

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 28, 1872.—Ordered to be printed.

Mr. LOGAN, from the Committee on Privileges and Elections, submitted the following

REPORT :

The Committee on Privileges and Elections, to whom was referred the memorial of Joseph C. Abbott, claiming to be entitled to a seat in this body as a Senator from North Carolina, for the term commencing on the 4th day of March, A. D. 1871, respectfully submit the following report :

Article 1, section 5, of the Constitution of the United States provides that—

Each House shall be the judge of the elections, returns, and qualifications of its own members.

The duty which devolves upon the Senate in deciding cases that arise under this clause of the Constitution is in the nature of a judicial proceeding, and the cases must be decided upon the evidence presented, and in accordance with legal principles, as established by former parliamentary and judicial precedents and decisions.

The only evidence which is before the committee in relation to the claim of the memorialist Abbott to a seat in the Senate of the United States is as follows:

That, on the second Tuesday of November, 1870, the day prescribed by law, the two houses of the legislature of North Carolina proceeded to the election of a Senator from that State for the term of six years, commencing on the 4th day of March, 1871, with the following results:

In the house of representatives :

	Votes.
Zebulon B. Vance received.....	63
Joseph C. Abbott received.....	32
Scattering.....	10
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Members present.....	105

In the senate :

Zebulon B. Vance received.....	32
Joseph C. Abbott received.....	11
Scattering.....	5
	<hr/>
Members present.....	48
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That the number of members present at the time and so voting constituted a quorum of each house of the legislature; the constitution of North Carolina providing that "neither house shall proceed upon public business unless a majority of all the members are actually present," the numbers so present amounting to a majority of all the members.

On the following day the two houses, in the usual form, declared that Vance had received a majority of the votes cast in both houses, and that he was duly elected as such Senator for said term of six years, commencing on the 4th day of March, 1871.

It is also further in evidence that said Vance was not on said second Tuesday of November, 1870, and at no time since has been, qualified to serve as such Senator, owing to disability imposed by the fourteenth article of amendment of the Constitution.

It is averred that the members of the legislature of North Carolina so voting for Vance, at the time their votes were cast had notice of the ineligibility of Vance, but no evidence on this point has been presented to the committee, the memorialist relying upon the assumption that this was a matter of public notoriety.

It appears, therefore, that Abbott rests his claim to the seat solely upon what he assumes to be the legal result of the conceded ineligibility of Vance, who, although receiving a majority of the votes, is not entitled to take the oath of office or hold the seat. He assumes that it is a conclusion of law that if the candidate who has received the highest number of votes is ineligible, and that ineligibility was known to those who voted for him before casting their votes, that the votes so cast for him are void, and should be considered as nullities, and as though they never had been cast; and, consequently, the candidate receiving the next highest number of votes is elected.

In support of this view of the case the memorialist has called the attention of the committee to a large number of English authorities bearing on this question. While the committee make no question as to the general tenor of the decisions to which attention has been called, yet it is evident that these are based upon a very different rule from that adopted in our country. To show that this rule is different, the committee would refer to the following authorities, which are cited in the very able report of Mr. Dawes from the Committee on Elections, in the case of *Smith vs. J. Y. Brown*, (Report of Committees, No. 11, 2d sess., 40th Cong.)

Haywood on County Elections, 535:

If, before the election comes on, or a majority has polled, *sufficient notice has been publicly given of his ineligibility*, the unsuccessful candidate next to him on the poll must ultimately be the sitting member.

Male on Elections, 336:

If an election is made of a person or persons ineligible, such election is void, where the ineligibility is clear *and pointed out to the electors at the poll*.

In the case of *King vs. Hawkins*, (10 East., 210,) Lord Ellenborough states that such is the law in England, "*after notice of ineligibility*."

In the case of *Claridge vs. Evelyn*, (5 B. and A., 8,) Abbott, C. J., remarks:

I am of the opinion, therefore, that he (the infant) was ineligible, and *due notice of his incapacity having been given to the electors at the time of the election*, their votes are thrown away.

Clerke on Election Committees, 156:

Whenever a candidate is disqualified from sitting in Parliament, *and notice thereof is publicly given to the electors*, all votes given to such disqualified candidate will be considered as thrown away.

This notice, in order to bring the case within the rule, was required to be strictly formal, and was generally given at the polls. And the reason for this is apparent, as by their theory a voter who, after due notice of the ineligibility of a candidate, persisted in voting for him, was deemed guilty of a crime. Therefore, as all crimes are committed

with an intention to commit the offense, it was necessary that the knowledge of the fact by the voter should be clear.

Roe on Elections, 256 :

It will be seen that the latter proposition is that which constitutes the law in cases where misapplication of the franchise by the electors was *willful*, and, therefore, *made in their own wrong*.

But is such a principle applicable in a government based upon the theory that the power emanates from the people? In the British government the case is exactly the reverse, as there the theory is that the power originates with the monarch, and the privileges allowed the people to select representatives are, under that theory, considered as conceded and not as inherent rights. But this government rests upon an entirely different basis. Here the power originates with the people, and that which the government is authorized to exercise is conceded by the people. The right to designate who shall exercise this power has never been delegated. The method by which this choice shall be made known consistent with this theory can never be otherwise than by giving the majority or plurality the right to decide. Any attempt to restrict the right of the voter is an attempt to invade that right; therefore the theory that casting a vote knowingly for an ineligible candidate is in the nature of a crime which may be punished by ignoring the act of the majority and recognizing the act of the minority, is in direct conflict with that most sacred right which the people of this Government have always guarded with jealous care. Such a rule is consistent with the theory of the British government, as it affords one means of preventing the power from passing into the hands of the people; but it is directly at variance with the theory of our Government, as it affords one means by which that right which the people have of selecting their representatives may be abridged.

While, therefore, the general tenor of the English authorities to which he refers us is admitted to be as claimed by the memorialist, yet we do not conceive such a rule to be applicable to and consistent with the political institutions of the United States, where the right of the majority to govern and the government is based upon the consent of the governed is one of the first political lessons to be learned.

There is also another very strong reason why the English authorities relied upon by the memorialist are not applicable in the present case, even if the spirit and fundamental idea of our institutions were insufficient to show this.

The third section of the fourteenth amendment of the Constitution, which imposes the disabilities in question, also contemplates and provides for the removal thereof by Congress. There is no such feature in the English law. The English cases are therefore based upon a very different state of facts from those that exist in this country, and are not precedents for this case.

It is difficult to conceive how the Constitution could grant authority to Congress to remove the disabilities under which an individual who has been elected is laboring, and allow him to take his seat as a member, and yet, at the same time, embrace the idea that such an election is wholly void and the votes cast for him nullities. Yet Congress by its action in numerous instances has given the first construction to this clause of the Constitution, and if the memorialist in this case shall be admitted to his seat the Senate will have to give the second construction.

The English law in question does not obtain in the United States, as is clearly shown from the following considerations :

First. The judicial decisions are against it, there being but one de-

cision which sustains it, namely, the Indiana case of 14 Ind., page 927, while on the other hand are the decisions in Maine, New Jersey, Pennsylvania, Wisconsin, and California, to which your committee would refer, and from which the following quotations are made:

1795. *The State vs. Anderson*, (1 Cox, N. J. Rep., 318:)

Anderson was elected sheriff of Hunterdon. He had not been three years a freeholder, and was therefore absolutely disqualified, the statute of 1788 having declared that no person shall hereafter be eligible to the office of sheriff in any county in this State, unless he shall be and hath been an inhabitant thereof and possessing a freehold estate in his own right in fee-simple, in the same county, for three years previous to his election.—(324.)

Held by the court—

That Anderson was disqualified, but that his election was not void. The election of an unqualified person as sheriff is not *ipso facto* void; it is only voidable.—(Syllabus, 318.) Still, however, we think the election not *ipso facto* void.—(Opinion, 327.)

1849. *State vs. Giles, ex rel. Dunning, &c.*, (1 Chand., Wis. Rep., 112:)

Two questions arose in this case:

1st. Whether the person holding the office of sheriff at the time of the adoption of the constitution was eligible to that office at the next ensuing election.

2d. If the then sheriff was ineligible, whether the person who, at that election received the next highest number of votes could be considered as entitled to the office.—(13.)

“The mere ineligibility of a person to hold a particular office, and who receives the greatest number of votes, such votes are not a mere nullity, but should be counted by the canvassers. A contestant for the same office, and receiving a lesser number of votes, though eligible, cannot be regarded as elected, and does not thereby become invested with the right to the office.”—(Syllabus, 112.)

It is proper to say that *we are all of the opinion* that the mere ineligibility of a candidate does not, as the law now is, render void the votes cast for him; that such votes should not be rejected, but should be counted by the canvassers, and that in the event of such ineligible person having the highest number of votes, the person having the next highest number is not thereby elected. If any public embarrassment is apprehended from this, such as that an office may remain indefinitely vacant, by reason of a majority of the electors obstinately persisting in voting for an ineligible person, it is within the undoubted power of the legislature to prevent it, by enacting that all such votes shall be deemed void and not be counted.—(Opinion, 117.)

And this remedy is so reasonable and practical that we may well ask, if it is intended that the English rule shall prevail in this country, why has it not been resorted to? Our answer is, that such an idea is contrary to the spirit of our institutions, and opposed to the principle that all power granted is by the consent of the governed. When we decide that a minority of votes may elect, we strike a blow at the very heart of this republican principle.

1855. 38 Maine Rep., 597:

A majority of the votes at the election in Sagadahoc County were cast for Abel C. Dinslow for county commissioner. There was no such person in being. The governor submitted to the judges the question whether it was competent “to throw out the votes for Abel C. Dinslow and issue a new commission to such person, who is eligible to said office, as shall appear to have the highest number of votes?”

The judges answered in the negative.

They were further asked whether the office was vacant.

The judges answered *it was*.

1861. *State ex rel. Off. vs. Smith*, (14 Wis., 497:)

The remaining questions are: 1st. Whether the defendant, being an alien, and not a qualified elector at the time of his election, was eligible to the office. 2d. If he was ineligible, whether the relator, who received the next highest number of votes cast, is entitled to the office.

The last question has been already settled in this State by the case of the *State vs.*

Giles, (1 Chand., 112.) It was there held by the unanimous judgment of the court that in the absence of a statute declaring it so, the mere ineligibility of a candidate does not render void the votes cast for him; that such votes should not be rejected, but should be counted by the canvassers; and that in the event of such ineligible person having the highest number of votes, the person having the next highest number would not be thereby elected.—(Opinion, 498.)

1867. Commonwealth *vs.* Cluley, (56 Penna., 270 :)

The votes cast at an election for a person who is disqualified from holding an office are not nullities. They cannot be rejected by the inspectors, or thrown out of the count by the return judges. The disqualified person is a person still, and every vote thrown for him is formal. Even in England it has been held that votes for a disqualified person are not lost or thrown away so as to justify the presiding officers in returning as elected another candidate having a less number of votes, and if they do so a quo warranto information will be granted against the person so declared to be elected, on his accepting the office. (See Cole on Quo Warranto, 141-2; Regina *vs.* Hiorns, 7 Ad. & E., 960; 3 Nev. & Perry, 184; Rex *vs.* Bridge, 1 M. & S., 76.) Under institutions such as ours are there is even greater reason for holding that a minority candidate is not entitled to the office if he who received the largest number is disqualified. We are not informed that there has been any decision strictly judicial upon the subject, but in our legislative bodies the question has been determined. It was determined against a minority candidate in the legislature of Kentucky, in a case in which Mr. Clay made an elaborate report and was sustained. In 1793 Albert Gallatin, elected a Senator from this State, was declared by the Senate of the United States disqualified, because he had not been a citizen of the United States nine years, and his election was declared void for that reason, but the seat was not given to his competitor. *Nobody supposed the minority candidate was elected.* There have been several other cases of contested elections in which the successful candidates were decided to have been disqualified, and denied their offices. John Bailey's case is one of them. He was elected to Congress from Massachusetts, and refused his seat in 1824. But neither in his case, nor in any other with which we are acquainted, were the votes given to the successful candidate treated as nullities, so as to entitle one who had received a less number of votes to the office. There is a class of cases in England apparently, but not really, asserting otherwise.—(Opinion of the court by Strong, J.)

This able opinion by Judge Strong, now on the supreme bench of the United States, is well worth careful consideration. Your committee would call special attention to that sentence where it is stated that “the *disqualified person IS A PERSON STILL*, and every vote thrown for him is formal.” The act of Congress prescribing the time and manner of electing Senators specifies what the vote shall be for in order to make it available in the count; for it says “each House shall openly, by a *viva-voce* vote of each member present, *name one PERSON for Senator.*” The vote must be for a person, not a blank in fact, not for a myth, but for a person. But if the vote is cast for *a person for Senator in Congress from that State*, this statute has been formally complied with, and no construing can change the fact. Vance is a *person*; 63 *viva-voce* votes in the House, and 32 *viva-voce* votes in the Senate, were given for him for Senator in Congress from North Carolina on the day and at the place required. Then the provisions of the act of July 25, 1866, have been strictly and formally complied with. What power, then, has the Senate of the United States, or any court, to declare these votes were never *cast for a person*; for this it seems to your committee must be said before the memorialist could be entitled to the seat he claims. But even this conclusion must result in a decision adverse to his claim; for if these votes are declared nullities, then no quorum voted. (Also Saunders *vs.* Hayes, 13 Col., pp. 145, 156; 10 Col., Whitman *vs.* Maloney.)

Secondly. The legislative decisions are against the idea that the English law obtains in this country. So far as any action has been taken in the Senate which bears upon the question, it has been decidedly against the English law.

In the case of Mr. Gallatin, from Pennsylvania, in 1793, although deciding him to be ineligible and his election void, yet, by resolution, the

governor of that Commonwealth was simply notified of this action.—(Cont. El., 3d Cong., 1st sess., p. 859.)

The case of Mr. Shields, of Illinois.—(Cont. El., Cong., from 1834 to 1865, p. 606.)

The case of Yulee *vs.* Mallory, of Florida, where blank votes were taken into the count.—(Cont. El., p. 608, 32d Cong.)

The cases of Mr. Thomas, of Maryland, and Miller, of Georgia, where the oath of office was modified, is a declaration on the part of the Senate of the American rule.

In the House of Representatives the same rule has so far prevailed.

The case of Mr. Bailey, of Massachusetts, 1824, where the candidate receiving the highest vote was declared ineligible, yet the votes given to him, as Judge Strong remarks in the case of Cluley, “were not treated as nullities.”—(Cont. El. from 1789 to 1834, p. 254.)

The case of Smith *vs.* J. Y. Brown, 1868, where the present question is ably discussed in the report by Mr. Dawes from the Committee on Elections, and it is decided that a minority cannot elect.—(Cont. El. from 1865 to 1871, p. 395.)

In the case of McKee *vs.* J. D. Young, 1868, although the claim of the contestant was decided on other grounds, yet the opinion is re-affirmed that a minority cannot elect.—(Cont. El., 1865 to 1871, p. 422.)

The case of Christy *vs.* Wimpy is of a similar character.—(Cont. El., 1865 to 1871, p. 464.)

Also the case of Jones *vs.* Mann, 1869.—(Cont. El., 1865 to 1871, p. 471.)

The case of Wallace *vs.* Simpson, 1870, has been referred to as sustaining the English rule. But an examination of that case shows that it was decided on wholly different grounds. That the proposition “that when one of two candidates is ineligible the votes given for him are of no effect, and the other candidate is elected,” was maintained by but one member of the sub-committee, Mr. Cessna, while it is expressly stated that the other two members, Mr. Hale and Mr. Randall, dissented from the proposition.—(Cont. El., 1865 to 1871, p. 731.)

In the case of Zeigler *vs.* Rice, of Kentucky, 1870, it is decided that even where there is notice of ineligibility of the successful candidate this does not entitle the minority candidate to take his seat. The majority report of the committee in this case states :

The committee are well satisfied that the acts of the contestee were well understood by the voters of said district at the time contestee was voted for, but do not agree with contestant that as contestee was ineligible, the candidate who was eligible is entitled to the seat.—(Cont. El., 1865 to 1871, p. 884.)

The removal of disabilities by the action of Congress, of the same nature as these under which Vance labored, is a decision in the strongest possible terms that such votes are not nullities; that the election of such candidate is not void but voidable only. For if they were nullities, and the election of such candidate void, then Congress, by such action as it has taken, has elected members to one of its own houses without reference to the action of the people. As an example, we may refer to the case of R. R. Butler, of Tennessee, (Contested Election Cases 1855-'71, p. 464;) also case of Young, of Georgia.

But suppose that it is admitted that the English rule is applicable here, do the facts in this case bring it within that rule? Were the votes for Vance cast in willful obstinacy for a candidate the voters knew, or had good reason to believe, would not be entitled to take his seat? The memorialist avers that the fact that Vance was known to be ineligible is not controverted. That his ineligibility was a matter of public notoriety in North Carolina is doubtless true, and that it was known to most if not

all of the members of the legislature, is quite probable; yet no evidence has been presented to the committee proving this fact, or that notice of his disqualification was given at the time the vote was taken.

Let us even go one step further, and suppose that the evidence on this point was clear and explicit, are we not justified in believing that those who voted for Vance did so in good faith, believing that his disabilities would be removed after the election by the action of Congress, basing this presumption on the precedents which had recently been set in similar cases? Nor is this by any means an improbable hypothesis, but accords much better with the facts presented to the committee than the hypothesis that the votes given for Vance were cast, in "willful obstinacy," for a candidate they knew would not be admitted to his seat. If they were given under the impression that these disabilities would be removed, then, although unavailing, they cannot be rejected from the count. And the committee would again refer to the report of the committee in the case of Yulee *vs.* Mallory, of Florida, 1852, where the following language is used which is applicable to this view of this case:

If blank votes are beyond a doubt a nullity; if the resolution is to be regarded of no effect, and we are brought to the question, under these circumstances, whether Mr. Yulee is duly elected, it seems to us difficult to maintain the affirmative of that proposition upon the facts before us. If the members were misled on both these material points by assuming that their previous doings afforded safe and certain rules of action, then they were misguided by what they had a right to consider as authority, and must have acted under a misconception of right, which stood, as they supposed, unquestioned. If this be so, they stand substantially in the condition of an elector who votes for a person disqualified, believing him to be qualified. *The vote in such case, though unavailing, is not rejected from the count.*"—(Contested Election Cases, 1864-'65, p. 610.)

Under the English rule, it is the fact that the voters *knowingly and purposely* throw away their votes that lays the foundation for saying they assent to the election of the minority man. But no such purpose can be predicated of the legislature of North Carolina. They *did not know* that their votes for Vance would be thrown away. They did not *purposely* throw them away, because Congress had, in numerous cases, previously removed disabilities of a similar character from those elected, and allowed them to hold their offices. Nearly all of the officers elected in this State in 1868 had their disabilities removed by the act of June, 1868, and were allowed, by virtue thereof, to enter upon and discharge the functions of their respective offices.

The same act removed the disabilities of a large number of persons elected in Alabama in February, 1868, and, at the close of the section, contains this sweeping clause:

And also all officers elect at the election commenced the 4th day of February, 1868, in said State of Alabama, and who have not publicly declined to accept the offices to which they were elected.—(15 Stat. at Large, 366, 2.)

These were certainly sufficient to raise in the minds of the members of the legislature of North Carolina who voted for Vance the belief that his disabilities would be removed, and that he would be allowed to take his seat. In fact, they had good right to believe that this was the rule, and the opposite the exception, especially where the persons so elected were known to favor the restoration of order and obedience to law.

Again, it may be fairly argued that the fourteenth amendment to the Constitution did not disqualify Vance *to be elected*, but *only to hold the office of Senator*, in case his disability should not be removed. Upon this interpretation, his election was voidable only, and not void, and, as a consequence, Abbott was not elected. But even if this interpretation is erroneous, it is one the legislature of North Carolina might (and as nothing to the contrary is shown, we are to presume did) honestly enter-

tain, (especially in view of the action of Congress above referred to;) and if they elected Vance under a mistake in law, his election was not void, but only voidable.

Although the committee have referred to the decisions of the courts and legislative bodies of this country bearing upon this case, the tenor of which is believed to be decidedly adverse to the claim of the memorialist, yet this appears unnecessary, as a careful examination of the act of Congress of July 25, 1866, (which has already been alluded to on one point,) when applied to the facts in this case, would seem to be an effectual bar to the claim of the memorialist.

The first section of this act is as follows :

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 the place of such Senator so going out of office, 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 said State, and the name of the person so voted for who shall have a majority of the whole number of votes cast in each house shall be entered on the journal of each house by the clerk or secretary thereof ; but if either house shall fail to give such majority to any person on said day, that 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 shall have received a majority of all the votes in each house, such person shall be declared duly elected Senator to represent said State in the Congress of the United States ; but if the same person shall not have received a majority of the votes in each house, or if either house shall have failed to take proceedings as required by this act, the joint assembly shall then proceed to choose, by a *viva voce* vote of each member present, a person for the purpose aforesaid, and a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected ; and in case no person shall receive such majority on the first day, the joint assembly shall meet at 12 o'clock, meridian, of each succeeding day during the session of the legislature, and take at least one vote until a Senator shall be elected.

The passage of this act was evidently intended to be an exercise of that authority conferred upon Congress by article I, section 4, of the Constitution, so far as the same relates to the election of Senator. This section provides that—

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed by 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 words "such regulations" in the latter clause refer to "the times and manner of holding elections" in the first clause, ("places" being expressly excluded;) therefore, by virtue of this provision, Congress has power—so far as the election of Senators is concerned—to prescribe the times and manner of holding elections. The act of July 25, 1866, is evidently intended to do this, and therefore has taken it out of the power of the legislatures of the States to determine either the times or manner of holding these elections, so long as this act remains unrepealed.

In regard to the time fixed, there is no difference of opinion. What, then, is prescribed in regard to the manner of holding the election in the first provision of the section ? "Each house shall openly" do what ? "name one person for Senator in Congress from said State." How ? "By a *viva-voce* vote of each member present." If we give to each word of this clause its full force and effect, consistent with the other portions of the provision, what are we to understand by "each member present ?" Does it signify those voting only, or has it some other meaning ? If we refer to the second provision of the section, we find the words "present" and "voting" both used in the same clause, showing clearly that

the two are intended to have different significations. But it is insisted that, if we give this construction to the provision of the act in relation to the election by the two houses, it is equivalent to saying that, to obtain an election, every member present must vote, thus placing it in the power of a single member so present to defeat an election on that day. If, on the other hand, it only applies to those voting, what force and effect do we give to these words?

It is manifest that the second provision of this section was intended to take it out of the power of a small majority in one house, by preventing an election, to defeat the election of a candidate, in favor of whom there is a majority of the aggregate of the two houses, and as the usual method of proceeding is changed by this provision, it was necessary to prescribe what should constitute a quorum. A majority of all the members elected to both houses are required to be present to constitute this quorum, and the person elected is required to have a majority of all the votes of said joint assembly.

What shall constitute a quorum in each house on the day the vote is taken separately, is left to the constitution and laws of the State. The constitution of North Carolina requiring a majority of each house to be present, it follows that the provisions of the two parts of the section are substantially the same. For upon what grounds can we suppose that Congress would require a majority of a quorum on the second day to elect, and not on the first?

Your committee is therefore satisfied that Congress, in the passage of this act, contemplated and intended that in the election of Senators, whether under the first or second provisions of this section, to be valid, it should appear that a quorum was present and voting.

It is, moreover, evident from the very wording of this act, that Congress did not even contemplate the possibility of an election by a minority under any circumstances, but by this act imply the opposite; for in the provision relating to the election by the two houses, separately, it is required that "the name of the person so voted for, who *shall have a majority* of the whole number of votes cast in each house, shall be entered on the journal of each house." This language is plain and easily understood. If any person receives a majority of the votes cast, *his name is to be entered on the journal*; nothing is said of those in the minority; no evidence is to be preserved of the fact that they were known in the election; nothing is required to be said about the number of votes that even the successful candidate receives; the simple fact that Mr. A. received a majority of all the votes cast is all that is required. The next day the two houses shall convene in joint assembly and compare journals, and if the same name and same fact in regard to him is on each, he is to be declared duly elected. But if neither candidate receives a majority the first day, *that fact is to be entered on the journal*; nothing more is required; no person has received a majority, and there is no use to preserve upon the record anything but *that fact*; yet it is possible that one out of three candidates may be known to be ineligible by those voting for him. If the second out of three candidates was disqualified, and those voting for him knew it, the case would be much more plausible than the present one. Yet this act contemplates no such contingency. Your committee is aware that this inference has no binding force; it is only alluded to, to show that the idea of a minority candidate, being entitled to his seat under any circumstances, is at war with the very spirit of our laws and institutions, and that the principle involved in this case is at variance with the spirit of the law upon which the memorialist founds his claim to a seat.

It has been suggested that there is a distinction, in respect to the operation of the rule insisted on by the memorialist, between a popular election, under our liberal system of suffrage, for a member to the House of Representatives by ballot, and an election of a Senator by a *viva-voce* vote of the members of a legislature.

Your committee are inclined to think this is correct, but that the distinction bears against the claim of the memorialist instead of in favor of it.

The number of persons entitled to vote at a popular election is not fixed and definite, and hence it is impossible to have a quorum or anything answering thereto. There is no power to compel attendance. This is and necessarily must be wholly voluntary; therefore it is necessary that those attending should have the right to elect, where the election is free, and are prevented from attending by force, intimidation, or fraud. If a candidate receiving the majority is disqualified, and the votes cast for him are declared nullities, (as claimed by the memorialist,) the remaining votes are as effectual to elect as if every voter of the district had been present; and if those who voted for the candidate receiving the majority had not been present at all, the election nevertheless would have been valid. But the rule is wholly different in legislative bodies. The number is fixed and definite, a quorum can be and is required to act; and the presence of a less number is not effectual. Had but the thirty-two who voted for Abbott been present in the house at the time the vote was cast, we do not suppose any one would contend that he had even a shadow to base his claim upon; yet this number would be sufficient to elect in a district of a thousand voters if no others voted. We therefore coincide in the view that there is a difference, and that, even if the English rule was applicable in the case of an election of a member to the House of Representatives, it would by no means follow that it was applicable to the election of a Senator where the number voting, of the votes counted, is less than a quorum.

Your committee, therefore, after a full hearing of the case and examination of the authorities, come to the conclusion that the Hon. Joseph C. Abbott, of North Carolina, is not entitled to a seat in the United States Senate, and recommend the adoption of the following resolution:

Resolved, That Joseph C. Abbott, not having received a majority of the votes cast by the North Carolina legislature on the second Tuesday in November, 1870, for the office of Senator of the United States, is not entitled to a seat in said United States Senate as such Senator.

O. P. MORTON.
JOHN A. LOGAN.
A. G. THURMAN.
JOSHUA HILL.

The following statement of Mr. Ransom, of North Carolina, is herewith presented with the report of your committee:

Immediately after the election in North Carolina in 1870, which resulted in the triumph of the democratic conservative party, the question of the election of a United States Senator became one of great, exciting interest throughout the State, and very soon assumed a sectional (State) character. Governor Vance, Governor Graham, and Judge Merryman were the persons most prominently brought forward by the western gentlemen and papers. The "west" (of the State of North Carolina) insisted most earnestly that their section, of right, ought to have the Senator. Article after article was written in the western papers, claiming the Senator for the west, and there was great feeling on the question when, in November, 1870, the legislature met.

Immediately on its meeting, Mr. Jarvis, an eastern member, was elected speaker of the house, and this event gave western gentlemen still further ground to claim the Senator. Mr. Jarvis, in caucus, beat Mr. Welch and Colonel McAfee, both western gentlemen.

The democratic caucus met.

Vance's, Merryman's, Graham's, Warren's, and Ransom's names were before the caucus.

The balloting at first was entirely indecisive.

While the democratic strength in the legislature are from 105 to 110, only 94 members attended caucus.

On the eighth ballot Merryman was ahead, receiving 35 votes; Vance and Ransom about 25 each, and Graham some 9 or 10.

Merryman's vote then declined and Graham's vote went up; when Ransom's strength was developed and his vote began to go up.

The balloting continued, and finally, Ransom being ahead, Vance's vote went up on the twenty-sixth ballot, Ransom then having 42, Vance 39, about 10 for Graham, and 3 scattering, when Graham's friends, western men, went to Vance, and the last ballot was, for Vance, 48; Ransom, 46. Vance was nominated, the vote standing 48 for Vance and 46 for Ransom.

After the twelfth ballot, Ransom had been ahead of Vance until the twenty-sixth ballot, and on the twenty-seventh, the Graham men went to Vance and elected him.

There were about 35 democrats from east of Raleigh, and about 70 or 75 west; but only 94 at caucus.

Vance's great personal popularity accounts for his running ahead of Graham and Merryman, both western men; and his popularity and position in the west, he living in the stronghold of the western democracy, beat Ransom.

Had Vance's disability been removed, he would have beaten all his opponents without a struggle; while it is simple candor to say that Ransom would beat any other man except Vance. The last election proves this.

Vance's nomination was then owing to his being a western man and his great personal popularity, both causes contributing to his nomination; his popularity beating Graham and Merryman, and his position and popularity together beating Ransom.

Merryman had no disabilities.

Graham was laboring under disabilities.

DISABILITIES.

Before the caucus met, and at the caucus, it was generally stated that Vance's disabilities would be removed, and that he would be admitted. It was generally argued and believed that many influential republicans of the North had assured Vance that his disabilities would be removed, and Vance himself expressed no doubt of it. His friends, by authority, stated in caucus that Vance would resign unless admitted.

REMOVAL OF DISABILITIES.

On the 20th April, 1868, an election took place in North Carolina for all the State officers: governor, lieutenant governor, secretary of state, treasurer, judges of the supreme court, judges of the superior courts, the probate judges, members of the legislature, and all county officers, sheriffs, &c., &c.

On the 25th June, 1868, two months after this election, Congress removed the political disabilities of most of these officers, nearly all of whom were under disability when elected.

Governor W. W. Holden and Mr. Thomas Ashe and Mr. D. R. Goodloe, were the candidates for governor. Holden, republican, Ashe, democrat, and Goodloe, republican. Goodloe was eligible, and he received only 300 out of 170,000 votes. The fact that he (Goodloe) only was eligible, and the others not, was fully discussed in the papers and canvass.

On the 25th of June, as aforesaid, Todd R. Caldwell, lieutenant governor, was also relieved.

And so were Richmond Pearson, chief justice; Robert P. Dick, associate justice; Thomas Settle, associate justice; Edwin G. Read, associate justice supreme court. And so with many of the judges of the superior courts: Daniel L. Russell, Anderson Mitchell, C. R. Thomas, (now member of Congress,) Judge Logan, &c.

The superintendent of public works, C. L. Harris; W. L. Adams, auditor of public accounts; Joseph W. Holden, speaker of the house of representatives, and nearly every white member of the legislature of 1868, which actually elected Mr. Abbott to the Senate when he was admitted. And, as before said, nearly if not all of the county officers in the State—all, all had their disabilities removed after the election.

And in this same act of June 25, 1868, it is declared, in section 2, page 581, (Congressional Globe, part 5, 2d session, 40th Congress:)

“ * * * And also all officers elect at the election commenced the 4th day of February, 1868, in said State of Alabama, and who have not publicly declined to accept the offices to which they were elected.”

This is the concluding sentence after the enumeration of a long list of persons in Alabama.

GOVERNOR VANCE AND SENATOR POOL.

About the 4th of March, 1871, great anxiety was felt by the legislature as to Vance's prospects, and Mr. Martin, member of the legislature from Carteret, introduced a resolution looking to Vance's resignation and another election. There was great interest on this question, and a caucus of the democrats called with a view to settle the matter. When on the 17th of March, 1871, Mr. Cowles, a senator in the North Carolina legislature, read from his place in the senate this letter from Hon. John Pool, now Senator in Congress, and this assurance quieted the legislature, and no action was taken.

This letter is herewith presented.

A. C. Cowles, esq., the senator from Yadkin county, recently wrote to Hon. John Pool at Washington in regard to the prospect of Governor Vance obtaining his seat, and received the following answer :

“ SENATE CHAMBER,
“ Washington City, March 17, 1871.

“ MY DEAR SIR: You ask me as an old friend to tell you candidly if Governor Vance is likely to be relieved. The Senate committee has just reported a bill for his relief, and it will pass next December, if not before. In the present state of things here, it may not be acted upon this session, as Congress refuses to take up any business except some few special matters. But even at this disadvantage, Vance stands a good chance of being relieved before we adjourn. Many Senators, heretofore opposed, will vote for him now. If Congress remains in session two weeks he will be relieved at this session. The House would pass the bill by an immense majority. I hardly have a doubt as to his final relief early in the next session.

“ I have not time to write more fully.

“ Very truly, &c.,

“ JOHN POOL.”

VIEWS OF THE MINORITY

OF THE

COMMITTEE ON PRIVILEGES AND ELECTIONS.

FEBRUARY 28, 1872.—Ordered to be printed.

Mr. CARPENTER asked and obtained leave of the Senate to present the following as the

VIEWS OF THE MINORITY :

A minority of the Committee on Privileges and Elections, to whom was referred the memorial of Joseph C. Abbott, who claims to be entitled to a seat in this body as Senator from North Carolina, for the term commencing on the 4th day of March, A. D. 1871, respectfully submit the following report :

The gravity of the question now for the first time directly presented to the Senate, and the fact that the decision which shall be made in this case will be a precedent, render it desirable that the question should be fully considered; and believing that the conclusion arrived at by the committee is erroneous in law, we present to the Senate the reasons which have compelled us to dissent.

The Constitution of the United States, Article I, section 5, provides :

Each House shall be the judge of the elections, returns, and qualifications of its own members.

The duty cast upon the Senate by this provision of the Constitution is judicial in character. We may not inquire or consider what party interests demand; whether it would appear impartial to decide against a political friend, or whether a decision in his favor would be condemned in political circles. The question to be determined is one of *strict right*, depending upon legal principles, as settled by former decisions, parliamentary and judicial; and we have no more right than a judge upon the bench, to turn away from the law to consider the political or partisan interests involved in the case or to be affected by the decision.

The case is this. On the 4th of March, 1871, the term of service of Joseph C. Abbott as Senator from North Carolina expired. On the second Tuesday of its session, in November, 1870, the day prescribed by law, the two houses of the legislature of North Carolina proceeded to the election of a Senator from that State for the succeeding term of six years, commencing on the 4th day of March, 1871, with the following result :

In the house of representatives :

	Votes.
Zebulon B. Vance received.....	63
Joseph C. Abbott received	32
Scattering	10
Members present	105

In the senate :

	Votes.
Zebulon B. Vance received	32
Joseph C. Abbott received	11
Scattering	5
Members present	48

these numbers constituting a quorum of each house of the legislature respectively.

On the following day the two houses, in the usual form, declared that Vance had received a majority of the votes in both houses, and was duly elected for the said term.

Had Vance been qualified to serve, there would be no question as to his right. But he was disqualified by the fourteenth amendment to the Constitution of the United States, for the reason that he had been a member of the Congress prior to the rebellion, and, as such member, had taken an oath to support the Constitution of the United States, and during the rebellion he had acted as colonel in the rebel army, and taken an oath of allegiance to the so-called Confederate States of America; and he had acted as governor of the rebel State of North Carolina from August, 1862, to April, 1865; and this disqualification was notorious—known to all the members of the legislature at the time of his election, and to all the people of that State. The fact *that Vance was known to the members of the legislature who voted for him for Senator to be disqualified, is not controverted.* On the contrary, General Ransom, who claims to have been subsequently elected, upon the resignation of Vance, was heard before your committee, and frankly admitted *that the fact that Vance was disqualified was well known to all the members of both houses of the legislature at the time of his pretended election.*

It is admitted on all hands that the election which was held, as before stated, conferred no right upon Vance to a seat in this body; but Abbott, who was qualified, and who received the next highest number of votes cast, and a majority of all the votes cast for qualified candidates in both houses, insists that *he* was elected at said election, and is now entitled to the seat; and this is the question to be determined.

The Constitution, Article I, section 4, provides :

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

The election of Senators is thus, by the Constitution, committed to the regulation of the respective States, except so far as Congress, under this provision, may legislate upon the subject. The only act of Congress applicable is that of July 25, 1866, as follows :

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 the place of such Senator so going out of office, in the following manner: Each house shall openly, by a *viva voce* of each member present, name one person for Senator in Congress from said State, and the name of the person so voted for who shall have a majority of the whole number of votes cast in each house, shall be entered on the journal of each house by the clerk or secretary thereof; but if either house shall fail to give such majority to any person on said day, that 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 shall have received a majority of all the votes in each house, such person shall be declared duly elected Senator to represent said State in the Congress of the United States; but if the same person shall not have received a

majority of the votes cast in each house, or if either house shall have failed to take proceedings as required by this act, the joint assembly shall then proceed to choose, by a *viva-voce* vote of each member present, a person for the purpose aforesaid, and a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected; and in case no person shall receive such majority on the first day, the joint assembly shall meet at 12 o'clock meridian of each succeeding day during the session of the legislature, and take at least one vote until a Senator shall be elected.—(U. S. Laws, vol. 14, p. 253.)

This act was intended to assure the election of a Senator by the action of the two houses separately, or in case of a failure to elect in that mode, then by joint assembly of the two houses, commencing on the following day, and continuing day after day until a result should be reached. This act deserves a careful consideration, because it is insisted that the conclusions herein arrived at are in conflict with its provisions. In regard to election by the houses separately, it is provided:

Each house shall openly, by a *viva voce* of each member present, name one person for Senator in Congress from said State, and the name of the person so voted for who shall have a majority of the whole number of votes cast in each house shall be entered on the journal of each house by the clerk or secretary thereof.

It will be perceived that this act does not attempt to determine what shall be a quorum of each house, but leaves that question to be determined by the constitution and laws of the State. By the constitution of North Carolina it is provided:

Neither house shall proceed upon public business unless a majority of all the members are *actually present*.

It is not necessary that all the members should participate in the transaction of public business by either house, but merely that a majority of all the members should actually be present in each house. But in providing for an election by the joint assembly of the two houses, the act of Congress does provide that in such election—

The person having a majority of all the votes of the said joint assembly, a *majority of all the members elected to both houses being present and voting*, shall be declared duly elected.

The difference in these two provisions is not one of phraseology merely, but of substance. In the election by the two houses separately in North Carolina, if a majority of the members elected to each house are actually present, the person who shall receive *the highest number of votes cast*, though that may be less than half of a constitutional quorum, is to be declared elected; but in the election by the joint assembly it is not enough that a candidate should receive a majority of all the votes cast, but he must receive a majority of "*all the votes of the said joint assembly—a majority of all the members elected to both houses being present and voting.*" These provisions are so materially different that the variation cannot be regarded as accidental, and the reason for the distinction is, no doubt, that the act intended to leave the matters of a quorum, and the proceedings of the houses acting separately, to be regulated by the constitution and laws of the State, but the act intended to provide what should be necessary to constitute a quorum, and make an election in the joint assembly—a *body created by the act, and whose proceedings might not be regulated by the constitution of the State*.

It is only necessary in this case to consider the effect of the proceedings in the two houses on the first day, because it is upon those proceedings that Mr. Abbott founds his claim. If he was legally elected on that day, the subsequent proceedings by the joint assembly could not affect his right, nor can such claim be affected by any subsequent proceedings of the legislature. His claim depends upon the legal effect of what took place in the two houses on the first day of the election.

It is insisted that the provisions of the act in relation to election by the two houses and by the joint assembly are substantially the same, because it is provided by the act that —

Each house shall openly, by a *viva voce* of each member present, name one person for Senator, &c., and the name of the person so voted for who shall have a majority of the *whole number of votes cast* in each house shall be entered on the journal, &c.

And hence it results that to be elected on the first day the person must have a majority of all the members present. But this construction, which is equivalent to saying that, to make an election, every member must vote, would put it in the power of a single member of the legislature to defeat an election on that day. This could not have been intended; and that clause must be regarded as relating merely to the manner of voting; and if a number of votes are cast for a qualified candidate, and the other members refuse to vote at all, then the person “who shall have a majority of the *whole number of votes cast*” must be deemed elected.

The provision concerning the joint assembly is materially different. There it is provided:

The joint assembly shall then proceed to choose, by a *viva-voce* vote of each member present, a person for the purpose aforesaid, and a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected.

The clause “a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting,” undoubtedly requires that, to make an election, a candidate must receive a number of votes greater than half of the majority of both houses. The difference between the two provisions is this: if a majority or quorum of each house are actually present when each house proceeds to the election on the first day, the person receiving the highest number of votes cast is elected, though receiving less than half of a majority. But in the joint assembly it is necessary to an election that a candidate should receive the votes of *more than half of a majority of both houses*.

It is a well-established rule for construing statutes that every clause, phrase, and word must be deemed to have been added to the statute for the purpose of accomplishing *some end that would not be accomplished without it*.

Dwarris on Statutes, (Potter's edition, 1871,) 198, says:

It is a safe method of interpreting statutes to give effect to the particular words of the enacting clauses. For when the legislature in the same sentence uses different words, the courts of law will presume that they were used in order to express different ideas. So, if there be a material alteration in the language used in the different clauses, it is to be inferred that the legislature knew how to use terms applicable to the subject-matter. “The several inditing and penning of the different branches,” said the judges in Edrick's case, “doth argue that the maker did intend a difference of the purviews and remedies.”

To the same effect, see *Rex vs. Bolton*, (5 Barn. and Cres., 74.)

Applying this familiar principle to the statute before us, it must be held that the provision in regard to an election by the joint assembly requiring a person to receive “a majority of all the votes of the said joint assembly,” which is not found in the act in relation to an election by the two houses acting separately, was added for the purpose of requiring in one case *what was not necessary in the other*. It may be said that the same thing ought to be required in the one case as in the other; and that the act of Congress ought not to be so construed as to permit an election by the minority in one case, and to forbid it in the other. But the answer to this is obvious. Before the passage of this act the

States elected Senators by various methods; some by a joint assembly of both houses, and some by the action of the two houses separately. In those States which elected by the latter method the houses might sometimes disagree, and thus defeat an election. It was the manifest intention of the act of Congress to afford to a legislature the opportunity of electing a Senator by the separate action of the houses; and in doing so, to leave the whole detail of the election to be regulated by the parliamentary usage of the State. But in providing for an election by the joint assembly, a method not in use in some of the States, it was necessary to provide what should be a quorum, and what should be necessary to an election.

As the act of Congress does not affect the question under consideration, resort must be had to the precedents and authorities, English and American.

It is admitted that when the electors vote for a disqualified candidate, *in ignorance of his disqualification*, the election is void, and must be remitted to the elective body. But it is insisted that where, as in this case, the electors (the members of the two Houses) had full knowledge of the disqualification, votes cast for such person are considered as thrown away, and the qualified candidate receiving the next highest number of votes, and a majority of all votes cast for qualified candidates, is elected. If this proposition is well grounded, Mr. Abbott is entitled to a seat; and this is the precise question upon which we are to consult the authorities.

Mr. Abbott furnished to your committee a printed brief containing references to and quotations from the decisions upon this question from the earliest times, which quotations are embodied in this report.

Rogers on Elections, (ed. 1847, ch. 7,) says:

The principle upon which courts of law have acted in such cases is broad and uniform, and is thus laid down, and the authorities all cited by Lord Ellenborough in pronouncing the judgment of the Court of King's Bench in the case of *Rex vs. Hawkins*, (A. D. 1803,) 10 East., 211, which judgment was affirmed upon appeal to the House of Lords, (2 Dow., 124.)

The general proposition that votes given for a candidate after notice of his being ineligible are to be considered the same as if the person had not voted at all is supported by the cases of the *Queen vs. Boscawen*, E. T., 13 Anne, 1713; *The King vs. Withers*, E. T., 8 Geo. II, 1835; *Taylor vs. Mayor of Bath*, M., 15 Geo. II, 1742; all of which are cited in Cowper, 537, in *King vs. Monday*, (A. D. 1777.) In the first, Boscawen and Roberts, the two candidates had an equal number of votes, but because Boscawen was incapable, the votes given for him were considered as thrown away, and the other duly elected. In the second case, Withers had five votes out of eleven, and the other six refusing to vote at all, the court held Withers duly elected, and the six who refused to vote were virtually consenting to the election of Withers. In the third case, Taylor, Biggs, and Kingston were candidates. Biggs was objected to as a disqualified person, notwithstanding which Biggs had 14 votes, Taylor 13, and Kingston only one. Then Lord Chief Justice Lee, at *nisi prius*, directed the jury that, if they were satisfied that the electors had notice of Biggs's want of qualification, they should find for the plaintiff, (Taylor,) because Biggs, not being qualified, was to be considered as a person not *in esse*, and the voting for him a mere nullity. The jury found for the plaintiff, and the court, on a motion for a new trial, agreed with the law as laid down by Lord Chief Justice Lee, and refused a new trial. The same principle has been acted on in the case of *Claridge vs. Evelyn*, (1821,) 5 B. and A., 81, where an infant, having been elected to the office of clerk of a court of requests, notice was given at the time of his election of his ineligibility on the ground of nonage. An action was brought for a false return by the unsuccessful candidate, and a verdict given for the plaintiff, subject to the opinion of the Court of King's Bench. At the close of his judgment, after argument, Abbott, C. J., said: "I am of opinion, therefore, that he (the infant) was ineligible, and due notice of his incapacity having been given to the electors at the time of his election, their votes were thrown away, and consequently there must be judgment for the plaintiff." (*Vide also R. vs. Coe*, Heywood on County Elections, 538; *R. vs. Parry & Phillips*, (1787,) 14 East., 549; *R. vs. Bridge*, (1811,) 1 M. & S., 76.)

Fife, 1 Luders, 435, (A. D. 1785-'90:) General Skene was elected. Mr. H. gave

notice at the poll that Gen. Skene was incapacitated, by reason of holding the offices of baggage-master to the forces and inspector of the roads, and petitioned upon those objections. The committee seated Mr. Henderson, on the ground that the novel creation of one of the offices was notorious and within 6 Anne, c. 7, s. 25. (a.)

Cockermouth, (1717,) 13 Journ., 673: The votes were, for Sir Wilfred Lawson, 90; for Lord Percy Seymour, 84. The former had been proved at the election to be under twenty-one years of age. The House seated Lord Percy Seymour.

Flintshire, 1 Peck., 526, (1802-'06:) The facts and decisions the same as in the case of Cockermouth.

Second Southwark, (Clifford, 130, 1736:) The former committee having resolved, "that at the last election for the borough of Southwark G. W. Thellusson, esq., did act in violation of the statute of the 7 W. III, c. 4, whereby he is incapacitated to serve in Parliament upon such election," and notice having been given of this resolution, the petitioner was seated with a minority of votes.

Second Canterbury, Clifford, 353: The first committee merely declared that neither of the sitting members was duly elected, and that the election was void. The second committee found specially that the first election was declared void for bribery and corrupt practices only; and having heard evidence that notice was given at the election of the ineligibility of the sitting members on account of bribery and corruption at the former election, and that copies of the opinions of three counsel, all stating that the sitting members were ineligible, were read, seated the petitioners with the minority of votes. (Kirkeudbright, 1 Lauder, 72 *ante*, 72 *et seq.*; Radnorshire, 1 Peck., 496; Leominster, 1 C. & D., 12; and 2 Dungarvon case. K. & Ambl., 6.)

Leominster, (1827,) C. & D., 1: Objection made that the candidate had declined to take the qualification oath when requested so to do. His return declared void and the petitioner seated.

Heywood on County Elections, 535, says:

It must be remembered, however, that in case a candidate laboring under disabilities should be returned, the election will be avoided on petition; and that if, before the election comes on, or a majority has polled, sufficient notice has been publicly given of his disability, the unsuccessful candidate next to him on the poll must ultimately be the sitting member. * * * When the disability of the candidate is notorious, it should seem that it is not necessary to give notice to the electors.

Roe on Elections, (ed. 1818,) page 256, says:

If there be no other candidate than the person incapacitated, the election will necessarily be void; but if, besides such incapacitated person, there be also one or more candidates, it is a very important question whether, in consequence of the incapacity of the former, the electors are to be called upon to reconsider their choice, or whether they are to be represented by the second in number upon the poll, he in reality being regarded the first by reason of the nullity of the franchise given to the other candidates. It will be seen that the latter proposition is that which constitutes the law in cases where misapplication of the franchise by the electors was willful, and therefore made in their own wrong.

Male on Elections, 336, says:

If the election is made of a person or persons ineligible, such election is void either *in toto* or of one only, according as the ineligibility applies to all or one only, where that ineligibility is clear and pointed out to the electors at the poll. It has been held that the votes given to such ineligible candidate, after notice, are thrown away, and a competitor, though chosen by a smaller number of electors, has in such case been held duly elected.

But such ineligibility ought to be clear, and grounded upon some known and settled rule of law. The same doctrine holds at law in the election to offices in which, after notice of the ineligibility of any particular candidate, the votes given to him are held to be thrown away.

Clerk on Elections, page 156, says:

Whenever a candidate is disqualified from sitting in Parliament, and notice thereof is publicly given to the electors, all the votes given for such disqualified candidate will be considered as thrown away, and the other candidate, with a minority of votes, will be in position to claim the seat on proof of the existence of the disqualification, and that sufficient notice has been given of it to the electors.

2 Kyd on Corporations, 12, says:

Two requisites are necessary to make a good election: 1. A capacity in the electors. 2. A capacity in the elected. And unless both concur the election is a nullity. With respect to the capacity of the electors, their right is this: They cannot say there shall be no election, but they are to elect; therefore, though they may vote and prefer one

to fill an office, they cannot say such a one shall not be preferred; or by merely saying we dissent to every one proposed, prevent any election at all. Their right consists in an affirmative, not a negative declaration. Consequently, there is no effectual means of voting against one man but by voting for another; and even then, if such other person be unqualified, and the elector has notice of his incapacity, his vote will be thrown away.

Grant on Corporations, 109, says:

When the ineligibility of a candidate arises from his holding or having held a public office, the people within the jurisdiction of such office are held in law to know and are chargeable with notice of such ineligibility.

And on page 208 he says:

A disqualification, patent or notorious, at once causes the votes given for the candidate laboring under it to be thrown away.

Arnold on Corporations, 141, says:

The general rule may be stated thus: If a candidate for an office is ineligible at the time of the election by reason of any disqualification, and public notice of such disqualification is given at the election, all votes given for that candidate after such notice are thrown away; and, if there are other eligible candidates, the one who has the largest number of votes will be duly elected.—(*Vide R. vs. Hawkins, &c.*)

In *King vs. Parry*, (in 1811,) 14 East., 559, it was ruled:

When a candidate is disqualified for sitting in Parliament, and notice thereof is given to the electors, all votes given for such candidate will be considered thrown away, and the other candidate, with a minority of votes, will be in a position to claim the seat on proof of the existence of the disqualifications.

In *Rex vs. Blissell*, upon a motion for a new trial, Lord Mansfield, interrupting counsel for the Crown, who was arguing that the disqualification was not notorious, said:

Do you doubt that, if he is really disqualified, whether such disqualification is notorious or not, the votes given for him are thrown away? In another jurisdiction, if the disqualification is notorious, it does more—it elects the other party; and of the law in this case you can have no doubt. (*Vide Heywood on Elections, 533-37.*)

In confirmation of this rule, we have a decision that to vote knowingly for a disqualified candidate is equivalent to not voting at all. In the case of *Taylor vs. Mayor of Bath*, quoted above—

All the judges held that the verdict was right. They held that, as the fourteen electors who voted for Biggs had notice that he was not qualified, their votes were thrown away; that, when electors vote for a person not qualified, it is the same thing as if they had given no votes at all, in which case it was not disputed that silence was a constructive consent.

In *Queen vs. Coaks*, (1855,) 28 Eng. L. and E., 307, Lord C. J. Campbell said:

Now, it is the law—both the common law and parliamentary law—and it seems to me also common sense, that if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existent person; as it has been said, as if he gave his vote for the man in the moon.

In *Oldknow vs. Wainwright*, (2 Burr., 1017,) it was held that if a majority dissent from an election, but vote for nobody else, the election by the minority is good. This case related to an election of town clerk by mayor, aldermen, and common council. Whole number of electors twenty-five, of whom, after due notice, twenty-one assembled. Nine electors voted for Seagraves, while eleven, protesting against any election at that time, refused to vote. As to the election of Seagraves, Lord Mansfield held:

Whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do.

In *King vs. Monday*, (2 Cowp., 538,) Lord Mansfield said:

Upon the election of a member of Parliament, or a verderor, where the electors

must proceed to an election, because they cannot stop for that day, or defer it to another time, there must be a candidate or candidates; and in that case there is no way of defeating the election of one candidate proposed but by voting for another.

In Southwark (Elections 259) it is said—

That it is wilful obstinacy and misconduct in a voter to give his vote for a person laboring under a known incapacity. (See also Willcock, Cor., 215, 1827.)

See also *Regina vs. Homes*, 3 Nevill and Perry, 48, 1839; S. C., 7 Adolph and E., 960; and *Regina vs. Pancras*, 1857, 7 Ellis and B., 954.

In *Gosling vs. Veley*, decided in 1848, 7 Q. B. R., 437, Lord Dunsan, C. J., delivering the judgment of the court, after citing cases, said:

Where an elector, before voting, receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchise; and, therefore, however strongly he may in fact dissent, and in however strong terms he may disclose his dissent, he must be taken in law to assent to the election of the opposing and qualified candidate, for he will not take the only course by which it can be resisted; that is, the helping to the election of some other person. He is present as an elector; his presence counting as such to make up the requisite number of electors, where a certain number is necessary; but he attends only as an elector, to perform the duty which is cast on him by the franchise he enjoys as elector; he can speak only in a particular language; he can do only certain acts; any other language means nothing; any other act is null; his duty is to assist in making an election. If he dissents from the choice of A, who is qualified, he must say so by voting for some other also qualified; he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend. And this is a wise and just rule in the law. It is necessary that an election should be duly made, and at the lawful time; the electoral meeting is held for that purpose only; and but for this rule the interest of the public and the purpose of the meeting might both be defeated by the perverseness or corruption of electors, who may seek some unfair advantage by postponement. If, then, the elector will not oppose the election of A in the only legal way, he throws away his vote, by directing it where it has no legal force; and in so doing he voluntarily leaves unopposed, *i. e.*, assents to the voices of the other electors.

It follows from these observations that the true ground of the decision is that stated by Lord Mansfield in the case first cited: "Whenever electors are present and do not vote at all they virtually acquiesce in the election made by those who do."

In case of *Taylor vs. Mayor of Bath*, the counsel, in argument, took the distinction between not voting at all and voting for the disqualified candidate. They admitted that silence might well be held to give consent, but that voting for the other candidate was an express negative; it was the only way, they said, of voting against one to vote for the other. But the court overruled the distinction. To vote for a person not qualified, they said, was the same thing as not to vote at all; which, it was admitted, would have been a constructive assent. It will not escape observation that, in all these cases, the law required the concurrence of a majority of the electors present to make the election good. In none of them could it be stated as a tenable proposition that the minority could bind the majority, or make a good election against their votes. In all of them, too, the numerical majority were *de facto* opposed to the election made. Yet this fact was never considered as rendering the election in law other than by an actual majority.

Cushing's *Lex Parliamentaria* states the rule as follows:

Section 111. Of elections of, and votes given for, disqualified persons.

175. If an election is made of a person who is ineligible, that is, incapable of being elected, the election of such person is absolutely void, even though he is voted for at the same time with others who are eligible and who are accordingly elected, (see *Male on Elections*, 336;) and this is equally true, whether the disability is known to the electors or not; whether a majority of all the votes or a plurality only is necessary to the election; and whether the votes are given orally or by ballot.

176. The principle above applies equally where the constitution or law points out, among other eligible persons, the particular candidates to be voted for; in which case votes given for other persons are void. Thus the constitutions of Maine and Massachusetts, providing that, in case of a failure to elect senators at the general election, the deficiency shall be supplied on the day of the meeting of the legislature by such senators as shall be elected and the members of the other branch from among the persons voted for and not elected as senators. All votes given on such occasions for any other than the candidate designated by law, though otherwise eligible, are thrown away.

177. In England, where a plurality only is necessary to an election, and where the votes are given orally, it is also held that if electors have notice of the disqualification of a candidate, every vote given for him afterward will be thrown away and considered as not having been given at all. (*King vs. Monday*, Cowper's Reports, 537; *Rex vs. Hawkins*, 10 East's Rep., 211, and cases there cited; 2 Dow's Rep., 124; *Claridge vs. Evelyn*, 5 Barnewell and Ald. Rep., 81; *Rex vs. Coe*, Heywood on County Elections, 534; Douglas's Rep., 398, n; *Rex vs. Blissell*, Heywood, 537; *Rex vs. Parry*, 14 East, 549; *Rex vs. Bridge*, 1 Maule and Selwyn's Rep., 76.) The effect of this rule is that not only will the election of a disqualified person be held void, but if such election takes place after notice of the disqualification is given to the electors, the candidate having the next highest number of votes will be elected. (Fife, 1 Luders, 455; Cockermonth, 18 Commons Jour., 672; Flintshire, 1 Peckwell, 526; Southwark, 2 Clifford, 130; Canterbury, 2 Clifford, 353; Kircudbright, 1 Luders, 72; Radnorshire, 1 Peckwell, 496; Leominster, Corbet, and Daniel, 1; Leominster, Rogers, App. IX; Cork County, Knapp and Ambler, 406; Belfast, Falconer, and Fitzherbert, 603; Rogers on Elections, 224. See also Maule on Elections, 336; and Abington, 1 Douglas, 419.) This doctrine, however hard it may seem, is founded in the familiar principle that every man is bound to know the law with reference to any act which he undertakes to do; and consequently that when an elector is apprised of the fact of disqualification of a candidate, and notwithstanding gives his vote for him, the elector takes upon himself the risk of losing his vote, if his construction of the law turns out to be wrong. (Rogers on Elections, 226.)

178. In this country it is equally true that the election of a disqualified person is absolutely void; and in those States where a plurality elects, and where the votes are given orally, as in England, votes given for a candidate after notice of his disqualification are thrown away, and the candidate having the next highest number of votes is elected.

179. In reference to elections by ballot, in which secrecy is the distinguishing feature, and in which, consequently, neither the returning officers nor the electors themselves are supposed to know for whom the votes are given until the result is declared, it seems not unreasonable to consider the votes for ineligible candidates to be thrown away in all cases, and the opposing candidate elected, where the electors know, or must be presumed to know, the disability; and in all cases where there is no such actual or presumed knowledge, to hold the whole proceeding merely void.

180. In reference to elections in which an absolute majority is requisite to a choice, and in which, consequently, the whole number of votes received is first to be ascertained, votes given for ineligible persons must, of course, be excluded from the enumeration, for the reason that, as the whole balloting would be void, and all the votes excluded, if they were all for such candidates, it would be preposterous to enumerate such votes where they constitute a part only of the votes given in. If, in consequence of such exclusion, the result of the election would be different from what it would otherwise be, the whole proceeding must, perhaps, be held void or valid, according as the electors have actual or personal knowledge of the ineligibility of the persons for whom the excluded votes are given.

To the same effect, see Wilson's Digest of Parliamentary Law, pp. 107 to 114.

Angell and Ames on Corporations, p. 98, n. 3, say :

If the assembly be duly convened, and the majority vote for an unqualified person, after notice that he is not qualified, their votes are thrown away, and the person having the next majority, and not appearing to be disqualified, is duly elected.

This subject has been discussed at different times in the legislature of Massachusetts, and it has been uniformly decided that votes given for candidates constitutionally ineligible should be regarded the same as blank votes. In 1843 an effort was made to change this parliamentary rule, and a majority of the committee submitted a report, accompanied by a resolution, to the effect that it was "not in accordance with the constitution and laws for the two branches of the legislature to reject, in making up the count, the ballots cast for ineligible candidates." A minority of the committee submitted an adverse report, saying :

The fact that the votes given for ineligible candidates, when the two houses have met in convention for the purpose of filling vacancies in certain offices, have been rejected from the count, is of long standing; and that no evil has resulted from such practice is, of itself, a sufficient reason why a different rule should not be established. It is time enough to provide a remedy when an evil is found to exist, and not in anticipation of an evil. This, it is believed, is a safe course in all cases.

The practice of rejecting blank pieces of paper, although they may have the form and shape of the actual votes which are cast, is believed to be uniform everywhere. The reason for the rejection of such paper is that it is not a voice given and numbered; that no one is designated who can be elected.

It is, however, no less an expression of dissatisfaction to the candidate voted for by other persons, on one side or the other, than it would be if it bore the name of an imaginary being, or a person ineligible. In both cases it is not a vote, and should not so be treated. So far as precedents can be found, the practice of rejecting from the count votes cast for an ineligible candidate is not peculiar to the convention of the two houses in the Massachusetts legislature. It has obtained more or less in the House of Representatives of the United States, and in the House of Commons in Great Britain. * * * Inasmuch as the custom has obtained, for aught that appears, from time immemorial, to reject such votes, the undersigned take leave to submit that the proposed resolution of the majority of the committee is uncalled for, and that no further action be had on such order.

The House laid the resolution of the majority on the table, thus in effect adopting the report of the minority.—(Cushing's Reports of Contested Elections in Massachusetts, p. 499.)

The subject was again discussed, and the decision reaffirmed, that votes cast for ineligible candidates should be thrown away. In 1849 Mr. Slade was returned as the duly elected representative of the town of Somerset, and his seat was contested, for the reason, among others, that a ballot for Nathaniel Morton, of Taunton, for member of Congress, was thrown out by the judges of election.

The committee, in their report declaring Mr. Slade lawfully entitled, discussed this question as follows:

The policy of the law requires that such a construction should be put upon all proceedings at elections as to make such proceedings valid, rather than nugatory. An election is always attended with trouble, inconvenience, and expense, and should not be set aside for light or frivolous causes. If votes cast by mistake for persons not eligible are to be counted, then the intention and will of the voter is defeated; if, on the other hand, such votes are willfully put into the ballot-box, the person who thus indicates so clearly his disregard of the value of the elective franchise, that it is only a deserved punishment for his delinquency to deprive his vote of all weight and influence at such election. By so doing a voter is not deprived of any legitimate exercise of his right, because he can always manifest his opposition to any one candidate by voting for some other.—(Rex vs. Monday, Cowper, Lord Mansfield said the only way of voting against one was to vote for another.)

Finally, it seems to the committee that there is no reason why a person who votes for an ineligible candidate should not be put upon the same footing with one who does not vote at all, as in both cases the parties show a disposition to prevent an election, and both of them show an unwillingness to perform their duty, by aiding to promote those elections which are absolutely essential to the existence of the government. For if every voter refrained wholly from voting, or voted for an ineligible candidate, the result would be the same—no choice; and although it is true that no penalty is attached by law to a neglect of this obligation of voting, yet the obligation is not the less plain for that; and the committee believe it to be a duty too important to be neglected, and too sacred to be trifled with, by voting for fictitious persons or ineligible candidates. * * * The voter who puts into the ballot-box a blank piece of paper as clearly indicates his opposition to all the candidates as he who puts in a vote for an ineligible candidate; and there seems to be no reason why the opinion of the one should not be entitled to consideration as well as that of the other.—(Report agreed to April 10, 1849. See Cushing, Reports Contested Election Cases, Mass., p. 576.)

In Indiana the same doctrine has been established by two decisions of the supreme court. In the cases, Gulick vs. New, (14 Ind., 927,) and Carson vs. McPhetridge, (15 Ind., 327.) In the former case the court say:

It being conceded that the votes cast for Wallace were powerless and fruitless in effecting the main end arrived at—that is, in electing him—we are still asked to decide that they were so far effective as to prevent the election of any other person; that they were, so far as affirmative results were involved, thrown away, but that negatively they were operative. We are reminded that, in our form of government, the majority should rule, and that if the course indicated is not followed, a majority of the voters may be disfranchised, their voice disregarded, and their rights trampled under foot, and the choice of a minority listened to. True, by the constitution and laws of this State, the

voice of a majority controls our elections; but that voice must be constitutionally and legally expressed.

Even a majority should not nullify a provision of the constitution, or be permitted at will to disregard the law. In this are the strength and beauty of our institutions. Suppose a majority should persist in voting for a man totally ineligible to take the office of sheriff, what would be the result? As he could not hold the office, either the one capable of holding, receiving the next highest vote, would, as contended by the appellant, be entitled to the office, or there would be a vacancy, as insisted by the appellee. Suppose the proceedings should result in creating a vacancy, then it would remain, greatly to the detriment of public and private interests, or it would, under the statute, have to be filled by the action and choice of perhaps two men, which might be, possibly, in direct conflict with the choice of that majority in every respect. Then, while it is true that the votes of a majority should rule, the tenable ground appears to be that if the majority should vote for one wholly incapable of taking the office, having notice of such incapacity, or should perversely refuse, or negligently fail to express their choice, those, although a minority, who should legitimately choose one eligible to the position, should be heeded. Suppose that eight years ago, at the first election under our new constitution, when nearly all the offices in the State were to be filled, a majority of the voters in the State, and in the several districts and counties, had voted for persons wholly ineligible to fill the several offices, would those offices have thereby remained vacant? Could that majority, by persevering in that course, have continued the anarchy which might have resulted from such action? Or, rather, is it not the true theory that those who act in accordance with the constitution and the law should control even a majority who may fail so to act? Whether the same reasoning should hold good where the ineligibility should arise out of some cause other than a constitutional prohibition, is a question we are not now called upon to decide.

The majority of the court held that the voter must take notice of the disqualification of the candidate, and that votes cast for a candidate in fact disqualified must be thrown out, whether the voters knew of the disqualification or not. Judge Perkins dissented upon this point, but affirmed the general doctrine, as follows:

1. Where, at an election, there are opposing candidates for an office, and the candidate receiving the highest number of votes is ineligible, but, from a fact or cause which the voters did not and were not bound to know, the result is a failure, and gives no candidate a right to the office, and should be followed by another election.

Probable examples, under this proposition, of cases where the voters might not have knowledge, viz, infancy of candidate, non-residency, want of naturalization, not of male sex, not of requisite degree of white blood, not in existence. This last was the fact in the case cited from 38 Maine R., app. There a portion of the people by mistake voted for a person not in being. The case of the State *vs.* Swearinger, (12 Ga. R., 23,) was a case of non-residency.

2. Where the voters at the election do know, or are legally bound to know, so that, in law, they are held to know of the ineligibility of a candidate, the election does not result in a failure; but, in such case, the eligible candidate receiving the highest number of votes is legally elected and entitled to the office.

Against this proposition we have not found a single authority. Those relied on as such by the court below were the cases in 38 Maine R. and 12 Ga. *supra* and The State *vs.* Giles, (1 Chand. Wis. R., 112.)

Of the case in Maine, we have said enough above.

Of the cases in Georgia and Wisconsin, it may be remarked that neither of them involved the point now under consideration, and what is said upon it is mere *dicta*, and neither of the cases cites a single authority.

The point involved in the Georgia case was whether a certain corporate town in that State could elect to office in it a person not residing within the corporate limits, and it was held that it could. This closed the case.

The point involved in the Wisconsin case was this: The constitution, article 6, section 4, provided that sheriffs should be ineligible for two years next succeeding the termination of their offices. A sheriff, in office at the time the constitution was adopted, was elected his own successor under the constitution; and it was held that he was legally elected, and that the disability imposed by the constitution related only to elections and terms held under the constitution. The decision of this point disposed of the case; and what is said beyond it, as in the Georgia case, if not improperly, but still is very loosely and carelessly said, and is not binding as authority.

But while there are no authorities adverse to the second proposition above laid down, there is a cloud of them vindicating its correctness. As the attention of the court below does not appear to have been called to them, we shall here indicate where they may be found and examined.

Mr. Grant, a late accurate English writer on corporations, at page 208, says: "As has been stated, a disqualification, patent or notorious, at once causes the votes given for the candidate laboring under it to be thrown away; the same would probably be held to be the case where the electors had the means of knowledge of the candidates' qualification, or the contrary, and might have ascertained the facts if they had pleased." Numerous cases are cited to sustain these positions.

Judge Cushing, in his American work on the Law of Legislative Assemblies, at pages 66, 67, lays down the same doctrine as deducible from the decided cases.

Where the same ineligibility of a candidate arises from his holding or having held a public office, the people within the jurisdiction of such office are held in law to know—are chargeable with notice—of such ineligibility; the votes given for such candidate are of no effect, and his highest eligible competitor is elected.—(Grant on Corp., *supra*, p. 107; *Biddle vs. Willard*, 10 Ind. R., 62, on p. 62.)

It is assumed that in general a certain number of persons less than a majority of a legislature, or any other legal elective body, is competent for the transaction of business. Speaking upon this point, Cushing's *Lex Parliamentaria*, sec. 247, says:

This number may be precisely fixed in the first instance, or some proportional part established, leaving the particular number to be afterward ascertained, with reference to each assembly; and this may be done either by usage or by positive regulation; and, if not so determined, it is supposed that a majority of the members composing the assembly constitute a quorum.

And we have before seen that, by the constitution of North Carolina, either house of the legislature may proceed to the transaction of public business, if a majority of the members elect *are present*. And if a quorum are present there may be an election by such members as choose to vote. This point was decided in England in the case of *Oldknow vs. Wainwright*, (2 Burr, 1017,) and in this country in *Commonwealth vs. Green*, (4 Wharton, 531,) where the court charge the jury as follows:

When there is a quorum of members present, the moderator can only notice those who actually vote, and not those who do not choose to exercise their privilege of voting. "Whenever," says Lord Mansfield, "electors are present and do not vote at all, they virtually acquiesce in the election of those who do." And with this principle agrees one of the rules of the general assembly itself, which must be familiar to every member: "Members (30th Rule) ought not, without weighty reasons, to decline voting, as this practice might leave the decision of very interesting questions to a small proportion of the judicatory. Silent members, unless excused from voting, must be considered as acquiescing with the majority."

This is not only the doctrine of the common law, of the written law, as you have seen, but it is the doctrine of common sense; for without the benefit of this rule it would be almost impossible, certainly very inconvenient, to transact business in a large deliberative assembly.

This, gentlemen, has been stigmatized as a technical rule of law, a fiction and intendment of law. It is sufficient for us that it is a rule of law. We must not be wiser than the law.

Nor can we know anything of any fancied equity as contra-distinguished from the law. The law is the equity of the case, and it must be so considered under the most awful responsibility by the court and the jury. In my opinion, a court and a jury can never be better employed than when they are vindicating the safe and salutary principles of the common law.

To the same effect, in the act of Congress before quoted, which declares that the person who shall receive a "*majority of all the votes cast*" shall be declared elected. Does this rule hold good in case of votes for a disqualified candidate, as well as in the case of members not actually voting? The unanimous opinion of the court in the case of *Taylor vs. Mayor of Bath*, before quoted, was that—

When electors vote for a person not qualified, it is the same thing as if they had given no votes at all; in which case it is not disputed that silence was a constructive consent.

In *Regina vs. Coaks*, before cited, Lord C. J. Campbell said:

Now, it is the law, both the common law and parliamentary law, * * * that if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all.

This question is also answered in the affirmative by an American work of standard authority, as follows :

After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, *although a majority* of the entire assembly altogether abstains from voting; because their presence suffices to constitute the elective body, and if they neglect to vote it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote. And such an election is valid, though the majority of those *whose presence is necessary to the assembly* protest against any election at that time, or even the election of the individual who has the majority of votes; the only manner in which they can effectually prevent his election is by voting for some other *qualified* person.

(Angell & Ames on Corporations, ch. 4, sec. 6, and cases there cited; Brooks *vs.* Young, 12 Grattan, 303; State *vs.* Lehre, 7 Rich., 234; King *vs.* Monday, 2 Cowper, 537; Oldknow *vs.* Wainwright, 2 Burr., 1017; and Crawford *vs.* Powell, 2 Burr., 1016.)

This is also in harmony with the act of Congress before quoted.

Inquiry has been suggested on the point whether, in the cases supposed, the person having the legal votes may be deemed elected, although the number of votes cast for him be less than a majority of a quorum.

To what has been above stated, and which may be applied to this question, the following additional reasons may be given to show that, in law, there is no sufficient ground for this objection :

1st. In no one of the cases cited, either in argument of counsel or opinion of the judge, do we find that this point has been raised or suggested, as it seems probable it would have been had it been valid; or, 2d. We find at least two cases (King *vs.* Bissell and King *vs.* Monday) where, if this objection had been raised and sustained, it would have determined the case, but the point was not made; 3d. In two cases the judges, incidentally, but *unequivocally*, deny the truth of this objection.

In 14 East's Reports, p. 599, note "d", on the case of Taylor *vs.* Mayor of Bath, (M. 15, Geo. II,) it is said :

Taylor moved for a *mandamus* to be admitted into the office of a common councilman of the corporation of Bath.

The defendant returned *non fuit electus*. * * It appeared in evidence at the trial that, by the charter, the election of common councilmen is to be by the mayor, recorder, and aldermen, *or the major part of them* then present, and the mayor and twenty-seven aldermen being assembled for this purpose, Biggs had 14 votes; Taylor, 13, and Kingston, 1.

In 2d Cowper, 537, in reference to the above case, it is stated :

Twenty-eight electors assembled; 14 voted for A, (Biggs,) 13 for B, (Taylor,) and 1 for C, (Kingston.) A was unqualified, and his incapacity known to the electors at the time.

Lee, chief justice, in his directions to the jury, said :

"That the votes given to A, with notice of his incapacity, were thrown away," It afterwards came before the court, (on motion for new trial,) when Lee, C. J., compared it to voting for a dead man, and held that B, who had the thirteen votes, was duly elected. And Justice Page (one of the court) said :

That in such a case a *minority of two only* would have been sufficient to elect the other candidate.

And this where the "majority of a quorum" was *eight*.

The case of King *vs.* Blissell was a motion for a new trial, on an information in the nature of a *quo warranto* against the defendant for acting as alderman at Portsmouth, and a verdict had been given for the Crown on two material issues. Pike and Blissell were adverse candidates. At the election the mayor only voted for Blissell, while three aldermen voted for Pike; but the mayor gave notice to the aldermen that Pike was incapacitated to be elected, because he held the office of

chamberlain, which was incompatible. Lord Mansfield, addressing the counsel for the Crown, who was arguing that the disqualification was not notorious, said:

Do you doubt that, if he is really disqualified, whether such disqualification is notorious or not, that the votes given for him are thrown away? In another jurisdiction, if the disqualification is notorious, it does more—it elects the other party; but of the law in this case you can have no doubt.—(Haywood on Elections, p. 533, and Wilson's Digest of Parliamentary Law, p. 111).

In this case *two* was a majority of a quorum, yet Lord Mansfield said if Pike was notoriously disqualified, Blissell, who received one vote, was elected, and “of the law in this case you can have no doubt.”

An examination of the opinion of the judges in 25 Maine Rep., 567, throws light upon the above opinion. There the governor submitted the following questions:

1. Whether the governor and council, in counting votes for county officers, under the statutes of that State, had power to receive from the town canvassers evidence to contradict the return made by them?

2. Whether the governor and council could receive an *amended* return from the town canvassers?

The judges, after citing the statutory provisions, answered as follows:

The powers conferred upon the governor and council are specific and precise; and it is believed that it would be irregular to go beyond them, or in any manner to deviate from them. If they could receive evidence that the certificates were erroneous in one particular, they might, with equal propriety, do so in another, and so exercise the powers of judges of those elections generally, and without restriction.

In other words, the duty cast upon the governor and council was purely ministerial. They were to canvass the election from the returns, and had no power to inquire beyond them. This was the ground upon which the opinion in the 38 Maine Rep. rested, as is evident from the fact that in the opinion in the 38th the judges refer to the opinion in the 25th Maine Rep. as conclusive of the questions then presented. In the opinion in 38 Maine the judges say the only duty cast upon the governor and council is to “open and compare” the copies of the records of the votes given, and from such comparison to ascertain and determine who had been elected. In other words, the statute did not make the governor and council the judges of the election, but merely cast upon them a specific ministerial duty; which performed, their power was at an end. This act had been performed by the former governor and council, who had declared that Abel C. Dinslow was elected. Consequently the then governor and councils had no power to revise such former determination and declare that another was elected. And the precise and express ground upon which the opinion was given was that Dinslow having been elected, and there being no such man in existence, the office was vacant. It is evident that these opinions have no application to a case like the one under consideration, where the Senate is “the judge” of the election, and is not restricted, as the governor and council in the Maine cases were, to a performance of the mere ministerial duty of declaring who appeared by the certificate to be elected.

Saunders vs. Haynes, (13 Cal., 145,) was a proceeding to contest the election of the defendant Haynes as judge of the district court for the eighth district in California.

The facts were these: Turner and Haynes were competing candidates at the election, and Turner received the larger number of votes, but the certificate was delivered to Haynes, upon the assumption that Turner was ineligible, because of his holding a lucrative office under the United States. The court held that Turner was not ineligible; and that, of course, ended the case, and entitled Turner to the office. In the opinion of the court,

it is said, *obiter dictum*, that if Turner had, in fact, been ineligible, Haynes would not have been elected; and the case of *State vs. Giles* (1 Chand. Wis., 112) is cited as sustaining that principle. With the opinion and decision in *Saunders vs. Haynes* we fully concur. But the question involved in Mr. Abbott's claim to a seat, viz, that the electors knew the candidate to be disqualified, was not averred, and was not involved, because the fact did not exist in that case. The court held that Turner was not ineligible. Of course, the electors did not know a fact that did not exist.

Commonwealth vs. Cluley. (56 Penn. St., 270,) was a rule on the relation of McLaughlin against Cluley to show cause why a *quo warranto* should not issue against Cluley, to test his right to the office of sheriff of Allegheny County. At the election, October 9, 1866, Cluley received 19,915 votes, and McLaughlin 12,925 votes, for the office of sheriff. The suggestion rested upon the allegation that Cluley was ineligible at the time of the election, but it did not appear that the electors had notice of the disqualification; nor did it appear that, if the votes for Cluley were thrown out, McLaughlin was elected. The case turned upon the precise point that, inasmuch as it was not alleged that throwing out Cluley's votes, McLaughlin had a majority, therefore it did not appear that McLaughlin had such an interest in the question as would enable him to contest the election. It is true that the court, speaking *obiter dictum* in regard to a popular election by ballot, expressed the opinion that McLaughlin was not elected. But the court fully approve of the English rule, that at an election *viva voce*, by a limited number of electors, the votes given for a candidate known to be ineligible are thrown away.

The courts say :

There is more reason for this in England, where the vote is *viva voce*, and the elective franchise belongs to but few, than here where the vote is by ballot, and the franchise well nigh universal. In those cases the notice was brought home to almost every voter, and the number of electors was never greater than three hundred, and generally not more than two dozen. Besides, a man who votes for a person with knowledge that the person is incompetent to hold the office, and that his vote cannot, therefore, be effective, that it will be thrown away, may very properly be considered as intending to vote a blank, or throw away his vote.

But the present relator suggests no such cause. He does not even aver that, if the votes given for Cluley were thrown out, he received a majority, though doubtless such was the truth. He has, therefore, exhibited no such interest as entitled him to be heard.

Without considering or quoting from the very able dissenting opinion of Chief Justice Thompson in this case, we think it quite evident that the majority of the court have laid down principles upon which Abbott is entitled to his seat. Indeed, Abbott's case is precisely that in which, according to the opinion of the court, those who voted for Vance "may very properly be considered as intending to vote a blank, or throw away (their votes.)" The election of Senator in North Carolina is made by two bodies, numbering, in the aggregate, less than two hundred, voting *viva voce*; and in this case those who voted for Vance voted *viva voce* for a person known by them to be disqualified.

These are the only American decisions supposed to conflict with the principle herein maintained which have been brought to the notice of your committee. In neither of these cases was the precise point now under consideration involved, and in no one of these cases is the principle of common and parliamentary law that a *viva-voce* vote given for a person known by the elector to be disqualified is thrown away, asserted, or even suggested, to be unsound. On the contrary, in the Pennsylvania case, *State vs. Cluley*, as we have shown, the correctness and justness of this principle are expressly declared.

There are but two cases, so far as your committee are informed, in which the election of a Senator has been contested upon the ground of ineligibility at the time of the election—that of Gallatin from Pennsylvania, and Shields from Illinois. And an examination of these cases will show that in neither of them was the point now made either involved or considered.

In Gallatin's case (1 Cont. Elec. in Congress, 854) the proof showed that when Gallatin was first mentioned as a candidate he expressed his opinion that *his citizenship* did not entitle him to be elected. Henry Kammerer testified that, at a meeting of some of the members of the legislature to agree upon a candidate for Senator, he heard Mr. Gallatin say :

As for my name, it is out of the question ; I have not been a citizen long enough to entitle me to serve in that station.

That at a second meeting it was stated, though not by Gallatin, that the doubt about his citizenship was then put to rights; and then it was almost unanimously agreed to put up Mr. Gallatin's name. Mr. Kammerer also stated the ground upon which Mr. Gallatin had at first supposed his citizenship did not entitle him to be a Senator. He says that the day after Gallatin's election he had a conversation with him, in which Gallatin said he had first declared himself ineligible "under a *mistaken* idea that it was necessary for him to have been nine years a citizen of the State of Pennsylvania ; but that upon examining the Constitution he had found that to have been nine years a citizen of the United States was sufficient, and that he had been above nine years a citizen of the United States, or words to that effect."

From this it is evident that at the time of his election Mr. Gallatin, and those by whose votes he was elected, believed that he had been for more than nine years a citizen of the United States. And although the Senate decided that he had not been a citizen of the United States for nine years prior to his election, and unseated him for that reason, yet it was nowhere suggested, either by proof or on the argument, that the electors knew him to be disqualified at the time they cast their votes for him.

Shields's case (Cont. Elec. in Congress, 1834 to 1865) is, in all material respects, like that of Gallatin. He had not, in fact, been nine years a citizen of the United States, and was unseated for that reason. But it was not pretended that the electors knew of his disqualification.

Therefore, neither of these cases has any bearing upon the question now under consideration.

Your committee have also been referred to the case of Yulee *vs.* Mallory, same volume, page 608. In that case, on the first day of the election—January 13, 1851—the general assembly of the legislature of Florida met in convention of the two houses, and proceeded to vote *viva voce* for Senator. Twenty-nine votes were given for Yulee, and twenty-nine votes were given for "blank." Thereupon the presiding officer declared no choice had been made. They then proceeded to a second and third vote, with substantially the same result. On the 15th of January they met again, and, on a call of the roll, thirty-one members responded "S. R. Mallory," and twenty-seven votes were given to Yulee and others, whereupon the presiding officer declared Mallory to be duly elected. From this statement it might seem that Yulee's case raised the question now under consideration. But the brief, though very clear and able report of Mr. Bright, from the select committee in that case, shows the contrary. The two houses of the Florida legislature had, in 1845, passed a concurrent resolution, as follows :

Resolved, That a majority of all the members-elect composing the two houses of general assembly shall be necessary to determine all elections devolving upon that body.

Though the validity of this resolution was attacked by Mr. Yulee, the committee held that the resolution had been duly passed; that it had never been rescinded; that it was consistent with the Constitution of the United States, empowering the Legislature of a State to regulate the time, place, and manner of electing a Senator; and that it was conclusive against the right asserted by Yulee. And the resolution reported by the committee, declaring that Mallory had been duly elected, passed in the Senate without a dissenting vote.

In the report the committee, after determining that, under the resolution of the legislature above quoted, Yulee was not entitled to a seat, say :

This being the view which the committee take of the case, there is no necessity for pursuing the subject further, since Mr. Yulee did not obtain votes sufficient to elect him.

The committee then notice the fact that the members of the legislature evidently voted upon the supposition that the resolution was valid, and say that—

Even conceding the resolution to be invalid, yet the members in the election were misguided by what they had a right to consider as authority, and must have acted under a misconception of right which stood, as they supposed, unquestioned. If this be so, they stand substantially in the condition of an elector who votes for a person disqualified, believing him to be qualified. The vote in such a case, though unavailing, is not rejected from the count.

The only remedy which we can see for an election carried on through misapprehension from such well-founded causes is to set it wholly aside and open the way to a new choice; but in our view of the case there is no occasion to consider what ought to be done upon such a state of facts.

The distinction between votes cast with knowledge, or in ignorance, of the disqualification of the candidate voted for, is inferable from the report in Yulee's case. And the doctrine maintained by that report, that an election carried on under honest misapprehension in regard to then existing facts ought to be set aside and a new election ordered, is conceded.

It was strongly contended before your committee that the case under consideration falls fairly within this equitable principle; because it was said that all the State officers and judges of North Carolina had been elected while under disability imposed by the fourteenth amendment, and Congress had, subsequent to their election, removed their disabilities and enabled them to hold their offices; and your committee were referred to the act of June 25, 1868, (15 Statutes at Large, 366,) by which "all officers elected at the election commencing the 4th day of February, 1868, in the State of Alabama," and who had not publicly declined to accept the offices to which they were elected, were relieved of their disabilities. From these facts it was contended that the members of the legislature who voted for Vance might well believe, and it was said that in fact they did believe, that Congress would relieve Vance of his disability, and that he would be admitted to his seat in the Senate.

This suggestion has some force, but a slight examination will show that it is rather plausible than sound. In the first place the case bears no resemblance to that supposed in the report in Yulee's case; because here there was no misapprehension as to any fact then existing. If the electors had supposed that Vance was not disqualified, though in fact he was, or had they believed that an act had already passed Congress relieving him from his disability, though such was not the case, then the electors would have acted under a misapprehension, and honestly entertained the belief that Vance was eligible. But such is not the

case. Every elector who voted for Vance *knew* that he was disqualified by the fourteenth amendment, and that his disability *had not been removed*. Every elector, therefore, *knew* when he gave his vote for Vance that, as the case then stood, *such vote was thrown away*. As well might a man claim exemption from the penalty imposed by a statute upon the ground that, although he knew he was violating its provisions, he expected the legislature would repeal it. It was the duty of that legislature to elect a Senator who, *in virtue of that election*, and without the aid of any other government, would be authorized to demand his seat as a Senator. To elect a disqualified candidate, and then refer it to Congress to remove his disqualification or not, is to transfer the election from the legislature to Congress. In such case the legislature would, in effect, be nominating a Senator and submitting it to Congress to determine whether or not he should be a Senator. Put the case in the strongest possible light for Vance, still it must be admitted that the electors who voted for him *knew that, as the case then stood*, their votes were being thrown away; that, without the action of Congress, which might or might not be interposed, the election was in violation of the Constitution; and, up to the time when Abbott claimed his seat in this body, and up to the present hour, the votes given for Vance remain wholly inoperative, void, blanks in the law, *thrown away for every legal purpose*. Mistakes which equity may relieve against are mistakes in regard to existing facts—not over sanguine and unfounded hopes looking to the future for realization and accomplishment.

In the second place, the legislation of Congress in regard to the organization of the reconstructed governments of the Southern States furnishes no precedent to bind the Senate in determining the election of its own members. Those State governments could not be organized without relieving the disabilities of those who had been elected. Congress was therefore compelled to do so, or abandon those States to anarchy, or remit them to military rule. To quote the language of a great statesman on another subject: "*a doubtful precedent should not be followed beyond its necessity*." No such necessity exists in regard to the Senate of the United States; and therefore the electors had no right to assume that Congress would do in this case, where there was no necessity for it, what it had been compelled to do in the other cases referred to. And in no case has a Senator elected under disabilities imposed by the fourteenth amendment been relieved of such disability and permitted to take his seat.

Several decisions of the House of Representatives have been referred to, which are supposed to be inconsistent with the principle here asserted. But it is believed that in none of those cases was it established that the electors *knew* of the disqualification of the candidate voted for; and in the very able report of Mr. Dawes, from the Committee on Elections, (Rep. of Committees, 11, 2d session 40th Congress,) which is much relied upon, it is expressly stated that *this point was not involved*, because *it did not appear that the electors had such notice*.

But there are many reasons for declining a critical examination of the decisions of the other House in regard to the election of its members. By the Constitution, each House is made the judge of the elections, returns, and qualifications of its members. It would, therefore, be improper for the Senate—certainly *indelicate* for a committee of the Senate—to criticise the actions or decisions of the House; and *it would be subversive of the Constitution*, because it would practically make the House of Representatives not only the judge of the elections, returns, and qualifications of its own members, but also of the members of

this House, if the Senate were to follow as precedents the decisions of the House in conflict with its own opinions.

Again, there is much force and reason in the distinction made by the court, in *Commonwealth vs. Cluley*, (56 Penn. St., 274,) between a popular election, under our system of almost universal suffrage, for a member of the House of Representatives, by ballot, and an election of a Senator by a *viva-voce* vote of the members of a legislature. And it might well be that the House of Representatives should establish one rule appropriate to the election of its members, and the Senate a different rule in regard to the election of its members. The difference between the two cases would justify different rules.

In a popular election, by ballot, for a member of the House of Representatives, where the voters are numerous and scattered over a considerable territory, it would be impossible to ascertain whether or not the electors, or enough of them to change the result, had knowledge of the disqualification of the candidate. Besides, voting by ballot includes the right of the elector to conceal the fact for which candidate he voted. This is his secret, which cannot be wrested from him even in a court of justice. And they who voted against the successful candidate, yet failed to defeat him at the polls, might attempt to accomplish the same end by pretending to have voted for him with knowledge of his incapacity. Even perjury in such case, should a voter voluntarily swear falsely in regard to it, could never be detected and punished. Such a principle applied to such elections would be unsatisfactory, often incapable of application, and always a temptation to frauds and perjuries, which might be committed with impunity. And it may be conceded that, in determining who has been elected at such popular election by ballot, *no candidate not receiving a majority of all votes cast, counting blanks and ballots for disqualified candidates, ought to be declared elected*; and that the decisions of the House of Representatives, as applied to the election of its own members, ought to proceed upon a different principle than the one here contended for.

But the circumstances which may well induce the House of Representatives to depart from the ancient rule and practice in determining the election of its members, do not exist in relation to the election of Senators. Senators are elected by a small number of persons, the number fixed by law, who are compelled to vote *viva voce*. Their votes are matters of record, and the record discloses who voted for and who voted against the disqualified candidate. Whether these electors had notice or not of the ineligibility of a candidate, is easily, and may be definitely and certainly, ascertained. There is no inconvenience, no opportunity for fraud, no temptation to perjury, in the application of the principle here contended for to such an election. Every reason that can be given for excluding the application of this principle to popular elections by ballot, sustains its application to the election of a senator by the *viva voce* vote of the members of a legislature; and it is worthy of remark, that the rule of parliamentary and common law, which is established by an unbroken current of decisions in England, had reference to elections, not by ballot, but *viva voce*. That method of election gave rise to the rule, and no reason has been given, none suggests itself, for departing from it now in regard to such elections. And it should also be observed that every case in the American courts of law, where the judges have, *obiter dictum*, declared that the minority candidate was not elected; not only was the element of knowledge of the disqualification wanting, but the election was by ballot, and not *viva voce*. Not a *dictum* of any American court, or American law-writer of established reputation, has been

cited to your committee, and it is believed that none exist, which disproves of the principle as applicable to elections *viva voce*.

In the report of the majority it is said that this principle belongs to a government where, as in England, the right to vote has been granted or conceded, as a boon or franchise, by the monarch to his subject; and hence to vote for a candidate known to be disqualified *is a crime*. But that, in this country, voting is the *inherent right of every citizen*; and Roe on Elections, page 256, is cited as sustaining this assertion in relation to elections in England. The author referred to, so far from sustaining such a distinction, does not allude to it. And it is believed, for many reasons, that no such distinction can be maintained.

(1) The great charter in England was not a concession in the sense of a *grant* of rights. It was an admission that certain rights belonged to Englishmen, and always had belonged to them. The rights there admitted to exist were the *inherent* rights of Englishmen. Blackstone says:

The great charter "contained very few new grants, but, as Sir Edward Coke observes, was, for the most part, declaratory of the principal grounds of the fundamental laws of England."

The great bill of rights delivered by the Lords and Commons to the Prince and Princess of Orange February 13, 1688, and afterward enacted in Parliament, after enumerating the privileges of the people, concludes in the following strain of ancient, manly eloquence:

And they do claim, demand, and insist upon all and singular the premises, as *their undoubted* rights and liberties.

And the act of Parliament recognizes—

All and singular the rights and liberties asserted and claimed in the said declaration to be true, *ancient*, and indubitable rights of the people of this kingdom.

(2) The right of voting in this country is not an *inherent right of the citizen*. If it were, women, as well as men, could vote; because women as well as men are citizens, and always have been under our Constitution; and every *inherent* right of the citizen is possessed as fully, and may be exercised as freely, by the female as the male citizen. Our popular elections are participated in by those who have a constitutional right to vote. Their right to vote does not spring merely from citizenship; it is a right secured, limited, and regulated by the Constitution and laws. A citizen has no more *inherent* right to be a voter than to be a Senator. The citizen may vote, if the Constitution and laws permit, not otherwise; so every citizen may be a Senator, if duly elected and qualified, not otherwise.

(3) But if such distinction were conceded to exist, it would strengthen the conclusion here arrived at. To test this, let us concede that the Englishman, in voting, is exercising not an *inherent* right, but a franchise *delegated to him by the Crown*; therefore, it is a crime for him to vote for a disqualified candidate; and, for that reason, his vote is considered as thrown away, and the next highest qualified candidate is to be considered as elected. And let us also concede that, at a popular election in this country, the voter exercises an *inherent right of citizenship*; and hence, if he votes for a candidate known to be disqualified, his vote is not thrown away. From these admissions, what results? Simply this: That in our popular elections, by ballot, for a member of the House of Representatives, the principle here contended for does not apply. Very well. It does not apply upon this hypothesis, *because* the voter is exercising an *inherent right*, and *not a delegated power*, when he casts his ballot. Now, if this distinction be well taken, does not every one perceive that the principle here contended for must apply to an

election of Senators by the members of a legislature, who, in that election, are exercising a *delegated power*, and not an *inherent right*? The members of the legislature, in electing a Senator, are exercising a power that is *delegated* in a double sense. The power to elect a Senator is delegated by this Government—that is, by the Constitution of the United States—to the legislature of the State; and the people elect members of that legislature, who are, among other things, to exercise this power of electing a Senator. It will not be pretended that a member of the legislature, in voting for a Senator, is exercising an *inherent* right of a citizen, and all must admit that he is exercising a *delegated power*; so that the very argument which exempts the election of members of the House of Representatives from the operation of the principle under consideration, subjects the election of Senators to its full operation.

It has also been urged before your committee that bills passed by Congress to relieve disabilities of members elected to the House of Representatives rest upon principles inconsistent with the conclusions of this report. To this two answers may be made: 1. The proceedings of Congress in relation to cases of election while reconstruction of the late rebel States was in progress can hardly be relied upon as settling principles by which either House of Congress ought to be bound in times of peace. The circumstances under which such legislation was had were exceptional, and the legislation itself ought not to stand as a precedent. 2. The bills which have passed were bills originating in the House of Representatives concerning members elected to that House, and, although the Senate has concurred in the enactment of such laws, it ought not to be regarded as settling principles by which the Senate must be bound in determining the election of its own members. Whenever the House of Representatives manifests its desire to seat a member, although it may require the enactment of a law by both Houses to accomplish the purpose, still the Senate, in concurring in such enactment, may be regarded as extending a courtesy to the House of Representatives rather than settling principles which will bind the Senate in relation to the election of its own members.

To recapitulate, in regard to the precise legal question involved in this case, viz, whether, in an election *viva voce*, the votes cast for a candidate known by the electors when they gave their votes to be disqualified are to be considered as thrown away, and the qualified candidate next on the poll is to be declared elected, we have in favor of such a principle:

1. The uniform and unbroken current of decisions in the British Parliament from the earliest to the present time.

2. The unanimous voice of the English courts of law.

3. The express and well-considered decision of the supreme court of the State of Indiana in the case of *Gulick vs. New*, (14 Ind. Rep., 927,) and the case of *Carson vs. McPhetridge*, (15 Ind. Rep., 327,) applying the rule even to a popular election.

4. The authority of Cushing's *Lex Parliamentaria*, the best American work on the subject; Wilson's Digest of Parliamentary Law; Angel and Ames on Corporations, a work of standard authority; the precedent of the legislature of Massachusetts, even in regard to a popular election of its members. (*Vide* Cushing's Reports of Contested Election Cases in Massachusetts, p 499; and another case, same report, 576.)

And opposed to this principle, in regard to an election *viva voce*, we have *absolutely nothing*. Not a writer, English or American, not a decision of any court, or *dictum* of any judge in either country has been

cited, condemning or denying this principle in regard to such an election; and, on the contrary, the court, in *Com. vs. Cluly*, (56 Penn. St., 270,) which is relied on as being opposed, expressly recognize and indorse this principle when applied to elections *viva voce* by a limited number of electors.

The cases which have been cited from the American Reports, and are relied upon as being opposed to this principle, all related to popular elections by ballot, and not to elections *viva voce*. Yet, even in those cases, the element of *knowledge that the candidate was disqualified* did not exist, and therefore all that is said about it in those cases is *obiter dicta*.

A declaration from the bench is *obiter dictum*, and not binding as authority, when it was unnecessary to a decision of the case in which it was made.

To illustrate, the Supreme Court of the United States, in the *Dred Scott* case, (19 Howard, 393,) first determined that the circuit court of the United States had no jurisdiction of the case. That ended the matter. The decision of the court below had to be reversed for that reason. It was therefore *obiter dictum* for the court to proceed to decide questions, which, decided either way, would not affect the judgment to be pronounced. Had the court in that case held that the Missouri compromise so called, was constitutional, yet the decision, that is the judgment, would have been the same.

The true rule upon this subject is given by Vaughan C. Juslin, (Vaughan, 382,) as follows:

An opinion given in court, *if not necessary to the judgment given of record*, but that it might have been as well given, if no such or a contrary opinion had been broached, is *no judicial opinion*, nor more than a *gratis dictum*. But an opinion, though erroneous, *concluding to the judgment*, is a judicial opinion, &c.

To the same effect see Heath, J., in *Hutchinson vs. Birch*, 4 Taunton, 625; *Pittstown vs. Plattsburg*, 18 Johnson, 418.

Therefore, all that was said by the judges in the American cases cited, *which cases did not involve the element of knowledge of the incapacity of the candidate*, is *obiter dicta*. But were it otherwise, and had those decisions been made in cases which showed *that the disqualification of the candidate was known to the elector*, still the fact that they relate only to popular elections *by ballot* would render them wholly inapplicable to the case now before the Senate.

Therefore, it is submitted that, upon reason and authority the votes cast for Mr. Vance, with full knowledge on the part of the members of both houses of the legislature that he was disqualified by the Constitution to serve in this body, ought to be considered as thrown away; and that, inasmuch as a majority of all the members elected to each house *were "actually present,"* the election was legal, and that the qualified candidate receiving the highest number of votes, and a majority of all votes cast for qualified candidates, was duly elected. It is conceded that majorities have a constitutional right to govern in this country; but it is not conceded that even a majority of the legislature of a State may morally or constitutionally defeat government by refusing to elect Senators to serve in the Senate of the United States. In this case the majority had a right to elect a qualified person to the Senate; but, having waived their right by voting for a person known to be disqualified, as much as though they had refused to vote at all, or had voted for a man known to be dead, the minority, who complied with the Constitution by voting for a qualified candidate, may well be held to have expressed the will of the legislature. If the majority, be-

ing called upon, will not vote, they cannot complain that the election was decided by those who did vote, though a minority of the elective body. And voting for a person known to be disqualified is not voting. Such votes are void—no votes; and the highest number of votes cast, a quorum being present, must effect an election.

Therefore, in view of the premises, the minority of your committee recommend the adoption of the following resolution:

Resolved, That Joseph C. Abbott has been duly elected Senator from the State of North Carolina for the term of six years, commencing on the 4th day of March, 1871, and that he is entitled to a seat in the Senate as such Senator.

MATT. H. CARPENTER,
B. R. RICE,
Minority of Committee.

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