

PROTEST AGAINST THE SEATING OF HON. NATHAN B. SCOTT.

MARCH 20, 1900.—Ordered to be printed.

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

REPORT AND VIEWS OF THE MINORITY.

[To accompany Senate Res. No. 213.]

The Committee on Privileges and Elections, to whom was referred a certain memorial of John T. McGraw, a citizen of West Virginia, and a certain memorial of John J. Cornwell and others, members of the senate and house of delegates of West Virginia, each memorial protesting against the seating of Hon. Nathan B. Scott as a Senator from that State, have considered the same and respectfully report:

The certificate of the governor of West Virginia, in due form, of the election of Mr. Scott by the legislature constituted a prima facie title in Mr. Scott to a seat in the Senate, and thereupon he was admitted to take the oath of office. The remonstrants insist that he is not entitled to a seat in this body.

The matter was submitted to the committee upon the memorials, the journals of each house, an agreed statement of facts, and certain oral arguments and admissions of counsel at the hearing. The remonstrants offered to prove certain declarations of several State officials, of members of the general assembly, and of attorneys in argument before legislative committees; also certain acts of persons, detailed in certain alleged depositions, submitted in printed form, but the committee was of opinion that there was no proffer of sufficient evidence of fraud or intimidation affecting the election to warrant such investigation by the committee.

On January 24, 1899, the two houses of the legislature of West Virginia each balloted, but failed to concur in the appointment of a Senator, and on the next day both house met in joint assembly, and upon the first ballot the whole number of votes cast was 95, of which Mr. Scott received 48, Mr. McGraw 46, and Mr. Goff 1. Thereupon the presiding officer of the joint assembly declared that Nathan B. Scott having received a majority of the votes cast by both branches of the legislature voting in joint assembly he is duly elected a Senator

in the Congress of the United States. The joint assembly thereupon adjourned.

A quorum of the joint assembly and a quorum of each house was present and voted. The proceedings were regular and resulted in the election of Mr. Scott, unless certain admitted facts constitute a valid objection to his election.

The memorial of John J. Cornwell and other members states briefly, and the memorial of John T. McGraw states fully, the objections of the remonstrants to Mr. Scott's title to a seat in this body.

The objections stated by Mr. McGraw are five in number.

The first objection assigned is, that Mr. Scott did not receive a majority of the votes constituting such joint assembly, that there were in said body 97 votes, a majority of which is 49, and that Mr. Scott received but 48 votes.

The journal of the joint assembly on January 25, 1899 (House Journal, p. 189), shows 25 senators and 70 members of the house of delegates present and voting; shows 95 to be the whole number of votes cast, and of these Mr. Scott received 48 votes—a majority of all votes cast.

Under the apportionment the senate contained one more member and the house one more member. The journal of the joint assembly discloses nothing concerning these two. It does not appear therefrom whether they were present. It does not show that they were entitled to vote, or that they in any manner claimed or waived the right to vote. Prima facie, from the journal of the joint assembly, either they were not entitled and were not present, or if present did not claim or waive their right to vote. Therefore this journal shows that Mr. Scott received a valid majority of the joint assembly, consisting of 95 members.

As was said in Lapham and Miller (Senate Election Cases, p. 602):

The ground alleged is that there was not a majority of the whole legislature actually voting for the members chosen. In our opinion that is not necessary. There was a quorum of each house present in the joint assembly; there was a majority of that quorum actually voting for the members chosen. In our opinion that was a valid election.

See also Clark and Maginnis *v.* Sanders and Power (Senate Election Cases, 637); Davidson *v.* Call (Senate Election Cases, 711).

The journals of the senate and house explain the nonparticipation of the senator from the fourth senatorial district and the member of the house of delegates from Taylor County.

On January 20, 1899 (Senate Journal, p. 66), a resolution was introduced in the Senate declaring that Kidd, the sitting member, was not elected and that Morris was duly elected, directing that Kidd vacate his seat and Morris be sworn in.

On January 23, 1899 (Senate Journal, 91-94), this resolution was considered and a substitute was adopted reciting the contest between Kidd and Morris, the reference to and pendency of the contest before the committee on privileges and elections, and the opinion of the senate that Morris was entitled to the seat pending the contest, wherefore the senate resolved that Kidd was not entitled and that Morris was entitled to a seat in the senate from the fourth senatorial district pending the contest, and that Morris be sworn in. Morris took the oath and was seated.

On January 25, 1899 (Senate Journal, p. 1081), the senate adopted a resolution that the contested election case of Morris *v.* Kidd be the

special order for consideration and determination on its merits on February 7, 1899, with leave to either party to take testimony, "and that pending the determination of such contest neither Morris nor Kidd shall be entitled to vote or sit as a member of this body."

The journal of the house shows the following proceedings in the contest over the seat of delegate from Taylor County:

The secretary of state, under chapter 3, section 70, of the Code of West Virginia, returned to the house when it assembled the list of delegates entitled to participate in its organization, and among them Brohard, of Taylor County, who was sworn in. (House Journal, p. 5.)

On January 12, 1899, the house referred to the committee on privileges and elections the question of the right of Brohard to be sworn in, with instructions to report the person *prima facie* entitled to be sworn in as member from Taylor County. On January 16, 1899, the house adopted a resolution reported from said committee that, pending determination of the title to the seat, neither Brohard nor Dent (the contestee) "be permitted to participate in the proceedings of this house."

On January 24, 1899, the majority of said committee reported a resolution that Dent was elected a delegate from Taylor County, and that he at once be qualified and take his seat.

On January 25, 1899, the house unanimously resolved that the consideration of the majority and minority reports concerning the contest in relation to the delegate from Taylor County be postponed until February 7, with leave to either party to take testimony.

The judgment of the senate was a finality in respect of Morris and Kidd. The judgment of the house was a finality in respect of Dent and Brohard. Each of them was adjudicated not qualified to participate or vote in the house wherein he claimed a seat, pending the final decision of the body which by the constitution of West Virginia (article 6, section 24) is made "the judge of the election returns and qualifications of its own members."

Therefore, on January 25, 1899, only 95 members had the right to participate and vote in the two houses; only 95 members had the right to participate and vote in the joint assembly. Of these Mr. Scott received 48 votes—a majority. Therefore the first objection, that there were 97 votes in the joint assembly, and that a majority was 49, is unfounded.

The second objection assigned is, that "of 48 votes received by Mr. Scott were the votes of Senators Getzendanner and Pearson, cast and received against a protest spread upon the journal of the joint assembly, and showing that these senators had, under article 6, section 13, of the State constitution, forfeited their seats as senators in the legislature by the acceptance of lucrative offices under the Federal Government, and likewise their right to vote in said joint convention."

These protests show that Senators Getzendanner and Pearson accepted commissions in the Second Regiment of West Virginia Volunteers and discharged the duties and received the pay of captain and lieutenant, respectively, while in the service of the United States during the Spanish war. These facts are admitted, and it is further admitted that these senators were "hold-over senators," who, between the session of the last legislature and the assembling of the new legislature in 1899, had accepted, had served, and had resigned their commissions prior to the twenty-fourth regular session of the State legis-

lature. The protest further recites that these two senators had vacated their seats and forfeited their right to vote in the joint convention, as stated in the second objection.

It appears by the journal of the joint assembly that Senators Getzendanner and Pearson were present therein and voted for Mr. Scott.

The constitutional provision is that—

No person holding a lucrative office under this State, the United States, or any foreign office * * * shall be eligible to a seat in the legislature.

On January 20, 1899, resolutions of like tenor and effect with these protests were offered in the senate, declaring that by virtue of this constitutional provision and the acceptance of said commissions each of these senators "thereby became ineligible and forfeited his right to a seat in this body." These resolutions were referred to the committee on privileges and elections, and on January 23, 1899, that committee reported in lieu of said resolutions a substitute declaring that Getzendanner and Pearson are legally qualified and entitled to hold their membership in the senate, and have not vacated their seats therein under the provisions of section 13 of article 3. The senate adopted the substitute on January 24, 1899.

This judgment of the senate of West Virginia upon the title of Senators Getzendanner and Pearson to their seats therein is a finality. The Senate of the United States can not reverse it. As before said, the State senate is, under the State constitution, "the judge of the elections, returns, and qualifications of its own members." Such constitutional powers have effect, not only to make the members of each house the judge in each case, but also to forbid that the members of any other tribunal shall be judges thereof to review or reverse such original judgment. The jurisdiction of each of the houses of the State legislature is original and exclusive. (Case of H. A. Du Pont, Fifty-fourth Congress, first session, Report No. 289, p. 104.)

The senate of West Virginia is the only tribunal which could either hear or determine lawfully these objections to the qualifications of Senators Getzendanner and Pearson. Its judgment in their favor is final. The Senate of the United States has not authority to originate, hear, or determine any objections to the qualifications of those who acted and voted as members of the senate of the State. Where the title of an individual member of the legislature who has once been seated has been determined by a subsequent adjudication of the house to which he belongs, such judgment will not be here disturbed or inquired into. (*Potter v. Robbins*, Senate Election Cases, 88; *Clark and Maginnis v. Sanders and Power*, Senate Election Cases, 652; the case of David Turpie, Senate Election Cases, 625; the petition of H. A. Du Pont (minority report), Fifty-fourth Congress, first session, Report No. 289, pp. 98-104; *Sykes v. Spencer*, Senate Election Cases, 521.)

It should be noted that the Senate of the United States, in *Stanton v. Lane* (Senate Election Cases, 180), upon a similar case came to a like conclusion with the senate of West Virginia. James H. Lane was elected a Senator from Kansas in April, 1861, and took his seat July 4, 1861. It appears that on June 20, 1861, President Lincoln appointed him brigadier-general of volunteers; that he accepted the appointment and qualified to perform its duties, but had resigned the office. The governor of Kansas appointed Frederic P. Stanton to fill the vacancy, but on January 16, 1862, the Senate voted that Lane was entitled to

his seat in that body. Of the majority, some held that the office of brigadier-general did not exist on June 20, 1861; others that, although Lane held the office after he had been elected Senator, yet, having resigned the same before taking his seat in the Senate, he did not come within the constitutional provision (article 1, section 6). It profits little here to discuss the reasons or motives of State senators or of the Senate.

It is well said in David Turpie's case (Senate Election Cases, 625), that—

This body is made by the Constitution the judge of the election, qualifications, and returns of its members. The senate of Indiana is likewise the judge of the election, qualifications, and returns of its own members. We must determine all questions arising out of the proceedings of the electors. But who sustain the character of electors is to be determined by the legislative body of the State. We can not inquire into the motive which controlled its judgment.

The third and fourth objections of John T. McGraw, remonstrant, may be considered as two parts of the same ground of objection. It is charged that Republican senators in the State senate threatened to unseat unlegally certain Democratic senators unless the house acceded to demands (not stated), and did unseat R. F. Kidd, a Democratic senator, in partial execution of these threats; that thereby the Democratic members went into joint convention under duress; that this joint convention was not held under the law, but under a private agreement between the members of the two houses, ratified by both houses; that this agreement was void as against public policy and vitiated the election of Senator Scott. That the effect of this agreement was to disfranchise one Democratic senator and one Democratic member of the house of delegates, who, had they been permitted to cast their votes in the joint convention, would have voted against Mr. Scott.

It does not appear from the journal of the joint convention that the alleged Democratic senator Kidd and the alleged Democratic delegate Dent were present or offered to vote in the joint convention. Their names were not called. If present, as stated in brief and argument, they appear to have acquiesced, to have waived their alleged right as representatives.

It does appear that the State senate had a Republican majority and the house of delegates had a Democratic majority, and that when the joint convention met that body was comprised of 49 Republicans and 46 Democrats. All of the latter voted for Mr. McGraw; all save one of the Republicans, who voted for Judge Goff, voted for Mr. Scott, giving him 1 majority, as stated.

It was conceded in briefs of counsel and in their oral arguments that there was excitement and much activity, as is not unusual in legislative bodies in like situations, and that there were contests against sitting members from political motives. One Democrat in the senate, Kidd, had been unseated and a Republican, Morris, seated in his place. One sitting Republican in the house, Via, had been unseated and a Democrat, Logan, had been seated in his place. Another sitting Republican, Brohard, of Taylor County, had been excluded from participation in the proceedings of the house on January 16, and on January 26 the committee had reported that Dent was entitled to the seat. Neither Kidd, Dent, nor Brohard had voted that day for Senator in either house, balloting separately, nor had either offered to vote. In the senate Morris was present and voted for Scott.

As the joint convention was to assemble at noon on the following day, it would appear difficult to unseat Brohard and seat Dent earlier the next morning.

At this juncture the Republicans would have had in joint convention 50 votes and the Democrats would have had 46 had the joint convention met without further action in either house.

As a result of conferences among adherents of the two parties, 5 Democratic members of the house, including Mr. McKinney, the speaker, and Mr. Davis, the leader of his party, signed the following proposal which was thereafter presented to and signed by 5 Republican senators, including Mr. Marshall, the president of the senate. This proposal, which purports to have been made by Democrats and accepted by Republicans is as follows:

To the Republican Senators:

GENTLEMEN: In order to bring about a peaceful and orderly settlement of the differences now existing between the two houses of the West Virginia legislature, we submit to you the following propositions, viz:

(1) The election and qualification of the member of the House of delegates from Taylor County, to be heard and tried upon its merits.

(2) The election and qualification of a senator from the Fourth senatorial district, to be heard and tried upon its merits.

(3) These two cases to be finally voted upon in each house on the 7th day of February, 1899, after 2 p. m. of that day, with privilege to any party to take any evidence pertinent up and until noon of February 6, 1899, when the taking of evidence shall be closed.

(4) All contests and controversies as to the membership of each house other than the two above named to be dismissed, and no further contests or controversies respecting the membership therein to be brought or entertained by either house.

(5) Pending the investigation hereinabove referred to, neither Dent, Brohard, Kidd, or Morris shall vote, in joint assembly or otherwise.

(6) All resolutions now pending in either house, looking to unseating any member thereof, or questioning the seat of any sitting member, shall be dismissed.

(7) Each of the signers of this proposition pledges himself to vote and use all honorable means to have the stipulations herein contained faithfully carried out and observed.

O. S. MCKINNEY.
ISAIAH BEE.
W. L. MANSFIELD.
JNO. W. DAVIS.
R. W. MORROW.

We, the undersigned Republican senators, concur in the foregoing proposition.

R. E. FAST.
O. S. MARSHALL.
ALONZO GARRETT.
S. L. BAKER.
S. W. MATTHEWS.

Its first sentence declares its purpose to bring about a peaceful and orderly settlement of the differences now existing between the two houses. It is to be noted that those who are alleged to have acted under duress first signed and submitted the proposal, then those who it is alleged threatened them consented to accept the proposal.

This proposal stipulated that the case of Brohard, Republican, in the house, and the case of Kidd, Democrat, in the senate, shall be heard and tried upon their merits and finally voted on February 7, 1899; that pending the decision of these cases, neither Dent, Democrat, nor Brohard, Republican, in the house, nor Kidd, Democrat, nor Morris, Republican, in the senate, shall vote, in joint assembly or otherwise, and that all contests and resolutions looking to unseating of members shall cease in each house.

The signers pledge themselves *individually* to so vote, and to use all honorable means to have those stipulations carried out. Five Democrats in the house and 5 Republicans in the Senate were numerically sufficient to change the partisan majority in either house. As these men included the presiding officers of each house and the floor leaders of the majority in each house, their statement of the spirit and purpose of the proposal of these Democrats, accepted by these Republicans in the paper they signed, should be accepted as true.

In the Senate, as a result of this conference, Senator Garrett the next morning offered the resolution postponing the *Kidd v. Morris* contest, as before stated, and forbidding further participation of Morris in the voting for Senator of the United States. It was adopted unanimously.

In the house Mr. Davis offered a like resolution, postponing the discussion of the *Dent v. Brohard* contest, as before stated. It was adopted unanimously.

Mr. John W. Davis, conceded by both sides to be a man of ability and high character, the leader of the Democratic majority in the house, who introduced the resolution, in a printed deposition (used by both sides in argument before the committee, and so used here) gives his own reasons for signing this paper and declares that the statement he makes for himself was in accord with conversations he had with other Democratic signers at or before the time the agreement was presented to him for signature. Mr. Davis's statement may therefore be taken as the statement of all the Democrats who signed this proposal.

Question. What was your understanding of the purpose of that agreement upon the part of the Democrats?

Answer. That agreement, as I understood it, was entered into for the purpose of avoiding further trouble between the two houses and in each house in regard to contests then pending, the situation having become very acute, rumors being current upon all hands of an intention upon the part of the Republican minority in the house to withdraw and organize a separate house and upon the part of the Republican majority in the senate to unseat various Democratic senators and it being believed that the best interests of the people of West Virginia and the proper conduct of the business of the legislature demanded an early and final settlement of these questions.

In the senate *Kidd* had been unseated by the Republican majority. In the house *Via* had been unseated and *Brohard* was about to be unseated by the Democrats. Other contests were pressed from partisan motives. The pacific understanding of these ten men ended this strife and enabled the legislature to proceed with its business.

It may be that wrong and injustice to members and contestants was done and intended to be done upon one side or the other or on both sides. There is no evidence of force or fraud in these transactions in the documents or facts before us. The unanimous vote in both houses upon resolutions postponing pending contests for seats disproves duress if the word duress has meaning in this remonstrance.

We can not say that such an agreement as this between ten men, and favored afterwards by all members, is "void as against public policy." We can not declare void the unanimous act of the senate or the unanimous act of the house, of like pacific purpose. Nor can we perceive how it "vitiates said election." Its immediate result was not "to disfranchise one Democratic senator and one Democratic member." Its immediate result, if any, was pacific and the subsequent action of both houses had as its immediate result the disfranchisement of *Morris*, the sitting Republican senator.

The sitting Republican delegate from Taylor County had eight days before been excluded from participation in the proceedings. The Federal statute required this legislature to proceed to elect the Senator of the United States on the second Tuesday after organization of the legislature and to meet next day at noon in joint assembly, and pending this joint meeting both houses thus disposed of contested cases. As it was unanimous in both houses, the members appear to have considered it a fair and reasonable plan, as it facilitated the meeting in joint assembly—to have considered it to be in the public interest.

It is true that speedily thereafter Morris was unseated and Kidd seated again, and that Brohard was unseated and Dent seated in his place. The merits of these contests were to be decided by the two legislative bodies having original and exclusive jurisdiction. As we have said, their public and solemn adjudications of the election of these members can not be reviewed, or reversed, or affirmed here. Therefore the third and fourth objections of the remonstrants are insufficient.

A majority of the committee do not mean to decide that the Senate could not refuse a seat to a claimant who is elected by a legislature which is itself directly and plainly the result of force or fraud. If, on the eve of a joint assembly, a majority in either house should cease to be judges of the elections and qualifications of members of the minority and become revolutionary conspirators; if, for instance, a majority should imprison enough minority members on the day of the joint convention to reverse the majority therein, we do not assert that the Senate should not inquire into such violence, force, and intimidation or that it could not declare that there was a joint convention in form only, but not in fact, and that there was no election therefore. In the past the Senate has investigated fraud and corruption in elections where the proceedings were regular and the form was lawful, and then declared there had been no election.

The case presented by the remonstrants in nowise resembles such extreme case.

Upon careful consideration of the case before us the majority of the committee agree that Mr. Scott was peacefully and fairly elected, and that the first four objections of the remonstrants are not valid objections.

The fifth objection assigned by John T. McGraw, memorialist, is that at the time of the election of Mr. Scott he was a citizen but not an inhabitant of the State of West Virginia, but was an inhabitant of the District of Columbia.

It is admitted that Mr. Scott was born in Ohio; that when a young man he removed to Wheeling, in West Virginia, engaged in business, had resided there until January 1, 1898, when he was appointed by the President Commissioner of Internal Revenue, and upon his confirmation thereafter he came to Washington to discharge the duties of this Federal office, but with the intent to retain his residence, citizenship, inhabitancy, and domicile in Wheeling, W. Va., his home; that in accord with this intent he exercised unchallenged the right to vote and did vote on November 8, 1898, in the precinct in Wheeling where his residence was and had remained unchanged; that he came here with no intent to change his domicile to Washington from Wheeling, and that he claims to be an inhabitant of Wheeling, W. Va., and that he remained in Washington in the discharge of his official functions with

intent to return to his home in Wheeling when his duties of office here ended.

The mere statement of facts should suffice to show that this objection is unfounded. The Federal Constitution requires that the Senator shall be an "inhabitant" of the State. This term is a legal equivalent to the term "resident," and residence is what is required by the law of West Virginia to entitle the male citizens of that State to vote.

The committee, without extended discussion, were unanimously of the opinion that Mr. Scott was an inhabitant of West Virginia at the time of his election to the Senate of the United States and is entitled to retain his seat.

The committee ask to be discharged from the further consideration of the several memorials, and recommend the passage of the following resolution:

Resolved, That Nathan B. Scott has been duly elected a Senator from the State of West Virginia for the term of six years commencing on the fourth day of March, eighteen hundred and ninety-nine, and that he is entitled to a seat in the Senate as such Senator."

VIEWS OF THE MINORITY.

The remonstrants in this case took a large number of depositions, on notice to Mr. Scott of the time and place, and these depositions were offered to the committee as evidence. But these depositions were not taken under authority of the committee, but were taken as though there was a case pending in a court of the United States between parties. The committee rejected the depositions.

Then the remonstrants asked to have the witnesses whose depositions had been taken summoned as witnesses, but the committee refused this request, and the case was tried on the journals of the two houses of the legislature of West Virginia and some arguments of counsel as to certain facts. Later your attention will be called to parts of the said depositions.

The facts, on the evidence received by the committee, are as follows:

On the 11th day of January, 1899, the legislature of West Virginia assembled and each house was organized.

In the senate the Republicans had about two-thirds, but two Republicans would not vote for Mr. Scott. The house of delegates was Democratic by a small majority.

In the senate objection was made to H. C. Getzendanner and E. G. Pierson being admitted to seats as senators, on the ground that each of them, after election in November, 1896, and after serving as senators in 1897, had accepted a commission as an officer in the Volunteer Army of the United States—an office of profit—and served as such officers—one as captain and the other as lieutenant. At first these objections were laid on the table, and the two persons objected to took their seats.

Afterwards the matter was referred to a committee, and the committee, in substance, found the facts as stated in the objections to be true; but the committee further found that each one of these army officers had been discharged before the legislature met in January, 1899. Therefore the committee reported that said Getzendanner and Pierson were still senators; and this report was adopted, by a party vote, on the 24th day of January, 1899. This ruling was made, on a demand for the previous question, and without any debate.

And on the same day (January 24, 1899) two petitions for contests of seats in the senate were presented to the senate as follows:

J. H. Collins, Republican, against J. H. Marcum, Democrat, and D. M. Shirkey, Republican, against Walter L. Ashby, Democrat.

On January 20, 1899, the following resolution was offered by Mr. White:

As there is a contest pending in this senate against Walter L. Ashby, a member of said senate from the ninth senatorial district: Therefore,

Be it resolved, That said Walter L. Ashby be suspended from voting or discussing any matter that may come up before this body until said contest is settled.

This resolution, under the rules, went over. And at the same time, January 20, 1899, Mr. White offered another resolution in these words:

Resolved, That R. F. Kidd, from the fourth senatorial district, now holding a seat in the senate of the State of West Virginia, was not duly elected on the 8th day of January, 1898, but B. M. Morris was duly elected: Therefore,

Be it resolved, That said R. F. Kidd vacate his seat in the senate of West Virginia, and M. B. Morris, of Gilmer County, be required to be sworn in as a member of said body. (66.)

This is the first mention of the name of M. B. Morris in the journal of the senate. This resolution also went over, under the rules, for one day.

As above shown, the petition of contest of J. H. Collins against James H. Marcum was presented to the senate on the 24th day of January, but it was marked by the clerk "Filed January 21, 1899, at 8.15 p. m."

On January 21 Mr. Latham offered the following:

Whereas a contest has been instituted by J. H. Collins against James H. Marcum for a seat in the senate as a senator from the sixth senatorial district, and believing that, pending the further investigation of the case, justice and right dictate that said seat be declared vacant:

Resolved, That the seat in the senate now occupied by James H. Marcum as a senator from the sixth senatorial district be declared vacant; that the committee on privileges and elections be instructed to make a thorough investigation of the case and have power to send for persons and papers and any ballots in dispute, and to take such pertinent evidence as may be offered by either party, and that said Collins and Marcum be granted leave to appear before said committee in person and by counsel, and that pending such investigation neither James H. Marcum nor J. H. Collins be permitted to participate in the proceedings of the senate nor to occupy a seat therein. (78, 79.)

This resolution was laid over for a day under the rules.

On January 23, 1899, the resolution offered by Mr. White unseating Kidd and seating Morris was called up and a substitute was offered by Mr. Smith, a Republican, and was adopted by a party vote—16 to 8. That resolution is as follows:

Whereas there is now pending in the senate a contest between R. F. Kidd and B. M. Morris for a seat as senator from the fourth senatorial district of this State; and

Whereas said contest has been referred to the committee on privileges and elections, where the same is pending, and can not be determined for a considerable length of time; and

Whereas it is the opinion of the senate that pending said contest M. B. Morris should be entitled to said seat: Therefore be it

Resolved, That R. F. Kidd is not entitled to a seat in the senate as a senator from the fourth senatorial district, and that B. M. Morris is entitled to a seat in the senate as a senator from the fourth senatorial district pending the final disposition of said contest proceedings, and that said B. M. Morris be forthwith sworn in as such senator. (91, 92.)

And B. M. Morris was sworn as a senator *pro tempore et pro hâc vice*. (94.)

On the 24th day of January, 1899, the senate voted for United States Senator, and N. B. Scott received 17 votes, counting Getzendanner and Pierson, the two who were army officers, and B. M. Morris, the man sworn in temporarily on the preceding day.

And J. T. McGraw received 8 votes, Whitaker, Republican, not voting.

Protests were filed against counting the votes of Getzendanner, Pierson, and Morris.

In the house of delegates a vote was had for United States Senator on January 24, 1899; and

John T. McGraw received 38 votes and Nathan B. Scott received 29 votes, Nathan Goff received 1 vote, Reese Blizzard received 1 vote, and Mr. Asbury was absent and did not vote.

Scott had 46 votes, McGraw had 46 votes, and 2 votes scattered.

On the 24th of January, 1899, when the vote for United States Senator was taken in each house separately, there were pending for seats in the senate the following contest cases: M. B. Morris *v.* R. F. Kidd, D. M. Shirkey *v.* W. L. Ashby, and J. H. Collins *v.* J. H. Marcum. And in the house of delegates there were then pending references as to the title to seats of the following persons: H. F. Brohard *v.* W. R. B. Dent, of Taylor County; Wilbur Spenser, W. S. Talbott, J. D. Logan, W. B. Cutright, Julius Scherr, B. J. Redmond, and Frank Legge, respectively.

The case of Brohard and Dent was in this shape: Neither had a certificate of election. The returns showed a majority for Brohard, but on a recount by the returning board, authorized by law, it appeared that Dent was elected. This board consisted then of two members only and the two did not agree. However, the officer who made the list of members, a Republican, put the name of Brohard, a Republican, on the list, though he had no certificate.

Then, after the first vote for United States Senator, five Democrats of the house and five Republicans of the senate made a written agreement on January 24, 1899, which is copied into the report of the majority of this committee, and by this agreement the contests between Morris and Kidd in the senate, and between Brohard and Dent in the house, were to be laid over until the 7th day of February, 1899, and neither one of the four was to be allowed to vote until the contests were decided; and all other contests were to be dismissed.

And on the morning of the 25th of January, 1899, resolutions were passed in each house to carry that agreement into effect.

And afterwards, on the last-named day, the two houses met together and voted for United States Senator, and N. B. Scott received 48 votes, J. T. McGraw received 46 votes, and Nathan Goff received 1 vote—total, 95. (S. J., 112.)

So Mr. Scott received a majority of one vote and was declared elected.

After Mr. Scott was declared elected, the senate, on February 7, 1899, had no trouble in giving Mr. Kidd the seat from which he had been suspended, *pro hac vice*. No one then disputed his right, for the purpose of his exclusion had been accomplished. (S. J., 312.)

And on the same day Dent was given his seat as a member of the house.

From the facts above stated, which are proved by the journals of the two houses, it appears that the election of Mr. Scott was procured by fraud. The senate *elected* two members for that body (Getzendorfer and Pierson), and *suspended* a Democrat (Kidd) until after the Senatorial election so that he could not vote against Mr. Scott. It must be remembered that Mr. Scott was declared to be elected by a majority of *one vote* only, and that on the vote in the houses separately on the day before Scott received 46 and McGraw 46 votes. So without some curiously fraudulent proceedings Scott could not be elected.

Now, look at the facts proved by the depositions above mentioned.

Together these depositions prove a regular conspiracy to elect Mr. Scott by fraudulent practices.

George W. Atkinson was governor, William M. O. Dawson was secretary of state and chairman of the Republican State executive committee, A. B. White was collector of internal revenue and secretary of the Republican State executive committee, Edgar P. Rucker was attorney-general of the State, and all of them Republicans, and all of them engaged in the conspiracy to elect Mr. Scott.

The governor, it appears, commenced the fraudulent proceedings. At the November election 1898, R. B. Ash, of Marion County, a Democrat, was elected a member of the house of delegates over A. N. Pritchard, a Republican. On the 29th day of November, the governor of the State sent a telegram in these words:

CHARLESTON, KANAWHA COUNTY, W. VA.,
November 29, 1898.

Capt. A. L. PRITCHARD, *Mannington*:

Party interests demand contest in your case. We will pay all expenses. Please wire Kendall to proceed immediately.

G. W. ATKINSON.

And on the same day the secretary of state and the collector of internal revenue sent a telegram in these words:

CHARLESTON, KANAWHA COUNTY, W. VA.,
November 29, 1898.

Capt. A. L. PRITCHARD, *Mannington*:

Republican State executive committee request you to allow the use of your name in contest proceeding to protect interests of Republican party. All costs and expenses will be paid by us.

WM. M. O. DAWSON, *Chairman*.
A. B. WHITE, *Secretary*.

These telegrams were addressed to Capt. A. L. Pritchard at the place of his residence, and were received by him, but were intended for Mr. A. N. Pritchard, who was defeated by Mr. Ash for a seat in the house of delegates (pp. 86, 87, brief of remonstrants).

In the house of delegates Logan had the regular certificate of election, and the committee on privileges and elections reported that he was prima facie entitled to be seated, though Via, who had no certificate, was improperly placed on the roll of the house by the secretary of state, W. M. O. Dawson, who sent the telegram to Pritchard.

Attorney-General Edgar P. Rucker and United States District Attorney Joseph H. Gaines and others represented Via in his contest with Logan before the house committee, and in his speech before that committee the attorney-general, in an ill-tempered way, charged that the committee had already agreed to decide against Via and in favor of Logan, and if they were to carry out this prearranged plan the committee need not be surprised "to see blood flow in the capitol on the next day, because plans had been formulated looking to the preventing of the seating of Logan, even at the cost of shedding of blood" (p. 81 of brief of remonstrants).

Threats were made by Republican members of the senate to turn out all of the Democratic senators elected in November, 1898, if a compromise was not made.

And many threats were made by Republicans in authority to organize a new house of delegates out of the Republicans then sitting and the Republicans defeated at the election in 1898, if a compromise was not made.

For the purpose of carrying out these threats, the defeated candidates for seats in the house of delegates of the Republican party were summoned and came to the capital.

And for the same purpose, Republicans defeated in November, 1898, for seats in the senate were summoned to the capital to occupy seats to which Democrats were duly elected, and the contests mentioned were instituted in the senate.

These fraudulent and revolutionary proceedings had the active support of the senate, the governor, the secretary of state, and the attorney-general, and all for the purpose of electing Mr. Scott to a seat in this body.

And threats were made to turn out of the senate all Democratic senators elected in November, 1898, if the compromise were not made.

Threats of violence were made by Republicans against Republican members who refused to vote for Mr. Scott.

It is inferred from the form of the paper called "The compromise agreement," in the report of the majority of the committee, that the Democrats in the legislature made the proposition for the compromise to the Republicans. This inference, though natural from the form of the writing, is not true as matter of fact. The Republicans in the senate made the proposition to the Democrats in this way, as shown by the deposition of Hon. William A. Ohley. He testifies:

Very soon after the unseating of Kidd I was met by Hon. Z. I. Vinson, of Huntington, chairman of the Gold Democratic State committee, at the Hotel Ruffner, who invited me to a conference with himself and John T. McGraw in John T. McGraw's room. He said that Senators Fast, Marshall, and others, though they acted with their party in unseating Kidd, did not approve of such revolutionary tactics and wished to make a compromise fair and just to all concerned under which they could break away from their party associations and act in accordance with good conscience.

He stated that if a sufficient number of Democrats in the house to carry the resolution through the house, in conjunction with the Republicans, would agree to the proposition he had to make, that enough Republicans in the Senate would agree to such a resolution to carry the proposition in the upper branch of the State legislature. His proposition had the essential features of the agreement as it was finally signed.

He said at the time that should Senator Elkins and Chairman Dawson learn what was going on before it was done they would put a stop to it, and urged that if the Democrats wished to retain their newly elected senators and to reseat Kidd, who had already been unseated, that they act with all speed, while those Republicans who had cooperated with their party in unseating Kidd were repentant and willing to act the part of honest officials and conscientious citizens. He was requested, either by myself or Mr. McGraw, to put his proposition in writing.

He did so then and there, and the proposition filed herewith is the original proposition then and there drafted, except as to the striking out of the word "conservative" and the change of dates in section 3. Figuring what the result would be under the compromise agreement it was seen at once that the Democrats could not elect a United States Senator by a party vote, but the advantage of retaining the legislature in its integrity and of preventing any further revolutionary tactics upon the part of the Republicans, and the undoing of the great wrong that had already been done Senator Kidd, was regarded by us as of too great advantage to be lightly thrown aside, particularly in the face of the evident purpose of the Republicans to further increase their majority by throwing out additional hold-over senators.

I therefore, after discussing the length of time allowed for maturing the contests and objecting to any greater delay than February 4, which was inserted in the paper, took the paper to the capitol and in fifteen minutes had the necessary number of signatures of the Democratic members of the house of delegates. The paper was then handed to Mr. Vinson, and he stated that he would immediately obtain the signatures of the Republican senators. The next time I saw the paper was that evening, when it was handed to me by George W. McClintic, who had been acting as counsel for the Republican committee in the Republican contest cases. The dates of hearing the contest cases had been changed in the paper from the 4th day of Feb-

ruary to the 10th day of February, Mr. McClintic stating that this much time was necessary in order to mature the contest cases.

The Democrats objected to this delay, as needed legislation had already been delayed too long. We were in the hall of the house of delegates, and there was a considerable dispute before the opening of the night session as to this change in date. Very much to the surprise of the Democrats, who supposed that the leaders of the Republican party were neither aware of the agreement nor approved of it, many of the latter appeared to participate in the discussion. W. M. O. Davidson, chairman of the Republican State committee, and the secretary of the committee, A. B. White, of Parkersburg, and others appeared as though interested in the proceedings.

The speaker of the house called the house to order and, on motion, it was adjourned in a very few minutes; and by arrangement the signers of the agreement and those proposing the same agreed to meet at the Ruffner Hotel, and did later gather at the room of Speaker McKinney. Here were present Senator Stephen B. Elkins, Congressman B. B. Dovener, Chairman Dawson, and other leaders of the Republican party. All seemed to be fully cognizant of the terms of the agreement and fully advised as to the difference between the parties having it under consideration. After some discussion the change in time to the 7th of February was agreed upon, and resolutions carrying out the terms of the agreement were spread on the records of the two houses the following morning, which was the day of the joint convention.

In short, those depositions prove the following:

1. That in November, 1898, soon after the election, the governor of the State, the secretary of state, who was also chairman of the Republican State committee, and the secretary of the said committee and others entered into a fraudulent conspiracy, the purpose of which was to elect Mr. Scott United States Senator.

2. And that the said conspirators, aided by the attorney-general and State senators and others in authority, accomplished their fraudulent purpose by fraudulent means.

The questions of law arising on the facts of this case will be briefly noticed.

It is urged by the majority of the committee that as each house of the legislative body was the judge of the election of its own members its decision can not be reviewed. This proposition, though often asserted, is not sound law, in the broad way it is asserted, because there are many cases to which it does not apply.

It is a universal rule of the courts that a judgment obtained by fraud will be set aside on timely application of the party injured if he is not in fault. One of the old judges put the law down in this form:

The jurisdiction of courts of equity to set aside a decree obtained by fraud in an original bill filed for that purpose has long been unquestioned.

See Freeman on judgments, sections 486 and 489, where the learning on this subject is collected.

The report of the majority of the committee states an exception to their general rule, which, if fairly applied to the facts, would be decisive against Mr. Scott. The paragraph of that report referred to is on page 8, and concludes in these words:

In the past the Senate has investigated fraud and corruption in elections where the proceedings were regular and the form was lawful, and then declared there had been no election.

Senators sometimes forget that this Senate is the judge of the "elections, returns, and qualifications" of its own members.

There is no need to cite cases to prove that, under common law, and under the constitution of West Virginia, quoted in the majority report, Getzendanner and Pierson, after they were elected senators in 1886, and after serving as senators in January, 1887, resigned their seats

by accepting offices of profit under the United States, and the State senate again *elected* them to seats in the senate. These senators were elected by the people and had their seats and resigned their seats and never were reelected by the people, but were reelected by the senate and voted for Scott.

But if it were admitted that the State senate were absolutely the judge of the elections and qualifications of its members, and that their decision could not be investigated elsewhere, still the record shows that in the case of Kidd the State senate did fraudulently and illegally suspend Kidd, who was duly elected a senator and received a certificate of election, and was duly sworn and admitted to his seat, and afterwards, on January 23, 1899, the senate passed a resolution, not as to his election or qualifications, not that he was not elected, not that his opponent, Morris, was elected, but the senate resolved in substance, without authority, that Morris should occupy Kidd's seat pending the contest—a fraudulent device, entirely outside of any pretense of authority, for the purpose of securing the election of Mr. Scott to a seat in this Senate.

Remember that all of the members of both houses were 97, and on the vote as counted Scott received 48, McGraw 46, and Goff 1. Getzendanner and Pierson, senators only by the fraudulent action of the senate, voted for Mr. Scott, and Kidd was prevented from voting against Scott by the revolutionary and fraudulent contrivances of the senate in suspending Kidd without any cause stated and without any authority to do so; for no man will dare to contend that any legislative body in any one of the United States has the authority to suspend a member without cause or evidence.

If you once establish such a doctrine, the inevitable result will be anarchy. For, unfortunately for this country, men like Governor Atkinson, Secretary of State Dawson, and Collector White are to be found to invent plans of fraud; and bold men like Attorney-General Rucker may be found to threaten bloodshed on "plans formulated," even when addressing a legislative committee as lawyers. And he the State's chief law officer!

The senate of the State, for cause, and by a two-thirds vote, could expel a member, or by a majority vote could decide a contest after hearing, but who so bold as to assert that the senate had authority, without any cause, to suspend a member pending a contest for his seat? And that contest in this case was merely a fraudulent pretense, invented by the governor and his associates, in champertous and fraudulent conspiracies, to institute contests and pay "all costs and expenses,"—"against the peace and dignity of the State."

Kidd's case, when he was suspended, was before a committee of the senate, and that committee had sent for and obtained certain ballots, but never afterwards asked for or received any other evidence. And the senate, after Mr. Scott was declared elected, unanimously declared that Kidd was elected. And peace was again a blessing in Charleston.

But it is insisted that Kidd and Dent were suspended by agreement. That agreement was, in itself, an illegal and void contract, and against public policy. And the purpose of the senate to elect Mr. Scott by fraud is clearly shown by giving Morris Kidd's seat pending the contest, and allowing Morris to vote for Scott on the 24th of January when the houses voted separately.

The following authorities cited by counsel demonstrate that the

action of the senate in suspending Kidd from his seat, and the agreement made by five Republicans of the senate and five Democrats of the house of delegates, consenting to the suspension of Kidd and suspending Dent of the house, was illegal and void, and vitiated the pretended election of Mr. Scott, which was the result of such fraudulent practices.

McCreary on Elections, 149, 151, 185, 186.

State *v.* Purdy, 36 Wis., 43.

Tucker *v.* Allen, 7 N. H., 140.

Lanssing *v.* Carpenter, 20 N. Y., 447.

People *v.* Maynard, 15 Mich., 171.

Alvord *v.* Collier, 20 Pick., 128.

Cooley's Con. Lim., 616.

In 1873, in the special session, there was a great debate of this question here raised, in the Caldwell case. It appeared that Caldwell had bought off his competitors and spent other money improperly, and afterwards Caldwell was regularly elected.

In that debate Senator Saulsbury said:

What is meant by the authority conferred upon each House of Congress to judge of the election of its members? It is something distinct from judging of their qualifications and the returns of elections. It must mean that you may look into the election and judge not only whether it took place at the proper time and at the proper place, and by the proper legislative body) for these facts must appear on the face of the returns), but also to see if the election was conducted in the proper manner; that is, whether it was the free expression of the legislative will, uncontrolled and undeterred by force or fraud. (90.)

And Senator Morton, in the same case, said:

If the Senate can not inquire into the circumstances attending the election of its members, whether such election was procured by bribery, corruption, or other matter impairing the freedom of elections, such inquiry can not be made anywhere. * * * The Constitution provides that each House shall be the judge of the elections, returns, and qualifications of its members.

It may inquire into his qualifications, whether the member is 30 years old, had been nine years a citizen of the United States, and was an inhabitant of the State; whether the returns of the election are in due form and show an election by the lawful legislature of the State, certified as required by law, and whether the election was conducted according to law, and was free or attended by circumstances that would make it invalid, such as bribery, fraud, or intimidation. * * * Whatever impairs the freedom of elections is illegal and against public policy, and makes the election void. (Mar. 11.)

And Senator Pratt, speaking against Caldwell's claim to a seat, said:

Called upon to pronounce whether that election was valid, can I say that such means were honest and proper, and not calculated to interfere with that freedom of elections which is the very soul of our political system? (95.)

This case was referred to the committee on the protest of 49 members of the legislature of West Virginia against the seating of Mr. Scott. The entire legislature, by law, could not have been over 97. So a majority of the whole body protests.

And good government and fair dealing protest.

E. W. PETTUS.