contested elections, and can only exercise such power where it has been conferred by express enactment, or necessary implication therefrom.[3]

§ 387. It has been held as already seen,[4] that a court of chancery should not interfere by injunction to restrain the officers of election from counting illegal votes, or from issuing certificates of election to persons not entitled to them. The reason is that a court of chancery will not interfere collaterally and in advance of a contest to pass upon the claims of conflicting claimants of an office.[5] In *Miller* v. *Lowery*,[6] the Court of Common Pleas of Philadelphia granted an injunction to restrain a candidate who had received a certificate of election, regular upon its face, from taking possession of the office, upon the ground that the certificate had been fraudulently issued.[7]

[1] Moore *v.* Hoisington, 31 Ill., 243.

[2] Walton *v.* Develing, 61 Ill., 201; Dickey *v.* Reed, 78 Ill., 261.

[3] And see Peck *v.* Weddell, 17 Ohio St., 271; State *v.* Taylor, 15 Id., 114; Commonwealth *v.* Garrigues, 28 Pa. St., 9; 41 Id., 396; Moulton *v.* Reid, 54 Ala., 320; Pink *v.* Barr, 14 Phila., 154.

[4] § 370.

[5] Lawrence *v.* Knight, 1 Brewst., 67, 69; Bright. Elect. Cas., 617. And to the same effect is Hulseman *v.* Rems, 41 Pa. St., 396; Moore *v.* Hosington, 31 Ill., 243. See, also, Peck *v.* Weddell, 17 Ohio St., 271; Umstead *v.* Buskirk, 15 Ohio St., 114; Commonwealth *v.* Garrigues, 28 Pa. St., 9; State *v.* Steers, 44 Mo., 223; Dickey *v.* Reed, 78 Ill., 261; Jones *v.* Black, 43 Ala., 540; [*Ex parte* Ivey, 26 Fla., 537]. But this ruling, though evidently sound and supported by the weight of authority, has not been altogether uniform.

[6] 5 Phila., 202.

[7] And see, also, Peck *v.* Weddell, 17 Ohio St., 271.

§ 388. Where the application is for an injunction to restrain the officers of election from receiving votes from a class of persons who are clearly disqualified, the rule that chancery will not interfere in matters of contested election does not apply, and an injunction may well be granted, for in such a case, the object would not be, to decide prematurely and collaterally a contested election case. *McIlvain* v. *Christ Church, of Reading.*[1]

§ 389. An injunction will not lie to restrain the proper officer from recording the abstract of the vote of a county, upon the question of removing the county seat, because of frauds and illegalities in conducting the election. The remedy for such wrongs is by means of a contest, as provided by law.[2] An adequate remedy will always be found either at law or in equity, for frauds perpetrated against the purity of elections. If a result has been secured by fraud, and the statute has provided no mode of redress, it by no means follows that no redress can be had. The right of any person claiming to exercise any public function or authority under a fraudulent election, may be tested by proceedings in quo warranto under the principles of common law.

§ 390. It is no objection to a proceeding in mandamus to compel a board of canvassing officers to canvass and return the votes cast for representative in Congress, that the same is instituted in a State Court. The proceeding is one to compel State officers to perform their ministerial duties, and the fact that these duties appertain to the election of a representative in Congress, does not deprive State courts of their jurisdiction.[3]

§ 391. Under the statute of Pennsylvania, conferring jurisdiction upon the Court of Quarter Session, to hear and determine election contests, and making its decision final and conclusive, it was held that an issue to a jury could not be

[1] 28 Legal Int., 126.

[2] Peck *v.* Weddell, 17 Ohio St., 271; State *v.* Berry, 14 Id., 315; [Bynum *v.* Commissioners, 101 N. C., 412].

[3] State *v.* Randall, 35 Ohio St., 64.

directed to try the question of an alleged fraud in an election. The chief reason given was that a trial by jury if conceded to one contestant, must be conceded to all, and that "delay must take place in preparing and setting down such an issue for trial; after trial of the most tedious and expensive kind the jury may disagree, (one dissenter from the rest being adequate to produce that result,) and their consequent discharge. Another and another trial may follow with like results, until one of the parties weary with delay, or bankrupt in prosecuting his rights abandons them in despair," and by bills of exceptions and writs of error the proceedings might be still further prolonged. This would operate most unjustly to the contestant, if in the end it should appear that he was rightly entitled to the office.[1]

§ 392. The same point was decided in the same way, by the Supreme Court of Pennsylvania, in *Ewing* v. *Filley*.[2] And in that case the Court also held that an act providing for the trial of a case of contested election without the intervention of a jury, is not for that reason unconstitutional. "It is not," says Lowrie, C. J., in that case, "in the act of organization of the State, nor in the perpetuation of its organic succession, but in the administration of rights under the organization, that the constitution secures the trial by jury. The jury is the proper element in the determination of rights which need enforcement by means of the State organization; but there is a much larger popular element in our elections—the votes of all the people; and all our political practice shows that we have not considered a jury an essential means in deciding contested elections of public officers.[3]

The contrary doctrine was asserted in *People* v. *Cicott*,[4] but that case seems to stand quite alone and can not be taken as a correct exposition of the law upon the subject.

[1] Kneass' Case, 2 Parsons, 599; S. C., Bright. Elec. Cas., 260. [A party to a contested election case has no right to a jury trial. Pedigo *v.* Grimes, 113 Ind., 148, and note to same case in 20 Am. & Eng. Corp. Cases, 42; Hughes *v.* Holman, 23 Oreg., 481.]

[2] 43 Pa. St., 389.

[3] Williamson *v.* Lane, 52 Tex., 335; Newton *v.* Newell, 26 Minn., 529; Commonwealth *v.* Leech, 44 Pa. St., 332.

[4] 16 Mich., 282.

§ 393. At common law the proper remedy against a person claiming to exercise an office, and who was believed to be not entitled thereto, was by the writ of quo warranto, which was issued upon proper application for the purpose of inquiring into the authority of such person, and ousting him from such office, in case no authority should be shown. In modern practice an *information* in the nature of a quo warranto, is resorted to, in the absence of any statutory proceeding.[1] And in fact where there are special proceedings authorized by statute, they partake of the nature and retain most of the substance of the common law proceeding by quo warranto.

§ 394. According to the common law of England the information in quo warranto, was filed in the Court of King's Bench, by the Attorney General. In this country it should be filed by a law officer of the government, and presented to the Court having the necessary common law jurisdiction. The proceeding was originally of a *quasi* criminal character, being intended to secure the punishment of the usurper by a fine as well as to oust him, or seize the office or franchise for the crown. But "it hath," says Blackstone, "long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only."

§ 395. A statute which confers upon any elector of the proper county the right to contest, at his option, the election of any person who has been declared to be duly elected to a public office, to be exercised in and for such county, does not oust the jurisdiction of the proper court, on information in the nature of a quo warranto, to inquire into the authority of any person who assumes to exercise the functions of a public office or franchise, and to remove him therefrom if he be a usurper, having no legal right thereto.[2] "The two remedies are distinct," says the court in that case, "the one be-

[1] Walker's American Law, p. 566. Blackstone's Comm., Vol. 3, p. 263.
[2] People *v.* Holden, 28 Cal., 123.

longing to the elector in his individual capacity, as a power granted, and the other to the people, in the right of their sovereignty."[1]

§ 396. In *Ex parte Murphy*[2] it was held that the mere circumstance that improper votes were received at an election will not vitiate it. In that case, one candidate had received a majority of two votes, and it was charged that two illegal votes were cast, but there was no allegation that they were cast for the candidate having the majority. The motion for quo warranto was denied, the Court saying, "For all that appears the spurious ballots were for the ticket which was in the minority." This ruling, however, should be explained and probably qualified. If it goes no further than to hold that the information in that particular case was insufficient to warrant the allowance of a quo warranto, it may be accepted as correct, but, if it is construed as asserting the doctrine, that in all cases it is necessary to show that the person declared elected was, in fact, defeated, before the election can be set aside, then it goes too far. An election may be set aside, declared void, and a new election be ordered, upon the introduction of such proof as renders it impossible to determine who has been chosen by a fair majority, but the contestant can, in no case, be declared entitled to the office until he shows, affirmatively, that he has received a majority of the legal votes cast.

§ 397. It is proper at this point to discuss the distinctions between cases wherein quo warranto should be resorted to and those where mandamus will lie.

Mandamus is not the proper remedy for obtaining possession of an office, or for ousting one who usurps an office. There are cases perhaps where there is no doubt as to the duty of a public officer to issue a commission to a person elected, and in which, therefore, a mandamus may issue to compel the performance of that duty. But when it is a ques-

[1] See also, People *v.* Jones, 20 Cal., 50.
[2] 7 Cowen, 153.

tion of any doubt, a court should not interfere by mandamus, but should put the party in the first instance to an information in the nature of a quo warranto, or to such remedy as may be specifically provided by statute.[1]

§ 398. A case may have arisen in which a court, having, in a proper action, decided upon the result of an election, may have issued, upon proper application, a writ of mandamus to compel the proper election officers to issue a certificate of election in accordance with that decision.[2] But, ordinarily, the writ of mandamus will only issue to compel a certificate to issue upon the returns, and in accordance with the result as it appears therefrom. When it becomes necessary to go beyond the returns and consider questions touching the legality of the election, or of fraud, illegal voting or the like, then mandamus is not the proper action, and it is necessary to resort to quo warranto, or to such statutory proceeding as may be provided in such cases.[3]

§ 399. Mandamus will lie to compel a board of returning officers to declare the result[4] and issue certificates in accordance therewith, where these duties are by statute required of such board. As such duties are purely ministerial, the board may be compelled by mandamus to perform them.[5] And in West Virginia it has been held that the circuit court can by mandamus compel a board of supervisors of a county to issue certificates of election to township officers adjudged by the court to have been duly elected at a valid election.[6] But of course this latter case must have been one in which the election returns, and all proper evidence as to the result,

[1] Commonwealth *v.* Commissioners, 5 Rawle, 75. [A writ of mandamus will issue only when the right to require the performance of the desired act is clear. State *v.* Bowman, 45 Neb., 752.]

[2] [Mandamus will lie to compel inspectors of election to make a true return. Gleason *v.* Blanc, 14 Misc. R., 620.]

[3] State *v.* Churchill, 15 Minn., 455.

[4] [But not to declare any *particular* result. State *v.* Thrasher, 77 Ga., 671.]

[5] Clark *v.* McKenzie, 7 Bush (Ky.), 523; [Enos *v.* State, 131 Ind., 560].

[6] Burke *v.* Monroe Co., 4 W. Va., 371.

came legitimately before the court for consideration. If otherwise, the case is not good authority, for it is quite well settled that mandamus will not lie to try and finally determine the title to an office.

§ 400. It has been held in Massachusetts that mandamus will not lie to compel a board of examiners of election returns to count certain votes containing the initial letter only of the Christian name of a candidate with other votes containing his name in full. This, upon the ground that the duties of the board under the statute of that State are purely ministerial, and it cannot receive or consider (as a court may) any evidence of extrinsic circumstances, but is confined to the record of votes returned and laid before it.[1]

§ 401. Where a statute requires a county office to be located at the county seat, mandamus will lie to compel the officer to open and hold his office there. And it is no answer to such a proceeding to show that there is a dispute as to which of two or more places is the county seat. The court is bound to inquire and determine where the county seat is, even if in order to this it may be necessary to determine as to the legality or result of an election held to settle the question of the location or removal of the same.[2]

§ 402. It is well settled, as a general rule, that the writ of mandamus will not be granted in any case where another adequate and specific remedy is provided,[3] and it follows that the cases are rare in which the courts will interfere by mandamus with questions touching the title to and possession of a public office. The courts have almost uniformly refused to grant the writ of mandamus in cases of this kind, upon the

[1] Clark *v.* Hampden Co. Ex's, 126 Mass., 282.

[2] The State *v.* Commissioners, 35 Kan., 640; [State *v.* Hamil, 97 Ala., 107. But in Nebraska it has been held that on an application for a mandamus to compel the removal of a county seat in pursuance of the declared result of a canvass of the vote on the question of relocation, the court cannot go behind the returns and investigate issues of fraud and illegality in the matter of conducting the election. State *v.* Roper, 46 Neb., 730].

[3] [Scoville *v.* Calhoun, 76 Ga., 263.]

ground that an information in the nature of a quo warranto is the appropriate remedy for testing the title to an office, as well as for determining the right to the possession thereof. Where a party is in possession of an office as its actual incumbent, exercising its functions *de facto* and under color of right, mandamus will not lie to compel him to vacate and give place to another. In all such cases the party aggrieved will be left to his common-law remedy by quo warranto, or to such other remedy of like nature as may be specifically provided by statute.[1] And the same doctrine is maintained in the courts of England.[2] A few cases may be found which seem to hold a contrary doctrine.[3] But it is safe to say that the rule as above stated is sustained by the overwhelming weight of authority.

§ 403. And the rule is quite as well sustained by reason. Mr. High, in his excellent work on Extraordinary Remedies, well says:[4] "Aside from the existence of another adequate remedy by proceedings in quo warranto to test the title of an incumbent to his office, it is a sufficient objection to relief by mandamus in such a case, that the granting of the writ would have the effect of admitting a second person to an office already filled by another, both claiming to be duly entitled thereto, and resort must still be had to further proceedings to test the disputed title. And the rule finds still further support in the fact that ordinarily the determination of the question of title to a disputed office upon proceedings in mandamus would be to determine the rights of

[1] High on Extr. Leg. Rem., § 49; People *v.* Corporation of New York, 3 Johns. Cas., 79; People *v.* Supervisors of Green Co., 12 Barb., 217; Anderson *v.* Colson, 1 Neb., 172; Bonner *v.* State, 7 Ga., 473; St. Louis Co. Court *v.* Sparks, 10 Mo., 118; State *v.* Rodman, 43 Mo., 256; People *v.* Detroit, 18 Mich., 338; Underwood *v.* White, 27 Ark., 382; People *v.* Forquer, Breese, 68; State *v.* Dunn, Minor (Ala.), 46; Commonwealth *v.* Commissioners, 6 Whart., 476.

[2] King *v.* Mayor of Colchester, 2 T. R., 260; Queen *v.* Derby, 7 Ad. & E., 419; King *v.* Winchester, Id., 215.

[3] Conlin *v.* Aldrich, 98 Mass., 557; Harwood *v.* Marshall, 9 Md., 83.

[4] § 50

the *de facto* incumbent in a proceeding to which he is not a party."

§ 404. "Where the office is already filled," says the court in *People* v. *Corporation of New York*, *supra*, "by a person who has been admitted and sworn and is in by color of right, a mandamus is never issued to admit another person, because the corporation being a third party may admit or not, at pleasure, and the rights of the party in office may be injured without his having an opportunity to make a defense. The proper remedy in the first instance is by an information in the nature of a quo warranto, by which the rights of the parties may be tried."

§ 405. While it is well settled that mandamus will not lie for the purpose of settling disputed questions concerning title or possession of an office, cases have arisen in which this writ has been granted to compel the proper officer to swear in the person elected to an office. This is simply to compel the qualifying officer to discharge a duty enjoined upon him by law, and is therefore within the proper scope of this writ.[1]

§ 406. But it is not competent, or at least not proper, for a court, in the exercise of this power to compel the swearing in of the person elected, to go further and, in cases of disputed and contested elections, to compel the qualifying officer to swear in either one of such parties before a judgment of ouster has been rendered in a proper proceeding. "In all cases of doubt," says Mr. High in his work above cited,[2] "as to the election of officers, where the validity of the election is the chief point in controversy, the courts will not interfere by mandamus, but will put the aggrieved party in the first instance to an information in the nature of a quo warranto. And before a mandamus will be granted to compel the recognition of one as an officer, the court

[1] King *v.* Clark, 2 East, 70; Churchwarden's Case, Carth., 118; King *v.* Rees, Id., 393; *Ex parte* Heath, 3 Hill, 42; High on Extr. Rem., § 53, and cases cited.

[2] § 53.

will require that judgment of ouster shall have been given against the incumbent *de facto*." [1]

§ 407. The Supreme Court of Massachusetts, in *Ellis* v. *County Commissioners*,[2] held that where the law imposed upon the county commissioners the duty of certifying as to who received the highest number of votes for county treasurer, mandamus will lie to compel such commissioners to certify that the petitioner had a majority of such votes (if such was the fact), although another person had been declared by them to be county treasurer, and put in possession of the office. This was a case, however, which turned upon a single question of law, and all the facts were, by the return to the alternative writ, fully stated. And while holding that the court might, if satisfied that petitioner actually received a majority of all the legal votes cast, command the board to so certify, the opinion is clearly intimated that after obtaining such a certificate it would be necessary to resort to quo warranto in order to remove the incumbent from the office and place the petitioner in possession; and it is therefore evident that the latter action is, in the absence of statutory regulations, the more appropriate remedy, and that it should be adopted in the first instance. Indeed, it is impossible to reconcile this case with the general current of authority upon this subject, and it is quite clear that no action should be had in a mandamus proceeding, to which the incumbent of the office is not a party, which may directly or indirectly affect his rights or prejudge his claims.

[1] Commonwealth *v.* County Commissioners, 5 Rawle, 75. Where election officers act in a ministerial and not in a judicial character — that is to say, in cases where they exercise no discretionary powers — they are subject to be compelled to proceed and perform their duties by mandamus. And it has been held that mandamus will lie to compel the granting of a certificate of election to a person legally elected when the same is unlawfully withheld. State *v.* The Judge, etc., 13 Ala., 805. Mandamus will not be granted to compel the canvass of the votes cast at an election which was held without authority of law. State *v.* Whittemore, 11 Neb., 175.

[2] 2 Gray, 370.

§ 408. While mandamus will not lie to compel admission to a disputed office, or to determine disputed questions of title to an office, it is sometimes, as already intimated, the proper remedy for a failure of election officers to perform certain merely ministerial duties in connection with elections.[1] By it the proper board or officer can be compelled to canvass the election returns; to determine and declare the result; to issue certificates to the persons entitled thereto. The writ may also be sought merely for the purpose of swearing in the person elected.[2] But the effect of a mandamus to swear one into an office is not to create or confer any title not already existing.[3]

§ 409. It is also clear that after there has been a judgment of ouster given against the incumbent *de facto*, in a regular proceeding by quo warranto, a mandamus will be granted to compel the recognition of such person as such officer unless some other process is provided by law.[4] And when mandamus is asked to compel the issuing of a commission to a person duly elected to an office, it is essential that the relator should show a clear title to the office claimed.[5]

§ 410. Mandamus will lie to compel the making of an appointment to fill an office if the person who is properly vested with the power of appointment fails or refuses to act.[6] But the writ will not be granted to compel the making of an appointment to an office where it is apparent that the appointing power is about to proceed in the matter, and where it is not shown that there is an attempt to evade the law by unnecessary delay.[7]

[1] [Mandamus will lie to compel a returning officer to make his statement complete and accurate. Steward *v.* Peyton, 77 Ga., 668.]

[2] *Ex parte* Heath, 3 Hill, 42.

[3] High on Extr. Rem., § 52, and cases cited.

[4] Commonwealth *v.* County Commissioners, 5 Rawle, 75.

[5] State *v.* Albin, 44 Mo., 346.

[6] [State *v.* Houston, 40 La. Ann., 393; S. C., 4 So. Rep., 50.]

[7] People *v.* Regents, 4 Mich., 98.

§ 411. The rule is, that mandamus will lie to compel election officers to discharge purely ministerial functions as contradistinguished from such duties as are *quasi* judicial in their character.[1] The duties of returning officers are purely ministerial, but in the nature of the case they must exercise a sort of judicial function in determining whether the papers received by them and purporting to be returns are in fact such, and are genuine and intelligible and substantially as required by law.[2] But after these questions are determined, the duty of counting the votes as returned, and declaring the result, is a ministerial duty which the proper officers are bound to perform, and the performance of which may be compelled by mandamus.[3] And it is not doubted that even as to questions concerning which returning officers exercise a discretion, they can be compelled by mandamus to act and to decide, though their discretion cannot be controlled by this means, and they cannot, therefore, be directed by mandamus as to how they shall decide. If they decide any such questions wrongfully or erroneously, the party injured has his remedy by quo warranto or by such other form of remedy as may be provided by statute.

§ 412. Canvassing officers are bound to certify the result of an election as shown by the returns made to them,[4] and

[1] [State *v.* Houston, 40 La. Ann., 393; S. C., 4 So. Rep., 50. As to mandamus against officers of the United States, see note to case of United States *ex rel. v.* Bayard (Dist. of Colo.), 17 Am. & Eng. Corp. Cases, 485–498.]

[2] [State *v.* Kavanagh, 24 Neb., 506.]

[3] [Houston *v.* Steele (Ky.), 34 S. W. Rep., 6; Page *v.* Letcher, 11 Utah, 119; 39 Pac. Rep., 499. Where a statute required the registrar to appoint commissioners ten days and to publish them six days before the election, if he has refused to perform this duty, parties interested are not precluded from judicial remedy because he has so acted, and mandamus will lie after the time named to compel such appointments. State *v.* Houston, 40 La. Ann., 393; S. C., 4 So. Rep., 50. But a peremptory mandamus will not be allowed requiring the judges and clerks of an election to count ballots rejected by them after such ballots have been returned to the county clerk and are beyond their control. State *v.* Russell, 39 Neb., 116.]

[4] [Board of Education of Topeka *v.* Welch, 51 Kan., 792.]

if such returns are altered by either fraud or mistake, after being sent in, the canvassers should disregard the alteration and base their certificates upon the original and genuine returns. The vote as certified must be canvassed. No alteration of that vote known by the canvassers to have been made after the returns were made could alter their duty to certify the vote so returned, and the performance of this duty can undoubtedly be compelled by mandamus.[1] The case of *State* v. *Garesche*[2] presented the question whether mandamus will lie in such a case if it appears that an alteration has been made in returns, but the canvassing officer does not know, although he believes it to have been fraudulently done after the return was sent in. The Court decided this point in the affirmative, holding that it is the duty of the Court in such a case to take proof and determine for the canvassing board which is the vote originally certified. The Court said:

"A peremptory writ of mandamus simply to count the vote certified by the judges and clerks, without ascertaining which was the vote so certified, would be a mere *brutum fulmen*, as it could never be determined from a certificate of obedience whether the writ had in fact ever been obeyed." And the Court held that it was proper for the court trying the mandamus case to determine which was the true return and compel the board to canvass it. This ruling is not in conflict with the general doctrine that mandamus will not lie to control the exercise of a discretion. The discretion contemplated by that doctrine is judicial in its nature. It cannot be said that the canvassing board has any discretion to certify the result as shown by a fraudulent alteration of the returns. Its duty is purely ministerial and consists in certifying the vote as returned. The performance of this ministerial act may be enforced by mandamus; and where the court is advised that the returns as originally made by the

[1] [Belknap *v.* Board of Canvassers of Ionia County, 94 Mich., 516; Roemer *v.* Board of City Canvassers of Detroit, 90 Mich., 27.]

[2] 65 Mo., 480.

judges of election have been fraudulently or accidentally altered, it is competent for the court to compel the board to disregard the alteration.

§ 413. It is no answer to an alternative writ of mandamus commanding a board of canvassers to count and canvass the returns of certain precincts to show that the returns are irregular and imperfect, without showing that they are in such a state as to render it impossible to ascertain from them the vote cast and for whom cast. Thus, it has been held in Florida that such irregularities as the following will not excuse the board from making the canvass and certificate required by law:

1. That one return has the number of votes for one candidate written twice, and the other, which should have been a duplicate, did not contain this repetition.

2. That the jurat to the oath returned by the inspectors was not signed.

3. That the two returns which should have been duplicates also differed in this, that one referred to a certain act of date August 6, 1868, and the amendments thereof, as the law under which the election was held, while the other gave the dates of the amendments.

4. From certain marks on the ballots the canvassers considered them unlawful.[1]

§ 414. It rests in the discretion of the Court to grant or refuse a writ of mandamus to compel the canvass of the votes cast at an election.[2] As a general rule the writ will be granted upon a showing that the board refuses to canvass the vote according to the face of the returns. The cases are indeed rare where the writ will be refused upon such a showing. All questions affecting the *bona fides* of the returns, and the correctness of the result indicated by them,

[1] State *v.* Canvassers, 17 Fla., 9. But it has been held that a canvassing officer cannot be compelled to canvass returns sent to him unsealed in disregard of a statute requiring that they be sealed and delivered to him. State *v.* Randall, 35 Ohio St., 64.

[2] [Shellabarger *v.* Commissioners of Jackson County, 50 Kan., 138.]

will, as a rule, be left to be determined upon a contest. Nevertheless a case may arise where fraud is so apparent that a court may refuse to compel the completion of the canvass. Thus, it has been held in Kansas that where the returns showed a vote cast of two thousand nine hundred and forty-seven, upon the question of removing a county seat, while in point of fact there were only about eight hundred legal voters in the county, the court should refuse to even apparently sanction so great a fraud by issuing a mandamus to compel, in the name of a technical compliance with duty, the canvass of such returns. The writ was accordingly refused.[1]

§ 415. The office of the writ of mandamus is to compel the performance of a duty imposed by law upon an inferior tribunal.[2] Whatever the duty may be, its performance may be required by this form of procedure. Hence, it has been held that where it was the duty of a board of county canvassers, under the circumstances described in evidence, to remit an erroneous return to the district inspectors for correction, the performance of this duty could be compelled by mandamus. Until the inspectors have made a true return, their duties are undischarged.[3] But after the inferior tribunal has completed the performance of its duties, mandamus will not lie by a contestant to compel the counting of votes cast for him. The remedy in such a case is by a contest.[4]

§ 416. And of course it will be understood from what has already been stated, that where, as is sometimes the case, large judicial powers are conferred by law upon canvassing boards, mandamus will not lie to direct or control them in the exercise of their judicial or discretionary functions.[5] It

[1] The State *v.* Stevens, 23 Kan., 456.

[2] People *v.* Schiellein, 95 N. Y., 124.

[3] People *v.* Green County Canvassers, 12 Abb. (N. Y.) New Cases, 95; S. C., 64 How. (N. Y.) Pr., 201.

[4] Myers *v.* Chalmers, 60 Miss., 772.

[5] [Arrison *v.* Cook, 6 D. C., 335.]

must be constantly borne in mind that the office of this writ is to compel the performance of acts which are purely ministerial in their nature, though it may, as we have said, be employed to compel, but not to control, the exercise of judicial functions. This rule being kept in view, no serious difficulty can arise upon this subject.[1]

§ 417. In proceedings by mandamus involving collaterally the rights of contesting claimants to an office, the court will not review the decision of a board of canvassers, for the reason that such decision is to be treated as conclusive, except in proceedings by quo warranto.[2] In accordance with this doctrine it has been held that where the statute directs the board of county commissioners to order an election for county officers, provided a certain number of qualified electors petition therefor, and it is made the duty of said board to ascertain whether the requisite number of electors have joined in such petition, mandamus does not lie to control them in the exercise of that duty. And if they have decided the matter and refused to order the election, mandamus will not lie to compel them to make such order.[3] And it is also clear that the writ of mandamus will not be ordered to compel election officers to perform a ministerial duty before the time for its performance has arrived. The court will not anticipate a refusal of an officer to do his duty, even though he may have threatened or predetermined not to perform it. There can be no omission, neglect or refusal to perform a duty where the time has not yet arrived for its performance.[4]

[1] Grier *v.* Shackleford, 2 Brev. (2d ed.), 549; Mayor, etc., *v.* Rainwater, 47 Miss., 547.

[2] People *v.* Stevens, 5 Hill, 616; High on Extr. Rem., § 57. [Where the board of supervisors of a county in Michigan has ordered an election to decide upon the removal of a county seat, and canvassed the vote and decided the result, such action is conclusive, and not subject to review by the courts of the State. Hipp *v.* Charlevoix County Supervisors, 62 Mich., 456. See, also, Dauble *v.* McQueen, 96 Mich., 39.]

[3] State *v.* Commissioners, 8 Nev., 309.

[4] State *v.* Carney, 3 Kan., 88.

§ 418. We have seen that mandamus does not lie to compel admission to an office, and we have also seen that it does lie to compel the proper authority to issue a commission to the person declared elected. There is no conflict between these two rules. The granting of the writ to compel admission to the office would have the effect of determining the title thereto, but this is not the effect of the writ when granted to compel the issuance of the certificate of election. This certificate, when issued by virtue of a mandamus, has precisely the same force as if issued without such writ. In either case it is only *prima facie* evidence of title to the office,[1] and may be attacked and overthrown by other proof.[2]

§ 419. In *People* v. *Hilliard*[3] it was held that it is no objection to the granting of the writ to compel the issuance of a certificate of election, that the respondent has already issued certificates to other parties. The court said: "We do not propose to turn the others out of office on an application for mandamus. They are not parties to this adjudication." On the contrary, however, it was held in *Magee* v. *Supervisors*,[4] that if the canvassers have performed their duty, and in the exercise of their discretion have declared the result of the election adversely to the claimant, he cannot have mandamus to compel the issuing of a certificate to him, his remedy being by proceedings in quo warranto. And this would seem the better rule, since the issuing of a second certificate under the order of the court, as we have seen, does not affect in any way the question of title to the office, and it is desirable that the claimant should be put to his remedy by quo warranto at once and in the first instance, to the end that the case may be speedily disposed of upon the merits.

§ 420. It has also been held that mandamus is the proper remedy to compel a registering officer to register as voters

[1] [Bisbee *v.* Hull, 1 Ells., 315.]

[2] High on Extr. Rem., § 61; State *v.* Gibbs, 13 Fla., 55; People *v.* Hilliard, 29 Ill., 413, 419; *In re* Strong, 20 Pick., 484; People *v.* Rives, 27 Ill., 241; Brower *v.* O'Brien, 2 Ind., 423.

[3] *Supra.*

[4] 10 Cal., 376.

the names of persons properly qualified.[1] [But a petition for the writ in such a case is premature where the officer or board has not yet held a session for hearing applications.[2]]

§ 421. Where an election is held and no question is made as to the result, the inspectors of the election have no right to consider the question of the validity of such election, but must certify the result, and upon their failure or refusal to do so, mandamus will lie to compel them to perform this duty. The writ of mandamus, however, even when used to place a person in possession of an office, does not determine the question of the right to the office. It merely places him in possession of the office to enable him to assert his right, which in some cases he could not otherwise do.[3] A few cases may be found in which the writ of mandamus has issued to the proper certifying or returning officer, commanding him to certify the election of a particular person by name, but this is believed to be an improper, or at least an improvident, use of the writ. It should be issued, if at all, simply to compel a return or certification of the result, as shown by the proper returns, but the court issuing the writ should not assume to determine, and in advance, who by such returns is entitled to the office. As we have heretofore observed, the proper use of the writ is to compel, but not control, action by the returning officers. If the person actually elected is not returned and certified to be elected, his remedy is plain, and it is desirable that all questions connected with counting the votes and declaring the result should in the first instance remain with the officers of election.

§ 422. In *Kisler* v. *Cameron*, *supra*, it seems that no question was made as to the fact that the relator had received a majority of the votes cast. The inspectors declined to certify, on the ground that in their opinion the election was void, for some reason not stated in the report of the case.

[1] Davies *v.* McKeely, 5 Nev., 304.

[2] [United States *v.* Bowen, 6 D. C., 196.]

[3] Brower *v.* O'Brien, 2 Ind., 423; Moses on Mandamus, 90; Kisler *v.* Cameron, 39 Ind., 488.

Mandamus was granted on the ground that it was not the province of the inspectors to inquire as to the validity of the election, that question being for another tribunal, but simply to cast up the returns, declare the result, and issue their certificate as provided by the plain terms of the statute, and this they were required to do.

§ 423. We gather from all the authorities the following rules:

1. If the officers of election refuse or fail to act, mandamus will lie to compel them to discharge their duties as required by statute; but in such cases the writ will not, as a general rule, command such officers to certify that any particular person has been elected.

2. If there are two or more persons claiming the office, the writ will never issue to require such officers to declare either one elected, but only to command them to execute the duties and exercise the functions conferred upon them by law.

3. If it clearly appears that a particular person has received the majority of the votes cast, and that no question is made upon this point, perhaps mandamus may issue to compel such officers to certify the election of that person by name, although this is substantially the same thing as to order them to certify the result according to law, and therefore the latter form will always be found to be the best.

CHAPTER XIII.

CONTESTED ELECTIONS—PROCEDURE.

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§ 424. It seems proper, in the next place, to give some attention to the subject of practice or procedure, including notice, pleading and the mode of procuring testimony, in contested election cases. Matters of this character are largely governed by local statutory regulations,[1] and in legislative bodies sometimes by the rules and orders of the body, the details of which need not be given here. It must suffice to refer to the more important of the rules bearing upon these subjects which have from time to time been established, and to some of the principles by which we are to be governed in the construction and administration of the statutes applicable thereto.

§ 425. In the absence of a statute prescribing the mode of contesting an election, the common-law proceeding by an information in the nature of a quo warranto must be resorted to. The information, according to the modern practice, must be filed on behalf of the State by the public prosecutor, usually by the Attorney General, and its purpose is to inquire into and correct the alleged usurpation of a public office by one not entitled thereto. While the proceeding retains its criminal form, it is now universally regarded as in substance a civil proceeding. The proceeding is instituted at the instance of a private citizen or citizens designated as the relator or relators, and its purpose is the determination of purely civil rights. The proceeding must be instituted in a court of general common-law jurisdiction, and the information must set forth the facts constituting the information by the incumbent of the office, as well as those upon which the relator's claim to the office is founded. Application must be made to the Court for leave to file the information, and, although leave is ordinarily granted as a matter of course, it rests in the sound discretion of the court to which the application is made to either grant or refuse it.[2]

[1] [Requisites of petition in Alabama. Taliafero *v.* Lee, 97 Ala., 92. Requisites of notice as to time and place of contest in Indiana. Grimbell *v.* Green, 134 Ind., 628.]

[2] High on Extr. Leg. Rem., § 605, note 2.

§ 426. Notice is absolutely essential to the validity of a proceeding to oust the incumbent of an office, and proceedings instituted and carried on without notice to the incumbent should be treated as absolutely null and void.[1] By notice here is not meant any particular form or character of notice, but simply that some kind of notice is essential.[2] It has accordingly been held by the Court of Common Pleas of Philadelphia, that where a member of a municipal legislative body has been expelled without notice or hearing, a mandamus will be granted to compel such body to restore him until he has had notice and a hearing.[3] It was also held in the same case, that where the council has determined, after notice and hearing, that the member has incurred a disqualification by accepting a Federal office, the Court will not interfere, for the reason that the council has power and jurisdiction to judge of the *qualifications* of its members.

§ 427. A statutory provision requiring notice of contest to be given within a given time from the date of the official count, or from the declaration of the result, or the issuing of the certificate of election or the like, is peremptory, and the time cannot be enlarged.[4] "It has always been held," says the Court in that case, "that where the jurisdiction of a Court is made to depend upon the time either of giving notice or of taking appeals, the requirement is peremptory." And see, also, *Costello* v. *St. Louis Circuit Court*.[5] And it may be added that there is the strongest reason for enforcing this rule most rigidly in cases of contested election, because promptness in commencing and prosecuting the proceedings is of the utmost importance, to the end that a

[1] [Though a notice of contest of an election is so indefinite that an objection would lie if made in proper time, it is sufficient if the parties take issue without objection and try the case. Lunsford *v.* Culton (Ct. of Appeals, Ky.), 23 Pac. Rep., 946.]

[2] [Whitney *v.* Blackburn, 17 Oreg., 564.]

[3] Duffield's Case, Bright. Elec. Cas., 646.

[4] Bowen *v.* Hixon, 45 Mo., 340; [Seeley *v.* Killoran, 53 Minn., 240].

[5] 28 Mo., 259, 278.

decision may be reached before the term has wholly or in great part expired.[1]

§ 428. Where notice of contest is to be given within a given number of days after the determination of the result, the true rule for computing the time is to include the first and exclude the last day, or *vice versa.* Hence it was held in Kentucky that where the certificate of election was issued on the sixth day of the month, and notice of contest was served on the sixteenth day of the same month, there was not ten days' notice as required by law.[2]

§ 429. The act of Congress approved February 19, 1851 [Rev. Stat., sec. 105], "to prescribe the mode of obtaining evidence in cases of contested elections," provides among other things that the contestant shall, "within thirty days after said election, give notice in writing to the member whose seat he intends to contest, and in such notice shall specify particularly the grounds on which he relies in said contest." A good deal of discussion has arisen as to what is to be understood by the words "specify particularly the grounds on which he relies." It is evident, however, that these words are not easily defined by any others.[3] They are as plain and clear as any terms which we might employ to explain them. Cases have arisen, and will again arise, giving rise to controversy as to whether a given allegation comes up to the requirement of this statute, and it must be for the House in each case to decide upon the case before it.[4] It may be observed, however, that this statute should receive a reasonable construction — one that will carry out and not defeat its spirit and purpose. And perhaps the rule of construction which will prove safest as a guide in each case is this: A notice which is sufficiently specific to put the sitting member upon a proper defense and prevent any

[1] [Higbee *v.* Ellison, 92 Mo., 13.]
[2] Batman *v.* Magowan, 1 Metc. (Ky.), 533.
[3] [Thobe *v.* Carlisle, Mob., 523.]
[4] [Duffy *v.* Mason, 1 Ells., 361; Baynton *v.* Loring, 1 Ells., 346.]

surprise being practiced upon him is good, but one which fails to do this is bad.[1]

It seems to be settled by the decisions of the House of Representatives that a notice is good under the law if it specify the number of illegal votes polled, for whom polled, and when and where polled, without specifying the names of the illegal voters.[2] The same rule prevails in cases brought under statutes providing for the contest of elections.[3]

§ 430. In *Follett* v. *Delano*,[4] the committee of elections of the House of Representatives expressed the opinion that, inasmuch as there is no statute defining the mode of proving the service of notice in a contested election case in that body, such service must be proven as any other fact in the case, by the deposition of a witness, and that an affidavit is not sufficient. And the committee in the same case also expressed the opinion that, inasmuch as the statute requires the contestant to "give notice in writing to the member whose seat he designs to contest," and does not define the mode of service, it must be a personal service, and that service by leaving a copy at the residence of the sitting member is not sufficient. These points can hardly be considered as settled by any decision of the House, since the case itself was considered upon its merits, notwithstanding the defective service, and it is the opinion of the author that it would not be safe to risk a case upon this construction of the statute, which, though perhaps technically correct, may at any time be disregarded by a majority of the House,— as it is quite

[1] Wright *v.* Fuller, 1 Bart., 152. [This rule obtains in contested elections in Minnesota. Soper *v.* Board of County Commissioners, 46 Minn., 274. A contestee may waive the insufficiency of the contestant's notice of contest. Duffy *v.* Mason, 1 Ells., 361; Otero *v.* Gallegos, 1 Bart., 177; Bramberg *v.* Haroldson, Smith, 356.]

[2] Wright *v.* Fuller, *supra;* Vallandigham *v.* Campbell, 1 Bart., 223; Otero *v.* Gallegos, 1 Bart., 177; Case of Joseph B. Varnum, Cl. & H., 112.

[3] Gibbons *v.* Sheppard, 65 Pa. St., 36; Batturs *v.* Megary, 1 Brewst., 165, Doerflinger *v.* Hilmantel, 21 Wis., 566; [Berry *v.* Hull (N. M.), 30 Pac. Rep., 936; Batterton *v.* Fuller (S. Dak.), 60 N. W. Rep., 1071].

[4] 2 Bart., 113.

likely to be in a case where the majority should consider it a construction too narrow and strict to meet the ends of substantial justice. An answer will of course operate to waive any defect in the *service* of the notice, though perhaps not in the notice itself.

§ 431. It may be stated as a general rule, recognized by all the courts of this country, that statutes providing for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections.[1] Immaterial defects in pleadings should be disregarded; necessary and proper amendments should be allowed as promptly as possible; and the court should require the parties to speed the cause, so that the official term which is in dispute may not expire either in whole or in large part before the final decision is reached.

§ 432. The title of one who has qualified and entered upon the duties of an office depends upon the fact of his election, and not upon the acts and omissions of boards of canvassers or other officials charged with duties in connection with the conduct of the election and the ascertainment and declaration of the result. If a contest is instituted under special statute, or a quo warranto proceeding commenced to try title to an office, it must be heard upon an allegation which goes to the merits, and shows that the incumbent was not in fact elected by the electors.[2]

§ 433. Where a statute provided that the grounds of contest "must be verified by the affidavit of the contesting party that the matters and things therein contained are true," it is sufficient if the ordinary form of verification is followed, viz.: that the statement is true except as to matters therein set forth on information and belief, and as to those matters affiant believes it to be true.[3] This has been

[1] Hadley *v.* Guthridge, 58 Ind., 302; [Grimm *v.* Hubbard, 97 Mo., 311].

[2] *Ex parte* Smith, 8 S. C., 495; *Ex parte* Norris, Id., 408; Govan *v.* Jackson, 32 Ark., 553.

[3] [Kreitz *v.* Behrensmeyer, 125 Ill., 141.]

held to be a substantial compliance with such a statute, and it has been well said that to require the contestant to make oath to the absolute verity of every averment of the statement or petition of his own knowledge would prevent the contest of an election in almost any conceivable case, and would work a practical abrogation of a beneficial law. In the nature of the case, many of the facts to be averred must necessarily be derived from others, and therefore must be stated upon information and belief only.[1]

§ 434. Where the statute provides that the election of a public officer may be contested by "any candidate or elector," the person instituting such contest must aver that he is an elector, or that he was a candidate for the office in question. This must appear on the face of the record, and it is not enough that the contestant offers proof that he is an elector. The incumbent is not bound to answer or take notice of a complaint which does not contain this averment.[2]

§ 435. An application for a recount of the ballots cast at an election will not be granted, unless some specific mistake or fraud be pointed out in the particular box to be examined. Such recount will not be ordered upon a general allegation of errors in the count of all, and giving particulars as to none of the boxes.[3] These rulings were made in cases of applications to the court to order a recount of ballots. Of course, such an order might be accompanied with proper provisions for securing fairness and accuracy, and the result might and would be rejected in case of doubt as to the identity of the ballots; but before ordering it the Court held that there must be charges of mistake or fraud sufficiently precise to induce the Court to entertain the complaint, and that a general allegation of errors believed to exist was not enough to au-

[1] Kirk *v.* Rhoads, 46 Cal., 398.

[2] Edwards *v.* Knight, 8 Ohio, 375; [Gillespie *v.* Dion (Mont.), 44 Pac. Rep., 954].

[3] Kneass' Case, 2 Pars., 599; Thompson *v.* Ewing, 1 Brewst., 67, 97; [Dean *v.* Field, Ells., 190].

thorize the perilous experiment of testing the election return by the result of a recount.

In Nebraska the canvassing officers have no authority to go behind the poll books and returns and inspect the ballots.[1]

[§ 435*a*. In an election contest an application for a recount of ballots must conform to the statutory requirements governing such applications, and a mere oral request is not sufficient.][2]

[§ 435*b*. It has been held in California that where a recount of votes made some time after the election disclosed a very material change, and where affidavits were filed attacking the result of the recount and charging fraud, and offering to prove by the testimony of voters that more votes were cast for a certain candidate than appeared from the recount, it was the duty of the Court to grant a continuance for a short time to allow an investigation.][3]

[§ 435*c*. In Illinois it is held as follows: Under an answer admitting that the ballot-boxes containing the ballots were forwarded to the county clerk and opened by him, with two justices, within four days after the election, the preliminary showing that the ballots are unchanged is sufficient to support a decree for a recount, as after the recount the contestee may show that the ballots have been changed, if such is the fact; evidence by the contestee that a ballot, after having been handed to the election officers, was changed by having a name pasted over that of contestee, though no such matter is charged in the answer, is admissible upon the issue raised by contestee's denial of the petition alleging that contestant was actually elected to the office; and evidence that a ballot was voted which does not appear among the ballots in the recount is admissible, though not pleaded in the answer, to rebut the case made out in chief by contestant.][4]

[1] Kane *v.* People, 4 Neb., 509.

[2] [McCoy *v.* Boyle, 51 N. J. Law, 53; S. C., 16 Atl. Rep., 15.]

[3] [Lord *v.* Dunster, 79 Cal., 477; S. C., 21 Pac. Rep., 865.]

[4] [Kreitz *v.* Behrensmeyer, 124 Ill., 141.]

§ 436. When the statute of a State provides a mode for contesting an election, that mode must be followed.[1] And in Illinois, the statutory proceeding is held to be, to all intents and purposes, a chancery proceeding.[2]

§ 437. In *Skerret's Case*[3] the Court of Common Pleas of Philadelphia had occasion to discuss the requisites of a petition to contest an election. The statute of Pennsylvania provided as follows: "That the returns of the elections under this act shall be subject to the inquiry, determination and judgment of the Court of Common Pleas of the proper county, upon complaint in writing of thirty or more of the qualified electors of the proper county, of the undue election or return of such officer, two of whom shall take and subscribe an oath or affirmation that the facts sets forth in said complaint are true," etc. And it was held that the complaint must set forth the facts with particularity and precision, and they must be such as, if true, to render it the duty of the Court either to vacate the election, or declare another person than the one returned to have been duly elected.[4] It was further held that unless the petition be thus verified and set forth facts that, if true, would have changed the result, it will be quashed on motion. And it has also been held bad on demurrer.[5] There is no doubt as to the soundness of this ruling. It is not desirable to encourage groundless or frivo-

[1] Dickey *v.* Reed, 78 Ill., 261.

[2] Dale *v.* Irwin, 78 Ill., 170. See, also, State *v.* Stewart, 26 Ohio St., 216.

[3] 2 Pars., 509.

[4] [State *v.* Stinson, 98 N. C., 591; State *v.* Patterson, 98 N. C., 593; Kreitz *v.* Behrensmeyer, 125 Ill., 141; Sone *v.* Williams, 130 Mo., 530.]

[5] [Todd *v.* Stewart, 14 Cal., 286. The Nevada statutes provide that any person who may be convicted of having offered a bribe to secure his election or appointment to office shall be disqualified to hold. Another section provides for the contest of an election in case the person elected to the office shall not, at the time of the election, be eligible to such office. *Held*, that a complaint to contest the election of a district attorney which alleged that the contestee offered, before election, to make a bond conditioned that if elected he would return to the

lous contests. If the complainants have a solid basis for their complaint, they can readily specify the facts upon which they rely, and if they have not such solid basis, it is better that they be not permitted to proceed. "The true rule," says King, P. J., in *Skerret's Case*, *supra*, "regulating such proceedings should be defined so as to advance, on the one hand, substantial and meritorious, and to arrest, on the other, futile and querulous complaints. It is not sufficient to state generally that A. received a majority of votes while the certificate was given to B., and therefore the complainants charge that there was an undue election. This is but a conclusion, and it is not for the pleader to state conclusions, but facts from which the court may draw conclusions. If fraud is alleged, the petition must state the manner in which the fraud was effected, and the number of votes fraudulently received or fraudulently rejected."[1]

§ 438. In an information setting forth that the respondent has usurped an office which is claimed by other persons, their claims should be set forth, and the judgment may order the ouster of the usurper as well as the admission of the rightful claimant.[2] Leave of Court must be had to file an information of this character, under the common law, though the Attorney General of England, it seems, might file it at his will.[3]

§ 439. Where some of the grounds set out in the petition are mere irregularities, which, if sustained by proof, would not vitiate the election, they will be stricken out on motion, and the respondent will not be put to the trouble of taking proof to rebut them.[4]

county treasurer each month a portion of his salary, but does not allege that he had been convicted of offering such bribe, does not show that he was disqualified to hold the office, and is fatally defective. Egan *v.* Jones, 21 Nev., 433.]

[1] Upon this general subject see Carpenter's Case, 2 Pars., 537; Lelar's Case, 2 Pars., 548; Kneass' Case, 2 Pars., 553.

[2] Gano *v.* The State, 10 Ohio St., 237.

[3] 4 Blackstone, 311.

[4] Kneass' Case, *supra*. And see Batturs *v.* Megary, 1 Brewst., 162.

§ 440. It was held by the Supreme Court of Pennsylvania, in *Gibbons* v. *Sheppard*,[1] that certainty to a common intent is all that is required, and that some of the rulings above referred to were too stringent; that the rule must not be held so strictly as to afford protection to fraud, by which the will of the people is set at naught, nor so loosely as to permit the powers of sworn officers chosen by the people to be inquired into without well-defined cause.

Undoubtedly the same rule should be applied to a pleading of this character that is applied to all other similar pleadings. It should state in a legal and logical form the facts which constitute the ground of the complaint; nothing more is required; nothing less will suffice.[2]

§ 441. In most of the States of the Union there are statutes to regulate pleadings, under which courts are authorized to allow amendments where petitions or other pleadings are found to be defective, and under most of these statutes a petition in a contested election case may be amended. In the absence of any statute of this character, the court trying a case of contested election may, under its general common-law power, permit such a petition to be amended; and an amendment ought to be allowed whenever the court, in the exercise of a sound discretion, shall be of opinion that the ends of justice will be thereby promoted.[3]

§ 442. There is, however, a very strong reason for requiring any such amendment to be made *instanter*, and for bringing an election case to a prompt and speedy trial and determination, and it is this: The subject-matter of the controversy is daily growing less, and of less importance and value. The office in question is usually for a short term of one or perhaps several years only, and if the "law's delays"

[1] 2 Brewst., 2; S. C., 65 Pa. St., 36.

[2] [Whitney *v.* Blackburn, 17 Oreg., 564.]

[3] Kneass' Case, 2 Pars. (Phila.), 553; S. C., Bright. Elec. Cas., 337; [Heyfron *v.* Mahony, 9 Mont., 487; Wilson *v.* Hines (Ky.), 35 S. W. Rep., 627; Nash *v.* Craig (Mo.), 35 S. W. Rep., 1001].

are to be allowed in these as in other cases, the term would often expire before a decision could be reached. If, therefore, an amendment of a petition would necessarily result in a continuance, or in considerable delay, it ought not to be permitted, because it is better that he whose fault it is that the original petition is insufficient should suffer, than that an innocent party should be deprived of his right to a speedy trial. In such a case the furtherance of justice requires that leave to amend should be refused.[1]

§ 443. As we have already seen, there are strong reasons for requiring the parties to an election contest to use great diligence in preparing for an early trial. In accordance with this rule it is held that an amended pleading setting up new facts will only be allowed where it affirmatively appears that such facts are new; that they were first discovered after the service of the original notice; and that by the use of due diligence they could not have been discovered before such service.[2] And in Louisiana it is held that all statutes providing for the speedy determination of election cases are to be strictly construed.[3]

§ 444. The special actions and forms of proceeding provided for by the statutes of most of the States to try the right to an office are in the nature of a quo warranto at common law. They differ in the formula of proceeding from proceedings by information, or by writ of quo warranto, but they are, as a general rule, in substance the same, and governed by substantially the same rules which regulated proceedings under the prior practice. Such was the ruling under the statute of New York, which is not unlike the statutes of most of the other States.[4]

§ 445. The inquiry in a court for the trial of a contested

[1] See, also, Gibbons *v.* Sheppard, 65 Pa. St., 20, 35; Mann *v.* Cassiday, 1 Brewst., 32; Thompson *v.* Ewing, Id., 68, 97, 101.

[2] Harrison *v.* Lewis, 6 W. Va., 713.

[3] State *v.* Hall, 26 La. Ann., 58; [Vailes *v.* Brown, 16 Colo., 462].

[4] People *v.* Pease, 30 Barb., 588.

election under the Kansas statute is not necessarily limited to the matters presented in the contestor's statement. The contestee may be heard, not merely in denial, but in proof of other matters tending to show his right to the office, notwithstanding the matters alleged in the statement; and these other matters the contestor may also controvert or avoid.[1]

§ 446. In the case of *Follett* v. *Delano*,[2] it was held that the rule that a failure to answer is a confession of the allegations contained in the complaint will not be applied to a contested election in the House of Representatives. The reason is, that the inquiry is of a public nature, and not a case involving private rights alone. Upon this point the committee in the report say:

"The contestant claimed that the sitting member, by failing to answer, must be taken to have confessed the truth of the allegations in the notice. The statute requires of the sitting member, within thirty days after the service, to answer such notice, admitting or denying the facts alleged therein, and stating specifically any other grounds upon which he rests the validity of his election. If the contestant and the sitting member were the only parties interested in the representation of this district, it might not be unfair to hold that the sitting member, upon service of notice upon him according to law, must answer as the law requires, or by neglect or refusal be taken as confessing the truth of the allegations made in conformity to law against his right to his seat, and abide the judgment of the House upon such confession. But the contestant and the sitting member are by no means the only parties interested in this representation. The electors of the district, each and every one of them, have a vital interest in that question, and no one of them can be precluded, by any laches not his own, from insisting that the choice of the majority shall be regarded. No confession of the sitting member, however it might bind

[1] Baker *v.* Long, 17 Kan., 341.
[2] 2 Bart., 113.

him personally, can place the contestant in the seat, unless he is the choice of the majority, nor deprive that majority of its rightful representation. The sitting member may well be deprived, by his neglect to answer, of reliance upon 'any other grounds upon which he rests the validity of his election,' for he has never given notice of any such grounds; but the committee are of opinion that the House should require proof that the sitting member has not, and that the contestant has, a majority of the legal votes before unseating the one and admitting the other, however the sitting member may have seen fit to conduct his own case in a contest."

§ 447. A similar ruling was made in the recent case of *Sheridan* v. *Pinchback*.[1] It is very clear that the usual judgment by default, such as would follow a failure to answer in the courts of the country, should not be rendered in a case of contested election in the House of Representatives. If the sitting member has not answered he may well be regarded as estopped from taking testimony or proceeding with the contest until he shall have, with the leave of the House, filed his answer; but the House will not take the allegations of contestant as true because they are not answered. In the case of *Sheridan* v. *Pinchback* the committee say that the case of the contestant, where the sitting member does not answer, is no stronger than if no one were contesting his right, and the committee had been ordered by the House to inquire whether he was elected. This distinction between contested election cases and other suits grows out of the fact that in the former the people have an interest so vital and important as to forbid the parties to the record to conclude their full investigation and decision by any compromise or other action of theirs.

§ 448. The practice in cases of contested election in the House of Representatives of the United States is not, and perhaps never can be, very definitely settled, for the reason

[1] [Smith, 196.]

that each House is the final judge of all questions arising in such cases, and neither House is absolutely bound either by the action of any previous House, or by the statute itself.[1] The statute, however, as we have seen, is regarded as a rule of decision, and as such is generally followed, and should never be departed from without the very strongest reasons.[2]

In addition to what has already been said touching the practice in these cases, the following suggestions are made concerning the mode of instituting and carrying on a contest under the statutes regulating contested elections in the House of Representatives:

1. Within thirty days after the result of the election in a district has been determined by the proper authority, the contestant must serve the returned member with notice of contest. This notice must be in writing, and must specify particularly the grounds upon which the contestant relies.[3] The period of thirty days within which such notice of contest may be given begins to run from the time when the result of the election "shall have been determined" by the proper board or officer. The statutes of the several States provide for canvassing the votes cast for Representative in Congress, and for declaring the result, and these statutes must be consulted in each case to determine the question when, how and by whom the result is to be determined and declared. It is no doubt true, that, for the purpose of fixing the time when the thirty days begin to run, there must be not only a decision, but a promulgation of the result; for if the result was kept secret after it was privately ascertained, and if it was in fact not communicated to the contestant, he could not be required to give notice. The promulgation need not be in any formal way, unless a formal proclamation or other publication is required by statute. It is only necessary that

[1] [Jones *v.* Shelley, 2 Ells., 681.]
[2] [Posey *v.* Parrett, Row., 187.]
[3] Revised Statutes, § 105.

it be made known in some manner.[1] The statute is silent as to the manner of the service of the notice; it declares that the contestant shall "give notice in writing," etc. In *Follett* v. *Delano*,[2] the committee expressed the opinion that the correct construction of the statute would require personal notice, and that service made by leaving a copy at the residence of the sitting member would not be good.[3] [In a later case, however, it has been held by the House that it is sufficient to serve the notice upon the wife of the contestee at his place of residence, if the contestee is absent from the State or Territory.[4]] Undoubtedly the service should be made personally upon the returned member, if this is practicable; but if by reason of his absence, or his avoidance of service, or for any other cause, personal service cannot be made, then undoubtedly the notice may be served in the manner provided by the statute of the State for serving process. It is clear that the House should hold service made under these circumstances, in the manner pointed out by the local law for serving process, to be sufficient, because otherwise the incumbent might, by avoiding personal service, prevent a contest altogether. Another question is, how shall the service of notice of contest be proved? Here again the act of Congress is silent. The affidavit of the person making the service has generally been taken, but in *Follett* v. *Delano*, *supra*, the sufficiency of this mode of proof was denied. Where the returned member answers, he waives any informality in the service[5] or proof of service; but where he does not, the safe practice is for the contestant to call as a witness the person who has made the service, and prove the fact of service as he would prove any other fact in the case.

2. The returned member must, within thirty days from

[1] Gunter *v.* Wilshire [Smith, 233].
[2] 2 Bart., 113, 115.
[3] § 430.
[4] [Manzanares *v.* Luna, Mob., 61.]
[5] [See note to § 429.]

the time when he is served with the notice of contest, answer the same. The answer must be served upon the contestant. This may be done by leaving a copy with him, or, if he be absent, by serving it in the same manner as required for serving the notice of contest. The answer may deny or admit the allegations of the notice, and may state specifically any other grounds upon which the returned member rests the validity of his election.[1] The statute makes no provision for further pleading, but the contestant may of course, if he chooses to do so, serve the returned member with a reply to any new matter in the answer. This, however, is not necessary. Inasmuch as the notice and answer are the only pleading recognized by the statute, no further pleading can be required, and the new matter contained in the answer must be proven, to avail anything, whether it is formally denied or not.

3. The statute allows ninety days in which to take testimony in a contested election case, and requires that it be divided between the parties as follows: The contestant shall take testimony during the first forty days, the returned member during the succeeding forty days, and the contestant may take testimony in rebuttal only, during the last ten days.[2] The period of ninety days within which testimony may be taken begins with the date of the service of the answer of the returned member upon the contestant.[3]

4. The statute provides for taking testimony in contested election cases, either within or without the Congressional district. In either case the notice provided for by Section 108 of the Revised Statutes must be given. By Section 109 it is provided that testimony may be taken at two or more places at the same time. The evident purpose of the statute is to enable the parties to complete the taking of testimony within the time prescribed. The officers before whom testimony

[1] Revised Statutes, § 106.

[2] Revised Statutes, § 107.

[3] See Act of March 2, 1875; [Bradley *v.* Slemons, 1 Ells., 296.]

may be taken are those named in Section 110 of the Revised Statutes, and the same officers are authorized to take depositions of witnesses residing out of the reach of a subpœna.[1] The party desiring to take testimony must give the notice required by Section 108 to his adversary, and must also apply to the officer before whom the testimony is to be taken to issue a subpœna. The officer thus applied to is required to issue his subpœna directed to all such witnesses as shall be named to him, requiring their attendance before him at some time and place named in the subpœna. The subpœna should follow the notice in giving names of witnesses, and fixing time and places.[2]

5. If neither of the officers named in Section 110 are residing in the district, then any two justices of the peace may take testimony.[3] Depositions may be taken by consent, without notice and before any officer authorized by law to take depositions in common-law or civil actions or in chancery.[4] Every subpœna must be served by a copy thereof delivered to the witness or left at his usual place of abode at least five days before the day on which his attendance is required, and every witness must be examined within the county in which he resides or may be served.[5]

Witnesses failing to attend and testify in obedience to a subpœna duly served, unless prevented by sickness or unavoidable necessity, are liable in damages and also to indictment and punishment for a misdemeanor.[6]

6. The statute further provides for taking the depositions of witnesses residing outside of the district and beyond the reach of a subpœna. Depositions outside of the district may

[1] R. S., § 117. [A United States Commissioner cannot take testimony except by written consent of the parties. Stolbrand *v.* Aikin, 2 Ells., 603.]

[2] R. S., §§ 108, 109, 110, 111.

[3] R. S., § 112.

[4] R. S., § 113.

[5] R. S., §§ 114, 115.

[6] R. S., § 116.

be taken before any officer authorized to take testimony in contested election cases.[1]

7. The notice to take depositions of witnesses residing outside of the district and beyond the reach of a subpœna is the same notice required to be given for taking the testimony of witnesses found within the district, and the substance of the notice and the manner and time of its service are specified in Section 108.

8. When a party to a contest receives the notice provided by law of the intention of his adversary to take depositions either within or without the district, he is at liberty to name an officer (having authority to take depositions in such cases) to officiate with the officer named in the notice, and, if both officers attend, the depositions shall be taken before them both sitting together and be certified by both. But if only one of such officers attends, the depositions may be taken before and certified by him alone. At the taking of testimony by deposition or otherwise, either party may appear in person or by attorney.[2]

9. As to the manner of the examination of witnesses the statute is not very clear.[3] The language is, that "all witnesses who attend," etc., "shall be examined *by the officer*," etc. This should no doubt be construed simply as requiring the examination to be conducted *before* the officer, and not as requiring him to propound the questions to witnesses. It will be seen that this section requires witnesses to be examined "touching all such matters respecting the election about to be contested as shall be proposed *by either of the parties or their agents.* And Section 122 provides that the officer "shall cause the testimony of the witnesses, together with the *questions proposed by the parties or their agents*, to be reduced to writing," etc. From all which it seems clear that witnesses are to be examined before the proper officer,

[1] R. S., § 117.
[2] R. S., §§ 118, 119.
[3] See R. S., § 120.

and under his direction, and that the parties or their attorneys may appear and propound any proper questions. In the absence of the officer named in the notice, and who issued the subpœna, depositions may be taken before any other officer who is authorized to issue such subpœna, or by any officer who may be agreed upon by the parties. And this rule applies as well to testimony taken within the district as to that taken without the district.[1]

10. The testimony is to be confined to the issues joined between the parties, and the ordinary rules of evidence should be applied in determining questions of competency and relevancy.[2] Testimony must be written down, together with the questions propounded, in the presence of the officer, and in the presence of the parties or their agents, if attending, and must be attested by the witnesses.[3] Section 123 provides for the production of papers to be used as evidence in contested election cases. The taking of testimony may, if so stated in the notice, be adjourned from day to day.[4]

11. The notice to take depositions with the proof or acknowledgment of service thereof, and a copy of the subpœna when one has been served, are to be attached to the depositions when completed, and a copy of the notice of contest, and the answer thereto, are to be prefixed to the same, and transmitted with them to the clerk of the House of Representatives.[5]

12. It is the duty of the officer who takes testimony to be used in a contested election case, without unnecessary delay to certify, carefully seal up, and forward the same to the clerk of the House of Representatives. This is to be done "when the taking of the same is completed."[6] If the testimony of a number of witnesses is taken before the same

[1] R. S. § 120.
[2] R. S. § 121.
[3] R. S. § 122.
[4] R. S. § 124.
[5] R. S. §§ 125, 126.
[6] R. S. § 127.

officer, he may delay the sending forward of the testimony until all have been examined—but must not delay its transmission any longer than is necessary for this purpose, and he must be careful to keep the testimony in his own possession, and securely, until it is mailed, as prescribed by the statute. Testimony of witnesses taken to be used in a contested election case, must be certified by the officer taking it, but neither the form nor the substance of the certificate is prescribed by the statute. Doubtless the form prescribed by the law of the State in which the testimony is taken, for authenticating depositions, taken under the laws of that State, should be regarded as sufficient. In cases where no form is prescribed by the local law, it will be sufficient if the officer's certificate shows that the witness came before the officer at the time and place named in the notice—that he was duly sworn and examined, that the questions propounded to him, and his answers thereto, were written down in his presence, and in the presence of the parties or their counsel, (if they attended,) and that after being thus written out the testimony of each witness was duly attested by him as by law required. The certificate should be signed by the officer, and attested by his seal of office, if he have a seal.

13. The clerk of the House of Representatives upon the receipt of the testimony in a contested election case, shall, after giving notice to the parties, open the sealed packages in the presence of the parties or their attorneys if they attend. The parties are then to agree, if possible, what portions of the testimony is to be printed, and if they can not agree or if either party fails to attend, the clerk shall determine that question, and cause the printing to be done. The clerk must preserve the portions of the testimony not printed. As soon as the testimony in any case is printed, the clerk shall furnish two copies thereof to each of the parties. Brief are to be promptly filed.[1]

[1] Act in relation to contested elections approved March 2, 1887. Acts

§ 449. Although the acts of Congress in relation to taking evidence in contested election cases, are not absolutely binding upon the House of Representatives, yet they are to be followed as a rule and not disregarded or departed from, except in extraordinary cases. A contestant must take his testimony under the statute, and in accordance with its provisions, unless he can show that it was impracticable to do so, and that injustice may be done, unless the House will order a special investigation.[1] The statute as it now stands after the recent amendments, affords an opportunity for investigation, so ample and complete that it is believed that it will seldom happen that the House will find it necessary to depart from its provisions in order to do the most complete and perfect justice, and it will no doubt therefore be adhered to as furnishing the best possible guide, for instituting and carrying forward inquiries of this character.[2]

§ 450. Testimony to be used in a case of contested election in the House of Representatives of the United States must, under the law as it stood prior to the recent amendments, be taken within sixty days from the time the answer is served, unless further time is given by the House. Therefore a deposition taken after the sixty days has expired, and without the order of the House, will be excluded.[3] In the case last named it was held, that notwithstanding the requirement of the statute that notice of contest shall be served "within thirty days *after* the result has been declared," yet if the sitting member answers to a notice served before the result is declared, he should be held as waiving this objection and can not avail himself of it on the final hearing. The true construction of the statute allows the notice to be served at any time within the thirty days, but not after the termination of that period.

2d Sess. 49th Cong., p. 445. As to evidence in contested election cases generally, see Chapter XIV, Contested Elections — Evidence.

[1] Brooks *v.* Davis, 1 Bart., 244.

[2] [Bisbee *v.* Finley, 2 Ells., 172.]

[3] Knox *v.* Blair, 1 Bart., 521; Todd *v.* Jayne, 1 Bart., 555.

§ 451. In *Vallandigham* v. *Campbell*,[1] the rule that a sitting member must use diligence in the preparation of his defense to a contest brought against him, was adhered to by the committee and the House. It was there held that the fact that the sitting member was a member of a previous Congress, and attended to his duties as such, during a part of the time when by law the testimony should have been taken, furnished no ground for an extension of time in his behalf. Also, that the fact that the contestant occupied or proposed to occupy the entire sixty days after service of the answer of the sitting member to the notice of contest, does not entitle the sitting member to an extension of time. Both parties were allowed to take testimony under the law as it then stood during the same time. And substantially the same ruling was made in the case of *Boles* v. *Edwards*.[2] The statute upon this subject was, however, by an act approved January 10, 1873, amended so as to extend the whole time for taking evidence to ninety days, and so as to divide the time as follows: the first forty days to the contestant, the succeeding forty days to the sitting member, and the closing ten days, to the contestant, to be occupied in taking testimony in rebuttal only.

§ 452. The House of Representatives of the United States will not grant to a sitting member whose seat is contested, an extension of time in which to take testimony, unless it appear that he has not by the use of great diligence, been able to procure his testimony within the time allowed by the law.[3] The reason for this rule is thus stated in the report of the Committee of Elections, in the case of *Giddings* v. *Clark*,[4] in the 42d Congress.

"It must be borne in mind that the party now asking an extension is the sitting member. He is now, and has been during a large part of the term, exercising the functions and receiving the emoluments of the office in question. In a

[1] 1 Bart., 223.
[2] [Smith, 18.]
[3] [Thobe *v.* Carlisle, Mob., 423; Mason *v.* Oates, 2 Ells., 8.]
[4] [Smith, 91.]

litigation of this character the thing in controversy grows daily less, and does not, as in most ordinary law suits, remain intact to be recovered by the successful party in the end. In this particular case the extension asked for would be very nearly equivalent to a final decision of the case in favor of the sitting member upon the merits. We are now near the close of the second session of the Congress. If the parties are to be sent back to Texas to take further testimony, of course no further action can be taken until the opening of the third and last session, which is of but ninety days' duration, and would be necessarily far spent before a final decision could be reached. It does not follow from these considerations that a sitting member can in no case be allowed an extension after the time allowed by law for taking testimony expires; but your committee think it does follow that no such extension should ever be granted to a sitting member, unless it clearly appears that by the exercise of great diligence he has been unable to procure his testimony, and that he is able, if an extension be granted, to obtain such material evidence as will establish his right to the seat, or that by reason of the fault or misconduct of the contestant he has been unable to prepare his case."

§ 453. In a contested election case in Congress an application by the sitting member for an extension of time to take testimony, made after the time allowed by law for taking testimony has expired, and after the term of office contested for has well nigh expired, it is necessary, in addition to showing great diligence, to state on oath the names of the witnesses whose testimony is desired, and the particular facts which can be proven by them; and the affidavits of such witnesses themselves should be produced, or a sufficient reason given for failing to produce them.[1]

§ 454. A contested election case, whatever the form of the proceeding may be, is in its essence a proceeding in

[1] Giddings *v.* Clark, *supra.* See same report for discussion as to what constitutes the proper degree of diligence in such a case.

which the people—the constituency—are primarily and principally interested. It is not a suit for the adjudication and settlement of private rights simply. It follows that the parties to the record can not, by stipulation or otherwise, discontinue or compromise a case of this character without the consent and approval of the court or tribunal trying it. Nor should such consent ever be given, unless the Court giving it is sufficiently advised to be able to say that it is for the interest of the public to do so.[1]

§ 455. In a case of quo warranto instituted for the purpose of trying the right of an individual to hold a public office, the people are understood to be interested as a body in the investigation; and therefore the Attorney General or other officer holding a similar relation to the public, must represent the people, and is the only person whose stipulation can be acted upon so as to affect the people. It was accordingly held in Michigan, that the court should not consider a statement of facts agreed to between the relator and the respondent, and not signed by the Attorney General.[2] And, as we have already seen, substantially the same rule prevails, in all cases of contested election, whether in the form of a quo warranto, or by statutory proceedings.

§ 456. While a continuance or postponement for a brief period of time may be allowed in a contested election case, where the court or tribunal trying the same shall in its discretion believe that the ends of justice will be subserved thereby,[3] yet, as we have seen, the ordinary rules governing applications for continuances, in the nature of the case, can not apply to a litigation of this kind. The proceedings must be regarded as in their nature so far summary, as to take them out of the operation of the general rule, which allows continuances from term to term, in the discretion of the court.[4]

[1] Mann *v.* Cassiday, 1 Brewst., 43; People *v.* Holden, 28 Cal., 139; Kneass' Case, 2 Pars., 570; Collings' Case, Bright. Elec. Cas., 513.

[2] People *v.* Pratt, 15 Mich., 184; Crawford *v.* Molitor, 23 Mich., 341.

[3] [Lord *v.* Dunster, 79 Cal., 477.]

[4] Keller *v.* Chapman, 34 Cal., 635. [Section 4710 of the Revised Stat-

[§ 456*a*. It has been held by the House of Representatives of the United States, that where, pending a contest in the House, and after the pleadings are made up and the proof taken, the contestee dies and a successor is elected to fill his unexpired term, the seat of the successor depends upon the election of the original contestee, and that he is in consequence bound by the pleadings and proof in the original contest and by a decision afterwards rendered therein.][1]

§ 457. The House of Representatives of the United States, in construing a State law, will follow the construction given it by the authorities of the State whose duty it is to construe and execute it. Where a given construction has been adopted and acted upon by the State authorities, the Federal government should abide by and follow it. It was so held by the House of Representatives of the United States in the matter of the election of Representative from the State of Tennessee.[2] The report of the committee has this language:

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

And in the case of *Burch* v. *Van Horn*,[3] the House refused to go into an inquiry as to the validity of the new Constitution of Missouri, upon the ground that it had been

utes of Missouri, which requires the contest of an election to be tried at the first term of the court held fifteen days after the official count of the votes and service of notice of contest, unless continued by consent or for good cause shown, is directory only. Kraleman *v.* Seppel, 57 Mo. App., 598.]

[1] [Mackey *v.* O'Connor, 2 Ells., 561.]

[2] 42d Congress.

[3] 2 Bart., 205. [For a discussion of this rule, see majority and minority committee reports in Lynch *v.* Chalmers, 2 Ells., 338.]

recognized as valid by the people and by all the departments of the State government.

[§ 457*a*. In the case of *Clayton* v. *Breckenridge*, the question arose whether the House of Representatives should be bound by the result of the trial of a criminal case where parties charged with election frauds had been acquitted. It was there held that such a trial was not an adjudication binding on the House in a case involving the same frauds.][1]

§ 458. When a contest is tried before a legislative body, under a law providing a special mode of proceeding, costs will not be allowed except by the action of such legislative body. They cannot be recovered by suit.[2]

[1] [Row., 679.]

[2] Garrard *v.* Gallagher, 11 Nev., 382.

CHAPTER XIV.

CONTESTED ELECTIONS—EVIDENCE.

§ 459. Ordinary rules of evidence apply.
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503. Parol evidence admissible to impeach.
504–506. Tally-sheets, if required by law to be kept, admissible in evidence.
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507. May be impeached for fraud.
508. Return must be signed.
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510, 511. Effect of entire disregard of the law by election officers.
512. Evidence of appointment of inspectors of election.
513. Proof of true vote by secondary evidence.
513. Correction of final return by reference to primary returns.
514. Absence of oath will not vitiate return.
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515–517. Illustrations.
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520. But decisions of State tribunals under such statutes *prima facie* evidence.
521. Rule as to proving votes when return has been rejected.
522. Failure of the officers of one of several precincts to make return.
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525. Proof that officers of election were not sworn.
526. Proof of alteration of return.
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527*a*. Rule in House of Representatives as to counting votes of legal voters rejected at the polls.
527*b*. Rule in Arkansas and other States.

§ 459. The general rule is that the ordinary rules of evidence apply as well to election contests as to other cases. The evidence must therefore be confined to the point in issue, and must be relevant. The burden of proof is always upon the contestant, or the party attacking the official return or certificate. The presumption is that the officers of the law charged with the duty of ascertaining and declaring the result have discharged that duty faithfully.[1] In a contested election case, however, where the question is, who received the highest number of votes, this presumption may be rebutted and overcome by proof. If a disqualified voter declines to answer as to how he voted, or if he cannot be found so as to be examined as a witness, a good deal of latitude should be allowed in showing the fact by circumstantial evidence. It may be shown that an illegal voter asked for a particular ticket at the poll; that no scratched tickets were voted, and the like.[2]

§ 460. Record evidence is, of course, admissible on the trial of a case of contested election in the House of Representatives of the United States, to the same extent and for like purposes as in courts of justice, and in the trial of ordinary civil actions. The question may be raised whether evidence of this character can be offered for the first time on the trial? It may be said that it should be produced before an officer taking testimony, in the presence of the opposite party, and put in evidence within the time required for completing the taking of the testimony in the case. And this is undoubtedly the correct practice; for if evidence of this character is to be used, it is but fair that the party against whom it is to be offered should have notice of it in time to offer evidence in response to it. It may therefore be laid down as the correct rule upon the subject, that a party desiring to use a record as evidence in such a case shall, at a time and place which has been fixed for taking testimony, and of which due notice has been given,

[1] [Garrison *v.* Mayo, Mob., 55; Rigsbee *v.* Durham, 99 N. C., 341.]

[2] Thompson *v.* Ewing, 1 Brewst., 68–9. As to evidence in prosecutions for violation of election laws, see Chap. XVIII.

offer such record, or a duly authenticated copy thereof, in evidence, and cause it to be spread upon the record. It is impossible here to designate the particular documents, papers or books which are included in the term "record evidence," or to specify the particular mode of authenticating copies thereof, so as to make them admissible.[1] These must depend largely upon local customs and laws. It is perhaps enough to say that any record or certified copy which would be admissible as evidence in the courts of justice of the country, where a similar issue is involved, may be admitted in a contested election case in the House of Representatives.

§ 461. Prior to the adoption by Congress of any statute regulating the mode of procuring evidence in contested election cases, the practice was conformed as far as possible to the laws of the State from which any case might be brought.[2] And there is no doubt but either House of Congress should regard the laws of the States as rules of decision upon any point not covered by Congressional statute or Federal Constitution.[3]

§ 462. Where it appears clearly that a statute requires the assent of two-thirds or any other proportion of the qualified electors residing in a particular territory to be expressed by ballot, it may become necessary, in order to determine the result, to ascertain the whole number of persons within such territory possessing, at the time of the election, the qualifications of electors; and in determining this question the latest registration books kept under a law of the State are competent evidence, subject, however, to be corrected by proof to show deaths, removals, etc., subsequently to the registration.[4] Where, however, the statute provides in general terms that the election shall be determined by a "majority

[1] [The family record showing the date of birth of a person whose age is a material question is better evidence than any statement of its contents, and if relied upon should be produced and properly identified. Kreitz *v.* Behrensmeyer, 125 Ill., 141.]

[2] Botts *v.* Jones, 1 Bart., 73.

[3] See case of Tennessee Representatives, 42d Congress.

[4] Hawkins *v.* Carroll Co., 50 Miss., 735.

of the electors," it will be held to mean a majority of the electors voting; and in ascertaining the result under such a statute, no inquiry as to the whole number of persons entitled to vote will be necessary or proper.[1]

§ 463. A census of population so classified as to show the number of persons in each county possessing the qualifications of voters, and taken by sworn officers, under the authority of the United States, is admissible in evidence as tending to show, approximately at least, the number of voters in any given county at the time such census was taken, and of course also as showing approximately the number of voters in such county at the time of an election held shortly before or after the taking of such census.[2] But of course this is not the most reliable sort of evidence, as there is always great room for mistakes and inaccuracies in the taking of the census. The census returns are by no means conclusive, and will be resorted to only in the absence of other satisfactory evidence, as when there is some proof of intimidation and violence, but great doubt and uncertainty as to how many legal voters were by this means deprived of the right to vote. In such a case, if it appear from the returns of a census taken about the time of the election that the vote was an ordinarily full one, it may be fairly inferred, in the absence of other evidence, that there were not a large number of persons deterred from voting at such election.

§ 464. A similar rule to the one here stated was adopted in the early case of *Taliaferro* v. *Hungerford*,[3] where it was held that the land list prepared under a statute of Virginia, and required by law to give the names of all freeholders for the year prior to an election, is proper to be considered as *prima facie* evidence of the number of voters in a county, but not conclusive. And in *Blair* v. *Barrett*,[4] it was held

[1] Everett *v.* Smith, 22 Minn., 53.

[2] Norris *v.* Handley, 42d Congress; Niblack *v.* Walls, 42d Congress; [Smith, 101].

[3] Cl. & H., 246.

[4] 1 Bart., 308.

that the city government of St. Louis, having ordered a census to be taken with statistics of nationality and naturalization, such census, and the testimony of the census taker, were admissible in evidence.

§ 465. Under a statute of Virginia requiring that all voters shall be freeholders, it was held that the land books of the county were admissible in evidence to show who were the freeholders, they being regularly certified by the clerk of the county to be correct. These books were made out annually under the laws of Virginia, and were intended to contain a list of all the separate tracts of land and the owners' names.[1] These books were undoubtedly admissible upon the same principle that census returns are admissible in evidence; but they are only *prima facie* and approximately correct. Books and records of this character are necessarily more or less inaccurate and erroneous, and do not have the conclusive character which attaches to some other public records.

§ 466. Where the statute provides for a list of voters to be prepared by the selectmen of the town and used at the election, such list is to be regarded as an official document, and is itself the best evidence upon the question whether the name of a particular voter is upon it. It is therefore not competent for a party to show by parol that his name was on such voting list, without first giving notice to produce the list.[2] And it was further held in the same case that the fact that a person's name is on the voting list is only *prima facie* evidence of his right to vote, and the selectmen may strike off the name and reject the vote, if they can prove that he was not entitled to vote. See also *Humphrey* v. *Clingman*.[3]

[§ 466*a*. A vote accepted by the judges or commissioners holding an election is *prima facie* legal. Before it can be thrown out for illegality it must be satisfactorily shown to

[1] Loyall *v.* Newton, Cl. & H., 520.

[2] Harris *v.* Granville, Whitcomb *et al.*, 4 Gray (Mass.), 433.

[3] 5 Metc., 162, 168.

have been cast by one not legally qualified to vote — that is to say, the presumption of legality must be overcome by a clear preponderance of competent evidence.][1]

§ 467. It seems to be quite well settled that where one who is alien born has voted at an election, the law presumes that he has been naturalized until the contrary is shown.[2] To presume the reverse would be to presume that a crime has been committed, but the law always presumes innocence. It is true that this involves the necessity of proving a negative, a very difficult thing to do, but often necessary in order to charge a party with a criminal offense.[3] The very great difficulty, however, of proving that a person has not been naturalized would seem to require that slight proof ought to be sufficient to shift the burden. Thus, if it be shown that he claimed that aliens had the right to vote; or if he has made declarations or admissions to the effect that he has not been naturalized; or if he produces as the evidence of his citizenship a paper showing that he has declared his intention to become a citizen only; or, perhaps, if when he is called as a witness he refuses to answer whether he has been naturalized or not, or to say when or where, or by what court, he was naturalized,— in any of these cases the presumption that such a voter was duly naturalized ought to be regarded as so far overcome as to require the party seeking to sustain his vote to produce affirmative evidence of naturalization, a thing not very difficult to do, since there is always a record, and the voter must be presumed to know where it is. There are in the United States many hundreds of courts possessing the power to grant naturalization;

[1] [Smith *v.* Jackson, Row., 9; Lowe *v.* Wheeler, 2 Ells., 61; Findley *v.* Bisbee, 1 Ells., 74; Perry *v.* Ryan, 68 Ill., 172.]

[2] [Gumm *v.* Hubbard, 97 Mo., 311. Where the statute of a State requires that before a person alien born can be permitted to vote he must produce to the proper officers a duly sealed and certified copy of his declaration of intention, he must produce such copy, even if not challenged, and a failure to do so will render his vote void. Bisbee *v.* Finley, 2 Ells., 172.]

[3] New Jersey Case, 1 Bart., 19, 24.

and to require in any case that affirmative proof be offered that no one of such courts has ever granted naturalization to a particular person would be to require what is practically impossible.

§ 468. In a contested election case, where it is alleged that certain aliens voted illegally, without having been naturalized according to law, parol evidence is admissible to show that naturalization papers were fraudulently issued or fraudulently procured. Thus, in Wisconsin it has been held that where oaths (or affirmations) in the form required, for aliens declaring their intention to become citizens, were signed in blank by the clerk of a circuit court, and so delivered by him to a justice of the peace, to be by him filled out with the date and names of the persons subscribing them, etc., and the oath was in fact administered by the justice, and not (as it purported to have been) by the clerk, these facts might be shown by parol, and the votes of such aliens must be rejected.[1] It is very true that the judgment of a court of competent jurisdiction, in the matter of the naturalization of a citizen, is as conclusive as its judgment in any other matter within its jurisdiction. But it is always competent to show that the parties were not within the jurisdiction of the court; and if the act of pretended naturalization was in fact the act of the clerk alone, and not in any proper sense the act of the court, it would be a monstrous doctrine to hold that the certificate bearing the clerk's signature and seal is conclusive. Such a rule would permit the party who committed the fraud to protect himself by his own fraudulent certificate.

§ 469. For the purpose of showing that non-residents have voted, witnesses are often called to testify that persons whose names appear upon the roll as having voted are not known to them as residents of the county or voting precinct, as the case may be. This kind of evidence is admissible for what it is worth, but it is manifest that its value must depend upon circumstances. If the district or territory within

[1] State *v.* Stumpf, 23 Wis., 630.

which the voter must reside is large or very populous, and the witness has not an intimate and extensive acquaintance with the inhabitants, the evidence will be of little value, and standing alone will avail nothing. But on the other hand, if such district or territory is not large or populous, and if the witness shows that his acquaintance with the inhabitants is such that he could scarcely fail to know any person who may have resided therein long enough to become a voter, his evidence may be quite satisfactory, especially if it further appears that soon after the election the alleged non-resident voter could not be found in the district within the limits of which all voters must reside. Proof of this character must at least be regarded as sufficient to shift the burden upon the party claiming that the vote of such alleged non-resident be counted, and require him to show affirmatively that he is a *bona fide* resident. It was held under the Constitution of Kentucky, which only required residence in the county, that no name should be stricken from the polls as unknown upon the testimony of one witness, only, that no such person is known in the county. Also, that where a man of like name is known, residing in another county, some proof, direct or circumstantial, other than finding such a name on the poll book, will be required of his having voted in the county or precinct where the vote is assailed.[1] It was further held in the same case that when the name of a particular person is found on the poll book as having voted, proof that an individual of that name resides in the county and is a minor is not of itself sufficient to strike out the vote. Some further proof, direct or circumstantial, should be required to show that the vote was in fact cast by such minor.

§ 470. The fact that a voter has been registered under a statute providing for the registration of voters, and authorizing a board of registration to inquire and decide as to the qualifications of persons applying for registration, is by no means conclusive as to his right. It is competent to introduce evidence on the trial of an election contest to show

[1] Letcher *v.* Moore, Cl. & H., 715, 749.

that persons registered as voters under such a statute were nevertheless not legal voters.[1]

§ 471. Where, as is the case in several of the States, the statute provides a mode of preserving the identical ballots cast at an election, for the purpose of being used as evidence in case of contest, such statute, and particularly those provisions which provide for the safe keeping of such ballots, must be followed with great care. The danger that the ballots may be tampered with after the count is made known, especially if the vote is very close, is so great that no opportunity for such tampering can be permitted. Such ballots, in order to be received in evidence, must have remained in the custody of the proper officers of the law from the time of the original official count until they are produced before the proper court or officer, and if it appear that they have been handled by unauthorized persons, or that they have been left in an exposed and improper place, they cannot be offered to overcome the official count.[2] In *Butler* v. *Lehman*, *supra*, the House of Representatives, after a full discussion, sustained the minority of the committee in rejecting a recount, on the ground that the ballot-boxes had not been so kept as to rebut a reasonable presumption that they had been tampered with.[3]

§ 472. In the case of *People* v. *Livingstone*,[4] the Court of Appeals of New York held that when a ballot-box and the ballots therein are offered in evidence, and there is proof that the box has not been kept in all respects as required by law, this is not of itself sufficient under the statute of that State to authorize the court to exclude the evidence from the consideration of the jury.[5] In such a case the court,

[1] Preston *v.* Culbertson, 58 Cal., 198; [Langhammer *v.* Munter, 80 Md., 518].

[2] See Gooding *v.* Wilson, Smith, 79; Butler *v.* Lehman, 1 Bart., 353; Kline *v.* Verree, Id., 381; [Hughes *v.* Holman, 23 Oreg., 48; Tibbe *v.* Smith, 108 Cal., 101; Hartman *v.* Young, 17 Oreg., 150].

[3] Upon this subject see Hudson *v.* Solomon, 19 Kan., 177.

[4] 80 Ky., 66.

[5] [Apple *v.* Bancroft, 158 Ill., 649; Sone *v.* Williams, 130 Mo., 530; Davis *v.* State, 75 Tex., 420.]

with some hesitation, concluded that it should be left to the jury to determine, upon all the circumstances of the case, whether the ballots constitute more reliable evidence than the inspector's certificate.[1] It was, however, in the same case, further held that the party offering such ballots in evidence must show affirmatively that they have not been tampered with, and that they are the identical ballots cast at the election in question.[2] "Every consideration of public policy," says Church, Chief Justice, "as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine." The burden of proof in such a case does not rest upon the party objecting to the ballots as evidence.[3]

§ 473. Whether the provisions of a statute providing for the preservation of ballots after an election are mandatory, or only directory, was one of the principal questions in this case, and is considered at considerable length with the result above indicated. So much depends upon the terms of the particular statute to be construed, that it is impossible to lay down a general rule applicable to all cases; but the better opinion seems to be that if the deviation from the statutory requirements relative to the manner of preserving the ballots has been such as necessarily to expose them to the public or unauthorized persons, the court should exclude them; but if the deviations have been slight, or of such a character as not necessarily to render doubtful the identity of the ballots, the question of their identity may well go to the jury to be determined upon all the evidence.[4]

[1] [Ferguson *v.* Henry (Ia.), 64 N. W. Rep., 292.]

[2] [Hartman *v.* Young, 17 Oreg., 150; Beall *v.* Albert, 159 Ill., 126; Fenton *v.* Scott, 17 Oreg., 189.]

[3] [In Wisconsin ballots are required to be totally destroyed after a certain time. Where this has not been done, after the time has elapsed such ballots have no legal existence, and are not admissible in evidence in an action to try title to an office. State *v.* Bate, 70 Wis., 409.]

[4] [Mallett *v.* Plumb, 60 Conn., 352; Henderson *v.* Albright (Tex. Ct. App.), 34 S. W. Rep., 992; Fishback *v.* Bramel (Wyo.), 44 Pac. Rep., 840.]

§ 474. Although the general rule is that the ballots themselves are the best evidence of the number of votes cast, and for whom cast, yet this rule can have no application to a case where the ballots have been tampered with after they were deposited in the ballot-box. In such a case the value of the ballots as evidence is almost totally destroyed, and the returns made by the officers of election presiding at the polls may become better evidence than the ballots.[1] It has accordingly been held that where the ballots cast at an election were not returned sealed, and there was evidence tending to show that the package of ballots had been opened and changed after they were received by the clerk, the board of canvassers, whose duty it was to declare the result of the election, were at liberty to determine who was elected upon inspection of the returns made by the officers of election, and a court trying a contest growing out of said election adopted the result arrived at in this mode by the board of canvassers.[2]

§ 475. In California there was a statute requiring the preservation of the ballots in the clerk's office for six months. In the same act was a provision requiring the preservation of the poll list and tally paper, with the certificates of the officers attached. Under this statute the case of *People* v. *Holden*[3] arose. The defendant in that case was returned as elected county judge by five majority, and the relator as defeated by that number. Upon an inspection of the ballots cast at one of the precincts and preserved in the clerk's office, under the law, it appeared that thirty-one democratic tickets had been cast, and that the name of Holden was on all of them except two, from which, as appeared upon inspection, his name had been torn off. Several ballots containing Holden's name having been thrown out for other causes, the case turned upon the two ballots from which his name had

[1] [Andrews *v.* Judge of Probate, 74 Mich., 278; Bisbee *v.* Finley, 2 Ells., 172.]

[2] People *v.* Burden, 45 Cal., 241.

[3] 28 Cal., 123.

been torn, and the question was whether the name was torn off after or before the ballot was placed in the box. There was no evidence upon this point, and the court held that the presumption was that the ticket had not been mutilated, and that the name had been torn off by the voter before voting. The evidence consisted of the certified returns and poll list on the one hand, and the ballots on the other. Here was a case of presumption against presumption. The law presumed that the returns were correct, and it also presumed that the ballots had not been tampered with. The temptation to tear the name of Holden from a few tickets, and thus change the result, was unquestionably very great, while it could hardly have been supposed by the officers who certified the township returns that to change two or three votes would change the result. The soundness of the ruling is seriously doubted by Mr. Brightley, in his note to this case,[1] and it is quite certain that the precedent is quite an unsafe one. Before the ballots should be allowed in evidence to overturn the official count and return, it should appear *affirmatively* that they have been safely kept by the proper custodian of the law, — that they have not been exposed to the public or handled by unauthorized persons, and that no opportunity has been given for tampering with them. If this is believed to be a rule founded upon the presumption that a fraud or a crime has been committed, the answer is that the rule does no more than to make choice between two presumptions of law, which in this instance come in conflict, and cannot both prevail. In such a case the question is, which is the stronger, the more reasonable and the safer presumption? And inasmuch as the ballots are counted by the board of canvassers immediately upon the closing of the polls, and generally before there has been an opportunity for tampering, and when it cannot be known that the changing of a few votes will change the result, and in most cases by a board composed of friends of each of the competing candidates, it is believed that in the absence of all proof, in case of a conflict between

[1] Bright. Elec. Cas., 484.

the tally sheets and returns on one side, and the ballots as they are found to be at some period after the election is over, and after the state of the votes as returned has been made known, on the other, the correctness of the original official canvass, made by sworn officers at the time of the election, should be presumed.

§ 476. In a more recent case, arising under the same statute, the Supreme Court of California refused to accept the result of a recount because it was not shown that the ballots had been in the interim sealed up and preserved as required by law.[1]

§ 477. The case of *Archer* v. *Allen*[2] is another case in which there was a recount of the ballots after the official count had been made and the result announced. The official canvass showed the election of the incumbent by a majority of only one vote. The recount, which was made by officers of the election some *four months* after the day of election, resulted in the alleged discovery of a mistake of two votes in favor of contestant — just sufficient to change the result. The necessity for proving affirmatively that the ballots had not been tampered with seems to have been felt and conceded by the contestant, and a good deal of testimony was taken upon that point — enough, according to the report of the majority of the committee, to make it clear that the ballots counted at the second and unofficial canvass were the identical ballots originally deposited in the box. The minority of the committee, however, took the opposite view, and insisted that the proof of identity was insufficient.

After an elaborate debate in the House, the report of the majority declaring the incumbent not duly elected was adopted, but the resolution giving the seat to the contestant was lost, and the seat thereby became and was declared vacant.

[1] People *v.* Burden, 45 Cal., 241. See, also, Hudson *v.* Solomon, 19 Kan., 177.

[2] 1 Bart., 169.

§ 478. The original ballots are undoubtedly the best evidence where their identity is clearly established.[1] The governing rules are thus well stated by Brewer, Judge, in *Hudson* v. *Solomon:*

"1st. As to the ballots cast at an election and a canvass of those ballots by the election officers, the former are the primary and controlling evidence.

"2d. In order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with."[2] If there has been an opportunity for tampering with ballots, they lose their character as primary evidence.[3]

§ 479. Where the poll books, tally sheets and ballots are all lost or destroyed, secondary evidence is admissible,[4] and in such a case the voters themselves may, if they choose, testify as to how they voted; but they cannot be compelled to do so and thus violate the secrecy of the ballot. So, also, in such a case, the judges and clerks who canvassed the vote may testify as to the number of votes given to each person voted for; and even spectators who were present at the count and heard the result announced and inspected the papers pre-

[1] Hudson *v.* Solomon, 19 Kan., 177; Dorey *v.* Lynn, 31 Kan., 758; [McDuffie *v.* Davidson, Mob., 577; Murphy *v.* Battle, 155 Ill., 182; Albert *v.* Twohig, 35 Neb., 563].

[2] See, also, on the same subject, Newton *v.* Newell, 26 Minn., 529; Cogland *v.* Beard, 65 Cal., 58.

[3] Kingery *v.* Berry, 94 Ill., 515; [Frederick *v.* Wilson (Minority Report), Mob., 406; Atkinson *v.* Pendleton, Row., 45; Martin *v.* Miles, 40 Neb., 135; Spidle *v.* McCracken, 45 Kan., 356. The return of the judges of election in an election contest is not conclusive, and, the ballots not having been so kept that they might not have been changed, the parol evidence of the judges of election as to the result of the ballots as counted and declared at the polls is admissible. Stemper *v.* Higgins, 38 Minn., 222].

[4] [Merritt *v.* Hinton, 55 Ark., 12.]

pared and signed by the officers recording the result are competent witnesses in such a case.[1]

§ 480. Concerning the admissibility of the ballots themselves, in evidence, in a case of contested election, Judge Cooley, in his Constitutional Limitations,[2] has this to say:

"But back of this *prima facie* case (made by the certificate of election) the courts may go, and the determinations of the State board may be corrected by those of the district boards, and the latter by the ballots themselves, *when the ballots are still in existence, and have been kept as required by law.* If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed, with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all,[3] or, if received, that it should be left to the jury to determine, upon all the circumstances of the case, whether they constitute more reliable evidence than the inspectors' certificate, which is usually prepared immediately on the close of the election, and upon actual count of the ballots as then made by the officers whose duty it is to do so."

§ 481. It has been held by the Supreme Court of Mississippi that "evidence that one of the registrars, being intoxicated, took a portion of the ballots in a handkerchief away from the other registrars, and did not return them until next morning, is not admissible without showing that some of the ballots had been lost or altered, or that the plaintiff was in some manner affected thereby."[4] This decision was put upon the ground that the misconduct of the officer was a mere irregularity, and did not, therefore, *prima facie*, affect

[1] Dixon *v.* Orr, 49 Ark., 238; 4 S. E. Rep., 774; Beardstown *v.* Virginia, 81 Ill., 541.

[2] Page 625.

[3] [Powell *v.* Holman, 50 Ark., 85. Where spoiled ballots were intermingled with genuine ballots so as not to be distinguishable, *held*, that the ballots could not be received to set aside the returns. Hendee *v.* Heyden, 42 Neb., 760.]

[4] Pradat *v.* Ramsay, 47 Miss., 24.

the result; but this was evidently a misapplication of that rule. One of the most important and imperative requirements of the law of elections is, that the ballots, from the time they are cast until they are canvassed, must be safely and securely kept. Frauds upon the ballot-box are very frequently perpetrated by tampering with the ballots after they are cast and before they are counted. It is for this reason that in many of the States there are statutes requiring that the ballots be publicly canvassed immediately upon the closing of the polls. These are most excellent statutes, and the author has found with surprise and regret that in several of the States there are laws allowing the election officers to hold the ballot-boxes a number of days before making public the canvass. If such laws had been framed for the purpose of enabling corrupt parties to perpetrate frauds, they could scarcely have been more aptly framed.[1] It is clear that where the law which requires the ballots to be safely and securely kept until canvassed and the result announced has been so grossly violated as to have afforded opportunity for fraud or tampering, the burden of proof should be shifted. If the ballots have been kept according to law, the presumptions are all in their favor; but if a drunken man has been allowed to carry them away and keep them in an exposed place over night, as in *Pradat* v. *Ramsay*, *supra*, the presumption is against them, and proof should be required that they are in fact the real ballots cast. In all such cases the evidence should go to the jury, and they should determine, upon the whole case, whether the ballots counted were in fact the same ballots cast.

§ 482. Under the statutes of some of the States the ballot is numbered to correspond with the number of the voter by whom it is deposited, and by this means it is possible to ascertain how each elector has voted.[2] When a contest arises

[1] Wallace *v.* Simpson, 42d Congress.

[2] [Where it was charged that the ballots of certain electors were changed, "an inspection and comparison of the ballots with the poll

in any of the States where a statute of this kind is in force, it often happens that one or the other party will desire an inspection of ballots cast by persons alleged to have voted illegally. In such cases an inspection of a voter's ballot should not be ordered until the evidence is all in, and it is shown with reasonable certainty that the ballot has been illegally cast and that an examination of the ballot is a matter material to the determination of the contest.[1]

It was held in the case of *Bell* v. *Snyder*[2] that where the return failed to state for what office the ballots were cast, the ballots themselves showing that they were cast for contestee for Representative in Congress, they should be counted by the House.

§ 483. It often appears in the course of the trial of a case of contested election that votes have been cast by persons not qualified to vote, and in such cases it becomes very important to ascertain for whom such votes were cast. A question of much importance has arisen as to whether the declarations of illegal voters made not under oath should be received to show the fact that they voted, or that they were not legally qualified to vote. The English authorities, though not entirely uniform, are generally in favor of admitting such declarations, and perhaps the weight of authority in this country is the same way, though it cannot be denied that the tendency in the more recent, and we think also the better-considered cases, is to exclude this evidence as hearsay.[3]

§ 484. In New York and in Wisconsin the English rule seems to have been adopted and such declarations admitted on the ground that the voter may be considered a party to the contest in such sense as to make his declarations competent

lists should be allowed in connection with the oral evidence in reference thereto." Clanton *v.* Ryan, 14 Colo., 419.]

[1] *Re* McCullough, 12 Phila. (Pa.), 570.

[2] Contested Elec. Cas., 1871 to 1876, p. 247.

[3] State *v.* Olin, 23 Wis., 309, 319; The New Jersey Case, 1 Bart., 19; Vallandigham *v.* Campbell, Id., 230, and cases there cited; [Crabb *v.* Orth, 133 Ind., 11; Wallace *v.* McKinley, Mob., 185].

evidence.[1] In Illinois the English rule has been modified, and the law of that State is that the voter may be considered a party *as against the contestant*, and that his declarations showing his want of qualification to vote may be shown after first proving by evidence *aliunde* that he voted adversely to the contestant.[2] In Arkansas also the English rule has been adopted in a modified form. It is there held that declarations by voters that they had voted illegally, made at or near the time and place of the election, may be received as part of the *res gestæ* of the election, and as tending to show a fraudulent combination for the purpose of carrying the election by fraud — there being other evidence tending to show the same thing.[3]

In Kansas the English rule is entirely repudiated, and it is there held that statements of persons who had voted, made to third persons, as to the number of times and the names under which they claimed to have voted, were inadmissible.[4] The Supreme Court of Kansas said:

"It is the testimony of what other persons told the witness, persons not parties to the suit, so that their admissions could be receivable. These declarations were not made at the polls by persons conducting the election, and so as to make part of the *res gestæ;* nor do they accompany a principal fact, so as to qualify or explain it. * * * We have examined the cases of *People* v. *Pease*,[5] *State* v. *Olin*,[6] and the note to *Newland* v. *Graham*,[7] and so far as they enunciate any principle contrary to the doctrine here announced we disapprove them."

And the same rule substantially has been adopted in Colo-

[1] People *v.* Pease, 27 N. Y., 45; State *v.* Olin, 23 Wis., 319.

[2] Beardstown *v.* Virginia, 81 Ill., 541.

[3] Patton *v.* Coates, 41 Ark., 111. And see upon same general subject, the New Jersey Case, 1 Bart., 19; Vallandigham *v.* Campbell, Id., 223; Newland *v.* Graham, 1 Bart., 5, note; S. C., 3 McCord, 230.

[4] Gilleland *v.* Schuyler, 9 Kan., 569.

[5] 27 N. Y., 45.

[6] 23 Wis., 319.

[7] 3 McCord, 230.

rado, where such declarations by voters as to their qualifications, made after the election, are held to be hearsay only and inadmissible.[1]

§ 485. The soundness of the rule which admits this species of evidence is seriously questioned in the case of *Cessna* v. *Meyers*.[2] The report in that case presents the following objections to the rule:

"The general doctrine is usually put upon the ground that the voter is a party to the proceeding, and his declarations against the validity of his vote are to be admitted against him as such. If this were true, it would be quite clear that his declarations ought not to be received until he is first shown, *aliunde*, not only to have voted, but to have voted for the party against whom he is called. Otherwise it would be in the power of an illegal voter to neutralize wrongfully two of the votes cast for a political opponent: 1st, by voting for his own candidate; 2d, by asserting to some witness afterward that he voted the other way, and so having his vote deducted from the party against whom it was cast.

"But it is not true that a voter is a party in any such sense as that his declarations are admissible on that ground. He is not a party to the record. His interest is not legal or personal. It is frequently of the slightest possible nature. If he were a party, then his admission should be competent as to the whole case — as to the votes of others, the conduct of the election officers, etc., which it is well settled they are not. Another reason given is, that the inquiry is of a public nature, and that it should not be limited to the technical rules of evidence established for private causes. This is doubtless true. It is an inquiry of a public nature, and an inquiry of the highest interest and consequence to the public. Some rules of evidence applicable to such an inquiry must be established. It is nowhere, so far as we know, claimed that in any other particular the ordinary rules of evidence should be relaxed in the determination of election cases. The sitting

[1] People *v.* Commissioners, 7 Colo., 190.

[2] 42d Congress [Smith, 60].

member is a party deeply interested in the establishment of his right to an honorable office. The people of the district especially, and the people of the whole country, are interested in the question, who shall have a voice in framing the laws? The votes are received by election officers, who see the voter in person, who act publicly in the presence of the people, who may administer an oath to the person offering to vote, and who are themselves sworn to the performance of their duties. The judgment of these officers ought not to be reversed, and the grave interests of the people imperiled, by the admissions of persons not under oath, and admitting their own misconduct.

"The practice of admitting this kind of evidence originated in England. So far as it has been adopted in this country, it has been without much discussion of the reasons on which it was founded. In England, as has been said, the vote was *viva voce*. The fact that the party voted, and for whom, was susceptible of easy and indisputable proof by the record. The privilege of voting for members of Parliament was a franchise of considerable dignity, enjoyed by few. It commonly depended on the ownership of a freehold, the title to which did not, as with us, appear on public registries, but would be seriously endangered by admissions of the freeholder which disparaged it. An admission by the voter of his own want of qualification was, therefore, ordinarily an admission against his right to a special and rare franchise, and an admission which seriously imperiled his title to his real estate. An admission so strongly against the interest of the party making it would seldom be made unless it were true. It furnishes no analogy for a people who regard voting, not as a privilege of a few, but as the right of all, where the vote, instead of being *viva voce*, is studiously protected from publicity, and where such admissions, instead of having every probability in favor of their truth, may so easily be made the means of accomplishing great injustice and fraud, without fear of detection or punishment.

"It may be said that the principle of the secret ballot

protects the voter from disclosing how he voted, and, in the absence of power to compel him to testify and furnish the best evidence, renders the resort to other evidence necessary.

"The committee are not prepared to admit that the policy which shields the vote of the citizen from being made known without his consent is of more importance than an inquiry into the purity and result of the election itself. If it is, it cannot protect the illegal voter from disclosing how he voted. If it is, it would be quite doubtful whether the same policy should not prevent the use of the machinery of the law to discover and make public the fact, in whatever way it may be proved. It is the publicity of the vote, not the interrogation of the voter in regard to it, that the secret ballot is designed to prevent. There would seem to be no need to resort to hearsay evidence on this ground, unless the voter has first been called, and, being interrogated, asserts his privilege and refuses to answer. Even in that case a still more conclusive objection to hearsay testimony of this character is this: it is not at all likely to be either true or trustworthy.

"The rule that admits secondary evidence when the best cannot be had only admits evidence which can be relied on to prove the fact, as sworn copies when an original is lost, or the testimony of a witness to the contents of a lost instrument. Hearsay evidence is not admitted in such cases, and is only admitted in cases where hearsay evidence is, in the ordinary experience of mankind, found to be generally correct, as in matters of pedigree and the like. But a man who is so anxious to conceal how he voted as to refuse to disclose it on oath, even when the disclosure is demanded in the interest of public justice, and who is presumed to have voted fraudulently — for otherwise, in most cases, the inquiry is of no consequence — would be quite as likely to have made false statements on the subject, if he had made any. To permit such statements to be received to overcome the judgment of the election officers, who admit the vote publicly, in the face of a challenge, and with the right to scrutinize the voter, would seem to be exceedingly dangerous."

§ 486. In *Newland* v. *Graham*,[1] the declarations of voters made after the election, of their having voted for the sitting member, were held inadmissible, and were excluded, although it was shown that, by the statute of North Carolina, where the election took place, voters were not compellable to give evidence for whom they voted. The Committee did not in their report state the ground of their decision, but we may fairly presume that it was held that an illegal voter could not refuse to answer for whom he cast his vote, and shield himself under the statute made to preserve the secrecy of an honest ballot, and that, therefore, since all such persons can be compelled to state for whom they voted, they should be called as witnesses, and their declarations not under oath should not be received.

§ 487. In the case of *Bell* v. *Snyder*, the House of Representatives of the 43d Congress held that the declaration of a voter as to how he voted or intended to vote is competent testimony on the point.[2] This was a case in which it appeared that certain legal voters tendered their ballots and were not permitted to vote. They therefore filed with the supervisor of the election their affidavits, to which they attached the ballots which they had tendered and desired to vote. It was in connection with the proof of these facts that their declarations were admitted as part of the *res gestæ*. The case is therefore not identical with a case where illegal votes have been admitted, and the question is for whom they were cast.

§ 488. The chief reason for the general adoption of the ballot in this country is, that it affords the voter the means of preserving the secrecy of his vote, thus enabling him to vote independently and freely, without being subject to be overawed, intimidated, or in any manner controlled by others, and protects him from any ill will or persecution on account of his vote. The secret ballot is justly regarded as an important and valuable safeguard for the protection of

[1] 1 Bart., 5.

[2] Contested Elec. Cases, 1871 to 1876, p. 251.

the voter, and particularly the humble citizen, against the influence which wealth and station may be supposed to exercise. And it is for this reason that the privacy is held not to be limited to the moment of depositing the ballot, but is sacredly guarded by the law for all time unless the voter himself shall voluntarily divulge it.[1]

§ 489. All devices by which the secrecy of the ballot is destroyed by means of colored paper used for ballots, or by other similar means, are exceedingly reprehensible, and, whether expressly prohibited by statute or not, should be discountenanced by all good citizens.[2] Judge Cooley, in his admirable work on Constitutional Limitations, expresses the opinion that inasmuch as the voter himself cannot be compelled to disclose for whom he voted, it is but reasonable to conclude that "others who may accidentally, or by trick or artifice, have acquired knowledge on the subject, should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy," he declares, "requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it.[3] His ballot is absolutely privileged, and to allow evidence of its contents, when he has not waived the privilege, is to encourage trickery and fraud, and would in effect establish this remarkable anomaly, that while the law, from motives of public policy, establishes the secret ballot with a view to conceal the elector's action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public."[4]

[1] [Attorney-General *v.* McQuade, 94 Mich., 439; Major *v.* Barker (Ky.), 35 S. W. Rep., 543; Tullas *v.* Lane, 45 La., 333]; People *v.* Pease, 27 N. Y., 45, 81.

[2] [Where the Constitution or statute laws of a State require uniformity of tickets without distinguishing marks or embellishments, and tickets are printed on material of such thickness as to be distinguishable, this would constitute a violation of the law. English *v.* Peelle, Mob., 167.]

[3] [*Ex parte* Arnold, 128 Mo., 256.]

[4] Pages 506, 507.

§ 490. The case of *People* v. *Cicott*[1] is cited to sustain the views just expressed. At the same time the author concedes that in legislative bodies it has been held that, when a voter refuses to disclose for whom he voted, evidence is admissible of the general reputation of the political character of the voter, and as to the party to which he belonged at the time of the election, but the hope is expressed that this rule of evidence will not be adopted by the courts. In practice it will be found that it can in general only be important to prove the contents of a ballot deposited in the box by a person claiming the right to vote, for one or the other of the following purposes:

1. When it is alleged that the person casting such ballot was not a legal voter, and for the purpose of excluding it.

2. When it is deemed important to show how many good votes were cast for a particular candidate at a given poll, for the purpose of impeaching the return and showing that such candidate has not been allowed all the votes cast for him.

When the object is to exclude the ballot as cast by a person not qualified to vote, as we have elsewhere seen, it is necessary to show *first* that the ballot was illegal. This being done, the person who cast it may be compelled to answer as to its contents, or if he cannot be found, or fails to remember, the contents of such illegal ballot may be shown by circumstances. If the object is to show how many good votes a particular candidate has received, for the purpose of impeaching the return, it is to be presumed that the voters who cast such votes will, as a general rule, not object to giving testimony, because the evidence is sought as a means of protecting their rights and defeating an alleged fraud by reason of which their votes have not been honestly counted and returned. But if any voter under these circumstances should refuse to waive his privilege and testify as to the contents of his ballot, and should object to his secret being divulged by any other witness, his refusal and objection must prevail, unless he has himself, at the time of voting, voluntarily made

[1] 16 Mich., 282.

public his ballot, and its contents, in which case such contents may be proven by the testimony of those persons to whom they were voluntarily communicated.[1]

§ 491. In *Reed* v. *Kneass*[2] it was insisted by counsel that a voter should not be *permitted* to testify as to the person for whom he has voted at an election. It was contended that the constitutional provision that "all elections shall be by ballot" was not simply intended as a security to the elector for the free and independent exercise of the right of suffrage, but that from considerations of public policy it should be held to prevent the voter, under any circumstances, from disclosing before a judicial or other tribunal how he voted. But this point was overruled, and it was held that while the voter has the privilege of preserving the secrecy of his ballot by refusing to testify to its contents, he is at liberty to waive that privilege. If it were otherwise, it might often be impossible to bring to light the darkest frauds. It would be a strange perversion of the rule which preserves the secrecy of the ballot for the purpose of encouraging free and independent voting, to make it serve to shield the fraud and corruption of those who would, by tampering with or changing ballots after they are cast, altogether deprive the majority of the electors of their choice. In the case just cited two hundred and thirty witnesses were examined and testified that they had each voted at a given precinct for W. B. Read for District Attorney, whereas, according to the official returns, he had received but one hundred and twenty votes therein. This mode of attacking and impeaching a return has been frequently recognized as proper, and this kind of evidence as competent.[3]

§ 492. A person who votes without being qualified is a mere intruder and not entitled to the privileges which belong to legal voters.[4] But such a person will not be compelled to

[1] See, also, §§ 488, 489.

[2] 2 Pars., 584; S. C., Bright. Elec. Cas., 366.

[3] Reid *v.* Julian, 2 Bart., 822; Loyall *v.* Newton, Cl. & H., 522; [Bell *v.* Snyder, Smith, 247].

[4] [State *v.* Kraft, 18 Oreg., 550.]

testify as to the person for whom he voted, until it is clearly shown that he voted illegally. So long as the question as to the legality of his vote is in doubt, he cannot be compelled to make the disclosure.[1] An illegal voter may, however, decline to answer for whom he voted, on the ground that his answer might criminate himself, but in such case the contents of the ballot may be shown by other testimony.[2]

And a legal voter may waive his privilege and voluntarily testify as to the persons for whom he has voted.[3]

§ 493. And where a voter refuses to disclose, or fails to remember, for whom he voted, it is competent to resort to circumstantial evidence, to raise a presumption in regard to that fact.[4] And within this rule it was held in *People* v. *Pease*[5] to be proper to ask the voter for whom he intended to vote; also to prove that he was an active member of a particular political party, or obtained his ballot from a person who was actively supporting a particular candidate or a particular ticket.[6]

§ 494. It is very clear that the rule which, upon grounds of public policy, protects the legal voter against being compelled to disclose for whom he voted, does not protect a person who has voted illegally from making such disclosure. To give to that rule this wide scope would be to make it shield

[1] Case of Locust Ward Election, 4 Penn. L. J., 349; People *v.* Cicott, 16 Mich., 282; State *v.* Hilmantel, 23 Wis., 422; [Pedigo *v.* Grimes, 113 Ind., 148].

[2] State *v.* Olin, 23 Wis., 309.

[3] Reed *v.* Kneass, 2 Pars. (Phila.), 584; S. C., Bright. Elec. Cas., 366.

[4] People *v.* Pease, 27 N. Y., 45. And see Cushing's Am. Parl. Law, §§ 199, 210; [Boyer *v.* Teague, 106 N. C., 576. In the absence of direct proof, evidence showing to what political party a voter belonged, whose election he advocated, whose friends maintained his right to vote, and kindred testimony, has been held admissible. What the voter said at the time of voting is admissible as a part of the *res gestæ*. Smith *v.* Jackson, Row., 9; Cook *v.* Cutts, 2 Ells., 243].

[5] *Supra.*

[6] Notwithstanding the high authority of People *v.* Pease, it is apparent that the distinction between asking a voter for whom he voted and asking him for whom he *intended* to vote is very narrow, and probably not substantial. [Bisbee *v.* Finley, 2 Ells., 172.]

alike the right and the wrong, the honest and the dishonest. It was intended to protect the inviolable secrecy of an honest ballot, and thus the purity of the ballot-box. It was not intended to be used in aid of the schemes of corrupt men to defeat the will of the people. It follows that, having proven that A. voted at the election in question, and that he was not a legal voter, he may be required to testify as to the person or persons for whom he voted.[1]

§ 495. If an illegal voter, when called as a witness, swears that he does not know for whom he voted, and it is impossible to determine from any evidence in the case for whom he voted, his vote is not to be taken from the majority.[2] But it does not follow that such illegal votes must necessarily be counted in making up the true result because it cannot be ascertained for whom they were cast. In purging the polls of illegal votes, the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number.[3] Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each.[4] Thus, we will suppose

[1] McDaniel's Case, 3 Pa. Law Journal, 310; S. C., Bright. Elec. Cas., 248. [For a general discussion of this question, see note to People *v.* Pease, 84 Am. Dec., 268.]

[2] McDaniel's Case, *supra.*

[3] Shepherd *v.* Gibbons, 2 Brewst., 128; McDaniel's Case, 3 Pa. L. J., 310; Cushing's Elec. Cas., 583.

[4] [Heyfron *v.* Mahoney, 9 Mont., 497; Attorney-General *v.* May, 99 Mich., 538; Russell *v.* McDowell, 83 Cal., 70; Finley *v.* Bisbee, 1 Ells., 74. Where ballots are found in excess of the names on the poll lists, and the inspectors fail to draw them out as required by the statute of Michigan, they should on the trial of the cause be so apportioned that each candidate shall have deducted a share of them proportioned according to the whole number of votes in his favor; the probability being that the legal and illegal votes have been cast ratably for the several candidates. People *v.* Cicott, 16 Mich., 283; Campbell *v.* Morey, Mob., 215. See, also, Hurd *v.* Romeis, Mob., 429. In the case of Little *v.* State, 75 Tex., 616, the Supreme Court of Texas sustained the ruling of the trial court in refusing to give this instruction: "Before you can reject an illegal

that John Doe and Richard Roe are competing candidates for an office, and that the official canvass shows

For John Doe,	625 votes.
For Richard Roe,	575 votes.
Total vote,	1,200
Majority for Doe,	—— 50

But there is proof that one hundred and twenty illegal votes were cast, and no proof as to the person for whom they were cast. The illegal vote is ten per cent. of the returned vote, and hence each candidate loses ten per cent. of the vote certified to him. By this rule John Doe will lose sixty-two and one-half votes, and Richard Roe fifty-seven and one-half votes, and the result as thus reached is as follows:

Doe's certified vote,	625
Deduct illegal votes,	62½
Total vote,	562½
Roe's certified vote,	575
Deduct illegal votes,	57½
Total vote,	517½
Majority for Doe,	—— 45

§ 496. This is probably the safest rule that can be adopted in a court of justice, where there is no power to order a new election, and where great injury would result from declaring the office vacant; but it is manifest that it may sometimes work a great hardship, inasmuch as the truth might be, if it could be shown, that all the illegal votes were on one side, while it is scarcely to be presumed that they would ever be divided between the candidates in exact proportion to their whole vote. But the rule which, in the absence of

vote, you must know for whom it was polled. It cannot be taken from the majority candidate, unless proven to have been polled for him." The ruling was sustained, however, on the one ground that there was sufficient evidence before the jury to authorize them to find for either party without knowing for whom any particular vote was cast.]

proof as to how illegal votes were cast, would deduct them all from the majority candidate, is much more unreasonable and dangerous. Of the two evils the least should be chosen. We see here, however, how important it is that it should, if possible, be made to appear, either by direct or circumstantial evidence, for whom each illegal vote was cast.

In a legislative body having power to order a new election, and in any other tribunal having the same power, it will doubtless, generally, be regarded as safer and more conducive to the ends of justice to order such new election than to reach a result by the application of the rule above stated.[1]

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

1. Declare the election void.
2. Divide the illegal votes between the candidates in proportion to the whole vote of each.
3. Deduct the illegal vote from the candidate having the highest vote.

And it is clear, also, that where in such a case no great public inconvenience would result from declaring the election void, and seeking a decision by an appeal to the electors, that course should be adopted. And in a case where it is essential that one or the other party to the contest be confirmed in the office to prevent such public inconvenience, then the second alternative above named should be resorted to, but the third should in no event be adopted. Let it be understood that we are here referring to a case where it is found to be impossible by the use of due diligence to show for whom the illegal votes were cast. If in any given case it be shown that the proof was within the reach of the party whose duty it was to produce it, and that he neglected to produce it, then he may well be held answerable for his

[1] [Finley *v.* Bisbee, 1 Ells., 74.]

own neglect; and because it was his duty to show for whom the illegal votes were cast, and because he might, by the use of reasonable diligence, have made this showing, it may very properly be said that he should himself suffer the loss occasioned by deducting them from his own vote.[1]

This is the principle involved in the case of *Duffey*,[2] where the court laid down the following rules:

1. It is the right of petitioners contesting an election, and also the right of the respondent, to examine the election papers on file in the proper office, and if it be apparent from them that persons have voted in any district whose names were not on the "registry list," without being vouched according to law, then *prima facie* all such votes are illegal.

2. When a contest has been inaugurated and complaint made and notice given that such votes have been received, the burden of proof falls upon the candidate advantaged by the general count in such district to show either that the persons so voting possessed severally every qualification, or if this be not so, that they voted for his opponent; he must lift the curse which the law imposes upon such ballots; otherwise it will be presumed that they were polled and counted for him; and thereupon the poll will be purged by striking the whole number of such votes from his count.

To the first of these propositions no exception can be taken, and we apprehend that the same ruling will be made in all our States which have registry laws requiring persons not registered to file with the judges of the election affidavits of themselves or others in proof of their right to vote. The second proposition can be maintained, if at all, only upon the ground that it is in the case stated practicable to show for whom the illegal votes were cast. It is said in the course of the opinion: "The number of these illegal votes was easy of ascertainment; the names of the persons polling them had but to be read to be known." Upon the theory that the illegal voter can be called as a witness and compelled to dis-

[1] [Platt *v.* Goode, Smith, 650.]

[2] 4 Brewst., 531.

close for whom he voted (which is beyond doubt the true theory), it would be easy in such a case as the one stated to call the illegal voters and require them to testify to the fact. It still remains, however, a question whether they shall be called at the instance of the contestant upon the theory that the burden of proof is upon him to make out his case, or at the instance of the respondent upon the theory that because he is advantaged by the general result he must show that all illegal votes were cast for his opponent or suffer them to be deducted from his own vote. The court adopted the latter theory, but we think the safer rule would be for the contestant to show not only that a certain number of illegal votes were polled, but also to show, if he can, that they were cast for his opponent. It is not intended by this to assert that the rule above quoted from Duffey's case is positively erroneous, but only to intimate a doubt, and to express the opinion that the ordinary principle which requires the party holding the affirmative to prove the facts, and all the facts, necessary to make out his case, is the better rule, and that it will in all cases be safer to follow it. Of course, if by the use of due diligence it be impossible to find the illegal voters, or if upon being found it shall be impossible to ascertain from their testimony how they voted, the contestant should not suffer. This would present the question, what is to be done with illegal votes when it is found to be impossible by due diligence to show for whom they were cast — a question which is discussed in the preceding sections.

§ 498. Where the statute makes it a misdemeanor for any officer of elections to place any number or mark upon the ballot of a voter, but does not declare that ballots so marked or numbered by such officer shall be rejected, the true rule is to receive and count them. To reject such ballots would be to establish a rule under which an officer of election could destroy the effect of a ballot cast in good faith by a legal voter, by placing a number or mark upon it. For a full consideration and discussion of this point, see the cases

of *McKenzie* v. *Braxton*,[1] and *Giddings* v. *Clark*,[2] in the 42d Congress. The report in the latter case says:

"By reference to the statute here referred to it will be seen that it is made a misdemeanor for any judge of election to place any number or mark upon the ticket of any voter; but it is not declared that the vote of a legally qualified voter shall be rejected because his ballot is marked by the judges. We should not be inclined to put a construction upon this statute which would enable an officer of election to destroy the effect of a ballot cast in good faith by a legal voter by placing a number or mark upon it. A ballot may be thus marked or numbered without the knowledge or consent of the voter, and it would be manifestly unjust that he should in this way be deprived of his vote."

"We think it plain that, inasmuch as the statute affixes a penalty for marking a ballot, and does not expressly declare that a marked ballot shall be thrown out, the board erred in rejecting the vote of this county upon this ground."

§ 499. In the report of the committee of elections in *Gooding* v. *Wilson*,[3] several important rules of evidence applicable to cases of contested elections were laid down, as follows:

"Evidence which might have been sufficient to put the voter to his explanation, if challenged at the polls, is not deemed sufficient to prove a vote illegal after it has been admitted. Nor has the mere statement by a witness that a voter was or was not a resident, without giving facts to justify his opinion, been considered sufficient to throw out such a vote. The testimony shows a number of instances where a witness would state positively the residence or non-residence of a voter on some theory of his own, or some mistake of fact, when other testimony would show with entire clearness that the vote was legal. After a vote has been admitted, something more is required to prove it illegal than to throw

[1] [Smith, 19.]
[2] [Smith, 91.]
[3] [Smith, 79.]

doubt upon it. There ought to be proof which, weighed by the ordinary rules of evidence, satisfies and convinces the mind that a mistake has been made, and which the House can rest upon as a safe precedent for like cases."

§ 500. Of course some weight is to be given to the decision of the judges of the election, whose province it is in the first instance to admit or exclude votes. Their action is to be presumed correct until it is shown to have been erroneous.[1] The other rule stated above is equally sound. Whether a person is, or is not, a resident of a particular place is often a question of law as well as of fact. Unless the facts are stated, the question, in so far as it is a question of law, cannot be determined, and that question is not for the witness to decide, but for the court.

§ 501. Where the charter of a municipal corporation makes the city council judges of election, but does not declare their decision to be final or conclusive, the canvass of the vote and the declaration of the result made by the council is *prima facie* evidence only of the right of the person declared elected, and the right may, in such a case, be contested by proper legal proceedings.[2] In such a contest the record of the count made by the city council is competent, but not conclusive evidence for the defendant, and may be proved by the original record kept by the council, or a certified copy.[3]

§ 502. It is undoubtedly the policy of the law not to throw too many obstacles in the way of investigating the correctness and *bona fides* of election returns. On this point the Court in *Reed* v. *Kneass*[4] very justly observe:

[1] [State *v.* Calvert, 98 N. C., 580; Atkinson *v.* Pendleton, Row., 45.]

[2] [Rigsbee *v.* Durham, 98 N. C., 81. It is held in Michigan that where the charter of a city provides that the common council of the city shall be the judge of the election and qualification of its own members, and shall have power to determine contested elections, the decision of the council upon these questions is conclusive and final. People *v.* Harshaw, 60 Mich., 200.]

[3] Echols *v.* State, 56 Ala., 131.

[4] *Supra.*

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

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

§ 503. The returns and other election papers, though conclusive upon the canvassers, may be impeached upon a quo warranto, or other form of contested election. The very question to be determined in such a contest is frequently the truthfulness and reliability of the returns, poll books, etc.; and the duty of the tribunal trying the case is to ascertain, not who was returned as elected, but who was in fact elected.[1] And in accordance with this rule it was decided in *Howard* v. *Shields*[2] that parol evidence is admissible not only to impeach but also to correct omissions in the poll books and tally sheets, and that these documents when so corrected are sufficient *prima facie* evidence of the result of the election.[3] In that case the judges and clerks of the election had omitted to sign the poll books and tally papers at the proper place, and had also omitted to fill the blanks in the caption, or to state the aggregate number of the voters, and parol evidence was held to be admissible to correct these errors.

§ 504. In the case last named it was also held that the tally sheet kept by the officers of the election is competent evidence in an election contest to show the true state of the vote.[4] It is good until impeached, and affords *prima facie*

[1] People *v.* Vail, 20 Wend., 12; Commonwealth *v.* Commissioners, 5 Rawle, 77.

[2] 16 Ohio St., 184.

[3] [Craig *v.* Shelley, Mob., 373.]

[4] But the rule stated in the text presupposes that tally sheets are re-

evidence of the number of votes cast for each candidate.[1] The ballots themselves are, however (when fully identified), better evidence of the number of votes cast and for whom cast than the tally lists made from them by the officers of election.[2] But unless the law has provided means for preserving and identifying the very ballots cast, and unless the law in that respect has been strictly pursued, the ballots may not afford evidence as reliable as the other election papers.

§ 505. A statute of Ohio required tally sheets to be kept, and the board of canvassing officers were required to certify and return the vote "as shown by the tally sheets." In *Follett* v. *Delano*, which arose under this statute, it was held that although the return might be so defective as to be unreliable as evidence, yet, if it did not appear affirmatively that the tally sheets were also defective and unreliable, it must be presumed that they were correct. And it was therefore the duty of the contestant, in order to make out his case, to put in evidence both the returns and tally papers, and show that neither afforded satisfactory evidence of the true result.[3] This was a correct ruling under the Ohio statute, but it must not be assumed that it is authority for any case not arising under a similar law. It was the duty of the contestant in that case to attack the tally papers as well as the return, because the tally papers were made by statute substantially a part of the return. They were papers to accompany the return. They were to be certified and sent in with the return, and they were required to show the time and place of holding the election; the persons by whom it was conducted; *the number of votes cast and for whom.* It might very well happen that these papers would supply informalities and defects in the returns themselves, and as they were not produced

quired by law to be kept. Where they are not required by law to be kept by the managers of the election, if such are nevertheless kept, they are not admissible. Echols *v.* State, 56 Ala., 131.

[1] And see, also, Powers *v.* Reed, 19 Ohio St., 189; [Spencer *v.* Morey, Smith, 437].

[2] People *v.* Holden, 28 Cal., 123.

[3] 2 Bart., 113.

in evidence, it was properly held that they were presumed to be correct and formal, and being so, that they did afford sufficient proof of the result in that case. But ordinarily, where the return is attacked and set aside, it is not necessary for the contestant to go further and set aside all the other election papers. The general rule is that when the return is set aside both parties must prove their votes by other evidence. The exception to this rule is where there are papers to accompany the returns, which are in fact a part of it, and which would, if formal, cure the defect in the return. In such a case these accompanying papers must be produced. These suggestions of course apply only to cases where returns are attacked on the ground of informality. Where the attack is made upon the ground of fraud or the like, the court or tribunal having jurisdiction will proceed with the inquiry, without reference to what appears upon the face of the returns.

§ 506. The rule which admits in evidence, on the trial of a case of contested election, the original tally sheet, duly certified by the officer of election as *prima facie* evidence of the election of the person for whom it shows a majority of the ballots to have been cast, was re-affirmed in Ohio in *State* v. *Donnewirth*.[1] We have already called attention to the provisions of the statute of Ohio in relation to the tally sheets to be kept by the officers of the election, duly certified and returned. And it may be observed here that the admissibility and value of the election papers depends largely upon the statutes governing the election in question.[2] But generally, all papers required by law to be kept in connection with the conduct of an election may be received in evidence upon being properly identified.

§ 507. While the poll books kept by the proper officers are *prima facie* evidence of the number of votes cast and of

[1] 21 Ohio, 216.

[2] [Under the laws of Iowa the returns made by the county auditor, to be canvassed by the county commissioners, are higher evidence than the tally sheets. Frederick *v.* Wilson, Mob., 401.]

the result of the election, they may, as we have elsewhere seen, be impeached for fraud or mistake. Thus, it was held in Kansas that when the judges and clerks of an election intersperse fictitious names in the list of voters on the poll books, and deposit spurious ballots in the ballot-box, the poll books and returns made by such officers are worthless as evidence, and must be altogether rejected. In such a case there must be evidence *aliunde* showing the number of honest votes cast, and for whom cast, or the whole vote must be thrown out.[1]

§ 508. In *Chrisman* v. *Anderson*[2] it was held to be the duty of the House of Representatives in the investigation of an election contest to go behind all certificates for the purpose of correcting mistakes brought to its notice. In the same case, however, it was held that a return not signed or certified by any of the officers of the election was not admissible, and the same point was held in *Barnes* v. *Adams*.[3] It is the duty of the party seeking to avail himself of a vote which is not legally certified or returned, to make the necessary proof to supply the place of the usual formal certificate and return, and, if he fails to do so, such vote cannot of course be received.

§ 509. It has been held that, for the purpose of showing that a person voted, the poll list is admissible in evidence, though not signed by the inspectors or clerks, having no heading to denote its character, and never having been filed in the clerk's office.[4] But it would, of course, be necessary to prove by evidence *aliunde* that such a paper was the poll list which was actually kept by the officers of the election, since it would not prove itself.

§ 510. Where the statute required that the return of the vote of each town should consist of a copy of the town record, signed by the selectmen and attested by the clerk, it was

[1] Russell *v.* The State, 11 Kan., 308; State *v.* Commissioners, 35 Id., 640.
[2] 1 Bart., 328.
[3] 2 Bart., 760.
[4] People *v.* Pease, 27 N. Y., 45.

held that a certificate which did not on its face purport to be a copy of the town record, and which was attested by James N. Tilton, without anything to show that he was town clerk, was void, and could not be received by the canvassing board.[1] And of course if the proper officers omit altogether to sign a return, though it may be otherwise formal, it is void and proves nothing.[2]

§ 511. While a mere irregularity which does not affect the result will not vitiate the return, yet where the provisions of the election law have been entirely disregarded by the officers, and their conduct has been such as to render their returns utterly unworthy of credit, the return must be rejected. In such a case the returns prove nothing. But it does not follow that legal votes cast at such poll must be lost. They may be proven by secondary evidence (the return being, until impeached, the primary evidence), and when thus proven may be counted.[3]

§ 512. A statute of New York directed that one of the inspectors of election who shall actually preside at such election, to be appointed by the major part of the inspectors, shall in person deliver to the clerk a copy of the statement of votes. It was held that the appointment of the inspector to deliver the statement to the clerk need not necessarily be in writing. An appointment by writing, in such a case, is to be preferred, but is not indispensable, since the statute is silent

[1] Luce *v.* Mayhew, 13 Gray (Mass.), 83.

[2] Barnes *v.* Adams, 2 Bart., 760, 771. [Where the law required the preservation of the ballots and tally lists until the next term of the Criminal or District court, as the case might be; and it was shown that neither the ballot-box returns nor other papers pertaining to the election had been filed with the clerk of the court, except that a tally sheet had been handed to him by one of the commissioners of the election, and was afterwards taken away, the House of Representatives refused to receive the tally sheet as a valid return. Spencer *v.* Morey, Smith, 437.]

[3] Littlefield *v.* Green, 1 Chic. Leg. News, 230; Bright. Elec. Cas., 493; McKenzie *v.* Braxton, 42d Congress [Smith, 19]; Giddings *v.* Clark, Id., 91; [Smith *v.* Shelley, 2 Ells., 18; Lowe *v.* Wheeler, 2 Ells., 61; Finley *v.* Walls, Smith, 367].

as to the mode of appointment, and it was therefore error to exclude a statement of the vote at a given precinct because the inspector presenting it did not produce *written* evidence of his appointment to discharge that duty.[1]

§ 513. On the trial of a contested election case in the lower House of Congress, if the final return is informal or insufficient, it is proper that the committee or the House should send for and examine the county or primary returns, and from them make an estimate of the votes, as the judges themselves might have done.[2] It is equally true that the House in such a case may go behind *all* returns, whether primary or final, and resort to any competent evidence, in order to ascertain the true state of the vote.[3]

§ 514. It was held by the majority of the committee in the House of Representatives, in *Koontz* v. *Coffroth*,[4] and also in *Fuller* v. *Dawson*,[5] that returns were void and should be rejected if the certificates of the oaths of the election officers were wanting. It must now, however, be regarded as settled, that if the returns are otherwise regular they are not to be rejected because it does not appear that the officers were sworn. If the contrary does not appear it will be presumed that they were sworn, as the law directs, and even if it be shown that they were not sworn, their acts are not void for that cause alone.[6]

§ 515. It is impossible to state more definitely than we have done, the general rule which should govern in determining whether a return should be set aside, and the parties on either side be required to prove their actual vote by other evidence. The rule is that the return must stand until *impeached*, *i. e.*, until shown to be worthless as evidence,— so worthless that the truth cannot be deduced from it.[7] In

[1] The People *v.* Van Slyck, 4 Cowen, 297.

[2] Case of David Bard, of Pennsylvania, Cl. & H., p. 116.

[3] The same point was decided in the same way in Chapman *v.* Ferguson, 1 Bart., 267.

[4] 2 Bart., 25.

[5] Id., 126.

[6] Barnes *v.* Adams, 2 Bart., 760, and cases cited.

[7] [Lloyd *v.* Sullivan, 9 Mont., 577; McDuffie *v.* Davidson, Mob., 577.]

practice it will be found necessary to apply this rule to an infinite variety of facts and circumstances. The following are examples of its application: Where it was clearly shown that the contestant received one hundred and seventy votes, and the return only gave him one hundred and forty-three votes, and there was other evidence tending to show actual tampering with the ballot-box, the return was set aside.[1]

§ 516. In the same case, the testimony concerning another precinct consisted wholly in proof of a discrepancy between the number of votes actually cast for contestant, as shown by the testimony of voters, and the number returned for him. The difference was twelve votes, and in the absence of any proof of fraud the return was not rejected, but was corrected and allowed to stand. In *Reed* v. *Julian*,[2] the discrepancy between the vote proven, as cast for the sitting member, and the vote returned for him, being very considerable, and there being other proof tending to show fraud, the return was set aside.

§ 517. Where the *place* of voting in an election precinct in the city of New York was not designated or published until the day before the election, so that many voters were not advised of the place, and where the inspectors were in violation of law appointed from non-residents of the precinct, and where the board did not meet at the place designated by law, but selected their own place of meeting, giving no notice to electors where they might be heard, and where the election was not held at the place designated, but "somewhere near" it, the people having great difficulty in finding the place, and where under these circumstances the vote was unusually large, and there was strong presumptive proof that a part of it was fraudulent, the return was held inadmissible in evidence.[3] In the report of this case will be found several examples of returns rejected, and of some attacked and not rejected for want of sufficient proof, but

[1] Washburn *v.* Voorhees, 2 Bart., 54.

[2] 2 Bart., 822.

[3] Dodge *v.* Brooks, 2 Bart., 78.

the details are too numerous and complicated to be inserted here with profit.

§ 518. To set aside the returns of an election is one thing; to set aside the election itself is another and very different thing. The return from a given precinct being set aside, the duty still remains to let the election stand, and to ascertain from other evidence the true state of the vote. The return is only to be set aside, as we have seen, when it is so tainted with fraud, or with the misconduct of the election officers, that the truth cannot be deduced from it. 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. It is important to keep this distinction in mind.

§ 519. A statute of Alabama empowered a "board of supervisors of elections" to hear proof upon charges of fraud, etc., and upon sufficient evidence to reject illegal and fraudulent votes cast, "which rejection so made as aforesaid," the statute declared, "shall be final, unless appeal be taken within ten days to the probate court." The House of Representatives of the United States, in the case of *Norris* v. *Handley*,[1] refused to be governed by this statute in so far as it made the decision of the board final. Upon this point the committee's report says:

"In the opinion of the committee it is not competent for the Legislature of a State to declare what shall or shall not be considered by the House of Representatives as evidence to show the actual vote cast in any district for a member of Congress, much less to declare that the decision of a board of county canvassers, rejecting a given vote, shall estop the House from further inquiry. The fact, therefore, that no appeal was taken from the decision of the board of canvassers rejecting the vote of Girard precinct cannot preclude the House from going behind the returns and considering the effect of the evidence presented."

[1] Smith, 68.

§ 520. Concerning the effect which should be given to the decision of a board invested by statute with power to hear proof of fraud and reject votes, the committee in the same report used this language:

"We have already seen that the statute of Alabama confers upon this board authority to revise the return of the vote of the several precincts, and, upon sufficient proof, to throw out such as in their judgment are illegal or fraudulent. Although this is an extraordinary, not to say a dangerous, power when placed in the hands of a board of this character, with such inadequate facilities for obtaining legal evidence and deciding upon questions of fraud, yet it is believed by the committee that the action of such a board under the statute in question, and in pursuance of the power conferred thereby, is to be regarded as *prima facie* correct, and to be allowed to stand as valid until shown by evidence to be illegal or unjust."

§ 521. We have already seen that when a return is shown to be fraudulent and set aside it proves nothing, and that other evidence must be resorted to, to show the number of votes cast and for whom cast. It is very clear that if the returns are set aside, no votes not otherwise proven can be counted. And if there are three candidates voted for at a given precinct and the return is set aside, it is not enough to show the whole number of votes cast, and the number cast for two of the three candidates; it will not be presumed that the third candidate received the remainder. In such a case each candidate must prove, by calling the voters as witnesses or otherwise, the number of votes received by him. Thus, in a recent case in New York, it appeared that at an election for mayor of the city of Albany, seven hundred and twenty-nine votes were given according to the poll list. While the votes were being counted by gas-light (having been turned from a box upon the table), the light suddenly went out, and before the gas was relighted some of the ballots were abstracted, so that upon completing the canvass only six hun-

dred and fifty-two ballots for mayor were found. Of this latter number

Geo. H. Thacher received	460
Edmund L. Judson "	113
Thomas McCarty "	79

Upon the trial of a contest growing out of this election, two of the above-named candidates, Judson and McCarty, made proof of their vote, from which it appeared that Judson received two hundred and McCarty one hundred and thirty-four votes. Thacher made no proof of his vote, but claimed that as the whole number of votes cast was shown to have been seven hundred and twenty-nine, he was entitled to the difference between that number and the combined vote proven for the two other candidates. This position was not upheld by the court, and was clearly untenable. It appears from the report of this case that the only question made was, as to whether Thacher's vote should be ascertained by deducting the combined vote proven for the other candidates from the number of votes canvassed, to wit, six hundred and fifty-two, or from the number actually cast, to wit, seven hundred and twenty-nine. The court below had allowed Thacher the difference between the sum of the votes cast for the other candidates and the whole number cast, and the Supreme Court, having held this to be error, went no further. From all that appears in the report of the case, Thacher did not prove any vote at all. He relied upon the return, but that should have been set aside, if, as appears to have been the case, a gross fraud had been perpetrated in the abstraction of part of the ballots before the canvass and in substituting others, the number abstracted and the number substituted being wholly uncertain. Such a return cannot be corrected by proof. It must be wholly disregarded, and the vote otherwise proved, if possible, and if other proof is not possible the election is void.[1]

§ 522. Where an election district is composed of several

[1] People *ex rel.* Judson *v.* Thacher, 7 Lans. (N. Y.), 274.

subdivisions or voting precincts, a failure of the officers of one of such subdivisions to make a return, no matter from what cause, will not invalidate the election, unless it be shown that the votes not returned would have changed the result. It was so held by the Supreme Court of New York in *Ex parte Heath and others*,[1] which was a case involving the validity of an election of ward officers in the sixth ward of the city of New York. The ward was composed of four districts, from three of which the returns were regular, but as to the remaining ward (the first) the inspectors certified thus: "It is impossible for us to declare what persons were by the greatest number of votes elected, by reason of lawless violence committed upon the inspectors of the first district, etc., and the dispersion of the ballots before they were counted," etc. There was no evidence to show that votes not returned from the first district would have changed the result as shown by the returns from the other three, and accordingly it was held that the persons receiving the highest number of votes as shown by the returns from the three districts were entitled to qualify; and a mandamus was granted, commanding the mayor to administer the oath of office to them. In the course of his opinion in the case, Cowan, J., says: "In no case we are aware of has it ever been held that the accidental loss of the ballots in a single subdivision of an election district, even though it prevent a return, shall, of itself, defeat, or indeed detract from, the election as it stands on the votes which are properly returned. Once admit the principle that the loss of a part of the votes out of the number which may or should be given at an election avoids the whole, and it is difficult to conceive how a system of government so entirely elective as ours could be carried on. That a part of the votes given are lost is never allowed *per se*, even in a private corporate election, as a ground for setting the election aside. It is not enough to say the result is therefore uncertain.[2] Yet the contrary rule would be much

[1] 3 Hill, 42.

[2] *Ex parte* Murphy, 7 Cowen, 153.

more tolerated in the case of private corporations than in that of large municipal and civil divisions. To give the loss any effect it must at least be shown that without its happening the result would have been different."[1]

§ 523. The question, under what circumstances the entire poll of an election division may be rejected, has been much discussed, and conflicting views have been expressed by the courts. The power to reject an entire poll is certainly a dangerous power, and though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested election case, it should be exercised only in an extreme case, that is to say, a case where it is impossible to ascertain with reasonable certainty the true vote.[2]

It must appear that the conduct of the election officers has been such as to destroy the integrity of their returns, and to avoid the *prima facie* character which they ought to bear as evidence, before they can be set aside, and other proof demanded of the true state of the vote.[3] And it is truthfully said in *Thompson* v. *Ewing*,[4] "that the whole conduct of election officers may, though actual fraud be not apparent, amount to such gross and culpable negligence, such a disre-

[1] The People *ex rel.*, etc., *v.* Vail, 20 Wend., 12.

[2] Power to throw out the vote of an entire precinct should be exercised only under circumstances which demonstrate beyond reasonable doubt that there has been such disregard of law or such fraud that it is impossible to distinguish what votes were lawful and what were unlawful, or to arrive at any certain result whatever, or where the great body of voters have been prevented from exercising their rights by violence or intimidation. Daily *v.* Petroff, 10 Phila., 389; *Re* School Directors, 12 Id., 605; [People *v.* Hanna, 78 Mich., 515. In the minority report in Hurd *v.* Romeis, Mob., 429, the following general rule as stated in Covode *v.* Foster, 2 Bart., 600, is cited with approval: "It has long been held by all judicial tribunals of the country, as well as by the decisions of Congress and the Legislatures of the several States, that an entire poll should always be rejected for any one of the three following reasons: 1. Want of authority in the election board. 2. Fraud in conducting the election. 3. Such irregularities or misconduct as render the election void"].

[3] Mann *v.* Cassiday, 1 Brewst., 60.

[4] Id., 107.

gard of their official duties, as to render their doings unintelligible or unworthy of credence, and their action entirely unreliable for any purpose."[1]

§ 524. It was said by the Supreme Court of Pennsylvania, in *Chadwick* v. *Melvin*,[2] that "there is nothing which will justify the striking out of an entire division but an inability to decipher the returns, or a showing that not a single legal vote was polled, or that no election was legally held." Undoubtedly the general rule is that if legal votes have been cast in good faith by honest electors, it is the duty of the court or tribunal trying a contest to ascertain their number and give them due effect, notwithstanding misconduct or even fraud on the part of the election officers. Such fraud or misconduct may destroy the value of the officer's certificate, and may subject him to severe punishment, but the innocent voter should not suffer on that account, if by any means his rights can be upheld. And yet the statement just quoted from *Chadwick* v. *Melvin* is too sweeping. The question is not whether a single legal vote has been polled, but whether the voice of the majority has been fairly expressed. In *Biddle and Richard* v. *Wing*,[3] the rule is more correctly stated as follows: "Indeed, nothing short of the impossibility of ascertaining for whom the *majority of votes* were given ought to vacate an election, especially if by such decision the people must, on account of their distant and dispersed situation, necessarily go unrepresented for a long period of time."[4]

§ 525. Although the fact that the officers of an election were not sworn will not of itself, and in the absence of fraud, render the return inadmissible in evidence, yet if fraud be proven, or it appear that such officers have wilfully

[1] See, also, Weaver *v.* Given, Id., 140; Batturs *v.* Megary, Id., 162; Gibbons *v.* Stewart, 2 Brewst., 1; [Bisbee *v.* Finley, 2 Ells., 172].

[2] Bright. Elec. Cas., 551.

[3] Cl. & H., 504, 506, 507.

[4] [Le Moyne *v.* Farwell, Smith, 406.]

disobeyed the law or disregarded their duty, the fact that they were not sworn may become an important fact in determining whether or not the poll shall be entirely rejected. It is impossible to define exactly the degree of irregularity and illegality in the conduct of an election which will render the return void, but perhaps the best rule upon the subject is this: If the voice of the electors can be made to appear from the returns, either alone or aided by extrinsic evidence, with reasonable clearness and certainty, then the return should stand, but not otherwise. This rule has made necessary another, viz.: That if it appear that illegal votes have been admitted, it is the first duty of the tribunal trying the contest to purge the poll of such illegal votes, if there is evidence upon which this can be done, and effect should be given to the majority of the good votes.

§ 526. Where a proceeding in quo warranto or other form of election contest is based upon an alleged fraudulent alteration of the original returns, it is necessary to produce the original returns with the alleged alteration, or to prove the loss or destruction thereof. Secondary evidence of the contents of the return, or of the alteration thereof, can only be introduced in accordance with the general rule that the party offering it has satisfactorily accounted for the absence of the original and best evidence.[1]

§ 527. 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.[2]

[1] Fletcher *v.* Jeter, 32 La. Ann., 401; Justices' Opinions, 70 Me., 570.

[2] McDowell *v.* Rutherford Const. Co., 96 N. C., 514; 2 S. E. Rep., 351;

[§ 527*a*. The rule is well established in the House of Representatives of the United States, that where legal voters have attempted to vote at the proper place, and have been denied the privilege, and it can be proven for whom they offered to vote, their votes should be counted upon a contest.[1] In the case of *Frost* v. *Metcalfe*[2] it was said that four things were necessary in order to authorize the counting of votes which have been rejected at the polls: First, the person offering to vote must have been a legal voter at the place where he offered to vote; second, he must have offered to vote; third, it must have been rejected; and fourth, it must be shown for whom he offered to vote.]

[§ 527*b*. The Constitution of Arkansas contains the provision that "if the officers of any election shall unlawfully refuse or fail to receive, count or return the vote or ballot of any qualified elector, such vote or ballot shall nevertheless be counted upon the trial of any contest arising out of such election."[3] The Supreme Court of Alabama has, however, held that where the votes of qualified electors have been rejected by the officers of the election that such votes cannot be counted upon a contest, but that where such votes have not been received the entire election should be set aside.[4] But it would seem that the rule in such cases should

Perry *v.* Whittaker, 71 N. C., 475; Van Bokkelen *v.* Canaday, 73 N. C., 198. [It seems that a contrary rule obtains in Wisconsin. It is there held that the person receiving a plurality of the legal votes actually cast at an election honestly conducted is entitled to the office although through an error of judgment the inspectors excluded votes of qualified electors sufficient in number to have changed the result. State *v.* Hanson, 87 Wis., 177; State *v.* Erickson, 87 Wis., 180.]

[1] [Frost *v.* Metcalfe, 1 Ells., 289; Sessinghaus *v.* Frost, 2 Ells., 380; Bisbee *v.* Finley, 2 Ells., 172; Covode *v.* Foster, 2 Bart., 600; Taylor *v.* Reading, 2 Bart., 661; Niblack *v.* Walls, Smith, 101; Buchanan *v.* Manning, 2 Ells., 287; Bell *v.* Snyder, Smith, 247.]

[2] [1 Ells., 289.]

[3] [Sec. 11, Art. 4; Govan *v.* Jackson, 32 Ark., 553.]

[4] [State *v.* Judge, 13 Ala., 805. See, also, Webster *v.* Byrnes, 34 Cal., 273. In New York the statute governing elections held by religious corporations provides that the inspectors of such an election shall be

be the same as that already indicated in cases where legal voters have been denied the privilege of registration,[1] and that such votes should be counted where the qualifications and intent of the voters are sufficiently proven.]

the judges of the qualifications of the electors. *Held*, that under this statute the inspectors must decide as to the qualifications of a voter when his vote is offered, and they cannot afterwards allow either party the benefit of votes offered but not received. Hartt *v.* Harvey, 19 How. Prac., 245.]

[1] [§ 136, *ante*.]

CHAPTER XV.

IMPERFECT BALLOTS.

§ 528. Incorrect spelling of names and the like.
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542. Repetition of name of candidate.
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543. Writing prevails over print.
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545. Courts not bound by rules which govern canvassers.
546. Illustrations.
547. The term "written" includes what is printed.
548. Constitutionality of statutes requiring ballots to be numbered.
549. Substantial compliance with statute as to form of ballot sufficient.
549*a*. Missouri decisions upon this subject.

§ 528. It frequently happens that ballots are deposited in the box which do not perfectly express the voter's intent. This is the case when the name of the person voted for is

incorrectly spelled,[1] or where the candidate's initials are not correctly given, or where the office to be filled is not clearly designated, as well as in many other similar cases.

In the case of *McKenzie* v. *Braxton*,[2] in the House of Representatives of the Forty-second Congress, this subject received a very careful consideration. That was a case in which ballots were deposited for "E. M. Braxton," for "Elliott M. Braxton," for "Elliott Braxton," and for "Braxton," for Congress. The report of the committee, which was adopted by the House, presents a correct statement of the law upon this subject, and the importance of the questions discussed will justify the following quotation therefrom:

§ 529. "The proof in this case clearly shows that the sitting member is known throughout the district as well by the name of E. M. Braxton as by that of Elliott M. Braxton; and that he is familiarly called Elliott Braxton; also, that there is no other person in the district, excepting the sitting member's infant son, who bears the name of Elliott M. Braxton, E. M. Braxton, or Elliott Braxton; and that the sitting member was regularly nominated for Congress by the democratic or conservative convention of the district; that his letter of acceptance was signed E. M. Braxton; that he canvassed the district and was the only person of the name of Braxton who was a candidate. These facts are not disputed by contestant; but we are asked to throw out a large number of votes, unquestionably cast in good faith for the sitting member, upon the purely technical ground that his name was printed upon the ballots E. M. Braxton, or Elliott Braxton, instead of Elliott M. Braxton. The grounds upon which the contestant makes this claim seem to be —

"1. That we are not permitted to look beyond the ballot to ascertain the voter's intent; and

"2. That the ballots in question cannot, upon their face, be held to have been intended for Elliott M. Braxton.

"It may be, and doubtless is, sometimes necessary to sacri-

[1] [State *v.* Walsh, 62 Conn., 26.]

[2] [Smith, 19.]

fice justice in a particular case, in order to maintain an inflexible legal rule, but all just men must regret such necessity and avoid it when possible to do so. Your committee are clearly of the opinion that no such necessity exists here. So far from demanding such a sacrifice of right, the law, as well as equity, forbids it.

"The contestant asks the House to apply the strict rule which has sometimes, though not always, been held to govern canvassing officers, whose duty is purely ministerial, who have no discretionary powers, and can neither receive nor consider any evidence *aliunde* the ballots themselves. It is manifest that the House, with its large powers and wide discretion, should not be confined within any such narrow limits. The House possesses all the powers of a court having jurisdiction to try the question, who was elected? It is not even limited to the powers of a court of law merely, but, under the Constitution, clearly possesses the functions of a court of equity also. If, therefore, it were conceded that the canvassers erred in counting for the sitting member the votes cast for E. M. Braxton and Elliott Braxton, it would not determine the question as to what the House should do. What, then, is the true rule for the government of the House in determining what votes to count for the sitting member? Your committee are clearly of the opinion that where the ballots give the true initials of the candidate's name, that is sufficient; and we therefore, without hesitation, hold that the ballots given for E. M. Braxton must be counted for the sitting member.

"Another objection, urged with much more zeal by contestant's counsel, is to the votes cast for Elliott Braxton, two hundred and thirty-five in number. These, it is urged, cannot be counted for Elliott M. Braxton, the sitting member. Even if we were not permitted to look beyond the ballots themselves, we could have little doubt as to our duty; but, under some circumstances, and for certain purposes, evidence outside of the ballots themselves is admissible. It is true that no evidence *aliunde* can be received to *contradict* the

ballot, nor to give it a meaning when it expresses no meaning of itself, but, if it be ambiguous or of doubtful import, the circumstances surrounding the election may be given in evidence to explain it, and to enable the House to get at the voter's intent. We see no reason why a ballot, ambiguous on its face, may not be construed in the light of surrounding circumstances, in the same manner and to the same extent as a written contract. The true rule, which should govern upon the subject of the admissibility of extrinsic evidence to explain such a ballot, is thus laid down in *Cooley on Constitutional Limitations, page 611:*

"'We think evidence of such facts as may be called the circumstances surrounding the election, such as who were the candidates brought forward by the nominating conventions; whether other persons of the same name resided in the district from which the officer was to be chosen; and if so, whether they were eligible or had been named for the office; if the ballot was printed imperfectly, how it came to be so printed, and the like, is admissible for the purpose of showing that an imperfect ballot was meant for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself; or unless the ballot is so defective that it fails to show any intention whatever, in which case it is not admissible.'

"To the same effect are the following decisions: *Attorney General* v. *Ely*,[1] *People* v. *Ferguson*,[2] *People* v. *Cook*,[3] *People* v. *Pease*.[4] Canvassing officers must record the ballots as they are and can receive no extrinsic evidence.[5]

"In *People* v. *Ferguson*, *supra*, it was held that, on the trial of a contested election case before a jury, ballots cast for H. F. Yates should be counted for Henry F. Yates, if, under the circumstances, the jury were of the opinion that

[1] 4 Wis., 420, 430.
[2] 8 Cowen, 102.
[3] 14 Barbour, 259.
[4] 27 N. Y., 45, 64.
[5] Opinion of Justices, 64 Me., 596.

they were intended for him; and that to arrive at that intention it was competent to prove that he generally signed his name H. F. Yates; that he had before held the same office for which these votes were cast, and was then a candidate again; that the people generally would apply the abbreviation to him, and that no other person was known in the county to whom it would apply. This ruling was followed in *People* v. *Seaman*,[1] and in *People* v. *Cook*.[2] In *Attorney General* v. *Ely*, the court went so far as to hold that ballots cast for "D. M. Carpente," "M. D. Carpenter," "M. T. Carpenter," and "Carpenter" might be counted for Matthew H. Carpenter, upon proof made to the satisfaction of the jury that they were intended for him.[3]

"In an early case in Michigan[4] it was held that no extrinsic evidence was admissible in explanation or support of the ballot, and this ruling has been followed in that State in several later cases.[5] The Supreme Court of that State, however, in its latest decision on the subject,[6] through a majority of the judges, expresses the opinion that the doctrine laid down in *People* v. *Tisdale* is erroneous, and it is adhered to upon the sole ground that it has been too long the law of that State to be overthrown, except by the Legislature. The chief justice, in a masterly dissenting opinion, advocates the entire overthrow by the Court of the erroneous and pernicious doctrine of the earlier cases. We quote from this dissenting opinion as follows:

"'All rules of law which are applied to the expression, in constitutional form, of the popular will should aim to give effect to the intention of the electors; and any arbitrary rule which is to have any other effect, without corresponding benefit, is a wrong, both to the parties who chance to be

[1] 5 Denio, 409.
[2] 8 N. Y., 67.
[3] [Wallace *v.* McKinley, Mob., 185.]
[4] People *v.* Tisdale, 1 Doug., 59, 65.
[5] [People *v.* McNeal, 63 Mich., 294.]
[6] People *v.* Cicott, 16 Mich., 282.

affected by it and to the public at large. The first are deprived of their offices, and the second of their choice of public servants.

"'The chief argument in favor of the rule of *People* v. *Tisdale* is that ballots cast for parties by their initials only are so uncertain that they cannot be applied without resort to extrinsic and doubtful evidence to ascertain the voter's intention, and therefore should be rejected. But nothing can be more fallacious. It frequently happens that a man is better known by the initials of his baptismal name than by the name fully expressed; simply because he is not in the habit of writing his name in full, or of being thus addressed in business transactions. I think it highly probable that this is the case with each of the parties before us.

"'In political conventions, or legislative bodies, no one deems it important to write the full name of a candidate for whom he is voting and no one ever thinks of challenging the vote for uncertainty. Under the application of this rule to the present case, the curious spectacle will be exhibited of votes cast for E. V. Cicott and G. O. Williams being rejected because the courts cannot determine for whom they were intended, while not a single person in the county of Wayne has the slightest doubt that they were cast for Edward V. Cicott and Gurdon O. Williams, the opposing candidates at this election. Thus the courts are required to close their eyes to what everybody else can see distinctly. The fallacy of the rule consists in its assuming that a certain form of ballot clearly expresses the voter's intention, while another form is so uncertain that it is dangerous to attempt to arrive at the meaning by evidence. But, in fact, no ballot can identify with positive certainty the persons for whom it is cast; and notice must be taken of extrinsic circumstances in order to apply it. It is always possible that other persons may reside in the election district having the same names with some of the candidates; but neither the canvassers nor the courts ever assume that there is any difficulty in these cases, but they count the votes for the persons who have been put

forward for the respective offices. And in some cases, where an element of uncertainty is introduced into the ballot unnecessarily, as by the addition of an erroneous designation, the courts resolve the difficulty by rejecting the erroneous addition and counting the ballot for the person for whom it was evidently designed.'[1]

§ 530. "There is, then, no room for doubt that the rule laid down by Judge Cooley, and quoted above, is the true rule, having for its support both authority and reason. To reject it and establish the doctrine contended for by contestant would be to defeat, in every such case as the one before us, the undoubted will of the majority. And this injustice would not be compensated by the establishment of a rule which is in itself either salutary or important. The cases are numerous where an imperfect ballot, by the aid of extrinsic evidence, can be made clear and perfect. No harm can result from admitting such extrinsic evidence so long as it is only admitted to cure or explain such imperfections and ambiguities as could be cured if they occurred in the most solemn written instruments, and to this extent, and no further, would we carry it. Thus guarded and qualified, the rule is most salutary and most just."[2]

[1] And see State *v.* Gates, 43 Conn., 533; Talkington *v.* Turner, 71 Ill., 234; State *v.* Griffey, 5 Neb., 161; People *v.* Kennedy, 37 Mich., 67; Lee *v.* Rainey, [Smith, 589, and Wimmer *v.* Eaton, 72 Iowa, 374]. In the case of State *v.* The Judge, etc., 13 Ala., 805, it was held that ballots for "Pence" could not be counted for "Spence." In Opinion of Justices, 64 Me., 596, it was held that the Governor and Council cannot hear evidence to explain the ballot of a voter. This upon the ground that they are merely ministerial officers. It was also held that votes for "W. H. Smith" or "W. Smith" could not be counted for William H. Smith. In so far as this case holds that there is no presumption that "W. H. Smith" and "William H. Smith" are one and the same person, it is not well supported by authority.

[2] [Boynton *v.* Loring, 1 Ells., 346; Wilds *v.* State Board of Canvassers, 50 Kan., 144; Brown *v.* McCullum, 76 Iowa, 479. The ballot is indicative of the will of the voter. It is not required that it should be accurately or nicely written, or that the name of the candidate voted for should be correctly spelled. It should be read in the light of all the circumstances surrounding the election and the voter, and the object

§ 531. The doctrine of this report will be found fully sustained by the decision of the House of Representatives in the case of *Chapman* v. *Ferguson*,[1] where votes for "Judge Ferguson" were counted for the sitting member, Fenner Ferguson, and in which also ballots which read "Bird B. Chapman for Congress," instead of "For Congress, Bird B. Chapman," were held good, and counted for contestant. And see, also, *Gunter* v. *Wilshire*,[2] where votes returned for "T. M. Gunter," "T. Ross Gunter," "Thomas N. Gunter," and "Gunter," were, upon proof of the intention of the voters, allowed to be counted for Thomas M. Gunter. In this case, however, the committee found that the original ballots were correct, and the error was in the returns.[3]

should be to ascertain and to carry into effect the intention of the voter, if it can be determined with reasonable certainty. The ballot should be liberally construed, and the intendments should be in favor of a reading and construction which will render the ballot effective, rather than some conclusion which will, on a technical ground, render it ineffective. Behrensmeyer *v.* Kreitz, 135 Ill., 495.]

[1] 1 Bart., 267.

[2] 43d Congress [Smith, 233].

[3] If a ballot expresses the intention of the voter without a reasonable doubt, it is sufficient, though technically inaccurate. Hawes *v.* Miller, 56 Iowa, 395; [Calvert *v.* Whitmore, 45 Kan., 99; Gumm *v.* Hubbard, 97 Mo., 311. Ballots which, on account of a mistake of the printer, gave the name of the candidate as "Herbert" should be counted for Mr. Herbert, who was the only person of a like name being voted for as a candidate. Strobach *v.* Herbert, 2 Ells., 5. Ballots reading "James H. Rainey" counted for Joseph H. Rainey. Lee *v.* Rainey, Smith, 589. In a case in Iowa the name of "E. W." was printed upon the ballot as "F. W." During the progress of the election the mistake was discovered and it was corrected by writing "E." on the remaining ballots. Those who voted the "F. W." ballots thought they were voting for "E. W." There was no one by the name of "F. W." in the township eligible to the office. *Held*, that these facts were admissible in evidence to show the intention of the voters, and "F. W." ballots should be counted for "E. W." Wimmer *v.* Eaton, 72 Iowa, 374. The only candidates for treasurer being John B. Kreitz, Charles F. A. Behrensmeyer, and B. A. Dikerman, votes for John M. Kreitz, although that was the name of a brother of John B. Kreitz, who had, at a prior time, held the office of sheriff and some minor office, are properly counted for John B. Kreitz, he being ordinarily known as "John," and his

§ 532. It has been held that if a ballot contains the names of two persons for the same office, when but one is to be chosen, it is bad as to both,[1] but this does not vitiate it as to candidates for other offices upon the same ticket. It often happens that an elector, without any evil intent, casts a ballot, through inadvertence or mistake, which contains the names of two persons for one and the same office. Tickets are often printed in this way, with a view to giving the voter a choice, which can be indicated by striking off one of the names. It would be a very rigorous and unjust rule to say such a ballot is bad as to all other names on it because bad as to the two names indicated for the same office.[2]

§ 533. It is well settled that where a limited number of persons are to be chosen to fill a given office — as, for instance, where the law provides for the election by the same constituency of two Representatives in the State Legislature — a ballot containing the names of a greater number

brother as "Mat," and the vote being evidently intended for John B. Kreitz. There being others of the name of the candidate Behrensmeyer resident in the county, votes for "Behernsmeyer" are properly counted for him, no others of that name being candidates. Testimony is admissible to explain that tickets poorly spelled, as for "Krietz," or "Critz," or even omitting the "z," are intended for the candidate Kreitz, the names being *idem sonans*. The converse applies to a ticket for "Dehbenmeyer," as intended for a candidate Behrensmeyer, the names not being *idem sonans*. The partial obliteration, in a ballot, of the printed name of the office by the name of the candidate written in, may be orally explained as unintentional. Kreitz *v.* Behrensmeyer, 125 Ill., 141. A different rule from that laid down in Kreitz *v.* Behrensmeyer has been adopted in Wisconsin, where it has been held that where two men in the same town were of the same name, one being "C. Sr.," and the other "C. Jr.," and both were eligible to a certain office for which "C. Sr." was a candidate, parol evidence was inadmissible to prove that ballots bearing the name of "C. Jr." were intended for "C. Sr." This for the reason that such ballots were not ambiguous. State *v.* Steinborn (Wis.), 66 N. W. Rep., 798.]

[1] [Montgomery *v.* O'Dell, 67 Hun, 169. See, also, Sawin *v.* Pease (Wyo.), 42 Pac. Rep., 750.]

[2] Commonwealth *v.* Ely, 4 Wis., 420; S. C., Bright. Elec. Cas., 258; [Fenton *v.* Scott, 17 Oreg., 189].

for that office is void. It was accordingly held in *People* v. *Loomis*,[1] that where the number of constables to be chosen was limited to four, ballots containing the names of five persons designated as voted for for that office cannot be canvassed, but must be rejected. "If," says Nelson, J., "one elector can cast a ballot containing *five* names, he may one of *eight*, and thus vote (if he chooses to insert the names) for both tickets. It would be impossible for the presiding officers to select the four according to the intention of the voter, and four only should be counted."[2]

§ 534. Unless there be a statutory provision requiring all officers to be voted for on a single paper ballot, a vote is not necessarily invalidated by being written or printed on several pieces of paper. Thus, it has been held in Kansas that where several officers are to be voted for, a ballot is not to be rejected because consisting of two pieces of paper, one of which contains votes for township officers and the other for county officers; provided the vote is cast in good faith by a legal voter.[3]

§ 535. In many of the States there are statutory provisions prohibiting the marking of ballots, or the placing upon the exterior thereof any character or figure. The purpose of these statutes is, of course, to protect the secrecy of the ballot, and public policy demands their enforcement.[4] Cases

[1] 8 Wend., 306.

[2] And see State *v.* Griffey, 5 Neb., 161.

[3] Wildman *v.* Anderson, 17 Kan., 344.

[4] [Fields *v.* Osborne, 60 Conn., 544; Spurgin *v.* Thompson, 37 Neb., 89; People *v.* Board of Supervisors of Duchess County, 135 N. Y., 522; Quinn *v.* Markoe, 37 Minn., 439. Ballots folded in an unusual and striking manner rejected; also creased and torn ballots. State *v.* Walsh, 62 Conn., 260. A ballot furnished by the State is not a marked ballot within the law because of any irregularity in making it up or printing it. People *v.* Wood, 148 N. Y., 142. When a ballot has a mark or figures on the back by accident or through inadvertence it should be counted. Wallace *v.* McKinley, Mob., 185. A printer's dash upon a ticket is not a distinguishing mark. Lynch *v.* Chalmers, 2 Ells., 338. *Held* in Texas, that a ballot should not be rejected because the voter has written his name on it, nor because election officers have indorsed

will arise, however, in which it will be found very difficult, if not impossible, to carry out strictly all provisions of this character. We have shown in another connection, that, although the law forbids the numbering of ballots, yet if, under a misapprehension of their duty, the judges of election number all the ballots to correspond with a number opposite to the name of the voter on the poll list, and if no one is injured thereby, the ballots thus marked should not be rejected.[1]

§ 536. And it has also been held that where the statute provided that all ballots should be written or printed upon white paper, without any marks or figures thereon to distinguish one from another, ballots upon paper tinged with blue, and which had ruled lines, were legal ballots within the meaning of the act.[2] This ruling, however, went upon the ground that the ruled paper was not used with any intent to violate the statute; and it is quite clear that where the statute distinctly declares that ballots having distinguishing marks upon them shall not be received, or shall be rejected, it should be construed as mandatory and not simply directory. And so it was held by the Supreme Court of Pennsylvania, under a statute of this character, that ballots having an eagle printed thereon were in violation of the law and should be rejected.[3]

§ 537. Where a statute prohibits the marking of ballots so that they may be distinguished by others than the voter and declares such ballots void, there is good reason for con-

their initials on it. Hanscom *v.* State (Tex. Civ. Ap.), 31 S. W. Rep., 547.]

[1] McKenzie *v.* Braxton, 42d Congress [Smith, 19; Dennis *v.* Coughlin (Nev.), 41 Pac. Rep., 768].

[2] People *v.* Kilduff, 15 Ill., 492; [Boyd *v.* Mills, 53 Kan., 594; State *v.* Saxon, 30 Fla., 668. It has been held in Oregon that tinted ballot paper purchased from the Secretary of State as provided by law may be used, although it is a surplus purchased for a former election and although its color makes the ballots distinguishable. State *v.* Wolf, 17 Oreg., 119].

[3] Commonwealth *v.* Woelper, 28 S. & R., 29; Luzerne Co. Election, 3 Penn. L. J., 155; Clinton Co. Election, Id., 160.

struing such statute as mandatory.[1] Such marks destroy the secrecy of the ballot, and it is well known that the plan of voting by ballot, instead of *viva voce*, was adopted for the very purpose of securing to every voter absolute secrecy if he desires it, and protecting him therein; and this was thought necessary in order to place the poor and dependent voter in a situation where he may act according to his own judgment, and without intimidation from the rich or powerful.[2] In *Commonwealth* v. *Woelper*[3] the Supreme Court of Pennsylvania said:

"The engraving (on the ticket) might have several ill effects. In the first place it might be perceived by the inspectors, even when the ticket was folded. This knowledge might possibly influence them in receiving or rejecting the vote. But in the next place it deprived those persons who did not vote the German tickets (which had an eagle on them) of that secrecy which the election by ballot was intended to secure. A man who gave in a ticket *without an eagle* was set down as anti-German and exposed to the animosity of that party. Another objection is that these sym-

[1] [Zeis *v.* Passwater, 142 Ind., 375; Baxter *v.* Ellis, 111 N. C., 124; Tebbe *v.* Smith, 108 Cal., 101; Pennington *v.* Hare, 60 Minn., 146; Sego *v.* Stoddard, 136 Ind., 297, in which will be found a consideration of what are distinguishing marks under the Indiana statute. Where it was provided by statute that a voter who wished to vote a straight ticket should put a cross at the head of the party ticket which he intended to vote, and certain voters put crosses at the heads of two columns, one marked "Republican" and one "Citizens'" ticket, this was held to be an unnecessary and hence a "distinguishing" mark, although the two tickets were identical. Here the court declared the rule to be that "any mark upon a ballot other than one appropriate and necessary to designate the intention of the voter must be regarded as a 'distinguishing mark.'" Attorney-General *v.* Glaser, 102 Mich., 396.]

[2] [Houston *v.* Steele (Ky.), 34 S. W. Rep., 6. But where ballots for judicial officers and those for other officers elected on the same day are required to be put in separate boxes, ballots having the word "Judiciary" printed on the back thereof are not void either as destroying the secrecy of the ballot or as being in violation of a statute forbidding the printing of any mark or device upon the back of the ballots. State *v.* Borden, 77 Wis., 601.]

[3] *Supra.*

bols of party increase that heat which it is desirable to assuage."

§ 538. The Supreme Court of California has had occasion to consider the force and effect of a statute regulating the size and form of ballots, the kind of paper to be used, the kind of type to be used in printing them, etc. The Court held, and we think upon the soundest reason, that as to those things over which the voter has control, the law is mandatory, and that as to such things as are not under his control, it should be held to be directory only.[1] The conclusion of the Court was that the purpose and object of the statute was to secure the freedom and purity of elections, and to place the elector above and beyond the reach of improper influences or restraint in casting his ballot, and that it should have such a reasonable construction as would tend to secure these important results. And so construing the statute, the Court concluded that a ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which the elector had no control; such as the exact size of the ticket, the precise kind of paper or the particular character of type or heading used.[2] But if the elector wilfully neglects to comply with requirements over which he has control, such as seeing that the ballot, when delivered to the election officers, is not so marked that it may be identified, the ballot should be rejected.[3]

§ 539. A statute of Indiana provided that all ballots should "be printed on plain white paper without any distinguishing marks or other embellishment thereon except the names of candidates and the officers to be voted for," and that "inspectors of election shall refuse all ballots offered of any other description." Under this statute it has been re-

[1] Kirk *v.* Rhoads, 46 Cal., 398.

[2] [Lindstrom *v.* Board of Canvassers of Manistee Co., 94 Mich., 467; People *v.* Wood, 148 N. Y., 142; English *v.* Peelle, Mob., 167; Milholland *v.* Bryant, 39 Ind., 363; State *v.* Adams, 65 Ind., 393.]

[3] [Lynch *v.* Chalmers, 2 Ells., 338.]

peatedly held by the Supreme Court of that State that a ballot may be headed with the words "Republican ticket" or "Democratic ticket" printed on the same side with the names of the candidates. These are not "distinguishing marks or embellishments" within the meaning of the statute.[1] The law was framed to forbid any marks or characters on the exterior of the ballot to distinguish it, and thus destroy its secrecy.[2]

[§ 539*a*. An act of the Legislature of North Carolina[3] provided that ballots should be "without device," and that any ballot having a device upon it should be void. The

[1] [But where tickets were headed with the words "Citizens' ticket," but were really issued by the Republican party, they were held to be illegal tickets, there being in fact no party known as the Citizens' party. Talcott *v.* Philbrick, 59 Conn., 472. It is held under the statute of Texas that a ticket will not be vitiated because the names of more than one political party are found on the ticket above the names of the candidates who belong respectively to such parties. Williams *v.* State, 69 Tex., 368.]

[2] Druliner *v.* State, 29 Ind., 303; Napier *v.* Mayhew, 35 Ind., 276. And this ruling was followed by the lower House of the 43d Congress in the case of Neff *v.* Shanks. And see Wyman *v.* Lemon, 51 Cal., 273. A "distinguishing mark" upon a ballot is a marking or embellishing of the ballot which will distinguish it from others and impart knowledge of the person who voted it. A mark made by the voter in scratching names from a printed ballot and substituting others is not a distinguishing mark. Wyman *v.* Lemon, 51 Cal., 273. See Applegate *v.* Eagan, 74 Mo., 258; Coffey *v.* Edmonds, 58 Cal., 521; Steele *v.* Calhoun, 61 Miss., 556; Oglesby *v.* Sigman, 58 Miss., 502; Opinion of Judges, 70 Me., 566; [Shields *v.* McGregor, 91 Mo., 534. Under a statute prohibiting the marking of an official ballot by the voter, it has been held in New York that where marks appear on such ballots, the intent with which the marks were made cannot be proven by examining the individual voters; further, that where it appears that a conspiracy has been entered into to defraud, and some ballots containing a specified mark are shown to have been cast in pursuance of such conspiracy, all ballots bearing such marks should be excluded from the count. People *v.* Board of Canvassers, 18 N. Y. Sup., 302. The words "For Judge of Probate Court, Henry H. Stedman," upon a ballot, was held in Connecticut to render the ballot void where no election was being held at the time for a probate judge. Fields *v.* Osborne, 60 Conn., 544.]

[3] [Sec. 18, Ch. 275, Laws N. C., 1877.]

committee on elections in the House of Representatives of the United States, in the case of *Yeates* v. *Martin*,[1] distinguished the language of this statute from that employed in the statute of Indiana, and held that in North Carolina the words "Republican ticket" on the inside of a ballot would render the ballot void.]

[§ 539*b*. Under a statute of Alabama providing that "the ballot must be . . . without any figures, marks, rulings, characters or embellishments thereon," it was held in the case of *Lowe* v. *Wheeler*,[2] that the use of the words "1st District," "2d District," etc., upon the ballots designating the election district is not a violation of the law and such ballots should be counted.]

§ 540. There are also in some of the States laws requiring that the voter shall indorse on the outside of his ballot the name of the office voted for. These statutes are generally held to be directory only. Thus, in *People* v. *McManus*[3] it was held that a ballot indorsed "for trustees of *public* schools" instead of *common* schools was sufficient. The intention of the voter must control, and therefore if that intention is clearly manifested it is enough.[4] And it was held in Wisconsin that where the description or designation of the office on a ballot is applicable to two or more offices, parol evidence is admissible to show which of them was intended by the voter.[5] If a ballot contains the names of more persons than are to be voted for for a specified office, it is void as to that office and must be rejected,[6] but is good as to the other offices named on it.

[1] [1 Ells., 384.]

[2] [2 Ells., 61.]

[3] 34 Barb., 620.

[4] People *v.* Matteson, 17 Ill., 167.

[5] State *v.* Goldthwait, 16 Wis., 146. And see State *v.* Elwood, 12 Wis., 552.

[6] *In re* Contested Election School Directors, 6 Phila., 437; Blockley Election, 2 Pars., 534; State *v.* Tierney, 23 Wis., 430; [State *v.* Foxworthy, 29 Neb., 341].

§ 541. But where a ballot contains the name of the person voted for and the office for which he is designated, several times repeated, it is not for that reason void, but is to be counted as one ballot.[1] There seems to be no reason why a ballot containing a less number of names for a given office than the number to be chosen should not be counted for those who are designated. If three Representatives in the Legislature are to be chosen by the voters of a given county or district, an elector may vote for one, or for two only, if he chooses to do so.

§ 542. While it is true that evidence *aliunde* may be received to explain an imperfect or ambiguous ballot, it does not by any means follow that such evidence may be received to give to a ballot a meaning or effect hostile to what it expresses on its face. The intention of the voter cannot be proven to contradict the ballot, or when it is opposed to the paper ballot which he has deposited in the ballot-box.[2] Thus, where a ballot is cast which has upon it the names of two persons for the same office, proof offered to show that the voter intended to vote for the one or the other of them, and not for both, must be rejected.[3] Such a ballot may be void, but it is not ambiguous, and therefore cannot be helped by parol proof.[4]

§ 543. It very often happens that a printed ticket is changed by the voter by erasing some part of it, or by writing on the face of it, or by both, to make it conform to his wishes. A ballot is to be construed in the same way as any

[1] People *v.* Holden, 28 Cal., 124; Ashfield's Case, Cush. Elec. Cas., 583.

[2] [Wigginton *v.* Pacheco, 1 Ells., 5; Apple *v.* Bancroft, 158 Ill., 649; State *v.* Steinborn (Wis.), 66 N. W. Rep., 798. But it is held in Arkansas that a voter may be permitted to contradict his ballot when it is shown that the ballot was prepared for him by one judge instead of two, as required by law. Freeman *v.* Lazarus, 61 Ark., 247.]

[3] People *v.* Seaman, 5 Den., 409.

[4] See McKinnon *v.* People, 110 Ill., 305. [A ballot for school directors, cast at an election held to choose one director for a long term and one for a short term, cannot be counted where it contains the names of two persons without anything to show which term either was intended to fill. Page *v.* Kuykendall, 161 Ill., 319.]

other written or printed document, and the construction must be such as to give effect to the voter's intent if that can be ascertained from the face of the ballot, or, in some cases, as we have seen, from the ballot as explained by evidence *aliunde*. If, therefore, a voter has *written* upon his ballot the name of a particular person in connection with the title of an office, and omits to strike out the name of another person *printed* upon it in connection with the same office, the writing must prevail, and the vote must be counted for the person whose name is written. This is upon the ground that the writing is the highest evidence of the voter's intention.[1]

The rule that what is written upon a ballot will prevail over what is printed was followed by the Supreme Court of Minnesota in *Newton* v. *Newell*.[2]

§ 544. In such a case the voter's intention can be clearly ascertained from the face of the ballot; there is no ambiguity, and therefore evidence *aliunde* is not admissible to explain it, and the Court must, in such a case, find, as matter of law, that the writing on the face of the ballot prevails over the printing.[3]

§ 545. In New York, since the decision in *People* v. *Sexton*, and *People* v. *Cook*, *supra*, it has been considered as settled that upon the trial of a case where the question as to who was elected to a particular office, and what was the intention of certain ballots, is investigated before a jury, the court and jury are not confined to the narrow limits which control boards of canvassers who have no power to take

[1] [People *v.* Pangburn, 14 Misc. Rep., 195; Rutledge *v.* Crawford, 91 Cal., 526; Wallace *v.* McKinley, Mob., 185; Brown *v.* McCollum, 76 Iowa, 479. But where the statute of a State provides that, if more persons are designated for an office than there are candidates to be elected, such part of the ticket shall not be counted, the statute will govern; and if the voter fails to erase the printed name of a candidate and writes under it the name of another person for the same office, the ballot cannot be counted for either. Blankenship *v.* Israel, 132 Ill., 514.]

[2] 26 Minn., 529.

[3] The People *v.* Saxton, 22 N. Y., 8 Smith, 309.

evidence *aliunde* the ballot itself. Such boards cannot, but courts and juries can, hear and consider evidence for the purpose of elucidating any apparent ambiguity on the face of a ballot, or any apparent incongruity between it and the surrounding circumstances. And it has accordingly been held that the placing of a "paster" containing one name over another name on a ticket indicates an intention to substitute one name for another.[1] If it be placed over another name which is under the title of an office, it indicates an intention to substitute for that office the name upon the paster. If it be done in such a manner as to afford any ground for doubt whether the voter intended to designate two persons for the same office, that doubt may be safely left to be solved by a jury, in view of all the facts, the appearance of the ballot and the surrounding circumstances. And in cases where there is doubt as to the intention of the voter, because of some apparent ambiguity on the face of the ballot, it is error for the court to reject proper evidence offered to explain the ambiguity, and to instruct the jury, as matter of law, that such ballot cannot be counted.[2]

§ 546. Where a pen or pencil mark is drawn over a name which has been printed on a ballot, it will be presumed that an erasure of the name was intended, although it be still legible, unless the contrary is shown. It is not necessary to obliterate the name entirely. And where the inspectors have rejected such a ballot on the ground that the name was erased, and where the ballot itself is not in evidence, the correctness of the decision of the inspectors will be presumed.[3]

§ 547. Where the Constitution declares that all ballots shall be "fairly written," a *printed* ballot is good.[4] The term "written" is held to include what is printed, following the definition of that term as given by the best lexicog-

[1] [Frederick *v.* Wilson, Mob., 401; De Walt *v.* Bentley, 146 Pa. St., 529.]

[2] The People *v.* Love, 63 Barb., 535.

[3] Adams *v.* Wilson, Cl. & H., 373.

[4] Temple *v.* Mead, 4 Vt., 535, 541; Henshaw *v.* Foster, 9 Pick., 312.

raphers, viz.: "to express by means of letters."[1] No doubt to the common understanding the term "written" conveys the idea of forming letters into words with a pen or pencil; but to give it this meaning in this connection would be to sacrifice the spirit for the sake of the letter. "The letter killeth, but the spirit maketh alive," is the forcible expression of Scripture.

§ 548. The Constitution of Indiana provides that "all elections by the people shall be by ballot." A statute of that State, passed in 1869, provides that "it shall be the duty of the inspector of any election, etc., on receiving the ballot of any voter, to have the same numbered with figures on the outside or back thereof, to correspond with the number placed opposite the name of such voter on the poll list, kept by the clerk of said election." The question of the validity of this statute came before the Supreme Court of Indiana in the case of *Williams* v. *Stein*.[2] The case presented squarely the question whether under a Constitution guaranteeing to every voter the right to vote at all elections by the people, by *ballot*, it is competent for the Legislature to provide for numbering the ballots in such manner as to destroy their secrecy. The court held the statute to be unconstitutional and void. Upon an elaborate review of the authorities, the conclusion is reached, upon what seems to be good ground, that in this country the ballot implies absolute and inviolable secrecy, and that this doctrine is founded in the highest considerations of public policy. That the term "ballot" implies secrecy, and that this mode of voting was adopted mainly to enable each voter to keep secret his vote, is clear.[3]

[1] [So, also, a written ballot should not be rejected where the statute requires a printed ballot. State *v.* Van Camp, 36 Neb., 91. *Contra*, State *v.* McElroy, 44 La., 796.]

[2] 38 Ind., 89.

[3] Cushing on Leg. Assemblies, § 103; May's Constitutional History of England, Vol. 1, p. 353; People *v.* Pease, 27 N. Y., 45; Cooley's Const. Lim., 604; Temple *v.* Mead, 4 Vt., 535; Leadbetter *v.* Hall, 62 Mo., 422.

§ 549. A statute of Indiana provided that in an election to determine the question whether a county subscription should be made to aid in constructing a railroad, the form of an affirmative ballot should be "for the railroad appropriation." At an election held under this statute, ballots were cast which had printed or written upon them only the words "for the railroad." This was held to be an irregularity which would not affect the election.[1]

[§ 549*a*. A statute of Missouri[2] provides that the caption of every ballot shall express its political character, and shall not be designed to mislead the voter as to the name or names thereunder. Construing this statute, the Supreme Court of Missouri has held that a ballot headed "Democratic State, Congressional and Senatorial, and Independent Judicial and County Ticket" was not void, and could not be rejected on account of its form.[3] Under an earlier and similar statute it was held, by the same court, that the heading "Republican Independent Greenback" was not misleading as a matter of law, but whether it was misleading should be determined as a fact from the evidence.][4]

[1] Railroad Co. *v.* Bearss, 39 Ind., 598.

[2] [Sec. 4671, Rev. Stat. 1889.]

[3] [Shields *v.* McGregor, 91 Mo., 534. See, also, Applegate *v.* Egan, 74 Mo., 258; Roller *v.* Truesdale, 26 Ohio St., 586.]

[4] [Turner *v.* Drake, 71 Mo., 285. See, also, Sessinghaus *v.* Frost, 2 Ells., 381.]

CHAPTER XVI.

VIOLENCE AND INTIMIDATION.

§ 550. Fairness, purity and freedom of elections must not be interfered with.
550, 551. Slight disturbances will not vitiate election.
551. Rule stated.
552. Interference by the military.
553. Surrounding polls by military force.
554. Stationing troops in the vicinity of the election.
555–557. Misconduct of soldiers stationed near voting place.
558, 559. Duty of House of Representatives to inquire into charges of intimidation.
560, 561. Violence and intimidation affecting a part only of the district in which the election was held.
560*a*. Burden of proof where intimidation is shown.
562–564. General rules upon the subject stated.
565. It must be shown that the violence and intimidation affected result.
566. Evidence of intimidation.
567. Importance of preserving freedom of elections.
568. Calling out militia on election day.

§ 550. If it clearly appear that the fairness, purity or freedom of an election has been materially interfered with by acts of violence, intimidation or armed interference, such election should be set aside. Slight disturbances frequently occur, and are often sufficient to alarm a few of the more timid, without materially affecting the result or the freedom of the election. The true rule is this: The violence or intimidation should be shown to have been sufficient either to change the result, or that by reason of it the true result cannot be ascertained with certainty from the returns. To vacate an election on this ground, if the election were not in fact arrested, it must clearly appear that there was such a

display of force as ought to have intimidated men of ordinary firmness.[1]

§ 551. In *Harrison* v. *Davis* the committee say in their report: "It (the specification) nowhere makes the formal allegation that the law requires, either that the election was arrested and broken up in every ward, or that so many individuals were excluded by violence and intimidation as would, if allowed to vote, have given the contestant the majority. Either of these grounds, if stated and proved, would have been in law decisive of the case, but neither is stated in the specification, and neither is proved by the evidence."

The case of *Bruce* v. *Loan* arose in Missouri in the early part of the war of the rebellion (1862), and the allegation was that the election in many places was controlled, and large number of voters overawed, by the "enrolled militia," a State military organization which had been raised and armed for military service. There was much dispute about the facts, but both the majority and the minority of the committee appear to have conceded the correctness of the general rule of law laid down in *Harrison* v. *Davis*.

§ 552. There can, however, be no doubt but that the law looks with great disfavor upon anything like an interference by the military with the freedom of an election. An armed force in the neighborhood of the polls is almost of necessity a menace to the voters, and an interference with their freedom and independence, and if such armed force be in the hands of or under the control of the partisan friends of any particular candidate or set of candidates, the probability of improper influence becomes still stronger. And although the fact that an armed force was stationed at or near the polls will not, of itself, vitiate an election in the absence of proof that it did in fact deter from voting a portion of the electors sufficiently large to change or render doubtful the

[1] Harrison *v.* Davis, 1 Bart., 341; Bruce *v.* Loan, Id., 482; Bromberg *v.* Haralson, 44th Cong. [Smith, 355]; Tarbox *v.* Sughrue, 36 Kan., 225; 12 Pac. Rep., 935. [To invalidate an election upon the ground of intimidation, the burden is upon the assailant to show that voters were kept

result, yet in such a case it would not be necessary to show that the electors who declined to vote would have been in actual danger if they had attempted to do so. If it be made to appear that there was an armed force at the polls, and that a number of voters sufficiently numerous to affect the result or render it doubtful considered the presence of such force so menacing to them as to render it unsafe for them to vote, and that they had reasonable cause so to think, and if for this reason they declined to go to the polls, the election ought to be set aside.

§ 553. In *Giddings* v. *Clark*[1] a contested election case tried by the United States House of Representatives of the Forty-second Congress, the following facts were shown in relation to the election in the county of Limestone:

"The colored voters generally failed to vote, so that only twenty-eight votes were cast for Clark, to one thousand one hundred and fifty-three for Giddings. That a state of excitement and fear existed in this county about the time of the election is clear. A collision occurred between some colored policemen and certain white men, which resulted in the death of one of the latter, and the wounding of one of the former. This produced great excitement, and was followed by a general uprising and arming of both whites and blacks. On the day of election, the town where the election was held was occupied by an armed force under command of one Captain Richardson. Pickets were stationed on all the roads leading into town, and persons coming in to vote were obliged to obtain a pass from the military authorities. Although the witnesses say that all voters were permitted to come and go in peace, and that the freedmen were urged to vote, yet it is clear that they abstained from doing so for reasons which most men would consider good and sufficient."

from voting or compelled to vote otherwise than they would. Mere noise, confusion or threats will not suffice. State *v.* Calvert, 98 N. C., 580.]

[1] [Smith, 91.]

The committee were of the opinion that this was not a free and fair election, and so reported to the House. The correctness of this decision cannot be doubted. Where the polls are surrounded by a military force, and voters required to pass pickets, and procure permission of military authorities, in order to approach them, there can be no free election. It is no answer to this to say that the military are stationed around the polls to *preserve* the peace and secure freedom to all voters.

§ 554. A case may perhaps arise where it will not be improper to station troops in the *vicinity* of the election, at a place where they can be called upon in case of emergency to suppress riot or prevent bloodshed, but in all such cases the troops should be removed from the actual presence of the voters, and should not be permitted in any manner to interfere with persons going to or returning from the polls. We have inherited from our British ancestors a strong aversion to interference by the military power with the conduct of elections, and this feeling has been heightened by the long enjoyment in this country of the larger liberty of American citizenship. As early as 1741 an attempt was made to interfere with an election held for the city of Westminster, by stationing a body of armed soldiers near the poll. On this being shown to the House of Commons, it was by that body resolved "that the presence of a regular body of armed soldiers at an election of members to serve in Parliament is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this kingdom." In some of the States there are statutes prohibiting the employment of troops, or their presence, at any place of election during the time of such election. Such a statute was enacted in Pennsylvania as early as 1803.[1]

§ 555. In the early case of *Trigg* v. *Preston*, in the House of Representatives of the Third Congress (1793), the question arose whether the presence of a part of the military

[1] 4 Smith's Laws, 101.

force of the United States at the polls, and certain disorderly and improper conduct of theirs, was sufficient to vitiate the election. The facts were as follows: A brother of the sitting member was the commander of a company of Federal troops, which was quartered near the voting place. On the day of the election the said troops were marched, in a body, twice or three times around the court-house, where the election was held, and paraded in front of and close to the door thereof. The troops were allowed to vote and voted generally in favor of the sitting member, but their votes were thrown out by the returning officers. Some of them threatened to beat any person who should vote in favor of the contestant. One of the soldiers struck and knocked down a magistrate who was attending at said election. Three soldiers stood at the door of the court-house, and refused to admit a voter because he declared he would vote for contestant. There were altercations between the soldiers and the people, which terminated *after the poll was closed* in a violent affray. Upon these facts the committee found and reported that the conduct of the soldiers as well as that of their commander "was inconsistent with that freedom and fairness which ought to prevail at elections; and that although it does not appear, from any other than hearsay testimony, that any voter was actually prevented from voting, yet there is every reasonable ground to believe that some were, and that the election was unduly and unfairly biased by the turbulent and menacing conduct of the military."[1] The report of the committee was lost in the House. It may be conceded that the facts in that particular case did not constitute such violence and intimidation as should have vitiated the poll, and still the rule we have stated remains well settled. If this case did not fall within the rule it was because it did not appear that the presence and conduct of the soldiery actually deterred from voting a number of legal voters sufficiently numerous to change or render uncertain the result.

[1] Cl. & H., 78.

§ 556. We conclude —

1. That an armed force should never be stationed immediately at the polls.

2. That in cases where riot and bloodshed are apprehended, troops may be stationed in the neighborhood, if so ordered by competent authority, with a view to keep the peace and suppress such violence as is beyond the power of the local peace officers or courts to control.

3. That in all cases where it is alleged that armed soldiers have interfered with the freedom of an election, either by their presence or their conduct, or both, all the facts are to be considered, and the question is whether, by reason of the action of such armed soldiers, legal voters have, for sufficient cause, felt themselves obliged to abstain from voting in numbers so large that if they had voted it would have changed the result or rendered it uncertain.

§ 557. In the case of *Bromberg* v. *Haralson*,[1] the House of Representatives held that the stationing a small squad of soldiers in the neighborhood of an election did not justify a rejection of the poll, where there was no threatening conduct on their part and no evidence of actual intimidation.

§ 558. In the case of *Biddle & Richard* v. *Wing*,[2] the committee of elections of the House of Representatives expressed the opinion that it was not the duty of the House "to inquire into the causes which may have prevented any candidate from getting a sufficient number of votes to entitle him to the seat." They considered that the duty of the House was to inquire, and if possible ascertain, "who had the greatest number of legal votes actually given at the election." And accordingly the committee held that they could not inquire into the truth of the allegation of one of the contestants, who did not claim to have received the greatest number of votes actually cast, but alleged that "he would have received the greatest number of votes had not his friends, at the election holden in the city of Detroit, *been*

[1] 44th Cong. [Smith, 355].

[2] Cl. & H., 504, 506, 507.

intimidated from voting," etc. This report was never acted upon by the House, and therefore is without its sanction, and depends for its force as a precedent solely upon the committee's recommendation.

It can hardly be said to state the doctrine upon the subject with completeness or accuracy. Intimidation of voters may always be shown, and allegations and proof upon this subject should always be heard. It must, however, in the nature of things, be a rare case in which the votes of persons prevented from voting by violence or intimidation can be counted for one or the other candidate as if actually cast. In order that a vote not cast shall be counted as if cast, it must appear that a legal voter offered to vote a particular ballot, and that he was prevented from doing so by fraud, violence, or an erroneous ruling of the election officers. Just what is to be understood by offering to vote is not perhaps perfectly well settled. If a voter approaches or attempts to approach the polls for the purpose of depositing his ballot, and is driven away, or by violence, intimidation or threats prevented from the actual presentation of his ballot to the proper officer, and if he used proper diligence in endeavoring to reach the polls and deposit his ballot, and was not intimidated without sufficient reason, the better opinion seems to be that his vote may be counted.[1] But of course voters who do not present themselves at the polls and offer their ballots, or who do not attempt to go to the polls at all, or attempting, fail, without reasonable cause, cannot in any case ask that their votes be counted.[2]

§ 559. But there is another ground upon which it is, in such a case, proper to offer proof of intimidation and violence, and that is to the end that the House may determine whether there has been a free and fair election. For if, by this means, legal voters have been deprived of their right to vote in numbers sufficient to change the result, the election may be set aside. In the report just referred to,

[1] [Bisbee *v.* Finley, 2 Ells., 172.]

[2] Newcum *v.* Kirtley, 13 B. Monroe, 515.

the committee concede that there may be a case in which "fraud and corruption should appear sufficient to destroy all confidence in the purity and fairness of the whole proceeding." And it is very clear that if in the course of an investigation it should become apparent that there was intimidation and violence sufficient to destroy the election, it would be the duty of the House to declare it void, even though no party to the contest has formally alleged that it was so. If the allegation be as in the case of *Biddle and Richard* v. *Wing*, *supra*, that enough of the friends of a contestant were deterred from voting by violence and intimidation to have elected him, if they had been allowed to vote, as was their right, yet, if the evidence shows that the election should be set aside, the House will not stop short of its duty for want of an allegation that the election was fraudulent and void. A court of justice might be so hampered by the rules of pleading as to be unable to grant any relief beyond that prayed for, but the House of Representatives is not.

§ 560. In saying that upon sufficient proof of violence and intimidation an election may be set aside, we mean, of course, that the particular poll or polls where such violence occurs shall be thrown out of the count.[1] Whether in a case where a number of counties or precincts vote for the same officer, and a portion of them are rejected for this cause, the entire election is to be held void, is often a question of difficulty. It is very clear that if the violence has prevented a large proportion of the electors in the whole district from participating, the election is void, and it is also clear that if only a small part of the district was disturbed by it, so that the great body of the electors have had a fair opportunity to vote, then the election must stand, unless it can be shown that but for the violence the result would have been different. The difficulty arises in cases where the infected part of the district is neither so large as to make it clear that the election is void, nor so small as to make it clear that the election is not void. Each case of this char-

[1] [Smalls *v.* Elliott, Mob., 663.]

acter must be determined by the circumstances surrounding it, and with a view to promote the ends of justice. Much will, of course, depend upon the relative vote of the several candidates outside of the infected districts, because if any one has a very large majority in the peaceable localities, and the vote of the infected precincts is not large, there will be less probability that the result has been achieved because of the violence; while, on the other hand, if the vote of the peaceable precincts is very close, the rejection of a small district for violence might be regarded as fatal to the election. In a word, if it is apparent that to accept the result as shown by the peaceable precincts would be to allow the minority to choose the officer, then the election is to be held void.

[§ 560*a*. It has been decided in the House of Representatives that where intimidation is shown to have been resorted to, the burden of proof is upon the person charged with receiving the benefits of the intimidation to show that the violation of law did not affect the result.][1]

§ 561. It was laid down by the committee of elections of the Forty-first Congress, in several cases, that violence and intimidation in some of the precincts does not invalidate the election in those which are peaceable.[2]

But thus broadly stated this is not a sound rule. This will be apparent upon a moment's reflection. Suppose there are ten counties in a Congressional district, and there is in nine of them such violence at the polls as to destroy the fairness and freedom of the election; can it be claimed that the one peaceable county should choose a representative for the ten? Clearly not. The true principle is, that if the great body of the electors are prevented, without their fault, from participating in an election, it is not a valid election. Where the majority *voluntarily* remain away from the polls, the minority, however small, who do vote, may elect, but not so where

[1] [Hurd *v.* Romeis, Mob., 429.]

[2] Hunt *v.* Sheldon, 2 Bart., 530–703; Sypher *v.* St. Martin, Id., 699; Wallace *v.* Simpson, Id., 731; Darrall *v.* Bailey, Id., 754.

the majority are kept from the polls by violence and intimidation.

§ 562. The rule laid down, in the cases just cited, cannot be said to have received the unqualified sanction of the House of Representatives, though in some of the cases the recommendations of the committee were adopted. The House soon found that under the operation of the rule persons were likely to be seated in that body who were not the choice of the majority. In the case of *Sypher*, *supra*, the report of the committee, which was based upon this rule entirely, was overruled, and the election declared to be null and void, for the reason, as we learn from the debate, that the parishes rejected for violence contained a majority of the voters of the district. The case of *Hunt* v. *Sheldon*, *supra*, is regarded as the leading case favoring the rule, but it was claimed by some, at least, of the members who voted for that report, that notwithstanding the violence there was a peaceable election in the larger and more populous portions of the district. In the course of the debate in Sypher's case, Mr. Garfield, of Ohio, explained his vote in Sheldon's case, as follows:

"Mr. Garfield, of Ohio. When the case of *Hunt* v. *Sheldon* was before the House I stated the ground on which I acted. It was that in nine hundred and ninety-nine parts, out of one thousand of the territory embraced by the district, there was no disturbance, and among the majority of the population, as exhibited by the census report, there was no disturbance. I considered, therefore, that a very large proportion of the territory, and a majority of the population of the district, had a peaceable election, and that, therefore, we should not throw the election out."

And it is manifest, not only from the debate, but from the action of the House in voting down the report in Sypher's case, that the decision in Sheldon's case was not intended as an indorsement of the doctrine that the peaceable precincts may elect, without regard to their number or population.

§ 563. It was claimed by those who sustained the rule as it was laid down by the committee in Sheldon's case, that it was necessary for the protection of the freedmen of the

South, who were, as it was claimed, "peculiarly exposed to violence and intimidation by the former master class, prone by habit and inclination to domineer over their former slaves." It may be hoped that the very anomalous condition of things which existed in that region at the time of the elections, which gave rise to the reports under consideration, was transient, and has already or will soon pass away forever. At all events, it is by no means safe to establish a rule applicable to all cases and for all time, and capable of incalculable mischief in its general and universal application, in order to provide for a few exceptional and extraordinary cases. Nor can it be conceded that this rule was necessary, even for the protection of the freedmen. The best protection against violence is the enactment and enforcement of laws for its punishment. Beyond this, it is enough that the community in which it occurs to such an extent as to prevent the holding of free and fair elections should go unrepresented, and, if need be, suffer the rigors of military rule, until they decide to obey the laws and appreciate the blessings of freedom for themselves and for all others.

§ 564. It would seem, therefore, that the following rules, if administered in the light of the general principles which have now been stated, will afford a safe guide:

1. If the violence and intimidation has been so extensive and general as to render it certain that there has been no fair and free expression by the great body of the electors, then the election must be set aside, notwithstanding the fact that in some of the precincts or counties there was a peaceable and fair election.

2. Where there has been an election, embracing a number of counties or precincts, in which there has been violence and intimidation enough to exclude from the count one or more precincts or voting places, but not enough to destroy the freedom and fairness of the election as a whole, such violence will not invalidate the election, nor affect the result of it, unless it be shown affirmatively that but for it the result would have been different.

3. The question in each case must be, has the great body of the electors had an opportunity to express their choice through the medium of the ballot and according to law, and this question must be decided in the light of all the facts and circumstances shown in the evidence. If some of the precincts or voting places are necessarily thrown out of the count because of unlawful disturbances or violence, it will be necessary to determine from the evidence whether their exclusion necessarily destroys the fairness and freedom of the election as a whole.[1]

§ 565. It was held in *State* v. *Mason*[2] that a petition which demanded that an election be set aside because of violence and intimidation at the polls must allege that a sufficient number of voters were prevented from voting to have varied the result of the election. The Court observes: "It is evident there would be no reason to contest an election if the result could not be changed, and such would be the event unless a number of voters had been prevented from voting, sufficient to have varied the result." And to the same purport is *Augustin* v. *Eggleston*.[3]

§ 566. Where it is alleged that a large number of persons have been deterred from voting by violence and intimidation, the testimony of those persons, or some of them, should be produced. The opinions and impressions of others is not sufficient. Upon this point the report in *Norris* v. *Handley*[4] has this language:

"It would seem that if over two thousand electors were

[1] ["Efforts on the part of black citizens to enforce unanimity in politics among voters of their race through the influence of the church, ostracism from society, and indignities which fall short of intimidation, will not avoid an election. . . . To justify the annulment of an election it is not necessary to show that a majority of the electors were actually prevented from voting, or voted against their wishes; it is sufficient to show that wrongs against the freedom of election have prevailed, not slightly and in individual cases, but generally, and to the extent of rendering the result doubtful." Jones *v.* Glidewell, 53 Ark., 161.]

[2] 14 La. Ann., 505.

[3] 12 La. Ann., 367; [Hurd *v.* Romeis, Mob., 423; Bowen *v.* Buchanan, Row., 193].

[4] 42d Congress [Smith, 68].

deterred from voting, by violence, threats or intimidation, some of these electors could be found to come forward and swear to the fact. Your committee think that it would establish a most dangerous precedent to allow a fact of this character, so easily established by the direct and positive testimony of so many witnesses, to be proven solely by hearsay and general reputation. We have not forgotten nor overlooked the fact that the same state of things which would make men afraid to vote for a particular party might also make it difficult to secure testimony in behalf of that party. But in many parts of the district where testimony was taken there is no pretense that witnesses were intimidated; and besides, if the contestant had shown to the satisfaction of the House that witnesses needed the protection of the Federal Government in order to be safe in testifying fully and freely, that protection would have been afforded at any cost."

§ 567. The freedom of elections is of the utmost importance. The law justly regards all attempts to interfere with the electors in the peaceable and quiet exercise of their rights, or to improperly influence them against their judgment or desire, as a crime, and, in addition to the ordinary punishment of the crime of bribery of an elector, it is provided by the Constitution of many of the States that whoever shall be convicted of that crime shall forfeit the right to any office of profit or trust under the State.[1]

§ 568. In some of the States it is provided by statute that the militia shall not be called out for exercise or drill on the day of election; and it has been held in New York that a defendant, sued under an act of this character, cannot plead in justification that he acted under the orders of his superior officer. Nor is it any defense that defendant was ignorant of the existence of the law.[2]

[1] See the Constitutions of Maryland, Missouri, New Jersey, West Virginia, Oregon, California, Kansas, Texas, Arkansas, Rhode Island, Alabama, Florida, New York, Massachusetts, Vermont, Nevada, Tennessee, Connecticut, Louisiana, Mississippi, Ohio and Wisconsin.

[2] Hyde *v.* Melvin, 11 Johns., 530.

CHAPTER XVII.

IMPEACHMENT OF RETURNS FOR FRAUD OR ILLEGAL VOTING.

§ 569, 570. Return, if free from fraud, the best evidence; but may be impeached.
571. Nature of impeaching proof required.
571. Effect of rejecting return.
571. Fraudulent return must fall to the ground.
571. Dangers attending rejection of return.
572, 573. Character of parol proof which may be admitted.
574. Fraud by officers and by other persons.
575. Circumstantial evidence tending to show fraud.
576. Effect of proof of fraud which does not change result.
577. Check list as evidence.
578. Not necessary to show that officers participated in fraud.
578. Evidence *aliunde* the return.
579. What acts of election officers will constitute fraud.
580. Presence of unauthorized persons at the place of canvassing votes.
581. Return not rejected on account of illegal votes received if they did not change the majority.
582. Proof that vote cast was largely in excess of number of legal voters.
583*a*. Disregard of law sufficient to shift burden of proof.
583. Other circumstantial evidence of fraud.
584. Fraudulent naturalization certificates.

§ 569. Although the return of the vote of a given precinct, made in due form, and signed by the proper officers, is the best evidence as to the state of the vote, yet it may be impeached, on the ground of fraud or misconduct on the part of the officers of the election themselves, or on the part of others. In election cases, however, before a return can be set aside, there must be proof that the proceedings in the conduct of the election, or in the return of the vote, were so tainted with fraud that the truth cannot be deduced from the

returns.[1] The rule is thus stated in *Howard* v. *Cooper:*[2] "When the result in any precinct has been shown to be so tainted with fraud that the truth cannot be deducible therefrom, then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction, but call for, the rejection of the entire poll when stamped with the characteristics here shown."

§ 570. The rule just stated needs the following explanation in order that it may be correctly understood: The committee, no doubt, meant to say that if the result, *as shown by the returns*, is tainted with fraud, the returns are to be rejected as false and worthless. But as we have elsewhere seen, the question whether the entire vote of the precinct shall be rejected for fraud depends upon another question, viz.: Whether from any evidence it is possible to ascertain the true result. The returns may be rejected as fraudulent, and yet the true vote may, in some cases, be ascertained; and where it can be ascertained independently of the rejected returns, the law requires that it be respected and enforced.[3] Where the true vote cannot be ascertained, either from the returns or from evidence *aliunde*, the vote of the precinct is to be rejected.

§ 571. 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.[4] This ruling is well settled by numerous authorities, including the following.[5] 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

[1] [Chamberlain v. Woodin, 2 Idaho, 609.]

[2] 1 Bart., 275.

[3] [Ferguson *v.* Allen, 7 Utah, 263.]

[4] [Blue *v.* Peter, 40 Kan., 701.]

[5] 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 Kan., 640.

committee of elections in the House of Representatives, in *Washburn* v. *Voorhees:*[1]

"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 enables them to deduce the truth therefrom, then no alternative is left but to reject such a return.[2] To use it under such a state of facts is to use as true what is shown to be false."

§ 572. Where the return showed that Geo. W. Julian had received at a given precinct only one hundred and forty-three votes, parol proof was admitted to show that the return was false, and that in fact he had received a larger number of votes than said return allowed him.[3] In this case one hundred and seventy legal voters of the precinct were called, and were permitted to testify that they had each voted for Mr. Julian. It was objected that the proof was not competent because the ballots were the best evidence; but this objection was very properly overruled. The allegation was that the ballots had been tampered with; that a fraud had been committed, by which a number of ballots legally cast had not been fairly deposited in the box and honestly counted out and returned. Of course, in such a case, the ballots might sustain the fraud. The ballots are the best evidence, when it is shown or conceded that they are

[1] *Supra.*

[2] [Londoner *v.* People, 15 Colo., 557.]

[3] Reid *v.* Julian, 2 Bart., 822.

the identical ballots, and all the ballots, deposited by legal voters; but when the question is whether fraudulent ballots have been deposited, or honest ballots abstracted, the ballots in the box are by no means the best evidence. Fraud of this character may, therefore, always be proven by parol.[1]

§ 573. But, of course, the parol evidence offered to set aside a return upon the ground of fraud must be such as to establish the fraud or mistake in the reception and deposit or in the count or return of the votes. 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 cannot be set aside upon proof that a recount made by unauthorized persons some time after the official count has been made showed a different result from the official count. This was upon the ground that the count made by sworn officers immediately upon the closing of the polls was better evidence of the true result than a count made by interested parties not sworn at a subsequent period and after the result of the official count had been made known. Such evidence comes far short of establishing either fraud or mistake in the official count.[2]

§ 574. Fraud in the conduct of an election may be committed by one or more of the officers thereof, or by other persons. If committed by persons not officers, it may be either with or without the knowledge or connivance of such officers. There is a difference between a fraud committed by officers or with their knowledge and connivance, and a fraud committed by other persons, in this: the former is ordinarily fatal to the return, while the latter is not fatal, unless it appear that it has changed or rendered doubtful the result. If an officer of the election is detected in a wilful and deliberate fraud upon the ballot-box, the better opinion is that this will destroy the integrity of his official acts, even though the fraud discovered is not of itself sufficient to affect the result.[3] The reason of this rule is that an officer who be-

[1] And see, also, Washburn *v.* Voorhees, 2 Bart., 54.

[2] Gooding *v.* Wilson, 42d Congress [Smith, 79].

[3] *Ante*, §§ 242, 511; Judkins *v.* Hill, 50 N. H., 140.

trays his trust in one instance is shown to be capable of the infamy of defrauding the electors, and his certificate is, therefore, good for nothing. If, for example, an election officer, having charge of a ballot-box prior to or during the canvass, is caught in the act of abstracting certain ballots and substituting others, although the number shown to have been abstracted be not sufficient to affect the result, yet no confidence can be placed in the contents of a ballot-box which has been in his custody.[1] We repeat, therefore, the opinion expressed in the former chapter, that a wilful and deliberate fraud on the part of such an officer being clearly proven should destroy all confidence in his official acts, irrespective of the question whether the fraud discovered is of itself sufficient to change the result. The party taking anything by an election conducted by such an officer must prove his vote by evidence other than the return.[2]

§ 575. Fraud in the conduct of an election may be shown by circumstantial evidence. It is sometimes a difficult matter to decide whether misconduct on the part of election officers is to be regarded as constituting fraud or as only the result of carelessness, ignorance or negligence. If, however, such misconduct has the effect to destroy the integrity of the returns, and avoid the *prima facie* character which they ought to bear, such returns will be rejected, and other proof demanded of each vote relied on. And this is the rule concerning such misconduct, whether it be shown to have been fraudulent, that is to say, prompted by a corrupt purpose, or whether it arise from a reckless disregard of the law or from ignorance of its requirements. In either case the effect may be to destroy the integrity of the returns. For example, in *Covode* v. *Foster*[3] a return was rejected upon proof that a hat and a cigar box were used instead of the regular ballot-boxes; that they were placed in or near the window through which the votes were received; that persons other than members of the board were permitted in the room

[1] [Hurd *v.* Romeis, Mob., 429.]
[2] [Lloyd *v.* Sullivan, 9 Mont., 557.]
[3] 2 Bart., 600.

where the votes were received, and were near the boxes, and were passing in and out at pleasure during the day; that there was great noise and confusion in the room; that whisky was kept in the room, and members of the board drank to intoxication; that challenges were disregarded; and when the votes were counted there were six ballots in the box over and above the number of names on the tally list. These facts, together with the further fact that one Speers acted as clerk without authority, and without being sworn, were regarded by the committee and by the House as furnishing good ground for rejecting the return. But misconduct which does not amount to fraud, and by which no one is injured, does not vitiate the poll.[1]

§ 576. Where the managers of an election are clearly shown to have committed a fraud in the conduct of the election, or the counting or returning of the votes, and where the effect of the fraud discovered does not affect or change the result, it is a grave question whether the result should not be the rejection of the return *in toto*. In *Judkins* v. *Hill*,[2] it appeared that there were declared as cast at one of the precincts, twenty-seven more votes for county commissioner than were marked on the check list. The court said, "if from the fact of this discrepancy the court ought to find that it was the result of fraud in the managers of the election, the court would hesitate long to count any of the votes cast at an election so tainted, on the ground that, with such proof of fraudulent and corrupt purposes, no confidence could be entertained in coming to any reliable conclusion as to what votes were actually given." And the safe rule probably is, that where an election board are found to have wilfully and deliberately committed a fraud, even though it affect a number of votes too small to change the result, it is sufficient to destroy all confidence in their official acts, and to put the party claiming anything under the election conducted by them to the proof of his votes by evidence other than the return.[3]

[1] Dobyns *v.* Weadon, 50 Ind., 298.

[2] 50 N. H., 140.

[3] And see Knox Co. *v.* Davis, 63 Ill., 405; Russell *v.* State, 11 Kan., 308.

§ 577. It was, however, decided in the case of *Judkins* v. *Hill*, *supra*, that no inference of fraud can fairly be drawn from the single fact that the votes declared exceeded by twenty-seven the number of persons marked on the check list as having voted. This discrepancy, the court say, might have resulted from a failure to check all the names of persons voting; or from double voting without the knowledge of the board; or from a mistake in counting; and in either case the board may have acted in good faith. The presumption is that an election is honestly conducted, and the burthen of proof to show it otherwise is on the party assailing the return. What we mean here to assert is only this: that where a return is clearly shown to be wilfully and corruptly false in any material part, the whole of it becomes worthless as proof. For if false and corrupt in one part, it may be in others, and all faith in its reliability is destroyed. In such a case, however, it must not be assumed that the *election* is necessarily void. If satisfactory proof of the actual vote can be made, and the result thus ascertained, the election may stand, although the return falls to the ground.

§ 578. It is not necessary, in order to set aside a return for fraud, that it be shown that the officers of elections participated in the fraud. If third persons unlawfully possess themselves of the ballot-box during or after the close of the election, before the canvass, and destroy the ballots or a portion of them, or abstract some of the ballots and place in the box others, or in any manner so tamper with the ballots as to change or render uncertain the result, such facts being proven will render the canvass and return void, although the canvassing officers may have had no connection with the fraud, and no knowledge of it.[1]

§ 579. It would be difficult, if not impossible, to specify in detail the various acts of election officers which will con-

[1] People *v.* Cook, 8 N. Y., 67, 86; People *ex rel.* Judson *v.* Thatcher, *supra*. The rule is, that if a return be impeached for fraud, it is good for nothing as evidence, and all legal votes must be proved by evidence *aliunde*. See *ante*, §§ 511, 515, *et seq.*; § 576.

stitute fraud. Without attempting such specification, it will be sufficient here to say that *any* act on the part of such an officer, by which a legal voter has been designedly and wrongfully deprived of his vote; or by which an illegal vote has been purposely and unjustly received; or by which a false estimate has been imposed upon the public as a genuine canvass, is fraudulent. Fraud, however, cannot be predicated of a mere emotion of the mind disconnected from an act occasioning an injury to some one. There must be a fraudulent transaction, and a party injured thereby.[1]

§ 580. The fact that persons other than members of the board of election officers are allowed to be in the room with such officers when votes are being received and deposited will not of itself, and in the absence of any proof of misconduct on their part, be sufficient to invalidate the return;[2] but the admission of such persons is decidedly improper, especially if the persons admitted be the partisans of any particular candidate or ticket, and the fact of their presence and misconduct may be shown as circumstances tending to invalidate the return.[3]

§ 581. It is not a valid objection to an election that illegal votes were received, if they did not change the majority.[4] If, therefore, a number of legal voters withdraw from an election and decline to vote upon the ground that illegal votes are being received, they do so at their peril, and take their chances of being able afterwards to show that the number of such illegal votes was large enough to change the result.[5]

[1] People *v.* Cook, 8 N. Y., 67.

[2] [Atkinson *v.* Lorbeer, 111 Cal., 419.]

[3] Thompson *v.* Ewing, 1 Brewst., 111; Covode *v.* Foster, *supra.*

[4] [Hacker *v.* Conrad, 131 Ind., 444. It is not enough to show that illegal votes were received in number greater than the plurality returned for the incumbent; there must also be shown circumstances rendering probable the conclusion that these illegal votes were cast for the incumbent. Lehlbock *v.* Haynes, 54 N. J. Law, 77.]

[5] First Parish, etc., *v.* Stearns, 21 Pick., 148; Trustees, etc., *v.* Gibbs, 2 Cush., 39; [Maynard *v.* Stillson (Mich.), 66 N. W. Rep. 388].

§ 582. Every circumstance which tends to show that an election was fraudulent may be proven, and the court must determine, from all the evidence, whether fraud has been shown. As, for example, if the aggregate vote cast is largely in excess of the number of legal voters resident in the precinct, or if the vote cast at the election in question is largely in excess of the vote cast at any previous or subsequent election, and this fact is not explained, or if a large number of persons, unknown to the oldest residents of the precinct, were present at the election and were seen voting, or if the list of voters contains the names of a large number of persons who are unknown to those inhabitants best acquainted with the people residing within the limits of the precinct, such facts as these, if unexplained, will often establish the fact that frauds have been perpetrated and illegal votes cast, and make it necessary to throw out the poll altogether, unless it can be sifted and purged.[1]

[§ 582*a*. While it is true that mere irregularities in the conduct of an election, where the will of the voter has not been suppressed or changed, will be disregarded, yet a succession of unexplained irregularities, and a disregard of law on the part of the officials, is sufficient to deprive the ballot-box and the returns of the credit to which they are otherwise entitled, and shift the burden upon the party maintaining the legality of the official count.][2]

§ 583. In *Littlefield* v. *Green*,[3] it appeared that in a precinct containing only about four hundred and fifty legal voters there was actually cast, counted and returned, two thousand eight hundred and twenty ballots. It also appeared that a large number of names on the poll list were recorded in *alphabetical order*. It was a clear case of fraud, and the only question considered was, whether there was any proof upon which the poll could be purged and the legal votes separated from the illegal. The court refused to

[1] Knox *v.* Blair, 1 Bart., 521.
[2] [Langston *v.* Venable, Row., 435.]
[3] Bright. Elec. Cas., 493.

allow any of the votes cast at the precinct in question to be counted, on the ground that there was no sufficient proof of any legal vote whatever. It was shown that there were over four hundred persons in the precinct who were entitled to vote, but there was no proof outside of the return that any of these voted, or as to how they voted. The court properly rejected the return as utterly unreliable and unworthy of credit. The return was, therefore, not admissible in evidence for any purpose, and it was the duty of respondent to have shown the legal vote by other evidence. There was no proof upon which the court could purge the return and separate the good votes from the bad, and therefore the whole poll was necessarily thrown out.[1]

§ 584. Naturalization certificates fraudulently issued by the clerk of a court, without the order of the court itself, are void, and, although regular on their face, confer no right upon the holders, and their fraudulent character may, on the trial of a contested election case, be shown by parol.[2] But an election officer cannot go behind the certificate of naturalization.[3] Such an officer may, however, act upon the voter's admission of facts which, if true, avoid his certificate.[4]

[1] And see to the same point, Russell *v.* State, 11 Kan., 308; State *v.* Commissioners, 35 Id., 640; [Lloyd *v.* Sullivan, 9 Mont., 577].

[2] *Ante*, § 468.

[3] *Ante*, §§ 76, 77.

[4] *Ante*, §§ 287, 291.

CHAPTER XVIII.

PROSECUTIONS FOR VIOLATIONS OF ELECTION LAWS.

§ 585. Statutory remedy exclusive.
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585. Decision of the question in Massachusetts.
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587, 588. Conflict of authority as to necessity for showing that defendant had knowledge of his disqualification.
589, 590. Liability of person voting upon void certificate of naturalization.
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§ 585. It is not within the purpose of this work to treat of the familiar general rules and principles of criminal practice and evidence, but it is thought that it will be useful to call attention to some of the more important rulings of the courts respecting the application of these rules and principles to cases arising under statutes providing for the punishment of persons guilty of violating election laws. In nearly all of the States there are statutes making criminal all attempts at fraud or illegal voting, and as a matter of course, where there is such a statute, the remedy prescribed thereby is exclusive of any proceeding under the common law. As to whether the crime of illegal voting or the like can be punished at common law in the absence of any statute upon the subject, the authorities are not altogether harmonious. The better opinion, and the one sustained by the weight of authority, is that there is a criminal common law applicable to such offenses which the courts of the several States may enforce in the absence of appropriate statutory provisions.[1]

§ 586. In *Commonwealth* v. *Samuel Silsbee*,[2] the indictment charged that the defendant, a legal voter, at the town meeting held on the 11th day of March, 1811, at Salem, for the choice of town officers, "did then and there wilfully, etc., give in more than one vote for the choice of selectmen for said town of Salem, at one time of balloting."

This was not made an offense by the express provisions of any statute, but the Court held it to be an offense at common law.

[1] [Commonwealth v. McHale, 97 Pa. St., 397.]
[2] 9 Mass., 416.

"There cannot be a doubt," says the Court, "that the offense described is a misdemeanor at common law. It is a general principle that where a statute gives a privilege, and one wilfully violates such privilege, the common law will punish such violation.[1] In town meetings every qualified voter has equal rights, and is entitled to give one vote for every officer to be elected. The person who gives more infringes and violates the rights of the other voters, and for this offense the common law gives the indictment."

In Ohio, however, a different rule prevails.[2] And in the Federal courts there is no common-law criminal jurisdiction.

§ 587. It is a disputed question whether under an indictment for illegal voting it is necessary, in order to convict, to show that the defendant had knowledge of his disqualification. In *Commonwealth* v. *Aglar*,[3] the municipal court of the city of Boston held that a person is not liable criminally for illegal voting, unless he knew at the time that he was not a qualified voter, and that he was doing or attempting to do an illegal act; and that if he honestly believed that he had a right a vote, it is not a wilful act punishable by indictment. The same doctrine prevails in Rhode Island, where the courts hold that, to sustain an indictment for illegal voting, the ballot must be *fraudulently* cast, that is, with knowledge by the voter of his disqualification.[4] It has also been held that whether the offense was wilfully committed is a question for the jury.[5]

In Tennessee it is held that ignorance of the law will not excuse illegal voting, but that in order to convict it must appear that the voter knew a state of facts which would, in point of law, disqualify him.[6] And so in North Carolina,[7]

[1] [State *v.* Philbrick, 84 Me., 562.]

[2] Key *v.* Vattier, 1 Ohio, 132; Van Valkenburg *v.* The State, 11 Ohio, 404.

[3] Thacher's Criminal Cases, 412; Bright. Elec. Cas., 695.

[4] State *v.* Macomber, 7 R. I., 349.

[5] Commonwealth *v.* Wallace, Thach. Cr. Cases, 592.

[6] McGuire *v.* State, 7 Humph., 54.

[7] State *v.* Hart, 6 Jones (Law), 389; State *v.* Boyett, 10 Ired., 336.

In California the courts have avoided both extremes, and planted themselves upon a sort of middle ground, by adopting the following rule: Where an unlawful act is proved to have been done by the accused, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant.[1]

§ 588. The statute of Rhode Island provided for punishment of any person who at "any election shall *fraudulently* vote, not being qualified." Under this statute it was held, that to warrant a conviction it must be shown that the vote was fraudulently cast, that is with knowledge by the voter that he was not qualified to vote; and that an honest mistake by a voter as to his right, and an assertion of it by voting, will not render him liable under the statute, even though he is cognizant of the *facts* which constitute the defect in his right.[2] In this case it is said that "the distinction between acts done honestly under a mistaken sense of right, and acts done fraudulently, with a consciousness of wrong, is familiar to every one who has had occasion to trace the boundary line between trespass and larceny."[3]

§ 589. A person to whom a void certificate of naturalization has been issued by the clerk of a State Court without any action by the court and without the appearance of such person in court has of course no legal right to vote as a naturalized citizen. It has, however, been held that the act of voting upon such a certificate by one who is only shown to have known that it was issued by the clerk and not by the court, is not a crime that can be punished, for the reason that the voter may have acted in good faith, believing the certificate to be valid.[4]

§ 590. Substantially the same doctrine was laid down in

[1] People *v.* Harris, 29 Cal., 678.

[2] State *v.* Macomber, 7 R. I., 349. [See, also, State *v.* McClarnon, 15 R. I., 462.]

[3] And see, also, State *v.* McDonald, 4 Harrington, 555; State *v.* Porter, Id., 556.

[4] United States *v.* Burley, 14 Blatchf., 91.

State v. *Smith, et al.*[1] This was an indictment charging defendants, as selectmen, with erasing from the list of voters of the town of Boscamen, the name of Timothy Kelley, alleged to have been a legal voter of that town. It was, under the statute, the duty of the selectmen to hear all applications for the insertion of the name of any person upon the list, or for the erasure of any name therefrom, and to hear proof and decide all such applications. And the statute provided that "if any selectman at any session holden for the correction of any list of voters, * * * *knowingly* erase from or omit to insert the name of any legal voter, he shall be punished," etc. It was held that the selectman could not be punished for an erroneous decision merely, but only for corruption.

§ 591. And it was observed by the Court, that notwithstanding the effort to distinguish by law clearly and plainly the persons who are entitled to vote, "there are still cases of no little difficulty constantly arising under those laws, some of which might well tax the acumen of persons more accustomed to investigate such questions than many of those persons are, who are required in every town to decide and to settle them. They are questions, in short, in the decision of which errors are not unlikely to occur, and it is certainly an anomaly in the law if those who are charged with the duty of deciding them, are liable to be charged criminally for forming an opinion that the court may, upon inquiry, pronounce to be erroneous."

§ 592. And in Wisconsin the same doctrine was very clearly and forcibly stated in *Byrne et al* v. *The State.*[2] It was there very clearly shown that the rule that ignorance of the law excuses no man, has no application to acts which are in their nature official, and done in the exercise of a discretionary power conferred by law. That maxim applies to acts which are voluntary, and will estop such officers from

[1] 18 N. H., 91.
[2] 12 Wis., 519.

setting up their ignorance of the penalties inflicted by a statute, as an excuse for their willful violation of the duties which it imposes upon them. Where the officer is obliged by law to act and to decide, the most that reason or justice can require of him, is a *bona fide* effort to discharge his duties according to the best of his knowledge and ability.

§ 593. A statute which provides for the punishment of any one who shall "wrongfully put or insert" ballots in the box, was construed to apply to a case where the defendant handed a fraudulent ballot to a judge of the election, with the intent to induce him to deposit it in the box. Such a statute will be so construed as to attain the evident object of the legislature.[1]

§ 594. The question when the act of voting is to be considered as complete, is also a disputed question. Thus, in Alabama it was held that it is not complete until the ballot is put into the box, and the name of the voter registered by the clerks, and that a defendant can not, therefore, be convicted of illegal voting, if the act is not thus consummated.[2] But in Tennessee it is held that when a voter presents himself before the judges, hands his ticket to the officer, and his name is announced and registered, the act of voting is complete, without the actual placing of the ballot in the box.[3]

§ 595. A minor who is otherwise duly qualified can not be convicted of illegal voting if he voted under the honest belief induced by information from parents, relatives or acquaintances having knowledge of the time of his birth,

[1] Commonwealth *v.* Gale, 10 Bush., (Ky.,) 488.

[2] Blackwell *v.* Thompson, 2 Stew. & Port. 348.

[3] Steinwehr *v.* State, 5 Sneed, 586. A statute providing for the punishment of election frauds should be so construed, if possible, as to attain the object of the legislation therein. Thus in Kentucky a statute providing for the punishment of any person who should "wrongfully put or insert" ballots in the boxes, etc., was held to prohibit the delivery of a fraudulent ballot to a judge of election, or procuring another to practice the fraud, whether with or without a corrupt motive on the part of the one inserting the ballot. Commonwealth *v.* Gale, 10 Bush., 488.

that he had attained his majority.[1] But it is clearly the duty of every person who exercises the right to vote to use due diligence in ascertaining the facts as to his qualifications, and he can not shut his eyes to facts which, by the exercise of such diligence, he might ascertain. The general rule that ignorance of the law excuses no man, applies with all its force to cases of the violation of election laws; but ignorance of facts, if it be not willful ignorance, may excuse. The true doctrine is, unless otherwise provided by statute, that if the voter is aware of a state of facts which disqualify him under the law, and is ignorant of the law, he may be convicted of the crime of illegal voting. If, however, he is honestly mistaken about a question of fact, as for example, if he honestly believes himself to be twenty-one years of age when he is not, he may be excused. If he knows he is only twenty years old, but is ignorant of the law, which requires him to be twenty-one years of age, he can not be excused. And so a person accused of illegal voting may show that he was honestly mistaken about any fact, and that he acted conscientiously, but he can not show that he did not know the law.

§ 596. In Maine it has been held that an indictment against a person for voting twice at one balloting, for the choice of a selectman at a town meeting, can not be sustained unless such meeting was warned and notified in the manner prescribed by the statute.[2] But this ruling, to be sustained, must be based upon the fact, that under the statute of that State no valid town meeting for the choice of selectmen, could be held, without such warning and notice. The true rule governing indictments for illegal voting is, that the election at which the illegal vote was cast was a lawful and valid election. An informality or irregularity which does not go to the validity of the election itself, can not be pleaded as a defense to such an indictment.

§ 597. It has accordingly been held in Texas that it is a

[1] Gordon *v.* State, 52 Ala., 208.
[2] State *v.* Williams, 25 Maine, 561.

good defense to an indictment for illegal voting to show that the election was not legal and valid, since the offense covered by the statute in such cases is that of voting illegally at a lawful election. And it has been held in Texas that when a party was indicted and imprisoned on a charge of this character, the question of the constitutionality of the statute under which the election was held can be inquired into in a case of *habeas corpus* brought by the prisoner.[1] This defense, however, must go to the lawfulness and validity of the election, and will not be supported by showing mere irregularity in the manner of conducting the election, or with respect to the voter thereof.

§ 598. Under a statute providing that any person who shall vote "without being duly qualified," shall be punished, etc., and also providing that no person is entitled to vote elsewhere than in the township of his residence, it was held that a person who was a resident of and qualified voter in one township, and who voted in another, was liable upon an indictment under such statute. The same statute required the voter if challenged to swear to his residence in the township, and it was held that he was liable to indictment, both for perjury and for illegal voting.[2]

§ 599. In considering whether an officer of election has acted willfully and corruptly in rejecting a vote which is offered, it is proper to look at the character of the question he was called upon to decide, and the manner in which he conducted himself in hearing and disposing of it. If the question be a plain one to the common understanding, one about which men of ordinary intelligence would be likely to agree, and if it be decided without deliberation, and against the right, a strong presumption of willfulness and corruption will arise. But if it be a question of doubt or difficulty, one about which men of ordinary intelligence might honestly differ, and if the judge acts with deliberation, and with an

[1] *Ex parte* Rodrigues, 39 Tex., 705.
[2] The State *v.* Minnick, 15 Iowa, 123.

apparent desire to decide rightly, and errs in his judgment, it is fair to presume that it is a case of honest error.[1]

§ 600. In Maryland it is held that where the law devolves discretionary and *quasi* judicial powers upon election officers they can be punished only for abuse of discretion, or for acts done wilfully, fraudulently or corruptly.[2] But it is also held in that State that where the statute imposes upon such officers purely ministerial or clerical duties and gives them no discretion as to their performance, and where a penalty is prescribed for a failure or refusal to perform such duties, it is not necessary to allege or prove a corrupt purpose.[3] This distinction is founded upon perfectly sound principles, and it is important, because in most of the States there are statutes imposing purely ministerial duties upon such officers and providing penalties to insure their prompt and faithful performance. It has been held that where commissioners of election were indicted under United States Revised Statutes, Sections 5515 and 5522 [now repealed],[4] for making unlawful additions to the voting list, it was necessary, in order to convict, to show a fraudulent intent.[5]

§ 601. Mere irregularities in the manner of holding or conducting an election constitute no defense to an indictment for illegal voting. If there was an election held in pursuance of law, at the proper time and place, it is suffi-

[1] Id. The appointment as inspector of elections of a person who could neither read nor write, made with intent to affect the election or the result thereof, was an indictable offense under Section 5515 of the Revised Statutes of the United States, and the indictment did not need to contain the word "fraudulent," the act charged being in its nature fraudulent. It is impossible for a person who can neither read nor write to properly perform the duties of such an office. United States *v.* Carruthers, 15 Fed. Rep., 309. A mere mistake is not punishable; but where an illegal act is done by officers of election with the intent to change or affect the result of the election, the act is a fraud. Id.

[2] Bevard *v.* Hoffman, 18 Md., 479; Friend *v.* Hamill, 34 Md., 298; State *v.* Bixler, 62 Id., 357; [United States *v.* Chamberlin, 32 Fed. Rep., 777].

[3] McCullough *v.* Helwig, 7 Atl. Rep., 454.

[4] [Act of Feb. 8, 1894.]

[5] United States *v.* Wright, 16 Fed. Rep., 112. See also People *v.* Boas, 29 Hun (N. Y.), 377.

cient.[1] But if the election is an illegal one, the indictment cannot be maintained.[2]

§ 602. On the trial of an indictment under a statute for "wilfully voting when not a citizen of the United States," evidence that the defendant consulted "friends" as to his right to vote, "and was advised by them that such right existed," was held inadmissible. A person who votes illegally cannot be excused on the ground that he has taken counsel of those no better informed than himself. If he had consulted persons learned in the law, and being advised by them with full knowledge of all the facts that he was a legal voter, this fact might have been shown as tending to disprove a criminal intent, but such evidence would not be conclusive.[3] A favorable decision by officers of election upon the right of an individual to vote is no defense to an indictment for illegal voting.[4]

§ 603. It is not within the scope of this volume to go into a detailed consideration of the rules of pleading applicable to prosecutions for fraudulent and illegal voting. It is sufficient to say that in general the principles and rules of criminal pleading govern here. The indictment should contain a specific averment of the facts which constitute the offense charged.[5]

[1] State *v.* Cahoon, 12 Ired., 178.

[2] State *v.* Williams, 25 Me., 561.

[3] State *v.* Shelley, 15 Ia., 404; Gordon *v.* State, 52 Ala., 208. And see § 595. [It is no defense to a prosecution of one accused of voting after having been disfranchised by a conviction of larceny, that he had forgotten the fact, nor that he had been advised by friends or legal counsel that there was no record of his conviction on the court dockets. Gandy *v.* State, 82 Ala., 61.]

[4] Morris *v.* State, 7 Blackf., 607. [But a different rule has been adopted in North Carolina. It is said by the Supreme Court of that State that "the decision of the judges of election that a person is entitled to vote is a complete defense to an indictment for illegal voting, although such person may not be in fact entitled to vote." State *v.* Pearson, 97 N. C., 434.]

[5] As to requisites of an indictment for unlawful voting, see United States *v.* Hendric, 2 Sawy., 479; United States *v.* O'Neill, Id., 481; United

§ 604. In Iowa it has been held that where a statute provided that where any person knowing himself not to be qualified shall vote at any election authorized by law, he shall be punished, etc., it is sufficient if the indictment follow the language of the statute, and it need not state in what the disqualification consisted.[1] But this is not the uniform doctrine of the courts of this country. The weight of authority, as well as of reason, probably is, that the defendant is entitled to be advised by the indictment more definitely as to the nature of the charge against him; *e. g.*, if he is charged with voting without being qualified, the indictment ought to state wherein he is disqualified.

§ 605. A statute of New Jersey provided for the punishment of "any person who shall vote or fraudulently offer to vote," knowing that he is not duly qualified, etc. It was held by the Supreme Court of that State, that, in charging a defendant with the offense of voting illegally under this statute, it was not necessary to allege that the illegal vote was *fraudulently* given, but in charging such defendant with offering to vote illegally, it must be charged that he fraudulently offered to vote, knowing that he was not duly qualified, etc. It was also held in the same case that an indictment which failed to specify the particular disability which is relied on as a disqualification of the defendant as a voter is fatally defective.[2]

§ 606. And in Tennessee it is held that an indictment charging the defendant with having "unlawfully and knowingly voted, not being a qualified voter," is bad, though in

States *v.* Johnson, Id., 482; [State *v.* Miller, 132 Mo., 297; 33 S. W. Rep., 1149; United States *v.* Brown, 58 Fed. Rep., 558; Blitz *v.* United States, 153 U. S., 308; United States *v.* Jaques, 55 Fed. Rep., 53. The same rule applies to indictments of election officers for fraud. State *v.* Krueger (Mo.), 35 S. W. Rep., 604; Commonwealth *v.* Maddox (Ky.), 32 S. W. Rep., 129.]

[1] State *v.* Douglass, 7 Iowa, 413.

[2] State *v.* Moore, 3 Dutch., 105. And see, also, State *v.* Tweed, 3 Dutch., 111; United States *v.* Cruikshank, 92 U. S., 553.

the words of the statute. There are various disqualifications, and the indictment must show which one is wanting.[1]

The ground upon which the courts proceed in holding that it is necessary to specify the disqualification is this: There are numerous disqualifications, such as want of age, non-residence, having once voted, having been convicted of felony, non-payment of taxes, want of registration, and the alike;[2] it is therefore but fair that the defendant should be advised by the indictment which of these disqualifications he is charged with, in order that he may intelligently prepare his defense. And this reasoning seems entirely sound.

§ 607. Nor is it always sufficient to charge an offense in the words of a statute. Whether this is sufficient or not will depend upon the question whether to do so will make the indictment as specific as, according to the well-known rules of criminal pleading, it ought to be.[3] Thus, where the statute provided that "if any inspector, judge or clerk shall be convicted of any wilful fraud in the discharge of his duties, he shall undergo an imprisonment," etc., it was held that an indictment charging that these officers "did commit wilful fraud in the discharge of their duties," without stating the particular acts constituting the fraud, was fatally defective.[4] It was further held in the same case, that the inspectors, judges and clerks cannot be joined in one indictment as defendants, their offices being distinct and their duties distinct and separate. And in *Commonwealth* v.

[1] Pearce *v.* State, 1 Sneed, 63. These cases are in conflict with State *v.* Douglass, *supra*, and the doctrine of the latter case is sustained by the case of United States *v.* Quin, 12 Int. Rev. Rec., 151, and United States *v.* Bullard, 13 Id., 195.

[2] [In People *v.* Barber, 48 Hun, 198, an indictment charging the defendant, a woman, with illegally voting, when disqualified on account of her sex, was held good.]

[3] [Under a prosecution for altering a tally-sheet it is not necessary to set out a copy of the poll-book or tally-sheet; it is sufficient to describe it by the description "poll-book" or "tally-sheet," and allege the fraudulent alteration. State *v.* Granville, 45 Ohio St., 264.]

[4] Commonwealth *v.* Miller, 2 Parsons, 480; Bright. Elec. Cas., 711. And see United States *v.* Cruikshank, 92 U. S., 542.

Gray,[1] a similar ruling will be found. In that case the indictment was against one of the judges, and charged him with knowingly and unlawfully receiving the vote of an unqualified person. This was held sufficient without showing whether the other judges of the election were opposed to, or in favor of, allowing the illegal vote to be cast. And see, also, *Commonwealth* v. *Ayer*.[2]

§ 608. And it has been held in Indiana that an indictment which charges that the defendant voted at an election, "not having the legal qualifications of a voter," is bad for not specifying what qualifications the voter lacked — for alleging, not a fact, but a conclusion of law.[3] Under such an indictment, if held good, the State might prove the want of any one of the many qualifications required to be possessed by a voter, and the defendant could not learn from the indictment precisely what he is expected to meet. This was therefore held to be one of the cases in which it is not sufficient to charge the offense in the words of the statute.[4]

§ 609. If an indictment against a party for voting illegally charges that the election was held on the day fixed by law, states what officers were then to be elected, and that such election was authorized by law, it is not necessary to aver further that the election was held by the proper officers. As we have seen, it is not necessary even to state what officers were to be chosen at the election, because the law fixes that, and the Courts must take judicial notice of it. An averment that the defendant voted illegally at an election held upon a specified day, and authorized by law, includes the idea that the election was held by the proper officers. Such an averment clearly and necessarily implies not only that the election held that day throughout the State was authorized, but also that the polls at which the defendant voted were

[1] 2 Duvall, 373.

[2] Cush. Elec. Cas., 674.

[3] Quinn *v.* The State, 35 Ind., 485.

[4] And see Gordon *v.* State, 52 Ala., 308. Compare State *v.* Welch, 21 Minn., 22, and State *v.* Bruce, 5 Oreg., 68.

opened and the election conducted by the properly constituted officers.[1]

§ 610. In the same case it was held that it is not necessary in an indictment to state what officers were to be chosen at the election at which the illegal vote was given. The Court will take judicial notice of the statutory provisions which provide for the election of certain officers on a given day. Nor is it necessary that in such an indictment there should be an averment that the defendant voted for or against any particular person. It being shown that defendant voted, the presumption that he voted for some person necessarily arises.

§ 611. In an indictment under the statute of Pennsylvania, providing for the punishment of any officer of election who shall "knowingly reject the vote of a qualified citizen," it was held that the officer could not be held criminally liable for a mere mistake of judgment, but only for a wilful disregard of duty. It was also held that the presumptions are in favor of the officer, the law presuming that he has acted conscientiously, and not corruptly, until the contrary appears.[2]

§ 612. An indictment charging the defendant with having voted more than one time at a general election, held on a given day in a particular county, is not demurrable because it fails to allege the names of the persons or officers for whom the defendant voted.[3]

§ 613. A person charged with a public offense is entitled, before he can be required to answer, to demand a specific averment of the *facts* which constitute the offense charged. It is therefore not sufficient to charge in general, in an indictment, that the officers of an election did commit wilful fraud in the discharge of their duties; there must be some specific averment of a fact which constitutes the fraud charged. It is not sufficient to lay the offense in the words

[1] The State *v.* Douglass, 7 Iowa, 413.

[2] Commonwealth *v.* Lee, 1 Brewst., 273; Cushing's Elec. Cas., 98.

[3] Wilson *v.* State, 42 Ala., 299.

of the statute, unless those words serve to allege the fact with all the necessary additions, and without any uncertainty or ambiguity.[1]

§ 614. Inasmuch as illegal voting is a local offense, it is necessary that an indictment therefor should state with precision where the illegal vote was cast.[2]

§ 615. The same presumptions obtain as in other criminal cases. The maxim *ignorantia legis neminem excusat* applies.[3] Where the defendant is proved to have committed an unlawful act, the law presumes it to have been intended, and the burden is upon him to show justification or excuse.[4]

§ 616. Evidence that a party consulted counsel as to his right to vote, and submitted to them the facts of his case, and was advised by them that he had the right, is admissible in his favor on the trial of an indictment against him for wilfully voting, knowing himself not to be a qualified voter, but is not conclusive that he had not such knowledge.[5]

And a person indicted for voting while yet a minor may show in defense that he voted under an honest belief, induced by information derived from parents, relatives or acquaintances having knowledge of the date of his birth, that he had attained the requisite age.[6]

§ 617. It has been held that if a party indicted under the statute of Massachusetts for wilfully giving in a vote at an election, knowing himself not to be a qualified voter, admits on his trial that he voted at the election, it is equivalent to an admission that he voted wilfully.[7] But this could

[1] 2 Parson's Select Cas., 480. [An indictment would not lie against one attempting to vote a second time, under Section 5511, United States Revised Statutes, for preventing and punishing corruption at Congressional elections. United States *v.* Trainor, 36 Fed. Rep., 176.]

[2] State *v.* Fitzpatrick, 4 R. I., 269; Commonwealth *v.* Shaw, 7 Metc., 52.

[3] McGuire *v.* State, 7 Humph., 54; State *v.* Hart, 6 Jones (N. C.), 389; State *v.* Boyett, 10 Ired. (N. C.), 336.

[4] People *v.* Harris, 29 Cal., 678.

[5] Commonwealth *v.* Bradford, 9 Metc., 268.

[6] Gordon *v.* State, 52 Ala., 308.

[7] Commonwealth *v.* Bradford, 9 Metc., 268.

hardly be true if the term "wilfully" was here used in the ordinary sense as implying a corrupt or unlawful purpose. Such a purpose could not be inferred from the mere fact of voting. It was not, however, in this sense that the term was used by the Court. But as the judge delivering the opinion declares, it was employed as meaning only "designedly, purposely, with an intent to claim and exercise the right of suffrage."

§ 618. On the trial of a party indicted for wilfully giving in a vote at an election, knowing himself not to be a qualified voter, when the only question is whether he had resided in the town where he voted six months next preceding the election, evidence that he had resided in another town until within seven months of the election does not put upon him the burden of showing that he had changed his residence, but the burden of proof to support the indictment remains on the Commonwealth.[1]

§ 619. It is held in Indiana that on trial of an indictment for illegal voting, the defendant's statements made at the polls on being challenged are not admissible evidence in his favor, nor is the decision of the election officers in favor of his right to vote any defense.[2]

[1] Id.

[2] Morris *v.* State, 7 Blackf., 607.

CHAPTER XIX.

LEGISLATIVE BODIES—THEIR ORGANIZATION AND JUDICIAL POWERS.

§ 620. Importance of established rules governing organization.
621. Members holding usual credentials entitled to participate in organization.
622. Temporary organization.
623. Statutory regulations.
624. No general business until members have been sworn.
625. Power of Houses of Congress over election, returns and qualifications of their members.
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628. Distinction between supreme and subordinate legislative bodies.
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632. Power of legislative body to preserve order and decorum.
633. Duty of presiding officer.
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639. Act of Congress of January 24, 1857.
639, 640. Power of House and of courts under said act.
640. Power of legislative body to punish for contempt not general, but limited.
640. Decision of Supreme Court of the United States in Kilbourne *v.* Thompson.

§ 620. Inasmuch as the failure of the legislative department of a government (whether National, State or municipal) to organize and proceed regularly in the discharge of its duties may prove a grave and most serious evil, it is important that

the rules governing the organization of such bodies be defined as clearly as possible, and be adhered to and enforced with great strictness. It will be our purpose in this chapter, in the first place, to lay down at least the more important of these rules, and secondly, to speak briefly of the power of a legislative body over its members, and over other persons.

§ 621. It is to be observed in the outset that when a number of persons come together, each claiming to be a member of a legislative body, those persons who hold the usual credentials of membership, are alone entitled to participate in the organization. For it is, as we have had occasion several times to repeat, a well settled rule, that where there has been an authorized election for an office, the certificate of election, which is sanctioned by law or usage, is the *prima facie* written title to the office.[1]

§ 622. Of course the first organization must be temporary, and if the law does not designate the person who shall preside over such temporary organization, the persons assembled and claiming to be members may select one of their number for that purpose. The next step is to ascertain in some convenient way the names of the persons who are, by reason of holding the proper credentials, *prima facie* entitled to seats, and therefore entitled to take part in the permanent organization of the body. In the absence of any statutory or other regulation upon this subject, a committee on credentials is usually appointed, to whom all credentials are referred, and who report to the body a roll of the names of those who are shown by such credentials to be entitled to seats. This report being adopted, the body is prepared to proceed to the election of permanent officers, by such mode as the rules of the body may prescribe.

§ 623. There are, however, in this country numerous statutes, prescribing the mode of organizing legislative bodies. Thus, it is prescribed by an act of Congress that in

[1] Kerr *v.* Trego, 47 Pa. St., 292.

the organization of the House of Representatives of the United States, the clerk of the preceding House shall preside and shall make up a roll of members. He is required to place upon such roll the names of all persons claiming seats as representatives, from States which were represented in the next preceding Congress, and whose credentials show that they were regularly elected in accordance with the laws of their States respectively—or the laws of the United States. In case of a vacancy in the office of clerk, or of his absence or inability to act, the duties imposed upon him relative to the preparation of the roll or the organization of the House devolve upon the sergeant at arms and in case of vacancy in both of said offices, or the absence or inability of both to act, the said duties are to be performed by the door-keeper of the House.[1] And by the laws of most of the States, similar statutory regulations are provided. Thus, in many of the States the Lieutenant Governor is *ex officio* president of the State Senate, and presides over the organization of the new Senate which commences with the expiration of his term of office. In most of the States, the lower House of the General Assembly is required to be called to order by the clerk of the preceding House, and to be organized by proceedings similar to those above described, in the organization of the lower House of Congress.

§ 624. Of course no business other than that which pertains to the organization of the body, can be properly transacted until after the members have been sworn according to law. In the absence of any law designating the person by whom the oath of office shall be administered, it is usual to require the services of a judge of one of the higher Courts, and the chief justice of the Supreme Court of the State is apt to be called upon to discharge this duty, though it is presumed that in the absence of any established rule upon the subject, the oath may be administered by any person having authority to administer oaths generally. Immediately upon the election of a permanent presiding officer,

[1] For this statute in full, see Appendix to this volume.

and upon his being sworn, it is proper to proceed to call the roll of members, to the end that each member, as his name is called, may advance and take the oath of office. In the House of Representatives of the United States, the oath of office is administered to the Speaker by a member of the House (usually by that one who has been longest a member), and the other members are sworn in by the Speaker.

§ 625. The power given to each House of Congress to "judge of the election, returns and qualifications of its own members" does not authorize an inquiry into the moral character of a person elected and returned as a member. Such an inquiry can only be made, if at all, in the prosecution of proceedings for expulsion. The term "qualifications," as used in the Constitution, means the constitutional qualifications, to wit, that the person elected shall have attained the age of twenty-five years, been seven years a citizen of the United States, and shall be an inhabitant of the State in which he shall be chosen.[1] [But a Territorial delegate to the House of Representatives is not, strictly speaking, a member of the House. He has no rights under the Federal Constitution to a seat, and, being entirely a creature of the statute, the House may inquire into his moral character and exclude him if he be judged unfit to hold a seat as delegate. In accordance with this principle, the contestant in *Cannon* v. *Campbell*[2] was excluded for the reason that he was a polygamist.]

§ 626. Notwithstanding the fact that these rules and regulations governing the organization of legislative bodies are well settled and generally understood, it will sometimes occur that an organization may not be effected without great delay and difficulty, and it has occasionally happened that two bodies have organized and elected officers, being nearly equal in point of numbers, and each claiming to be the lawful organization. Nor has the lower House of Congress always been able to organize without delay or difficulty. In the Twenty-sixth Congress, the clerk of the House undertook

[1] Maxwell *v.* Cannon, 43d Congress [Smith, 182]. [2] [2 Ells., 604.]

to omit from the roll both the claimants for each of several contested seats, and by this action the organization was delayed for some ten days. In this he was clearly wrong, for it was his duty to place upon the roll the names of the persons holding proper certificates of election, without regard to the question whether the seats of any such persons were to be contested. In the thirty-first, thirty-fourth, and thirty-sixth Congresses, the organization of the House was delayed by reason of the failure of a majority of the members to vote for any candidate for speaker, thus preventing an election. Delay from this cause may frequently occur, and can not be prevented, so long as the votes of a majority of members are required to elect a speaker. It was found necessary, in the thirty-first and thirty-fourth Congresses, to adopt the plurality rule in the election of a speaker, for the reason that the majority seemed altogether unable to agree upon any person for that office. This was effected by a resolution of the House, authorizing an election of speaker by a plurality, and afterwards by the passage of a confirmatory resolution, declaring him "duly elected."[1]

§ 627. In case of a division of a legislative body, that ought to be a unit, it becomes important to determine which is the legal, and which the illegal assembly. In such a case the true test is this: that is the legal organization which has "maintained the regular forms of organization, according to the laws and usages of the body, or in the absence of these, according to the laws, customs and usages of similar bodies in like cases, or in analogy to them."[2] This rule affords the best possible test of legitimate organization.

In all cases where part of a legislative body remains, and where the body is to be completed by the reception of new members, the old members who hold over remain as an organized nucleus, which receives the new members, when the whole body proceeds to the exercise of all its functions. The new members, though they be in the majority, must meet with the old at the time and place fixed by law, and

[1] Barclay's Dig., 126.
[2] Kerr *v.* Trego, *supra.*

proceed regularly with the organization of the body, and they cannot assemble elsewhere and organize the body. They must join themselves to the existing body, for the members holding over, though they may be in the minority, and not sufficiently numerous to constitute a quorum, are yet the body, for the purposes of receiving the new members and acting as the organs of reorganizing the body. And this principle applies, and often becomes very important, in those cases where but a single officer of the preceding body holds over, and is authorized to take charge of the organization of the new body. Thus, as we have seen, the Clerk of the previous House of Representatives of the United States, is authorized, by law, to preside at the organization of the new House, and he is, therefore (unless he be absent, or incapacitated, or the office be vacant, in which cases the law provides a substitute), the only person who can take charge of the organization. Even if a quorum of the House should refuse to recognize him, and should choose another to preside over the organization, that action would be null and void.

It is apparent that this rule will, if adhered to, ensure a legal organization and prevent a schism of the body, in every case, though the process of organization may, in some cases, be tardy. It may be urged that this rule puts too much power in the hands of the person or persons who are empowered to prepare a roll of members, and take charge of the organization; but the answer is, that whatever of inconvenience or hardship may result from this rule, can not be weighed against the advantages of securing a regular and legal organization, and avoiding the possibility of division, disorganization, and conflict. Besides, the majority can always, by legal and orderly means, correct errors and redress wrongs, if any are attempted upon their rights.

§ 628. In the event that a municipal or legislative body which ought to be a unit, divides into two separate bodies, each claiming to be the legitimate and legal organization, what is the remedy by which the authority of the lawful body may be maintained, and the unlawful body be restrained from assuming and attempting to exercise functions

which do not belong to it? In considering this question, we must keep in view the fact that there are two classes of legislative bodies, to-wit: those which are supreme, and those which are subordinate. To the former class belong the Congress of the United States, and the legislatures of the several States. These represent the supreme legislative power of the nation or of the State. To the latter class belong the common councils of cities and towns, and other similar municipal legislative bodies. These are *under law*, and subordinate to the judgments and orders of the courts of justice.

For a failure to organize a supreme legislature, there is no remedy which courts of justice can administer; and this fact makes it all the more important that the rules which have been established to prevent such failure, and avoid the anarchy, confusion, and possible bloodshed, which might ensue, should be adhered to. As to subordinate legislatures, such as are not supreme, but subject to the jurisdiction of the judiciary, it has been held that an illegal body may be restrained by injunction, from acting. In the case of *Kerr* v. *Trego*, *supra*, the Supreme Court of Pennsylvania discussed the question of the remedy for these evils, as follows:

"Have the Courts authority to redress this wrong? We think they have. All bodies, except the supreme legislature, are *under law*, and therefore, for all transgressions of law are subject to the authority of the judicial power established by the constitution. The corporation itself is subject to this authority, so far as its acts are directed by law, though it is not, and can not be so, in so far as it is itself a law-making power; in so far as its judgment and discretion are uncontrolled by the law of the land, it is free from the control of the courts; but in so far as its acts are directed by law, it is subject to the judicial authority; much more, then, are its officers subject to this authority, and especially those that pretend to act as its officers, without right, and as there can not be two common councils, one of these bodies must be a mere pretender to the right to act as such. May the wrong-

ful party be restrained from acting by the means of the equitable remedy of injunction? We think it may; this remedy extends to all acts that are contrary to law, and prejudicial to the interests of the community, and for which there is no adequate remedy at law; and we can hardly imagine any act that more clearly falls within this description than one that casts so deep a shade of doubt and confusion on the public affairs of a city as this does. In such a case no remedy is adequate that is not prompt and speedy as this one. If a private partnership or corporation were to fall into similar confusion affecting all its members, and all its creditors, we can think of no better remedy than this for staying the confusion that would be caused by two opposite parties pretending to act as the society. It is the very remedy usually adopted when churches divide into parties, and we have applied it in three such cases in the last year; therein we decided directly on rights of *property*, because that became the aim of dispute; here we must decide on the right to public *functions*, because that is here the purpose of the dispute. The main question in all such cases is regularity of organization, and the right to functions and property is a mere consequence of this. May one of the conflicting bodies, or the members of it, maintain this action against the other? We think they may; this could not be doubted in relation to private corporations and partnerships; but it is argued that in relation to public corporations the attorney general alone can file such a bill; we do not think so; it is a right for those to whom public functions are entrusted, to see that they are not usurped by others. Either of these bodies has the right to demand of the courts that it, and all the interests of the public alleged to be committed to it, shall be protected against the usurpation of the other. We decided a similar principle in *Mott* v. *The Railroad*,[1] and we need say no more about it now. This case is, therefore,

[1] 30 Pa. St., 9.

regularly before us, and we proceed to the consideration of it, premising that there is no material fact in dispute, and that we have no authority to decide directly upon the validity of the election of any one of the claiming members."

§ 629. Inasmuch as Senators of the United States are chosen in each State by the legislature thereof, it is manifest that the Senate may sometimes find it necessary to inquire and determine whether a body claiming to be the legislature of a State is in fact such. If two bodies have organized, each claiming to be the legislature, and each has elected a Senator, of course the Senate, in order to decide between them, must inquire and determine which was the legislature. Such a case arose in *Sykes* v. *Spencer*, in the Senate of the United States.[1] And in determining, that case the Senate of the United States laid down a rule which may at first appear to be, but which is not in reality, in conflict with the doctrine we have been considering in the preceding sections of this chapter. The contest between the two legislatures in this case depended upon this: In one body were eight or nine members who had received regular certificates of election, but who were conceded not to have been elected, while in the other was found an equal number of persons duly elected, but without certificates of election. To make a quorum of the former body, it was necessary to count the persons holding certificates, but not elected, and to make a quorum of the latter, it was necessary to count the members duly elected, but without certificates. The former body was called the State house legislature, while the latter was called the court house legislature. The Senate held that the body having a quorum of members in fact duly elected, should be regarded as the legislature of the State, for the purpose of electing the Senator in Congress, and the grounds of this decision are thus stated in the committees' report, submitted by Senator Carpenter of Wisconsin:

[1] Forty-third Congress, 1st Sess. Report No. 291.

"The matter, then, comes to this: The State house legislature was the legislature in form, and the court house legislature was the legislature in fact. While these two pretended legislatures were in existence, each claiming to possess the legislative power of the State, Spencer was elected to the Senate by the court house legislature, and Sykes was elected by the State house legislature. Spencer was first elected, and on the day of his election the court house legislature was recognized by the governor as the legal legislature of the State. Therefore, in determining as to the right of Spencer or Sykes to this seat, the Senate is compelled to choose between the body in fact elected, organized, acting, and recognized by the executive department as the legislature, and another body, organized in form, but without the election and without a recognition on the part of the executive of the State at the time they pretended to elect Sykes. When we consider that all the forms prescribed by law for canvassing and certifying an election, and for the organization of the two houses, are designed to secure to the persons actually elected the right to act in the offices to which in fact they have been elected, it would be sacrificing the end to the means, were the Senate to adhere to the mere form, and thus defeat the end which the forms were intended to secure.

"The persons in the two bodies claiming to be the Senate and House of Representatives who voted for Spencer, constituted a quorum of both Houses of the members actually elected; the persons in the State House legislature who voted for Sykes did not constitute a quorum of the two Houses duly elected, but a quorum of persons certified to have been elected to the two Houses. Were the Senate to hold Sykes' election to be valid, it would follow that erroneous certificates, delivered to men conceded not to be elected, had enabled persons who in fact ought not to vote for a Senator to elect a Senator to misrepresent the State for six years. On the other hand, if we treat the court house legislature as the

legal legislature of the State, it is conceded that we give effect to the will of the people as evidenced by the election. So that, to state the proposition in other words, we are called upon to choose between the form and the substance, the fiction and the fact; and, considering the importance of the election of a Senator, in the opinion of your committee the Senate would not be justified in overriding the will of the people, as expressed by the ballot-box, out of deference to certificates issued erroneously to persons who were not elected.

"In the opinion of your committee it is not competent for the Senate to inquire as to the right of individual members to sit in a legislature which is conceded to have a quorum in both houses of legally elected members. But, undoubtedly, the Senate must always inquire whether the body which pretended to elect a Senator was the legislature of the State or not; because a Senator can only be elected by the legislature of a State. In this case, Spencer having been seated by the Senate, and being *prima facie* entitled to hold the seat, the Senate can not oust him without going into an inquiry in regard to the right of the individual persons who claim to constitute the quorum in these respective bodies at the Court House and at the State House. We can not oust Spencer from his seat without inquiring and determining that the eight or nine individuals who were elected were not entitled to sit in the legislature of the State, because they lacked the certificates. But if the Senate can inquire into this question at all, it must certainly inquire for the fact rather than the evidence of the fact. It can not be maintained that when the Senate has been compelled to enter upon such an examination it is estopped by mere *prima facie* evidence of the fact, and the certificate is conceded to be nothing more than *prima facie* evidence. But the Senate must go back of that to the fact itself, and determine whether the persons claiming to hold seats were in fact elected. When we do this we come to the conceded fact that these

persons, lacking the certificate, had in fact been elected, and that the persons who claimed to be a quorum of the two houses were in fact the persons who, in virtue of the election, were entitled to constitute the quorum of both houses."

§ 630. The case here decided was without an exact precedent in the history of contested seats in the United States Senate. It was, of course, insisted in opposition to the doctrine of the report that the Senate was bound to recognize as the legislature of Alabama, that body which consisted of a quorum of members holding the usual *prima facie* evidence of election thereto. But the answer to this was that the Senate may in such a case as this, inquire into the question who *in fact* composed the legislature, and shall not be concluded by the *prima facie* evidence by which a legislative body *in organizing itself*, ought to be bound. There was an important fact in the case, of which we are speaking, which must not be overlooked. The two bodies did not remain separated, but came together, and after uniting and forming a legislature, about the legality of which there was no question, they adjudicated the question concerning the several contested seats in favor of the persons who sat in the court house body, which elected Mr. Spencer. So that the legislature of Alabama itself having adjudicated this question, it become in the Senate of the United States simply a question whether effect should be given to the votes of persons who had in fact no right to vote. This precedent should not be extended beyond the case decided, and therefore all the facts should be kept in view. It is believed that the case was well decided upon the following rule, to-wit:

Where a State legislature, which ought to be a unit, is divided into two bodies, one of which is composed of a majority of the members elected, but not a majority of the members returned, if this body assumes to be the legislature, and as such elects a Senator in Congress, and if afterwards the two bodies unite, the validity of such election of Senator will depend, not upon the question whether the persons com-

posing that body were *prima facie* entitled to the office, but upon the question whether they were *in fact* so entitled. Whether this rule would apply where the two bodies remained permanently separated, was not decided, for the question did not arise. That it should apply to a case like the one under consideration, is manifest from the consideration that to adopt the opposite rule would be in effect to say that a minority of the members elected, the consolidated legislature being itself the judge as to who was and who was not elected, shall be held to have composed the legislature.

This would be to put the *form* above the *substance*, and to sacrifice the real merits out of regard to the first appearances, and regardless of the fact that the *prima facie* evidence of title to seats, upon which alone such a decision could be based, has been set aside and overcome by subsequent proof.

But it may be said that the six persons holding certificates, but not elected, should have been regarded as members of the legislature *de facto*, and their acts as such held valid until they were unseated by a contest. Here again is a misapplication of a well settled rule.

The election of a Senator in Congress is not in the nature of an ordinary legislative act; it is an *election*, and not the enactment of a law. Of the validity and *bona fides* of such an election the Senate of the United States is the sole and exclusive judge.

The cases in which the official acts or votes of members of a legislative body who are such *de facto* only, and not *de jure*, have been held valid, *are all cases in which there was no question as to the legality of the body in which they sat.* They are cases in which the body admitting such persons was, in doing so, acting within its admitted jurisdiction, and in such cases the courts will not inquire into the title of such members to their seats. The courts, in such cases, will go no further than to inquire as to the legal *status* and authority of the body as a whole, but where there are two bodies, each claiming to be the legislature, then the Court, whose duty it

is to respect and execute the acts of such legislature, must of necessity decide which is the legislature.

§ 631. From these considerations it is apparent that the case of *Sykes* v. *Spencer*, is not in conflict with the rule that in the organization of legislative bodies, persons holding the usual credentials are alone authorized to act; nor is it in conflict with the general doctrine that the acts of a member of a legislative body who is such *de facto* only, are valid. It goes no further than to hold that the particular election in question, though perhaps irregular, was not void; that it was by the action of the consolidated and legal legislature, shown to have been an election by the quorum of members duly elected to the legislature; and that the Senate of the United States acting as sole judge of said election, might with propriety admit to a seat the person chosen at said election.

§ 632. A legislative body has power to preserve order and decorum, enforce its rules, and prevent or punish any breach of decorum or of the privileges of the body or of any of its members. Mr. Cushing in his manual of parliamentary practice, in speaking of the rights and duties of members of a deliberative assembly, says: "The only punishments which can be inflicted upon its members by a deliberative assembly of the kind now under consideration consist of reprimanding, exclusion from the assembly, a prohibition to speak or vote for a specified time, and expulsion; to which are to be added such other forms of punishment as by apology, begging pardon, etc., as the assembly may see fit to impose, and to require the offender to submit to on pain of expulsion."[1]

§ 633. A member may be accused or complained of by any other member, or by the presiding officer, and it is the duty of the latter to make such complaint to the House, in case any member is guilty of irregular and disorderly deportment in the course of the sessions of the body. When a complaint of this kind is made, the offender is named, that

[1] Cush. Man., Chap. 8.

is the announcement is made to the assembly, that such a member, calling him by name, is guilty of certain irregular and improper conduct. The accused member may be heard in his defense, and after being heard, must withdraw, while the body deliberates upon the case, unless the assembly resolve to allow him to remain. He must not, however, in any case, be allowed to vote on his own case, "it being," says Mr. Cushing, "contrary not only to the laws of decency, but to the fundamental principles of the social compact, that a man should sit and act as a judge in his own case."

§ 634. The power of the two Houses of Congress over their members is derived from Article 1, Section 5, of the Constitution, which provides: "Each House may determine the rules of its proceedings; punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member." The question has been much discussed, whether a member may be punished or expelled for an act or acts done prior to his election. The question seems first to have arisen in the case of Senator Marshall, of Kentucky. (1804.) The Senate in that case refused to take jurisdiction, for the reason, among others, that the alleged offense had been committed prior to the Senator's election, and was matter cognizable by the criminal courts of Kentucky. But the doctrine of this case was antagonized by the report submitted to the Senate by John Quincy Adams, in December, 1807, in the case of Senator John Smith, of Ohio, who, after his election, but not during the session of the Senate, had been, as was alleged, involved in the treasonable conspiracy of Aaron Burr. In this latter case it was held that the power to expel should be used as a means of relieving the body of the presence of corrupt or infamous persons. The report says:

"The power of expelling a member for misconduct results, on the principles of common sense, from the interests of the nation that the high trusts of legislation shall be invested in pure hands. When the trust is elective, it is not to be presumed that the constituent body will commit the deposit to

the keeping of worthless characters. But when a man whom his fellow citizens have honored with their confidence on a pledge of a spotless reputation, has degraded himself by the commission of infamous crimes, which become suddenly and unexpectedly revealed to the world, defective indeed would be that institution which should be impotent to discard from its bosom the contagion of such a member; which should have no remedy of amputation to apply until the poison had reached the heart."

§ 635. The question was again raised in the case of Matteson in the 35th Congress. The charges against Mr. Matteson had been preferred in the previous Congress, and a committee of investigation had reported against him, recommending his expulsion. Pending these resolutions he had resigned, having, however, at the time of his resignation been re-elected. When he took his seat in the new Congress by virtue of such re-election, the charges were renewed. A majority of the committee reported adversely to the jurisdiction of the House. In the report, as well as in the debate, the want of jurisdiction was based upon various grounds, and among them, upon the ground that the offense was committed prior to the election of the accused member. After a long debate the whole subject was laid upon the table, so that it cannot be said that the question was authoritatively determined, one way or the other. Thus the question stood, when the whole controversy came up anew upon the report of the special committee to investigate the alleged Credit Mobilier bribery. This investigation took place in the forty-second Congress, and related chiefly to transactions of members of the fortieth Congress. The report of this case discusses the question at length, and concludes that the power to expel is not limited to those cases where the accused has been guilty of misconduct as a member, and subsequent to his election. From this report we quote as follows:

"It is universally conceded, we believe, that the House has ample jurisdiction to punish or expel a member for an

offense committed during his term as a member, though committed during a vacation of Congress and in no way connected with his duties as a member. Upon what principle is it that such a jurisdiction can be maintained? It must be upon one or both of the following: that the offense shows him to be an unworthy and improper man to be a member, or that his conduct brings odium and reproach upon the body. But suppose the offense has been committed prior to his election, but comes to light afterward, is the effect upon his own character, or the reproach and disgrace upon the body, if they allow him to remain a member, any the less? We can see no difference in principle in the two cases, and to attempt any would be to create a purely technical and arbitrary distinction, having no just foundation. In our judgment, the time is not at all material except it be coupled with the further fact that he was re-elected with a knowledge on the part of his constituents of what he had been guilty, and in such event we have given our views of the effect.

"It seems to us absurd to say that an election has given a man political absolution for an offense which was unknown to his constituents. If it be urged again, as it has sometimes been, that this view of the power of the House, and the true ground of its proper exercise, may be laid hold of and used improperly, it may be answered that no rule, however narrow and limited, that may be adopted, can prevent it. If two-thirds of the House shall see fit to expel a man because they do not like his political or religious principles, or without any reason at all, they have the power, and there is no remedy except by appeal to the people. Such exercise of the power would be wrongful, and violative of the principles of the Constitution, but we see no encouragement of such wrong in the views we hold.

"It is duty of each House to exercise its rightful functions upon appropriate occasions, and to trust that those who come after them will be no less faithful to duty, and no less jealous for the rights of free popular representation than

themselves. It will be quite time enough to square other cases with right reason and principle, when they arise. Perhaps the best way to prevent them, will be to maintain strictly public integrity and public honor in all cases as they present themselves. Nor do we imagine that the people of the United States will charge their servants with invading their privileges, when they confine themselves to the preservation of a standard of official integrity which the common instincts of humanity recognize as essential to all social order and good government."

§ 636. Precisely the opposite doctrine was, however, maintained in a report made to the House, from the committee on the judiciary, by Mr. Butler, of Massachusetts, and which was submitted within a few days after that of the Credit Mobilier investigating committee just quoted from.[1] The question now under consideration entered very largely into the debate upon the report of the Credit Mobilier investigating committee, and at the close of that debate Mr. Sargeant, of California, offered a substitute for the pending resolutions, which substitute proposed to change the punishment of the accused members from expulsion, to condemnation and censure. This substitute consisted of two resolutions, and the following preamble:

"Whereas, by the report of the special committee herein, it appears that the acts charged as offenses against members of this House, in connection with the Credit Mobilier of America, occurred more than five years ago, and long before the election of such persons to this Congress, two elections by the people having intervened, and whereas grave doubts exist as to the rightful exercise by this House of its power to expel a member for offenses committed by such member long before his election thereto, and not connected with such election. Therefore," etc. The resolutions of condemnation and censure, following this preamble, were first voted upon

[1] Cong. Globe, Third Session, 42d Congress, part 3, p. 1651.

and were adopted by the House. A separate vote was then taken on the adoption of the preamble, and it was lost by a vote of ninety-eight yeas to one hundred and thirteen nays.[1] Thus the House decided to sustain the doctrine contended for by the special committee, and against the doctrine laid down in the above mentioned report from the committee on the judiciary. It may, therefore, be said that the House has fairly decided the question, and has held that a member may be expelled or punished for offenses committed prior to his election, especially if those offenses were unknown to his constituents at the time of his election. It will of course occur to every one that this is a power which should be exercised with great circumspection and moderation, and with a due regard to the rights both of constituencies and of individual members of Congress.

§ 637. It is very clear that either House of Congress possesses the power to punish for contempt of its authority. The power to punish for contempt of course includes the power to hold in confinement a person summoned as a witness in the course of an investigation before either House, or before a committee thereof, and who refuses to answer proper questions put to him, by the House or by the committee under the order of the House. This latter is not strictly punishment for the contempt, because in such a case the recusant witness may release himself from confinement by answering, but it is a necessary and proper exercise of the authority of the House to compel the disclosure of all facts within the knowledge of any witness which affect the order, the dignity, or the purity of its legislation. These general rules are well settled by the authorities.[2] As we shall presently see this power to punish a witness for contempt in

[1] See Globe, Third Session, 42d Congress, pp. 1830 to 1835.

[2] Cooley on Const. Lim., 133; Anderson *v.* Dunn, 6 Wheat, 204; Stockdale *v.* Hansard, 9 Ad. & El., 231; Burnham *v.* Morrisey, 14 Gray, 226; State *v.* Mathews, 37 N. H., 450; Case of Irwin, 43d Congress; Case of Walcott, 35th Congress.

refusing to answer questions put to him, is not a general power, but one which exists only in cases where the jurisdiction of the House is made to appear.

§ 638. An examination of the authorities upon the subject, will show that not alone the two Houses of Congress, but our legislative bodies generally, possess the power to protect themselves by punishment for contempt, and by expulsion of a member. This is a power inherent in every legislative body. The power to punish contempts of its authority which belongs to legislative bodies in general, is not limited to the punishment of members, but reaches other persons who are shown to be within the jurisdiction of the House, and it belongs to each House of our State legislatures, whether expressly conferred by constitutional provision or not. Where, however, imprisonment is imposed by a legislative body as a punishment for contempt, or as a means of compelling disclosures by a witness, it must terminate with the final adjournment of the House, and if the prisoner be not then discharged by its order, he may be released on habeas corpus.[1]

§ 639. An act of Congress of 24th January, 1857, provides for the punishment by fine and imprisonment, of any person who having been summoned as a witness by the authority of either House of Congress, shall willfully make default, or who having appeared shall refuse to answer any question pertinent to the question under inquiry. The said act further provides in the last section thereof as follows:

"That when a witness shall fail to testify as provided in the previous sections of this act, and the fact shall be reported to the House, it shall be the duty of the Speaker of the House or the President of the Senate to certify the fact, under the seal of the House or Senate, to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."[2]

[1] Jefferson's Man., Sec. 18; Cooley on Const. Lim., 134.
[2] Rev. St. U. S., p. 17.

Under this statute it has been claimed that the Houses of Congress are deprived of the power to punish for contempt, and that they have authority only to report a case of contempt to the proper district attorney to be laid before the grand jury. But this is an erroneous view of the effect of the statute. Because a contempt of the authority of the House is made by statute a misdemeanor, it does not thereby cease to be a contempt. The power of the House or Senate to punish ceases with its final adjournment, and the punishment which it may inflict is therefore often very inadequate. If the offense is committed near the close of a Congress, the utmost that either House can do, may be to confine the offender for a few days or possibly only for a few hours. It was for this reason, doubtless, that Congress provided by the statute above named a more effective remedy by indictment. This view of the statute was sustained by the criminal court of the District of Columbia in the case of R. B. Irwin, decided by Judge McArthur, January, 1875. The House of Representatives having committed Irwin to the common jail of the District of Columbia for contempt, in refusing to answer proper questions put to him in the course of an investigation, he applied to said court for release upon habeas corpus, and his counsel urged, as one ground for his discharge from imprisonment, that under the statute above mentioned, the House had no power to commit him, its authority over him having been exhausted by a certification of the facts to the district attorney. The court overruled this point and in the course of his opinion the judge used this language:

"It is said that inasmuch as Congress has created the act of a witness refusing to answer a misdemeanor, they have abolished it as a contempt. I can not so regard it. It appears to me that the punishment provided in the statute for this as an offense does not merge the contempt, and does not abolish the power of the House. It appears to me that it has not been so understood from the time of the enactment

of the statute; and I believe this is the first time that that aspect of the case has ever been presented for judicial examination. There is nothing clearer than that the same act may be both a misdemeanor and a contempt. If one member should strike another while the House was in session, and in its presence, it would be a contempt of the House, and a misdemeanor under the law, for which he could be punished. It would be no answer to the proceedings in the House for contempt to say that he was liable under the general law of the land, to be punished for the misdemeanor."

§ 640. The power of legislative bodies to punish their, own members, as well as others, for contempt, is not a general unlimited power, but one which can be exercised only to the extent that it is conferred either by express constitutional or statutory provision, or by necessary implication therefrom. Thus in the case of *Kilbourne* v. *Thompson*,[1] it was held that although the House of Representatives of the United States can punish its own members for disorderly conduct or for failure to attend its sessions, and can decide cases of contested elections and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government and may, where the examination of witnesses is necessary to the performance of these duties fine or imprison a contumacious witness, there is not found in the Constitution of the United States any *general* power vested in either house to punish for contempt. It was therefore held in that case that the imprisonment of Kilbourne for refusing to divulge his private affairs before a committee of investigation of the house was unlawful, because the particular matter about which the witness was examined was not a matter to which the authority of the house extended. The elaborate and exhaustive opinion by Mr. Justice Miller in this case discusses fully the whole subject, and may be referred to as settling finally the question of the powers of

[1] 103 U. S., 168.

the Houses of Congress in the matter of punishing persons charged with contempt. *Anderson* v. *Dunn*, *supra*, is commented upon and some of its reasoning overruled and rejected.[1]

[1] [The Legislature of the State of New York does not possess the common-law power to punish for contempt which is exercised by the British Parliament. It has only such powers in that respect as are expressly conferred upon it. People *v.* Webb (Sup. Ct. N. Y., 1889), 5 N. Y. Sup., 855.]

CHAPTER XX.

CORPORATE ELECTIONS.

§ 641. Corporations governed by stockholders.
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§ 641. Strictly speaking a corporation consists of the whole number of its stockholders; but in point of fact the business of such bodies is carried on by officers or agents chosen or elected by the stockholders. In the exercise of the power of electing officers, the majority rules. Whoever takes shares in a corporation is understood as consenting to be bound by the action of the majority proceeding within the scope of the powers conferred by the charter or organic law of the corporation.[1]

§ 642. At common law it seems each shareholder was entitled to but one vote irrespective of the number of shares held by him.[2] But by long continued custom and usage, it has been established as a principle of corporation law that each shareholder is entitled to one vote for each of his shares of stock and this is presumed to be the law governing every corporation unless a contrary intention is expressed by the charter, or some general provision of law. It is very generally provided by statute, or by express provision of charter or articles of association that such shall be the rule.[3]

§ 643. The qualifications for voting required of a stockholder are that he shall be a *bona fide* holder of stock, and shall have complied with all requirements of the statute or Constitution of the particular State and of the charter of the company prescribing terms or conditions upon which the right of stockholders to vote is to be exercised. Stockholders are not disqualified from voting by reason of personal interest. If this were a disqualification, they could not vote at all, as all stockholders are necessarily personally interested in all the business transactions of the corporation of which they are members.

The rule which forbids an officer or agent to represent the corporation in a transaction where his interests are hostile

[1] Morawetz on Private Corp., 2nd Ed., Secs. 474, 475, 641, 647; **Dudley** v. Ky. High School, 9 Bush., 578.

[2] Taylor v. Griswold, 14 N. J. Law, 222, 237.

[3] Morawetz on Private Corp., Sec. 476.

to those of the corporation, has never been applied to determine the qualifications of stockholders to vote at a corporate election. The courts will not enter into an investigation as to the interests of the numerous stockholders voting at a general corporate meeting.[1]

This doctrine, however, has its limitations; and it is safe to say that the majority of the stockholders can not fraudulently conspire together to defraud the corporation of its property or rights, nor to injure the minority, for their own personal advantage. And if, in attempting to carry out a scheme of this sort, and as a part of the conspiracy, the majority of the stockholders should elect a board of directors composed of their tools and pledged to carry out the conspiracy, it is not doubted that the courts would interfere at the suit of a stockholder and afford relief. The majority must exercise diligence and fidelity in administering the company's affairs.[2]

§ 644. Each shareholder in a corporation is entitled as a matter of absolute right to be present and vote at any meeting of shareholders held for the purpose of electing officers or deciding any other question by the action of the shareholders as a body.[3] He is also entitled to obtain from the agents of the company the proper evidence of his right to vote, as for example, a certificate showing the number of shares to which he is entitled, the extent to which they have been paid up and the like. A shareholder who has purchased his stock in the market in good faith is entitled to have the transfer thereof entered upon the books in accordance with law. For the enforcement of these rights such shareholder may proceed by mandamus or by bill in equity for specific relief; or he may sue for and recover damages.[4]

§ 645. As already stated, the right to vote belongs to the

[1] Morawetz on Priv. Corp., Sec. 477.

[2] Meeker *v.* Winthrop Iron Co., 17 Fed. Rep., 49; Morawetz on Priv. Corp., Secs. 478, 520, and cases cited.

[3] [A by-law authorizing holders of railroad bonds to vote at stockholders' meetings is void. Durkee *v.* People, 155 Ill., 354.]

[4] Mor. Priv. Corp., Secs. 212 *et seq.*, 453, 236, and cases cited in notes.

shareholders; that is to say, to the persons who hold the legal title to the shares of stock outstanding. A mere equitable assignment of shares does not deprive the holder thereof of his right to vote thereon. So it has been held that a pledgor or mortgagor of shares is still entitled to vote as the legal holder thereof.[1] The right to vote at a shareholders' meeting is not limited to natural persons. A corporation or other collective body holding shares may vote upon them through a duly authorized agent.

§ 646. While the general rule is that the right to vote belongs to the legal holder of shares, yet this rule is not without its limitations. If the shareholder has sold all his interest in his shares, he has no right to vote upon such shares without the consent of his vendee, although there may be no transfer of the shares upon the company's books.[2] But the right of the legal holder of shares to vote thereon is complete as against the other shareholders, and the latter have no right to inquire into the question of the equitable ownership of such shares.[3]

§ 647. Where a dispute arises as to who is entitled to vote upon a particular share of stock, reference is generally had to the corporate transfer book. The person there registered as the owner of the stock is entitled to vote upon it. The inspectors can not well inquire beyond the transfer book, especially where the statute provides, as is the case in most of the States, that the stock shall be transferred only upon the books of the company.[4]

§ 648. It is not necessary that the owner of stock should produce his certificate, or even have a certificate, in order to

[1] McHenry *v.* Jewett, 26 Me., 453; *In re* Barker, 6 Wend., 509; Hoppin *v.* Buffum, 9 R. I., 513; *Ex parte* Willcocks, 7 Cow., 402; Vail *v.* Hamilton, 85 N. Y., 453; Morawetz on Priv. Corp., Sec. 483. [And a pledgor of stock which stands in the name of the pledgee may compel the pledgee by a suit in equity to give him a proxy to vote or to transfer the stock to him for that purpose. Hoppin *v.* Buffum, 9 R. I., 513; Vowell *v.* Thompson, 3 Cranch, Cir. Ct. Rep., 428.]

[2] McHenry *v.* Jewett, 26 Me., 453.

[3] *Re* St. Lawrence Steamboat Co., 44 N. J. Law, 529, 539, and cases cited.

[4] *In re* Long Island Railroad Co., 19 Wend., 37, 44; *Ex parte* Willcocks, 7 Cow., 404; State *v.* Ferris, 42 Conn., 560, 568.

be entitled to vote.[1] And it has been held that it is not necessary that the holder of the stock shall have paid for the same in order to entitle him to vote, if he has purchased it and is indebted for the purchase price. This vests the title to the stock in him, together with the right to vote upon it.[2]

§ 649. The general rule is that a person holding stock as a trustee is entitled to vote upon the stock.[3]

It has, however, been decided that where stock is held by a naked trustee without any interest, the *cestui que* trust may compel the trustee to vote as he shall direct.[4] An executor or administrator may vote on stock of his testator or intestate. This upon the ground that the title is vested by law in such executor or administrator; and it has been held that in such case the right to vote can not be denied upon the ground that the stock has not been transferred on the books of the corporation.[5] It is well settled that a corporation can not vote upon shares of its own stock.

§ 650. It is sometimes important to determine at what time a person becomes entitled to the right to vote as a stockholder of a corporation, or in other words when the contract of membership becomes complete so as to clothe the stockholder with the privileges as well as to impose upon him the duties of membership. The rule is that the contract is complete when a subscription to the stock of the corporation has been entered into and all conditions precedent have been complied with. Stock subscriptions are often entered

[1] Becket *v.* Houston, 32 Ind., 393.

[2] Birmingham, etc., Railway Co. *v.* Locke, 1 Q. B., 256; Savage *v.* Ball, 17 N. J. Eq., 142; Downing *v.* Potts, 3 Zab., 66.

[3] Widow Conant *v.* Millaudon, 5 La. Ann., 542; Wilson *v.* Proprietors of Central Bridge, 9 R. I., 590; Hoppin *v.* Buffum, 9 Id., 513; Crease *v.* Babcock, 10 Metc., 525, 545; In *re* Barker, 6 Wend., 509; In the matter of the Mohawk & Hudson R. R. Co., 19 Id., 135; In the matter of the North Shore & Staten Island Ferry Co., 63 Barb., 556; *Ex parte* Holmes, 5 Cow., 426; Pender *v.* Lushington, L. R., 6 Chan. Div., 70.

[4] Hoppin *v.* Buffum, 9 R. I., 513; *Ex parte* Holmes, 5 Cow., 426, 435.

[5] *In re* North Shore & Staten Island Ferry Co., 63 Barb., 556; Middlebrook *v.* Bank, 3 Keyes (N. Y.), 135. [Right of executor under statute. *In re* Election of Cape May Nav. Co., 51 N. J. L., 78. In California a surviving partner may vote partnership stock in his hands as an asset, the firm business being unsettled. Allen *v.* Hill, 16 Cal., 113.]

into before the incorporation has been completed, and in such cases the contract is to be regarded as consummated as soon as the incorporation is accomplished and the prescribed conditions are complied with. At this moment the subscriber becomes a shareholder with the right to vote as such. In other words the transaction whereby a person becomes a stockholder in a corporation is a contract, the terms and conditions of which are generally in large part prescribed by law, but which may embody terms and conditions not required by law, provided they are not in conflict with it.

To determine when a person has become a stockholder it is necessary to determine when the contract of membership was complete by its own terms and the terms of the governing statute.[1] It is not necessary that a stock certificate should be issued in order to complete the contract of membership in a corporation. Such a certificate is *evidence* of membership, but is not a necessary part of the contract.[2]

§ 651. The formalities to be observed in holding meetings of shareholders for the purpose of electing officers are generally regulated by statute, charter, or by-laws. If, however, regulations are prescribed by by-laws, they must be in harmony with the general provisions of the charter and with the laws under which the corporation was formed, and must no attempt to abridge the substantial rights of any shareholder.[3]

§ 652. Due notice must be given of each meeting of shareholders held for the purpose of electing officers. Every shareholder is entitled to be present at such a meeting and to have a hearing as well as the right to vote; and therefore an election held at a meeting at which some of the stockholders have no notice is invalid and may be set aside.[4] If

[1] Morawetz on Priv. Corp., Sec. 56 and cases cited in notes 1, 2, 3 and 4.

[2] Id. and cases cited in note 5.

[3] Brewster *v.* Hartley, 37 Cal., 15, 24; People *v.* Phillips, 1 Denio, 388; Taylor *v.* Griswold, 14 N. J. Law, (Green), 222; Petty *v.* Tooker, 21 N. Y., 267; Morawetz on Priv. Corp., 487.

[4] [But the appearance of all the stockholders at a corporate meeting will be construed to be a waiver of formal notice. Judah *v.* Am. Live Stock Ins. Co., 4 Ind., 333; Thompson on Corp., Sec. 712.]

notice to any one is omitted, those present have no right to go on with the election. The rule is, that power which is entrusted to the whole body of stockholders can not be legally exercised without notice to all.[1]

§ 653. Notice, however, may be given by law, or by the charter, by-laws, or standing rules of the corporation; and if by either of these a time is fixed at which meetings are to be held for the election of officers, no further notice is necessary.[2] As to presumption that a meeting of stockholders has been regularly called and due notice given to all stockholders, see authorities cited in note.[3]

§ 654. Meetings of shareholders held for the purpose of electing officers of the corporation, if not held at a time fixed by some general law or some provision of the charter, by-laws, or standing rules of the corporation, must be called by persons having competent authority.[4] Ordinarily the officers who are to have such authority are named in the charter or by-laws which also usually determine the mode of calling such meetings. But in the absence of such provision, the managing agents of the company have ample authority to act in the premises.[5] If the officers of a corporation whose duty it is to call a meeting for the election of officers shall wrongfully refuse to perform that duty, mandamus will lie to compel its performance. As to the form of the notice to be given, it is

[1] Commonwealth *v.* Cullen, 13 Pa. St., 133; State *v.* Bonnell, 35 Ohio St., 10; MacDougall *v.* Gardiner, L. R., 1 Ch. D., 14; People *v.* Railroad Co., 55 Barb., 344; Morawetz on Priv. Corp., Sec. 479; People *v.* Batchelor, 22 N. Y., 134; Jackson *v.* Hampden, 20 Me., 37; McDaniels *v.* Manf'g Co., 22 Vt., 274; San Buena Ventura Manf'g Co. *v.* Vassault, 50 Cal., 534; People *v.* Railroad Co., 55 Barb., 344; Stockholders *v.* Railroad Co., 12 Bush (Ky.), 62; Morawetz on Priv. Corp., Sec. 479, note 3; [Carter Gas Engine Co. *v.* Carter, 47 Ill. Ap., 36; Hill *v.* Rich Hill Coal Mining Co., 119 Mo., 9].

[2] Warner *v.* Mower, 11 Vt., 385, 391; State *v.* Bonnell, 35 Ohio St., 10; People *v.* Batchelor, 22 N. Y., 128; San Buena Ventura Manf'g Co. *v.* Vassault, 50 Cal., 534; Morawetz on Priv. Corp., Sec. 479.

[3] Sargent *v.* Webster, 13 Metc. (Mass.), 497; McDaniels *v.* Flower Brook Manf'g Co., 22 Vt., 274; Lane *v.* Brainard, 30 Conn., 566, 567; Pitts *v.* Temple, 2 Mass., 538; Copp *v.* Lamp, 12 Me., 312.

[4] [Reilly *v.* Oglebay, 25 W. Va., 36; Goulding *v.* Clark, 34 N. H., 148.]

[5] Stebbins *v.* Merritt, 10 Cush., 27; Morawetz on Priv. Corp., Sec. 480.

sufficient to say that it must fix the exact time and place of the meeting in all cases; and where so provided by law, or by the charter, or by-laws, the notice must also state the nature of the business to be transacted, or the officers to be chosen. The time of the meeting must be stated with precision, and no business can be transacted before the time set.[1] The meeting must be opened within a reasonable time after the hour indicated in the notice or fixed by law or otherwise.[2]

§ 655. If the officers of the corporation fail or neglect to give the required notice of a meeting of stockholders for the purpose of electing officers, mandamus will lie to compel them to take such action as the law authorizes to call such an election.[3] If it were otherwise, the trustees or directors and officers of a corporation might continue themselves in office indefinitely by failing to call an annual election, and the stockholders would be powerless. In most of the States there are statutes providing for the manner of calling an election in case, for any reason, the time fixed by law or by charter provision shall pass without an election being held; and the duty of obedience to such statutory provisions will be compelled by mandamus.[4] Where the civil law prevails, as in the State of Louisiana, if the proper authorities of the corporation refuse to act, or die, or resign, a court of equity will appoint a receiver or manager *ad interim* for the purpose of winding up the concern.[5] But in a State where the common law prevails, it seems that a court of equity would not interfere in such a case, because there is an adequate remedy by mandamus.[6]

[1] People *v.* Railroad Co., 55 Barb., 344; People *v.* Batchelor, 22 N. Y., 134.

[2] South School District *v.* Blakesley, 13 Conn., 227, 237; State *v.* Bonnell, 35 Ohio St., 10.

[3] [Mottu *v.* Primrose, 23 Md., 482; Congregational Society of Bethany *v.* Sperry, 10 Conn., 200.]

[4] People *v.* Board of Governors of Albany Hospital, 61 Barb., 397; State of Nevada *v.* Wright, 10 Nev., 167; People *v.* Cummings, 72 N. Y., 433; Cook on Stock and Stockholders, Sec. 906.

[5] Brown *v.* Union Insurance Co., 3 La. Ann., 177, 182.

[6] Curry *v.* Woodward, 53 Ala., 371, 375; Knowlton *v.* Ackley, 8 Cush., 93.

§ 656. A meeting of shareholders for the purpose of electing officers must be held at a reasonable hour and must not be called at an unusual place where the stockholders would be unable to attend without great inconvenience.[1] Such meetings must be held within the State by which the corporation was chartered, unless all the stockholders give their consent to the holding of a meeting in a foreign jurisdiction,[2] [or unless permitted by statutory provision].[3]

§ 657. A meeting of shareholders held for the election of officers of a corporation, unlike a general election by the people, may be adjourned from time to time, and all the shareholders are bound to take notice of such adjournment. Any business which may not have been transacted at the regular meeting may be transacted at the adjourned meeting.[4]

§ 658. Upon the question of the validity of a corporate meeting held beyond the borders of the State creating the corporation, there is a serious conflict among the authorities. It has been held in a number of cases that the proceedings of such a meeting are wholly void, and not capable of being rendered valid by subsequent ratification by the corporation at a regular meeting.[5] There are other cases holding that the votes and proceedings at such a meeting are voidable rather than void, and that they may be subsequently ratified by the corporation.[6]

[1] [First Nat. Bank *v.* Asheville Furniture & Lumber Co., 116 N. C., 827.]

[2] Morawetz on Priv. Corp., Sec. 488, and numerous cases cited in note 2.

[3] [Statutes of Minnesota, 1881.]

[4] Warner *v.* Mower, 11 Vt., 385.

[5] Aspinwall *v.* Ohio, etc., R. R. Co., 20 Ind., 492, 497; Wood Hydraulic Hose Mining Co. *v.* King, 45 Ga., 35; Miller *v.* Ewer, 27 Me., 509; Freeman *v.* Machias Water Power, etc., Co., 38 Id., 343; Hilles *v.* Parrish, 14 N. J. Eq., 380; Ormsby *v.* Vermont Copper Mining Co., 56 N. Y., 623; Merrick *v.* Brainard, 38 Barb., 574. See S. C., *sub nom.*, Merrick *v.* Van Santvoord, 34 N. Y., 208.

[6] Ohio, etc., R. R. Co. *v.* McPherson, 35 Mo., 13; Freeman *v.* Machias Water Power Co., 38 Me., 343. The Legislature may also validate the acts passed at such a meeting, in case it could have authorized the meeting in the first instance. Graham *v.* Boston, Hartford & Erie R. R. Co., 118 U. S., 161, 178, affirming S. C., 14 Fed. Rep., 753. See also

§ 659. Whatever the true rule may be, it is clear that the corporation itself can not be heard to insist that such proceedings are void.[1] The corporation is estopped to deny the validity of such proceedings, as is also any stockholder who takes part in such a meeting.[2] It is equally clear that officers chosen at a meeting of stockholders held outside of the State, and who qualify and enter upon their duties, will be regarded as officers *de facto* whose acts as to third parties and the public will bind the corporation. It seems evident, however, that in the present state of the law, it is an unsafe proceeding to hold meetings for the transaction of the business of a corporation outside of the State creating it, and that it is especially desirable that all meetings of stockholders of a corporation for the purpose of electing officers, should be held within such State.

§ 660. At common law voting by proxy is unknown, and therefore the members of corporations must vote personally unless the right to vote by proxy is conferred by statute, or by the charter or by-laws.[3] It is believed that the right to vote by proxy is conferred upon the shareholders in a very large majority of the corporations in this country by express provision of statute or by the company's charter or by-laws. As to the form in which the authority to vote may be dele-

Grenada Co. *v.* Brogden, 112 U. S., 261; Anderson *v.* Santa Anna, 116 Id., 356; Shaw *v.* Norfolk R. R. Co., 5 Gray, 162; Howe *v.* Freeman, 14 Id., 566. [The proceedings of a meeting of the board of directors of an Alabama corporation held outside that State cannot be introduced in evidence in an action in a court of Alabama unless it be first shown that the requirements of the statute (Acts 1889, p. 76) regulating the holding of such meetings outside the State have been complied with. Brockway *v.* Gadsden Mineral Land Co., 102 Ala., 620.]

[1] Heath *v.* Silverthorn Lead Mining Co., 39 Wis., 146.

[2] Camp *v.* Byrne, 41 Mo., 525; Ohio, etc., Railroad Co. *v.* McPherson, 35 Mo., 13.

[3] Phillips *v.* Wickham, 1 Paige, 590, 598; Taylor *v.* Griswold, 14 N. J. Law, 222; 2 Kent's Com., 294; People *v.* Twaddell, 18 Hun, 427; Craig *v.* First Presb. Church, 88 Pa. St., 42; Commonwealth *v.* Bringhurst, 103 Id., 134. See Brown *v.* Commonwealth, 3 Grant's Cases, 209; State *v.* Tudor, 5 Day, 329; Matter of Barker, 6 Wend., 409.

gated, it is sufficient to say that it must be in writing and must be sufficient to reasonably insure the inspector that the agent is acting by authority of his principal; but no prescribed form need be executed with any particular formality.[1] The authority of a proxy may be revoked at any time, unless the delegation be irrevocable as between the parties.[2]

§ 661. Upon the question, by what officers shall a corporate election be conducted, it is sufficient to say that in so far as the mode of proceeding is prescribed by statute, or by provisions of the charter or by-laws, it is desirable that they be strictly followed, though ordinarily such provisions will be regarded as directory only, and a departure from them will not invalidate the election provided there is a fair expression of the will of the majority.[3] The form of proceeding is in general not material, provided no positive or mandatory provision of the statute or charter is violated and the election is fair and orderly.[4] It is not essential, in the absence of an express provision of law or of the charter, that the corporate officers shall conduct the election.[5] The corporators, when assembled, may exercise the power of appointing inspectors for the purposes of the election, if the

[1] *Re* St. Lawrence Steamboat Co., 44 N. J. Law, 529, 534; *Re* Cecil, 36 How. Pr., 477; Marre *v.* Garrison, 13 Abb. New Cas., 210; Cook on Stock and Stockholders, Sec. 608.

[2] Reed *v.* Bank of Newburgh, 6 Paige, 337.

[3] [An election of directors of an incorporated company will not be set aside on a summary application for that purpose on the ground that the inspectors were not sworn in the form prescribed by the statutes; and it seems that an election would not be set aside upon such application, although no oath was administered to the inspectors, if no objection was interposed at the time of the election. It is enough that they were duly appointed and entered upon the discharge of the duties of their office. In the Matter of the Election of the Directors of the Mohawk & Hudson R. R. Co., 19 Wend., 135.]

[4] Fox *v.* Allensville, etc., Turnpike Co., 46 Ind., 31; Cook on Stock and Stockholders, Sec. 605.

[5] People *v.* Twaddell, 18 Hun, 427.

inspectors provided for by law fail to act[1] or are restrained by injunction.[2]

§ 662. When the shareholders of a corporation are assembled for the purpose of electing officers, they have the right to appoint inspectors or judges of election.[3] This right belongs exclusively to the shareholders and cannot be exercised by the board of directors.

§ 663. Concerning the reception of illegal votes, it is sufficient to say that the rules which are to determine whether the election is thereby vitiated are the same with respect to corporate elections as in cases of elections by the people. These rules have been sufficiently stated elsewhere in this work.[4]

§ 664. What is known as cumulative voting in private corporations is provided for by constitutional provisions in several of the States, and among them Illinois, Pennsylvania, West Virginia, Nebraska, Missouri and California. These constitutional provisions provide in substance that the voting power of each shareholder shall be the number of shares he owns multiplied by the number of directors, and that he may divide this power among as many candidates not greater than the whole number to be elected, and in such proportions, as he shall see fit. There seems to be no reason to question the validity of these provisions in so far as they apply to corporations organized after their adoption; but it has been held that they are unconstitutional as impairing the obligation of contracts and infringing on vested rights so far as they concern corporations chartered before the adoption of the Constitution.[5]

[1] Matter of Wheeler, 2 Abb. Prac. (N. S.), 361.

[2] People *v.* Railroad Co., 55 Barb., 344.

[3] State *v.* Merchant, 37 Ohio St., 251.

[4] See, however, Morawetz on Priv. Corp., Sec. 485, and cases cited in note.

[5] Hayes *v.* Commonwealth of Pennsylvania, 82 Pa. St., 518; State *v.* Greer, 78 Mo., 188; S. C., 8 Am. and Eng. Corp. Cas., 322; Cook on Stock and Stockholders, Sec. 609; Commissioners *v.* Harper, 38 Ill., 103. And see Morawetz on Priv. Corp., Sec. 1059.

§ 665. It is held in New York that where a corporate election is held for the purpose of choosing a board of directors composed of a given number, any stockholder may vote for any number of candidates not exceeding the whole number to be chosen.[1] In that case thirteen directors were to be elected, and one of the tickets voted contained the names of only seven persons, and it was held that the ticket was not void because it did not contain thirteen names. Davis, P. J., said:

"No stockholder was bound to vote for any larger number of persons than he chose, and any number of persons receiving a majority of lawful votes are elected, although there be a failure to elect the full number required by law."

It would seem, therefore, that while a stockholder cannot concentrate more votes than he is entitled to cast upon a number of candidates less than the whole number to be chosen, unless authorized so to do by the express statute or constitutional provision,[2] yet he may cast the votes he is entitled to cast for any number he chooses not exceeding the whole number to be elected.

§ 666. Where an election was held for the purpose of choosing seven directors of a corporation, and a cumulative system of voting was adopted as authorized by the Constitution of Pennsylvania, and five directors only received the necessary pluralities, it was held that said election was valid as to the five directors so chosen, and that they had full power to act as a board, even though the remaining two directors were not chosen.[3]

[1] Vandenburgh *v.* Railroad Co., 29 Hun, 348.

[2] Hayes *v.* Commonwealth, 82 Pa. St., 518; Pierce *v.* Commonwealth, 104 Pa. St., 150.

[3] Wright *v.* Commonwealth, 109 Pa. St., 560. [Where, by an act incorporating an insurance company, the management of the stock and affairs of the corporation was given to a board of twenty-three directors to be annually elected, a major part of whom by the act were competent to the transaction of all the business of the corporation, and an election of the directors took place, at which only twenty-two persons received a plurality of votes, such twenty-two persons were duly

§ 667. In a late case in Pennsylvania it is held that the directors of a corporation have no power to accept the provisions of a constitutional amendment authorizing cumulative voting where the charter gives each stockholder one vote for each share of stock.[1]

§ 668. In corporate elections, as well as in elections by the people of public officers, the rule has been established that votes cast for a disqualified or ineligible candidate are not thrown away so as to make the election fall on the candidate having a minority of votes, especially if it is not shown that the stockholders casting such votes had knowledge of the fact which rendered the candidate voted for by them ineligible and disabled by law from holding office.[2]

§ 669. It is well settled that a failure to elect officers at the time fixed by law does not work a dissolution of the corporation. The old officers will hold over until their successors are duly elected.[3]

§ 670. The duration of the official term of officers of corporations is in this country very generally fixed by statute or charter provision. It is almost always provided in terms that the officer shall hold for a definite period and until his successor is elected and qualified.[4] In England and according to the common law, it seems that officers of corporations do not hold over until the election and qualification of their successors, unless by express provision of statute or charter. The right to hold over did not, by common law,

elected and took the place of their predecessors, notwithstanding that it chanced that the full number of twenty-three directors was not filled up. In the Matter of the Union Insurance Co., 22 Wend., 591.]

[1] Baker's Appeal, 109 Pa. St., 461.

[2] *Re* St. Lawrence Steamboat Co., 44 N. J. Law, 529, 535, citing Regina *v.* Coaks, 3 E. & B., 249; Regina *v.* Mayor of Tewksbury, L. R., 3 Q. B., 629; Drinkwater *v.* Deakin, L. R., 9 C. P., 626; Etherington *v.* Wilson, L. R., 20 Eq., 606; *Re* Long Island R. R. Co., 19 Wend., 37; Downing *v.* Potts, 3 Zabr., 66; [*In re* St. Lawrence Steamboat Co., 44 N. J. L., 529].

[3] State *v.* Bonnell, 35 Ohio St., 10, 17; Smith *v.* Silver Valley Mining Co., 64 Md., 85; People *v.* Twaddell, 18 Hun, 427; Reilly *v.* Oglebay, 25 W. Va., 36, 43.

[4] [Nathan *v.* Tompkins, 82 Ala., 437.]

exist by implication, and was not an incident to the office.[1] A different doctrine, however, prevails in this country, and it is here very generally held that, even in the absence of a provision for holding over, corporate officers may continue to discharge the duties of their offices until their successors are chosen and qualified. In other words, unless there is a statute to the contrary, corporate officers will hold until their successors are qualified so as to take their places.[2] It is not, however, necessary that the restriction against holding over should be express. It may be implied by the use of any language which clearly shows the intention of the Legislature to limit the tenure strictly to a definite period; as, for example, where it is provided that the officers shall be annually elected on a particular day, and that they shall hold from one election day till the next, or that they shall be elected for the year ensuing *only*. In such cases they cannot hold over beyond the fixed term.[3]

§ 671. The law affords several distinct remedies, either of which may be pursued by parties aggrieved by illegal or fraudulent corporate elections.[4] In the first place, the com-

[1] Dill. on Munic. Corp., Sec. 217; Rex *v.* Atkins, 4 Mod., 12; Rex *v.* Thornton, 4 East, 294.

[2] Dill. on Munic. Corp., Sec. 219; People *v.* Runkel, 9 Johns., 147; Slee *v.* Bloom, 5 Johns. Ch., 366, 378; 2 Kent's Com., 238; Kelsy *v.* Wright, 1 Root (Conn.), 83; South Bay, etc., Co. *v.* Gray, 30 Me., 547; Chandler *v.* Bradish, 23 Vt., 416; Overseers of Poor *v.* Sears, 22 Pick., 122, 130; School Dist. *v.* Allerton, 12 Metc., 105; Dow *v.* Bullock, 13 Gray, 136; McCall *v.* Byram, etc., Co., 6 Conn., 428.

[3] Dill. Munic. Corp., Sec. 220 and cases cited in notes; Tuley *v.* State, 1 Ind. (Carter), 500, 502. [When the charter of a corporation provides that annual meetings for the election of directors shall be held by the stockholders, the directors cannot by a by-law so change the time of holding the annual election as to continue themselves in office more than a year against the wishes of the holders of the majority of the stock. Elkins *v.* Camden & Atlantic Ry. Co., 36 N. J. Eq., 467. As to expiration of term of one elected to fill a vacancy, see State *ex rel.* Piper *v.* Batt, 38 La. Ann., 955.]

[4] [Mandamus will lie upon the petition of a private corporation to compel the surrender to its proper officers of books and papers pertaining to their offices and held by persons actually but unlawfully exer-

mon-law remedy by action of quo warranto in the name of the State upon the relation of the parties aggrieved will lie to try the title of the person claiming an office by virtue of such an election;[1] or if action by quo warranto has been, by the law of the particular State, supplanted by a statutory remedy of a similar nature, this can be resorted to for the same purpose.[2] The rules and principles applicable to elections of public officers in general which are treated of in other portions of this work will apply, with few if any exceptions, to such a suit. Besides proceedings in quo warranto at common law or under statute regulating the contest of elections, there is a concurrent remedy in equity in a particular class of cases.[3] Where the question of the validity of an election arises incidentally in a proceeding in equity, the court will inquire into it and pass upon it.[4] And it has been held that fraud in the election of directors of a corporation will give a court of equity jurisdiction to set the same aside.[5] In the latter case the opinion was expressed by the court that "if the election of certain persons as directors is the result of a conspiracy, a court of chancery will find its

cising the functions of those offices under a claim of right, but having usurped the offices under the choice of a minority of the stockholders by the use of illegal votes. Am. Railway-Frog Co. *v.* Haven, 101 Mass., 398. The directors of a corporation cannot dispute the right of a stockholder holding a majority of the stock to have an election in accordance with the by-laws of the corporation, on the ground that he intends to use his legal rights for purposes detrimental to the interests of the corporation, and that the proposed election is a step towards the illegal control of the property. Camden R. R. *v.* Elkins, 37 N. J. Eq., 273.]

[1] [Jenkins *v.* Baxter, 160 Pa. St., 199.]

[2] [Tomlin *v.* Farmers' & Merchants' Bank, 52 Mo. Ap., 430; *In re* St. Lawrence Steamboat Co., 44 N. J. Law, 529.]

[3] [An injunction will be granted to restrain the voting of stock in violation of the charter provisions of a corporation, and to restrain a transfer made for the purpose of fraudulently controlling an election. Webb *v.* Ridgely, 38 Md., 364; Busey *v.* Hooper, 35 Md., 27.]

[4] Mechanics' National Bank, etc., *v.* Burnett Manf'g Co., 32 N. J. Eq., 236; Johnson *v.* Jones, 23 Id., 216.

[5] Davidson *v.* Grange, 4 Grant's Ch. (Upper Canada), 377; Wadsworth, etc., Gaslight & Coke Co. *v.* Wright, 18 W. R., 728.

arm long enough to deal with such a fraud." It has also been held, irrespective of statutory provision, that the shareholders in a private corporation have such an interest in its affairs as justifies them in appealing to a court of chancery to try and determine the validity of an election of directors.[1] [But a stockholder who, with full knowledge of the objections to the legality of a certain class of votes, attends a meeting of the corporation, participates in its deliberations, and acquiesces in its decisions by canvassing and voting in the election of officers, cannot question the title of the officers elected on the ground that such class of votes was illegal.][2]

Injunction cannot be maintained for the purpose of determining the question of contested election of directors of a corporation.[3]

[1] *In re* Election of St. Lawrence Steamboat Co., 44 N. J. Law, 529. But see New England Mut. Ins. Co. *v.* Phillips, 141 Mass., 535; 13 Am. & Eng. Corp. Cas., 104.

[2] [Thompson on Corporations, Sec. 787; State *v.* Lehre, 7 Rich. Law (S. C.), 234.]

[3] New Eng. Mut. Life Ins. Co. *v.* Phillips, 141 Mass., 535; 13 Am. & Eng. Corp. Cas., 104. [But where an office in a corporation has been obtained by fraud, this confers on a court of equity jurisdiction to inquire into the validity of such election for the purpose of restraining by injunction the acts of one claiming office thereunder. Johnston *v.* Jones, 23 N. J. Eq., 216. See, also, Elkins *v.* Camden & Atlantic Ry. Co., 36 N. J. Eq., 467.]

CHAPTER XXI.

STATUTORY REGULATION OF ELECTIONS.*

§ 672, 673. Importance of the subject.
674. Evils of crowding the polling places.
675. Multiplication of voting precincts.
676. Complete registration.
677. Non-partisan election boards.
677. Presence of witnesses representing all parties.
678, 679. Counting of votes without delay.
680. Protection of voters against intimidation and violence.
681. Fraudulent ballots.
681. Regulation as to size and form of ballot.
682. Summary of necessary provisions.
683–689. Existing statutes.
684. Recent act of Kansas Legislature to prevent crowding at polls.
690. Provisions against counting ballots so printed as to mislead voters.

§ 672. Experience has shown that the careful revision and amendment of the statutes of most of the States regulating the conduct of elections is a matter of the first importance. In the hope of directing the attention of legislators to this subject, of stimulating its consideration, and of securing the much needed action, this chapter has been prepared and is here inserted. The design of the author is not only to show the importance of the subject, but also to submit some practical and, he hopes, useful suggestions as to the character of the legislation required to secure and preserve that without which free government is impossible — the freedom and purity of the ballot.[1]

[1] [The general adoption by the States of the Australian ballot system, embodying the reforms suggested in this chapter, and the consequent revision of the election laws mentioned herein as in force at the time the chapter was written, make it impracticable to indicate adequately by foot-notes the changes which have taken place. The chapter is therefore reproduced as originally published, the following chapter being devoted to the Australian system, the provisions of which have very generally superseded the statutes of the different States referred to herein.]

* This chapter is taken, in substance, from an article on "Our Election Laws," prepared by the author and published in "*The North American Review*" for May, 1879.

§ 673. A government based upon popular suffrage can be successful in the best sense only to the extent that the popular voice is freely expressed, fairly and honestly ascertained, and fully obeyed. It is therefore of the greatest consequence that the purity and sanctity of the ballot should be guarded by the wisest and best legislation that statesmanship can devise. It is impossible to over-estimate the importance of this subject in a government such as ours, where the supreme power is vested only in the people, to be exercised by means of the ballot. Fairness and honesty in the conduct of elections will alone keep pure the sources of power in this government, and thus promote peace and good order and give stability to our institutions. Our election laws ought to be framed and executed with a view to securing these great ends, but truth compels the statement that our statutes are exceedingly imperfect in themselves, and, what is worse, are too often administered in the interest, not of purity and justice, but of party. It is not to be denied that many of the wisest and best of our citizens consider that our institutions are in peril, from the fact that popular elections are so frequently controlled by fraud and violence. Wise and prudent citizens may well say that, if we lose faith in the machinery provided for the expression of the popular will, we must also eventually lose faith in our form of free government, since it can be valuable only in proportion as it is in fact, as well as in theory, a government by the people. As our population increases and our great cities multiply, the problem of how to secure and preserve freedom and fairness in elections, grows annually more grave and difficult. It is to-day a question of how to secure and record a fair and honest expression from at least ten millions of voters. Within the lifetime of some of the present generation it will become a question of dealing with at least forty millions of voters. To be assured that this problem has been solved, is to know that our greatest danger has been removed, and therefore every citizen should be willing to contribute something toward its solution. Let it be premised that the ends to be aimed at by

legislation upon this subject are (1), to secure to all legal voters equal and ample opportunity to vote, and to exclude all others; and (2), to secure a fair canvass and an honest declaration of the result of every election. No difference of opinion can exist among honest men as to the propriety, nay the necessity, of securing these ends, which all will admit constitute the foundation upon which the fabric of free government rests. To render them secure, is to perpetuate our institutions and transmit them pure and strong to future generations. It would seem that no State should hesitate to provide the legislation necessary to secure ends so manifestly just, and so essential to the very existence of free government. Many of the laws upon this subject were originally enacted for the government of a largely rural and agricultural population, who needed few if any restraints, and they have been copied and applied to communities very differently situated from such a population, and, as a whole, by no means so well disposed toward law and order. Assuming that the ends to be sought are freedom and equality among voters, and honesty and perfect fairness in the count, and that these great ends are not always secured under existing laws, let us inquire how we may remedy existing evils by legislation. It is believed that plain, simple, and ample remedies are within our reach, the adoption of which would injure none, while, as nearly as human laws can do so, they would protect the rights of all.

§ 674. First in importance as a means of securing freedom in elections, are such statutory provisions as will prevent the crowding of the polling places by large numbers of people. In some of the States all the voters of an entire county may vote at the county seat, and in all the large cities, and in many of the smaller ones, the crowds that assemble at the polls are large and often disorderly and turbulent. The evils that result from overcrowding the polling places are apparent enough:

1. It delays the process of voting so that each voter

waiting for his turn may be detained for hours. Many business men, who value time more highly than the right of suffrage, are deterred from voting by this consideration alone.

2. It makes it a difficult and disagreeable task for quiet, orderly people, and especially for the sick, lame, and infirm, to press their way through the throng, and many of these are thereby deterred from voting.

3. It makes it impossible to consider with deliberation and decide intelligently questions arising at the polls as to the qualifications of persons whose votes are challenged, and this leads to erroneous rulings. But, what is worse, it affords evil-minded persons the opportunity, by frequent challenges and by unnecessary discussion, to so delay the proceedings as to consume the day and exclude large numbers of legal voters, who by these interruptions, are prevented from reaching the polls within the time required.

4. The practice of crowding the polls by the members of one party, who open the way for their friends and put all possible obstacles in the way of their opponents, is frequently resorted to as a means of defeating a full and fair vote.

§ 675. All these mischiefs can be remedied by requiring a multiplication of voting precincts to such an extent that only a limited number of voters—say not over three hundred—shall be residents of, and voters in any one precinct. This, with a further provision requiring every voter to register and vote in his own precinct and in no other, would, if adopted in all the States, work a reform of vast importance and consequence. This very important subject of legislation is by no means the most difficult one with which our law-makers have to deal. The task of providing against the most crying evils of our system of election laws should be approached with the conviction that the people can well afford to be put to some pains and expense in order to protect the purity of the ballot, and, if thus approached, the problem will be found very easy of solution. The multiplication of voting

precincts will prove an effectual remedy for all the evils which result from overcrowding the polling places, some of which are specified above. A properly guarded statute upon this subject would secure as a rule, sufficient time and opportunity at each poll for the orderly, deliberate and satisfactory transaction of the business of receiving and depositing the ballots of all legal voters, and for the examination and decision of disputed questions arising at the election. Let us suppose that a population containing three hundred voters be the basis upon which election precincts are to be organized, who does not see that, with only that number of votes to be received in the course of the day, the election could be conducted decently and in order? Contrast such an election with the attempt in a great city to receive the ballots of many thousands of voters and pass upon hundreds of challenges!

§ 676. In connection with the increase of the number, and the reduction of the size, of precincts, there should be provided a complete registration, and by this is meant an enumeration of the legal voters of each precinct, made with the utmost possible care. By requiring that each precinct shall be small in the sense of containing only a limited number of voters, and by appointing a board of registration for each precinct, it will be practicable and easy to enroll every voter. This process is especially necessary in the city precincts, and its application only to them would probably be entirely sufficient. If the precinct is not too large in the country, the judge of the election or the bystanders will be able to recognize the voters, with rare exceptions. But in the cities, where the registry must be relied on, provisions should be made to render it accurate, and none but registered voters should be allowed to vote. The persons preparing the lists should be required, if necessary, to go from house to house, and by all reasonable means to make sure that no legal voter is omitted, and the voters themselves should be made to know that they must register if they wish to enjoy the

franchise. Whoever neglects to enroll himself as a voter, can not complain that he is not allowed to vote. The registry list should be printed or written, and posted up at the most public places in the precinct at least ten days prior to the day of election, and corrections and additions should be made up to the day before the election. With these two requirements, namely, small precincts and complete registration, how easy becomes the task of receiving and depositing in the box the ballots of all who are entitled to vote! There can be no objection to these provisions, except that they propose a multiplication of election officers, and some additional labor and expense. To this objection we reply that the end is so important that, in comparison with it, the trouble and expense made necessary to secure it are not worthy of a moment's attention. If, however, the *cost* must be considered, it may be suggested that by having fewer elections, a corresponding saving would be made. Let our officials be chosen for longer terms. This would save much in the way of expense, and at the same time benefit the people by relieving them from the continual excitement and agitation caused by the struggle of parties for office and power. Another great advantage would result from the adoption of small precincts. The voters would be very generally known to each other, and in no single precinct would it be possible for any considerable number of non-residents, or otherwise disqualified persons to cast fraudulent votes without detection. Nor would it be possible for fraudulent voters to personate absent or deceased persons. In a precinct composed of only a small number of voters, generally known to each other, such frauds would be impossible.

§ 677. It may be said that some of the worst frauds are committed with the assistance or connivance of the officers of election, and that, therefore, fraud in the election or in the count would be possible, notwithstanding the reduction of the size of precincts. This is very true, and the suggestion brings us to the next essential of an efficient election law,

which is such provision as will prevent the selection of purely partisan election boards. All parties in interest should be represented in each board of election officers, and by witnesses to be present. The officers of the election should be required to perform all their official duties in the presence of each other and in the presence of a limited number of witnesses representing the several parties to the contest. No conidserable fraud can be committed by an election officer without the knowledge of all the members of the board; and, therefore, great security is to be found in a statute requiring all sides to be represented upon such boards. Add to this a provision requiring the admission to the room where the ballots are received, deposited and counted, of at least one witness on behalf of each party interested, and great frauds with the knowledge or connivance of the board will be become practically impossible. The witnesses should not be clothed with authority to interfere (otherwise than any citizen might, through the proper judicial proceedings) with the action of the officers; but should be permitted to witness every step in the progress of the election and the count, and to verify the correctness of the same. Officers of the law who propose to do their duty, and nothing more nor less, can not reasonably object to the presence of witnesses representing the parties most interested, and officers who are capable of a violation of duty should not be permitted to object. It is a safe and sound principle, and one which ought to be applied to the preparation of election laws, that men are not apt to commit crime in the presence of witnesses. Let the law be so framed that every step, from the opening of the polls to the completion of the count and the announcement of the result, shall be taken in the presence of at least two intelligent witnesses representing opposing candidates, and the chances of successful fraud will be reduced to the minimum.

§ 678. There is another mode of cheating which demands attention, and should be guarded against by legislation; and

that is, by tampering with the ballots after they are cast and before they are counted. This is generally done after the polls are closed. If the law permits, the board is apt to adjourn and its members to separate, for a time, during which a strict and honest watch over the ballot-box is not always kept. The only remedy is to require the votes to be counted immediately after the closing of the polls, and to strictly forbid the separation or adjournment of the board until the count is completed and the returns signed.

It is of the utmost importance that the statutes of every State should imperatively require an immediate canvass by officers and before witnesses representing both sides.

What would the people of this country say to a proposition that Congress and our State Legislatures should sit with closed doors, excluding all witnesses from their presence, or that courts and juries should try causes in secret? The suggestion, would, of course, meet with a storm of dissent and denunciation from all parts of the land. With equal, if not greater reason, may the people demand the utmost publicity in the proceedings of a popular election, whereby Congresses and Legislatures are made and unmade.

§ 679. Legislation upon this subject should not be based upon the theory that officers of election will always do right. If that were the fact, no penal election laws would be necessary. On the contrary, the law should, if possible, be so framed that an election officer shall not, if he would, defraud the electors without exposure and punishment. In this connection is further seen the importance of the first named essential of an efficient election law, namely, small voting precincts; for if the number of ballots to be counted does not exceed three hundred, the time required for the canvass will not be great, and the work can conveniently be done without an adjournment or separation of the board.

§ 680. It is scarcely necessary to say that no statute regulating elections can be complete without containing ample provision for the prevention of every species of intimidation

of voters, whether by violence, the exhibition of force, threats, or other means. In a well ordered community this crime will be rarely committed, and in every such community public opinion will demand its prompt and severe punishment. The law should be so framed as to guard with scrupulous care the perfect freedom of the ballot, and every attempt to rob even the poorest and weakest elector of his free choice should be regarded as a high crime, since the rights of all are involved in the question of the protection of the rights of each.

§ 681. Another mode of cheating at elections is that known as the tissue-ballot fraud and other kindred contrivances, by means of which one person may deposit in the box a number of ballots. For this a plain, simple and effectual remedy will be found in the enactment of a law prohibiting altogether the employment of such ballots, and forbidding the election board to count them if cast. This can be accomplished either by fixing the size of the ballots to be used, or by requiring the voter to place his ballot in an envelope containing nothing else, and hand it thus to the officer authorized to receive it.

§ 682. From what has now been said it will be seen that every efficient election law must, among other things, provide:

1. For small voting precincts.

2. That an elector shall vote only in the precinct of his residence.

3. For complete registration, especially in cities, and only persons registered to be allowed to vote.

4. For representation of all parties on boards of election and registration.

5. For the presence with the officers of election, at all stages of the proceedings, of witnesses representing the parties in interest.

6. For a canvass of the vote immediately upon the close

of the polls, and without an adjournment or separation of the board.

7. For the punishment of violence and intimidation.

8. For the prohibition of the use of tissue ballots, and kindred fraudulent contrivances, including the use of printed slips pasted over names, and of ballots made to resemble a regular ticket of one party, but with the name of one or more candidates of the opposite party interpolated therein.

9. For the prohibition of the crowding of the polling places by standing, or distributing tickets, within fifty feet thereof.

These, in addition to the ordinary directory provisions, are essential. Experience will doubtless show the necessity for other and further enactments.

§ 683. Let us now refer to some existing election laws, in order to show how far they are deficient if judged by these requirements.

In most of the States the statutory provisions regulating the formation and fixing the extent of election precincts, are exceedingly imperfect. In probably a majority of cases the subject is committed absolutely to certain county officers—as for example, in Alabama, Colorado, Florida and Nebraska, to the county commissioners; in Arkansas and California, to the county supervisors; in North Carolina, to the board of justices of the peace; and in Tennessee, Texas and West Virginia, to the county court. In at least twenty-four States neither the number nor size of precincts is fixed by law. In several States, towns or townships in the country and wards in the cities are constituted election precincts, which is a very excellent arrangement, so far as the rural districts are concerned, but often works very badly in cities where the wards are generally altogether too large and populous for convenient election precincts. In two States only (New York and Oregon) do we find such legislation on this point as seems to be required. In Oregon it is provided that election precincts shall not contain more than three hundred voters, and in New

York the maximum in cities is eight hundred voters. In those States where the matter is confided to local officers (and they include a great majority of the States), there is great temptation to partiality and injustice in the designation of precincts and of voting places. Purely partisan considerations too often control the action of the local authorities.

In some instances it would seem that polling places have been arranged with a view to render it very inconvenient, if not impossible, for large numbers of electors to cast their votes.

§ 684. By act of March 4, 1887, the Legislature of Kansas wisely provided that no person should distribute tickets or remain standing within fifty feet of the polls during the hours that the polls are open. The purpose of this enactment is to prevent the crowding of the polling places.

§ 685. A number of the States have enacted registry laws. Very few of them, however, contain provisions limiting the right of voting to registered electors, and for making the registry perfect and complete in advance of the day of voting. These, as we have seen, are very necessary provisions. Any statute that leaves open the question of the right of non-registered persons to vote, and devolves the duty of deciding in each case upon the election board, on election day, will prove a frail barrier against fraud. Let the registry list be prepared with the most painstaking care, by a board of registration composed of persons belonging to the different political parties; and let all persons not registered be excluded from the privilege of voting.

§ 686. As to the place of voting, some of the States still continue the vicious practice of permitting an elector to vote anywhere in the county of his residence. Such seems to be the law in Arkansas, California, Georgia, Kentucky and Oregon. It is, however, gratifying to be able to state that the tendency of legislation is very strongly toward the sound and salutary doctrine that each elector should be required to vote

in the neighborhood of his residence, and where he is likely to be known to election officers and bystanders.

§ 687. Several of the States have recognized the importance of providing for the presence with the election officers of witnesses representing the parties to the contest—a most important step in the right direction, and one which every State should adopt. For example, the law of Alabama provides for the presence of five of each party; that of Florida provides for the presence of one representative of each political party that has nominated candidates; that of Illinois, for the presence of two legal voters of each party to the contest; those of Kansas and Oregon permit the presence of the candidates in person, or of not exceeding three of their friends. Similar statutes are also to be found in Pennsylvania and Virginia.

The very important requirement that the board of election officers should be composed of members of different political parties, is omitted from the statutes of twenty-two States. Comment upon this fact is quite unnecessary.

§ 688. The equally necessary requirement that there shall be a count of the votes immediately upon the close of the polls is, I am glad to say, to be found in the statutes of nearly all the States. A few, however, have omitted it. Thus, in Mississippi, if the canvass is not finished by 12 P. M., it may be completed the next day. And in South Carolina it is provided that the board of managers may have three days in which to deliver to the commissioners of election the poll list and the boxes containing the ballots, and that the commissioners of election shall meet *at the county seat* on the Tuesday next after the election, and proceed to count the votes of the county. In this State there is no law providing for the count of the precinct vote at the place of voting, but both boxes and ballots are to be carried to the county seat and there canvassed by a board of commissioners, nearly a week after the close of the polls. This statute reads as if it might have been framed with a view to provide ample oppor-

tunity for tampering with the ballots between the day of election and the day of counting.

§ 689. The form and size of the ballot are regulated by law in but few of the States. In twenty-two States no law is found upon the subject. In several others it is provided that all ballots shall be printed or written on plain white paper. In California they are required to be four inches in width and twelve inches in length, and there is a similar statute in Nevada. Except in these two States there is no law to forbid the use of a ballot printed in the finest possible type, and on the smallest possible piece of paper. It is well known that the absence of this regulation has given rise to some very gross frauds in recent years.

§ 690. A common method of fraud is by printing slips containing a candidate's name and pasting them over the name of another candidate which has been printed upon a particular ticket; or by printing tickets resembling those of one or the other of the competing parties, but with the name of some one candidate thereon omitted and that of his opponent substituted. By these and similar means voters are often deceived, especially where the ballots contain numerous names. To prevent frauds of this character, statutes are sometimes enacted rendering invalid all ballots of the character here indicated and requiring their rejection by the canvassing officers.[1] Such legislation is well calculated to suppress the evil practices above named, and the instances in which any injustice will be caused thereby will be rare, especially after the statute becomes familiar to the people.

[1] See act of Kansas Legislature, approved March 4, 1887, Sess. Laws, page 218.

CHAPTER XXII.

THE AUSTRALIAN BALLOT SYSTEM.

§ 691. Origin of the system and introduction in other countries.
692. Introduction in the United States.
693. Provision for an official ballot.
694. Directions governing printing of ballots.
695. Size and style of, and arrangement of names upon the ballots.
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697. Manner of nominating candidates and filing certificates of nomination.
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699. The limitation of the right to have ballots printed at public expense and to have names of candidates printed thereon, not unconstitutional.
700. Right of the voter to vote for the person of his choice.
701. Right of a political convention to delegate authority to make nominations.
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705. Provisions of the statute concerning certificates of nomination; mandatory or directory.
706. Other provisions liberally construed.
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708. Effect of wrongful certificate as to a part of the candidates upon the ballot.
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713. Voting compartments.
714. Act of voting; how accomplished.
715. Provision requiring voter to prepare ballot in voting compartment.

§ 716. Provision requiring initials of two judges of opposite parties upon the ballot not mandatory.
717. The requirement that the ballot must bear the initials of a judge of election held unconstitutional in Nevada.
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726. Separate ballots and ballot-boxes provided for women in some States.
727. General provisions for the prevention of fraud.
728. Use of voting machines authorized in Michigan and New York.
729. Voting machines; how constructed and operated.

§ 691. The Australian Ballot System is said to have been the conception of Francis S. Dutton, member of the Legislature of South Australia from 1851 to 1865. The elections act of 1857–58 embodied his idea of the secret ballot, and is the basis of the system now generally in force in the United States as well as in England and upon the continent of Europe. The measure, though first agitated in South Australia, first became a law in Victoria in 1856. It was adopted in Tasmania and New South Wales in 1858, by New Zealand in 1870, and later by Queensland and West Australia. On May 30, 1872, the English Ballot Act (Statutes 35 and 36 Victoria, ch. 33) was passed by the English Commons. It contains the salient features of the South Australian act, modified and adapted to new conditions. Following its adoption by the mother country came the introduction of the system in British Columbia in 1873;[1] in the province of Ontario, March 24, 1874;[2] in Canada, May 26, 1874;[3] in the

[1] Ballot Act, 36 Vict., No. 6.
[2] Ballot Act, 37 Vict., ch. 5.
[3] Dominion Elections Act, 37 Vict., ch. 9.

province of Quebec, February 23, 1875; in Nova Scotia, May 6, 1875;[1] in the Northwest Territories, December 18, 1885, and in Manitoba, May 28, 1886.[2]

The European countries which have followed England in this reform are Belgium, which adopted the English system somewhat simplified on July 9, 1877, and Luxemburg in 1879, while in Austria, Italy and Norway laws providing for the secrecy of the ballot are in force, resembling in many respects the Australian system.[3]

§ 692. In the United States, the first States to adopt the Australian ballot system were Massachusetts,[4] Indiana,[5] Wisconsin[6] and Montana.[7]

The successful operation of the system as enacted in these States has led to its general adoption by the different States,[8] and it is now common to every State in the Union except the Carolinas, Georgia and Connecticut. It is the purpose of this chapter to outline the salient features of the system

[1] Statutes of 1875, ch. 26.

[2] Election Act of 1886, ch. 29.

[3] Wigmore's Australian Ballot System, pp. 3–21.

[4] In force November 5, 1889.

[5] Approved March 6, 1889.

[6] Adopted in 1889.

[7] In force June 1, 1889.

[8] Alabama: Law approved February 21, 1893. Arkansas: Law adopted in March, 1891. California: Law adopted in 1891; Law amended March 28, 1895. Colorado: Law approved March 26, 1891; in force June 25, 1891; amended February 27, 1894. Florida: Law approved May 25, 1895; amended May 30, 1895. Illinois: Law approved June 22, 1891; in force, July 1, 1891. Indiana: Law approved March 6, 1889; in force June, 1890; Iowa: Law approved April 2, 1892 (ch. 33, Acts 1892). Kansas: Law approved March 11, 1893 (ch. 78, Session Laws of 1893). Kentucky: Law adopted June 30, 1892. Louisiana: Law approved July 9, 1896 (Act No. 137, Laws of 1896). Maine: Law adopted March, 1891 (ch. 102, Laws of 1891); amended in 1893 (ch. 267, Laws of 1893). Maryland: Law adopted in 1890; amended in 1896 (ch. 202, Laws of 1896). Massachusetts: Law in force for first time at State election, November 5, 1889 (Laws of 1889, ch. 413); amended by ch. 417, Laws of 1893; amended by ch. 469, Laws of 1896. Michigan: Law approved July 3, 1891 (Public Acts of 1891, p. 256); amended by Public Acts of 1895, Act 271. Minne-

as in force in the different States, and to review the decisions of the courts construing the laws so adopted.

§ 693. A distinctive feature of the law, common to all the States, is the provision for an official ballot printed and distributed by the State or municipality, the use of all other ballots being prohibited. In most States provision is made for the number of ballots to be printed,[1] the time when they shall be in the hands of the election officers,[2] the manner of

sota: Law adopted in 1893 (ch. 4, Gen. Laws of 1893); amended in 1895. Mississippi: Law adopted November 1, 1890; took effect January 1, 1891. Missouri: Law adopted in 1889 (Rev. Stat., ch. 60, art. 3); amended by Session Acts of 1891, p. 136. Montana: Law in force June 1, 1889; amended March 19, 1895. Nebraska: Law approved March 4, 1891. Nevada: Law approved March 13, 1891. New Hampshire: Law adopted in 1891 (ch. 49, Laws of 1891). New Jersey: Law approved April 18, 1896; in force July 4, 1896. New York: Law adopted in 1890 (ch. 262, Laws of 1890); amended May 27, 1896 (ch. 909, Laws of 1896). North Dakota: Law adopted in 1895 (ch. 8, Rev. Codes, 1895). Ohio: Law adopted in 1891. Pennsylvania: Law approved June 10, 1893. Rhode Island: Statutes of Rhode Island, ch. 11. South Dakota: Law approved in 1891. Tennessee: Law approved May 13, 1890 (ch. 24, Acts of 1890); applies to counties having seventy thousand inhabitants and over, and to cities having nine thousand inhabitants and over. Texas: Law in modified form adopted in 1891 (applies to cities having ten thousand inhabitants or more). Utah: Law adopted in 1896; in force on the 5th day of June, 1896. Vermont: Law adopted by Acts of 1890, No. 9; amended by Acts of 1892, No. 1; Gen. Laws of 1895, title 3. Virginia: Law approved March 4, 1896. Washington: Law adopted in 1891. West Virginia: Law passed in 1891 (Acts of 1891, ch. 89). Wisconsin: Law adopted in 1889; amended by ch. 288, Laws of 1893; revised in 1896. Wyoming: Law first authorized by the Territorial Legislature in 1890. Since then there have been several amendments.

[1] Statutes of Kentucky, ch. 41, sec. 1461; Virginia, Ballot Act of March 4, 1896, sec. 6; Minnesota, Gen. Laws of 1893, ch. 4, sec. 23; Statutes of New Hampshire, ch. 33, sec. 12; New Jersey, Ballot Reform Law of 1896, sec. 33; Missouri, Laws of 1893, p. 153; Maine, Laws of 1893, ch. 267, sec. 12; Montana, Political Code, sec. 1355; New York, Election Law of 1896, art. 4, sec. 86; Wisconsin, Election Law of 1896, sec. 45.

[2] Colorado, Ballot Act of 1891, sec. 17; Maryland, Laws of 1896, ch. 202, sec. 49; Vermont, General Laws, title 3, sec. 96; Iowa, sec. 15, ch. 33, Laws of 1892.

their distribution,[1] and the manner of supplying ballots where the original supply has been lost or stolen.[2]

§ 694. In Kentucky, Ohio, Pennsylvania, Tennessee and other States the ballots are bound in book form, with stubs and perforated lines for convenience in detaching; the voter's name, residence and registered number being entered upon the stub.[3]

In Virginia the printer is required to take an oath that he will print no more than the number of ballots required by the electoral board; that he will destroy all ballots printed and not delivered to the board; will, as soon as the ballots are printed, distribute the type used for the work, and will communicate to no one whomsoever the size, style or contents of the ballots. It is further made the duty of the electoral board to have one of their number present in the room while the ballots are being printed, to see that the undertakings of the oath are strictly complied with.[4]

In Kentucky, Michigan, Indiana, Minnesota and West Virginia it is made a felony for the printer to deliver any of the ballots to any person other than the proper officer, or to knowingly print the ballot in any other than the prescribed form, or with any other names thereon, or with the names spelled or arranged in any other way than as directed by said officer.

In Ohio the printer is required to give bond conditioned

[1] Laws of Iowa of 1892, ch. 33, sec. 15; Ohio Ballot Law, sec. 15; North Dakota, Revised Code, sec. 493; Colorado, Ballot Act of 1891, sec. 21; Michigan, Public Acts of 1895, sec. 19; Pennsylvania, Ballot Law of 1893, sec. 17; Louisiana, Laws of 1896, art. 137, sec. 70; Massachusetts, Acts of 1893, ch. 417, sec. 141; Maine, Laws of 1893, ch. 267, sec. 18; New York, Election Laws of 1896, art. 4, sec. 87; Wisconsin, Election Laws of 1896, sec. 47.

[2] Louisiana, Laws of 1896, act 137, sec. 72; Mississippi, Election Ordinance of 1890, sec. 8; Maine, Laws of 1893, ch. 267, sec. 19; New York, Election Laws of 1896, art. 4, sec. 89.

[3] Statutes of Kentucky, ch. 41, sec. 1461; Statutes of California, sec. 1198; Statutes of Tennessee, ch. 24, sec. 6; Pennsylvania Ballot Act of 1893, sec. 15; Ohio Ballot Law, sec. 18.

[4] Act of March 4, 1896, sec. 7.

for the faithful performance, pursuant to contract, of such printing as may be awarded to him.[1]

In some instances provision is made for the filing of a proof copy of the ballot in the proper office for the inspection of candidates, or chairmen of committees furnishing names of candidates, in order that errors may be corrected.[2]

§ 695. The size and style of the ballot and the color of the paper and ink used are almost universally prescribed, uniformity of size, quality and type being required. As a general rule the names of all the candidates of all parties are printed upon each ballot, although in New Jersey separate tickets are provided for the nominees of the different political parties.[3]

The arrangement of the names of candidates is different in different States, the more common method being to print each party ticket in a separate column, with one column for individual nominations. In some cases the columns are arranged arbitrarily by statute, in others alphabetically, according to the first letter of the party name, in others precedence is given to the party which polled the largest number of votes at the last preceding general election. At the head of each column is placed the name of the political party whose nominations are contained therein. In many of the States the political parties are required to choose a party emblem or symbol, and this is printed at the head of the party ticket with the party name.[4]

In Massachusetts[5] and New Hamsphire[6] the names of candidates are arranged under the designation of the office in alphabetical order according to the surnames; to the name

[1] Ballot Law, sec. 15*a*.

[2] Michigan, Act 271, Public Acts of 1895, sec. 11.

[3] Ballot Reform Laws of 1896, sec. 32.

[4] There is nothing in the law preventing two or more political parties, whether acting through conventions or by petition, from selecting the same individuals for one or more of the offices to be filled. Simpson *v.* Osborn, 52 Kan., 328.

[5] Acts of 1893, ch. 417, sec. 130.

[6] Statutes of New Hampshire, ch. 33, sec. 11.

of each candidate being added the name of the party, or designation of the principle represented by him, together with his address. This general arrangement of names of candidates has also been adopted in Louisiana, Colorado, Minnesota, Rhode Island, Alabama, Florida, Tennessee, Montana, California and Nevada. The pasting of names upon a ticket by a voter is generally, though not in all cases, forbidden. On the back and outside of the ballot is printed the words "Official Ballot," followed by the designation of the polling place for which the ballot is prepared, and usually a *fac-simile* of the signature of the officer under whose direction the ballot was printed.

§ 696. Under the law of Nebraska directing the names of candidates to be arranged on the ballot in alphabetical order according to surnames, it was held in *State* v. *Allen*[1] that the name of each candidate should be printed but once upon the ballot, accompanied by such political or other designations as represent the different parties or persons nominating him. But in those States where the tickets of the different political parties are printed in separate columns, with a separate column for independent nominations, the name of a candidate nominated for the same office by more than one party should appear on the official ballot under the name or emblem of each party or body of voters nominating him.[2] An exception to this rule is found in Michigan, where the statute[3] prohibits the printing on the official ballot of the name of a candidate receiving the nomination of two or more parties in more than one column.[4] This statute has been declared by the Supreme Court of that State as a valid exercise of the power of the Legislature to pass

[1] 43 Neb., 651; 62 N. W. Rep., 35.

[2] Fisher *v.* Dudley, 74 Md., 242; 22 Atl. Rep., 2; Simpson *v.* Osborn, 52 Kan., 328; 34 Pac. Rep., 747.

[3] Act of March 14, 1895.

[4] The Indiana statute contains a similar provision. (Gen. Laws, ch. 87, sec. 19.)

laws to preserve the purity of elections, and not unconstitutional because subversive of the right to vote.[1]

§ 697. The nomination of candidates for office under the Australian system may be made either by conventions or primary elections held by political parties polling a certain per cent. of the entire vote cast at the last preceding general election, or by nomination papers signed by a fixed number of qualified voters. Such nominations must be certified as required by law, and filed with the proper election officer.[2]

Provision is made for publishing the names of the candidates nominated; for the public inspection of certificates of nomination and nomination papers; for the filing of objections to and decision of questions affecting the regularity of nominations;[3] for the withdrawal of persons nominated, and for the filling of vacancies.

§ 698. The question has arisen as to what comprises the duty of the Secretary of State when certificates of nominations are filed with him by rival factions of a political party, each claiming authority to represent the party. It has been decided in Michigan[4] and Colorado[5] that the Secretary has no authority to determine which of two factions is entitled

[1] Todd *v.* Board of Election Commissioners, 104 Mich., 474; 64 N. W. Rep., 496.

[2] A certificate purporting to state nominations made by a party convention without giving the business, residences or business addresses of the candidates, and signed by the chairman and secretary of the convention, without the addition of their residences and business addresses, in disregard of the requirements of the statute, may be properly rejected by the Secretary of State. Lucas *v.* Ringsrud, 3 S. Dak., 355; 53 N. W. Rep., 426.

[3] The ballot law of Missouri makes no provision for a tribunal to determine the regularity of nominations. The Supreme Court of that State has held that the State committee of a party, in accordance with party usage and precedent, has authority to order a new primary election for the purpose of settling a dispute between the nominees of rival factions of the party. State *v.* Lesueur, 103 Mo., 253; 15 S. W. Rep., 539.

[4] Shields *v.* Jacob, 88 Mich., 164; 56 N. W. Rep., 105.

[5] People *v.* District Court, 18 Colo., 26; 31 Pac. Rep., 339.

to represent the party for which it assumes to act, and where two sets of nominations are made by rival conventions it is the duty of the Secretary to certify both sets, if apparently conformable to law; this upon the theory that in case of doubt the course should be followed which will afford the citizen the greatest liberty in casting his ballot. A somewhat different view has been entertained by the courts of Missouri[1] and Nebraska,[2] which hold that though the duties of the Secretary of State in such a case are ministerial, still he is not a "mere figurehead or automaton, moved about at the whim or touch of every eager applicant;" that he is vested with sufficient discretionary powers to authorize him to consider before acting, and to search and inquire before reaching a conclusion; that in case of objection he should ascertain from the record or from extrinsic evidence whether such candidates were in fact placed in nomination by a convention or assemblage claiming to represent a political party.[3]

§ 699. The courts have been called on to determine whether the limitation of the right to have ballots printed at public expense by restricting it to parties polling a certain per cent. of the vote cast at the last general election, or to a certain number of qualified voters signing a nomination paper, is in violation of the constitutional provision that elections shall be free and equal, and that all laws regulating them shall be uniform throughout the State. The Supreme Courts of Pennsylvania and New Jersey have upheld this provision as a

[1] State *v.* Lesueur, 103 Mo., 253; 15 S. W. Rep., 539.

[2] State *v.* Allen, 43 Neb., 651; 62 N. W. Rep., 35.

[3] Where candidates are nominated by petition, the Secretary of State has no right to file the petition unless properly signed and acknowledged by the requisite number of electors. State *v.* Lesueur (Mo.), 38 S. W. Rep., 325. See, also, People *v.* Police Commissioners, 10 Misc. Rep., 200; 31 N. Y. Sup., 467; People *v.* Police Commissioners, 31 N. Y. Sup., 469. In New York the Secretary of State is authorized by statute to determine the conflicting claims of rival factions of a party. Laws of 1896, ch. 909, sec. 56.

reasonable regulation of the elective franchise. The former court, in *De Walt* v. *Bartley*,[1] say:

"The act does not deny to any voter the exercise of the elective franchise because he happens to be a member of a party which at the last general election polled less than three per cent. of the entire vote cast. The provision referred to is but a regulation, and we think a reasonable one, in regard to the printing of tickets. The use of official ballots renders it absolutely necessary to make some regulations in regard to nominations in order to ascertain what names shall be printed on the ballot. The right to vote can only be exercised by the individual voter. The right to nominate, flowing necessarily from the right to vote, can only be exercised by a number of voters acting together."

In *State* v. *Black*[2] the Supreme Court of New Jersey holds that such a restriction in no way impedes the voter in the exercise of his right to vote for any particular person; it only embarrasses him in his right to form a party and vote as a member of that party.[3]

§ 700. The statutes of most of the States expressly permit the voter to cast his ballot for the person of his choice for office, whether the name of the person he desires to vote for appears upon the printed ballot or not. Statutes which deny the voter this privilege are in conflict with the constitutional provision guaranteeing the right of suffrage to every citizen possessing the requisite qualifications and are void. Legislatures may provide for the printing of an offi-

[1] 146 Pa. St., 529; 24 Atl. Rep., 185. See, also, Slaymaker *v.* Philips (Wyo.), 40 Pac. Rep., 971.

[2] 54 N. J. L., 446; 24 Atl. Rep., 489.

[3] It has been held in Missouri that the provisions of the Australian ballot system as a whole are not in violation of the constitutional provision that all elections shall be free and open. State *v.* McMillan, 108 Mo., 153; 18 S. W. Rep., 784. A candidate for office cannot compel election officers to cause his name to be printed upon the official ballot where he has not been nominated in the manner provided by the statute. Miner *v.* Olin, 159 Mass., 487; 34 N. E. Rep., 721. The law declared constitutional in Common Council *v.* Rush, 82 Mich., 533; 46 N. W. Rep., 951.

cial ballot and prohibit the use of any other, but they cannot restrict the elector in his choice of candidates, nor prohibit him from voting for any other than those whose names appear on the official ballot.[1]

§ 701. It has been held by the Supreme Court of Montana in the case of *State* v. *Benton*,[2] that a political convention may delegate to a committee power to fill all vacancies upon the party ticket; that the exercise of this delegated power by the committee after the adjournment of the convention should be regarded as the act of the convention, and that the names of persons so nominated are properly upon the official ticket. It was further held in the same case that a certificate of nomination, regular upon its face, and filed with the proper officer, is *prima facie* evidence of the nomination of the person so certified.

§ 702. A candidate nominated by electors is not the nominee of a political party, but of the individual electors nominating him, even though all of the electors signing the nominating paper be members of the same political party. Such electors cannot, by choosing the name of a political party authorized to make nominations by convention, make such nominee the nominee of such party. Such a nominee, however, has the right to appear upon the official ticket as the representative of the political principle named by the electors nominating him, and such principle should be printed in type as bold and significant as that used in printing party names in the headings over party nominations.[3]

§ 703. The statute of Massachusetts provides that "every voter signing a nomination paper shall sign the same in per-

[1] State *v.* Dillon, 32 Fla., 545; 14 S. Rep., 383; Sanner *v.* Patton, 155 Ill., 553; 40 N. E. Rep., 290; Bowers *v.* Smith, 111 Mo., 45; 17 S. W. Rep., 761; Eaton *v.* Brown, 96 Cal., 371; 31 Pac. Rep., 250; People *v.* Shaw, 133 N. Y., 493; 31 N. E. Rep., 512; People *v.* President, 144 N. Y., 616; 39 N. E. Rep., 641.

[2] 13 Mont., 306; 34 Pac. Rep., 301.

[3] Atkinson *v.* Lay, 115 Mo., 538; 22 S. W. Rep., 481. See, also, *In re* Madden, 148 N. Y., 136; 42 N. E. Rep., 534; Fernbacher *v.* Roosevelt, 90 Hun, 441; 35 N. Y. Sup., 898.

son, and shall add to his signature his place of residence, with the street and number thereof, if any." This provision has been construed by the Supreme Court of that State, in a criminal prosecution for falsely making a nomination paper, to mean that a voter must either with his own hand write his name and address, or the signing must be done at his request and in his presence, previous authority or subsequent ratification not being sufficient.[1]

§ 704. The language of the Minnesota statute (Sec. 34, Ch. 4, Gen. Laws of 1893), providing for nominations by "an assembly or convention of delegates representing a political party," has been construed as not prohibiting political parties from holding mass conventions for the nomination of candidates for office. The Court here, in attempting to carry out the supposed intention of the Legislature, gave to the word "delegate" the popular, but inaccurate, definition, "a regularly selected member of a regular party convention."[2]

§ 705. There is some conflict among the authorities as to whether the provisions of the statute concerning certificates of nomination are to be regarded as mandatory or directory merely. The first decision affecting this question was by the Supreme Court of Montana in *Price* v. *Lush*.[3] The Court in this case applied the rule that where a State adopts the statute of another State or country, the construction of the statute by the courts of the latter is to be received in the new jurisdiction with all the weight of authority. The Montana court therefore adopted what it believed to be the view of the English courts, and held that these provisions are mandatory, and that the requirements of the law for the nomination of candidates for office must be complied with in every particular.

A radically different view has been adopted by the Supreme Court of Missouri. In *Bowers* v. *Smith*[4] it was charged

[1] Commonwealth *v.* Connelly, 163 Mass., 539; 40 N. E. Rep., 862.
[2] Manston *v.* McIntosh, 58 Minn., 525; 60 N. W. Rep., 672.
[3] 10 Mont., 61; 24 Pac. Rep., 749.
[4] 111 Mo., 45; 20 S. W. Rep., 101.

that the official ballots used at a municipal election contained the names of the nominees of a political party which had not polled at the last previous general election the per cent. of the entire vote required by statute; also that the list of names of candidates was not legally certified to the County Court. The Court refused to repudiate the votes cast for these candidates, holding that the strict rule adopted by the Montana court was antagonistic to the fundamental law of Missouri, and that prior decisions elsewhere could not properly be followed if inconsistent with such law. The Court, in referring to election laws generally, says:

"Strictly speaking, all provisions of such laws are mandatory, in the sense that they impose the duty of obedience on those who come within their purview. But it does not therefore follow that every slight departure therefrom should taint the whole proceedings with a fatal blemish. Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end, and, in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free from fraud and have not interfered with a full and fair expression of the voter's choice."[1]

A similar view has been expressed in New York in a case where there was a failure at a town election to file certificates of nomination, and a neglect to prepare official ballots, the ballots used containing the names of all the candidates and being treated as official by the voters.[2] The weight of

[1] The same court has, however, indicated that the provisions of the Missouri statute requiring a certificate of nomination to be acknowledged in the same manner as a conveyance of real estate must be complied with. State *v.* Lesueur, 103 Mo., 253; 15 S. W. Rep., 539.

[2] Montgomery *v.* O'Dell, 67 Hun, 169; 142 N. Y., 665. But in another case in New York it had been held that the provision with respect to the time when the certificates of nomination must be filed is mandatory, and after the time has passed a county clerk has no right to receive and file nominations. Matter of Cuddeback, 3 App. Div., 103; 39 N. Y. Sup., 388.

authority is against a construction making these provisions "so mandatory that a mere formal defect incapable of affecting the regular and orderly conducting of an election or its result should invalidate an election."[1] An examination of these decisions will show, however, that they are influenced to some extent by the failure of the opposing parties or candidates to make timely objections to names not properly upon the ballot.[2]

§ 706. A liberal rule of construction has been adopted very generally with reference to other portions of the law pertaining to nominations and to the form and contents of the ballots. Thus, it has been held that a violation of the provision that the name of each candidate shall be printed upon the ballot in but one place will not vitiate the vote.[3] Nor will a voter be deprived of the right to have his vote counted because the ballot fails to properly state the political affiliation of the candidate;[4] nor because the names of all independent candidates are not printed in one column as required by the statute;[5] nor on account of a failure to publish the names of candidates in exact conformity with the law;[6] nor because the names of certain candidates are printed under the wrong party device;[7] nor because the officer of election has written the name of a candidate upon a ticket in correction of an error in printing;[8] nor because an opportunity has not been afforded the voters to inspect the ballots.[9]

[1] State *v.* Barber (Wyom.), 32 Pac. Rep., 14, 26, 28; Simpson *v.* Osborn, 52 Kan., 328.

[2] See, also, Allen *v.* Glynn, 17 Colo., 338; 29 Pac. Rep., 670.

[3] Miller *v.* Pennoyer, 23 Oreg., 364; 31 Pac. Rep., 830.

[4] State *v.* Norris, 37 Neb., 299; 55 N. W. Rep., 1086.

[5] Murphy *v.* Battle, 155 Ill., 182; 40 N. E. Rep., 470.

[6] Atkinson *v.* Lay, 115 Mo., 538; 22 S. W. Rep., 670; People *v.* Avery, 102 Mich., 572; 61 N. W. Rep., 4; Allen *v.* Glynn, 17 Colo., 538; 29 Pac. Rep., 670.

[7] Allen *v.* Glynn, 17 Colo., 538; 29 Pac. Rep., 670. And see Talcott *v.* Philbrick, 59 Conn., 478; 20 Atl. Rep., 436.

[8] State *v.* Van Camp, 36 Neb., 9; 54 N. W. Rep., 113.

[9] Lindstrom *v.* Board of Canvassers, 94 Mich., 467; 54 N. W. Rep., 280.

These decisions proceed upon the principle that, in the absence of fraud, the voter who has had nothing to do with the preparation of the ballot, nor with matters preliminary to the election, should not be deprived of the right to have his vote counted because of the errors or wrongful acts of election officers.[1]

§ 707. The general rule that a paper is to be considered as filed when it is deposited in the proper office, and that the indorsement upon the paper by the official is not an essential part of the act of filing, has been very properly applied to the filing of certificates of nomination. The ordinary rules with reference to the proof of contents of lost instruments should, of course, apply to lost certificates, although the statute usually makes provision, in such a case, for supplying valid nominations.[2]

§ 708. Where the Secretary of State refuses or neglects to certify to the proper county officers the name of a candidate nominated by petition, the petitioners nominating such candidate have such a special and peculiar interest in having his name appear upon the official ballot as to entitle them to maintain an action to require the Secretary of State to certify the fact of the candidate's nomination, and they may proceed by mandamus for that purpose.[3]

But the act of the Secretary of State in wrongfully certifying the names of certain persons as the candidates of a particular party will not destroy the efficacy of ballots cast for other candidates for other offices upon the same ticket

[1] It has been held in England under the Australian ballot law, as there adopted, that where a candidate had been nominated twice by petition, one nomination being good and the other bad, and his name had been twice printed upon the ballot — once for each nomination, and he had received votes under each,— that the bad nomination did not avoid the good one, and that all votes cast for him under each nomination should be counted for him. Northcote *v.* Pulsford, L. R., 10 C. P., 476, 483.

[2] Rathburn *v.* Hamilton, 53 Kan., 470; 37 Pac. Rep., 20.

[3] Rathburn *v.* Hamilton, *supra*.

who were legally nominated and whose names were legally certified.[1]

§ 709. In construing the provision of the law requiring certificates for filling vacancies to state for whom the person nominated is to be substituted, and the cause of the vacancy, it has been held in South Dakota that a certificate which fails to contain this information should be rejected by the Secretary of State.[2]

§ 710. For the instruction of the voter the law directs the printing and distribution by election officers of sample ballots, printed upon paper of a different color from that used for the official ballot, and containing the names of the candidates to be voted for, substantially in the form of the official ballot. Provision is also made for the publication in newspapers of a list of all nominations to be voted for, and for the posting and printing of full instructions for the guidance of the voter in all matters pertaining to the depositing of his ballot.

§ 711. The statute of Kansas contains the usual provision that the ballots shall be printed on white paper. In *Boyd* v. *Mills*[3] it appeared that the election officers of one township used the sample ballots printed on colored paper in conducting the election, and returned all the official ballots which were printed on white paper. All the ballots used were of the same color. The conclusion of the court was that the secrecy of the ballot had been in no wise impaired; and as the use of the colored ballots was an honest mistake on the part of the election officers, these ballots should be counted.

§ 712. The law provides for the appointment of judges and clerks of election, and defines their qualifications and

[1] Smith *v.* Harris, 18 Colo., 274; 32 Pac. Rep., 616. The fact that a constitutional amendment was not printed in proper form upon the ballot does not give a defeated candidate ground for complaint, as it has no bearing upon his rights. Atkinson *v.* Lay, 115 Mo., 538; 22 S. W. Rep., 481.

[2] Lucas *v.* Ringsrud, 3 S. Dak., 355; 53 N. W. Rep., 426.

[3] 53 Kan., 594; 37 Pac. Rep., 16.

duties. It is customary to provide that the different political parties shall be represented, and that the election officers shall not be candidates to be voted for at the election, and shall be able to read and write the English language. In the absence of fraud, however, the fact that the officers of election were not possessed of the prescribed qualifications will not avoid the election. In such cases the well-established doctrine of the validity of the acts of *de facto* officers should be applied.[1]

The different political parties are permitted to select challengers and watchers to be present at the polls and to witness the count. It has been held in Minnesota that a compliance with a provision of this character is not vital to the legality of the election where no fraud is alleged and where it is not claimed that the result of the election has been changed by the omission or disregard of the requirement.[2]

§ 713. One of the chief objects sought to be accomplished by the Australian system is to preserve the secrecy of the ballot. For this purpose the polling places are provided with compartments or booths, each of sufficient size to accommodate one voter at a time, and so constructed that the voter is screened from observation while preparing his ballot. These compartments, as well as the ballot-boxes, are usually protected by a guard-rail, within which no person is permitted other than election officers, challengers, persons admitted for the purpose of voting, and peace officers admitted by the officers of election to keep order and enforce the law. Neither the voting booths nor the ballot-boxes are permitted to be hidden from the view of those outside the guard-rail. A sufficient number of booths are provided to avoid crowding and inconvenience, and only as many

[1] Sec. 247 *et seq.;* Opinions of Justices, 70 Me., 565; People *v.* Avery, 102 Mich., 572; 61 N. W. Rep., 4; Trustees *v.* Garvey, 80 Ky., 159. As to effect of failure of inspectors to be sworn, see sec. 525. As to irregularities in opening and closing polls, see secs. 162–165.

[2] Soper *v.* Board of Commissioners of Sibley Co., 46 Minn., 274; 48 N. W. Rep., 1112.

voters are admitted within the rail at one time as there are booths. The presence of persons other than those authorized by law in the vicinity of the polling place is forbidden.

§ 714. The act of voting is accomplished as follows: The elector receives from the judges or inspectors of election one official ballot, upon which the names or initials of certain of the election officers have first been written. The voter forthwith, and without leaving the voting place, retires alone to one of the voting compartments, and there prepares his ballot. The preparation of the ballot is accomplished differently in different States. In most cases the voter indicates his choice of tickets or candidates by making a cross (×) at the head of the ticket for which, or opposite the name of the candidate for whom, he desires to vote, or by writing in the name of the candidate of his choice in a blank space prepared for that purpose. He indicates in a similar manner his answer to questions submitted to the voters. In some States the voter is required to use an official stamp instead of a cross made with ink. In Missouri the voter is directed to cross out all the groups except one, by drawing a line or lines lengthwise through the rejected columns, and then make all changes on the remaining column by striking out such names as he does not wish to vote and writing the names of his choice underneath. The law prescribes that the voter shall fold his ballot in such a manner as not to disclose its contents, but so that the initials of the officers can be seen. In some cases the ballot is folded by the officers of election before it is delivered to the voter. In New Jersey the ballot is inclosed in an envelope and so deposited unsealed in the ballot-box.[1] No elector is allowed to occupy a voting compartment already occupied by another. If the voter spoils a ballot through accident or mistake, he may surrender it to the officers and receive another. The length of time which he may remain in the booth is fixed by statute.[2] In some States he is not permitted to converse with

[1] Ballot Reform Laws, 1896, sec. 226.

[2] A limitation of two and one-half minutes held not so unreasonable

any one except the election officers while inside the inclosure. He is forbidden to disclose the contents of his ballot before depositing it. At some time during the process of voting the name and address of the voter is announced in a loud and distinct voice by an election officer. The name of the voter is checked upon the poll-list by the officer having the same in charge immediately after the ballot is placed in the box. As soon as the voter has deposited his ballot, he is required to quit the inclosed space and is not permitted to return.

§ 715. The provision of the statute requiring the voter to retire alone to the voting compartment and there prepare his ballot was considered by the Supreme Court of Missouri in *Hall* v. *Schoenecke*,[1] where six voters, five of whom were judges or clerks of election, prepared their ballots without going into the booths. It was held in this case that this section was only intended to give directions for the guidance of the voter, and that a failure to comply strictly therewith would not invalidate the vote if the spirit of the law had not been violated.

§ 716. Where the statute requires that two judges "of opposite political parties" shall place their initials upon the backs of all the ballots before they are used by the voters, and provides further that no ballot which has not the initials of two judges of election, in said judges' handwriting, on the back thereof, shall be placed in the box, ballots bearing the initials of two judges belonging to the same political party should not be rejected where the irregularity is the result of ignorance of the requirement, and where no fraud has been attempted or accomplished. The Supreme Court of Minnesota, in reaching this conclusion, assigns as a reason that to hold this provision mandatory would enable an election judge, by misrepresenting his politics, to disfranchise an entire election precinct, and that the refusal of

as to render the law void. Pearson *v.* Board of Supervisors of Brunswick Co., 91 Va., 322; 21 S. E. Rep., 483.

[1] 128 Mo., 661; 31 S. W. Rep., 97.

all members of the minority party to serve as judges would make it possible for that party to prevent the casting of a single legal vote.[1]

The same conclusion has been reached by the Supreme Court of Indiana in a case where the initials of the clerks of the election were indorsed on the ballots in a place different from that required by the statute, the Court expressing the opinion that the purpose of the law was as well accomplished as if it had been obeyed literally.[2]

§ 717. The statute of Nevada provides that any ballot not bearing the initials of an inspector or judge of election shall not be counted. The Supreme Court of that State has decided that this part of the statute is in conflict with the provision of the State Constitution that all persons possessing the requisite qualifications shall be entitled to vote at all elections, and cannot be enforced to disfranchise the voter. It is held in the same case that the failure of the election officers to provide election booths in compliance with the law is but an irregularity, which will not avoid the election.[3]

§ 718. In case of physical disability or inability to read or write on the part of the voter, the law requires the officers of election to render him such assistance as may be necessary in preparing his ballot, and in some States ballots may be received at the door from persons physically disabled from entering the room.[4] Such provisions are constitutional and not subject to the objection that they deprive the voter of the right to cast a secret ballot.[5]

§ 719. Under the statutes of some of the States the assistance rendered a disabled voter must be given privately

[1] State *v.* Gay, 59 Minn., 6; 60 N. W. Rep., 676.

[2] Parvin *v.* Wimberg, 130 Ind., 561; 30 N. E. Rep., 790. See, also, Slaymaker *v.* Philips (Wyo.), 40 Pac. Rep., 971.

[3] Moyer *v.* Van De Vanter, 41 Pac. Rep., 60.

[4] In Nevada a disabled voter may call on any elector to aid him. Act of March 13, 1891, sec. 23. Intoxication is not a physical disability under the Illinois law. Ballot Law, 1891, sec. 24.

[5] Pearson *v.* Board of Supervisors of Brunswick Co., 91 Va., 322; 21 S. E. Rep., 483; Ellis *v.* May, 99 Mich., 538; 58 N. W. Rep., 483

in a voting compartment. In the absence of such a clause the Minnesota court has held that the ballot of such a voter will not be excluded because made up openly in the presence and hearing of the election officers and other electors.[1] But it was held in that case that the law requiring the administering of an oath to such voters as claim the right to have their ballots marked by another person is mandatory and must be strictly observed. The same provision in the statute of Indiana has been construed to be directory only, the Court holding that the right of a voter to assistance depends not on his declaration, but on the fact of his disability.[2] The provisions of the statutes of Michigan and California with reference to assisting disabled voters in marking their ballots have been held by the courts of those States to be mandatory.[3]

§ 720. The provisions of the law defining the manner in which the voter shall mark his ballot are generally held to be mandatory. To permit the ballot to be marked in a different manner from that prescribed would be to enable the voter to place a distinguishing mark upon his ballot, thereby depriving it of its secrecy, and frustrating the chief object sought to be obtained by the system.[4]

[1] State *v.* Gay, 59 Minn., 6; 60 N. W. Rep., 676. Under the Missouri law the election judges are not permitted to enter the voting compartment to assist an elector to prepare his ballot, but must prepare the ballot at the voter's dictation without leaving their respective positions. Session Laws, 1883, p. 164.

[2] Montgomery *v.* Oldham, 143 Ind., 137; 42 N. E. Rep., 474.

[3] Ellis *v.* May, 99 Mich., 538; 58 N. W. Rep., 483; Tebbe *v.* Smith, 108 Cal., 101; 41 Pac. Rep., 454.

[4] Tebbe *v.* Smith, 108 Cal., 101; 41 Pac. Rep., 454; Taylor *v.* Bleakley, 55 Kan., 1; 39 Pac. Rep., 1045, and note to same case in 49 Am. St. Rep., 240; Richardson *v.* Jamison, 55 Kan., 16; 39 Pac. Rep., 1050; Whittan *v.* Zahorek, 91 Iowa, 93; 59 N. W. Rep., 57; State *v.* Hogan, 91 Iowa. 510; 60 N. W. Rep., 108; Parvin *v.* Wimberg, 130 Ind., 561; 30 N. E. Rep., 790; Curran *v.* Clayton, 86 Me., 42; 29 Atl. Rep., 930; *In re* Vote Marks, 17 R. I., 812; 21 Atl. Rep., 962; Ellis *v.* Glaser, 102 Mich., 405; 61 N. E. Rep., 648; Sego *v.* Stoddard (Ind.), 36 N. E. Rep., 204; Kirk *v.* Rhodes, 46 Cal., 398; Bechtel *v.* Albin, 134 Ind., 193; 33 N. E. Rep., 967; Lay *v.* Parsons, 104

Most of the decisions holding that this rule should be relaxed sufficiently to determine the intention of an innocent voter are based upon statutes containing peculiar or indefinite provisions. Thus, under the section of the Nebraska statute that "when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part," it has been held that a ballot which the statute requires should be marked with ink should not be rejected because marked with a lead pencil.[1] Likewise under the statute of Minnesota, which does not prescribe any inflexible rule as to what shall, or shall not, be accepted as a cross-mark, it has been held that "any mark, however crude and imperfect in form, if it is apparent that it was honestly intended as a cross-mark, and for nothing else, must be given effect as such."[2] It may be concluded that while there is some authority to the contrary,[3] the great weight of authority in this country is in favor of holding such provisions mandatory.

§ 721. In most States the use of any mark upon a ballot by means of which it may afterwards be identified or distinguished will render the ballot void.[4] It has been held in Michigan and Nevada that this provision applies only to marks made upon the ballot by the voter, and not to marks made by

Cal., 661; 38 Pac. Rep., 447; Vallier *v.* Brakke (S. Dak.), 64 N. W. Rep., 180 and 1119; McKittrick *v.* Pardee (S. Dak.), 65 N. W. Rep., 23; *In re* Contested Election of School Directors of Little Beaver Township, 165 Pa. St., 233; 30 Atl. Rep., 955; State *v.* McElroy, 44 La. Ann., 796; People *v.* Sausalito, 106 Cal., 500; Parker *v.* Orr, 158 Ill., 609.

[1] State *v.* Russell, 34 Neb., 116; 51 N. W. Rep., 465; Spurgin *v.* Thompson, 37 Neb., 39; 55 N. W. Rep., 297.

[2] Pennington *v.* Hare, 60 Minn., 146; 62 N. W. Rep., 116.

[3] Houston *v.* Steele (Ky.), 34 S. W. Rep., 6; Johnson *v.* Board of Canvassers (Mich.), 59 N. W. Rep., 412; Coleman *v.* Gernet, 14 Pa. Co. Ct. R., 578.

[4] Tebbe *v.* Smith, 108 Cal., 101; 41 Pac. Rep., 454. The Supreme Court of Texas has held that the writing of the voter's name upon the back of his ticket will not avoid it. Hanscom *v.* State (Tex.), 31 S. W. Rep., 547. The Texas law is, however, a modification of the system as adopted in the other States and is less rigid in its regulations.

election officers through mistake.[1] But in New York ballots having the name of one polling district printed upon the backs thereof, and sent to and used at another district through the accident or design of the county clerk, were rejected in *People* v. *Board of County Canvassers*,[2] on the ground that the indorsement thereon was not as prescribed by law, and was a distinguishing mark within the meaning of the statute. This case arose, however, under the New York ballot law of 1890, under which separate tickets were prepared for each political party, and the error in question occurred only in respect to the ballots prepared for one party, so that these ballots became thereby distinguishable from all others. This decision was by a divided court, Judges Peckham and Andrews filing dissenting opinions. Under the present law of New York, providing for one ballot for all parties, a different conclusion has been reached. In the recent case of *People* v. *Woods*,[3] it is held that a ballot furnished by the State is not a marked ballot because of any irregularity in making it up or printing it. In this case a public official, charged with the duty of making up and printing the ballots, inserted the names of candidates in a party column, not duly nominated by such party. This was held not to invalidate such ballots cast by innocent voters, though done in violation of law.

The fraudulent placing of distinguishing marks upon ballots after they have been deposited in the ballot-box will not render them illegal.[4]

§ 722. The statute of Nevada provides "that any names, words or marks, except as in the act provided, shall invalidate the ballot." It has, however, been held under this section that a mark inadvertently or accidentally made, not for

[1] Lindstrom *v.* Board of Canvassers, 94 Mich., 467; 54 N. W. Rep., 280; Buckner *v.* Lynip (Nev.), 41 Pac. Rep., 762.

[2] 129 N. Y., 395; 29 N. E. Rep., 327.

[3] 148 N. Y., 142; 42 N. E. Rep., 536.

[4] Attorney-General *v.* Howcroft (Mich.), 64 N. W. Rep., 654.

an evil purpose, should not be construed as a distinguishing mark.[1]

§ 723. The statute of Missouri provides that no writing shall be placed upon the back of the ballot except the names or initials of two of the judges of election and the number of the ballot. It has been said by the Supreme Court of that State in a recent case[2] that this provision refers to the time when the ballot was delivered to the voter, and not to the time when it was voted; and though the intention of the statute doubtless was to require that the ballot should have no other writing upon it when delivered by the voter to the judges, still this provision should not be regarded as mandatory, it not having been made so by the statute. The Court therefore held that a ballot on the back of which a voter had written his name was not void, where it did not appear that the ballot was so folded that the name could be seen, or that the name was written for the purpose of identifying the vote.

The soundness of this decision may well be doubted, even though the statute of Missouri does not expressly provide for the rejection of ballots bearing distinguishing marks. A holding to the contrary would seem to be more in accord with the spirit of the law, and more likely to secure the secrecy of the ballot. The Courts of Nebraska and South Dakota hold that ballots on which voters have written their names cannot be counted.[3]

§ 724. The decisions cited in the preceding sections upon the question whether the provisions of the law are mandatory or directory are not entirely harmonious. They, however, disclose a well-defined disposition on the part of the courts to distinguish between acts to be performed by the voters, and those devolving upon the public officials charged with the conduct of the election. The weight of authority

[1] Dennis *v.* Caughlin (Nev.), 41 Pac. Rep., 768.

[2] Lankford *v.* Gebhart, 130 Mo., 621.

[3] Spurgin *v.* Thompson, 37 Neb., 39; 55 N. W. Rep., 297; Vallier *v.* Brakke (S. Dak.), 64 N. W. Rep., 180.

is clearly in favor of holding the voter, on the one hand, to a strict performance of those things which the law requires of him, and on the other of relieving him from the consequence of a failure on the part of election officers to perform their duties according to the letter of the statute where such failure has not prevented a fair election. The justice of this rule is apparent, and it may be said to be the underlying principle to be applied in determining this question. The requirements of the law upon the elector are in the interest of pure elections, and should be complied with at least in substance, but to disfranchise the voter because of the mistakes or omissions of election officers would be to put him entirely at the mercy of political manipulators. The performance by the election officers of the duties imposed upon them can be reasonably well secured by providing a penalty for failure so to do.

§ 725. In the State of Kentucky all primary elections held in that State are conducted according to the Australian system.[1] Forty days' public notice is required to be given of such elections, specifying the day when the election will take place, the hours between which it will be held, the offices for which candidates will be nominated, and the places at which the polls will be opened. All legal voters may participate in such primary elections, but, in order that none but those affiliating with or being members of a political party may participate in a primary election held by such party, provision is made for ascertaining the political affiliation of all voters at the regular State registration, and for recording the same upon the State registration books. The list thus made up is posted and may be copied by the governing authority of any political party. Tampering with this list is made a criminal offense. The primary election inspectors are sworn in in the same manner as at general elections, and are subject to like penalties for offenses against the law. The names of candidates for office must be submitted to the party committee fifteen days before the elec-

[1] Art. 12, ch. 41, Kentucky Statutes.

tion, and persons complying with the conditions imposed by the committee must be declared candidates. The expense of printing ballots and notices, together with all other expense of the primaries, is borne by the political party holding the same, but the ballots must be printed under the same restrictions provided by the general law of the State for the printing of ballots used at State elections. This valuable innovation is said to have given very satisfactory results since its introduction in the State in 1892.[1]

§ 726. In Massachusetts a special ballot for the use of women qualified to vote for school committee is printed on tinted paper, different, however, from that used for specimen ballots.[2] In North Dakota, ballots cast by women on propositions pertaining to school matters must be deposited in a separate ballot-box,[3] and in Minnesota a separate ballot-box is likewise provided for ballots cast by women.[4]

§ 727. Among the general provisions of the statute for the prevention of fraud in elections, and not already referred to, may be mentioned the furnishing of ballot-boxes by the State or municipality, the requirements for the surrender and cancellation of unused ballots, provisions forbidding the taking of official ballots from the voting place, closing saloons on election day and prohibiting electioneering in the vicinity of the polls,[5] supplemented by provisions for the criminal prosecution of persons guilty of wilful violations of the law. The division of cities into small voting precincts, though not strictly a feature of this system, is a reform which has been embodied in the law as introduced in some States, and is now almost universally applied in conducting municipal elections in the United States.[6]

[1] See Article of John E. Milholland, "The Danger Point in American Politics," North American Review for January, 1897, p. 92.

[2] Acts of 1893, ch. 417, sec. 132.

[3] Sec. 522, Rev. Code of North Dakota, 1895.

[4] Sec. 77, ch. 4, Laws of 1893.

[5] The provision of the law forbidding electioneering in the vicinity of the polls is constitutional. State *v.* Black, 54 N. J. Law, 446; 24 Atl. Rep., 489.

[6] This chapter has been confined to a consideration of American de-

§ 728. Probably the chief objection to the Australian ballot law is that the counting of the official ballots is of necessity a tedious and difficult process, and that information with reference to the result of an election is, on this account, unduly delayed. An interesting innovation has been introduced in Michigan and New York which promises to obviate this difficulty and to revolutionize the manner of conducting elections in this country. In 1893 the Legislature of Michigan provided by statute that at all township, State and village elections held in that State the voting might be done with the "Rhines Vote Recorder."[1] By an act of the Legislature of New York, approved May 24, 1894,[2] it is provided that any city or town in the State outside of New York and Kings counties may adopt the "Myers Automatic Voting Machine" for use at all elections. By an act approved April 21, 1896,[3] a similar provision was made permitting the use of the "Davis Voting Machine." The use of other machines is also permitted in incorporated towns and villages.[4] In 1895 the New York statute providing for the use of the Myers machine, and prescribing the manner of conducting elections with it, was adopted in its entirety in Michigan,[5] the act applying, however, to every city, township and village in the State. At the same session of the Michigan Legislature the use of the "Abbot Voting Machine" was also legalized in cities, townships and villages.[6]

§ 729. While the construction of and manner of operating these devices differ to some extent, the design in each

cisions affecting the Australian system as introduced in this country, and no attempt has been made to review the decisions of the courts of other countries where the system has been adopted. A compilation of the decisions of foreign courts may be found in Wigmore's Australian Ballot System, 2d edition.

[1] Act No. 98, Public Acts of 1893, p. 122.

[2] Laws 1894, ch. 764.

[3] Laws 1896, ch. 339.

[4] Laws 1894, ch. 765.

[5] Act No. 85, Public Acts of 1895, p. 185.

[6] Act No. 76, Public Acts of 1895, p. 174.

case is to secure absolute secrecy in voting, and speed and accuracy in counting the ballots.

The Myers, Abbot and Davis machines are operated substantially alike. There is a compartment to be occupied by the voter in voting, and a closed counter compartment containing the automatic mechanical counters. In the voters' compartment is arranged a frame in which appear the names of all candidates for office arranged in rows similar to the arrangement of official ballots under the Australian system, the party designations being at the head of the columns and the names of the offices to be filled appearing on the left. Propositions to be voted upon appear as upon official ballots. The different party tickets are distinguished from each other by the use of distinctive colors. Where a candidate is nominated by two or more parties for the same office, his name is printed on the ballot of the party first nominating him, unless he designates a preference to appear otherwise. A key-board is arranged in connection with the ballot-frame, and the voter is enabled to register his choice of a straight ticket or of individual candidates by pressing a push-knob or similar device.[1] The voters' compartment is fitted with one door for entrance and another for exit. The doors of the compartment are closed while the elector is voting and he is only permitted to remain in the compartment one minute. Provision is made whereby assistance may be rendered disabled voters. The machines are so constructed that repeating is impossible. The total number of votes cast is registered publicly upon a dial at the front

[1] The Abbot machine is of the type which keeps the record by means of registering wheels. The working parts of the apparatus are a set of slides, each carrying the name of a candidate for office. The machine is so constructed that the slides containing the names of the candidates may be moved singly or in unison, at the will of the voter, so that either a straight ticket or a split or scratched ticket may be voted at one motion. The operating bar carries the unit wheel of the candidate voted for forward one number each time a vote is cast for such candidate, thus adding each vote to those already received by the candidate.

of the machine. The result of the vote for each candidate, and upon each proposition, is indicated upon dials in the counter compartment, but during the process of election this compartment is kept closed and locked. As soon as the polls are closed the entrance door of the voter's compartment is locked. The inspectors, then, in the presence of the watchers and challengers, unlock and open the doors of the counter compartment. The result of the vote is then read from the dials and announced, and each and all are required to observe and record the total number of votes registered for each candidate and upon each question or proposition submitted; and such ascertainment of the results is deemed to be the canvassing of the votes cast at the election.[1]

The Rhines machine differs from the others in that the voter is required to use a different machine in voting for candidates for each of the different offices to be filled, and the vote is recorded upon a ribbon contained in each machine, which ribbon is preserved in the same way that ballots were preserved before the adoption of the law.[2]

[1] It is stated by reliable authority that at the last general election the result of the election at Hudson, Michigan, where a voting machine was used, was announced by the inspectors one minute and forty-four seconds after the closing of the polls.

[2] The mechanism of the Rhines machine is thus described in the New York "Nation" of April 18, 1889:

"The ordinary paging machine of the printer suggested the main idea to Mr. Rhines. The principle involved is that of the counting machine, as in the odometer. The machine itself is an oblong brass box about ten by fourteen inches, six inches deep, with a hinged cover. This box is placed on a small stand in the rear of the polling-room, and in plain sight of the judges and clerks of election. The voter is identified by the judges, and passes into the stall where the machine is. On raising the lid of the box, a screen is drawn up before the stall, shutting both voter and machine from view. The lid when raised discloses a number of keys not unlike organ stops. There are as many vertical rows of keys as the greatest number of candidates for any one office, and as many keys in a horizontal row as there are offices to be filled. The printed name of each candidate and the office for which he is nominated are placed in the top of or above these keys.

"The elector in voting presses down the key bearing the name of the candidate he wishes to support. The key remains down. In being depressed it has locked all the keys of other candidates to the same office, thus making it impossible for an elector to vote for more than one candidate for the same office; at the same time this key has imprinted indelibly, on a slip of paper beneath in the box, a number which shows the total vote cast for that candidate up to that time. The elector votes for each of the other offices in turn in the same way, shuts down the lid of the box, dropping the screen in front, exposing machine and voter to the view of the judges. The box-lid, on being closed, liberates all the keys, and the machine is ready for the next voter.

"When the last elector has voted, the count is thus already made and recorded for each candidate, while the turnstile at the judges' desk has recorded the total number of voters admitted. There is no opportunity for repeating by closing and raising the lid, and thus setting free the keys; for each raising of the lid not only is visible to the officers but also rings an alarm bell."

APPENDIX.

LAWS OF THE UNITED STATES

IN RELATION TO

THE ELECTIVE FRANCHISE.

ELECTION OF SENATORS.

ELECTION OF REPRESENTATIVES

ORGANIZATION OF MEETINGS OF CONGRESS.

CONTESTED ELECTIONS.

PRESIDENTIAL ELECTIONS.

ALSO

A DISCUSSION OF THE QUESTION OF RESIDENCE AS A QUALIFICATION FOR VOTING, BEING PART OF REPORT OF THE COMMITTEE OF ELECTIONS IN THE HOUSE OF REPRESENTATIVES, U. S., IN CASE OF CESSNA *v.* MYERS.

THE ELECTIVE FRANCHISE.*

(FROM THE REVISED STATUTES OF THE UNITED STATES, TITLE XXVI.)

SEC. 2002. Bringing armed troops to places of election. [Repealed.]
2003. Interference with freedom of elections by officers of army or navy.
2004. Race, color, or previous condition, not to affect the right to vote.
2005. Nor the performance of any prerequisite. [Repealed.]
2006. Penalty for refusing to give full effect to the preceding section. [Repealed.]
2007. What shall entitle a person to vote. [Repealed.]
2008. Penalty for wrongfully refusing to receive a vote. [Repealed.]
2009. For unlawfully hindering a person from voting. [Repealed.]
2010. Remedy for deprivation of office. [Repealed.]
2011. In cities or towns of over 20,000 inhabitants, upon written application of two citizens, the circuit judge to open court. [Repealed.]
2012. Supervisors of election. [Repealed.]
2013. Court to be kept open. [Repealed.]
2014. District judge may perform duties of circuit judge. [Repealed.]
2015. Construction of preceding section. [Repealed.]
2016. Duties of supervisors of elections. [Repealed.]
2017. Attendance at elections. [Repealed.]
2018. To personally scrutinize and count each ballot. [Repealed.]
2019. Their positions. [Repealed.]
2020. When molested. [Repealed.]
2021. Special deputies. [Repealed.]
2022. Duties of marshals. [Repealed.]
2023. Persons arrested to be taken forthwith before a judge. [Repealed.]
2024. Assistance of bystanders. [Repealed.]
2025. Chief supervisors of elections. [Repealed.]
2026. Their duties. [Repealed.]
2027. Marshals to forward complaint to chief supervisors. [Repealed.]
2028. Supervisors and deputy marshals to be qualified voters, etc. [Repealed.]
2029. Certain supervisors not to make arrests, etc. [Repealed.]
2030. No more marshals or deputy marshals to be appointed than now authorized. [Repealed.]
2031. Pay of supervisors, etc. [Repealed.]
Act of February 8, 1894, repealing certain sections.

*The repealed sections, together with the repealing act, are inserted here for convenience of reference in connection with decisions thereon referred to in the text.

SEC. 2002. No military or naval officer, or other person engaged in the civil, military, or naval service of the United States, shall order, bring, keep, or have under his authority or control, any troops or armed men at the place where any general or special election is held in any State, unless it be necessary to repel the armed enemies of the United States, or to keep the peace at the polls. [Repealed.]

SEC. 2003. No officer of the Army or Navy of the United States shall prescribe or fix, or attempt to prescribe or fix, by proclamation, order, or otherwise, the qualifications of voters in any State, or in any manner interfere with the freedom of any election in any State, or with the exercise of the free right of suffrage in any State.

SEC. 2004. All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or territory, or by or under its authority, to the contrary notwithstanding.

SEC. 2005. When under the authority of the constitution or laws of any State, or the laws of any Territory, any act is required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are charged with the duty of furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, every such person and officer shall give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote. [Repealed.]

SEC. 2006. Every person or officer charged with the duty specified in the preceding section, who refuses or knowingly omits to give full effect to that section, shall forfeit the sum of five hundred dollars to the party aggrieved by such refusal or omission, to be recovered by an action on the case, with costs, and such allowance for counsel fees as the court may deem just. [Repealed.]

SEC. 2007. Whenever under the authority of the constitution or laws of any State, or the laws of any Territory, any act is required to be done by a citizen as a prerequisite to qualify or entitle him to vote, the offer of such citizen to perform the act required to be done shall, if it fail to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing to vote, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had in fact performed such act. [Repealed.]

SEC. 2008. Every judge, inspector, or other officer of election whose duty it is to receive, count, certify, register, report, or give effect to the vote of such citizen, who wrongfully refuses or omits to receive, count,

certify, register, report, or give effect to the vote of such citizen upon the presentation by him of his affidavit, stating such offer and the time and place thereof, and the name of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall forfeit the sum of five hundred dollars to the party aggrieved by such refusal or omission, to be recovered by an action on the case, with costs, and such allowance for counsel fees as the court may deem just. [Repealed.]

SEC. 2009. Every officer or other person, having powers or duties of an official character to discharge under any of the provisions of this Title, who by threats, or any unlawful means, hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at any election in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall forfeit the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with costs, and such allowance for counsel fees as the court may deem just. [Repealed.]

SEC. 2010. Whenever any person is defeated or deprived of his election to any office, except elector of President or Vice-President, Representative or Delegate in Congress, or a member of a State legislature, by reason of the denial to any citizen who may offer to vote, of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impaired by such denial; and the person so defeated or deprived may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it appears that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And the circuit or district court shall have, concurrently with the State courts, jurisdiction thereof, so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States, and secured herein. [Repealed.]

SEC. 2011. Whenever, in any city or town, having upward of twenty thousand inhabitants, there are two citizens thereof, or whenever, in any county or parish, in any congressional district, there are ten citizens thereof, of good standing, who, prior to any registration of voters for an election for Representative or Delegate in the Congress of the United States, or prior to any election at which a Representative or Delegate in Congress is to be voted for, may make known, in writing, to the judge of the circuit court of the United States, for the circuit wherein such city or town, county or parish, is situated, their desire to have such registration, or such election, or both, guarded and scrutinized, the judge, within not

less than ten days prior to the registration, if one there be, or, if no registration be required, within not less than ten days prior to the election, shall open the circuit court at the most convenient point in the circuit. [Repealed.]

SEC. 2012. The court, when so opened by the judge, shall proceed to appoint and commission, from day to day, and from time to time, and under the hand of the judge, and under the seal of the court, for each election district or voting precinct in such city or town, or for such election district or voting precinct in the congressional district, as may have applied in the manner hereinbefore prescribed, and to revoke, change, or renew such appointment from time to time, two citizens, residents of the city or town, or of the election district or voting precinct in the county or parish, who shall be of different political parties, and able to read and write the English language, and who shall be known and designated as supervisors of election. [Repealed.]

SEC. 2013. The circuit court, when opened by the judge as required in the two preceding sections, shall therefrom and thereafter, and up to and including the day following the day of election, be always open for the transaction of business under this Title, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court. [Repealed.]

SEC. 2014. Whenever, from any cause, the judge of the circuit court in any judicial circuit is unable to perform and discharge the duties herein imposed, he is required to select and assign to the performance thereof, in his place, such one of the judges of the district courts within his circuit as he may deem best; and upon such selection and assignment being made, the district judge so designated shall perform and discharge, in the place of the circuit judge, all the duties, powers and obligations imposed and conferred upon the circuit judge, by the provisions hereof. [Repealed.]

SEC. 2015. The preceding section shall be construed to authorize each of the judges of the circuit courts of the United States to designate one or more of the judges of the district courts within his circuit to discharge the duties arising under this Title. [Repealed.]

SEC. 2016. The supervisors of election, so appointed, are authorized and required to attend at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for a Representative or Delegate in Congress, and to challenge any person offering to register; to attend at all times and places when the names of registered voters may be marked for challenge, and to cause such names registered as they may deem proper to be so marked; to make, when required, the lists, or either of them, provided for in section two thousand and twenty-six, and verify the same; and upon any occasion, and at any time when in attendance upon the duty herein prescribed, to personally inspect and scrutinize such registry, and for purposes of identification to affix their

signature to each page of the original list, and of each copy of any such list of registered voters, at such times, upon each day when any name may be received, entered, or registered, and in such manner as will, in their judgment, detect and expose the improper or wrongful removal therefrom, or addition thereto, of any name. [Repealed.]

SEC. 2017. The supervisors of election are authorized and required to attend at all times and places for holding elections of Representatives or Delegates in Congress, and for counting the votes cast at such elections; to challenge any vote offered by any person whose legal qualifications the supervisors, or either of them, may doubt; to be and remain where the ballot-boxes are kept at all times after the polls are open until every vote cast at such time and place has been counted, the canvass of all votes polled wholly completed, and the proper and requisite certificates or returns made, whether the certificates or returns be required under any law of the United States, or any State, territorial, or municipal law, and to personally inspect and scrutinize, from time to time, and at all times, on the day of election, the manner in which the voting is done, and the way and method in which the poll-books, registry-lists, and tallies or check-books, whether the same are required by any law of the United States, or any State, territorial, or municipal law, are kept. [Repealed.]

SEC. 2018. To the end that each candidate for the office of Representative or Delegate in Congress may obtain the benefit of every vote for him cast, the supervisors of election are, and each of them is, required to personally scrutinize, count, and canvass each ballot in their election district or voting precinct cast, whatever may be the indorsement on the ballot, or in whatever box it may have been placed or be found; to make and forward to the officer who, in accordance with the provisions of section two thousand and twenty-five, has been designated as the chief supervisor of the judicial district in which the city or town, wherein they may serve, acts, such certificates and returns of all such ballots as such officer may direct and require, and to attach to the registry-list, and any and all copies thereof, and to any certificate, statement, or return, whether the same, or any part or portion thereof, be required by any law of the United States, or of any State, territorial, or municipal law, any statement touching the truth or accuracy of the registry, or the truth or fairness of the election and canvass, which the supervisors of the election, or either of them, may desire to make or attach, or which should properly and honestly be made or attached, in order that the facts may become known. [Repealed.]

SEC. 2019. The better to enable the supervisors of elections to discharge their duties, they are authorized and directed, in their respective election districts or voting precincts, on the day of registration, on the day when registered voters may be marked to be challenged, and on the day of election, to take, occupy, and remain in such position, from time to time, whether before or behind the ballot-boxes, as will, in their judgment, best enable them to see each person offering himself for registration or offering to vote, and as will best conduce to their scrutinizing the manner in which the registration or voting is being conducted; and at the closing of the polls for the reception of votes, they are required to place themselves in such position, in relation to the ballot-boxes, for the

purpose of engaging in the work of canvassing the ballots, as will enable them to fully perform the duties in respect to such canvass provided herein, and shall there remain until every duty in respect to such canvass, certificates, returns, and statements has been wholly completed. [Repealed.]

SEC. 2020. When in any election district or voting precinct in any city or town, for which there have been appointed supervisors of election for any election at which a Representative or Delegate in Congress is voted for, the supervisors of election are not allowed to exercise and discharge, fully and freely, and without bribery, solicitation, interference, hinderance, molestation, violence, or threats thereof, on the part of any person, all the duties, obligations, and powers conferred upon them by law, the supervisors of election shall make prompt report, under oath, within ten days after the day of election to the officer who, in accordance with the provisions of section two thousand and twenty-five, has been designated as the chief supervisor of the judicial district in which the city or town wherein they served, acts, of the manner and means by which they were not so allowed to fully and freely exercise and discharge the duties and obligations required and imposed herein. And upon receiving any such report, the chief supervisor, acting both in such capacity and officially as a commissioner of the circuit court, shall forthwith examine into all the facts; and he shall have power to subpœna and compel the attendance before him of any witness, and to administer oaths and take testimony in respect to the charges made; and, prior to the assembling of the Congress for which any such Representative or Delegate was voted for, he shall file with the Clerk of the House of Representatives, all the evidence by him taken, all information by him obtained, and all reports to him made. [Repealed.]

SEC. 2021. Whenever an election at which Representatives or Delegates in Congress are to be chosen is held in any city or town of twenty thousand inhabitants or upward, the marshal for the district in which the city or town is situated shall, on the application in writing of at least two citizens residing in such city or town, appoint special deputy marshals, whose duty it shall be, when required thereto, to aid and assist the supervisors of election in the verification of any list of persons who may have registered or voted; to attend in each election district or voting precinct at the time and places fixed for the registration of voters, and at all times and places when and where the registration may by law be scrutinized, and the names of registered voters be marked for challenge; and also to attend, at all times for holding elections, the polls in such district or precinct. [Repealed.]

SEC. 2022. The marshal and his general deputies, and such special deputies, shall keep the peace, and support and protect the supervisors of election in the discharge of their duties, preserve order at such places of registration and at such polls, prevent fraudulent registration and fraudulent voting thereat, or fraudulent conduct on the part of any officer of election, and immediately, either at the place of registration or polling place, or elsewhere, and either before or after registering or voting, to arrest and take into custody, with or without process, any person who

commits, or attempts or offers to commit, any of the acts or offenses prohibited herein, or who commits any offense against the laws of the United States; but no person shall be arrested without process for any offense not committed in the presence of the marshal or his general or special deputies, or either of them, or of the supervisors of election, or either of them, and, for the purpose of arrest, or the preservation of the peace, the supervisors of election shall, in the absence of the marshal's deputies, or if required to assist such deputies, have the same duties and powers as deputy marshals; nor shall any person, on the day of such election, be arrested without process for any offense committed on the day of registration. [Repealed.]

SEC. 2023. Whenever any arrest is made under 'any provision of this title, the person so arrested shall forthwith be brought before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto, as authorized by law in case of crimes against the United States. [Repealed.]

SEC. 2024. The marshal or his general deputies, or such special deputies as are thereto specially empowered by him, in writing, and under his hand and seal, whenever he or either or any of them, is forcibly resisted in executing their duties under this Title, orshall, by violence, threats, or menaces, be prevented from executing such duties, or from arresting any person who has committed any offense for which the marshal or his general or his special deputies are authorized to make such arrest, are, and each of them is, empowered to summon and call to his aid the bystanders or *posse comitatus* of his district. [Repealed.]

SEC. 2025. The circuit courts of the United States for each judicial circuit shall name and appoint, on or before the first day of May, in the year eighteen hundred and seventy-one, and thereafter as vacancies may from any cause arise, from among the circuit court commissioners for each judicial district in each judicial circuit, one of such officers, who shall be known for the duties required of him under this Title, as the chief supervisor of elections of the judicial district for which he is a commissioner, and shall, so long as faithful and capable, discharge the duties in this Title imposed. [Repealed.]

SEC. 2026. The chief supervisor shall prepare and furnish all necessary books, forms, blanks, and instructions for the use and direction of the supervisors of election in the several cities and towns in their respective districts; he shall receive the applications of all parties for appointment to such positions; upon the opening, as contemplated in section two thousand and twelve, of the circuit court for the judical circuit in which the commissioners so designated acts, he shall present such applications to the judge thereof, and furnish information to him in respect to the appointment by the court of such supervisors of election; he shall require of the supervisors of election, when necessary, lists of the persons who may register and vote, or either, in their respective election districts or voting precincts, and cause the names of those upon any such list

whose right to register or vote is honestly doubted to be verified by proper inquiry and examination at the respective places by them assigned as their residences; and he shall receive, preserve and file all oaths of office of supervisors of election, and of all special deputy marshals appointed under the provisions of this title, and all certificates, returns, reports, and records of every kind and nature contemplated or made requisite by the provisions hereof, save where otherwise herein specially directed. [Repealed.]

SEC. 2027. All United States marshals and commissioners who in any judicial district perform any duties under the preceding provisions relating to, concerning, or affecting the election of Representatives or Delegates in the Congress of the United States, from time to time, and, with all due dilligence, shall forward to the chief supervisor in and for their judicial district, all complaints, examinations, and records pertaining thereto, and all oaths of office by them administered to any supervisor of election or special deputy marshal, in order that the same may be properly preserved and filed. [Repealed.]

SEC. 2028. No person shall be appointed a supervisor of election or a deputy marshal, under the preceding provisions, who is not, at the time of his appointment, a qualified voter of the city, town, county, parish, election district, or voting precinct in which his duties are to be performed. [Repealed.]

SEC. 2029. The supervisors of election appointed for any county or parish, in any congressional district, at the instance of ten citizens, as provided in section two thousand and eleven, shall have no authority to make arrests, or to perform other duties than to be in the immediate presence of the officers holding the election, and to witness all their proceedings, including the counting of the votes and the making of a return thereof. [Repealed.]

SEC. 2030. Nothing in this Title shall be construed to authorize the appointment of any marshals or deputy marshals, in addition to those authorized by law, prior to the tenth day of June, eighteen hundred and seventy-two. [Repealed.]

SEC. 2031. There shall be allowed and paid to the chief supervisor, for his services as such officer, the following compensation, apart from and in excess of all fees allowed by law for the performance of any duty as circuit court commissioner: For filing and caring for every return, report, record, document or other paper required to be filed by him under any of the preceding provisions, ten cents; for affixing a seal to any paper, record, report or instrument, twenty cents; for entering and indexing the records of his office, fifteen cents per folio; and for arranging and transmitting to Congress, as provided for in section two thousand and twenty, any report, statement, record, return, or examination, for each folio, fifteen cents; and for any copy thereof, or of any paper on file, a like sum. And there shall be allowed and paid to each supervisor of election, and each special deputy marshal who is appointed and performs his duty under the preceding provisions, compensation at the rate of five dollars per day for each day he is actually on duty, not exceeding ten

days; but no compensation shall be allowed, in any case, to supervisors of election, except to those appointed in cities or towns of twenty thousand or more inhabitants. And the fees of the chief supervisors shall be paid at the Treasury of the United States, such accounts to be made out, verified, examined, and certified as in the case of accounts of commissioners, save that the examination or certificate required may be made by either the circuit or district judge. [Repealed.]

ACT OF FEBRUARY 8, 1894.

AN ACT to repeal all statutes relating to supervisors of elections and special deputy marshals, and for other purposes.

Be it enacted, etc., That the following sections and parts of sections of the Revised Statutes of the United States be, and the same are hereby repealed; that is to say of title "Elective Franchise," sections twenty hundred and two, twenty hundred and five, twenty hundred and six, twenty hundred and seven, twenty hundred and eight, twenty hundred and nine, twenty hundred and ten, twenty hundred and eleven, twenty hundred and twelve, twenty hundred and thirteen, twenty hundred and fourteen, twenty hundred and fifteen, twenty hundred and sixteen, twenty hundred and seventeen, twenty hundred and eighteen, twenty hundred and nineteen, twenty hundred and twenty, relating to the appointment, qualification, power, duties, and compensation of supervisors of election;

And also sections twenty hundred and twenty-one, twenty hundred and twenty-two, twenty hundred and twenty-three, twenty hundred and twenty-four, twenty hundred and twenty-five, twenty hundred and twenty-six, twenty hundred and twenty-seven, twenty hundred and twenty-eight, twenty hundred and twenty-nine, twenty hundred and thirty, twenty hundred and thirty-one of same title, relating to the appointment, qualification, power, duties and compensation of special deputies;

And also of title "Crimes," sections fifty-five hundred and six, fifty-five hundred and eleven, fifty-five hundred and twelve, fifty-five hundred and thirteen, fifty-five hundred and fourteen, fifty-five hundred and fifteen, fifty-five hundred and twenty, fifty-five hundred and twenty-one, fifty-five hundred and twenty-two, fifty-five hundred and twenty-three.

But the repeal of the sections hereinbefore mentioned shall not operate so as to affect any prosecutions now pending, if any, for a violation of any of the provisions of said sections;

And also part of section six hundred and forty-three,[1] as follows:

"Or is commenced against any officer of the United States or other

[1] The section here referred to relates to the removal of causes from State to Federal courts, against United States officers acting under color of office.

person on account of any act done under the provisions of title twenty-six, The Elective Franchise, or on account of any right, title or authority claimed by any officer or other person under any of said provisions."

SEC. 2. That all other statutes and parts of statutes relating in any manner to supervisors of election and special deputy marshals be, and the same are hereby repealed.

SEC. 3. That this Act shall take effect from and after its passage.

ELECTION OF SENATORS.

(REVISED STATUTES, U. S., TITLE II, CHAPTER I.)

SEC. 14. When Senators to be elected.
15. Mode of election.
16. Vacancy occurring before meeting of legislature.
17. Vacancy occurring during session of legislature.
18. Election of Senators certified.
19. Countersign of certificate.

SEC. 14. The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.

SEC. 15. Such election shall be conducted in the following manner: Each house shall openly, by a viva-voce vote of each member present, name one person for Senator in Congress from such State, and the name of the person so voted for, who receives a majority of the whole number of votes cast in each house, shall be entered on the journal of that house by the clerk or secretary thereof; or if either house fails to give such majority to any person on that day, the fact shall be entered on the journal. At twelve o'clock meridian of the day following that on which proceedings are required to take place as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house, he shall be declared duly elected Senator. But if the same person has not received a majority of the votes in each house, or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, by a viva-voce vote of each member present, a person for Senator, and the person who receives a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected. If no person receives such majority on the first day, the joint assembly shall meet at twelve o'clock meridian of each succeeding day during the session of the legislature, and shall take at least one vote, until a Senator is elected.

SEC. 16. Whenever on the meeting of the legislature of any State a vacancy exists in the representation of such State in the Senate, the legislature shall proceed, on the second Tuesday after meeting and organization, to elect a person to fill such vacancy, in the manner prescribed in the preceding section for the election of a Senator for a full term.

SEC. 17. Whenever during the session of the legislature of any State a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy.

SEC. 18. It shall be the duty of the executive of the State from which any Senator has been chosen, to certify his election, under the seal of the State, to the President of the Senate of the United States.

SEC. 19. The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State.

THE ELECTION OF REPRESENTATIVES.

(THE FOLLOWING ARE THE MATERIAL PORTIONS OF THE ACTS OF CONGRESS IN FORCE UPON THIS SUBJECT, AND FOUND IN REVISED STATUTES, U. S., TITLE II, CHAPTER II.)

SEC. 22. Should any State deny or abridge the right of any of the male inhabitants thereof, being twenty-one years of age, and citizens of the United States, to vote at any election named in the amendment to the Constitution, article fourteen, section two, except for participation in the rebellion or other crime, the number of Representatives apportioned to such State shall be reduced in the proportion which the number of such male citizens shall have to the whole number of male citizens twenty-one years of age in such State.

Sec. 23 has been repealed by the following Act:

ACT OF FEBRUARY 7, 1891.

AN ACT making an apportionment of Representatives in Congress among the several States under the eleventh census.

Be it enacted, etc., That after the third of March, eighteen hundred and ninety-three, the House of Representatives shall be composed of three hundred and fifty-six members, to be apportioned among the several States, as follows:

Alabama, nine.
Arkansas, six.
California, seven.
Colorado, two.
Connecticut, four.
Delaware, one.
Florida, two.
Georgia, eleven.
Idaho, one.
Illinois, twenty-two.
Indiana, thirteen.
Iowa, eleven.

Kansas, eight.
Kentucky, eleven.
Louisiana, six.
Maine, four.
Maryland, six.
Massachusetts, thirteen.
Michigan, twelve.
Minnesota, seven.
Mississippi, seven.
Missouri, fifteen.
Montana, one.
Nebraska, six.
Nevada, one.
New Hampshire, two.
New Jersey, eight.
New York, thirty-four.
North Carolina, nine.
North Dakota, one.
Ohio, twenty-one.
Oregon, two.
Pennsylvania, thirty.
Rhode Island, two.
South Carolina, seven.
South Dakota, two.
Tennessee, ten.
Texas, thirteen.
Vermont, two.
Virginia, ten.
Washington, two.
West Virginia, four.
Wisconsin, ten.
Wyoming, one.

SEC. 2. That whenever a new State is admitted to the Union, the Representative or Representatives assigned to it shall be in addition to the number three hundred and fifty-six.

SEC. 3. That in each State entitled under this apportionment the number to which each State may be entitled in the Fifty-third and each subsequent Congress shall be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of the Representatives to which such State may be entitled in Congress, no one district electing more than one Representative.

SEC. 4. That in case of an increase in the number of Representatives which may be given to any State under this apportionment, such additional Representative or Representatives shall be elected by the State at large, and the other Representatives by the districts now prescribed by law until the Legislature of such State in the manner herein prescribed shall redistrict such State, and if there be no increase in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State be redistricted as herein prescribed by the Legislature of said State.

SEC. 5. That all acts and parts of acts inconsistent with this act are hereby repealed.

* * * * * * * * * * * * * * *

SEC. 25. The Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the Forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is established as the day for the election, in each of said States and Territories, of Representatives and Delegates to the Congress, commencing on the fourth day of March next thereafter.

Ch. 130, Sup. 1874–1891, R. S. (p. 76).

SEC. 6. That section twenty-five of the Revised Statutes, prescribing the time for holding elections for Representatives to Congress, is hereby modified so as not to apply to any State that has not yet changed its day of election, and whose Constitution must be amended in order to effect a change in the day of the election of State officers in said State.

SEC. 26. The time for holding elections in any State, District, or Territory, for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

SEC. 27. All votes for Representatives in Congress must be by written or printed ballot; and all votes received or recorded contrary to this section, shall be of no effect. But this section shall not apply to any State voting otherwise whose election for Representatives occurs previous to the regular meeting of its legislature, next after the twenty-eighth day of February, eighteen hundred and seventy-one.

ORGANIZATION OF MEETINGS OF CONGRESS.

(FROM REVISED STATUTES, U. S., TITLE II, CHAPTER III.)

SEC. 28. Oath of Senators.
29. Oath of President of the Senate.
Act of April 18, 1876, authorizing Presiding officer, Secretary and Chief Clerk of Senate to administer oaths.
30. Oath of Speaker, members and Delegates.
31. Roll of Representatives-elect.
32. When roll made by Sergeant-at-Arms.
33. When by Door-keeper.
34. When President may change the place of meeting.

SEC. 28. The oath of office shall be administered by the President of the Senate to each Senator who shall hereafter be elected, previous to his taking his seat.

SEC. 29. When a President of the Senate has not taken the oath of office, it shall be administered to him by any member of the Senate.

ACT OF APRIL 18, 1876.

AN ACT further to provide for the administering of oaths in the Senate.

Be it enacted, etc., That the presiding officer, for the time being, of the Senate of the United States, shall have power to administer all oaths and affirmations that are or may be required by the Constitution, or by law, to be taken by any Senator, officer of the Senate, witness, or other person, in respect to any matter within the jurisdiction of the Senate.

SEC. 2. That the Secretary of the Senate, and the Chief Clerk thereof,

shall, respectively, have power to administer any oath or affirmation required by law, or by the rules or orders of the Senate, to be taken by any officer of the Senate, and to any witness produced before it.

SEC. 30. At the first session of Congress after every general election of Representatives, the oath of office shall be administered by any member of the House of Representatives to the Speaker, and by the Speaker to all the members and Delegates present, and to the Clerk, previous to entering on any other business; and to the members and Delegates who afterward appear, previous to their taking their seats.

SEC. 31. Before the first meeting of each Congress the Clerk of the next preceding House of Representatives shall make a roll of the Representatives elect, and place thereon the names of those persons, and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their States respectively, or the laws of the United States.

SEC. 32. In case of a vacancy in the office of Clerk of the House of Representatives, or of the absence or inability of the Clerk to discharge the duties imposed on him by law or custom relative to the preparation of the roll of Representatives or the organization of the House, those duties shall devolve on the Sergeant-at-Arms of the next preceding House of Representatives.

SEC. 33. In case of vacancies in the offices of both the Clerk and the Sergeant-at-arms, or of the absence or inability of both to act, the duties of the Clerk relative to the preparation of the roll of the House of Representatives, or the organization of the House shall be performed by the Door-keeper of the next preceding House of Representatives.

SEC. 34. Whenever Congress is about to convene, and from the prevalence of contagious sickness or the existence of other circumstances, it would, in the opinion of the President, be hazardous to the lives or health of the members to meet at the seat of Government, the President is authorized, by proclamation, to convene Congress at such other place as he may judge proper.

CONTESTED ELECTIONS.

(FROM REVISED STATUTES U. S., TITLE II, CHAPTER VIII.)

SEC. 105. Notice of intention to contest.
106. Time for answer.
107. Time for taking testimony.
Act of March 2, 1875, construing preceding section.
108. Notice of deposition, service.
109. Testimony taken at several places at same time.

SEC. 110. Who may issue subpœnas.
111. What the subpœna shall contain.
112. When justices of the peace may act.
113. Depositions, by consent.
114. Service of subpœna.
115. Witnesses need not attend out of the county.
116. Penalty for failure to attend or testify.
117. Witnesses outside of district.
118. Party notified may select an officer.
119. Depositions taken by party or agent.
120. Examination of witnesses.
121. Testimony, to what confined.
122. Testimony how written out and attested.
123. Production of papers.
124. Adjournments.
125. Notice, etc., attached to deposition.
126. Copy of notice and answer to accompany testimony.
127. [Amended.] How testimony to be sent to Clerk of House; how opened.
128. Fees of witnesses.
129. Fees of officers.
Act of March 3, 1879, expenses of contest.

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

SEC. 106. Any member upon whom the notice mentioned in the preceding section may be served shall, within thirty days after the service thereof, answer such notice, admitting or denying the facts alleged therein, and stating specifically any other grounds upon which he rests the validity of his election; and shall serve a copy of his answer upon the contestant.

SEC. 107. In all contested-election cases the time allowed for taking testimony shall be ninety days, and the testimony shall be taken in the following order. The contestant shall take testimony during the first forty days, the returned member during the succeeding forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period.

ACT OF MARCH 2, 1875.

Ch. 119, Sup. 1874–1891 (p. 69).

SEC. 2. That section one hundred and seven of the Revised Statutes of the United States shall be construed as requiring all testimony in cases of contested election to be taken within ninety days from the day on which the answer of the returned member is served upon the contestant.

SEC. 108. The party desiring to take a deposition under the provisions of this chapter shall give the opposite party notice, in writing, of the time and place, when and where the same will be taken, of the name of the witness to be examined and their places of residence, and of the name of an officer before whom the same will be taken. The notice shall be personally served upon the opposite party, or upon any agent or attorney authorized by him to take testimony or cross-examine witnesses in the matter of such contest, if, by the use of reasonable diligence, such personal service can be made; but if, by the use of such diligence, personal service can not be made, the service may be made by leaving a duplicate of the notice at the usual place of abode of the opposite party. The notice shall be served so as to allow the opposite party sufficient time by the usual route of travel to attend, and one day for preparation exclusive of Sundays and the day of service. Testimony in rebuttal may be taken on five days' notice.

SEC. 109. Testimony in contested-election cases may be taken at two or more places at the same time.

SEC. 110. When any contestant or returned member is desirous of obtaining testimony respecting a contested election, he may apply for a subpœna to either of the following officers who may reside within the congressional district in which the election to be contested was held:

First. Any judge of any court of the United States.

Second. Any chancellor, judge, or justice of a court of record of any State.

Third. Any mayor, recorder, or intendent of any town or city.

Fourth. Any register in bankruptcy or notary public.

SEC. 111. The officer to whom the application authorized by the preceding section is made, shall thereupon issue his writ of subpœna directed to all such witnesses as shall be named to him, requiring their attendance before him, at some time and place named in the subpœna, in order to be examined respecting the contested election.

SEC. 112. In case none of the officers mentioned in section one hundred and ten are residing in the congressional district from which the election is proposed to be contested, the application thereby authorized may be made to any two justices of the peace residing within the district; and they may receive such application, and jointly proceed upon it.

SEC. 113. It shall be competent for the parties, their agents or attorneys authorized to act in the premises, by consent in writing, to take depositions without notice; also by such written consent, to take depositions (whether upon or without notice), before any officer or officers authorized to take depositions in common law, or civil actions, or in chancery, by either the laws of the United States, or of the State in which the same may be taken, and to waive proof of the official character of such officer or officers. Any written consent given as aforesaid shall be returned with the depositions.

SEC. 114. Each witness shall be duly served with a subpœna, by a copy thereof delivered to him or left at his usual place of abode, at least

five days before the day on which the attendance of the witness is required.

SEC. 115. No witness shall be required to attend an examination out of the county in which he may reside or be served with a subpœna.

SEC. 116. Any person who, having been summoned in the manner above directed, refuses or neglects to attend and testify, unless prevented by sickness or unavoidable necessity, shall forfeit the sum of twenty dollars, to be recovered, with costs of suit, by the party at whose instance the subpœna was issued, and for his use, by an action of debt, in any court of the United States; and shall also be liable to an indictment for a misdemeanor, and punishment by fine and imprisonment.

SEC. 117. Depositions of witnesses residing outside of the district and beyond the reach of a subpœna may be taken before any officer authorized by law to take testimony in contested-election cases in the district in which the witness to be examined may reside.

SEC. 118. The party notified as aforesaid, his agent or attorney, may, if he see fit, select an officer (having authority to take depositions in such cases), to officiate with the officer named in the notice, in the taking of the depositions; and if both such officers attend, the depositions shall be taken before them both, sitting together, and be certified by them both. But if only one of such officers attend, the depositions may be taken before and certified by him alone.

SEC. 119. At the taking of any deposition under this chapter, either party may appear and act in person, or by agent or attorney.

SEC. 120. All witnesses who attend in obedience to a subpœna, or who attend voluntarily at the time and place appointed, of whose examination notice has been given, as provided by this chapter, shall then and there be examined on oath by the officer who issued the subpœna or, in case of his absence, by any other officer who is authorized to issue such subpœna, or by the officer before whom the depositions are to be taken by written consent, or before whom the depositions of witnesses residing outside of the district are to be taken, as the case may be, touching all such matters respecting the election about to be contested as shall be proposed by either of the parties or their agents.

SEC. 121. The testimony to be taken by either party to the contest shall be confined to the proof or disproof of the facts alleged or denied in the notice and answer mentioned in sections one hundred and five and one hundred and six.

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

SEC. 123. The officer shall have power to require the production of papers; and on the refusal or neglect of any person to produce and deliver up any paper or papers in his possession pertaining to the election, or to produce and deliver up certified or sworn copies of the same in case they may be official papers, such person shall be liable to all the penalties prescribed in section one hundred and sixteen. All papers thus

produced, and all certified or sworn copies of official papers, shall be transmitted by the officer, with the testimony of the witnesses, to the Clerk of the House of Representatives.

SEC. 124. The taking of the testimony may, if so stated in the notice, be adjourned from day to day.

SEC. 125. The notice to take depositions, with the proof or acknowledgment of the service thereof, and a copy of the subpœna, where any has been served, shall be attached to the depositions when completed.

SEC. 126. A copy of the notice of contest and of the answer of the returned member, shall be prefixed to the depositions taken, and transmitted with them to the Clerk of the House of Representatives.

SEC. 127 AS AMENDED BY ACT OF MARCH 2, 1887.

Ch. 318, Sup. 1874–1891 (p. 553).

All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward the same, by mail or by express, addressed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia; and shall also indorse upon the envelope containing such deposition or testimony, the name of the case in which it is taken, together with the name of the party in whose behalf it is taken, and shall subscribe such indorsement.

The Clerk of the House of Representatives, upon the receipt of such deposition or testimony, shall notify the contestant and the contestee, by registered letter through the mails, to appear before him at the Capitol, in person or by attorney, at a reasonable time to be named, not exceeding twenty days from the mailing of such letter, for the purpose of being present at the opening of the sealed packages of testimony, and of agreeing upon the parts thereof to be printed.

Upon the day appointed for such meeting, the said Clerk shall proceed to open all the packages of testimony in the case, in the presence of the parties or their attorneys, and such portions of the testimony as the parties may agree to have printed shall be printed by the Public Printer, under the direction of the said Clerk; and in case of disagreement between the parties as to the printing of any portion of the testimony, the said Clerk shall determine whether such portion of the testimony shall be printed; and the said Clerk shall prepare a suitable index to be printed with the record.

And the notice of contest and the answer of the sitting member, shall also be printed with the record.

If either party, after having been duly notified, should fail to attend, by himself or by an attorney, the Clerk shall proceed to open the packages, and shall cause such portions of the testimony to be printed as he shall determine.

He shall carefully seal up and preserve the portions of the testimony

not printed, as well as the other portions when returned from the Public Printer, and lay the same before the Committee on Elections at the earliest opportunity.

As soon as the testimony in any case is printed, the Clerk shall forward by mail, if desired, two copies thereof to the contestant and the same number to the contestee; and shall notify the contestant to file with the Clerk, within thirty days, a brief of the facts and authorities relied on to establish his case.

The Clerk shall forward by mail two copies of the contestant's brief to the contestee, with like notice.

Upon receipt of the contestee's brief, the Clerk shall forward two copies thereof to the contestant, who may, if he desires, reply to new matter in the contestee's brief within like time.

All briefs shall be printed at the expense of the parties respectively, and shall be of like folio as the printed record; and sixty copies thereof shall be filed with the Clerk for the use of the Committee on Elections.

SEC. 128. Every witness attending by virtue of any subpœna herein directed to be issued shall be entitled to receive the sum of seventy-five cents for each day's attendance, and the further sum of five cents for every mile necessarily traveled in going and returning. Such allowance shall be ascertained and certified by the officer taking the examination, and shall be paid by the party at whose instance such witness was summoned.

SEC. 129. Each judge, justice, chancellor, chief executive officer of a town or city, register in bankruptcy, notary public, and justice of the peace, who shall be necessarily employed pursuant to the provisions of this chapter, and all sheriffs, constables, or other officers who may be employed to serve any subpœna or notice herein authorized, shall be entitled to receive from the party at whose instance the service shall have been performed, such fees as are allowed for similar services in the State, wherein such services may be rendered.

ACT OF MARCH 3, 1879.

Ch. 182, par. 14, Sup. 1874–1891, R. S. (p. 252).

That hereafter no contestee or contestant for a seat in the House of Representatives shall be paid exceeding two thousand dollars for expenses in election contests.

And before any sum whatever shall be paid to a contestant or contestee for expenses of election contest he shall file with the Clerk of the Committee on Elections a full and detailed account of his expenses, accompanied by the vouchers and receipts for each item, which account and vouchers shall be sworn to by the party presenting the same, and no charges for witness fees shall be allowed in said accounts unless made in strict conformity to section one hundred and twenty-eight of the Revised Statutes of the United States.

PRESIDENTIAL ELECTIONS.

(FROM REVISED STATUTES U. S., TITLE III, CHAPTER I.)

SEC. 131. Time of appointing electors.
132. Number of electors.
133. Vacancies in electoral college.
134. Failure to make a choice on the appointed day.
135. Meeting of electoral college.
136. List of names of electors to be furnished to them.
137. Manner of voting.
138. Certificates to be made and signed.
139. Certificates to be sealed and indorsed.
140. The transmission of the certificates.
141. When Secretary of State shall send for district judge's list.
142. Counting the electoral votes in Congress.
143. Provision for absence of President of the Senate.
144. Mileage of messengers.
145. Forfeiture for messenger's neglect of duty.
Act of January 19, 1886, repealing sections 146 to 150 inclusive, and providing for the performance of duties of President in case of disability of President and Vice-President.
151. Resignation or refusal of office.

SEC. 131. Except in case of a presidential election prior to the ordinary period, as specified in sections one hundred and forty-seven to one hundred and forty-nine, inclusive, when the offices of President and Vice-President both become vacant, the electors of President and Vice-President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice-President.

SEC. 132. The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice-President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

SEC. 133. Each State may, by law, provide for the filling of any vacan-

cies which may occur in its college of electors when such college meets to give its electoral vote.

SEC. 134. Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct.

SEC. 135. The electors for each State shall meet and give their votes upon the first Wednesday in December, in the year in which they are appointed, at such place, in each State, as the legislature of such State shall direct.

SEC. 136. It shall be the duty of the executive of each State to cause three lists of the names of the electors of such State to be made and certified, and to be delivered to the electors on or before the day on which they are required, by the preceding section, to meet.

SEC. 137. The electors shall vote for President and Vice-President respectively, in the manner directed by the constitution.

SEC. 138. The electors shall make and sign three certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President, and the other of the votes for Vice-President, and shall annex to each of the certificates one of the lists of the electors which shall have been furnished to them by direction of the executive of the State.

SEC. 139. The electors shall seal up the certificates so made by them, and certify upon each that the lists of all the votes of such State given for President, and of all the votes given for Vice-President, are contained therein.

SEC. 140. The electors shall dispose of the certificates thus made by them in the following manner:

One. They shall, by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the President of the Senate, at the seat of Government, before the first Wednesday in January then next ensuing, one of the certificates.

Two. They shall forthwith forward by the post-office to the President of the Senate, at the seat of Government, one other of the certificates.

Three. They shall forthwith cause the other of the certificates to be delivered to the judge of that district in which the electors shall assemble.

SEC. 141. Whenever a certificate of votes from any State has not been received at the seat of Government on the first Wednesday of January, indicated by the preceding section, the Secretary of State shall send a special messenger to the district judge in whose custody one certificate of the votes from that State has been lodged, and such judge shall forthwith transmit that list to the seat of Government.

SEC. 142. Congress shall be in session on the second Wednesday in February succeeding every meeting of the electors, and the certificates, or so many of them as has been received, shall then be opened, the votes

counted, and the persons to fill the offices of President and Vice-President ascertained and declared agreeable to the constitution.

SEC. 143. In case there shall be no President of the Senate at the seat of Government on the arrival of the persons intrusted with the certificates of the votes of the electors, then such persons shall deliver such certificates into the office of the Secretary of State, to be safely kept, and delivered over as soon as may be to the President of the Senate.

SEC. 144. Each of the persons appointed by the electors to deliver the certificates of votes to the President of the Senate shall be allowed, on the delivery of the list entrusted to him, twenty-five cents for every mile of the estimated distance, by the most usual road, from the place of meeting of the electors to the seat of government of the United States.

SEC. 145. Every person, who, having been appointed, pursuant to subdivision one of section one hundred and forty, or to section one hundred and forty-one, to deliver the certificates of the votes of the electors to the President of the Senate, and having accepted such appointment, shall neglect to perform the services required from him, shall forfeit the sum of one thousand dollars.

ACT OF JANUARY 19, 1886.

AN ACT to provide for the performance of the duties of the office of President in case of the removal, death, resignation, or inability, both of the President and Vice-President.

Be it enacted, etc., That in case of removal, death, resignation or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation or inability, then the Secretary of the Treasury, or if there be none, or in case of his removal, death, resignation or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death, resignation or inability, then the Secretary of the Interior shall act as President until the disability of the President or Vice-President is removed or a President shall be elected:

Provided, That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days notice of the time of meeting.

SEC. 2. That the preceding section shall only be held to describe and

apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of President under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively.

SEC. 3. That sections one hundred and forty-six, one hundred and forty-seven, one hundred and forty-eight, one hundred and forty-nine and one hundred and fifty of the Revised Statutes are hereby repealed.

SEC. 151. The only evidence of a refusal to accept, or of a resignation of the office of President or Vice-President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

ACT OF FEBRUARY 3, 1887.

AN ACT to fix the day for the meeting of the electors of President and Vice-President, and to provide for and regulate the counting of the votes for President and Vice-President, and the decision of questions arising thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the electors of each State shall meet and give their votes on the second Monday in January next following their appointment, at such place in each State as the legislature of such State shall direct.

SEC. 2. That if any State shall have provided, by laws enacted prior to to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

SEC. 3. That it shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State, by the final ascertainment under and in pursuance of the laws of such State providing for such ascertainment, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are reqired by the preceding section to meet, the same cer-

tificate, in triplicate, under the seal of the State; and such certificate shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of Government the lists of all persons voted for as President and of all persons voted for as Vice-President; and section one hundred and thirty-six of the Revised Statutes is hereby repealed; and if there shall have been any final determination in a State of a controversy or contest as provided for in section two of this act, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State, to the Secretary of State of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the Secretary of State of the United States, as soon as practicable after the receipt at the State Department of each of the certificates hereinbefore directed to be transmitted to the Secretary of State, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress thereafter he shall transmit to the two Houses of Congress copies in full of each and every such certificate so received theretofore at the State Department.

SEC. 4. That Congress shall be in session on the second Wednesday in February succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of one o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted in the manner and according to the rules in this act provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President of the United States, and together with a list of votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House

of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section three of this act from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return of paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section two of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section two of this act, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

SEC. 5. That while the two Houses shall be in meeting as provided in this act the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.

SEC. 6. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes and not more than once; but after such debate shall have lasted

two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.

SEC. 7. That at such joint meeting of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this act, in which case it shall be competent for either House, acting separately, in the manner herein before provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of ten o'clock in the forenoon. But if the counting of the electoral votes and the delaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.

Approved, February 3, 1887.

ACT OF OCTOBER 19, 1888.

AN ACT supplementary to an act approved February third, eighteen hundred and eighty-seven, entitled, "An Act to fix the day for the meeting of the electors of President and Vice-President, and to provide for and regulate the counting of the votes for President and Vice-President, and the decision of questions arising thereon."

Be it enacted, etc., That the certificates and lists of votes for President and Vice-President of the United States, mentioned in Chapter one of Title three of the Revised Statutes of the United States, and in the act to which this is a supplement, shall be forwarded in the manner therein provided, to the President of the Senate forthwith after the second Monday in January, on which the electors shall give their votes.

SEC. 2. That section one hundred and forty-one of the Revised Statutes of the United States is hereby so amended as to read as follows:

"Sec. 141. Whenever a certificate of votes from any State has not been received at the seat of Government on the fourth Monday of the month of January in which their meeting shall have been held, the Secretary of State shall send a special messenger to the district judge in whose custody one certificate of the votes from that State has been lodged, and such judge shall forthwith transmit that list to the seat of Government."

RESIDENCE.

House of Representatives, 42d Congress, 2d Session, Report No. 11.

JOHN CESSNA *VS.* BENJAMIN F. MEYERS.

FEBRUARY 7, 1872.—Laid on the table and ordered to be printed.

Mr. Hoar, from the committee on elections, made the following

REPORT:

THE COMMITTEE ON ELECTIONS, TO WHOM WAS REFERRED THE MEMORIAL OF JOHN CESSNA, CLAIMING TO BE ADMITTED TO THE SEAT FROM THE SIXTEENTH CONGRESSIONAL DISTRICT OF PENNSYLVANIA, RESPECTFULLY REPORT:

The case has required the consideration of many very interesting questions of law, and an examination, by itself, of the evidence in regard to the right to vote of each of several hundred persons. The committee have given it patient and thorough study.

The majority for the sitting member according to the returns, when correctly added, is fourteen. The contestant has shown that more than fourteen illegal votes were cast for his antagonist, and would have established his claim to the seat, were it not for illegal votes which were cast for the contestant himself, the evidence of which, so far as appears, first came to his knowledge when introduced in the case. The questions of law which have arisen are, some of them, exceedingly doubtful, and there are statements of the law in the reports of previous cases which would be quite likely to induce an expectation on the part of the contestant of a different result in the whole matter. He seems, therefore, to have been well warranted in the belief that his duty to the people required him to claim the seat. The whole case has been conducted with entire propriety on both sides.

The majority for the sitting member, as found by the return judges, is fifteen. There is a mistake in the footing, and one should be deducted,

leaving fourteen. The contestant claims that three hundred and twenty-eight illegal votes were cast for the sitting member; that two lawful votes which were cast for himself were not counted, and that eight legal votes which were offered for him were rejected. The sitting member, joining issue on these allegations, claims also that three hundred and forty-one votes were illegally thrown for contestant. Of these contestant admits that eighty-one have been proved to be illegal.

The provisions of the constitution of Pennsylvania, concerning the qualification of voters, are as follows:

"Article III, Section 1. In elections by the citizens every (white) freeman of the age of twenty-one years, *having resided* in this State one year, and in the election district where he offers to vote ten days immediately preceding such election, and within two years paid a State or county tax which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. But a citizen of the United States who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district and paid taxes as aforesaid, shall be entitled to vote after residing in the State six months: *Provided*, That (white) freemen citizens of the United States between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days as aforesaid, shall be entitled to vote, although they shall not have paid taxes."

The contestant claims, first, that he received a majority of the votes cast at the election by lawfully qualified voters; and, second, that the votes of certain other persons, lawfully qualified, who desired to vote for him, were excluded, either from the box or the count, by the mistake or misconduct of the election officers. The result to which an examination of the first claim has brought us renders it needless to consider the second.

The questions which it is material to consider relate either to the qualification of voters under the clause in the constitution of Pennsylvania just cited, or to the rules of evidence which should govern the House in election cases.

Under these constitutional provisions, the burden of proof, when either party insists that a vote should be deducted from those cast and returned for his competitor, is upon that party to show that the person whose vote is in question voted; that the vote was for the competitor; that the voter lacked some one of the following qualifications, viz: citizenship of the United States; the age of twenty-one; residence in the election district for ten days just previous to the election; residence in the State one year just previous to the election, or for six months, if previously a qualified voter; payment, within two years, of a State or county tax, assessed at least ten days before the election, or, in lieu thereof, being between twenty-one and twenty-two years old.

It is claimed by the contestant that a considerable number of those who voted for his competitor lacked the qualification of residence in the election district. The largest number to whom this objection applies came into the election district for the purpose of working upon a railroad in

process of construction therein, were employed in building said railroad, and were not proved to have formed any intention to reside in the district after its completion. The length of time which the completion of the road would be likely to occupy was not distinctly proved, but it was shown that persons who were in fact at work upon it continued in the district for a longer period than eighteen months. The committee have carefully considered the legal question which is thus raised.

The word "residence" used in the constitution of Pennsylvania in describing the qualification of voters is equivalent to "domicile," not in the sense in which a man may have a commercial domicile or residence in one country, while his domicile of origin and of allegiance is in another, but in the broadest sense of the term. As it is upon the meaning of this word that the case chiefly turns, it will be well to consider it a little more fully.

The word "domicile," or "residence," as used in law, is incapable of exact definition. Inquiries into it are very apt to be confused by taking the tests which have been found satisfactory in some cases and attempting to apply them as inflexible rules in all. Probably the definition which is most expressive to the American mind is that a man's domicile is "where he has his home." Two or three rules, however, are well established. A man must have a domicile somewhere; a domicile once gained remains until a new one is acquired; no man can have two domiciles at the same time. With these exceptions, it will, we believe, be found that nearly every rule laid down on the subject in the books, even if generally useful, fails to be of universal application, and would be opposed to the common sense of mankind if extended to some states of fact that may arise. For instance, Vattel defines domicile to be "*a fixed residence in any place, with an intention of always staying there.*" On this Judge Story (Conflict of Laws, Sec. 43) well remarks: "This is not an accurate statement. It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom." But certainly Judge Story's definition is not much better. A man's domicile remains after he forms the intention of removing therefrom, and sometimes even after he removes, until he gets another. A man may acquire a domicile, if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end of some short time to remove and acquire another. A clergyman of the Methodist church who is settled for two years may surely make his home for two years with his flock, although he means, at the end of that period, to remove and gain another. So of the principle upon which the contestant most relies in the present case.

He claims—and many expressions can be found used by commentators and in judicial decisions which seem to support the claim—that personal presence in a place with intent to remain there only for a limited time and for the accomplishment of a temporary purpose, and to depart when that purpose is accomplished, will not constitute a residence. This is true

as a general rule. It is true of those persons, probably the greater number, who, while so present and engaged in business, have some other principal seat of their interests and affections elsewhere. Most men have some permanent home, the claims of which outweigh those of a place of temporary sojourn. The place where a man's property is, where his family is, the place to which he goes back from time to time whenever no temporary occasion calls him elsewhere, the domicile of his origin, where the permanent and ordinary business of his life is conducted—that is to the ordinary man the place of his home. But we are now dealing with a class of persons who have no property, who have no family, or whose family moves with them from place to place, who have no place to return to from temporary absences, the domicile of whose origin is in another country, and has been in the most solemn manner renounced, and the ordinary business of whose life consists in successive temporary employments in different places.

Suppose a man, single, with no property, to come from Ireland and be employed all his life on railroads or other like works in different places in succession. If he does not acquire a residence he can never become a citizen, because he never would reside in this country at all. It seems to us that to such persons the general rule above stated does not apply, where a man who has no interests or relations in life which afford a presumption that his home is elsewhere, comes into an election district for the purpose of working on a railroad for a definite or an indefinite period, being without family, or having his family with him, expecting that the question whether he shall remain or go elsewhere is to depend upon the chances of his obtaining work, having abandoned both in fact and in intention all former residences, and intends to make that his home while his work lasts—that will constitute his residence, both for the purpose of such jurisdiction over him as residence confers, and for the purpose of exercising his privileges as a citizen. Of course the intent above supposed must be in good faith, and an intent to make such district the home for all purposes. The party's intent to vote in the district where he is, he knowing all the time that his home is elsewhere, will not answer the law.

The rule is stated by Chief Justice Shaw, in Lyman vs. Fiske, (5 Pick. 234,) as follows: "It is difficult to give an exact definition of habitancy. In general terms, one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place with the intent to regard it his home. The act and the intent must occur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance. In such a case the mere declaration of the party, made in good faith, of his election to make the one place rather than the other his home, would be sufficient to turn the scale."

The article in the appendix to Vol. 4 of Dr. Lieber's Encyclopædia Americana, title Domicile, written by Judge Story, is, perhaps, the best treatise on this subject to be found. He says: "In a strict and legal sense, that is properly the domicile of a person where he has fixed his true, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." It is often a mere question of intention. If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of present domicile, it becomes his place of domicile, notwithstanding he may have a floating intention to go back at some future period. *A fortiori* would this be true if his "floating intention" were to go elsewhere in future, and not to go back, as in such case the abandonment of his former home would be complete.

In the Allentown election case (Brightly's Lead. Cases on Elections, 475), it is said: "Unmarried men, who have fully severed the parental relation, and who have entered the world to labor for themselves, usually acquire a residence in the district where they are employed, if the election officers be satisfied they are honestly there pursuing their employment, with no fixed residence elsewhere, and that they have not come into the district as 'colonizers,' that is, for the mere purpose of voting, and going elsewhere as soon as the election is held. The unmarried man who seeks employment from point to point, as opportunity offers, and who has severed the parental relation, becomes a laborer, producing for himself, and thus adds to the productive wealth of the community in which he resides, being willing not only to enjoy political privileges, but also to assume and discharge political and civil duties." *A fortiori* would this reasoning apply to the married laborer who takes his family with him.

The habits of our people, compared with many other nations, are migratory. To persons, especially young men, in many most useful occupations, the choice of a residence is often experimental and temporary. The home is chosen with intent to retain it until the opportunity shall offer of a better. But if it be chosen as a home, and not as a mere place of temporary sojourn, to which some other place, which is more truly the principal seat of the affections or interests, has superior claim, we see not why the policy of the law should not attach to it all the privileges which belong to residence, as it is quite clear that it is the residence in the common and popular acceptation of the term.

The case of Barnes vs. Adams, (3 Con. El. Cas., 771,) does not, when carefully examined, conflict with these rules. The passage cited from that case is not a statement of the grounds on which the House or even the committee determined the case, but is a concession to the party against whom it was decided. It therefore, if it bore the meaning contended for, would not be authority in future cases. But the language, taken together, it seems to us, means only that going into an election precinct for a temporary purpose, with the intent to leave it when that purpose is accomplished, no other intent and no other fact appearing, is not enough to gain

a residence. In this view, it is not in conflict with the opinion here expressed.

It is true that, as was remarked in the outset, a former residence continues until a new one is gained. But in determining the question whether a new one has been gained, the fact that everything which constituted the old one—dwelling house, personal presence, business relations, intent to remain—has been abandoned is a most significant fact.

5. We have, then, to apply these principles to the evidenc· in the case.

The contestant claims that three principal classes of persons who voted for the sitting member were disqualified by reason of non-residence, viz: persons who came into the district for the purpose of working on the railroad; students at the university, who came from other districts solely for the sake of pursuing their studies, and paupers supported in a poor-house common to all the districts in the county, who came to the poor-house from another district, and voted in the district where it is situated.

The cases of the railroad laborers and contractors should be disposed of by the following rules:

1st. Where no other fact appears than that a person, otherwise qualified, came into the election district for the purpose of working on the railroad for an indefinite period, or until it should b· completed, and voted at the election, it may or may not be true that his residenee was in the district. His vote having been accepted by the election officers, and the burden being on the other side to show that they erred, we are not warranted in deducting the vote.

2d. Where, in addition, it appears that such voter had no dwelling house elsewhere, had his family with him, and himself considered the voting place as his home until his work on th railroad should be over, we consider his residence in the district affirmatively established.

3d. On the other hand, where it appears that he elected to retain a home, or left a family or a dwelling place elsewhere, or any other like circumstances appear negativing a residenc in the voting precinct, the vote should be deducted from the candidate for whom it is proved to have been cast.

The principles applicable to the students are not dissimilar. The law, as it applies to this class of persons, is fully and admirably stated by the Supreme Court of Massachusetts, in an opinion given to the legislature, and reported in 5th Metcalf, and which is cited with approbation in nearly all the subsequent discussions of the subject. Under the rule there laid down, the fact that the citizen came into the place where he claims a residence, for the sole purpose of pursuing his studies at a school or college there situate, and has no design of remaining there after his studies terminate, is not necessarily inconsistent with a legal residence, or want of legal residence, in such place. This is to be determined by all the circumstances of each case. Among such circumstances, the intent of the party, the existence or absence of other ties or interests elsewhere, the dwelling place of the parents, or, in the case of an orphan just of age, of such near friends as he had been accustomed to make his home within

his minority, would of course be of the highest importance. See Putnam vs. Johnson, 10 Mass., 488.

The case of the paupers presents greater difficulty. Under the laws of Pennsylvania it is conceded they may be entitled to vote. In several contested election cases cited by the contestant, it is stated by the committee that, in the absence of statute regulations on the subject, a pauper abiding in a public almshouse, locally situated in a different district from that where he dwells when he becomes a pauper, and by which he is supported, away from his original home, does not thereby change his residence, but is held constructively to remain at his old home.

Monroe vs. Jackson, 2 Elect. Cas., 98.

Covode vs. Foster, Forty-first Congress.

Taylor vs. Reading, Forty-first Congress.

And there are some strong reasons for this opinion. The pauper is under a species of confinement. He must submit to regulations imposed by others, and the place of his abode may be changed without his consent. Having few of the other elements which ordinarily make up a domicile, the element of choice also, in his case, almost wholly disappears. There are also serious reasons of expediency against permitting a class of persons who are necessarily so dependent upon the will of one public officer to vote in a town or district in whose concerns they have no interest. On the other hand, the pauper's right to vote is recognized by law. It can practically very seldom be exercised except in the near neighborhood of the almshouse. In the case of a person so poor and helpless as to expect to be a life-long inmate of the poor house, it is, in every sense in which the word can be used, really and truly his residence —his home. And it is important that these constitutional provisions as to suffrage should be carried out in their simplest and most natural sense, without the introduction of artificial or technical constructions. It will, however, be unnecessary to determine this question, as will hereafter appear.

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