REPORT

OF

COMMITTEE ON ELECTIONS

IN THE CASE OF

BULL VERSUS HENDERSON

For a Seat in the Senate, from the 27th Senatorial District.

[*PRINTED BY ORDER OF THE GENERAL ASSEMBLY.*]

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SENATOR Hartshorn, from the Committee on Elections, submitted the following report:

MR. PRESIDENT: Your Committee on Elections to whom was referred the contest of J. W. Bull vs. John W. Henderson for a seat in this Senate from the 27th Senatorial District, beg leave to report that they have had the same under consideration and have unanimously instructed me to report to the Senate an abstract of the issues, statement of facts and legal conclusions, accompanied by the resolution herewith submitted.

E. J. HARTSHORN, *Chairman.*

In the Senate of the Eighteenth General Assembly of the State of Iowa.

J. W. BULL,
Contestant,
vs.
JOHN W. HENDERSON,
Incumbent.

ABSTRACT OF ISSUES.

CONTESTANT claims his election to the office of Senator for the 27th Senatorial District on the grounds:

1. That by the face of the returns the incumbent received a majority of 24 votes.

2. That in fact the vote of Marion township was for incumbent 371 votes and for contestant 527 votes, but that the return made by the canvassers gave to incumbent 402 votes and to contestant 488 votes, by which incorrect count and return contestant was deprived of 39 votes, 31 of which have been given to the incumbent; and that there were sundry irregularities practiced which authorize the setting aside of the returns as follows:

(*a*) That persons not judges or clerks were permitted to assist in the count.

(*b*) That the canvassing board adjourned pending the canvass.

(*c*) That the ballots were not securely or safely kept, so as to avoid the possibility of fraud.

He further claims that 35 ballots cast for him were, in fact, taken from the box pending the canvass and the same number substituted for incumbent.

Incumbent admits the adjournment and alleges its necessity. Denies fraud or opportunity for fraud in the count and in general denies all facts showing an incorrect, irregular or fraudulent canvass and return.

3. Contestant claims that votes cast for persons other than incum-

bent were counted for him sufficient in number to change the result, which incumbent denies.

4. Contestant claims that more than enough illegal ballots were cast to change the result which is denied.

5. That in Rapids township is the city of Cedar Rapids, containing more than 6,000 inhabitants;

That the township is divided into six precincts, the First, Third, Fifth and Sixth of which are wholly in the city, and the Second and Fourth of which comprise portions of the city and territory outside the city;

That the streets of the city are named and the houses numbered; and that in said precincts illegal votes were received and irregularities practised as follows:

(*a*) In the First precinct 130 votes were received from persons whose names were not registered, of which 90 were cast for the incumbent;

(*b*) In the Second precinct 129 such votes were cast, of which 72 were cast for incumbent;

(*c*) In the Third precinct 70 such votes were cast, of which 52 were cast for incumbent;

(*d*) In the Fourth precinct 94 such votes were cast, of which 52 were cast for incumbent;

(*e*) In the Fifth precinct 29 such votes were cast, of which 16 were cast for incumbent;

(*f*) In the Sixth precinct 15 such votes were cast, of which 9 were for incumbent; making in all 467 such votes, of which 291 were for incumbent, being a majority of 115 votes so cast;

That of the 176 remaining votes contestant cannot say whether they were cast for him or not because of the fact that incumbent's name was printed upon certain tickets purporting to be "regular" Republican tickets, whereby voters were deceived and confused;

That none of such unregistered voters whose ballots were cast for contestant complied with the law by filing affidavits;

(*g*) Giving sufficient excuse for not registering;

(*h*) Or affidavit of free-holder;

(*i*) Or giving street and number of residence;

(*j*) And that affidavits were made by persons not residents of the township;

(*k*) And the affidavits filed were insufficient, informal and fraudulent;

The incumbent in general denies all the material facts in relation to the votes of non-registered voters, and on the other hand claims that such votes, if illegal, were not cast for him as alleged;

That the contestant likewise published tickets of such character as to deceive the voters and that the same were used at the various precincts.

Incumbent, in addition to his denials, claims:

6. That 6 votes were in fact cast for him but counted for other persons by the County Board of Canvassers, said votes being intended for incumbent, he being a regular candidate and the only one of that name, which would increase his vote to 3462.

7. That 268 illegal votes were cast and counted for contestant by the Board of Canvassers, and that a large number of votes in fact cast and intended for other persons were by said Board counted for contestant.

8. That in the Third precinct of Rapids township 148 votes were cast for contestant and 278 votes were cast for incumbent, and the return and canvass was, for contestant, 151 votes, and for incumbent, 276 votes.

9. That in the Second precinct of Rapids township, after the polls were closed, the judges allowed and procured one W. W. Smith to handle and arrange the ballots and the votes were in fact canvassed by him, he not having been sworn, nor a judge of election and that less votes were counted and returned for him, and more for incumbent, than were in fact cast.

The contestant is deemed to have denied all material affirmative claims made by the answer.

THE FACTS RELATING TO THE CANVASS OF THE VOTES IN MARION TOWNSHIP ARE AS FOLLOWS:

Two ballot-boxes were used. One for the voters inside the city limits, the other for voters residing in the township but outside the city limits.

Upon closing the polls, and before the boxes were opened, it was proposed by various parties interested in the result as to certain candidates, that the ballots should be examined and the result in which such interest was felt ascertained.

The judges thereupon consented that one member should be selected from each of the political parties, who might in the presence of the

judges examine the ballots and ascertain the result for themselves. One Republican, one Democrat and one Greenbacker were selected as such committe. By the consent of the judges, and agreement of the committee, one Crawford was permitted to assist in the proceedings.

The ballot-boxes were placed upon a table, about ten feet long and four feet wide. One of the judges sitting opposite, near to each box, the other judge standing at the end of the table.

The clerks took no part, but were present most of the time during the count by committee. Other persons were present, as was also a constable, and there was no unusual noise, confusion or disturbance. The committee and their assistant sat in the ordinary position on each side of the table. Two lamps were placed upon the table.

One of the judges took from the box a number of ballots, varying from twenty to fifty, partially arranged, and passed them to a member of the committe, who, with the assistance of another member sitting by him, completed the arrangement into parcels of "straight Republican," "straight Democrat" and "mixed" tickets. The number in each package was counted, the package handed to the other judge sitting by the box, who marked on the back of the last ticket the number contained in the package, and the kind of tickets in package, placed a rubber band around it and kept it in his immediate possession upon the table before him until the box was emptied, when it was replaced in the ballot-box. When all the tickets had been thus arranged, they were again taken from the box, the count in each package verified by the committee, announced to two of them acting as tellers, handed back to the judges and replaced in the box.

The mixed tickets were called separately so far down as the township ticket.

The straight tickets were counted by the number appearing to be contained in each package.

The offices in which particular interest was felt were Congressman, State Senator, Representatives, and some of the county officers.

Informal tally lists were kept by the committee, the footings of which are as follows:

NAME.		Outside of City.	City.	Total.	Majority.
Thompson	Congress.	335	369	704	505
Calhoun		122	77	199	
Bull	State Senator.	287	242	529	156
Henderson		210	163	373	
Stephens	Representative.	264	278	542	219
Armstrong		182	141	323	
Brown	Representative.	264	249	513	190
Terry		168	131	299	
Jackson	County treasurer.	250	290	540	218
Oxley		206	116	322	
Yambert	Sheriff.	156	147	303	
Lyman		16	14	30	

This result was thought by the committee to be correct.

The judges took no part further than to prevent any abstraction or change of ballots and did not attempt to ascertain for themselves the state of the vote.

The count lasted until about 11 o'clock P. M. when the committee completed the tally-list and announced the result. The judges replaced all the ballots in the boxes which were not locked, but sealed with paper and mucilage, three strips extending over the opening of the box and the joint of the lid, thereby preventing any opening of the box or change of ballots except by the breaking of the seals.

The boxes were then taken by the judges to an unused vault in the court-house where the election was held, placed therein, the ventilator closed and secured, the vault locked with a key furnished by the auditor of the county, who directed the mode of locking.

The windows in the room leading to vault were fastened down, the door to the room locked and the judges separated.

On the morning of the next day the judges together went to the vault, found all the fastenings apparently as they had been left, examined the seals upon the boxes sufficiently to satisfy themselves that they had not been disturbed, took the boxes to the room where the election had been held and publicly proceeded to count the ballots.

Four of the five judges and clerks of election were Republicans and

voted for contestant. Not having finished the count that night they again sealed the boxes, containing all the ballots, placed them in the vault and secured the doors as before, and separated until the next morning, when the doors, fastenings and seals did not appear to be disturbed or to have been tampered with, then proceeded to finish the count in the same place where the election was held and certified the result on the poll books as follows:

OFFICE.	Rep.	Dem	Scattering	Total
Thompson	690			
Calhoun } Congress		201		
Byington			1	893
Bull	488			
Henderson } State Senator.		402		890
Stephens	504			
Armstrong } Representative.		349		853
Brown	479			
Terry } Representative.		333		812
Melbourne			36	
Lyman } Representative.			32	70
Daniels	538			
Fitzgerald } County Auditor		321		
Young			1	860

During the count by the committee there was a question between the tellers as to the correctness of the count, which was settled in some way and the count proceeded.

The attention of the committee was also called to the fact that certain ballots, apparently Republican throughout, contained the name of the incumbent instead of the contestant for the office of State Senator. The contestant being the regular Republican candidate and the ballots denominated *straight* Republican supposed to contain his name.

Upon the count by the judges a number of ballots of this kind were found among the packages marked and counted by committee as *straight* Republican.

In the canvass the Judges counted for the incumbent: 26 votes for J. W. Henderson, 1 for J. N. Henderson, 2 for Henderson only, and 3

for John Henderson. Six of these votes were rejected by the Board of Supervisors. No candidate of the name of Henderson was voted for except for the office of State Senator, and no candidate of that name was known to the public on the day of election, except the incumbent, and concerning his election there was much interest.

During the count by the committee the judges had no reason to suspect any attempt to commit fraud by change of ballots or otherwise, but in fact used a good degree of caution to prevent the possibility of such act. In the adjournment and sealing of the boxes and placing them in the vault they acted in the same manner.

In that precinct it had been the custom to adjourn the count by the Judges until the day after the election, and to allow, as in this case, the preceding count by a committee composed of members of the several political parties.

THE FACTS AS TO THE VOTE IN RAPIDS TOWNSHIP ARE AS FOLLOWS :

The township is divided into six (6) election precincts, designated by number.

The 1st, 3d, 5th and 6th, of which are wholly within the limits of the city of Cedar Rapids. The 2d and 4th of which are each made up of territory both within and without the city limits.

The township contains a population as shown by the last census of more than 6,000 inhabitants.

The streets of the city are named and the houses in general numbered, and the residence of citizens are generally known by reference to such named streets and numbers.

The township trustees on the 8th day of October, acting as a board of registry certified to a register of electors in each of the several precincts which several registers were used by the judges of election.

The registers contained the names of voters alphabetically arranged, in some cases in full length, and others giving the initials only of the name.

In no case was the residence of any elector indicated in any manner except by the certificate of the trustees which stated the lists to be a true and correct register of electors in the election precinct as far as the same had come to their knowledge.

The judges of election received the ballots offered by all persons whose names appeared on the registers and added to the registers severally as follows:

In the 1st precinct	134
In the 2d precinct	132
In the 3d precinct	71
In the 4th precinct	95
In the 5th precinct	28
In the 6th precinct	15
Total	475

In the third precinct 12 votes were received and names added to the register without furnishing any affidavit of excuse, or voucher.

The other electors whose ballots were received furnished affidavits in attempted compliance with the law.

The excuses rendered were as follows:

First year in ward	1
Absent	11
No reason given	35
Registered in another ward	14
Neglect	179
Ignorance	14
Omitted in making up register	4
Not naturalized in time	2
Supposed they were registered	120
Overlooked it	40
Not time	4
Did not know it was necessary	30
Sick	3
Initials wrong	1
Mistake	5
Total	463

In 35 cases no reason whatever is given for not appearing before the Board of Registry.

Seventy-two electors were vouched for by persons whose names did not appear upon the register.

The vouchers made affidavit that they were householders in 336 cases.

That they were freeholders in 62 cases.

That they were property-holders in 41 cases.

In 24 cases the affidavits were left entirely blank in regard to whether they were free or householders.

In no case did the affidavit of the voucher give the residence of the elector, or of the voucher, except in the general statement that the elector was a resident of the precinct wherein the vote was offered.

In no case did any of the affidavits give the number of the precinct where the vote was offered.

Three hundred and thirty-two of the affidavits state the elector lived six months in the state and sixty days in the county, omitting to state residence in election precinct.

One hundred and thirty-one of the affidavits state the elector has resided in the county 60 days, and that he is an actual resident of the precinct wherein he offers his vote, omitting the length of time he has resided in the state.

Fifty-four of the affidavits were not signed by the electors, but the jurats of the officers are regular, certifying that said affiants were duly sworn.

One, W. W. Smith, was allowed to assist in counting the ballots in second ward, in which the majority returned for incumbent was 53, but there is no evidence of any actual fraud.

For the incumbent there were 5 votes cast that were illegal in fact, on other grounds than those relating to the affidavit.

For the contestant there were 3 votes illegal in fact, on other grounds than those relating to the affidavit.

Of the unregistered voters who furnished no affidavit, but whose names were put on by the judges on the day of election, 4 voted for incumbent and 1 for contestant.

Of the unregistered voters furnishing affidavits, 35 voted for incumbent and 27 for contestant.

The evidence does not show for whom the other unregistered voters cast their ballots.

Nine affidavits were made by vouchers not residents of the precinct.

There were many tickets of various kinds in circulation at the several election precincts, and the name of incumbent was in many cases printed or written upon tickets otherwise Republican, and it was well understood that the incumbent and contestant were the only candidates for the office of State Senator, and that such tickets were in circulation, and that incumbent was an independent candidate and soliciting votes from all parties.

One vote cast in Mt. Vernon precinct, for which the candidate was named "Bull," without initials, was not counted for contestant by the Board.

No other candidate by the name of Bull was known to the public on the day of election.

Stated more briefly the facts are:

1. A register of voters is required in Rapids township.

2. The register was duly certified for each of the six precincts and was defective in that the particular residence of no elector was given.

3. There is no proof that any voter knew of any defect in the register.

4. Twelve votes were received by the judges without any affidavit. Of these contestant received 1 and incumbent 4, and for whom the others voted is not shown.

5. Of the illegal votes, on other grounds than those relating to registry, contestant received 3, incumbent 5.

6. Of the unregistered votes contestant received 27, incumbent 35, and the remainder of the unregistered votes are not accounted for—no evidence being offered or satisfactory reason shown why the proof was not produced.

7. There is no evidence of any gross fraud practiced at any of the precincts, nor of any deceit used by the parties or their adherents, of any character which would affect results.

8. The defects in affidavits of electors are classified thus:

Defect in statement of residence in State	131
Defect in statement of residence in election precinct	332
Defect in statement of street and number and particular place of residence	463
Failure to sign affidavit	54
Failure to state any excuse	35
Those giving a sufficient excuse	21
Those giving an insufficient excuse	267
Those giving a doubtful excuse	140

DEFECTS IN AFFIDAVITS OF VOUCHER.

Defect in failing to state whether free or householder	24
In stating they were property holders	41
In vouching for electors when not registered themselves	72
In failure to state the street and number, and particular place of elector's residence	463

The result would stand thus upon the count of the votes proven to be illegal:

Incumbent's majority	24
Add votes in Marion township thrown out	6
	30
Deduct from this illegal for want of registry	4
Illegal for want of any affidavit	5
Illegal vote for contestant in Mt. Vernon precinct	1
	20
Add to this votes illegal for want of registry cast for contestant	1
Votes illegal for want of any affidavit	3
	24

If the other votes unregistered, and proven to have been cast for the parties are considered illegal, the result will stand:

Votes cast for incumbent	35
Votes cast for contestant	27
Incumbent's loss	8
Which leaves his majority	16

LEGAL CONCLUSIONS.

From the foregoing statement of facts your committee might report their conclusions without entering into any argument or statement of the law.

But the case has been presented with so much ability and pertinacity on both sides, and is of such general importance that a brief statement of the law seems to be necessary.

I.

AS TO THE MARION TOWNSHIP VOTE.

The judges did not proceed to canvass the votes in this township after closing the polls, but adjourned the canvass until the next day, and in the meantime permitted a committee of private citizens representing the different political parties to run over the tickets and make an informal count as to certain offices including the office of State Senator.

After this was done the board returned the ballots to the boxes, sealed the boxes and then deposited them in the vault at the court-house, locked the vault door, and one of the judges took the key and the boxes were permitted to remain in the vault until the next morning, when they commenced their official count. In the evening of that day, not having finished the canvass, they adjourned until the next day and sealed and deposited the ballot-boxes in the vault as before until the next morning.

It is claimed by the contestant that these irregularities on the part of the board tended to destroy the sanctity of the ballot-box and rendered the official count of no validity in fact.

The conduct of the judges of election in this precinct in allowing the ballots to be handled by private citizens, either as a matter of curiosity or for partisan purposes, cannot be too strongly condemned.

The purity of the ballot-box is so essential to our form of government that it ought not under any circumstances to be subject to suspicion, and suspicion will arise in all cases where the ballots are allowed to pass into the hands of private persons to be counted, if their count differs from the official count. The evidence in this case however shows that these judges of election were in main partisan friends, and ardent supporters of the contestant.

It is conceded that they are honest men and acted in good faith. They say that they were vigilant and exercised all reasonable care in watching the ballots while they were being counted by the committee. They were in a position to know, and they have testified that there was no tampering with the ballots; and that they are satisfied that the ballots were under their observation all the time, and that the identical ballots taken out were returned to the boxes. While, therefore, the conduct of the judges in permitting the ballots to be handled by private citizens was a clear violation of their duty, and necessarily cast suspicion upon the purity of the ballot-box, it seems clear that this irregularity cannot of itself prevail to deprive the electors of their votes or defeat the regular count of the board when made.

Sec. 622 *of the Code* provides that "When the poll is closed the judges of election shall proceed to canvass and ascertain the result of the election."

This provision of our statute is evidently only directory and unless some prejudice results from the adjournment it would not invalidate the canvass.

The vital question in all such cases is as to the care and prudence

exercised by the board to guard against fraud and protect the purity of the ballot-box during the adjournment.

If the box is left in some public place, or in such exposed condition that it could readily be tampered with, the presumption will prevail that it *has* been tampered with, and the ballots in the box will not be regarded as the best evidence of the voice of the people; but if the ballot-box has been safely guarded and securely kept during the adjournment it will be presumed to contain the actual ballots of the electors, and the official count of such ballots will be the best evidence of the result of such election.

That the board exercised due diligence and proper care to protect the ballot-boxes during the several adjournments in this case is clearly shown by the evidence.

Irregularities of the character complained of will not cause the ballots to be rejected, or the canvass and return thereof to be set aside unless accompanied by proof tending to show that such ballots and returns were incorrect and did not indicate the true result of the election.

Fry v. Booth, 19 Ohio, 25.

People v. Holden, 28 Cal., 123.

People v. Cook, 8 N. Y., 67.

The Board of Supervisors, etc., v. The People, etc., Ex Rel. Willard Scott, 65 Ill., 360.

Inasmuch as the count of the committee would have elected the contestant it is quite natural that he should think it correct. There is no question but that the board correctly canvassed the votes in the ballot-box; and hence the contestant thinks that the ballot-box was opened by some one in some way, and the ballots exchanged sufficient to cover the discrepancy in the count.

There is, however, no evidence to support this theory, and it is much more reasonable to suppose that the "committee" made a mistake in assorting, bunching, or labeling the tickets.

The evidence shows that the "committee" did "bunch" Republican tickets with Henderson's name on, with straight Republican tickets.

The count of the "committee" was very unreliable. Neither member of that committee had within himself evidence of its correctness. The tickets were examined for the purpose of bunching the straight tickets.

None of these were called off. The kind of ticket and number was marked on the back. The official count shows a gain of 29 for incumbent and a loss of 41 for contestant over the count of the "committee." So the mistake must have occurred in "bunching" and marking the tickets. Some bunch of "scratched" tickets was marked as "straight."

As a fact conclusion we therefore find that the count of the "committee" was incorrect; that there was no change of ballots in the box, and that the judges of election, in fact, counted and made their returns of the identical ballots cast by the electors.

Inasmuch as there was but one person of the name of Henderson in the field as a candidate for Senator, it is fair to presume that the six votes cast for John Henderson, Henderson, etc., were intended to be cast for incumbent. These votes should be given him, and the canvass corrected in this respect.

McCrary on Elections, 297.

II.

It is conceded that the registry law applies to the city of Cedar Rapids, and that four hundred and seventy-five persons voted at the election whose names were not on the registers.

The statute of this State in relation to registration provides that "The judges in election precincts, where the registry law is in force, shall designate one of their number to check on the register the name of every person voting, and no vote shall be received from any person whose name does not appear there unless he shall furnish the judges his affidavit, showing that he is a qualified elector, and a sufficient reason for not appearing before the board on the day for correcting the register, and also shall prove by the affidavit of one free-holder or householder whose name is on the register that such affiant knows him to be a resident of that election precinct, giving his residence by street and number if in a city or incorporated town, as the same is in such cases required to appear on the register. * * *"

Sec. 618 of Code.

Twelve of the persons so voting whose names were not on the registers filed no affidavits or vouchers whatever. The other *four hundred* and *sixty-three* attempted to comply with the law but their affidavits and proof are all more or less defective in some essential particular.

It will be observed that the law requires the voter to show by his own affidavit two things:

1. That he is a qualified elector.
2. A sufficient reason for not being registered.

The Constitution of this State, section 1, article 2, provides that, "Every male citizen of the United States of the age of twenty-one years, who shall be a resident of the state six months next preceding the election, and of the county in which he claims his vote sixty days, shall be entitled to vote at all elections which are now, or hereafter may be authorized by law."

The statute of this state, Sec. 605, of the Code, further provides that, "No person shall vote in any other precinct than that in which he resides at the time."

Three hundred and thirty-two of the persons so voting failed to show by their affidavits that they were residents of the precinct in which they voted.

One hundred and thirty-one of them failed to show by their affidavits that they had resided in the state six months next preceding the election.

One hundred and seventy-nine of these voters say in their affidavits that they failed to register on account of "*neglect*," and no reason whatever is given in *thirty-five* cases. In fact but very few of the affidavits show any sufficient reason for not registering.

The supporting affidavits are equally defective.

These affidavits are required to be made by a householder or free-holder whose name is on the register and must state that affiant knows the person offering his vote to be a resident of that precinct, giving his residence by street and number.

Seventy-two of these affidavits were made by persons whose names were not on the registers themselves.

In *sixty-five* cases the affidavits do not show that they were made by householders or free-holders.

None of the affidavits give the residence of the voter by street or number, or in any other manner except the general statement of residence in precinct.

It is conceded that the registry law is not in conflict with the Constitution because it does not "prescribe any new qualifications for voters but only new formalities to be observed by those possessing the constitutional qualifications." In other words, it does not take away the right of any man to vote but imposes on the voter such reasonable

conditions as in the judgment of the General Assembly are necessary to protect the purity of the ballot-box.

It therefore only becomes necessary to determine the proper construction of this law.

The incumbent insists that the judges of election have a discretionary power under the law in passing upon the affidavits and receiving the votes of non-registered electors and that no vote received by them can be thrown out, and not counted, on account of the insufficiency of the affidavits.

The statute seems to be imperative. "No vote shall be received from any person whose name does not appear there unless," etc. *This amounts to a prohibition.* It is not discretionary. It is compulsory.

The statute imperatively commands the judges of election not to receive any ballot offered by an elector whose name is not on the register unless he shall *comply* with the law. If the judges of election in open violation of the law receive such ballots as they are commanded not to receive, it would render the law nugatory to say that such ballots can not be thrown out but must be counted. If the elector does not attend and see to having his name put on the register he cannot vote unless he shall comply with the law in all its essential particulars in regard to affidavit and proof. This he must attend to at his peril, and if he fails to do it his vote cannot be lawfully received, and if the judges of election in violation of law do receive it and deposit it in the ballot box it cannot be counted but must be rejected.

This seems to be the settled law of the land.

In re Duffy, 4 Brewster, 542, Harding, P. J., in giving the opinion of the court said:

"The third section of the act of 1869, provides in mandatory terms," that "no man shall be permitted to vote at the election * * * * whose name is not on said list, unless he shall make proof of his right as hereinafter required."

How is the proof to be made?

This is a vital question.

It is not for the officers of an election board to decide how; the statute does that.

In *Doerflinger v. Hilmantel*, 21 Wis., 570, Dixon, Judge, in delivering the opinion of the court on the construction of a statute exactly similar to ours, said: "It is essentially an imperative statute and deprives the inspectors of all jurisdiction to receive the votes of unregistered voters, unless the conditions as to the affidavit and oath are fully

complied with * * * * *. In this matter of a voter whose name has been omitted and who has not appeared on the day for the correction of the register, the burden of answering the requirements of the law by furnishing the affidavit and proof, is thrown upon the voter himself. He is presumed to know the law and must go to the polls prepared to comply with its conditions; and if he does not, and his vote is lost, it may, so far as it is the fault of anyone, with justice be said to be his own fault. It is in the nature of a penalty imposed by the law for his neglect to do what is required of him. The inspectors cannot receive his vote, and if they cannot, it cannot afterward be received and counted by the court."

In *Nefzger v. The D. & St. P. R. R. et al.*, 36 Iowa, 642, the Supreme Court of this state cite the above authority with approval, and lay down the rule "that no legal election can be held in this State where the registry law is in force, without registration."

See also as bearing on this same subject:

The People v. Pease, 27 N. Y., 45.

Capen v. Fisher et al., 12 Pick., 485.

The People v. Kopplekom, 16 Mich., 342.

State v. Albin, 44 Mo., 306.

We are therefore of the opinion that the 475 votes referred to are illegal and void.

By section 7, article 3, of the Constitution: "Each house shall * * * judge of the qualification, election and return of its own members."

In *People v. Vail*, 20 Wend., Bronson, Judge, says: "In those legislative bodies which have the power to judge of their own members, it is the settled practice, when the right of the sitting member is called in question, to look beyond the certificate of the returning officer * * and inquire into and ascertain the abstract question of right."

The Senate is therefore a court of inquiry to ascertain and determine who has, in fact, received the greatest number of legal votes cast in that district for the office of Senator.

The evidence discloses the fact that five of the twelve persons voting who were not registered and filed no affidavits, voted for incumbent, and one for contestant. That of the unregistered voters who made and filed affidavits, thirty-five voted for incumbent and twenty-seven for contestant. There is no evidence tending to show who the other four hundred and eight illegal votes were cast for.

After crediting each party with such additional votes as they are entitled to, not given them by the board of canvassers, and deducting such illegal votes as the evidence shows were cast for each of the parties, the incumbent's majority is reduced to 16 votes.

Hence it is impossible to determine from the evidence before the committee, *who* has, in fact, received a majority of the legal votes cast for Senator in that district.

The burden of proof is upon the contestant to establish his right to the seat. This could only be done by showing that he received a majority of the legal votes cast. He has not done this, and hence has failed to establish his case.

It is shown, however, that more than enough illegal votes were cast to overcome the majority of incumbent and change the result of the election. Under this showing the incumbent was required to account for the illegal vote and show that if the polls were purged of it, he would still have a majority of the legal votes, and be rightfully entitled to the seat. This he has failed to do.

The committee might ask power to take testimony for the purpose of determining for whom these illegal votes were cast, but in view of the fact that the parties have neglected to take such testimony themselves although they have had ample time and opportunity to do it, both before and since the case was referred to the committee, we have concluded that it would be impracticable. Under these circumstances what is to be done? The contestant claims that the poll should be purged of the illegal votes in each precinct by dividing the illegal votes between the parties in proportion to the whole vote received by each.

Incumbent's right to the seat is forfeited because it is impossible to determine who was elected on account of the presence of this large illegal vote, so greatly in excess of his majority.

Now, if you divide the illegal votes between the parties, you are as much in doubt about the election as you were before. Such division is a mere guess on an equitable basis, but it has been adopted in a few cases where it would work great public inconvenience to declare the office vacant.

It is, however, of doubtful propriety in any case, because it has no certainty of right or justice in it, and it should never be adopted by any court or tribunal having the power to order a new election.

McCrary on Elections, in speaking of this mode of division, Sec. 299, says: "This is probably the safest rule that can be adopted in a court of justice where there is no power to order a new election and when great injury would result from declaring the office vacant; but it is manifest that it may sometimes work a great hardship inasmuch as the truth might be, if it could be shown, that all the illegal votes were cast on one side, while it is scarcely to be presumed that they would ever be divided between the candidates in exact proportion to the whole vote. * * * *

"In a legislative body having power to order a new election and in any other tribunal having the same power, it will doubtless generally be regarded as safer and more conducive to the ends of justice to order such new election, than to reach a result by the application of the rule above stated. * * * And it is clear also that when in such case no great public inconvenience would result from declaring the election void and seeking a decision by an appeal to the electors, that course should be adopted."

In Ex parte Heath et al., 3 Hill, 43, it is held, that if the illegal votes cast would change the result, and it is impossible to ascertain for whom they were cast, a new election may be ordered.

See also *Ex part Murphy*, 7 Cow., 153.

In commenting on this case McCrary in his work on Elections in Section 269 says:

"An election may be set aside, declared void and a new election ordered upon the introduction of such proof as renders it impossible to determine who has been chosen by a fair majority; but the contestant can in no case be declared entitled to the office until he shows affirmatively that he has received a majority of the legal votes cast."

It is well settled, therefore, both upon principle and authority that in a case of this kind where the illegal votes cast are sufficient to change the result, and it is impossible to ascertain for whom they were cast, that the seat should be declared vacant.

The duly qualified electors have the right to determine who shall represent them, and when from any reason it is impossible to determine their choice, the question should be again submitted for their decision.

This course is fair to all, and unjust no none. It will secure them the man of their choice. Any other course might not.

We therefore recommend the adoption of the resolution herewith presented:

Resolved, That the seat held in this Senate by John W. Henderson, from the 27th Senatorial District be and the same is hereby declared vacant.

REPORT

OF THE

JOINT COMMITTEE

OF THE

EIGHTEENTH GENERAL ASSEMBLY

OF THE

STATE OF IOWA,

APPOINTED TO VISIT THE

STATE FISH HATCHING HOUSE,

LOCATED AT

ANAMOSA.

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