
In the Fifty-first Congress.

Contested Election Case.

CHARLES B. SMITH,

VERSUS

JAMES M. JACKSON.

From the

Fourth Congressional District

—OF—

West Virginia.

BRIEF FOR CONTESTEE.

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In the Fifty-first Congress.

Charles B. Smith, Contestant, }
vs. } Contested Election.
J. M. Jackson, Contestee, }

From the Fourth Congressional District of West Virginia.

BRIEF FOR CONTESTEE.

The Contestant bases "his claim to a seat in this Congress upon the ground that by the face of the returns as made to the Governor, and the record thereof preserved as required by law, he received a plurality of votes cast for Representative in Congress from the Fourth West Virginia District on the 6th November last."

The Contestee on his part, contends that he was legally elected by the qualified voters of said District at said election, as shown by the proofs to be found in the record, and that the Governor of the State, as was his duty so to do, did on the face of the returns of said election as made to him, declare that the Contestee was duly chosen, on the 6th day of Nov., 1888, a Representative in the Congress of the United States, for the Fourth Congressional District of the State for the term commencing on the Fourth day of March, 1889; and in pursuance of such declaration he awarded the Contestee a certificate of his said election, as such Representative, regular in form, and signed by the proper authority and therefore Contestee claims that the same constitutes *prima facie* evidence of his title to the office, and the only evidence which can be considered in the first instance to determine his right thereto.

THE PRIMA FACIA RIGHT.

It is remarkable that the Contestant, no where in his brief claims that he was elected by the legal and qualified voters of the several counties of said district, "but that he has procured from each clerk of

the county court of the several counties of the district, who by law is the custodian of the returns, his certificate showing the result of the election for Representative in Congress in each of said counties," "and has called witnesses to prove the original records," and upon the facts disclosed by these certificates, the Contestant bases his right to the seat.

And then to maintain this right he proceeds to examine the proofs, in the record, being the certificates of the clerks of the county court of the several counties. These certificates are part of the proof filed by him in the case, the validity and legality of some of which were assailed by the Contestee before the Governor of the State and before the declaration by him, of the election of the Representative in Congress. They cannot be looked to in any respect, to determine the *prima facie* right as will hereinafter be fully shown.

The Contestant surely did not expect the Contestee to comply with his request, when he coolly invited him to rest his case upon returns, which Contestee had claimed before the Governor, were illegal and invalid and did not show the result of the election by the legal and qualified voters of the district, cast and returned in the manner required by law. The Contestee insisted before the Governor, that he (the Governor) had the right, and should go behind the returns in his office, and inquire into the said election, and the proceedings of the County Commissioners, and asked him so to do. This was strenuously resisted by Contestant, and after elaborate argument by his counsel, the Governor decided the matter in favor of the Contestant. Thereupon the Governor confined himself to the face of the returns as they appeared in his office, declared the Contestee elected and awarded him the certificate. For doing what the Contestant insisted he should do, and against the claim of the Contestee the Contestant in his brief assails the Governor in unmeasured terms. No further notice will be taken of the attack made upon him, except to say, that vituperation and abuse are not arguments.

We now submit that the certificate of the Governor, awarded the Contestee, is in the language of the Statute of West Virginia in such case made and provided, duly authenticated, and perfect in form, and no defect appearing on the face thereof, it determines the *prima facie* case in favor of the Contestee. We confidently assert that said certificate is superior evidence of the title of said Contestee to said office, to the returns relied upon by the Contestant and which he has filed as part of the proofs on the merits of the case.

For authority for this, we cite Paine on election, page 815, section 981.

This being true, the title to the office vested *prima facie* in Contestee. The fact whether Contestant or Contestee was legally elected can only be determined by the trial of this case on its merits.

But what are the rights of the Contestee under his certificate of election? There is no pretension that the certificate is a forgery; nor

is it impeached in any manner; nor is it claimed that he is not qualified to serve in the House of Representatives of the American Congress. Otherwise, it is submitted that he is entitled to enter upon the duties of his office and occupy the seat in Congress until this contest is disposed of upon its merits. There have been so many adjudications of this question in the courts of this country, and in the House of Representatives itself to cite them all would make this brief cumbersome, to say the least; and, for that reason, we shall use only the leading cases upon this question. The rule which has always prevailed in the House of Representatives with but one legitimate exception, is, that whoever presents to the House such credentials as are provided for by the law of the State, is entitled, *prima facie* to a seat in the House, and shall be sworn in, pending any contest which there may be with regard to the merits of the case. This has been the rule universally held in the courts of this country, and the practice in the House of Representatives, with but a single exception. Mr. McCreery in his book on the American Law of Elections, 3rd Edition, Sec. 267, says: "If the party holding the ordinary credentials of an office can be kept out of the office by the mere institution of a contest, the organization of a legislative body, such for example as the House of Representatives of the United States, might be altogether prevented by instituting contests against a majority of the members, or what is more to be apprehended, the relative strength of political parties in such a body might be changed by instituting contests against the members of one or the other of such parties. These considerations have made it necessary to adopt and to adhere to the rule that the persons holding the ordinary credentials shall be qualified and allowed to act, pending a contest, and until a decision can be had on the merits." This same doctrine is sustained by all the text writers on the subject of elections, and has been so decided in

- Lurtin vs. Gillin, 1 Scam, Ill., 577.
- People vs. Callaghan, 83 Ill., 128.
- Magee vs. Supervisors, 10 Cal., 376.
- People vs. Jones, 20 Cal., 50.
- People vs. Miller, 16 Mich., 56.
- People vs. Vail, 20 Wend. N. Y., 12.
- Kerr vs. Trego, 47 Pa. St., 292.
- Marshall vs. Kerns, 2 Swan, Tenn., 68.
- State vs. Avery, 14 Wis., 122.
- People vs. Thatcher, 7 Lans., N. Y., 274.
- Commonwealth vs. Baxter, 55 Pa. St., 263.
- Swinburn vs. Smith, 15 W. Va., 483.
- Crowell vs. Lambert, 10 Minn., 369.

See also, 41 Pa., 396 ; 15 Minn., 455 ; 1 Dutch, 351 ; 16 Mich., 356 ; 1 Ore, 149, and 1 Hust., 39.

If there could be any question of doubt as to the effect of the certificate held by the Contestee in this case, arising from the adjudication of this question by the courts of this country, as well as the elementary writers, it seems to us, that it is removed by the precedents on that subject in the House of Representatives. It is claimed by counsel of Contestant, in their brief, that by the face of the returns as made to the Governor, and the record thereof preserved, as required by law in the several counties of the district, he, the Contestant received a plurality of votes cast at said election for said office; and, upon these returns, Contestant relies for his right to the seat pending the contest. Fortunately, we have a precedent covering Contestant's pretensions in that regard. In the 47th Congress, Mr. Wheeler who was declared elected from the Eighth District of the State of Alabama, and whose name had been placed upon the roll of members by the clerk of the preceding house, presented himself to be sworn in by the Speaker, as a member of the 47th Congress. *Mr. Jones*, of Texas, objected to the oath being administered to Mr. Wheeler. It appeared that Mr. Wheeler had the certificate of election regularly issued by the Governor in the forms of the law of the State of Alabama. The ground of objection to his taking the oath, as stated at the time by *Mr. Jones*, was that Mr. Wheeler had not been duly returned or elected as a member of the 47th Congress ; that while Mr. Wheeler had the certificate of the Governor of the State, Mr. Lowe who was then contesting in the regular way Mr. Wheeler's right to the seat was shown to have been elected by the official returns made by the supervisors of election and certified to said Governor, by upwards of 400 majority, and these returns were presented to the House by Mr. Jones accompanying the following resolution :

Resolved: That the question of the *prima facie*, as well as of the final right, of Joseph Wheeler and William M. Lowe, contestant's respectively, claiming a seat in this House from the Eighth District of Alabama, be referred to the Committee on Elections hereafter appointed : and until such committee shall report and the House decide such question, neither of said contestant's shall be seated."

While the House had this resolution under consideration, with the facts, which we have stated, before it, a number of gentlemen took part in the debate which followed, not one of whom, however, except Mr. Jones, by any statement made upon the floor, favored the adoption of said resolution.

We quote Mr. Robeson, who was a leading member of that House, in his remarks, while said resolution was under consideration, as follows :

Mr. Robeson. " Mr. Speaker, it is very important we should proceed in a case like this according to law, and that our first step forward should be from a firm basis.

“Therefore let us understand the position of this case. By the law of the land, the Clerk of the last House makes up the roll of this house as a preliminary body competent to organize itself.

When that is done, then by the statute the speaker is to proceed to swear in the representatives-elect. How is he to know who are the representatives-elect? By the certificate of the constituted authorities of the State according to the laws of the State, whose constituted authorities give it. If that certificate is here, properly authenticated by the great seal of the State, according to the laws of the State of Alabama, it can only be questioned in two ways—I mean *prima facie*. The one is that it is a forgery, and the other is that there is some other disqualification of the member offering to be sworn, which is not covered by the certificate. But so long as the certificate certifies only to what the law authorizes the Governor to certify to, so long it is a *prima facie* case, and commands in my opinion *prima facie* the action of this House, and all other objections *prima facie* are out of order.

Now my sympathies are all one way in this case, but I cannot violate what I feel to be the law of the land and the good order which is necessary to the proper and expeditious organization of this House.” (See Cong. Rec. Vol. 13, Part 1, p. 12, 47 Cong. 1 Sess.)

A motion was made by Mr. Randall, of Penn., to lay the resolutions offered by Mr. Jones upon the table, which motion was agreed to without an aye and nay vote.

And the same gentleman moved to re-consider the vote by which said resolution was laid upon the table and also moved to table the motion to reconsider, which was agreed to by a like vote, and, thereupon Mr. Wheeler was permitted to qualify and occupy the seat as a member of said Congress until said contest was disposed of upon its merits. This case, it seems to us, concludes clearly the right of the Contestant to question the right *prima facie* of the Contestee to be sworn in and occupy the seat pending the contest, in any view possible to be taken.

In the Forty-Eighth Congress there was a case of contest in the House, of Jonathan H. Wallace vs. William McKinley, Jr., from the 18th district in the State of Ohio. The State Canvassing Board, consisting of the Governor and Secretary of State, in ascertaining the result of the election as between Contestant and Contestee, treated Jonathan H. Wallace, John H. Wallace, Major Wallace Wallace, W. H. Wallace, W. W. Wallace, Jonathan Wallace, Major Wallace and J. H. Wallace as distinct persons, and in that way ascertained and certified Mr. McKinley to have been elected. Mr. McKinley was permitted to qualify as a member of said Congress under this certificate. The facts show that Jonathan H. Wallace was the only person by the name of Wallace who was a candidate for said office in said district at said election, and it was admitted in the argument of the case before the Committee on Elections, that the votes certified for Major Wallace Wallace, Jonathan Wallace, Major Wallace and J. H. Wallace, should have been counted for Jonathan H. Wallace, the contestant, which gave him a plurality of eight (8) votes, on the face of the returns over Contestee;

yet, Mr. McKinley was permitted to occupy the seat pending the hearing of the contest upon its merits.

In the Forty-Eighth Congress in the case of George T. Garrison vs. Robert M. Mayo, from the First Congressional district of Virginia, it was held that the certificate of election issued to the Contestee by the Governor of Virginia, being in due form, in the absence of anything to impeach it, was conclusive of the right of the Contestee to his seat. Mobley's Con. Elec. cases, p. 53.

In the Forty-Second Congress, W. T. Clark presented to the House what purported to be a certificate of his election from the Governor of Texas, as a member from ——— district in said State. It was urged by members on the floor with a great deal of force, that the certificate was void and nugatory on its face, but the House decided otherwise. From this certificate it appeared that the Governor of Texas, in ascertaining the result of said election, excluded and rejected from the count a very large proportion of the vote cast for Congressmen at the election. The question was raised as to the *prima facie* right of Clark to be sworn in and occupy the seat pending the hearing and trial of the contest brought against him by D. C. Giddings to determine his right to the same. While this question of the *prima facie* case was under consideration, Mr. Hoar, who was then a member of the House Committee on Elections, and now a United States Senator from Massachusetts, stated the following proposition of law:

We quote:—

“Now, Mr. Speaker, I undertake to say that the law is this; that a certificate of election given by an officer authorized by law to give it, where it contains nothing more than the declaration that the party to whom it is given was duly elected to an office, is *prima facie* evidence that a party holding it was duly elected, and has a right to such office.”

Mr. McCreery, the great writer upon American Election Laws and the standard authority on that subject in this country was a member of this Congress and took part in the debate to which we refer. On page 347. Part 1-2 Sess. 42 Congress Cong. Globe, he said: “There is one rule which has governed this House in all cases of this kind, and which has never been departed from except in one single instance; and I believe that no gentleman upon this floor will undertake to justify the departure from the rule in that instance. That rule is this: that whoever presents to this house such credentials as are provided for by the law of the State is entitled *prima facie* to a seat in the House, and shall be sworn in pending any contest which there may be with regard to the merits of the case. That rule was overborne in one instance, but, as I have said, nobody will undertake to justify the action of the House in that case. In every other case the rule has been adhered to, and I hope it will be adhered to in this case. It is a sound rule—a rule which is necessary to the very organization of this House.”

Mr. Clark was sworn in and occupied the seat for some months,

until the case of contest was fully heard upon its merits, when, upon the report of the Committee on Elections, he was ousted by the unanimous vote of the members of the House, except one.

In Mr. McCreery's book on American Law of Elections, Sec. 271, same edition, it is held: "It is enough for a *prima facie* case if the certificate comes from the proper officer of the State and clearly shows that the person claiming under it has been adjudged to have been duly elected by the officer or board on whom the law of the State has imposed the duty of ascertaining and declaring the result. And in the case of *Kerr vs. Trego*, 47 Pa. St. Rep. 292 it is held that the certificate of election, sanctioned by law or usage is *prima facie* evidence of title to the office and can only be set aside by a contest in the form prescribed by law."

The House in considering the *prima facie* right to a seat, has no power to look beyond the certificate which is presented; and unless something should appear on the face of the certificate itself which impeaches its integrity, it must be taken as importing a verity, and there is no power in the House to look *aliunde* for facts, to uphold or discredit it.

"Where the Statute gives the Governor of the State the power, and makes it his duty to commission the person elected to an office, the issuing of a commission by him confers a vested right upon the person commissioned, which nothing but a judicial decision can take away or authorize the Governor to recall." McCreery, Am. Law of Elections, sec. 272.

"The certificate, therefore, must be regarded as evidence of the election of the person named therein, so far conclusive that it cannot be attacked except in the ordinary mode provided for contesting, but it is not evidence of the qualifications of the person named." *Idem.* sec. 284.

The case of *Chalmers vs. Manning*, in the forty-eighth Congress, is not in point, nor can it be regarded as authority to sustain the contention of Contestant in his brief to the seat *prima facie*. Because, in that case it was conceded in all stages of its discussion, that had Mr. Manning filed his certificate of election with the old clerk of the House, had his name enrolled on the list of the members-elect, and then presented himself with his credentials at the proper time before the Speaker of the House and claimed his right to be sworn in as a member, no objection would or could have been successfully made against it, but on the contrary he would have been permitted to take the oath and occupy the seat till the controversy was decided on its merits.

We conclude this branch of the case therefore, in the language of Judge McCrary, "There can be no doubt but a certificate of election regular in form, and signed by the proper authority, constitutes *prima facie* evidence of title to the office, which can only be set aside by such proceedings for contesting the election as the law provides."

"The certificate, whether rightfully or wrongfully given, confers upon the person holding it the *prima facie* right to the office."

McCrary on Elec., Sec. 282.

“The regular certificate of election properly signed, is as we have seen, to be taken as sufficient to authorize the person holding it to be sworn in. It is *prima facie* evidence of his election, and the only evidence thereof which can be considered in the first instance, and in the course of the organization of a legislative body.”

Idem. Sec. 283.

It is therefore respectfully submitted that under the practice and authorities herein referred to, the Contestee has the *prima facie* right to the office, and is entitled to be admitted to his seat as such Representative from the Fourth Congressional District of West Virginia.

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BRIEF OF TESTIMONY

ON PART OF CONTESTEE.

Contestee will now proceed to examine the testimony as to the votes charged in Contestants Brief, as being disqualified. No notice will be taken of any other votes named in Contestants notice or any grounds of contest not discussed in Contestants Brief, taking it for granted that the Contestant considers the same are not proved.

The Contestee will take them up by Counties in alphabetical order.

CABELL COUNTY.

William Surrat.

The evidence of Joseph Anderson, p. 269, and of S. D. Hayslip, p. 280, fully sustain the vote of William Surrat, and completely rebuts the evidence of W. L. Fruetel, p. 58 and 59 and of B. F. Sites, p. 60 attacking the same.

Ephriam Hensley and W. J. Gilmore.

The evidence tends to show these two votes illegal.

CALHOUN COUNTY.

The evidence of contestant is confined to the votes of Stalnaker, Gibson and Wix & Starcher.

The evidence of R. A. Ross, p. 65, and of Peter M. Booker, p. 66, tends to show that C. D. Stalnaker was a minor and voted for Respondent, and that his vote should be rejected.

As to Wm. Gibson, the evidence of Peter Goff p. 63 is negative, he knows nothing of his own knowledge, only comparing Gibson's age with young Starcher. The testimony of Peter M. Booker p. 66 is to the same effect.

The evidence of Respondent relating to Gibson's vote completely rebuts the testimony of Ross and Goff and establishes Gibson's vote clearly. John W. Bailey testifies p. 296, that the first time he saw Gibson was at Martin Haskins wedding Decr. 31, 1868, and at that time he was 15 or 16 months old.

Geo. W. Silcott, p. 302, testifies that he as clerk has examined the record of marriages in his office, and that Martin Haskins was married Decr. 31, 1868.

Nancy Booker p. 296, testifies she was midwife at Gibson's birth, and that he was born on the 15th day of September, 1867, and that the John Starcher referred to by Ross and Goff was four days older.

Isaac Starcher p. 307, testifies that he knows Gibson to be over 21 years, and gives dates to support his testimony. It is clear, therefore that Wm. Gibson is a legal voter.

The vote of Wm. Wix is contested also by Respondent, and will be referred to in his evidence, showing that he was a minor as claimed by contestant, and that he voted for contestant, and that his vote should be deducted from the vote of contestant and not from Respondent.

John Starcher.

The Contestee objects to the testimony relating to the vote of John Starcher, because no vote by this name is attached in the notice of the contestant; see p. 67. If however it is permitted to show evidence as to the right of John Starcher to vote upon the ground of his not being of age, this is clearly proved by the testimony of Nancy Booker, midwife at his birth, p. 296, who testifies that Starcher is four days older than William Gibson, and that Gibson was born on the 15th September, 1867.

JACKSON COUNTY.

The first vote attacked is *J. N. Worstel*. This voter is also assailed by respondents. Non residence. Samuel Tidd, p. 74, testifies that he knew Worstel; that Worstel was residing at his house Nov. 6, 1888, had his washing done and boarded there; that he was there off and on for sixteen months prior; that he does not know how he voted. Sam. Tidd lived in Meigs County, Ohio, Joseph A. Petty, p. 78 testifies that Worstel was staying with Sam. Tidd in Meigs County, Ohio, on Nov. 6, 1888; had been staying at Tidd's to the best of witnesses knowledge six or eight months prior to election; that Worstel is a Democrat in politics, but don't know that he voted; that Worstel's father lives in Ravenswood.

To rebut this testimony, J. N. Worstel testifies, p. 323, that he is a single man, son of J. T. Worstel who lives in Ravenswood, who has lived there five or six years; that witness was born March 14, 1859, and lives in Ravenswood; has been steamboating 13 years past, painting sometimes; witness says he was at Tidd's a little while before the election; never boarded there, that is, eat there some but paid no board; was not at Tidd's for the purpose of changing place of residence from West Virginia to Ohio; never voted in Ohio; voted at Presidential election in 1884 in Wirt Co., W. Va., at all other elections at Ravenswood, W. Va.; did not at any time reside or intend to reside permanently in Ohio.

That Mrs. Tidd did some washing for witness, part of which she sent to him in Ravenswood. The testimony of this witness is wholly ignored in Contestant's brief.

The weight of testimony is in favor of the legality of the vote. The voter was a steamboatman frequently from home. Made his home in Ravenswood and voted there for years. There is no declaration made by him of intention to change his residence; on the contrary, he expressly testified that he never so intended. In addition there is no evidence in the record how Worstel voted. No case is made against this vote.

The vote of *E. E. Higgs* is contested: non-residence. U. Lytle p. 79, testifies that Higgs lived in Ravenswood at the time of election; don't know how long he lived there; stated Higgs told him he always voted the Democratic ticket, but witness don't know how he voted.

R. E. Kampfer, p. 80, testifies he knew Higgs; heard Higgs remark a short time before the election of November 6, 1888, that on the day of the election he (Higgs) would have been here about 65 days; he (Higgs) came here from Marshall Co., this State; his parents lived in Marshall County.

W. H. Gould p. 80, testifies he is the father-in-law of Higgs; Higgs was in Ravenswood for sixty days previous to the election. He came from Marshall County here.

E. Wells p. 320, testifies that E. E. Higgs and his wife came here with their baggage more than 60 days prior to Nov. 6, 1888, and stopped at Mr. Cline's in this town and county. I am able to say that he was here 60 days before the election, because I was one of the committee to look after voters, and thus ascertained the fact.

It thus fully appears that E. E. Higgs was a resident of the State for more than one year, and was a resident of Jackson County for more than sixty days before the election, thus conforming to the constitutional requirement.

The vote of *Andrew Myers* is contested. Non residence. R. E. Kampfer, p. 78, testifies that Andrew Myers came to Ravenswood a year or more before his family came; that his family came about the 8th of Nov. 1887; came from Monroe County, Ohio, to work in tannery; did not own property in Ohio or here.

E. W. Brown, p. 319, testifies: I know the fact that Andrew Myers himself came here over one year prior to Nov. 6, last (1888). He came before his family and went to work at his trade, he being a tanner.

It fully appears that Andrew Myers was a legal voter.

The vote of *N. E. Polsen* is contested. Non-residence. It is claimed by the testimony of Samuel Tidd, p. 74, and Joseph A. Petty, p. 78; that Polsen lived in Ohio before the election, and that he voted the Democratic ticket at Ravenswood at the Nov. election, 1888. N. E. Polsen however, testifies, p. 322, that he was a resident of Jackson

County from 1877 to 1887, then went to Ohio temporarily and afterwards returned to Jackson County. This witness' testimony is wholly ignored in Contestant's Brief.

Polsen also testifies that he voted for Charles B. Smith, the contestant. If he was not a legal voter his vote should be deducted from contestant and not respondent.

It is attempted to contest the right of *Charles Cline to vote*, by the evidence of W. A. Holland, p. 79, who testifies to a conversation with Cline after the election, in which witness stated to Cline, "Charley, I reckon this is your first vote?" "No," he says, "I am not of age; I did not vote." Witness did not ask him how he voted; nor does he know how he voted.

I. N. Cline p. 319, testifies that Charles Cline is his son; that he was twenty-three years old the 28th of February last, (1889); that he lived at home here in Ravenswood for more than a year next before February last, makes his home with me; and I have lived here for three years last past; think he is a democrat; not certain; don't know who he voted for. This witness' evidence is entirely ignored in contestant's brief.

The proof is clearly in favor of Cline's right to vote as to age and residence, and there is no evidence as to his voting for respondent.

Haze Williams' vote is contested upon the ground of non-residence, voting at Murrayville.

W. C. Statts, p. 76, testifies, that he knew one Haze Williams on Nov. 6, 1888; he lived on a boat near the wharf at Ravenswood; that witness was deputy sheriff, collecting taxes in March, 1889; called on Williams for tax bill for year 1888; Williams said he was not here when assessment was made, and he had no right to pay it, because he was not a resident of the State when assessment was made. Witness further stated he had heard Williams say he was a democrat.

Contestant on, p. 87, files the certificate of W. W. Riley of the contested voters, voting at Murrayville, being W. O. Bonars and J. R. Coleman. It does not appear that Haze Williams voted at Murrayville, or that he voted for respondent. The charge is not, therefore, sustained as to Williams.

The vote of *N. M. Bolese* is contested upon the ground that he was a minor, and voted at Given, in the district of Ripley.

No evidence is produced by contestant as to a person of this name.

There is evidence in the record for contestant referring to one *N. M. Bowles*, and his vote is assailed, not upon the ground of minority, but on the ground of non-residence.

If it is contended that Bolese and Bowles is one and the same person, then the evidence is objected to, as respondent had no notice that the voter charged was a non-resident, If, however, it was admissa-

ble, it is wholly insufficient. The evidence of W. G. Hickel, p. 83, states that witness knows N. M. Bowles, he is a son of James Bowles; he is a single man; he voted at Givens' voting place Nov. 6, 1888; he voted the democratic ticket, at least that was the way he said he voted; *I think* his place of residence on the 6th of Nov. 1888, was with his father in Putnam county, West Virginia; his father, James Bowles, resided in Putnam county on the 6th of Nov., 1888, and lives there yet.

This is all the evidence produced by contestant as to this vote. Attention is directed to the statement of witness as to residence of Bowles. He says, "*I think* his place of residence was with his father." No evidence of knowledge as to the place of residence. To throw this vote out would disregard all the rules of evidence. The witness states no facts nor gives any reason why he should think so. There is no evidence of minority. As before stated the evidence is wholly insufficient to reject the vote of N. M. Bowles.

The vote of *S. C. Dailey* is contested upon the ground of non-residence.

The evidence of J. O. Shinn p. 91, is taken to prove Dailey's non-residence.

Shinn's ^{*residence*} ~~residence~~ is rebutted by the deposition of T. J. C. Parsons p. 330, and the deposition of Dailey himself p. 347. It is not necessary to examine the evidence as to non-residence, for that Dailey is asked, "state whether you voted on the 6th of November last for J. M. Jackson the contestee for Representative in Congress of the 4th Congressional District, West Virginia." Ans., "I did not." The testimony of these last two witnesses is wholly ignored in contestant's brief.

Dailey not having voted for respondent, the charge is not sustained.

The vote of *O. J. Simons* is contested on the ground of non-residence.

W. G. Hickel p. 83, testifies he knows O. J. Simons; he voted at Givens on the 6th of Nov., 1888; he voted Democratic ticket straight; known him ever since he was a little boy 18 or 20 years; the last time I saw him before I saw him at Givens' voting place on election day, was at Columbus Ohio; that was between 15th and 20th of September, 1888; I asked him if he thought he would come back to West Virginia any ways soon, and he said he didn't think he would, that he could do better there.

This testimony is rebutted by the testimony of C. H. McCoy p. 333, who states that he resides near Jackson C. H., Jackson County, W. Va.; that he knows O. J. Simons; that he is single, and that he was born and raised in the county up to the time he was 18 or 19; witness further testified that Simons made his house his home all the time; that Simons called that his home; that witness' house was between $2\frac{1}{2}$ and

3 miles from Ripley, where witness has lived about seven years; that Simons has kept part of his clothing at witness' house during that time, and all of his clothing a part of the time; that the said Simons has never been out of the State as much as a year in his life.

The evidence of this witness shows clearly that Simons had his home in West Virginia, and that there he kept his clothing and other property. The only evidence contradictory of this, is the alleged statement made by Simons to the witness Hickel in Columbus when asked if he thought he would come back to West Virginia any ways soon; said "he did not think he would." There is nothing in this statement to indicate an abandonment of his home in West Virginia, upon the contrary it is fairly to be inferred from the language used that he did intend to return *but not soon*. It is submitted that the weight of testimony is in favor of the vote being legal. The testimony of this last witness is wholly ignored in Contestant's brief.

The vote of *J. L. Starcher* is contested upon the ground of non-residence.

H. C. Flesher testifies, p. 82, that J. L. Starcher left Jackson county in April 1886, and went to the West, and returned to Jackson county in the early part of April 1888; that Starcher did not reside in Jackson county at any time during the date he left the county in 1886 and his return to the county in 1888, and did not reside in West Virginia during that time, so far as witness knew.

James M. Poling's deposition, p. 82, is to the same purport of Flesher's, with the addition that Poling testifies in a conversation with Starcher before he left. Starcher said "that he didn't think he would ever come back here to live."

It will be seen from the evidence of these two witnesses, that Starcher at no time declared he intended to change his residence, nor did he ever declare he did not intend to return. The statement, "that he didn't think he would ever come back," is not sufficient. It has been repeatedly held the intention to change the residence must be positive.

It is well settled that the act of residence does not alone constitute the domicile of a party, but it is the fact of residence, coupled with the intention of remaining permanently, which constitutes it.

59, American Decision, Note p 113, and cases cited.

"Legal residence" or "inhabitaney" and "domicile" mean the same thing.

59, American Decisions, Note, 112.

Inhabitants of Warren vs. Inhabitants of Thomaston, 43 Me., 406.

Chareton County vs. Moberly, 59 Mo., 238.

Hart vs. Horn, 4 Kansas, 238.

In the light of these authorities apply the testimony of J. I. Starcher himself, p. 350, who testifies he resided at different places in the west for quite a number of years up to 1884; then witness came to Jackson C. H., Jackson county, W. Va., and resided there until April, 1886; went West about the 15th day of April, 1886, and came back to Jackson C. H. the 7th day of April, 1888, and lived there ever since. Witness went West to look after cattle and real estate he owned there. Witness testified that he did not intend to reside permanently away from Jackson C. H. When he left in April, 1886, he left his furniture in his house at Jackson C. H., also his cattle, horses and other stock on his farm near Jackson C. H. When witness returned in April, 1888, he used the same furniture he left on leaving to go West and is using it yet. This testimony is ignored in plaintiff's brief.

If there was intention of removing West to reside permanently, certainly some disposition would have been made of property left behind. It is submitted that the charge is not sustained as to the vote of J. L. Starcher.

The vote of *J. C. Leonard* is contested upon the ground of non-residence.

John Leonard, p. 324, testifies he is father of J. C. Leonard. Previous to 6th of November was a republican. He advocated republican principles. Witness asked him the day of the election if he could not give Jackson a *hint* and he said he could not as he did not like the man. He said he liked C. B. Smith, and intended to vote for him. The witness further testified that his son J. C. Leonard in the summer of 1888 lived in Kansas City, Missouri.

G. W. Parsons, p. 394, testifies that J. C. Leonard was living in Kansas City, Mo., from May, 1888, until July or August same year. I was there during that time.

The deposition of T. H. B. Lemley, clerk, p. 345, shows that J. C. Leonard is recorded as voting at Ripley voting place, Ripley district.

The charge is not sustained as voting for Respondent, but is sustained as voting for Contestant, and should be deducted from his vote.

Charles Reynolds :

The testimony of H. W. Deem, p. 87, tends to show that this vote is illegal.

The votes of *J. I. Hassler* and *J. G. Armstrong* are also contested upon the grounds that each of said voters were non-residents.

The depositions of H. C. Flesher and J. M. Poling, p. 82 of the record, are taken to establish their non-residence. From these depositions it appears that Hassler and H. G. Armstrong, and not J. G. Armstrong, were appointed in the year 1885 to positions in Washington City, in the employment of Government; Hassler as appointment

clerk in the Interior Department, and Armstrong was chief of the Stamp Division in the Internal Revenue Bureau.

Both of these persons were, prior to their appointment, residents of Ripley district, in Jackson county, where they had lived for many years, and left to take employment under the government, and not for the purpose of changing their residence.

They returned to Jackson county, their homes, and voted whilst they were in office in 1886, and also in 1888, showing their intention to hold their residence in Jackson county. It is so well understood that parties going to Washington either as executive or legislative officers, do not abandon their residence in the States from which they are elected or appointed; that the statement of the proposition is sufficient to settle the question. But Contestee relies upon the fact that the vote of H. G. Armstrong is not contested by Contestant. The charge as to these votes not sustained.

The vote of *Frank Lockhart* is contested on the ground that he was a miner, voting at Red Brush voting place. There is no testimony in the record relating to Lockhart's vote, except that of Jos. A. Morrison, p. 75.

He says: "I know Frank Lockhart I suppose he resided in Ravenswood district, Jackson county, West Va., but I do not know. I know Frank Lockhart voted in Grant district at the Red Brush precinct for I received his ballot and Henry Archer put it in the box."

This is the deposition in full so far as the same relates to Lockhart's vote. Not one word as to age and nothing else affecting his right to vote, and there is no testimony as to S. F. Lockhart's right to vote. Charge not sustained.

John C. Deaton's vote is contested on the ground that he was a pauper.

It appears from the evidence of Henry Heck p. 78, that Deaton received assistance from the county a few days prior to the election of Nov. 6th, 1888, and during the summer preceeding.

Jos. A. Petty, p. 78, testifies he knew John C. Deaton; that he resided in Ravenswood, and voted there at the election of Nov. 6th, 1888; that he voted the straight democratic ticket without a scratch

John C. Deaton himself testifies p. 322, and in part sustains the witness for contestant. The weight of testimony is against Deaton's vote, and charge should be sustained.

The vote of *A. A. Walters* is contested upon the ground that he was a non-resident of Ravenswood district in which he voted.

The depositions of D. D. Depue, p. 76., Geo. W. Murray, p. 77, and Jos. A. Morrison, pp. 75 and 77, are taken. These witnesses throw but little if any light upon the question of the district line between Grant and Ravenswood districts, most of their testimony being heresay, and but little of their own knowledge.

The deposition of *A. A. Walters* himself is taken, p. 315. He

testifies that he voted Nov. 6th, 1888 at Independence school house in Ravenswood district; has lived in the county seven years; in Ravenswood district; lived on Nov. 6th, 1888 last, where he now lives.

Witness further testified that his farm and personal property is assessed in Ravenswood district; that his children attend school in that district; that the original district line puts witness three hundred yards in Ravenswood district; that witness has been shown the original line; have seen it; it is marked in the woods.

C. S. Wilcox, p. 338, testifies that he resides near Sandyville, Ravenswood district; has resided there since 1872; was Secretary of the Board of Education of Ravenswood district 12 years since 1872; that A. A. Walters lives on the Ravenswood district side of the line. A. A. Walters is a trustee of sub-district No. 29, Ravenswood district. Witness further testifies that he can't say that he knows in fact where the line is; that the Board of Education employed him on three separate occasions to enumerate the youths of the district of Ravenswood, and in his official capacity he only knows what the people of the vicinity told him with reference to the line. In taking the enumeration he had due regard to the magisterial districts and sub-districts. These last two witnesses testimony are not referred to in Contestant's brief.

The testimony largely preponderates in favor of the legality of Walters' vote, and that he lived in Ravenswood district.

The vote of *John Carney* is contested upon the ground of his being of unsound mind.

W. G. Hickel, p. 83, testifies he knows John Carney and says he is not considered of sound mind, and was not so on Nov. 6, 1888; don't think he is competent to make a contract; don't think he would be responsible for any act he might do. He voted the democratic ticket.

S. G. Awaugh, p. 89, testifies he knows John Carney for twenty-five years; dont consider him a man of sound mind; same mental condition now as Nov. 6, 1888; dont think him a person capable of making a contract or liable for his acts.

Per contra, A. F. Parsons, p. 327, testifies that he knew John Carney ever since he was a little boy; he is not as bright as some men; he was capable of doing farm work; can comprehend what is said to him; he would readily know the difference between right and wrong; if witness was going to employ a man to attend to any thing on the farm would employ him.

B. F. Casto, p. 332, testifies that he knows John Carney and has seen him working on the farm at different kinds of work; he is capable of performing any kind of labor on a farm, would think he would have some knowledge of the value of stock and other things raised upon a farm from what I have heard him say of those things at different times; would think he knows the difference between right and wrong.

Wm. A. Parsons, p. 336, testifies he knew John Carney upwards

of ten years ; he is capable of doing most if not all sorts of farm work ; knows how to take care of money and property kept on a farm ; is not an idiot and has not been a lunatic since I first became acquainted with him ; is capable of making a living for himself.

The last three witnesses who are wholly ignored by Contestant in his brief have equal facilities of forming an opinion as to Carney's mental capacity as the first two. Taking their opinion as correct the preponderance is in favor of Carney's right to vote.

It is, however, sought to defeat his right by showing that a committee had been appointed for him. See Dep. of Lemley, clerk, p. 88, Exhibit "6."

The clerk had no power to make such adjudication ; his act was and is void. The power is vested in the Circuit Court of the county in which the party at the time resided. See Code of West Virginia, Chap. 58, Sec. 38, p. 572.

The vote of *John Kenna* is contested on the ground that he was of unsound mind.

No testimony is taken relating to a voter of this name. Testimony is taken as to John Kemma's right to vote on this ground.

Henry C. Flesher, p. 81, testifies that he knows one John Kemma for about two years ; don't regard him as a person of sound mind, and was not so on Nov. 6, 1888 ; heard him say after the election he voted the democratic ticket.

James M. Poling, p. 82, testifies to knowledge of Kemma to the same purport of Flesher.

T. E. Graham, p. 325, testifies he has been acquainted with John Kemma three or four years ; had frequently conversed with him and heard him converse with others. Whilst witness don't consider him very bright he is not an idiot ; knows that he has correct ideas of right and wrong to a great extent at least ; he is capable of performing almost any kind of ordinary labor ; he goes to the store, buys goods for the house where he lives, chops wood, attends to the garden, hoes corn, attends to stock, and does general farm work.

Wm. A. Parsons, p. 336, testifies as to Kemma's capacity to work and transact business to the same extent as Graham, and further adds : "he is not as bright and intelligent as a great many men ; he has more natural sense than a good many people I know, and, in my opinion, more natural sense than some persons who voted here, at this voting place on the 6th of Nov. last." The testimony of last two witnesses not referred to in Contestant's brief.

The weight of the testimony is in favor of his right to vote.

It is however not conceded that the testimony is applicable to the vote of John Kenna, whose vote is contested, and is therefore objected to.

The vote of *P. W. Jack*, is objected to on the ground of non-residence.

E. F. Ong, p. 85, testifies that he is only slightly acquainted with *P. W. Jack*. I heard him say he was a democrat, might have been in county 60 days before election.

Isaac Sayre, p. 85, testifies; knows *W. Jack*; came to Angerona about Sept. 1, 1888; he worked on Ohio River Railroad; boarded at witnesses house whilst working on railroad; told me his home was in Roane Co.; that he owned property there; opinion of witness was that *Jack* had been in County 60 days before election.

P. W. Jack himself testifies, p. 347, that he resides at Angerona, Union District, Jackson County; that he is single and came to Jackson County, 31st July, 1888 to stay, and has resided there ever since. I was raised in Roane County. This testimony is not referred to in contestant's brief.

Contestant's witness, Sayre, testifies that *Jack* was in Jackson County 60 days before the election, and *Jack* testifies that he came to the County July 1888, to stay. He was therefore in the County the time provided by law (coming from another County in the State) And his intention to remain, which is not denied, fixes his qualification to vote. The charge is not therefore sustained.

George Jacobs' vote is contested upon the ground that he was of unsound mind.

Elijah Slaughter p. 84, testifies that he knows *George Jacobs*, sometimes called *Spencer Jacobs*; he is a person of unsound mind; he has but very little mind; do not regard him as a person capable of making business contracts, or being legally bound by his contracts or his acts.

E. F. Ong, p. 85; He knows *George Jacobs*; he was and is considered by his neighbors as a person of unsound mind; known him 6 or 8 years. Do not regard him as a person capable of transacting business.

Isaac Sayre, p. 86; know *George Jacobs* 7 or 8 years; he voted Nov. 6, 1888; he was a person of unsound mind in my opinion at that time.

R. Ankrum, p. 347, testifies ; Have known George Jacobs, the son of Henry Jacobs for several years ; never talked with him ; heard him talk to others ; have seen him hoeing corn ; working in the garden at Mr. Compton's ; he used to do errands from Mr. Compton's family to my house ; I would not take him to be one of the brightest men, nor is he an idiot.

H. Jacobs, p. 348, testifies that he has a step-son whose name is George ; his sur name is Spencer ; he makes his living by his own labor ; I don't help him any ; he cant do much ; he can plow a little and he can hoe a little ; he is a pretty good plower ; he did all my plowing when he was at home ; he goes to mill ; to the store and anywhere I send him ; he took plums and quinces to market and sold them for me at different times ; he transacted this business in the usual way such business is transacted. He did all the marketing such as taking to the store chickens, butter and eggs and traded them for coffee, muslin and other things the family needed. He knows readily the difference between right and wrong ; he comes pretty close to the value of stock we had on the farm ; he went by my direction and always did it right when he went to the store with marketing. The testimony of this witness is wholly ignored by contestant in his brief.

The deposition of his step-father, Henry Jacobs, goes into detail and clearly negatives the depositions of contestant as to his, George Jacobs mind being unsound. It is not admitted that George Jacobs voted for respondent.

The vote of *Henry Jacobs* is contested upon the ground that he voted, and was an alien at the time he voted.

E. F. Ong, p. 85, testifies that H. Jacobs voted, and he *thinks* he voted the democratic ticket ; that H. Jacobs said that day he was a foreigner ; said he was born in Germany ; he did not produce any naturalization papers.

Isaac Sayre, p. 86, testifies he knows H. Jacob ; he voted the democratic ticket, was standing by him when he handed it in ; he stated he was foreign born ; I challenged his vote.

H. Jacobs is himself sworn. Dep. p. 348. He testifies that he had lived near Angerona, Jackson county, since 1864 ; 70 years old, born in France ; came to the United States when I was 13 or 14 years old. Have been voting since I came to the county ; I obtained naturalization papers in the city of Erie in the fall after I was twenty-one years old ; my house was robbed in the year 1864 or 1865 and my naturalization papers were taken or destroyed, and cannot produce them for that reason. This testimony is not referred to in contestant's brief.

Jacobs has been a voter in West Virginia for twenty-five years. His right to vote has never been called in question, until he offered to vote Nov. 6, 1888. He swears he was naturalized, and his papers destroyed in the way testified to, and therefore cannot be produced. Is his testimony sufficient to legalize his vote? or must his vote be rejected because he does not produce his naturalization papers? It is held as a general rule a person who has voted is presumed to have been qualified until the contrary is proved. *Dale vs. Irwin*, 78 Ills., 170. *People vs. Thornton*, 60 How Prac., 471. McCreary's American Law of Elections, sec. 62.

Where an alien born person votes at an election, the presumption that he is not entitled to vote, arising from the fact of being alien born is not sufficient to exclude his vote on a contest, but the presumption will be that he voted legally. The presumption of law against the fact of the commission of crime, will overcome the one against his right to vote, arising from the fact of foreign birth. *Beardstown vs. Virginia*, 76 Ills., 34. *New Jersey case*, 1st Bartlett, 24. McCreary Am. Law of Elections, sec. 294.

Jacobs' vote was challenged; the commissioners in receiving his vote acted in a quasi judicial character in passing upon his right to vote. It must have been made to appear that he was naturalized; in this contest, having voted, the fact that he was foreign born is not sufficient to exclude his vote.

Oliver Burns.

This voter is referred to in contestant's brief. The deposition of Elijah Slaughter, p. 84, is taken as to his right to vote. Contestee excepted to this deposition so far as the same relates to Oliver Burns, because the illegality of said Oliver Burns' vote is not attacked in contestant's notice on any ground whatever. See p. 84 of record.

These are all the grounds of contest in Jackson county claimed in contestant's brief. All others specified in contestant's notices are deemed to be waived.

LINCOLN COUNTY.

The vote of *Reece Stratton* is contested upon the ground that he was of unsound mind, and being so, voted at Hamlin in the district of Carroll. Dr. W. S. Bowles' deposition, p. 93, is taken to support this charge. He testifies that he has known Reece Stratton about seven years. As to the condition of Stratton's mind, the doctor says that Stratton is like a great many others, he is not burdened with a very strong mind. Farther the doctor is asked: "Do you or do you not consider the said Reece Stratton to be of sound mind?" Answers, "he has a medium mind."

H. Hager testifies, p. 93, he has known Stratton for ten years; considers him a man of weak mind. I do not consider him a man of sound mind; that Stratton claimed to be a democrat.

W. W. Baker, p. 93, testifies, that he has known Reese Stratton since 1872 or 1873; that from his understanding of the word "sound mind" I do not consider Stratton a man of sound mind; that Reece did a little work for him, chopped a little stove-wood or something, can't remember exactly what it was; that his understanding was he belonged to the democratic party; votes the democratic ticket. On cross examination witness testified that he did regard Stratton as entirely devoid of understanding; he can understand simple things. His vote was challenged at election Nov. 6, 1888, never knew of any objection to his voting before. He told me he voted for Jackson for congress.

John W. Carroll testifies, p. 95, that he's 22 years old and has

known Stratton nearly all his life. When witness was asked as to condition of Stratton's mind; stated, "It just depends upon what it takes to constitute a sound mind. If unsound mind means bordering on idiotcy, then I believe him to be of unsound mind."

Upon cross examination witness further stated he can understand some few simple things. I regard him as a very weak minded man.

Respondent in rebuttal offers the evidence of John W. Reynolds, p. 354, who testifies that he his 30 years old; that he has known Reece Stratton for 10 or 12 years, and Reece has made my house his home for as much as a year during that time; I think he is capable of voting; he has not as sound a mind as some others; I don't think he is an idiot; he knows right from wrong; I think he has mind enough to take care of himself and to make his own living. I think he can do ordinary work, and what work he does, he does well; you can't get him to slight his work; I have known him to work the public roads for the last six or seven years; I think he has worked the roads every year I have except this year, and he left my house this year when I wanted him to hoe corn, saying that Calahan, the overseer of the road, had warned him to work, and he would have to do so.

Lacy Grass, another witness for respondent, testifies, p. 355, that he is 46 years old and has been acquainted with Stratton for 8 years. When witness was asked as to the condition of Stratton's mind, testified: "I can't say he is a man of unsound mind. He has mind enough to know what is right and what is wrong. He has mind sufficient to perform any ordinary labor, such as farm labor. He is a member of the Southern Methodist church; I have heard him both pray and speak; I think he lives as close to his duties as any man I ever saw, judging from his outward walk. From my acquaintance with him I regard him as a qualified voter so far as his mind is concerned; not related to him; not that I know of. I have been voting the Republican ticket for some time." These last two witnesses not referred to in contestant's brief.

Doctor Bowles says that Stratton is not burdened with a strong mind; that he has a medium mind.

The witnesses for respondent clearly prove his qualifications to vote. The preponderance is largely in favor of the legality of Stratton's vote. It should not be rejected. No other ground of contest in Lincoln county being claimed in contestant's brief, all others stated in his notices, are deemed waived.

MASON COUNTY.

The vote of *J. M. Lewis* is contested by the contestant upon the ground that he was a minor and voted for respondent at Wolfe Valley voting place in the district of Union.

Samuel Smith, p. 96, testifies that he was acquainted with *J. M. Lewis*; that witness was a commissioner of elections; that *Lewis* voted; that his vote was objected to, and that *Lewis* stated he was 21 years

of age, his father having told him so; that witness had a conversation with James Lewis, the father of J. M. Lewis, after the election, in which conversation James Lewis stated that J. M. Lewis was not of age at the time he voted.

B. H. Blagg, p. 96, testified that he filled out the ticket that J. M. Lewis voted; that it was a straight democratic ticket with the exception of R. L. Barnett, republican for Assessor, and the said B. H. Blagg, republican for Justice of the Peace.

Z. L. Harris testified in rebuttal, p. 367, that he was a commissioner at said election; that J. M. Lewis was not sworn; that the commissioners hesitated to receive his vote, and being assured by other parties that Lewis was of age, his vote was received; that the said Lewis claimed he was 21 years old, and that he was a legal voter.

John M. Lewis, p. 370, testifies that he was born Oct. 16, 1867; have examined the family bible in reference to the date of my birth, and it shows October 16, 1867; examined it before the election and after. I had no doubt about my right to vote; my father said nothing to me about it; never heard my father express his doubts to any one about my age before or after I voted.

The weight of testimony is clearly with J. M. Lewis' right to vote. No testimony is offered by contestant as to the minority of Lewis, except the statement of Smith, as to what James Lewis, the father; told him; this was hearsay and illegal, and objected to at the time. If it was proper testimony, the evidence of J. M. Lewis, the son, fully rebuts it. The vote, therefore, must stand as cast.

The vote of *W. Palmer* is contested upon the ground that he was a non-resident, and voted for respondent at the voting place of Hannan No. 2.

W. H. Hayman, p. 97, testifies that he was present when W. A. Palmer voted on the 6th of Nov., 1888; that he challenged his vote; that the commissioners of election permitted him to vote on the ground he came of age after coming into the State, though he had not been a resident of the State a year; he came in September, 1887, to seed his farm with his father, and moved here in March, 1888.

W. Palmer testifies in rebuttal, p. 365, that he is the W. Palmer who voted at Hannan No. 2; that he came to this county to reside permanently in September, 1887; my father declared his intention to come to this State to live in September, 1887; he rented a farm in this county, and the only reason he did not move over here at that time was he could not get a house to move into; the house on the farm he rented was occupied, and he could not get it until March, 1888. I made my home with my father until September, 1887, when I came to this county; I did not claim to the Judges and others on the day of the election that I had a right to vote here because I came of age in this State; I claimed that I was here one year; I also claimed I became of age after I came to this State; I came here to seed the farm with my

father in September, 1888; I came here at that that time with the intention of making this my home. This testimony is not referred to in contestant's brief.

It is manifest that the testimony of Palmer establishes his right to vote, and the charge is not sustained.

James McDaniel's vote is contested upon the ground that he was a non-resident, having voted for respondent at Point Pleasant voting place.

William Chambers, p. 98, testifies that McDaniel admitted to him on the day of the election that he had voted; that on the day before the election the said McDaniel admitted that he had no right to vote, and that if he did vote he would not vote to suit witness as he (witness) was a Republican; he further stated to witness the reason he was not entitled to vote was because he had not been a resident of the State long enough.

This is all the evidence as to this vote in the record. Giving it full force for all it proves, and it is not sufficient to charge this vote as being cast for respondent. There is nothing in the evidence to indicate that McDaniels voted for respondent. The fact that he stated that he would not vote to suit the witness is not sufficient. He may have been a Republican and yet not voted to suit the witness. Nothing was said in the conversation as to candidates for Congress. In addition there is no legal evidence that McDaniels voted at all. His name is not in the list testified to by R. E. Mitchell, clerk, p. 105, as voting at Pt. Pleasant Precinct, at the Court House, which list purports to give the names of voters whose votes contestant charges were illegal. It is claimed, therefore, if McDaniel's vote was illegal, his vote should not be allowed against respondent as charged.

The vote of *E. J. Long* is contested upon the ground that he was a non-resident, and voted for respondent at Faidley's voting place.

C. W. Messick, p. 98, testifies that he has known E. J. Long since October, 1888; witness asked him before the election in regard to his voting at the election of Novr. 1888; asked him about his political views; he said he was a democrat; he said he did not expect to vote here as he was not entitled to vote, as he only came here from Missouri in the Spring of 1888.

It appears from the deposition of R. E. Mitchell, p. 105, that E. J. Long voted at Faidley voting place.

It is insisted, however, that contestant should not be allowed to contest this vote, for the reason that no notice was given by contestant to respondent that the vote of E. J. Long would be contested. The evidence of Messick was excepted to, p. 99, at the time it was taken. It should not, therefore, be rejected for this reason.

The vote of *W. S. Reece* is contested upon the ground that he was a ~~new~~ resident voting for respondent at Faidley precinct.

Moses Carlyle, p. 97, testifies that he knows W. S. Reece for eight years; that Reece came to Clendenin district in the latter part of 1886 or forepart of 1887, and practiced medicine; he left there about the first of October, 1888, and moved to Gallipolis, Ohio; he has practiced medicine on this side of the Ohio river and came back and forth from Gallipolis; he said he had moved his family to Gallipolis and asked me to tell any of his friends who enquired about him that they would find him at Gallipolis. John L. Whitten, p. 99, testifies that he has known Dr. Reece all his life; had a conversation with him about two months ago; he told me during the conversation that he had been living since last summer—conversation was in Gallipolis, Ohio; he is a democrat.

The deposition of the said W. S. Reece is taken in rebuttal, p. 374. He testifies that on the 6th day of November, 1888, and for two and one-half years prior thereto he resided in Clendennin district, Mason county; about the last of November, 1888, he moved to Gallipolis, Ohio, my family went to Gallipolis about October 1st, 1888. I moved them there temporarily, having contracted for a farm in Clendennin district on which I lived, and having rented the farm about the 1st of October, 1888, I moved my family out to vacate the house for the tenant till the terms of sale were completed, not wanting to build a house for the tenant until I had gotten title to the farm.

Upon cross examination witness further testifies that he did not enter into the practice of medicine in Gallipolis when he moved his family there because he expected to make his permanent home in Mason county, W. Va., and staid in Mason county to hold his practice until the forfeiture of the land contract which was about the last of November, 1888, about which time witness decided to move out of the State of West Va., and had not at that time decided to locate at Gallipolis; was not in Gallipolis more than two or three nights or days until about the 1st of December, 1888. This testimony is not referred to in contestant's brief.

This is a question of intent; It fully appears from the evidence of Dr. Reece that he did not intend to remove from West Va. until after the election. There is nothing in the evidence of Contestant inconsistent with the statements of Dr. Reece. His vote is clearly legal and must stand as cast.

The votes of *John Sayre* and *Absalom Sayre* are contested upon the ground of non residence, voting for Respondent at Point Pleasant voting place, Lewis district.

L. T. Pilchard, p. 100, testifies that he has known John Sayre and Absalom Sayre all his life, they lived near Letart; called that their home. Had a conversation with them some months before the election; asked them where they were living; they replied they were in a junk boat up in the Kanawha and had been there a few days; asked them where they would be on the election in November, 1888; they replied they didn't suppose they could vote in Point Pleasant; if they

voted they supposed they would have to go to Letart. Ab. told me they called that their home up there, but they had been going up and down the river in a boat; they were democrats. Letart is in Mason county, West Va.

Benjamin Clagg, p. 101, testifies upon cross-examination that he knew John Sayre lived at the mouth of Three Mile Creek, in this Lewis district, during the winter of 1887-1888.

The deposition of Rankin Wiley, in rebuttal, p. 372, was taken. Wiley testifies that he has known John Sayre for three or four years. Two years ago, last September, John Sayre worked for me on the farm in this (Lewis) district; have seen him here frequently since that time. Both of the Sayres were sworn when they offered to vote and stated under oath that they made Point Pleasant their home at the time they voted.

There is no claim upon the part of contestant that John Sayre and Absalom Sayre were non-residents of the State, but being resident of Letart district, they voted in Lewis district. The statute requires that the voter shall be a bona-fide resident of the district in which he offers to vote. No length of time is required for such residence. Both of the Sayres being sworn made oath that they were such residents.

The testimony is sufficient to show they were legal voters, and that their votes should be counted as such.

The votes of *G. W. Shamlin*, and *W. R. Shamlin*, and *Wilson Shamlin*, are contested upon the grounds that they were non-residents of the State, and voted for Respondent at Point Pleasant in Lewis district.

Benjamin Clagg, p. 101, testifies that he knew *G. W. Shamlin* and *Wm. R. Shamlin* for eight years; saw them here at times on boats running around; had conversation with them on Sunday before the election; was down on the Kanawha river bank; they were there and old man Shamlin said he had not voted for several years, but he was going to vote this time; he said he expected to vote here; vote the democratic ticket; he said his home before he went on the river was in Jackson county. They were here in the spring for two or three weeks and then went down the river, in spring of 1888; on the day of the election their boat was anchored on Clendenen side of the river; know old man Shamlin about eight years: first got acquainted with him below Kanawha about a mile from Point Pleasant.

W. H. Barrett, p. 103, testifies that he knows the Shamlins when he sees them; don't know them apart; their occupation is making rustic chairs, and live in a shanty boat; when I first knew them one of them lived at Five Mile, up the Kanawha, on the Point Pleasant side of the river; the other lived at Three Mile on the lower side of the river; on the day of the election they were located on lower side of the river; I challenged their votes; they swore they made Point Pleasant their home for five or six years; received their mail here and still claimed it their home and place of residence.

Respondent offered the deposition of Rankin Wiley, p. 372, in rebuttal, who testifies that he knew G. W. Shamlin, and Wm. Shamlin, for three or four years; two years ago G. W. and Wm. Shamlin worked for me on my farm in this (Lewis) district Mason County; have seen these parties here frequently since that time. The testimony of this witness not referred to in Contestant's brief.

There is no question as to residence of the Shamlins in Mason county. Their votes are contested upon the ground that they were residents of Clendennen district and not Lewis district. As stated as to the votes of the Sayres it only requires bona-fide residence in the district in which they offered to vote. This residence they swore to and is not disputed. The mere fact that they were temporarily out of the district did not defeat their right to vote at the place of their legal residence. There is no evidence, however, of any of them having voted except Wm. R. Shamlin. Dep. of Mitchell, p. 195.

The charge fails, and the votes must stand as cast.

The vote of *Wilson Ward* is contested on the ground that he was a non-resident, voting for Respondent at West Columbia voting place, Waggener district.

A. B. Woodrum, p. 102, testifies, know Wilson Ward when I see him for about one year. Been running a mill back of West Columbia about two years.

Wilson Ward sworn in rebuttal, p. 360, testifies he is 24 years of age; had lived in West Va four years this fall; am the same Wilson Ward who voted at West Columbia; I moved in the vicinity of West Columbia in August, 1887, and have lived in Waggener district since that time; moved there from Kanawha county, this State; I have made my home in this State ever since I came into it.

Samuel Ward, p. 361, testifies to the same as his son William has testified to. The testimony of these last two witnesses not referred to in Contestant's brief

The vote of Wilson Ward is clearly legal and should stand as cast.

The vote of *W. N. Dixon* is contested on the ground of non-residence, voting in West Columbia.

A. B. Woodrum, p. 102, testifies: Have known W. N. Dixon for thirteen years; he lived in West Columbia, and about a year prior to the election he moved to Carbondale, Ohio; he took his plunder with him; he came back but had not been back a year before the election.

No other evidence is offered as to the legality of this vote. It fully appears that Dixon had been a resident of West Virginia for at least thirteen years; that about a year before the election he went to the State of Ohio. There is no evidence that he went to change his residence. The fair inference is that he did not so intend, for in a short time he returned.

It appears from the cross-examination of Woodrum that Dixon with other coal miners went to Carbondale coal mines in Ohio temporarily for work; that shortly afterwards they returned, and all voted, both democrats and republicans. There is no evidence to show how Dixon voted. They were sworn and the evidence is they did not go away to change their residence. Dixon's vote is legal.

The vote of *William Drake* is contested on the ground that he was a non-resident voting at West Columbia.

J. Taylor Bumgarner, p. 104 testifies that he has known William Drake nearly all his life. About a year or eighteen months before the election he went to Hocking Valley, Ohio; he married there. I don't know long he lived there before he came back. He came back here about a month or six weeks before the election; he told me he was a democrat. He was living with his mother in West Columbia before he went to Hocking Valley, when he returned he made his home with his mother.

John Behan a witness for Respondent, p. 363, testifies that he knows William Drake; that he lived in West Columbia with his mother; he left his mining tools at his mothers while he was gone. He worked part of the time in the coal mine and part on the tippel while at Camden; he worked at the coal mines while in Ohio. There is no evidence how he voted. The testimony of last witness is not referred to in Contestant's brief.

The weight of testimony in this case is that Drake did not abandon his home; did not go from the State to change his residence, as is evidenced by his returning to his former home. He is also a miner raised in West Virginia, leaving temporarily for work and then returning. It is confidently claimed that his vote is legal.

These are the voters as to whom evidence is offered in the record. There are several others named in the notice of contest, as to whom no evidence is offered. Upon the whole testimony we claim that contestant has produced no testimony warranting the rejection of any vote contested, and certainly no evidence tending to show that any vote cast for Respondent in Mason county should be rejected.

PLEASANTS COUNTY.

Contestant contests the votes of the following named persons voting for Respondent in the county of Pleasants:

The vote of *John W. Cunningham* is contested on the ground of non-residence, voting at Galloway school house in Union district.

John W. Cunningham, p. 106, testifies that prior to September 4, 1888, he was living in Ritchie county, West Va.; that on September 4, 1888, he removed from Ritchie county and settled in Pleasants county where he has since resided; that when he left Ritchie county as above stated it was his intention to reside permanently in Pleasants county.

Same witness for Respondent, p. 393, testifies that he was in Pleasants county, residing there 62 days before the election and claimed his residence there.

R. A. Gorrell, witness for Respondent, p. 389, testifies that he has known John Cunningham ever since he was born; considered him a citizen of Pleasants county on November 6, 1888; that Cunningham came to Pleasants county some time in July or August; he told me that he and his wife had parted, and he did not allow to live with her any more. He went back about the last of August to Ritchie county, and the first I saw of him was on the 4th of September when he came back and asked me to rent him a house; said that him and his wife was going to live together; that is what I predicate my judgment upon that he was a resident of the county.

Cunningham's vote is contested on the ground that he was a non-resident of the county 60 days prior to the election, removing from one county to another. It was not pretended he was not a resident of the State.

There is nothing in the evidence to contradict Cunningham's testimony that he was not a resident of Pleasants county for 60 days prior to the election. So the charge is not sustained.

J. R. Courthney's vote is contested upon the ground that he was a non-resident of the district of Jefferson and had not been a resident of Pleasants county 60 days prior to the election, voting at Ruckman's school house.

J. B. Courtney's deposition is taken, p. 108, testifies that he is a resident of Pleasants county; that he lived one year at West Union, in Doddridge county, and moved from there to French creek, Pleasants county, this spring one year ago and still staying there; was not living in the State of Ohio during the year 1888; moved to French creek on the 15th of May.

J. H. Marple, p. 108, testifies that Courtney moved from his neighborhood to Ohio in 1884, and came back to French creek in the spring of 1888; he does not know of Courtney's moving from Ohio to Doddridge county, and from Doddridge to Pleasants county.

Ralph H. Wilson, p. 395, testifies that Courtney was sworn when he offered to vote, and proved that he was entitled to vote.

If the witness Courtney is the one whose vote is challenged by the name of "I. R. Courthney" then being offered as a witness by Contestant his statements must be taken to be true. He proves conclusively his vote to be legal; there is nothing in the evidence to contradict him. He is supported by Wilson and not contradicted by Marple. There is no evidence as to I. R. Courthney. The charge therefore is not sustained.

William Ruttencutter's vote is contested on the ground that he was of unsound mind, voting at Raven Rock voting place in Union district,

To establish the fact that Ruttencutter was of sound mind, Contestant first gives him credit as a witness of sound mind by taking his deposition. p. 110 of the record, in which the said Ruttencutter testifies that he was born in 1823; his occupation farming, getting out ties and logs, and any kind of work that any other man could do of common work; that his vote was challenged on the ground that he was of unsound mind; that his mind was sound enough, and could tell how old he was: it was as sound as his mind when I voted; when I say "as sound as his mind" I mean as sound as the one who challenged me; I voted that (Democratic) ticket all way through.

Contestant's counsel not being satisfied with Ruttencutter's deposition after making him Contestant's witness, proceeds to contradict him, taking the deposition of George M. Williamson, p. 112, who testifies: "I don't consider him (Ruttencutter) a man of sound mind, and have not for several years. I formed this opinion since I have known him, and that has been several years; have known him twenty-five years.

James Bailey, p. 126, testifies that he has known William Ruttencutter for over thirty years; I don't think he was a man of sound mind for the last five years.

Enos McFadden, p. 126 testifies that he is acquainted with William Ruttencutter, and don't consider him a man of sound mind.

In rebuttal Respondent files the testimony of Wm. Kester, p. 385, who testifies that he has known William Ruttencutter, of Union district, Pleasant's county, for fifty years, and considers him perfectly competent to cast an intelligent vote; that he has, to the best of witness's knowledge, always managed his own business on his farm, buying and selling throughout his entire life to the present time.

Charles Bailey, another witness for Respondent testifies, p. 391, that he is 51 years of age and has been acquainted with William Ruttencutter ever since he could recollect anybody; he has queer ways, but believes his mind is all right. He has always attended to his own business, managed his large farm, done all his buying and selling and trading all through life. Have worked for Wm. Ruttencutter; run rafts for him; he always kept the account of the work and attended to the business himself. Frank Riggs does not attend to the business for him; he attends to his own business; I live about one mile from Ruttencutter, and lived there all my life.

On cross-examination witness testified that he is acquainted with Ruttencutter; he talks and acts curious sometimes; he has good sense and attends to his affairs.

A. W. Powell, another witness for Respondent, testifies, p. 394, that he has known Wm. Ruttencutter 12 or 14 years; considers him to be a man of sound mind. He dealt with me in my store several years, and he sometimes loaned me money, and I loaned him money back; he kept his accounts in his head, I kept mine in book, and we

always came out right together, and he is still dealing with me occasionally.

E. R. Riggs, another witness for Respondent, p. 397, testifies he has known Wm. Ruttencutter 35 years. So far as witness knows he has always attended to his own business in the management of his affairs, and is a man of sound mind. This last witness's testimony is not referred to in Contestant's brief.

It is manifest that the weight of testimony is in favor of the soundness of mind of this voter, which taken in connection with the testimony of Wm. Ruttencutter himself, establishes the fact that he was, on the 6th day November, 1888, a legal voter, and the charge of Contestant is not sustained.

Cassius Ruckman's and *Aaron Thomas'* votes are contested upon the ground that they were of unsound mind, voting at the Court House in Washington district.

Cassius Ruckman is, by Contestant, offered as a witness, p. 113. He testifies that his name is Cassius M. Ruckman; age 27 years; occupation, farming; reside at John McTaggart's, in Grant district, Pleasants county; I voted Nov. 6th, 1888, at St. Marys for Mr. Jackson, for Congress. Aaron Thomas, p. 113, testifies to the same facts as to himself.

Contestant further offers the deposition of John Boley, p. 115, who testifies that he is acquainted more with Aaron Thomas than with Ruckman; they are easy turned sort of fellows; could not say they are foolish; they are not as bright as they ought to be; have seen sharper fellows; from their actions I could not say they were men of sound mind; I could not say they were intelligent, but they are easy turned fellows and easy persuaded.

George K. Ruttencutter, p. 119, testifies that he is acquainted with Aaron Thomas and Cassius Ruckman; judging from their actions I would not think them men of sound mind.

Addo Doan, p. 118, testifies that he is acquainted with Aaron Thomas; have known him in the neighborhood of 18 years; don't think he is a man of sound mind. I am not an expert, but I consider a man of sound mind that can do business intelligently.

In rebuttal, Respondent files the deposition of P. S. Braford, p. 398, who testifies that he is over 50 years of age and by occupation a physician; has been practicing over 30 years and am a graduate of Jefferson Medical College, Philadelphia, Pa.; that he is acquainted with Cassius Ruckman from his boyhood up to the present, and have known Aaron Thomas for several years; from my knowledge of them personally, and from a professional standpoint, I consider them to be men of sound mind.

The testimony of Dr. Braford is of more weight than the evidence of Contestant's witnesses. The witness Boley himself giving testimony that would warrant the conclusion that Ruckman and Thomas

have sufficient mental capacity to authorize their votes to be received added to the testimony of Dr. Braford is sufficient to establish their right to vote. The charge as to these votes are not made out. But attention is called to the fact that Contestant, in his brief, entirely ignores the testimony of Ruckman and Thomas, which he himself took, thereby giving them credit as witnesses of mind enough to testify. This omission does not seem to be accidental.

The vote of *A. Kamminka* is contested on the ground that he was not a resident of the district of Washington at the time of said election, and had not been a resident of said State for one year next preceding said election, and had not been a resident of said county for 60 days next preceding said election.

In support of this charge Contestant takes the testimony of *A. Kamimky*, p. 113, being the party whose vote is contested.

A. Kamimky testifies that his age is 26 years, and he resides in St. Mary's, Pleasants county; was born in Russia; arrived in Philadelphia, Pa., in 1880; went from there to Baltimore and first made that my home; subsequently removed to West Virginia; was naturalized in Baltimore, Sept. 26th, 1888; voted at St. Mary's, Nov. 6th, 1888; was a citizen of the State; had a right to vote; was long enough in the State, and long enough in the county; was in the county about eleven months before I voted. Witness produced his naturalization paper which is filed, p. 114 of record. On cross-examination witness testified that he did not have any particular place in the State where he resided before he came to Pleasants county; used to peddle at different places; at Grafton, Clarksburg, Martinsburg, and at other points for about three years.

Kamimky proves that he has lived in the State more than one year, and in the county which he voted more than 60 days. There is no evidence to controvert these facts, and being Contestant's witness his testimony must be taken as true. He must be held to be a legal voter, and the charge as made is not sustained.

James Powell's vote is contested on the ground that he is of unsound mind, voting at Ruckman's School House, in Jefferson district in Pleasants county.

Contestant's testimony as to *Powell's* vote tends to show that it is illegal.

The vote of *J. C. Adair* is contested on the ground that he voted for Respondent at the voting place of Calf creek school house in the district of Grant, and that he was *not* a resident of said district of Washington at the time of said election.

C. P. Cochran, p. 121, testifies that he is acquainted with *J. C. Adair*; that he is a democrat and always has been so far as he knows. *Adair* was not a resident of Grant district for the reason that he had moved to St. Mary's, in Washington district. I was here about the 3rd or 4th of November, 1888, in St. Mary's, and saw *Adair's* goods being

moved from the depot. Adair's vote was challenged in Grant district for that reason, and he said he had moved to St. Mary's, at the voting place on the day he voted. When he moved his goods to St. Mary's he claimed he was going to California. He claimed that he had only moved to St. Mary's temporarily, and claimed he thought he had a right to vote.

George W. Boss, p. 123, testifies that he is acquainted with J. C. Adair, and that Adair and his family did not reside in Grant district on the 6th day of November, 1888.

E. B. Steere, p. 124, testifies that he does think that J. C. Adair lived in Grant district on Nov. 6, 1888. He stated in my hearing that he had moved his goods to St. Marys, Washington district, except a few traps that seemed to be left in the yard.

In rebuttal, Samuel C. Hammat, a witness for Respondent, testifies, p. 385; that he is acquainted with J. C. Adair; has known him about five years; I think he was a resident of Grant district at the November election, 1888. I saw Adair on the platform waiting for the train; I asked if he was moving away; he said no, they were only going to St. Marys on a visit, and that he was not going to move until after the election; he said he was packing preparing to move to California; that he intended to move to California about the 9th or 10th of November.

On cross examination, witness further testified that the conversation was about the 1st of November; he said he was going to St. Marys; Mr. Adair returned.

Mary Ellener Chisholm, another witness for Respondent, p. 397, testifies that it is not true that J. C. Adair moved his family and effects to my house a short while before the election of the 6th of November, 1888; he came with his family to make me a visit the Thursday before the election, before they moved to California. The household furniture that came with them and Mrs. Adair belonged to my mother; Joe Adair staid until Friday and then went back to Willow Island; came up again on Saturday evening and went back Monday to Willow Island; came up Tuesday evening again after the election. J. C. Adair claimed Grant district as his home; he said it was his intention to stay there until after the election.

The evidence proved that Adair, who had lived for several years in Grant district, intended to remove to California after the election, but that he did not intend to, nor did he abandon his home in Grant district, until after the election.

The weight of evidence is certainly with the Respondent as to the legality of Adair's vote, and therefore claims that the charge is not sustained.

The vote of *M. Wade* is contested on the ground that he was a non-resident, voting at Raven Rock, Union district.

George M. Williamson, p. 112, testifies that *M. Wade* was only

in Pleasants county about six or eight months before the election ; as to his right to vote he could not say as he might have come from some other county in the State.

James Kincade, p. 125, testifies that he is acquainted with M. Wade ; he is a democrat ; he told me he voted the democratic ticket on the 6th day of November, 1888 ; he told me he moved from Barnesville, Ohio, when he came to Raven Rock last May, 1888 ; Raven Rock is in Pleasants county.

The evidence would probably have been sufficient to exclude the vote of M. Wade, if it had been proved that he voted at Ravens Rock, in Pleasants county. The witness, Kincade, testifies that Wade told him he voted but he does not testify where he voted. The charge is he voted at Raven Rock ; Contestant files the certificate of John L. Knight, clerk of the court, with his deposition, p. 128, marked Exhibit 2, giving the names of persons voting at the several voting places in said county at the election of Nov. 6, 1888, whose votes were contested, and the only one named at Raven Rock is Wm. Ruttencutter. M. Wade's name does not appear at that voting place nor does the proofs in the record show that he voted at all. In the absence of any proof that he voted at Raven Rock or anywhere else the charge is not made out.

Contestant offers no testimony as to the other person in his notice charged with illegal voting. As to persons charged he is entitled to have the vote of James Power rejected and deducted from Respondents count of votes cast in Pleasants county.

PUTNAM COUNTY.

C. B. Smith contests the following votes in this county :

I. Sprigle, Andrew Burns, Hugh Ross, R. M. McCalister, Samuel Peters, Toliver Tockett, William Tollman, Jackson Dillon, W. H. Morris, F. Alford, Will. Arbaugh, George Johnson, Hank Dudding and Samuel Green.

The Contestant offers no proof whatever to sustain the charges against these voters, and therefore it must be considered he has abandoned the same.

RITCHIE COUNTY.

Contestant contests the following votes in this County in his brief, thereby waiving objection to all others in his notices.

George Dean, charge, minor.

George Dean, p. 131, proves his age point blank. He is put on the stand by Contestant and he is not permitted to discredit him. But still Contestant endeavors to do so, and signally fails. He puts on the stand Hezekiah Kibbee, p. 131, and C. Douglass, p. 133-4. Contestee

insists on the exceptions taken to these depositions as being legally and properly taken, and therefore they should not be read. But if they are read, contestee denies that they are sufficient to overthrow the sworn statement of George Dean himself. The certificates filed with G. W. Amos, clerk, are not proper evidence, and they do not identify this voter. This vote is good.

Grant Griffith, minor.

The evidence tends to show this vote to be illegal.

George Dotson, non-resident.

Owen Mulline, dep, p. 137, is the only evidence in regard to this vote, and he gives only his opinion and no facts whatever. He affirms he has no personal knowledge of his own, touching Dotson's right to vote. He, however, testifies that Dotson himself told him he had been in the county long enough to vote. The charge is not sustained.

John Meritt, pauper.

The Contestee excepts to this vote being contested, for the reason that no notice was given him that the same would be contested. Therefore the vote should stand.

ROANE COUNTY.

Smith contests a number of votes alleged to have been cast for Jackson and takes evidence as to the following:

Henry Reynolds, charge, non resident.

Elmore Cutright, p. 144, Sylvester Wilson, p. 146, Edward Carder, p. 160, and J. B. Casto, p. 161; all give evidence tending to prove that Reynolds had moved to Kansas and said it was his intention to make that his home. He came back in October, 1888 and voted, and in about three weeks went back to Kansas.

Per Contra, J. M. Holswade, p. 477, testifies that he stated to the commissioners of election that he was in the West visiting relations and that he always regarded Roane county as his home. The weight of evidence the vote is illegal.

Dr. J. D. Summers, charge, non-resident.

J. C. Clevinger, p. 146, testifies that to the best of his recollection moved to Roane county between 15th and 20th of October, 1888; that he had not been a resident of the county 60 days.

A. J. Coberly, p. 148, testifies that Summers moved in the county between 15th and 20th of October, 1888.

M. W. Howell, p. 149, testifies he met him with his furniture in a wagon about 17th September, 1888; he said he was moving to Roane County. He also told me at the time he had been in Roane County three weeks before, and rented a Dwelling House there, to practice medicine.

C. A. Crislap, p. 149, testifies that Summers voted there and that there was no other Summers voted.

P. T. Radabaugh, p. 155, testifies the same as Crislap.

Per Contra W. B. Gibbs, page 475, testifies that he rented property to Summers on the 4th or 5th September, 1888, possession to be delivered on the 18th September following—that the contract would be reduced to writing when he moved, and it was and the contract is dated 20th Sept., 1888. But he swears he moved into the property on the 18th or 19th Sept., 1888.

Dr. J. D. Summers, p. 476, testifies he rented of W. B. Gibbs on the 5th day of Sept., '88; that he was a resident of the State all his life and of Curtis District, Roane County.

The said Summers further testifies that it was his intention to be a citizen of Roane county from the said 5th day of September, 1888, at the time he made the contract, although it was not reduced to writing until the 20th. That he returned to Gilmer county and at once settled up his business, looked up teams and did other acts showing conclusively that he had ceased to be a citizen of Gilmer county, but was a citizen of Roane county. The testimony of last two witnesses not referred to in Contestant's brief. The vote is legal.

Alexander Gibson, charge, non-resident.

John Taylor, dep. p. 147, testifies he lived in Kanawha county, just across the line between Roane and Kanawha; says his case was considered by the commissioners of election, and his vote admitted.

Asa Harper, dep. p. 461, testifies in rebuttal that Gibson lived in Roane Co., and proved conclusively, by facts and circumstances that said Gibson lived on the Roane County side of the line.

The certificate of G. W. Hundley, clerk, p. 466, supports the testimony of Harper and proves the vote to be legal.

The testimony of the last two witnesses and certificate of Clerk Hundley not referred to in contestant's brief.

N. B. Armstrong, charge non residence.

C. A. Crislap, dep. p. 149, testifies that Armstrong moved into Curtis District a short time before the election; about the 1st of October; said he knew he had not been in the county long enough to vote. He afterwards said he had voted the Democratic Ticket. Except that he had voted for witness.

A. C. Sleath, dep. p. 151, testifies that Armstrong moved into Curtis District, Roane Co., 20 or 30 days before the election. He had been away about two years in Wirt County, W. Va.; says Armstrong lived before that in Roane County; has known him for about 12 years; that he has lived in Roane County ever since. Did not know what his intention was in going to Wirt Co.

P. T. Radabaugh, dep. p. 155, testifies that Armstrong was out

of the County about 18 months and returned a day or two before the election; that he had been living in Palestine, Wirt Co., W. Va., and affiliated with Democratic party.

But Armstrong himself testifies on pages 473 and 474 that he had been a resident of Roane County ever since it had been a county; that about the 1st day of July, 1886 he moved with his family to Wirt County; that he had large amount of timber in Reedy creek, that emptied into the Kanawha river. That his intention was to remain but one year and that he had rented his farm for one year to Squire Otha Wade; that he expected to move back to Roane county in the fall of 1887 but owing to the sickness of Squire Wade he could not get his house; by they expected to give him possession in the spring of 1888. That he, Armstrong, came on in the spring of 1888, put in the crop in his garden and on the farm, was on the farm the principal part of the time, until the death of Squire Wade which occurred on the 2nd day of June, 1888; that he boarded with them until the 1st day of September, 1888 until they (the Wades) moved away, at which time he brought his family back to the farm in Roane county. He swears to the date of their return, the *1st day of September, 1888*; that he had been there himself all the Summer. He also testifies as to his property in Roane county, and as to his intention in going to Wirt county.

This testimony thus specific is not referred to in contestant's brief. It certainly proves he had been a resident of Roane county for over sixty days prior to the election and should certainly prevail against the uncertain and contradictory testimony of the other witnesses; the first one testifying that he "did not know the date of his moving in the district *precisely* but his *best information and impression* is that he moved into the district the 1st of October." This surely is too vague and unsatisfactory, and is not even legal testimony.

Sleath's testimony is that he moved into the district between 20 and 30 days before the election.

Radenbaugh swears that he returned "just a day or two before the November election."

It is submitted with confidence that these contradictory statements of these three witnesses is not sufficient to overthrow the testimony of Mr Armstrong, who should know, better than anyone else, the date of his return, and who fixes it on the 1st day of September, 1888. The vote is legal.

Abe Hoge, charge, non resident of Co.

A. C. Sleath, dep. p. 150-151, testifies that he told him he was living with his father in Ohio --was gone some 18 or 20 months and returned about 2 or three weeks before election; said he did not think he had a right to vote.

On cross examination said that Hoge moved in county four or five years before; that he is married and that his wife and family resided in Curtis District, Roane county, while he was absent; that on the day of

election he declared that his father's house was his home and he intended to make it so as long as his father lived.

P. T. Radabaugh dep. p. 155, testifies that Hoge was in Ohio until a short time before the election; was gone about 16 or 18 months and returned 6 or 7 weeks before election.

Per Contra D. S. Cottle, dep. p. 459, testifies that he knew Hoge; that he voted at Reedyville, Curtis District, Roane county; that his vote was challenged and he was sworn by witness in the presence of the others Commissioners, and he swore that he always claimed Roane county, and Curtis District as his home, and that he had only been out of the county and State to work; that he had been working in Ohio because the wages were better there than here and that he had never been absent from the county a year at a time; that all three of the Commissioners were unanimous in allowing said Hoge to vote; he swore that he made his home at his father's in Curtis District, Roane county, and when he is in the neighborhood he calls it his home. On cross examination he testifies that he understood he did not live with his wife; that he saw him in the county after the election, although he went away a time or two after the election. The whole testimony taken together shows the vote to be a legal one. The testimony of Cotton is ignored in contestant's brief.

I. D. Fore, charge, unsound mind.

John House, p. 157, testifies that *he don't think* he is of sound mind; that he had that reputation, and that his general conduct makes him think it is correct.

On cross examination, says that he was a single man, and that he worked and did his work well; that he was very religious; had been charged with rape, but did not know whether it is true or not.

John A. House, dep. p. 160, testifies that he considers Fore to be a man of unsound mind, but that he trades for himself.

Edward Corder, dep. p. 160, testifies he has known Fore for 15 years, and does not regard him as a person of sound mind.

But, that Fore supports himself by working around; does not receive any aid from any one, and that his impression is he has voted before. But of what value is the opinion of this witness when he swears he tried to vote Fore himself?

Per Contra E. M. Howell, dep. p. 449, testifies he knows J. D. Fore; that he does business for himself and is capable of transacting ordinary business; knows he can write and thinks he can read; has worked for him and give orders on him; has had law suits in his own name; has heard him testify and give reasonably intelligent testimony. On cross examination, says he knows nothing of his being charged with rape, or that he is the butt of tricks and riggs gotten up by the boys, but that he considers him of ordinary sound mind.

I. W. Ball, dep. p. 471, testifies that he has known Fore for 8

years: has known him for working for people as a farm hand; that he carried a memorandum book in his pocket; did not know whether he could read or write; but he lost his memorandum book and it was found and brought to witness' place and Fore said it was his book, and he turned to his name in the book and said there was his name in it anyhow. He further testifies that he is a person of ordinary intelligence for a poor boy; that he was not much below the average of the county to put them in the same circumstances. It is submitted that these last two witnesses give facts showing Fore's mental capacity to be of the average, while the other witnesses give only their opinions, and that the first must prevail over the latter, and it follows that the right of Fore to vote is established if it can be considered at all.

The testimony of last two witnesses is ignored in contestant's brief.

But contestee excepts and protests to the said vote being canvassed because the said contestant has not given contestee any notice whatsoever that said vote would be contested, and the grounds upon which it would be contested.

John Ball, charge, unsound mind.

John House, dep. p. 157, testifies he has been acquainted with Ball 15 or 16 years, and thinks he has but very little mind; that he was considered an idiot by his neighbors; that he worked for him but did not know what his services were worth, etc.

John A. House, dep., p. 159-60, testifies that he has known John Ball about 12 years; that he considered his mind to be weak and imbecile; that he went to school, and that he was dull and sluggish as a pupil, &c., &c. That his vote was challenged and the commissioners heard testimony and admitted his vote.

Per contra J. W. Ball, dep. p. 470, whose testimony is ignored in Contestant's brief, testifies that he has known John Ball since he was an infant, and first saw him in 1865. His father was witness' brother, and was in very poor circumstances, and depended almost entirely on witness' family for their support, that said John Ball is 23 or 24 years old; that he was raised in ignorance, but has naturally as good mind as anyone.

According to the testimony it is doubtful as to how this voter voted, but, nevertheless, his vote is legal.

But Contestee excepts and protests to the said vote being canvassed because the said Contestant has not given Contestee any notice whatsoever that said vote would be contested, and the grounds upon which it would be contested.

A. M. Ball, called *Food Ball*, charge, minor.

John House, dep. p. 157-8, testifies he would say that said Ball was between 17 and 20 years of age; that he has known him for 15 or 16 years. Gives no facts that fixes his age, only his opinion from his acquaintance with him.

John A. House, dep. p. 160, testifies he has known said Ball about 12 years; attended his school one term in 1881, and gave his age at 11 years; he appears to be about 18 or 19 years old. His right to vote was challenged on account of his being a minor, and the commissioners heard the evidence and determined his right to vote in his favor, and the word challenged marked opposite to it.

In rebuttal J. W. Ball, dep. p. 470, whose testimony is ignored in Contestant's brief, testifies that the said was 23 or 24 years old; when he first saw him he was a babe at the breast in September 1865; that he was absent in the war from 1861 till 1865, and after he returned home he visited the family at Glenville in Gilmer county. He saw John and A. M. Ball at that time, September, 1865; that he is the uncle of these two persons. This witness gives facts and not opinions as to the age of A. M. Ball, and he was certainly entitled to vote, not being a minor, and his vote is legal. *a m Ball*

But Contestee excepts and protests to the said vote being canvassed because the Contestant has not given Contestee any notice whatsoever, that said vote would be contested and the grounds upon which it would be contested.

WAYNE COUNTY.

The Contestant has named many voters in this county in his notice that are not referred to in his brief. Only those will be noticed here who are claimed in the brief to be illegal:

Napoleon Adkins, W. S. Napier, W. W. Bromfield, Alderson Watts, jr., William Noe, C. O. Bellomy, Elias Browning.

The evidence in regard to these seven votes tends to show them to be illegal. Therefore the Contestee will not claim them.

Abram Jones, pauper.

Wm. R. Houchins, p. 162, testifies that he knew Jones for about two years; that he thinks Jones voted at the election; that he prepared a ticket and gave it to him; it was a democratic ticket; that he, one or two hours afterward, went towards the voting place.

Chapman Fry, p. 163, testifies that Jones received aid from the county and says his name appears on the poll book used at the Wayne courthouse precinct. This is all the evidence touching the vote. There is absolutely no proof whatever as to how this voter voted, and the presumption that he voted the democratic ticket is exceedingly slim and strained. The charge is not proven.

Anderville Newman, non resident.

S. C. Ratcliff, p. 168-9, testifies that he knew Newman and that he resided in Kentucky at time of election; that it was generally understood he was a democrat and that *his opinion* was he voted for Contestee. On cross-examination, says Newman was sworn as to his right to vote on day of election, and that he claimed West Virginia as his

residence, and that he went to Kentucky for temporary purposes; that he had no personal knowledge how Newman voted. Surely this vote is a legal one, and if it were not there is no proof that he voted for Contestee. The charge is not sustained.

Thomas Stinson, non-resident of county.

S. C. Ratcliff, p. 170, testifies he knew Stinson; that he was not a *bona fide* resident of the district; that he said he lived in Logan county; that it was *generally understood* he was a democrat; that it was *generally understood* he voted for Jackson. On cross-examination, says that Stinson resided in Wayne county prior to the election; that his right to vote was challenged; that he was sworn and examined touching his place of residence and his right to vote, and that after full examination under oath he was permitted to vote; that he (witness) had no personal knowledge as to how or for whom Stiner voted at that election. This vote is certainly a legal one, and if it were not there is absolutely no proof that he voted for Contestee. The charge is not sustained.

J. M. St. Clair, non-resident of State.

I. D. Atkins, p. 170, testifies he was acquainted with St. Clair; did not know where St. Clair lived at time of the election; knew that he formerly lived in Kentucky and voted there at the August election, 1887, and came back to Wayne county in the spring of 1888; that he was *understood* to be a democrat.

John Y. York, p. 198, testifies he was acquainted with St. Clair; never saw him vote in Kentucky; heard he did; thinks he was in Kentucky a year, may be two years; claimed to be a democrat.

But J. M. St. Clair himself is sworn on behalf of Contestee, and testifies on page 502 that he voted at Cassville, Butler district, Wayne county, on the 6th of November, 1888; that he lived on his farm in said district; that he lived in the years 1884, 1885, and 1886 in Lawrence county, Ky.; that he came back to Butler district, Wayne county in September, 1886, and lived there up to the election in November, 1888, and sometime after that, in April following, he moved across the line into Lincoln district, Wayne county, and has lived there ever since; that he has in good faith been a resident of West Virginia, Wayne county, Butler district, for one year prior to the 6th day of November, 1888, and that he is the only J. M. St. Clair that he knows of in that county; swears he was a democrat. This evidence certainly establishes his right to vote. The Contestant in his brief entirely ignores the testimony of this witness.

J. M. Marcum, non-resident of State.

I. D. Adkins, p. 171, testifies he knows Marcum; that he moved to Kentucky in the spring of 1888 and resided there until about three weeks before the election when he returned. I *understood* he sold his farm in Wayne county and had moved to Kentucky; that he had not been a resident in Wayne county 60 days, nor the State one year, before the election; heard he voted in Missouri precinct; saw his name

on the poll books; that he is known to be a democrat; that he is *satisfied* he voted for Jackson.

On cross-examination, says he is a preacher, reputation good; that he has known him fifteen years and that he resided most of that time in Wayne county; that he would *guess* he was over in Kentucky seven months.

John W. Copley, p. 173, testifies he knew Marcum; that he went to Kentucky and staid there but does not know how long; that he moved in the spring of 1888; that he expected to buy land if he was suited and if he did not he would not.

Anthony Copley, p. 190, testifies he knows Marcum; that he lived in Kentucky in 1888, and was living there on the day of the election. On cross-examination, says he does not know whether he went there for temporary purposes or not; that he was born and raised in Wayne county; that he thinks he was in Wayne county six or eight months. Does not know how he voted.

Sylvester Tabor, p. 192, testifies he knows Marcum; that immediately before the election he resided in Kentucky; saw him and his family at James Marcum's in the fall of 1888. Did not see him vote, is a democrat and suppose he voted his ticket; that he was in Kentucky seven or eight months; that he lived in Wayne county ten or twelve years before he went to Kentucky.

On behalf of Contestee, J. M. Marcum himself was sworn, pp. 502-3 and testifies that on the 6th Nov., 1888; he lived in Lincoln district, Wayne county, W. Va.; that he was born and raised in the State; never voted out of the State in his life; lived in said district and county for over 20 years before the 6th Nov. 1888. That he had sold his farm in the county and was thinking of going to two of his brothers-in-law in Wayne county. Being sick with fever and rheumatism, a brother-in-law in Kentucky came over to see him, and proposed he should go home with him, instead of going to his brothers-in-law on Kiah's Creek, Wayne county, as he had more house room, and stay with him until he got better. He went with him, with his family and part of his things, in April, 1888, and was there until October, 1888, when he came back to Wayne county, to a piece of land which he bought, and where he now lives. That he only went to his brother-in-law until he got well; that he told his brother-in-law, and others, that he still claimed to be a citizen of Wayne county, West Va.; that he had no intention when he went to Kentucky to make it his home; that he was a democrat

There certainly can be no doubt, under the proof in this case but that he was a legal voter. For some unexplained reason the Contestant in his brief entirely overlooks the testimony of Mr. Marcum,

James Dillen, Walter Dillen, father and son; non-residents of State.

The testimony is the same as to each of them.

H. W. Neel, pp. 176-7 testifies that he was acquainted with them; that they came to Wayne county, in February, 1888; that they came from Floyd county, near Prestonburg, Kentucky; that they were democrats, and he *believes* they voted for Jackson.

On cross-examination he says he first saw the Dillens on the 6th or 7th day of February, 1888, in Wayne county. The question was then propounded him: "have you any personal knowledge as to where they resided before that time?" he answers "none at all." That they have resided in Wayne county ever since that time; that he saw them the day before, that they were in $\frac{1}{2}$ mile of where he lived, and the officers that summoned him were in their neighborhood when they summoned him.

George W. Bellomy, p 184, testifies that he is acquainted with the Dillens; known them for a little over a year. The question is asked him in chief: "How long have they resided in Wayne county, W. Va?" He answers, "I can't state the exact time. I was sick a long time that I did not know them. *They have been here something over a year.* I don't know the exact time.

On being pressed by Contestant's counsel as to whether they had been in Wayne county 12 months before the election, said he could not say whether they had or not.

This is Contestant's witness, and yet he entirely ignores his evidence in his brief. He proves beyond a doubt that these votes are legal. The first witness says positively he did not know and had no personal knowledge as to where they resided before he knew them on the 6th or 7th February, 1888. The presumption that the votes were legal and must be overthrown by positive proof. But, on the contrary, their legality is proven by the Contestant's witness, Bellomy.

Ali Artrip, minor.

John Bartram, p. 179, testifies that he knows Artrip, did not know where he lived on 6th Nov. 1888. Says: "*I think I know his age or close to it*, that he was 21 years old on that day." Said he would not be 21 years old until next April, but did not vote. On cross examination witness says he did not see him vote. He was born in April 1868, *I think.* Is not a relative of Artrip; does not know for whom he voted. Says he saw two Ali Artrips name on the poll-book at either Cassville or Trace precincts.

Chapman Fry, p. 202, proves that Ali Artrip's name appears only on the Cassville book and that but once, and does not appear on the Trace book.

Harman Artrip, p. 244, testifies he is uncle of Ali and was his Guardian; that he told him last fall he would be 21 in April, and would not settle with him before the election because he thought he was not of age. Heard him say he voted a democratic ticket; can't say what his deportment was during the last election, nor with which political party he associated; said he was born in 1868.

But Burwell Akers, p. 481, testifies that he knew Jackson Artrip, the father of Eli Artrip, and that he was sent to the Insane Asylum in 1867 in the latter part of the summer; that the reason he knew it was in 1867 was that it was the same year he was married, and that he was married in 1867; that the Jackson Artrip never came back to his home after he was sent to the asylum in 1867, and that Ali was said to be his son; that they lived about three miles apart.

William H. Frasher, p. 486-7, testifies that he knew Jackson Artrip for 25 years; that he is now dead; died in the asylum as he understood; that he could not fix for certain when he was sent to the Asylum, but his impression he was sent in the latter part of 1866; but if not, then it was in the first part of the year 1867. Cannot say for certain whether Ali was born before or after his father went to the asylum but things it was a month or two after; we lived about 2 or 2½ miles apart. His impression is 21 years old on the 6th day of November, 1888. On cross-examination says his impression is he was born in the latter part of 1866 or first of 1867; that he was not present when he was born. That he saw Jackson Artrip's wife before he was sent off, and she was in that fix, but whether he was born then or afterwards he could not say; that he has never seen her in that fix since then; that she has never had any children since; that he has known her well and seen her often, and never heard of it. That he never saw anything wrong of her, although after she was married he heard she was a little trickey.

It is submitted that the illegality of this vote is not established, and there is no proof he voted for Contestee.

John Pauley, jr., non-resident of district.

John Bartram, p. 180, testifies that Pauley voted out of his district that; he lived in Lincoln district; that he understood the road was the line and he voted above the road; that he lived in Butler district at Cassville; that he is a democrat; that his *opinion* was that he voted for Jackson; saw him in democratic procession hallowing for Jackson and Cleveland.

John Pauley, jr., p. 188, is placed on the stand by Contestant and testifies that he voted at Cassville, and that from what he heard he lived in Lincoln; that he always heard the road was the line, but heard the other day that the review was the line. If the road was the line he lived in Lincoln; that he voted the democratic ticket and if Jackson was on it he voted for him.

On cross-examination, says he had lived at the same place for three years; that this was his first vote; that James Crabtree lived at the same place he did before he moved there, and that he and everybody else who lived there voted at Cassville as he always heard: that the farm he lived on laid in both districts.

The said John Pauley again testifies on page 498; but the Contestant in his brief makes no reference to this testimony. He testifies he

voted at Cassville, and that he supposed that was his voting place; that he had worked the roads in Butler district for three years before; was assessed in Butler district each time for four years past and paid taxes to James Furguson, deputy sheriff, who was riding in Butler district, and always voted at the Cassville precinct ever since he had been a voter. He was never assessed in any other district; that he honestly believed he had a right to vote in Butler district and had always been told so, and that he lived 6 miles from Cassville where he voted and it was only two miles to Jarrel precinct in Lincoln district where it is claimed he should have voted. The charge as we claim is not sustained by the proof.

John Cox, non resident of State.

William Damron, p. 181, testifies that he knew John Cox; that he told him he was a democrat; didn't see him vote and in answer to question says: "He (Cox) moved here, Wayne county, in February or March, 1888. *I think* that he told him he came from Kentucky, that he had a family and that he was regarded as a democrat; that he could not swear he voted for Jackson for Congress; that he has known him ever since he was a boy and now lives in Wayne county and has a good character.

John Cox, pp. 195-6-7, is placed upon the stand by Contestant, thus giving him credit, and he is bound by his statements, and is not permitted by a cross-examination to assail his testimony. He swears he went to Kentucky for a temporary purpose; that he went from Wayne county where he was raised; that he did not intend to live in Kentucky, but intended to come back and live in West Virginia; that he did not vote in Kentucky or exercise any of the rights and privileges of a citizen while there.

On examination by Contestant's attorney, says he had no other business in Ky. other than temporary business. The counsel for Contestant then asked him the question, "What part of West Va., did you claim for your residence while you was in Ky." His answer was, "I claimed Wayne county, West Va., as the place of my residence," near Cassville. He lived on land of his wife, given her by her father. He knew before he left for Ky. his wife's father was going to give her the land. He bought the land where they now live for her before they went to Ky.

We contend that the Contestant has, by his own witness, proved the legality of this vote, and it should stand as cast.

John Stroud, Non-Resident of State.

Lou Vinson, p. 186 7, testifies that he knew Stroud; that he saw him in Kentucky at his son's before the election in November, 1888; did not know whether he lived there or not; this was a year or more before the election; know of his voting at the democratic primary; told him he had no right to vote; knew of his voting in Kentucky, but could not say he was living there; dont consider he had any politics, but he voted for democrats at the primary.

John Y. York, p. 198, testifies that he knew John Stroud; that he was present when he swore his vote in, in Kentucky, and knew of his living there for several years; that he did not consider his reputation good; that he would sell his vote. It is proved by Mr. Vinson that when he was in Kentucky, was a year or more before the election and York does not fix the time when he saw him in Kentucky. His vote is presumed to be good until the contrary is made to appear, which has not been done. And there is absolutely no proof how he voted at the election. But it is sufficiently proved that he had no politics. The charge is not sustained, much less is it proved he voted for Contestee.

Ezekiel Counts, Non-Resident of State.

James Ferguson, pp. 189-190, testifies he knew Counts; did not know what time he came to Wayne county, but that he came into his neighborhood the latter of winter of 1888, or between January and April of that year; that he *understood* he moved from Russel county, Va., and that "I *think* he is a democrat." This is all the testimony affecting this vote. Surely he cannot be disfranchised, on such flimsy testimony, merely the opinions of witness, without any knowledge whatever. The charge is not sustained.

Alford France, Minor.

John J. Maynard, p. 191, testifies he is acquainted with France, says: "Of course I don't know his age, and only know he swore his mother said he was 21 years old, and I heard him say he was only 17 and refused to work the roads; knew from his conversation that he was a democrat, and would think he voted for Jackson from the way he talks; says he knows his reputation and that it was bad. Was asked by Contestant's Counsel: "From that reputation could you believe him on oath?" His answer was: I can't answer that all. This is sufficient to satisfy anyone that his oath should be taken, when he swore he was of age when he voted, as against his mere declaration that he was only 17 years old, in order to get rid of working the roads.

George W. Crabtree, Minor.

Anthony Copley, p. 190, testifies very promptly, his legal opinion that Crabtree was not a bona fide resident of Lincoln district, Wayne county on the 6th of November, 1888, which is objected to by Counsel for Contestee. He is equally prompt to say he is *satisfied* that he voted for Jackson. Of what value is such testimony as this. On cross-examination he testifies he did not know how he voted. Except that he was a strong democrat.

Now Mr. Crabtree's vote is contested on the ground that he is a minor. There is not one particle of proof, on this question, and certainly the charge is not sustained. Nor does the proof show that his vote is illegal in any other respect even it could be considered which we insist cannot be done.

WIRT COUNTY.

E. D. Lewis, charge, minor.

Isaac Nelson, page 208, testifies he knows him only by comparison with his son's age, and that he was too young to vote Nov. 6th, 1888.

I. W. Nelson, p. 209, testifies to substantially the same effect, and thinks he voted democratic ticket.

Thos. A. Gilmer, p. 214, testifies that he voted at the election, did not know his politics, but from the company he keeps had no doubt but what he is a democrat. He was with Robt. Perrin, a democrat, when he voted. Lewis said he was 21 years old.

Jos. N. Sharpneck, p. 214, testifies that he was to Lewis' mother's house and saw the Family Bible, and that E. D. Lewis was set down as born September 3rd, 1868.

The Contestee examined several witnesses as to the right of Lewis to vote, but the Contestant has entirely overlooked them.

R. B. Perrin, page 504, testifies that he was acquainted with Lewis, and had been since he was born; knows his age from what his mother told him and from the family record. That he had occasion to see the record about one year before. It showed his age to be 21 years 2 months and 3 days old on the 6th day of November, 1888. Had seen the record since the election, and it shows now what it did a year ago.

H. L. Jackson, p. 504 testifies he knew Lewis ever since his birth; have seen the family record several times. It shows he was born the 3rd day of September, 1867. About two years ago he saw it, when there was a dispute about witness's age, and Lewis' aunt and he saw it there. Has seen it since the election and it shows no change whatever, and proves him to be old enough to vote at said election.

Angeline E. Lewis, p. 504, testifies that she is the mother of the young man Lewis; that he was 21 years old on the 3rd September, 1888; that she has a family record, and his age is recorded in it.

Mrs. Malinda Bibbee, p. 553, testifies that she is the Aunt of Lewis, and knows him and his mother; knows his age; that he was born in September, 1867, and fixes his age by the age of her oldest girl who was born in 1869.

R. D. Perrin, pp. 554-5, testifies that he procured the family bible of Mrs. Lewis from her, containing the record of the ages of the Lewis family and that he had it now before the Notary taking the depositions and wanted him to copy the entry of Lewis' birth, which was done and appears on page 555, Exhibit, No. 1. "D. E. Lewis was born September 3rd, 1867."

The vote is contested by Contestant under the name of E. D.

Lewis when his name was D. E. Lewis, but it sufficiently appears it was one and the same person. Daniel E. Lewis is his proper name. This vote is certainly proved to be legal.

W. T. Woodring, charge, non-resident.

W. T. Woodring, p. 210 testifies that he had not been in the State one year when he voted. His vote is therefore illegal.

Noble Hunter, charge, convict—felony.

N. Hunter testifies p. 212, that he was a convict and served in penitentiary. This vote conceded illegal.

Lewis Mattoch, unsound mind.

The deposition of A. Stalnaker, p. 216, tends to prove the charge, but the deposition of this witness was accepted to for the reason that notice was not given Contestee of the taking of the same. This exception is still insisted on.

James Bolyard, minor.

The deposition of A. Stalnaker and S. L. Showalter, pp. 216-217, tends to prove the charge, but the depositions of these witnesses were accepted to, for the reason that notice was not given the taking of said depositions. The exceptions are still insisted on. Contestee also objects to any proof being taken as to the said Bolyard, or being considered, because said Bolyard's vote is not contested in either of the notices of said Contestant. For these reasons the said vote should stand as cast.

WOOD COUNTY.

C. W. Meyers, non-resident of State.

George S. Arnold, p. 219, testifies he knew Meyers; that there was a question about how long Myers resided in Belleville. He moved his family there on the 24th November, 1887, but he had been in Belleville a month or probably that time before the 24th November; that his family resided prior to that time in Gallipolis, Ohio; that Meyers voted democratic ticket. On cross-examination, witness says Meyers staid there continuously from October to November, 1888; don't think he ever went back to Gallipolis after he first came.

I. H. Owing, pp. 229, 230, 231, testifies he knew Meyers; that his family had been in Belleville, Wood county, since the 24th November, 1887, and that he had been there a month before his family came. On cross-examination, says Myers and others claimed that he had a right to vote because he had been living there more than a year; that his vote was challenged and the question of his right to vote contested at the polls; that he made his acquaintance a few days after he came there; that he had been living there himself for more than a year before the election. He had been at work there; that he spoke to me to rent him a house before the 24th November, 1887; said he wanted it for his family. He asked me for the house from ten days to two weeks before the 24th November.

Fridrick Satow, p. 235, testifies he knew Meyers; he was a strong democrat; said he intended to put in his vote straight.

S. B. Williamson, p. 244, testifies that Meyers voted at Belleville; said he expected to vote the democratic ticket. I claimed the right to vote if he did. I did not vote because I asked advice on it and didn't try to vote.

The Contestee in rebuttal of this testimony introduced P. Foster Wells, p. 580, who testified that he knew Meyers; that he came to Belleville the latter part of October, 1887, and remained until the spring of 1889. He was employed as a miller and his intention was to remain there as long as he had employment.

Whitten Wells, p. 582, testifies he knew Meyers; that he lived in Belleville continuously from October, 1887, until he left. He expressed himself that that was his home, and that he intended to become a citizen there at the time; this was soon after he came there; within a week or ten days.

W. C. Kever, pp. 601-2, testifies he knew Meyers; that he resided in Belleville, Wood county, West Va.; he was a miller; thinks he came to his house sometime in September, 1887; that he boarded with witness five or six weeks; said he had hired with the Mill company; that his wife was not able then; that he wanted to move if he could get a house; that it was the first Sunday after he came he asked me for a house, and I showed him the only vacant house in town and he afterwards rented it, but his family did not come for sometime after; said his wife was not able to come. On that Sunday he said he was going to move there; that he hired with the Mill company to attend the mill. On cross-examination, says that Meyers' family did not come for perhaps a month or six weeks after he did; his wife he said was sick and unable to come. I know he spoke about moving right away and then his wife got sick and he could not move, and afterwards I showed him the house and he rented it.

H. H. Pennybacker, p. 604, testifies he knew Meyers; that he resided in Belleville, Harris district; that he came there on the 26th day of October, 1887, and that he resided there from that time. He continued in our employment from the 1st day of November, 1887, seventeen months lacking one day. When he hired with us on the 1st day of November he said he would move to Belleville as soon as he could get a house; don't think his wife came to Belleville before the 6th day of November.

We claim that this vote is undoubtedly good.

William Fallen, non-resident of the county.

This vote is not challenged by Contestant in either of his notices and Contestee insists on it that said vote cannot be questioned.

But if it should be determined to investigate it, Contestee denies that the vote is illegal but that its legality is established by the proof.

Geo. S. Arnold, pp. 219-20-22-23, testifies he knew William

Fallen ; that he voted at Belleville on the 6th November, 1888 ; that he reckons he must have been there seven or eight months ; that he was section boss on the railroad and is yet ; he told me lived in Ritchie county, West Va., prior to his coming there ; that he is a democrat ; that his vote was challenged. He told me he considered his home there ; he was single and considered wherever he worked was his home and that he was going to vote there.

James H. Owings, p. 229, testifies he merely knew Fallen when he saw him ; that he had lived from three to six or eight months in Belleville before the election ; boarded at Mr. Wares and Mrs. McGees'.

Contestee introduced as a witness in rebuttal, W. M. Fallen, p. 575. who testified that he had resided in Wood county, West Va., over eleven months before the election ; was born and raised in West Virginia ; was out of the State and returned in 1884, and has been in it ever since ; was employed as section foreman on the O. R. R. on the 21st November, 1887 ; came to reside at Belleville and resides there still and have never changed my residence from there. I know of no other William Fallen in that district and there is no William Fallen there that he knows of.

On cross-examination, said he formerly lived in Ritchie county, West Va., and boarded with his mother ; worked for B. & O. Railroad. My vote was contested and the election commissioners told me I had a right to vote Mr. Arnold questioned me right close and then they received my vote.

P. F. Wells, p. 581, testified that he first saw Fallen in the winter 1887-8, and has known him ever since ; that he resided in Belleville, Wood county, and did not know of his leaving the county to stay.

Whitten Wells, p. 582, testifies he knew Fallen ; that he came to Belleville in the fore part of the winter of 1887-8, and has resided there ever since.

W. C. Keever, p. 601, testifies that he knew Fallen ever since he had been on the road there, something over a year ; about a year. He resided in Belleville and was section boss.

H. H. Pennybacker, p. 605, testifies he knew Fallen for about a year ; that he was in Belleville about that time, before the 6th November, 1888, and that he came there a year before. This vote we conceive to be good.

John Cochran, pauper.

Frederick Schwall, pauper.

Contestee admits that the evidence tends to prove the charge in each one of these cases, or at least leaves it doubtful, and therefore does not examine the testimony but leaves the matter to be determined as it may seem fit.

John Lockhart, non-resident of the State.

This vote is not challenged by Contestant in either one of his notices and Contestee insists that therefore said vote shall not be questioned, but it should be determined to investigate it; Contestee denies that the vote is illegal, but that its legality is established by the proof.

George E. Leavitt, p. 226 testifies he knows Lockhart; it is hard to tell where he lives; that he is part of the time across the river in Ohio, and part of the time at Mr. Wesers, on the north fork of Lee Creek, Wood county; he was going back and forward.

Jas. H. Owings, p. 230, testifies he knows Lockhart, but have not seen him for years; when I knew him he lived in Ohio.

Frederick Satow, p. 234, testifies he knew him and that the last he ever heard of him he was over in Ohio; that he lived there except the last one or two years; that he was a democrat; that his vote was challenged and permitted to vote. On cross-examination states, "We swore Mr. Lockhart and that settled it; he swore his home was in Wood Co."

But in rebuttal Contestee produced Whitten Wells, p. 583, who testifies he knew Lockhart; has know him since 1860; that in 1888 he resided at Matthew Wesers, in the upper end of the district, and Locker said he had been there continuously three years; that he told me about September or October 1887, that he was making his home at Matthew Wesers. He is about 60 years old and a bachelor.

John Lockhart, p. 585, testifies; I am 77 years of age, live at Matthew Wesers, Harris district, Wood county; never married, and resided there on the 6th day of November, 1888, and have resided there over two or three years I believe; have a poor recollection. There is no person by the name of John Locker, or Lockhart in that district but he. That he has lived at Matthew Wesers for the last two years. Had five acres of land and a little cabin on it with some few cooking things and an old bed, but no bedstead. Went over once in a while to look after it, and take bread and meat with me to last till I get back. I made my home at Mr. Wesers and did not tell Mr. Fred Satow within the last two years I lived in Ohio; voted for Jackson.

Matthew Weser, p. 587 testifies he knows Lockhart, for 35 years, and that on the 6th day of November, 1888 he lived with him on the north fork of Lee creek in Harris district, Wood county; that he had resided with him for the last four years; the last two years he has forsaken his place in Ohio and been with him altogether. Has a little place in Ohio of 5 acres and goes over there to see after it and stays a day or two and comes back; takes with him bread and meat with him; always takes his bread and eatables from my house, (Matthew Wesers) with him. He raised a crop last year on my farm and is raising one this year. On cross-examination says he don't think, take it altogether, Lockhart spent two weeks in Ohio; that is off and on; that his washing is done at his place, his mending was done there; he moved all his clothes he had to his house; his washing and mending has been done the last 3 or 4 years at his house.

Asa Pease, p. 595, testifies he knows Lockhart for 24 or 25 years, that he resided at Matthew Weser's in Wood county, and had for three or four years; has no family.

H. H. Pennybacker, p. 605, testifies he knew Lockhart, ever since the war; he was staying out at Matthew Weser's saw him there often.

The vote if it is considered, is certainly good.

James Lemley, non-resident of the county.

This is a dispute as to the county line between Ritchie and Wood counties. The voter, Lemley, lived close to it, but in good faith voted in Wood county. The testimony leaves it doubtful as to where the line was actually run originally, but the voter was indicted for illegal voting in Wood county and was acquitted. See record pages, 639-640. This very question as to where the line was before the jury in that case see Hutchinson's deposition. The witness says on page 639: "The point at issue in that trial, where was the residence of Lemley on the day of election and sixty days prior thereto, and was determined solely by the establishment of the line between the two counties." It is contended that there is nothing in contestant's rebuttal testimony to overthrow this. The testimony of witness Alleman and his repeated surveys, and his plat only tend to make confusion worse confounded. But contestee insists that none of the rebuttal testimony of contestant shall be considered and he insists on his exception and objection as set out in the record, pages 854 and 855.

It is claimed that the charge is not made out as to this vote and it should stand as cast.

J. E. Carle, non-resident of the county.

J. M. Benedict, pp. 232-3, testifies that Carle resided on the 6th day of November, 1888, in a house about 300 yards from Volcano Junction; that the house is in Ritchie county.

On cross-examination says that he does not know where the line is except where it is claimed to be; that the house was in about 100 feet of the line as claimed; never measured it; just a guess. Knows that Carle has for years continuously claimed Wood county as his residence. Was the nominee of the democratic party in Wood county for the legislature and was voted for at that election. Never to his knowledge exercised any rights of citizenship in Ritchie county.

T. J. Smith, clerk of county court, p. 247, testifies that he knows Carle and that he was assessed in Wood county and files the assessment lists exhibit A. 1.

Contestee in rebuttal produces J. E. Carle himself who testifies, p. 630-631, that on the 6th day of November, 1888 he was temporarily residing in Ritchie county, W. Va., that he wanted to build a new house on the same ground his old house stood on, on his farm in Wood county, had an old house across the line in Ritchie county, he moved in while he built his new house, this house was on a part of the home

farm and a part of the same tract. Before I moved I took advice as to whether I would lose my vote and my residence by going temporarily out of Wood county; and was told if I only moved out temporarily I had a right to hold my residence in Wood county, I was told this by Gov. Jackson and Gov. Boreman both. I never exercised any rights of citizenship in Ritchie county; paid his head tax and other taxes in Wood county. The land that he lived on was taxed in Wood county, but a small portion of the land run over into Ritchie county. Is a democrat and voted for J. M. Jackson.

It is submitted that this is a legal vote.

William Milstead, non-resident of the county.

This vote is not challenged by Contestant in either of his notices and Contestee insists on his objection to said vote being questioned as set out on page 258 of record.

A. C. Farnsworth, p. 262, testifies as to when Milstead came into Walker district, and about a conversation he heard after the election. The same objection is taken by contestee to this testimony; see page 262. But even if the testimony is considered it does not appear that Milstead voted for Jackson. For these reasons this vote should be permitted to stand as cast.

Henry Yearing, non-resident of the county.

This vote is not challenged by Contestant in either of his notices, and Contestee insists on his objection to said vote being enquired into as set out on page 261 of the record. Contestee also insists on his exception to the deposition of Alvin Swearingen as set out on page 262 of the record.

Michael Holbert, non-resident of the county.

This vote is not challenged by Smith, but challenged by Jackson and proven to have voted for him. It is submitted whether under this state of the facts, the vote being proved to be illegal, it can avail Smith or not, by having the same deducted from Jackson's total vote in the county. It seems to us it should not avail either.

Joseph Starling, non-resident of the State.

This vote not challenged by Smith, but challenged by Jackson. It is submitted that it being proved to be illegal it can avail Smith or not by having it deducted from Jackson's vote in the county. But Contestee denies that it is satisfactorily proven that Starling voted for Jackson. It is true that J. M. Johnson, p. 687, testifies that Starling told him sometime after the election that he voted a straight democratic ticket. But in opposition see what R. Heber Smith says, p. 705 of the record. For some unexplained reason the Contestant does not refer to this evidence in his brief.

Smith says that on the day before he testified in this case he saw Starling and had a talk with him. In that conversation he told him he voted for Smith, and repeated it, "that he certainly voted for Charley Smith and not for Jackson."

Now turn to the testimony of J. I. Tracewell on p. 618-619. He testifies that he knew Starling and that he has always been a republican. On cross-examination of witness he heard Starling say on the day of the election he was a republican and he said he always had been a republican. On re-direct examination, being asked to fix the time of the conversation, said that he would tell the time exactly; the polls had closed at noon; he came over and wanted to vote and the polls had closed at noon; it was between 12 and 1 o'clock.

The preponderance of evidence is strongly in favor of the proposition that he voted the republican ticket.

The Contestee will now examine as to the illegality of the votes cast for Contestant as charged in Contestee's notices, as also, the other grounds of contest therein specified :

CABELL COUNTY.

George Christian, non-resident

Joseph Anderson, p. 268, and S. D. Hayslip, p. 280, show conclusively that Christian only came to Cabell county from Virginia in August, 1888, and that he had not been a resident of the State for one year prior to the election and that he voted for Contestant. Charge proved and vote is illegal.

Isaac Dotson, pauper.

Wm. Bowden p. 266 proves that Isaac Dotson was poor, that his children were beggars on the street, and in same deposition in answer to question 23 on page 267, propounded by Contestant's counsel, witness states that the said Dotson told him "he was on the county;" told him he was a republican and always voted the republican ticket.

I. F. Stewart, p. 279, substantiates the testimony of Bowden. Charge proven and vote illegal.

Peter Trent, Spencer Dean and David Smith, charge, non-residents.

These voters are not named in the Contestee's answer as being illegal voters. As the Contestant has claimed in his brief the benefit of votes said to be illegal that are not named in his notices, Contestee will claim the benefit of these three votes, cast for Contestant, which are clearly illegal if Contestant's claim is allowed.

M. R. Quimby, pp. 269-270, testifies these three parties voted at 3rd Ward precinct in Huntington; that they were republicans and voted the republican ticket; that they were not residents of the State for one year or of the county 60 days before the election; that they came to Cabell county in October, 1888; that Trent and Smith came from Kansas City, Mo., and Dean came from Kentucky. On cross-examination, he says they stated they lived in old Virginia. These votes were certainly illegal according to the evidence.

CALHOUN COUNTY.

Ebenezer precinct in district.

Contestee charges in his return notice, that at Ebenezer precinct in district in said county that the commissioners who held the election at said precinct on the 6th day of November, 1888; were not sworn before entering upon the discharge of the duties of their office of Commissioners of election at said voting place, nor were they sworn at any time afterwards; and that the said oaths of said Commissioners do not appear properly certified on any of the poll books of the election held at said precinct on said day, as is required by law, nor was it proven before the Commissioners of the County Court convened at the Court House to examine and declare the result of said election; that said Commissioners of election were sworn as required by law.

The vote at said voting place was: for Contestant, 39; for Contestee, 17.

Section, 8 of Chap. 3, of the Code of West Virginia, 1887, (Worth's) page 53, provides: "Every commissioner, canvasser and clerk so appointed as aforesaid shall, before entering upon the discharge of his duties take and subscribe an oath to the following effect: 'I, A. B., do solemnly swear that I will support the Constitution of the United States, and the Constitution of this State, and that in the election about to be held, I will faithfully and impartially discharge the duties of my appointment to the best of my skill and judgment, so help me God.'" Said oath may be taken before any person authorized to administer oaths; but if no person be present at any place of holding an election, it may be taken before and administered by any one of the commissioners so appointed, who in turn may take the same before another of said commissioners. The said oath shall appear properly certified on one of the poll books of every election, and in no case shall the vote taken at any place of voting be counted unless said oath so appears, or unless it be proved to the satisfaction of the commissioners of the county court, convened at the court house as hereinafter required that the oath was taken before said commissioners, canvassers and clerks entered upon the discharge of their duties of this appointment."

It is not, and cannot be claimed, that any evidence was taken by or before the Commissioners of the County Court, convened at the Court House, to canvass the votes cast in said county, to prove to the satisfaction of said commissioners that said oath was taken before said commissioners and clerks, entered upon the discharge of their said duties. Certain it is no such proofs appear in the record.

In the language of the statute then, "in no case shall the votes taken at the Ebenezer precinct be counted unless said oath appears properly certified upon one of the poll books of the election held at that place. If it does not so appear said poll must be thrown out."

The copies of certificates appended to each of said poll books

of the election held on the 6th day of November, 1888, are filed with the deposition of George W. Selcott, clerk of the county court (the custodian of said books) pp. 302-303 of the record.

It appears from said certificate that L. F. Law, Peter Conley and Amos Laughlin were the commissioners to hold the election. The oath to be taken is signed by them respectively. The jurat subscribed to each oath is:

"Subscribed and sworn to before me, as one of the commissioners, L. F. Law, this 6th day of November, 1888. Signed, Peter Conley."

The jurat is alike on both books. It was competent for one of the commissioners to administer the oath. Which did administer it? The wording of the jurat says that L. F. Law did; but he does not sign the jurat showing that he did: it is signed Peter Conley. Peter Conley does not certify that he administered the oath as commissioner, nor is there anything in the certificate, or any evidence, to prove that the signature of Peter Conley, signed to the jurat, is the Peter Conley named as commissioner. It is therefore respectfully submitted that the certificate appended to the poll books does not show that the commissioners holding said election were sworn.

If, however, the name of L. F. Law was signed to the jurat instead of Peter Conley, this would be insufficient, as it would then nowhere appear on the poll books that Law was sworn. If Conley administered the oath then it would not appear that he was sworn.

The statute is mandatory—all must be sworn. If one of the commissioners administered the oath, he *in turn* may take the oath before another of said commissioners. This was manifestly not done, no such jurat appears. It follows, therefore, that either Law or Conley was not sworn. It is, however, insisted that none of said commissioners were sworn, for that there is no legal evidence appearing on said poll books that they were so sworn. A failure of one to take the oath is as bad as if all had failed. The vote at Ebenezer precinct cannot, therefore, be counted.

While omissions to observe merely directory provisions of the law will not vitiate the poll, the contrary is the rule concerning such provisions as are mandatory. The rule is stated that if the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void; all courts must so hold, whether the particular act goes to the merits, or affects the result of the election or not.

Barner vs. Supervisors, 51 Miss., 305.

Wheelock's case, 82 Pa. St., 297.

Tremmier vs. Bomar, 20 S. C., 354.

A violation of mandatory provisions will avoid the election without regard to the motive of the person guilty of the violation, and without any enquiry into the effect of the result of the election.

Respondent further charged that the commissioners of the County Court of Calhoun County, under date of November 12th, 1888, transmitted to the Governor of the State a certificate of the result of the election in said county, in which it appears Respondent received 919 votes and Contestant received 630 votes, including the illegal votes counted for Contestant at Ebenezer precinct aforesaid; after which said County Court at another term of said court, to-wit: on the 7th day of January, 1889, entered a so-called order, changing the vote for Contestant to 632 votes.

It is submitted that when the commissioners as aforesaid adjourned, their powers ceased, and, as a returning board, they were *functus officio*, and said order of January 7th, 1889, was a nullity.

Section 21 of Chapter 3 of the Code of West Virginia, p. 57, provides: "The commissioners of the County Court shall convene in special session at the Court House, on the fifth day (Sundays excepted) after every election held in their county, or in any district thereof, and the officers in whose custody the ballots, poll books and certificates have been placed shall lay the same before them for examination." The residue of the section provides how said commissioners shall declare the result. Section 22 provides for issuing the certificate to the party having the greatest number of votes, and Section 23, page 59, provides: "of the certificate respecting the election for representative in the Congress of the United States, the commissioners shall transmit one to the Governor, who shall *ascertain who are elected and make proclamation thereof.*"

The fifth day after the election, excluding Sunday, was the 12th day of November, 1888. On that day they met and proceeded to declare the result; see deposition of Geo. W. Silcott, their clerk, p. 298. The result on that day was declared and entered upon the record of said commissioners, a copy of which is filed with the deposition of said Silcott, p. 298, and after the result of the election was so declared they transmitted to the Governor the result thereof, as required by law, and then commissioners adjourned until first day of next term which was January 17th, 1889. See Silcott's deposition, p. 299.

Section 21 of chapter 3, of our Code has received judicial interpretation by our Supreme Court. See *Brazie vs. Commissioners*, 25 W. Va., p. 222.

They are authorized to enter no judgment and their power is limited by the express words of the Statute, which gives them being, to the signing of a certificate containing the whole number of votes received by each person for each office, and therein declaring the result after "having carefully and impartially examined the returns of the election."

See also *Chenowith vs. Commissioners*, 26 W. Va., p. 231.

The said section provides for an adjournment from time to time and when a majority of the commissioners are not present from day to

day until a quorum is present ; and provides when the result is declared, where the sealed package of ballots and poll books are to be preserved and when destroyed.

After concluding their labors there is no authority to re-open the canvass to correct mistakes or for any other purpose ; when the result is declared it is final, and as decided in the cases above referred to ; they enter no Judgment ; there can be no appeal. If any one is prejudiced by their certificate, the only way open is by a contest in the manner prescribed by law.

The certificate of November 12, 1888, sent to the Governor, is the only legal certificate. The only one he was authorized to inspect and upon which, under the law he was authorized to ascertain who was elected.

As an act granting a certificate is merely ministerial, it would seem that when a certificate has been issued, the power of the board is to be considered at an end and that the certificate would be irrevocable except by regular contest.

Ewing vs. Thompson, 43 Pa. St., 372.

Respondent in addition contests the votes of the following named persons voting for contestant in said county of Calhoun :

P. Wayne, minor.

The deposition of Amos Laughlin, p. 304, proves that the voter (entered on one poll book as P. Wayne, and on the other as P. Wain as shown by deposition of George W. Silcott, p. 299) was a minor, born in February, 1868, and that he voted for contestant. This evidence is wholly uncontradicted. The vote is illegal.

Wm. Wix, minor.

It is conceded by contestant's notice and proved by contestant by the deposition of F. Ferrell, p. 69, and of Andy C. Maze, p. 72, that Wm. Wix was a minor. It is proved by the deposition of Silcott, p. 299, that he voted. It is proved by the deposition of A. C. Maze, that he wore a Harrison and Morton cap. It is proved by the deposition of his mother, Susan Wix, that Wm. Wix was not twenty-one until June 22, 1889. And by his sister Julia Ann Wix, and his mother, Susan Wix, depositions, p. 297, that he voted for contestant. This vote not good.

George S. Ferrell, lunatic.

The deposition of Peter Johnson, pp. 292-3, shows that George S. Ferrell was, by him the said Johnson, then a justice of Calhoun county, on the 13th day of April, 1888, adjudged a lunatic, and that he was committed to the custody of his father, Franklin Ferrell ; that said George S. Ferrell is still in the custody of his said father under the bond at that time given, said judgment being in full force.

It further appears by the deposition of George W. Silcott, p. 299,

that the said George S. Ferrell voted Nov. 6, 1888. And it also appears by the census returns of 1880, a certified copy of which is filed with said Silcott's deposition, p. 301, that in addition to his being a lunatic he was also a minor, being only 11 years of age prior to June 1st, 1880, and this is not rebutted by any competent evidence in the record.

It further appears by the deposition of James S. Wolverton that the said George S. Ferrell was a republican and voted the straight republican ticket. See his deposition, p. 306. His vote was therefore illegal.

Randolph Ferrell, minor.

The deposition of James S. Wolverton, p. 306, proves that Randolph Ferrell was a minor and that he voted the republican ticket straight. The deposition of Geo. W. Silcott proves that Randolph Ferrell voted at Big Bend, see p. 299, and on page 301 of same deposition, as appears from a copy of the census of 1880, he was only eight years old prior to June 1st, 1880, and must therefore have been a minor on November 6, 1888. These depositions are not contradicted, and Randolph Ferrell's vote must therefore be deducted from the vote of Contestant.

Thomas Ferrell, minor.

The deposition of James S. Wolverton, p. 306, proves that Thomas Ferrell was a minor; that he was a republican, and voted the straight republican ticket. The deposition of Geo. W. Silcott proves that T. Ferrell voted at Big Bend. See page 299 and on page 300 of same deposition as appears from a copy of the census of 1880, he was only eleven years of age prior to June 1st, 1880, and must have therefore have been a minor on Nov. 6, 1888.

These depositions are not contradicted, and Thomas Ferrell's vote must therefore be deducted from the vote of contestant.

A. H. Blackshire, minor.

The deposition of J. P. Knight proves that A. H. Blackshire was a minor on the 6th day of November, 1888, and that he voted on that day at Big Bend voting place.

The deposition of Salathiel Stump, p. 295, shows that A. H. Blackshire at that time voted the republican ticket.

Charles J. Blackshire, in his deposition, p. 298, testifies that A. H. Blackshire told him he voted the republican ticket.

George W. Silcott, in his deposition, p. 299, testifies that the poll books show that A. H. Blackshire voted at Big Bend. In same deposition, p. 301, he files copy of census returns of 1880, showing that Aaron H. Blackshire was eleven years old prior to June 1, 1880, and must have been a minor on November 6, 1888.

These depositions prove conclusively that A. H. Blackshire was

a minor on Nov. 6, 1888, and that he voted the republican ticket and for contestant, and his vote must therefore be deducted from contestant's vote.

I. H. Sowerborn,

In addition it is fairly shown by the depositions of George G. Stump, p. 305; Daniel Evans, p. 308, and of George W. Silcott, p. 303. That I. H. Sowerborn or Hannibal Sowerborn was a legal voter, and would have, if permitted to vote, voted for contestee.

It is claimed that contestee should have this vote counted for him.

So that the true returns from Calhoun county should have been as follows:

Whole number of votes for Contestant, as returned to the Governor on November 12, 1888,	630
	SMITH.
Deduct votes cast at Ebenezer precinct,	39
“ P. Wayne or Wain's vote,	1
“ Wm Wix, “	1
“ Geo. S. Ferrell, “	1
“ Randolph Ferrel, “	1
“ Thomas Ferrell, “	1
“ A. H. Blackshire, “	1
	<hr/>
Total	45 45
Whole number Smith entitled to	585
Whole number of votes returned to Governor	
for Respondent - - - - -	919
Deduct Ebenezer precinct as illegal - - - 17	
Deduct vote of C. D. Stalnaker - - - 1—18	
	<hr/>
	901
Add I. H. Sowerborn - - - - -	1—902
	<hr/>
Respondent's majority over Contestant -	317

JACKSON COUNTY.

Contestee in his answer to Contestant's notice, and in his answer to Contestant's additional notice of contest, contests the votes of the following named persons voting for Contestant in said county of Jackson.

John Brannen, jr, non-resident.

Daniel Howell, p. 312, testifies he knew John Brannen, jr.; knew he was in the county about Sept. 21, preceding the elction at Ravenswood fair; he had lost his wife and was here on a visit; a few days after he returned back to some other county, I think Roane or

Braxton county, and in a few days he came back to this county with his household goods. Had several talks with him during the Ravenswood fair; talked with reference to where he was living; it seems to me he told me he was living in the edge of Roane county; I knew he lived out of this county, and did not ask him particularly about that. I can't state how long he had been absent before I saw him at the fair, but I suppose three or four years. He married again in this county after the fair, and then moved back where he came from. He does not live here now.

He advocated republican principles. He was talking for the republican ticket at Munceyville the day of the election.

I told him on election day he had not been here long enough to entitle him to vote, and he told me at that time he thought he had.

Nelson Bonar, p. 313, testifies he was one of the commissioners of election; he has known John Brannen, jr., 15 or 20 years; I took his vote and put it in the box; it was not challenged at the time, but afterwards, an hour or two, he came back and asked us to give him his vote back; he stated he was mistaken as to the time he had been in the county.

William Milhorn, p. 306 testifies he knows John Brannen, jr.; he left the county and went to Roane or Calhoun, where he lived four or five years; he lost his wife last summer, and shortly afterwards he came back to Grant district, this county; he came back the 17th or 18th day of September; did not remain here many days until he returned back where he came from, and *fetches* in a cow, his child and some things a short time afterwards; he married in December, and then he went back to where he came from; he has never returned here to live; I was standing near the voting place when he came to the polls and desired the commissioners to give him back his vote. He was regarded a republican.

The depositions of Jacob Bates, p. 729, and of James A. Seaman, p. 733 are taken in rebuttal. These depositions do not contradict the fact of the non-residence of Brannen, and his request to have his vote returned. They further show him to be a republican and that he voted. The charge is sustained, and vote should be deducted from Contestant's vote.

John Sheets, non-resident.

C. C. Nesselrood, p. 317, testifies that he knows John Sheets; he lived in Pennsylvania a year or two; he moved back to Grant district sometime in December, 1887; he lived on W. T. Dernberger's place in said district from the time he moved back until election, Nov. 6th, 1888; he always advocated republican principles. About two weeks before the election I had a talk with him about his right to vote; he asked me if he had better vote; I told him he had not been back from Pennsylvania one year, he had no right to vote; he told me he believed he would not attempt to vote; after discussing the matter he de-

cided he would not attempt to vote. When I told him he had not been back a year he did not deny it; it being a fact he would not deny it.

Sheets voted at Red Brush, Grant district. See exhibit "D," filed with dep. of T. H. B. Lemley, p. 345.

It is clearly shown he was not a resident of the State for one year prior to the election, and his vote should be excluded from the vote cast for contestant.

C. M. Messerly, non-resident.

The deposition of E. Wells, p. 320, is clear upon the question of the non-residence of Messerly. He testifies that Messerly was a resident of Clarington, Ohio, prior to Oct. 15th, 1887; on or about the 15th October, 1887, Messerly came to see witness at Ravenswood, and contracted to take the room witness occupied as an office; that Messerly and his hand came about 4th or 5th of November, 1887, and took possession of room and commenced business; witness testifies that he desired to rent the building for a year to Messerly, which he declined, but would only rent by the month, until March following, as he (Messerly) said he only came as an experiment to justify him in moving his family; about January 1st Messerly said that business was better than he expected, and that he would move his family, which he did March, 1888. On the evening of the election Messerly informed witness that he had voted; and voted the straight republican ticket with the exception of E. W. Brown, democrat candidate for house of delegates.

The evidence is positive that Messerly came only as an experiment; that he did not intend to make his home in Jackson county unless his business justified it. This intention to remain did not become fixed until after the election, and was not, in fact, carried into effect by removing his family until March, 1888. As the intention controls, when it fully appears by the evidence that he had no such intention to remain until January 1st, 1888, the vote must be held illegal. He voted the republican ticket entire with the exception of one name. He voted for Contestant, his vote must therefore be deducted from Contestant's vote.

Henry Dye, non-resident.

Robt. B. Graham, p. 324, testifies he knows H. P. Dye, called Henry Dye by those acquainted with him; first became acquainted with him in the fall of 1887; saw Dye frequently in Jackson county up to May 5th or 8th, 1888, at which time he told me he was going to Kentucky to live; witness received a letter from him from Pike county, Kentucky, saying he was there; this was after 8th May, 1888; witness has not seen Dye in the county since the conversation in May. Witness states Dye was a republican, that he had heard him advocate republican principles frequently.

Contestant in rebuttal produces the evidence of George S. M. King, p. 727, who testifies that he knows Dye; that he worked for

witness from March, 1887, to April, 1888; that he left saying he was going to Kentucky to get some money that was coming to him, and that he would be back in about three weeks; witness did not see him any more until morning of 6th November, 1888; and then saw him in Jackson county; witness further testified that Dye left his home on the Saturday following, telling witness that he was going back to Kentucky.

H. P. Dye voted at Ripley; see exhibit "D" with Lemley's deposition, p. 345.

The evidence is he left to go to Kentucky to live: it is true that King says he was going to Kentucky and would be back in about three weeks; there is nothing in King's testimony to negative the statement that he made to Graham, that he intended to live in Kentucky. From King's own evidence Dye went to Kentucky, and never returned until the morning of the election, voted, and then returned back to Kentucky.

Dye's vote is clearly illegal, and must be deducted from Contestant's vote.

J. C. Leonard, non-resident.

John Leonard, p. 324, testifies that J. C. Leonard is his son; heard him say he was going to vote if he had a right to vote; that he was going to the polls to see. Previous to November 6th, 1888, he always voted the republican ticket; he advocated republican principles. Witness asked him on election day if he could not give Jackson a *hist* and he said he could not as he did not like the man. He said he liked C. B. Smith, and intended to vote for him. In the spring and summer of 1888, my son, J. C. Leonard, I presume was in the state of Kansas; I know he was; he lived in Kansas City, Missouri, in the summer. He came from Kansas City to Point Pleasant, West Virginia, and from Point Pleasant, Mason county, he came to Ripley, Jackson County. I can't be right positive about the time he made the changes, but it was somewhere thereabouts. There is no other evidence in rebuttal of this.

J. C. Leonard voted at Ripley, see Exhibit "D" filed with dep. Lemley, p. 345.

Evidence clearly shows that J. C. Leonard was not a resident of the State one year prior to voting: that his vote was therefore illegal, and having voted for Contestant must be deducted from his vote.

John Davis, non resident.

T. E. Graham, p. 325, testifies he knows J. L. Davis, sometimes called John Davis; was present at the polls of Ripley voting place, when his vote was challenged, 6th of November last; he voted. It was in October, 1887, he came to me with notes, and wanted to sell, and did sell them to me, stating he was going to move to Huntington, Cabell county, West Virginia. He immediately afterward

moved to Huntington; don't know of his moving back since. His politics were republican; he always advocated republican principles; on the 6th of November last republican workers were urging his right to vote and democrats resisting.

A. F. Parsons, p. 326, testifies knows John Davis; my understanding now is he resides at Huntington; he left about year 1886 or 1887, this county; he did not tell me he was going to Huntington, but told me afterwards that he did live there. In the summer of 1888 he told me that he had to come away from Huntington with his sick child; made an application to me for a school, saying that if he could not get a school he would go back immediately; if he could get a school he would stay and help his father this winter and go back in the spring; he did not get the school; he and his whole family are republicans.

W. P. Kerwood, p. 330, testifies he has known John Davis ten or twelve years; that he had a conversation with John Davis a few days before the election of the 6th of Nov. 1888 in which he told me he thought he would go to Huntington, Cabell county to vote; that when he (Davis) left there he locked up his household goods in his house and came to Jackson county with the intention of staying but a short time with his father; said his child had been seriously sick and he was advised to take it to the country; for that reason he came to Jackson county, to his father's.

The contestant in rebuttal takes the evidence of Wm. Davis father of John Davis, p. 726. William Davis does not deny that his son moved to Huntington; He does not state that he had removed back to Jackson county; he says J. L. Davis and his family were from July, 1888 until the 6th of November, 1888 in this county and the family are still at my house. They lived in Huntington; kept house there; that their house is now rented and that his son is now working in Huntington at the car shops. There is nothing in the deposition of Wm. Davis inconsistent with the testimony of witnesses for respondent. It is submitted that the charge of non-residence is proved as to John Davis, and he having voted for contestant, Contestent's vote should be reduced as to his vote.

Wm. Carsey and Warren Carsey, non-residents.

A. F. Parsons, p. 326, testifies he knows William Carsey three or four years and Warren Carsey two years; these two Carseys were called William and Warren by the neighbors; witness further states that he is well acquainted with the people of Ripley district and did not know of any family by the name of Carsey who lived in the district on the 6th of November last or prior to that time. The Carseys were republicans; they were so regarded. Witness further testified when asked as to the line between Jackson and Putman counties; that the second house from Hill's low gap is about one hundred and fifty yards from the line of Jackson and Putnam counties and is in Putnam county; that witness' understanding is that William Carsey lived in this house on the 6th Nov. 1888. Witness further testified that he assisted in locating the county line at that point, and knows well where it is.

Witness further testifies that he has no doubt that W. C. Carsey and Warren Karsey are the same.

T. I. C. Parsons, p. 330, testifies that he knows J. W. Carsey and W. C. Carsey, sometimes called Warren and William Carsey; have known William Carsey four or five years, and Warren two or three years. Witness further testifies that the line between Jackson and Putnam counties, corners at Hill's Low Gap, and sighting the timbers marked for the county line they lived on the 6th Nov., 1888 in Putnam county by one hundred and fifty yards or more; they were living together, occupying the same building at that time; they have not lived in Jackson county since the election; they were republicans on Nov. 6th and prior thereto; have heard them at different times advocating republican principles.

Witness further testifies that Ira Carsey occupied the house where William and Warren lived on the 6th of November, 1888, prior to them; that Ira Carsey when he lived in said house voted, paid taxes and served on the jury in Putnam county.

Witness further testified that he had examined the county line before and since the election; that a few days before the election, B. F. Casto, one of the Carseys and witness talked about where the county line was, or how far it missed the house; we were at the house at the time and could see where the corner was or within a few feet of it at Hill's Low Gap; and on the other side of the house from Hill's Low Gap, we could see where the line is at that place; and a straight line from these two points will miss William Carsey's house one hundred and fifty yards or more, putting him that far in Putnam county. Witness testified that he had seen the line for five or six miles and had traced it for a mile from Hill's Low Gap, east past William Carsey's house.

B. F. Casto, p. 332, testifies; knows the Carsey's, William and Warren; William for six years, Warren for about two years. William's initials are I. W., do not know Warren's.

Witness further testifies that; "following the line from Jackson and Putnam counties corner, in Hill's Low Gap, east past William Carsey's house, that he was in Putnam county; Warren lived with William Carsey on the 6th of November last; he told me he did; he boarded there and took me there to give me a meals victuals when I was working for him." Warren told me his wife had left him and gone to Ohio; that he had sold his farm and moved to William Carsey's.

Witness further stated he was the B. F. Casto spoken of by T. I. C. Parsons in his deposition. It was Warren we had the conversation with; we were pointing or showing where the county line was supposed to run through; I said to him that by moving over to Bill Carsey's it would throw him out of a vote in this county; he said he was coming to Ripley on the day of the election; that he didn't know that he would try to vote.

Witness further stated, "that the line we followed east from Hill's Low Gap was marked; the marks were on live trees; the marks were a blaze and two hacks; it was marked on several trees in front of the house now occupied by Dan McCullom, and it is marked as far as he followed: he followed it from the corner in Hill's Low Gap to a point near the house occupied by William Carsey; that would place William Carsey's house one hundred and fifty yards in Putnam county.

Contestant offers the evidence of Wm. I. Carsey, p. 730, in rebuttal. (Respondent calls attention that he had no notice of the examination of a witness by this name. The name of the witness in the notice is I. W. Carsey. See notice p. 723.

This witness testifies that he cannot state where the county line is; it is a matter of dispute which side of the line his house is; that he lived on the 6th of November, 1888, where he now lives; don't know where the corner between Jackson and Putnam counties in Hill's Low Gap is, or anything about the corners or lines; there is some dispute about the lines; some say I live in Putnam and some say that I live in Jackson; I never traced the line past where I live and never attempted to trace it; I have always known since I lived in the county there was a dispute as to the line. Witness states that he is frequently called Wm. Carsey by his neighbors, and that he voted at Ripley voting place by the name of W. S. Carsey, the straight Republican ticket; Warren writes his name Warren Carsey; don't know whether there is an initial letter "C" in his name or not; he is in the State of Ohio; Warren separated from his wife in the early part of May, 1888. Witness further stated Warren came to his house and boarded after he and his wife parted until after the election; he both eat and slept there and had his washing done there. He was a republican in politics.

Dan McCollum, p. 731, another witness for contestant, testifies that Warren Carsey went to Wm. Carsey in May, 1888, and boarded there until after the election, and then left and went to Ohio.

This is all the testimony presented by either party. The witnesses for contestant prove beyond contradiction where the county line was, and that the Carseys lived in Putnam county.

The testimony of Wm. Carsey, in rebuttal, does not contradict this testimony; he only shows that he does not know where the line was.

All the witnesses testify that Warren Carsey, in May, 1888, moved to William Carsey's house after he separated from his wife. The testimony of William shows he voted at Ripley voting place. The Exhibit "D," filed with Lemley dep. p. 344, shows that W. C. Carsey, (that is Warren) voted also at Ripley voting place, both were republicans and voted the republican ticket, and for contestant. These two votes should be deducted from contestant's vote

J. T. Mooney or J. T. Mooley; minor.

P. H. Parsons, p. 328, testifies he knows J. T. Mooney; it is the same man who stays with John Bostick; witness testifies that he had a conversation with him a few nights after the election; he told witness that he had voted at Ripley voting place, and that he was under twenty-one years of age; he told witness when he would be of age; don't recollect just when, but think it was some time in December. He said he voted a straight republican ticket. He further said on cross-examination that J. M. Poling gave him his supper and told him to go up to the polls and offer to vote, and if they asked him if he was under age to step back and not vote.

John Bostic, p. 328, testifies that he knows J. T. Mooney and that he has lived with him about six months; thinks Mooney did vote on the 6th of Novr. last; saw J. M. Poling give him a ticket and Mooney afterwards told witness he voted it; witness further testified that he presumed Poling's politics was republican; he was running for Sheriff of Jackson county on the Republican ticket; Mooney told witness that he voted the straight republican ticket; witness further testified that Mooney would be 21 years of age the 20th day of May next according to his and his father's statements. His father's name is Samuel J. Mooney and lives at Pee Wee, in Wirt county, West Virginia.

J. T. Mooney, himself, testifies p. 334, that he resides in Ripley District, Jackson county, at John Bostic's; that witness voted at Ripley voting place, Jackson county, on the 6th Nov. last, and voted the straight republican ticket; witness further stated he would be twenty-one on the 20th of next May, 1890; was born on the 20th of May, 1869; father has a family record, a bible; my birth is recorded in the bible.

It is sought to defeat the contest of this vote by the evidence of T. H. B. Lemley, p. 726, showing the vote is recorded J. T. Mooley. There is no evidence in the record nor can any be produced that any person of the name of Mooley voted at that place. The evidence is beyond contradiction that Mooney did vote and that he was an illegal voter; his name is not recorded as Mooney but as Mooley. This vote should be excluded, and as he voted for contestant his vote should be reduced accordingly.

William McCoy, non-resident.

Frank Vail, p. 335, testifies: I know Wm. McCoy when I see him; have known him about one year; know that William McCoy voted on the 6th of November last at Ripley voting place; he voted the republican ticket; I saw the ticket he voted; the ticket was open when it was handed to him at the ballot box; he tried to vote two tickets and reached them to the commissioner of election; they discovered there was two and declined to received them; it was immediately after that T. H. B. Lemley reached him the Republican ticket. It was generally known that T. H. B. Lemley was acting as chairman of the republican executive committee of this county during the campaign of 1888.

Witness further testifies that McCoy told him before the election that he lived in Mason county, West Va., and was going home; that he had been at work in this county.

Contestant offers the deposition of John McCoy, p. 732, in rebuttal. John McCoy testifies that he is a brother of William; that William lived in Mason county until his wife died; that William was born and raised in Mason county; witness further testifies that he did not know that William McCoy had a home any other place than Mason county, West Va., and further, that to the best of witness' knowledge he did not know that William McCoy ever, at any time, lived in this (Jackson) county sixty days.

This being all the evidence, the charge is made out that William McCoy was a non-resident of the county; that he voted, and voted the republican ticket and therefore his vote should be deducted from Contestant's votes.

Respondent further in answer to Contestants' notice of contest, charges that at Kentuck precinct, in said county, 152 votes were counted as cast for Contestant and 72 votes were counted as cast for Respondent at said precinct at said election in said county by the Commissioners of the County Court in special session assembled, as required by law, and that said Commissioners acted in counting said vote without warrant or authority of law, there being no true return made to them of such vote.

Respondent further charged that there was no vote returned and certified upon the poll books to said Commissioners of the County Court as required by law of any such vote being held and polled at said precinct, and Respondent averred that the officers of election at said precinct failed to certify and make return of any vote for Representative in Congress at said precinct in the manner prescribed by law. Respondent therefore claims that this illegal and unwarranted action upon the part of the County Court, if it could have been enquired into by the Governor, in the manner and at the time Respondent petitioned him to do so would have shown Respondent's election beyond dispute or cavil, if what Contestant claims is true, that Respondent was not elected by the face of the returns.

Respondent therefore claims that the said votes and said poll of Kentuck voting place should be rejected and not counted in the returns of the election for Representative in Congress for Jackson county.

Sec. 20, chapter 3, p. 57, of the Code of West Virginia (Worth's) provides "As soon as the results are ascertained the commissioners, or a majority of them, and the canvassers (if there be any) or a majority of them, at each place of voting, shall make out and sign two certificates thereof, in the following form or to the following effect:"

"We, the undersigned, who acted as commissioners of the election held at _____, in the district of _____, county of _____, on the _____ day of _____, do hereby certify that, having been first duly sworn,

we have fairly and impartially held the said election according to law, and the result thereof is as follows: For the office of (here designate the office, as for example: "Representative in the Congress of the United States, for the first Congressional district," and so forth, as the case may be) A. B. received — votes, C. D. — votes, and E. F. — votes, and so on throughout, stating according to the truth, the full name of every person voted for, for every office, and, in words at length, the number of votes he received for the same, and concluding as follows: "Given under our hands this — day of —." The said two certificates shall correspond in all respects with each other, and shall contain complete returns of the polls taken at the said place of voting for every office to be filled. When the said certificates are signed the ballots shall be enclosed by the commissioners in an envelope, which they shall seal up, and write their names across the place or places where it is sealed, and endorse on the outside of the said envelope as follows, "Ballots of the election held at — in the district of —, and county of —, the — day of —."

"The commissioners, or one of them, shall, within four days, excluding Sundays, after the day on which the election was held, deliver the ballots so sealed up, one set of the poll books, and one of the said certificates, to the clerk of the county court, and the other certificates and set of the poll books, to the clerk of the circuit court."

Sec. 21 of said chapter 3, provides: "The commissioners of the county court shall convene in special session at the court house on the fifth day (Sundays excepted) after every election held in their county, or in any district thereof, and the officers in whose custody the ballots, poll books, and certificates have been placed, shall lay the same before them for examination. They may, if deemed necessary, require the attendance of any of the commissioners, or canvassers, or other officers or persons, present at the election, to answer questions under oath respecting the same, and may make such other orders as shall seem proper to procure correct returns and ascertain the true result of said election in their county."

Sec. 22 of same chapter provides for the certificate of the result of the election.

It appears by the express provisions of Sec. 20 that it was mandatory upon the commissioners holding the election at Kentuck voting place, in said county of Jackson, on the 6th day of November, 1888, for a representative in the Congress of the United States, for the fourth congressional district, to certify that, having been first duly sworn, they have fairly and impartially held the said election, according to law, and the result thereof, is as follows:

"For the office of Representative in the Congress of the United States, for the fourth congressional district, James M. Jackson received — votes, Charles B. Smith received — votes, and — votes," and stating according to the truth, and in words at length, the number of votes received by each of said candidates, voted for for said office.

No such certificate was made and returned with the poll books as required by law.

Wm. A. Parsons, p. 336, testifies, "I have carefully examined the poll books and certificates of the election officers who held and conducted the election of the 6th of November last, at the respective voting places in the different magisterial districts of Jackson county, West Virginia, returned by such election officers, copies of which are on file in the county and circuit court clerk's offices of the said county of Jackson, and find, as shown by said certificates, signed by the commissioners of election, and returned to said officers, that at Kentuck voting place in said district of Washington, Jackson county, West Virginia, there is no vote certified by the election officers who held and conducted the election at Kentuck voting place, on the 6th November last, for any candidate for representative in Congress from the fourth congressional district of West Virginia."

On cross-examination witness further testified, the poll books and certificates of the election officers show that there was an election held at Kentuck voting place on the 6th of November last; couldn't state the exact number of votes cast, as the votes for some of the different candidates varied slightly from the vote cast for other candidates on the same ticket; the vote cast there was about 225, as shown by the certificate of the election officers and the poll books; I cannot state the exact number.

Witness further testified, that there is nothing in the certificate or poll books, signed and returned by the election officers, who held and conducted the election at Kentuck voting place, on the 6th of November last, showing that the Contestant or Contestee, or either of them, was voted for, for the office of representative in Congress at that voting place at that time; there are some straight marks made up and down on a paper which witness found with the poll books, not signed or certified by the election officers who held the election at that place at that time, which marks are made opposite, or to the right of the Contestant or Contestee's name, but cannot say that these marks indicate that the Contestant or Contestee were voted for at that time and place, in the absence of the usual, and what witness deemed to be the legal evidence of the fact that they were voted for at that time and place. As witness remembers there were 152 of these marks opposite to, or to the right of the name of the Contestant, and 72 opposite to or to the right of the name of the Contestee.

Witness found the names of other candidates for office at that election on that paper with marks similar to those first spoken of, opposite or to the right of their names made on the paper substantially the same way. The marks opposite the names of the persons last spoken of correspond in number with the marks opposite the names of Contestant and Contestee, the same as to some of the candidates voted for, and for others a few more or a few less. The paper, I believe, is termed a tally-sheet. Witness did not examine the ballots that were used there by the voters on that day; don't know whether any were returned by

the election officers at that place with the poll book or not. Have no personal knowledge of a recount having been made, and if it was made cannot state at whose instance.

Respondent files with the deposition of T. H. B. Lemley, clerk, Exhibits "A" pp. 341-2-3 and "B" pp. 343-4, which said Lemley testifies to as correct copies from the poll books and certificates on file in his office, and correspond with the same on file in the office of the clerk of the Circuit Court. See also certificate of Clerk of Circuit Court, exhibit "A" with his deposition p. 351.

Contestant offers the deposition of T. H. B. Lemley, clerk of the county court, p. 724, in rebuttal Lemley testifies that the commissioners of the county court of Jackson county did make a recount of all the votes cast in said county at the several voting places thereof at the election held on the 6th of Nov., 1888 for the office of Representative in Congress for the fourth congressional district of West Virginia; that said recount was made at the instance of Judge James M. Jackson, Contestee. Charles B. Smith, contestant, was not present either in person or by counsel. Judge James M. Jackson was not present in person, but was present by B. F. Rader, as counsel. The commissioners used the poll books, tally sheets, ballots, and they opened and counted all the ballots; upon the recount the result was that J. M. Jackson, contestee, received 1886 votes, and C. B. Smith, contestant, 2272 votes. W. M. Wheatley received 10 votes. Witness filed with his deposition the entry made by the county court of the vote as appears on the record of the court, showing the vote as counted.

The question and the answer of the witness as above stated, was objected to by respondent upon the ground that they related to matters of record, and can only be proved by the record.

Sec. 21, chapter 3, page 58 of the code provides that the commissioners "shall upon the demand of any candidate voted for at such election, open and examine any one or more of the sealed packages of ballots and recount the same."

There is no evidence of such demand having been made by Respondent except the evidence of Lemley above. There is nothing filed, certified from the record showing such demand. The certificate of the entry made by the Court filed with Lemley's deposition makes no mention of any such demand, and does not show that the result was ascertained from a recount.

Respondent insists that he made no such demand as to Kentucky voting place, and there is no evidence by the record, or by the testimony of Lemley, that such demand was made of a recount of that poll.

Attention is directed to the fact that by the provisions of Sec. 21, above referred to, the commissioners had power to require the attendance of any of the commissioners or other officers or persons present at the election to answer questions under oath respecting the same and make such other decrees as shall seem proper to procure correct returns and ascertain the true result of the said election in their county.

With this power vested in them there is no pretense that said commissioners summoned the commissioners, officers or any one else to ascertain if an election was held at Kentuck voting place for representative in congress, and to procure a proper return of the vote cast there for that office.

It must be conceded from the evidence that no such return was made. If votes were cast there for that office it was an easy matter under the law to have ascertained that fact. As it was not done the fair inference is, it could not be proved.

If there was no return certified as required by law, nor no proper return procured by the Commissioners under the power conferred upon them, then there could be no vote to count, and if the commissioners of the county court did make such pretended count as testified to by Lemley, as to Kentuck voting place it was wholly unauthorized, illegal and of no binding effect whatever.

The weight of authority is to the effect that the law requiring returns to be certified to, or signed or attested by the officers making it, is mandatory, and a return not thus authenticated cannot be received in a contest, or by the canvassers. American and English encyclopedia of Law, Vol. 6, page 337, and cases cited. And it is insisted that it no where appears that the commissioners who conducted the election in Kentuck voting place in said county, returned any ballots showing any votes cast for representative in congress at that voting place.

It is attempted to aid the certificate and poll books by showing that tally sheets were returned, showing that Contestant and Respondent were voted for. Admit they were voted for; for what office were they voted for. The poll books do not disclose that Contestant or Respondent were candidates for any office. See dep. of Parsons. The returns of the Commissioners fail to make mention of their names as candidates and when you look to the tally sheet whilst their names appear there, there is no designation of any office for which they were voted for. It would be just as proper from what appears upon the paper to say they were candidates for any one of the offices mentioned in the returns. In fact there is no evidence in the record either verbal or documentary, whether before the commissioners at the polls, or the commissioners of the county court on making up the returns to show that Respondent or Contestant were candidates for the office of representative in congress for the 4th Congressional district, and voted for as such at Kentuck voting place.

It is therefore confidently claimed that the vote cast at Kentuck voting place in Jackson county must be excluded in making up the returns from that county.

Respondent by way of further answer to Contestant's notice charges that at Pine Log or Clay Lick voting place in the district of Grant there was such misconduct and fraudulent acts upon the part of those who conducted the election at said voting place as to render such

poll and the votes cast respectively for Contestant and Respondent null and void, that is 139 votes cast for Contestant and 92 votes cast for Respondent. Upon this charge Respondent introduced the following witnesses:

C. C. Nesselrood, p. 317, testifies that he lives in Grant district and voted at Pine Log precinct in Grant district on the 6th November, 1888; that the names of the commissioners who held the election at Pine Log at the November election last, were Thomas Rorden, John McKown and W. T. Dernberger, called "Tock" Dernberger sometimes.

Witness further testified that the votes received by the election officers on the 6th day of November, last, at Pine Log voting place were counted in the school house in which they were received by the election officers; they were counted the night after the election, beginning the evening after the election and continuing until completed; witness remained there whilst the vote was being counted; remained there until near or after midnight: then went to sleep; slept perhaps two hours or more; wakened up; one of the commissioners was asleep on a bench; another was smoking in the back part of the house; only one of the commissioners was at the ballot box; a man who was not a clerk, or sworn to help conduct the election, was counting the votes, and two other men, not clerks or commissioners, and not sworn in as aforesaid, were stringing the votes; this continued until the final count was made; the two commissioners spoken of as being asleep and smoking, took no further part in the counting until it was finished, then they signed up the books. W. T. Dernberger was the commissioner asleep, John McKown was smoking, W. E. Dernberger was counting, or reading off the votes, and W. H. Rardon and Asberry Davis were stringing votes.

On cross-examination witness further testified that W. T. Dernberger, the commissioner who was asleep, was a democrat; that W. E. Dernberger, son of W. T., is a democrat, and that he took the place of John McKown, in counting the votes; that Asberry Davis was a democrat, and that he did not know if the result at that precinct of Pine Log was correctly certified.

No evidence was taken to rebut the evidence of Nesselrood as above testified to.

In addition it is claimed by Respondent that the deposition of Lemley, clerk, page 725, whilst not responsive to any allegation of Contestant made in his notice of contest, and which testimony, so far as the same refers to Pine Log voting place, was objected to, tends to show misconduct of the commissioners at said voting place, for that the said Lemley, a witness for Contestant, testifies that he has examined the certificate of the commissioners of election, held at Pine Log voting place in this county, on the 6th of November, 1888, filed in the office of the clerk of the circuit court of this county, in the custody of the said clerk. Charles B. Smith, Contestant, received one hundred and thirty-nine votes (139) as appears from the certificate; there is

no other person voted for for said office, as appears from the said certificate. That in the recount by the commissioners, ninety-two (92) votes were ascertained from the ballots to have been cast for J. M. Jackson, Contestee, and were counted in the result for him for representative in Congress.

So that whilst it appears that Respondent was a candidate, and was voted for, for representative in Congress for the Fourth Congressional district of West Virginia, at Pine Log voting place, in said county, yet said commissioners, at said voting place, so carelessly and negligently conducted themselves in certifying said vote, that they were guilty of gross misconduct, amounting to fraud, in conducting said election, in failing to certify the vote cast for Respondent, and in effect, by their misconduct, depriving Respondent of the votes so cast for him.

It is further submitted that the acts of said commissioners, one of them going to sleep, another absenting himself from the ballot box, leaving only one in charge during the count of the vote at said poll, and permitting persons not sworn, to handle said ballots, and count the same, was gross misconduct, and fraudulent upon the part of said commissioners, rendering themselves wholly unable to certify said election as they were required to do by Sec. 20, chap. 3 of the Code, and said acts so suffered and committed by them rendering it possible for fraud to be committed upon said ballot box, were such acts of misconduct upon the part of said commissioners, as would make said returns doubtful and uncertain, and the same should for that reason be held to be null and void, and should be thrown out.

It has been held a failure to count the votes at the time or the place fixed by law will not necessarily vitiate the election. Where, however, this failure gives a chance for fraud in counting the votes or tampering with the ballots, and the proof is not reasonably clear that the canvass was honest and correct, the returns should be rejected. *Spencer vs. Morley*, 4 Cong. El. cases, 437.

There is no evidence in the record making it reasonably clear that the canvass was honest and correct. If, therefore in the case cited, if the count was elsewhere than provided by law, and for that reason a chance was given to commit fraud in counting the votes, or tampering with the ballots, there is no reason why the rule should not be the same where the count was proceeded with at the proper place, and the evidence positive that unauthorized persons were given unlimited chances to commit fraud in counting the votes and to tamper with the ballots. It is insisted, therefore, that the returns from Pine Log voting place should be rejected.

Benjamin Singer, non-resident.

Patrick Slaven, p. 311, testifies that he is acquainted with Benjamin Singer; he lives near me in Grant district; he came there 6 or 8 years ago and he worked around for two or three years in that district for neighbors; then he married a mulatto girl and lived with her until

about two years ago, when he and his wife parted and he left the country. I cannot state when he came back; he was here last fall and this winter and spring again; I met him coming from the election at Red Brush in said district Nov. 6th last, but did not see him at the polls; I think he votes the republican ticket; he is regarded as a republican in that neighborhood; I don't think he has lived with his wife since he left her; don't know positively.

C. C. Nesselrood, p. 318, testifies I know a man by the name of Benjamin Singer. I have known him for ten years; I rode into town with Mr. Singer a week or so before the election; he told me at that time he had been in northern Ohio and Michigan; he had a Knight's of Labor badge on, marked Detroit, Michigan; I asked him how long he had been there; He said he had been in Ohio and Michigan for the last two years. He lived in the colored settlement before he went to Ohio and Michigan within four or five miles of me from where I then lived in Grant district. I saw him perhaps one month before he went to Ohio and Michigan; he is a colored man; I did not see him from the time he left the colored neighborhood until a few weeks before the election, not likely more than two weeks. In conversation he said he was a Harrison man; he and all the colored people in that neighborhood were considered republicans.

T. H. B. Lemley, Dep. p. 345, Exhibit "D," proves the name of Benjamin Singer is among the names of those voting at Red Brush voting place.

A *prima facie* case is made, Benjamin Singer having lived in this State abandoned his wife and been absent more than two years prior to the election, returning about two weeks before the election and then not to live with his wife. Notice to take his deposition is given, but it is not taken. The legal inference is that his testimony would be against Contestant. Being a colored man and the general reputation that he is a republican, stating that he was a Harrison man and having voted at Red Brush voting place his vote should be rejected and deducted from Contestant's vote.

Richard Piatt, minor.

John Parsons, p. 329, testifies that he knows Richard Piatt; I have known him nearly all his life, from a small boy up; part of the time he was in my neighborhood, and part of the time he was out of it; I have not seen or heard of him since the election. I live in Parchment Valley, Jackson county, a little over a mile from where Richard Piatt made his home before he left. I had a conversation with Richard Piatt a few days before the election, November 6th, 1888, about his age. He came along by where I was, and said he had been up to see his mother about his age, and he said his mother told him that he would be twenty-one some time in January then following; I think about the 24th; this conversation was less than a month before the election in November last; he did not say at that time whether he would vote or not, or how he would vote; I do not know of but one Richard Piatt.

W. P. Kerwood, p. 330, testifies he knew Richard Piatt when he saw him. On the 6th of November last, and prior thereto he was regarded as a republican; on the 6th of November last I lived about five or six miles from him, and prior to that time, about one year I lived within about one mile of him.

Exhibit "D" p. 345, filed with T. H. B. Lemley dep, shows that Richard Piatt voted at Ripley voting place in said county.

It is submitted that the charge as to Richard Piatt is made out, and that his vote should be rejected and deducted from Contestant's vote in Jackson county.

LINCOLN COUNTY.

Robert Treet, (improperly called Robert Tripp, in said notice,) pauper.

John Reynolds, p. 354, testifies that he has known Robert Treet about two years; heard he died about two months ago; he claimed always to me to belong to the republican party, and said he voted the republican ticket.

Lacy Gross, p. 355, testifies that he knew Robert Treet about 3 years; he claims to belong to the republican party.

H. Hager, p. 356, testifies that he has known Robert Treet five or six years; the county court made decrees for the payment of the doctor bills as a pauper for the last four or five years. I have the custody of said records; the records show that allowances have been made by said court for the benefit of said Treet. I have examined the poll books of Porter's school house precinct, (which are now handed witness); this is the book which was used at said precinct at the general election held at said precinct on the 6th day of November, 1888, at which candidates for congress for the 4th district of West Virginia were voted for. Robert Treet's name appears on said poll books as a voter, and as having cast his vote at said precinct at said election.

John Wysong, p. 357, testifies I am overseer of the poor for Carol district, Lincoln county, and have held the office for two years past. I have directed Dr. Holly to attend to said Treet upon three or four different occasions in the last 12 or 15 months. By my directions he and his wife were both sent to the poor house of Lincoln county, where his wife died three or four months ago.

The evidence clearly shows that Robert Treet was a pauper, and that his vote should be rejected. It further shows he voted for Contestant.

William Saxon, and *R. A. B. Saxon*, paupers; improperly called Saxon, their true names being Sexton.

W. D. Holley, p. 356, testifies that he knows William Sexton and Ira B. Sexton. I have known them 25 years, or ever since they were children; they always told me they belonged to the republican party; think they vote with the republican party; I have talked with the county court for two or three years about getting their taxes removed, and the court told me it had released them from paying their county and State taxes, and they also told me they were released from their taxes by the county court, and I think they have not paid any taxes for three or four years.

H. Hagar, p. 356, testifies, I have been clerk of the county court of Lincoln county for sixteen years. The county court of Lincoln county made an order for a draft to be issued for the amount of William Saxton and Ira B. Saxton's taxes and directed me to pay their taxes with said draft; their taxes were paid in this way for the past three years. The records of Lincoln county show the said order.

James A. Holly, p. 357, testifies that he knows William Saxton and Ira B. Saxton; they claim to belong to the republican party; am satisfied from what I have heard them say and from other circumstances that they vote the republican ticket.

The charge is made out as to these two votes and they should be rejected, as voting for Contestant.

MASON COUNTY.

B. F. Blessings, non-resident.

Robert Conley, p. 358, testifies that he has known B. F. Blessing for 18 years; Blessing voted at Letart, November 6th, 1888; he resided in Mason county, until about six years before the election he went West; he told me he went to Nebraska and Dakota, where he said he owned property; he returned in about two years on a visit, a short visit of about two weeks; he was not in this county to my knowledge any more until the day of the election; he said he had come back on a visit, as he had done four years before; he stayed here after the election about a week or ten days; he told me when here he lived in Dakota, he was outspoken and always announced himself as a straight republican; I saw Blessing vote; I had a conversation with Blessing at his mother's four years prior to the election; and had a short talk with him after his return, and after the election; I heard him say he was a republican on election day, and that he had got in time to vote for Harrison. His mother resides in this county; he was a widower when he left here; his vote was challenged, he was not sworn; I was present at the time.

The conversation I spoke of was in regard to his property in this State, which he wanted to sell to me; that he had property in the West, where he expected to live, and did not want his property in this State

J. F. Roush, p. 364, testifies that he has known B. F. Blessing nearly all his life; he was gone from this State about 6 years prior to the election November 6th, 1888. He returned about two years after he left and stayed two or three weeks, when he left again, and came back to Letart on the day of the election; Blessing told me he lived in Wyoming part of the time and the rest of the time in Dakota. He affiliated with the republicans.

Upon cross-examination the witness further testified, that, as commissioner of the election, he did not swear Blessing when he offered to vote; I told the other two commissioners he had no right to vote, but they let him vote. His vote was marked challenged on the poll book.

Rankin Wiley, Jr., p. 372, testifies that he met B. F. Blessing on the day of the election for the first time. He came to the Court House, Point Pleasant, this county, and offered to vote; I questioned his right to vote and had him sworn by the judges; he stated under oath that he had been in the Western territories about six years; that he was in this county at the time of the election held for President in 1884, and had voted here for Blaine; soon after 1884 he returned to the West, and had arrived here a day or two days before the election of November 6th, 1888, and in reply to a question propounded he said he had voted once for county officers in the West, since leaving this county; the judges rejected his vote and he left the court house; when he offered to vote he was accompanied by J. B. Menager, a leading republican of this place, who tried to aid him in having his vote accepted, but when it was rejected Menager told him that if he had voted out West he could not vote here.

On cross examination witness testified that he did not see him vote at Letart, but the poll books show he voted there.

The deposition of L. T. Pilchard, 741 is taken by Contestant in rebuttal. This deposition does not contradict the statements of respondent's witnesses. It is not denied that Blessing had been from the State at least four years since he had exercised his franchise here. That he had voted in the West where he then lived. His voting elsewhere is the highest evidence of intention to change his residence. Clearly his vote should not have been received at Letart voting place, after an attempt to vote at the Court House, where his vote had been rejected upon the ground of non-residence.

The charge as to B. F. Blessing's vote should be sustained, and his vote should be rejected.

Israel Cullen, non-resident.

Robert Conley, p. 358, testifies that he is acquainted with Israel Cullen and has known him about 12 or 14 years; he removed from this State; he told me he was going to Indiana; he returned about a month before the election, November 6th, 1888; he sold his real estate and made a public sale of his personal property; he went to In-

diana early in the spring of 1888; he took his family and unsold effects with him; he was outspoken and always affiliated with the republican party.

J. F. Roush, p. 364, testifies that he has known Israel Cullen for 6 or 8 years; he voted at Letart at the election of Nov. 6, 1888; he left the State about six months before the election; he sold his farm, and all his personal property at public sale; he said he was going to Indiana when he sold out; he returned about two months before the election and stayed about two weeks, when he came back and brought his wife with him

On cross-examination witness stated that Cullen was elected on the Board of Education on the republican ticket and when he left here to go to Indiana he resigned his office.

Contestant files the deposition of L. T. Pilchard, p. 741, who testifies that Cullen told him he was going west on account of his wife's health to visit relatives; that he had sold his farm, and stored his household goods in a neighbor's house; that he was going there temporary; that he has partly contracted for a farm here, and since bought it.

Whilst the evidence of Pilchard, contradicts in some particulars the testimony of the witnesses for Respondent, yet it is submitted that the weight of the evidence is in favor of Respondent. Pilchard says that Cullen told him he had stored his household goods with a neighbor; this testimony is hearsay, and therefore, illegal. Collins and Roush both testify that he sold his personal property at public sale, and Collins testifies that Cullen took his unsold effects with him. The evidence is clear that he sold or removed his unsold effects thus contradicting the hearsay of Pilchard. The evidence further shows that Cullen resigned his office before leaving; if he was to be absent temporarily, why resign? Why sell his farm and a part of his personal property, and remove residue? Cullen has returned, lives in the county, why not take his testimony as to his intentions? The inference fairly deducible is that he would testify that he intended to reside permanently in Indiana, when he removed there. All the testimony in rebuttal is hearsay, and not competent.

We submit the vote of Israel Cullen should be rejected, and deducted from Contestant's vote.

William Lee, pauper.

John Fowler, p. 361, testifies that he is the overseer of the poor for Wagener district; have known William Lee for 24 years. I have as overseer of the poor given William Lee and his family things to live on and buried his child that died and furnished him medical aid. I gave orders to the store as overseer of the poor, and gave orders for the coffin and burial outfit for the child. His child was buried on the 22nd day of October, 1888. I buried it. He has been getting orders off and on for the past three years. He was in such destitute circumstances

as to require assistance from the county. The application for assistance was given upon the application of William Lee, his wife and also William Van Matre.

Contestant has taken Wm. Lee's testimony, p. 740, which substantially sustains the deposition of John Fowler, admitting that he received aid from the county, and that the county furnished the coffin to bury his child, and further stated that he refused to vote the democratic ticket. J. P. R. B. Smith's deposition, p. 375, shows that Wm. Lee voted at West Columbia precinct.

The evidence sustains the charge that Lee was a pauper; that his vote was illegal, and voted the republican ticket, and his vote should therefore be rejected and not counted for Contestant.

Charles Anderson and Chris. Anderson, non-residents.

C. V. Stewart, p. 362, testifies that he was acquainted with Christopher C. Anderson and Chas. Anderson; have known them for ten or twelve years. I understand they lived in Ohio prior to Nov. 6th, 1888. C. C. Anderson told me himself that they lived in Ohio; they moved from this State to Ohio and returned to this State a short time before the election; it was less than a year.

On cross-examination, witness further testified that he could not say that they left their property or some of it in this county when they went to Ohio. Mr. C. C. Anderson told me he was going to move to Ohio. They claimed to be republicans; C. C. Anderson and Chris. Anderson is the same person; they told me they were republicans.

John Behan, p. 363, testifies that he has known Chris. and Charles Anderson, and have known them for several years. They were digging coal at Camden mines in the latter part of the summer 1887, and moved to Carbondale, Ohio. I asked C. C. Anderson why he left Camden at that time; from what I could hear the work out there was not any better than at Camden; he said the coal was hard at Camden and he did not intend to dig it any more; the next I saw of him he came back to Camden mines about July 1st, 1888; he hired again and rented a house; Charles Anderson left sometime before his father C. C. Anderson did; don't know the exact time; he was a single man when he left the Camden mines; he returned sometime in August, 1888; he got married and lived across the river in Ohio, at Cheshire; I heard them both say they voted the republican ticket.

On cross-examination, the witness testified in reply to a question asked by counsel for contestant, viz: "Is it not a fact that said Andersons only left the State with others temporarily to dig coal at Carbondale, Ohio?" answered, "They went to stay permanently so I understood."

Witness further stated he did not see either one of them vote, but if he had been there he would have challenged their votes.

J. P. R. B. Smith, p. 375, testifies that Charles Anderson and C. C. Anderson voted at West Columbia.

It sufficiently appears by the evidence that the Andersons had removed to Ohio permanently; that they voted the republican ticket on Nov. 6, 1888, in Mason county, West Va.; having so removed, their votes were illegal, and their votes should be rejected and taken from the number cast for contestant in said county.

T. G. Hulbert, non-resident.

W. E. Beiler, p. 367, testifies that he has known T. G. Hulbert 6 or 7 years; when I first knew him he resided at Deer Lick, Mason county. In about the spring of 1885 he went west; his father and brother said he went to Kansas; he told me that he was most of the time located at Emporia, Kansas; but had been in various parts of the State. He returned to Deer Lick about two months before the election of Nov. 6, 1888, and told me he was just from the west.

Witness further testifies that Hulbert affiliated with the republican party; he was a very strong advocate of republicanism.

On page 375, witness further stated that T. G. Hulbert is commonly known as Trume or Truman Hulbert.

J. P. R. B. Smith, clerk, p. 375, testifies that Truman Hulbert is recorded at Wolfe's Valley precinct as voting.

Isa Hulbert, a witness for Contestant, p. 737, testifies he has known T. G. Hulbert all his life; he had been a resident of West Virginia, Mason county about five years, when he went away, and was gone about two years; has been back here in Mason something over a year to this date; has been living with his father in Union district; I talked with him the day before he went away; he was going to Kansas, and if he got work there so as to make it pay better, he did not know how long he would stay; I wouldn't take it he meant to *stay there permanently*; I got a letter, he said he liked Kansas pretty well; then not so well; he returned in spring of 1888; commonly known as Truman Hulbert.

It appears from the evidence that Hulbert left for the West and was gone two or three years; when he went West, according to Isa Hulbert's testimony, he left to stay an indefinite time. Certainly he made no declarations as to when he would return, if ever; the declaration of the witness that he "didn't take it he meant to stay permanently," is not evidence. Hulbert is in Mason county, or was during the time of the taking of these depositions; his testimony is not taken. The legal inference is, his testimony would have been adverse to Contestant's pretensions. We claim, therefore, he voted illegally, and his vote should be deducted from Contestant's vote in Mason county.

James Johnson, minor.

W. H. Baker, p. 369, testifies, that he is acquainted with James Johnson, charged with voting illegally at Stephens precinct, at the election of November 6th, 1888, and has known him ever since he was a child; he told me he was not of age until the 14th day of April, 1889; I bought a piece of land of him and he said he could not make

a deed to it until the 14th day of April, 1889; he did not make the deed until after that time. He affiliates with the republican party.

The charge is made out as to James Johnson's vote, and it should be excluded from Contestant's count of votes in Mason county.

George H. Rice, non-resident.

James Capehart, p. 370, testifies that he knows George H. Rice; known him all his life; born on his father's farm; that prior to February, 1888, the said Rice lived on witness' farm in the state of Ohio, for two years. In February 1888, he moved from Ohio to witness' farm in this State; he is a republican, and told me he voted at Point Pleasant; I saw him at the polls here.

George H. Rice, himself a witness for Contestant, p. 738, testifies that he made his home in Mason county; lived there all his life except what time he was on Mr. Capehart's place, in Ohio, about a year; was out West about three years ago. I went to Capehart's place to make it my temporary home *I guess*; of course I went there to make it my temporary home. I voted for Charles B. Smith.

On cross-examination, witness testified that he moved with his father to Nebraska; moved there in 1885, lived there eighteen months, returned here in fall of 1886; my father moved to Ohio in the summer or fall of 1886; always made my home with my father; my father moved to Nebraska with his entire family; he kept house while there. *It was February, 1888, my father moved back from Ohio to this county. I returned with him at that time.* I know that my father refused to vote at the November election 1888, for the reason he had not resided here one year prior to the election. My father kept house while he lived in Ohio; I lived with him.

The evidence in this case proves beyond doubt that Rice voted illegally; his home was with his father; his father refused to vote for the reason that he had not been in the state for a year; the status of the son was the same as the father. Rice voted illegally, and, having voted for Contestant his vote should be rejected, and not be counted for him.

Respondent relies upon the deposition of J. P. R. B. Smith, clerk, p. 375, as to the names of persons voting in the several voting places in said county, whose votes have been contested.

PLEASANTS COUNTY.

A. C. Jordan's vote is contested on the ground that he voted at voting place in McKim district; the said Jordan not being then and there an actual *bona fide* resident of said McKim district, but was a resident of another and different district than said McKim district.

Thornton Lucas, p. 380, testifies that he lives in McKim district and is surveyor of roads; that A. C. Jordan was a single man when witness last knew him. He (Jordan) had been living with

his brother for four or five years; his brother lived in Doddridge county and moved to McKim district about two years ago. Last spring he moved to Lafayette district; his father lived in McKim district on up to some time in September, and then moved to Lafayette district. I asked A. C. Jordan one day if he would work the roads under me in McKim district. He answered me he would work on the roads in Lafayette district down on the run; he said he had his washing down there; he claimed his home with his brother at that time. He always claimed to be a republican. When I went to the polls I asked him if he had voted and he said he had; all I ever talked to always said he was a republican.

A. C. Jordan voted at "Cloverdale," McKim district. See deposition of J. L. Knight, clerk, p. 401.

No other evidence is offered. A *prima facie* case is made out that Jordan being a resident of Jefferson district voted in McKim, and not being a *bona fide* resident of McKim at the time of voting his vote is illegal, and it appearing that he was and is a republican, his vote should be deducted from the number cast for contestant in Pleasants county.

Walter Henry, non-resident.

Green B. Harris, p. 382, testifies that he is acquainted with Walter Henry; he is a single man; that Walter Henry's parents resided last November in the State of Ohio. Walter Henry worked for me in the blacksmith shop in the first part of 1888. I have heard him speak of his home being with his father; in his conversation he speaks of his father's being his home. He has always been a straight out republican, and he said he voted a straight republican ticket 6th Nov. 1888. He left my place soon after the election and went back to his father's in Ohio; he has been at my house lately; he came from home in Ohio.

C. P. Cochran, a witness for contestant, p. 750, testifies that he knows Walter Henry probably 8 or 10 years; he made his home part of the time with his brother-in-law at Horseneck; he told me he claimed that as his home.

On cross-examination, witness testified that Walter Henry's parents lived at Milltown, Ohio, and that he was a single man.

E. B. Steen, another witness for contestant, p. 753 testifies that he knew Walter Henry 8 or 10 years. When I first knew him he lived at Cow creek, Grant district; the latter part of the time he has been with his brother-in-law, Green Harris, and I suppose that to be his home.

On cross-examination witness testified, I think Walter lived with his father at the time he lived at Frank Irwins. I used to see him at the blacksmith's shop; I dont know whether Walter went with his father when he moved to Ohio or not; there was a time I did not know anything of Walter or his father either. Green Harris married Walter Henry's sister.

The weight of evidence is against the right of Henry to vote. Cochran bases his statement on the fact that he lived with his brother-in-law, (Green Harris). Steen bases his statement on the fact that he *supposed* Henry lived with his brother-in-law Green Harris; supposed that to be his home.

Green Harris, the brother-in-law, in his evidence rebuts these statements, and fixes Henry's home in Ohio with his father. He had better means of knowing, and when he testifies that Walter Henry always claimed his home with his father in Ohio, his evidence is entitled to outweigh the testimony of the others.

The charge is therefore made out, and Walter Henry's vote should be excluded from the vote cast for Contestant in Pleasants county.

Warren Barnhart, minor.

Mary Bland, p. 383, testifies, I am acquainted with Warren Barnhart; am his aunt; Warren Barnhart was going on twenty years of age on the 6th of November, 1888. He was born in 1869; I was not present at his birth; when I first talked with him about his voting at the November election, he contended that he was twenty-one years old, and I told him he was not, and he said John Boley told him not to get scared about his vote, and he would see him through with it; have seen Barnhart since and he told me Boley was the cause of his voting. He told me he voted the republican ticket; my brother's oldest girl and Warren Barnhart are about of an equal age, and I have a record in my bible of her age; his father told me Barnhart was born on the 8th of March, 1869, and my brother's oldest girl was born on the 25th of March, 1869.

No other testimony is taken as to this vote. The evidence is clear that he was a minor when he voted. That he voted is proven by the deposition of John L. Kight, p. 401. Having voted illegally, his vote should be rejected and being a republican, voting that ticket, his vote should be deducted from Contestant's vote in Pleasants county.

Henry S. Perry, non-resident.

William Naish, p. 384, testifies that he is acquainted with Henry S. Perry, he worked for me during November, 1888. He claimed to me he had a family in Marietta, or Harmar, Ohio, I forget which just now; they lived in Marietta, Ohio, and moved to Harmar, Ohio, but I don't know whether before or after the 6th of November, 1888. I don't know where he lives now. He told me he had been a democrat, but that he was going to vote the republican ticket in November, 1888; he went to the polls with me and I think I heard him say that he voted the republican ticket, but I am not certain; I am a republican; he came to work for me about the middle of March, 1888; he left my house about the latter part of November. When he left my house he told me he was going back to Ohio; that he had rented a house of Mrs. Lynch, on Bull Run, Wood County, this state, and he was going over after his family to move into it, and that is the last I heard of him.

Green B. Harris, p. 382, testifies that he knows Henry S. Perry when he sees him; He was a married man; his family resided back of Marietta, on the Big Muskingum.

On cross-examination witness testifies that he simply knows that his name is Henry S. Perry, and that he is an old, crippled man, that emigrated from Ohio; his family lives in Ohio, he lives in Ohio now; he worked for William Naish at the time of the election; he said he lived in Ohio, his son-in-law and his daughter said he did. His son-in-law is George Rush, and his daughter is Rush's wife. He was here some time before the election, and then he left and went home about 3 or 4 months before the election, went home to stay; he quit work at my place and went home, he came back on a visit.

The case is made out that Perry was a non resident. He voted at Calf Creek voting place, in Grant district; see deposition of John L. Knight, p. 401. He voted the republican ticket, his vote should be rejected and deducted from Contestant's vote in Pleasants county.

Edgil Fletcher, non-resident.

Jonathan Gilmore, p. 390, testifies that he has been a little acquainted with Edgil Fletcher for the last six years. I don't know where he resides now; I reckon in Jackson county. I knew him when he lived in Tyler county; two years I was there; I did not see him any more until he came down last fall. Something like two or three weeks before the election of November, 1888, he came down from Tyler county to Pleasants county. I don't know how long he stayed after the election; he was not here more than a month and a half altogether. He went to the polls on the 6th of November, 1888, with republicans, Melvin Miller, Alvin Ash, Charley Ash, and I believe Bub Miller, they talked as if they were republicans; they stopped and talked with me. Mel. said he wouldn't haul a democrat but would haul all the republicans he could. As to his vote, see Knight's dep. p. 401.

There being no other testimony offered, a *prima facie* case is made out against the legality of Fletcher's vote. It should be rejected and deducted from Contestant's vote in Pleasants county.

Elijah Kiggins, non-resident.

Wm. J. Barker testifies, p. 376, that he is acquainted with Elijah Kiggins; Kiggins lived in Pleasants county on Nov. 6th, 1888, but his family was not. Kiggins' wife was over in Ohio; I can't give the date at what time Kiggins left Pleasants county; it was before the election; Kiggins has gone to his family since the election. I don't know who he voted for for congress; didn't see his ticket; I supposed him to be a republican; that is the way he always talked; he was commonly reputed to be a republican by his neighbors and as having voted that ticket.

On cross-examination, witness further testified that Kiggins lived at Raven Rock until he moved to Ohio. He married a second wife in Ohio and moved all his stuff except his bed before the election, and

moved *it* after the election. I saw him on election day starting across the Ohio river; Kiggins went to Ohio to live with his wife before the election.

John W. Morgan, p. 386, testifies that he has known Elijah Kiggins about five years; he told me awhile before the election that he had married a lady in Ohio. He is a republican.

On cross-examination, witness further testified that he got from Kiggins himself the information about his marriage in Ohio and about himself.

James M. Snively, a witness for Contestant, p. 746, testifies that he is acquainted with Elijah Kiggins; known him for several years; he resided at Raven Rock on Nov. 6, 1888.

On cross-examination, was asked: "You have stated that Elijah Kiggins resided at Raven Rock on Nov. 6 1888; explain how you know he resided there at that time?" Answer—"I seen him there." Witness was further asked: "You say that Elijah Kiggins resided at Raven Rock, and when asked how you know they resided there, you say you saw them there. Is that the way you determine where a man resides?" Answer—I judge a man's residence by his place of business. Witness was further asked: What business did Kiggins follow at Raven Rock Nov. 6, 1888? Answer—He was at the polls that day and watched around to get a vote. See also dep. of George M. Williamson, p. 748.

The weight of testimony as to this vote is that he, prior to the election, was a resident of Pleasants county; that being a widower he married in Ohio, and removed there to live with his wife, thereby losing his residence. It is submitted that the charge is sustained and Elijah Kiggins' vote should be rejected.

D. Mott and N. Stewart, unsound mind.

W. J. Barker testifies, p. 377, that he is acquainted with D. Mott and N. Stewart; that he would not call them of sound mind at all; that the said Mott and Stewart are commonly considered in their neighborhood as idiots; they are reputed as having voted the republican ticket, but whether they voted for Smith I cannot say.

John W. Morgan, p. 387, testifies that he is acquainted with D. Mott and N. Stewart; have been acquainted with them for about five years. Judging by their appearance, actions and conversation, I should say they are not men of sound mind. Their fathers belong to the republican party, as to them I don't think them possessed of sufficient intellect to belong to any party. I don't know what ticket they voted; I didn't see them at the polls but I heard a republican say he had made out Stewart's ticket, a republican ticket, and Harvey Mott wrote out a republican ticket for Dan Mott.

A *prima facie* case is made that D. Mott and N. Stewart are of unsound mind. The deposition of J. L. Knight, p. 401, shows that they voted at Raven Rock. Their votes should be rejected and deducted from Contestant's vote in Pleasants county.

The votes of *Thomas Bennett, David Stewart, Enoch Rudder, John Rudder, Elijah Rudder* and *William Northcroft* are contested on the ground that they and each of them were of unsound mind and voted at Raven Rock, Union district.

William J. Barker, p. 377 testifies that he is slightly acquainted with Thomas Bennett, David Stewart, Enoch Rudder, John Rudder, Elijah Rudder and William Northcroft; I don't consider them men of sound mind; they are reputed to have voted the republican ticket; they associated with republicans, went to republican meetings and to the polls with republicans.

On cross-examination, witness further testified that he would not consider them men of sound mind, from their walk and conversation; that is the way I judge Thomas Bennett, David Stewart, Enoch Rudder, John Rudder, Elijah Rudder and William Northcroft. I judge them by their daily walk and conversation; from what dealings I had with them.

Charles Bailey, p. 392, testifies that he is pretty well acquainted with Dave Stewart, and slightly acquainted with the Rudders. It is commonly reported they voted the republican ticket, November 6th, 1888.

On cross-examination, witness further testified, that Dave Stewart acts like a man whose mind is not very sound; I just go by his actions; I believe I am capable of knowing when a man acts the fool; I believe my mind is as sound as the man who propounded the question—Barron I mean.

J. W. Cunningham, p. 394, testifies that he does not know as he has seen William Northcroft for some time; that he used to know him; he don't act like a man of sound mind; that is what I have to say, according to my judgment.

W. H. Bishop, p. 396 testifies that he is acquainted with Wm. Northcroft; my opinion is, I would not pronounce that he was of sound mind at times; Northcroft claims that he is a republican and voted the republican ticket November 6th, 1888.

Witness was asked, on cross-examination, by counsel for Contestant, "How sound is your mind, and what is your politics, and are you a doctor and an expert capable of judging proper minds," to which he replied, "about as sound as Barron's is on some things; I am a democrat, always was; I judge by their actions; am no doctor, no, no, for I can't get into their heads."

John W. Morgan, p. 387, testifies that he knows David Stewart; I think he knows what he is voting for, although he is not very bright; he is commonly reported in his neighborhood as being a republican, and having voted the republican ticket.

James M. Snively, a witness for Contestant p. 746, testifies that he is acquainted with Enoch Rudder, Elijah Rudder, John Rudder

and David Stewart. It is a pressing question as to their being of sound mind; I consider that a man that has a sound mind is capable of transacting any kind of business, and these men I consider capable of making a living for themselves; they are not idiots, nor have they ever been counted so by anyone I have ever heard; am acquainted with Thomas Bennett; have known him about 15 years, he is a man of sound mind; he has worked for me.

George M. Williamson, p. 748, testifies that he is acquainted with David Stewart; It is a question of what constitutes a sound mind; I consider him capable of voting.

David Stewart, p. 751, testifies, after giving the names of Presidents for whom he voted, commencing with Stephen A. Douglass down to Harrison, and that he had been in the army 18 months; that his mind is as good as when he went into the service.

We claim the charge is sustained as to all these votes; except as to Stewart, and all the votes except his are illegal, and should be deducted from Contestant's vote in Pleasants county.

PUTNAM COUNTY.

Robert Leach, non-resident.

It is proved by the deposition of Hamrick and Burnside, pp. 401, 402 and 403, that said Leach was a resident of the State of Ohio; that he came to West Virginia about the 3rd day of July, 1888, and that about the time of the election he stated he knew he had no right to vote. He said he was a republican; that he always voted the republican ticket. He said he lived in Jackson, Ohio; that he was going to leave or he would be arrested for illegal voting. This was after the election of 6th November, 1888; said he would have gone home to vote but thought he would stay here and give Goff a lift. He said he lived in Jackson, Ohio, before he came here on the 3rd day of July, 1888; that if he had taken his father's advice he would be better off; asked what they would do with them if they caught him for voting here. He has not been here since he left in March, 1889. The charge is proved and the vote is illegal.

J. Lute or Luh, non-resident.

The deposition of Daniel Jeffries, M. A. Lovejoy and Eugene Jeffries, pp. 403, 404, 405 and 406, fully sustain the charge that said voter has not been a resident of the State for one year, or of the county of Putnam for sixty days prior to Nov. 6, 1888. Eugene Jeffries, p. 406, says he has been a resident of Mason county, West Virginia, ever since he knew him, up to about the 16th October last, (1888); that he lived in Union district, Putnam county, West Virginia, less than sixty days previous to the 6th day of November, 1888. He always claimed to be a republican; didn't remember his saying anything about the election only claiming a victory on their side. The charge is sustained and the vote is illegal.

John Rine, Rhine or Ryan, non-resident.

Fred. Walker, p. 405, testifies that he knows Rine; that he came to Putnam county, West Virginia, in June, 1888; he boarded with witness. When he first came he came from Indiana; went away to Ohio after the election; he said he voted at Red House in Union district. He claimed to be a democrat, but told witness he voted the republican ticket for money; does not know where he is now. The charge is sustained and the vote is illegal.

Matt Crago, unsound mind.

J. H. Casey, pp. 406-7, testifies he is acquainted with Crago; known him all his life; is his cousin; that he votes the republican ticket; that he is of unsound mind and has been ever since he was a chunk of a boy.

W. F. Melton, p. 407, testifies he knows Crago ever since he was a boy; he voted at Pocatolico precinct; that he considers him of unsound mind, and he has been so ever since he was a boy; that he is a republican.

Dr. E. H. Travel, p. 408, testifies that he is a regular graduate; that he has been acquainted with Matt Crago several years, and that he is of unsound mind.

The charge is proven and the vote is illegal.

M. D. Hedrick, non-resident of county.

Milton Lovejoy, pp. 404-5, testifies he knew Hedrick 8 or 10 years; that he is a republican; that he lived for one year, the year 1888, at Sial Carney's, in Kanawha county. Exhibit, No. 8, J. M. K. proves that M. D. Hedrick voted at Thomas school house precinct. The charge proved and vote illegal.

Wm. Crago, charge, unsound mind.

W. F. Mettor, p. 407, testifies that he has known him since he was a boy, sometimes called W. D. Crago. He is of unsound mind, and has been for 8 or 9 years; he is a republican.

Dr. T. P. Carpenter, p. 413, knows him, and testifies he is of unsound mind. He belongs to the republican party. This vote is illegal

Henry Rutherford or, Ruleford, charge, non-resident.

James Fowler, p. 408-9, testifies Rutherford was a resident of Kentucky for sometime before the election, and returned four or five days before the election and staid four or five days after it and left; never been back since. He voted the republican ticket.

This vote is not in the list of votes contested by Contestee, and is excepted to for that reason by Contestant. The vote is illegal.

R. B. Cobb, minor.

Wm. H. Good, p. 411, testifies that Cobb's wife and father-in-law told him he was only 18 years old past; that he went to warn him to work the road; that is the same person who married India Carter, named in the marriage license shown here. Marriage license produced and offered in evidence, pages 411-412. This shows his age at 20 years on the first day of November, 1888.

J. W. Harmon, p. 419, testifies to substantially the same facts. That he voted, see exhibit No. 2, of J. M. Killey, clerk, or page 412. This vote is illegal.

Thomas Burt, non-resident of county.

J. W. Harmon, p. 419, testifies that he has not been in the county sixty days; and that he voted republican ticket, and he never saw him after the day of the election. This testimony is uncontradicted, p. 419-420. This vote is illegal.

Lewis Mallory, John Harris, E. J. Anderson, O. Yancey, Hez. White, Charles Qualls, Marcellus Thomas, Ernest Graves, Martin Wright, John Diggs, Robert Brown, James Fortune, Flem. Washington, Major Jones.

The testimony of Richard Goodwin, Wm. H. Morris, W. S. Burton and James H. Conner, pages 420 to 431 inclusive, prove that these fourteen voters were not legal voters in Putnam county. They were laborers on a construction train on the C. & O. R. Rd., running through Cabell, Putnam, Kanawha, and Fayette counties, W. Va. They were mostly from Virginia; they moved from county to county; had no permanent abode in West Va. Staid only in one county as long as it was necessary to repair the road and then moved.

There is no testimony rebutting the testimony of the above named witnesses, and they prove clearly the illegality of these votes.

J. M. Killey's deposition and certificates to be found on pages 415 and 418 inclusive, as well as certificate in regard to Cobb on page 412, proves all these parties herein contested to have voted at the election November 6th, 1888.

It is contended that Smith has not proved a single illegal vote cast for Jackson, but that Jackson has proved that twenty-two illegal votes were cast for Smith.

The Commissioners of Putnam county reported to the Governor that there were cast for C. B. Smith	-	-	-	-	1555	votes
Deduct illegal votes proven	-	-	-	-	22	
					<hr/>	
Leaves	-	-	-	-	1533	
They reported as cast for Jackson	-	-	-	-	1384	
					<hr/>	
Smith's majority	-	-	-	-	149	votes.

This is without reference to the other charges by Contestee which will be considered now.

Boyers precinct.

In Buffalo district the voting place was established by law at McGill's post office in said district called Boyers precinct. J. M. Kelley's deposition, p. 415, and Exhibit No. 1, filed with said deposition on same page proves this. He also testifies that there had been no order repealing said order establishing said voting place prior to the 6th November, 1888, and files Exhibit No. 2., J. M. K. on page 416, as proof of this. He also files Exhibit No. 4, J. M. K., on page 416, which shows that at the election on 6th November, 1888., for representative in congress, C. B Smith received seventy-four votes and J. M. Jackson received thirty-four votes at Boyers precinct, in Buffalo district.

James Fowler, p. 408, testifies he voted on 6th November, 1888, at Isaac Branch school house, in Buffalo district. Before that the voters had been in the habit of voting at McGill's office; that it was over a half a mile—between a half a mile and three quarters, from McGill's office to Isaac Branch school house; the other voters voted there. I was never at an election there before.

David Dunlap, p. 410, testifies that he was at Isaac Branch school house, in Buffalo district, on the 6th November, 1888; that at the October State election, 1884, he voted up at McGill's, at the house he built for an office. The election for that part of Buffalo district on the 6th day of November, 1888, was held at the Isaac Branch school house. It was between one-half mile and three-quarters of a mile from McGill's office to the Isaac Branch school house.

The county court of Putnam county on the 30th day of March, 1889, long after the election 6th November, 1888, made an order discontinuing the election precinct at McGill's office and establishing it at Isaac Branch school house. See Exhibit No. 3, J. M. K., filed with Killey's deposition on page 416.

This is conclusive evidence and an admission on the part of the court that McGill's office was the proper voting place for that part of Buffalo district on the 6th day of November, 1888, and that Isaac Branch school house was not.

Thomas precinct, Union district, in said county.

In Union district the voting place was established at the residence of Josiah C. Thomas. It was established by an Act of the Legislature as is proven by Josiah C. Thomas, p. 410, about 1849 or 1850. All the elections were held there up to and including, 1880—the Presidential election. Since then they have been held at the Thomas school house, as it is called. The Thomas school house is three-quarters of a mile from my residence, to go the road. The voting was done in my house. My wife wanted it changed from there, and spoke to my son to have it done, and the word came it had been done, but there was

no writing nor order of court came. The voting was afterwards done at the school house.

J. M. Killey, testifies, p. 417, that no order of court was made, changing the place of holding the election from the residence of Josiah C. Thomas to the Thomas School House, or to any other place in Union District, before the 6th day of November, 1888 and files exhibit marked No. 5, J. M. K., in support of his testimony on page 417. He further testifies that the poll books at the Thomas School House precinct shows that J. M. Jackson received at said precinct 80 votes, and C. B. Smith received 184 votes and files exhibit marked No. 7, J. M. K., with his deposition in support thereof.

W. W. Thomas, p. 413, testifies that he was raised in the neighborhood of the Thomas School House and his best judgment is that it is five eighths of a mile from the residence of J. C. Thomas to the Thomas School House.

The county court of Putnam county on the 30th day of March, 1889, long after the election of 6th November, 1888, made an order discontinuing the election precinct, "the present voting place" in Union district and establishing it at the Thomas School House in said district, see exhibit marked No. 6, J. M. K., filed with his deposition on page 417, as further evidence. This is conclusive evidence and an admission on the part of the court, that the residence of Josiah C. Thomas was the proper voting place in Union district on the 6th of November, 1888.

It is hardly necessary to cite authority that the votes cast at these two voting places should not be counted. McCreary on Elections, Sec. 114, says: That "those provisions of law which fix the time or place of holding elections are to be considered as mandatory and not as merely directory." See also Judge Thompson's opinion, Sec. 115, and top of page 127; Payne on elections, Sec. 327, holds that "the requirement that the election shall be held at the place designated by law is not directory; it is mandatory and must be obeyed."

And it is a rule to which there are few exceptions, that an election held at an improper place will be held absolutely void without proof of any fraud or injury. American and English Encyclopedia of law, page 323, Sec. 12, and Cases cited

Code of West Virginia, Chap. 3, Sec. 5, provides, "There shall be at least one voting place in every magisterial district, and the elections provided for in this chapter shall be held at the places of voting therein which have been or shall be appointed for the purpose according to law." Sec. 2 of same chapter provides for the election of representative in congress.

Contestee therefore claims that all the votes cast for representative in congress at the election on the 6th Nov. 1888, at Isaac Branch school house voting place, in Buffalo district and at Thomas school house in Union district, in Putnam county, West Virginia,

should be stricken out from the total vote of said county for representative in congress, and that the whole vote respectively of Contestant and Contestee should be diminished by the votes returned to them, respectively, in each of said precincts as hereinbefore specified and proven by the said J. M. Killey.

And the said county court of Putnam county having by their orders entered of record as herein set out admitted that the votes counted and allowed by them in making up the result of the election of Congressman in said county of Putnam, were ^{not} cast at the proper and legal voting places, as established by the law the Contestee should have been permitted to have the same corrected before the Governor, as he endeavored to do, and that the wrong done him by the county court set aside. He therefore asks that the same be now done.

Again the Contestant has filed the order of the Governor, page 868, showing that the clerk of the county court of Putnam county returned to the Governor that J. M. Jackson received 1384 votes, and C. B. Smith received 1555 votes, and the Governor so ascertaining the same it is incompetent for the Contestant to impeach such return to the Governor, by filing the certificate of the clerk of the county court of Putnam county on page 860, showing that C. B. Smith received 1557 votes (instead of 1555 votes reported to the Governor) and that J. M. Jackson received 1384 votes. The certificate of the commissioners on page 860, is dated the 17th day of November, 1888, while the true certificate and the one on their order book and which was forwarded to the Governor was dated the 19th day of November, 1888, two days after the date of the certificate filed by contestant and which was corrected two days afterward by the court, and the latter transmitted to the Governor. And the Contestee now here files a certified copy of said last order, and asked that the same may be considered as the true return.

RITCHIE COUNTY.

W. F. Bird, non-resident of the district where he voted.

R. W. Goff, p. 432, testifies he was one of the Commissioners of election at Buzzard's precinct, in Murphy district, Ritchie county; that said Bird voted at that precinct; that he was a resident of Union district and not of Murphy district; that he voted republican ticket.

E. R. Tibbs, p. 433, testifies that his understanding was he lived in Union district.

W. F. Bird, the voter, testifies, p. 433, in answer to question as to his place of residence, that he lived on the waters of Spruce creek, Ritchie county, West Va; he studiously avoids saying in what district; that he voted for Smith.

J. J. Prather, and E. L. Goff, pp. 433-4, testify he voted in Murphy and lived in Union district; vote not good.

George F. Jones, non-resident.

R. W. Goff, p. 432, testifies that Jones voted in Murphy district, at Buzzard's precinct, and heard him say he was a republican.

E. R. Tibbs, p. 433, testifies he knows Jones; knew of his first being in the State 18th or 20th September, 1888. He said he had been in Wood county driving team for his sister; don't think he had been in Ritchie county sixty days before the election.

J. J. Prather, p. 433, testifies he had only been in the neighborhood a few days before the election.

E. L. Goff, p. 434, testifies that he had a conversation with Jones and asked him if he was entitled to vote and he said he was, and had been in the county thirty days, and the State a year. He evidently thought residence in the county thirty days, instead of sixty as required by law, entitled him to vote. He was classified with the republicans and associated with them principally on the day of the election.

In rebuttal, Smith offers Jones as a witness, p. 760. He testifies he was in Ritchie county about the 23rd August, 1888, that he voted for Smith. His testimony is overthrown by Contestee's testimony. Vote not good.

James Parr, non-resident.

A. Beckner, pp. 434-5, testifies that he voted at Petroleum, Ritchie county; that he was a resident of Wirt county and was a republican and said he was one. He told witness he would have to go to Wirt county to vote as he was not a resident of Ritchie county.

G. W. Hill, p. 435, testifies he was a resident of Wirt county, and that he was going to vote there in Wirt county for a certain gentleman. On cross-examination, witness testifies that 29 days before the election he said he was going to vote for Mr. Bumgardner for sheriff of Wirt county.

D. C. Hill, p. 436, testifies that he voted at Petroleum, Ritchie county, and claimed the right to vote there the night before the election.

James Parr testifies, p. 436, that he voted for Smith—says, "I claim my residence in Ritchie county. I was *backward and forward*, but claimed my residence in Ritchie county."

Anthony Sharpnack, p. 761, does not alter the case, but rather confirmed it.

It is contended that the weight of testimony is against this vote and it should be rejected.

Sylvester Dilworth, pauper.

In his own deposition p. 439, he testifies he voted for Smith.

S. T. Riddle, p. 439, swears he told him he was receiving aid from the county in 1888. G. W. Amos, clerk, p. 445, in answer to

question 10, says, allowances from the county were made to Dilworth in 1888. His vote is not good.

George Goodwin, non-resident.

James Taylor, p. 440, testifies that Goodwin is a republican; that he had not seen him in Ritchie county for four months before the election.

W. C. Gilbert, p. 440, testifies he told him he was a resident of Lewis county. Vote not good.

Rufus Corbin, minor.

James Kelley, p. 441, testifies he was a republican.

G. W. Amos, Cl'k. Co. Ct., p. 443 testifies he voted at the election. Also on page 445, files a copy of record of conviction of said Corbin for illegal voting. See record pp. 445-6; Corbin's plea of guilty, p. 446. His vote not good.

Samuel Gray, minor.

This voter, p. 443, testifies he voted republican ticket straight.

G. W. Amos, clk., testifies on page 444, he issued marriage license to Gray on the 25th day of February, 1888, and he gave his age then as 18 years, that he voted as S. Gray.

The marriage license, p. 444 offered in evidence proves he gave his age at 18 years. This vote not good.

F. L. Johnson, non-resident.

Leroy Leeson, p. 441, testifies that Johnson said he voted and for Smith. Johnson came to his father's house about 6 weeks before the election. He had been away three years.

J. C. Johnson, p. 760, testifies he is father of F. C. Johnson and that his home was in Ritchie county. But on cross-examination says his son left and went to Texas in November, 1887; that he remained till August, 1888; that he was home from that time until December, 1888, when he went back to Texas and has been there ever since. It is contended that all the facts proven, show this not to be a good vote.

Simon Poole, non-resident.

Leroy Leeson, p. 441, testifies that Poole voted and said he voted for Smith; that he been away from Ritchie county two or three years. Told witness he had been in one of the western States. *The said Poole told him after the election he knew he had no vote*

S. S. Pool, p. 763, testifies he left West Virginia, in November, 1886, and went to Kansas; staid there until March 13, 1888, but did not get home until May, 20, 1888; said he went to visit his sister and to stay a year, that he considered West Va. his home.

A. B. Pool, p. 763, testifies to substantially the same. The evi-

dence should not be received and the exception to it sustained. It is contended that S. S. Poole's testimony, being an interested party should not overthrow the testimony of Leroy Leeson who is wholly disinterested and who swears that Poole told him since the election he knew he had no right to vote. We claim the vote is not good.

G W. Amos, clk., pp. 443-4, proves all these parties voted.

ROANE COUNTY.

Frank Batton or, *Balton*, unsound mind.

John Stalnaker, dep. p. 467, testifies he knows Franklin Batten, commonly called and known as Frank Batten; that he voted at Stalnaker school house, at said election; that Wm. Watson, a republican seemed to be the main person engaged in securing him a vote. That said Batten told witness he tried to vote at Spencer, and they refused to let him vote, and said he did not know why. Witness challenged his right to vote, because he thought he was not of sound mind, and has had no reason to change that opinion. And, on cross-examination, witness gives reasons for his opinion that he was not of sound mind. See top of page, 468.

Hiram Goff, dep. p. 472, testifies that he is acquainted with Frank Batten has known him for 5 or 6 years; that said Batten offered to vote at Spencer precinct twice; his vote was objected to, and he was not allowed to vote, because he was of unsound mind; that the decision of the commissioners holding the election was unanimous. He was examined by the commissioners, was asked if he knew any of the candidates who were running, and what they were running for, and he said he did not. Then they asked him if he knew what county he lived in, and he said he didn't. They asked him if he knew the county seat of the county, and he said he didn't; there might have been more questions asked him. Thinks that Bartlett, the republican, was the main one who asked questions, but Holdswade asked him some also.

J. M. Holswade, dep. p. 477, testifies that he has known Batten since he was a boy; that he considers him very weak minded; that he offered to vote at Spencer, and his vote was objected to and he was asked what county he lived in, what was the county town, and who were the republican and democratic candidates for the Presidency, and could not answer either question, and the republican commissioners agreed very readily to refuse his vote.

On cross-examination says that his opinion that he has a weak mind, is formed from the fact that he has an idiotic expression, and that he has a silly appearance, more so than ordinary people; that he lives within two miles of him, sees him at least every three months; does not think his mind has improved any since he first knew him; can do ordinary labor; has heard that he has gone to school a little; does not know that he was ever examined by a physician.

On re-examination says that Jacob Wilson was very clamorous in claiming Batten's right to vote and that Wilson was uncompromising republican. That it is not the custom in that county to examine idiots with reference to their minds.

On the question of Batton's mental capacity the Contestant took testimony in advance of Contestee's testimony.

A. J. Boyer, dep. p. 144 testifies that he knew Batton; has worked for him and knows of his doing business for himself; does not regard him as a right intelligent young man; Says that he has been raised up in an ignorant way, entirely uneducated.

On cross-examination by contestee, he is asked if Batton is a person of sound mind, and answers, I don't consider him a bright intelligent boy, &c. The question is again repeated to him, and he answers, "I don't know that I can answer it in any other way than I have."

This witness, from the tenor of his testimony evidently had misgivings as to his (Batton's) mental soundness.

Elmore Cutright, dep. p. 144, testifies that he knows Batton; that in some things he appears to have ordinary sense for a common uneducated man; in other things he appears to be pretty dull; that he works, is hard to trade with, you can't cheat him in the price of anything he is acquainted with; that he is improved in the last year or two; worked on the public highway two days, &c. There is no cross-examination.

Sylvester Wilson, dep. p. 145, testifies to about the same purport of Cutright.

I. B. Casto, dep. p. 161, testifies he was acquainted with Batton, has sold him goods; he always knew how much he owed, and knew when his account was correct.

It is submitted that this testimony in rebuttal by Contestant is not sufficient to nullify the positive testimony of Contestee, and that this vote is not legal and should not be counted. His vote was twice rejected at Spencer precinct by the unanimous decision of all three commissioners, one of whom was a republican. He was then run off to another precinct and voted, and without making known his rejection before at Spencer.

A. C. Donald and H. P. Donald and A. C. Darnold and H. P. Darnold, charge, non-residents.

G. W. Hundley, dep. p. 452, testifies that he knew A. C. Darnold and H. P. Darnold; that their home was in Harrison county, in this state; they voted at the election in 1888; they left immediately after the election, and understood they had gone to their home in Harrison county, that they had been working in a brick-yard. That their uncle told him they were republicans, and from his conversation with them he took them to be republicans. They claimed Harrison county to be their home. These two votes are illegal.

John Mitchell, non resident.

G. W. Hundley, dep., p. 452, testifies he knows Mitchell from boyhood; that he voted; that he lived in the west some place; he thinks Illinois; that he told him he married in Illinois; that he only returned to Roane county 4 or 5 months before the election; that he did not consider him a legal voter, and that he is a republican.

Asa Harper, dep., p. 463, testifies that he had some acquaintance with Mitchell; saw him 3 or 4 months before election; he said he was not a citizen of West Virginia, that he was a citizen of Illinois; said that he did not intend to go to the election, that he could not vote; this was right before the election; that he was there in a political discussion with James Gibson; that his friends say he has gone back to Illinois; that he said he was a republican and was arguing that way. The charge is sustained and the vote is illegal.

John Hall, convicted of felony.

James A. Butcher, dep. pp. 454-5-6, testifies he knows Hall; that he told him he had been in the penitentiary; and that he told him a few days before the election he intended to vote a straight republican ticket. Heard afterwards he had voted at Linden precinct; that said Hall said he affiliated with the republicans.

G. W. Hundley testifies on page 453, that at the usual voting place in the town of Linden, John Hall voted at the election on the 6th of November, 1888.

And the record of the conviction and sentence of John Hall to the penitentiary for perjury is set out at large on pp. 456-7-8. This vote is illegal.

Wesley McDonald, non-resident.

James A. Butcher, dep., pp. 457-8, testifies that he knew McDonald since July, 1885; that he was a citizen of Calhoun county and not of Roane county on the day of election in 1888; that he told him that he was a resident of Calhoun county; that he moved to Calhoun county with his family and all his effects in April, 1888; that he was going to move back and did move back after the election; that he said he voted the straight republican ticket and told him before the election he intended to vote the straight republican ticket; that he voted at Linden.

H. A. Attizer, dep., p. 458, testifies that he had a conversation with McDonald ten or fifteen days before the election in 1888, and asked him as to how he voted; said he always voted the republican ticket straight; asked him to vote for him (Attizer) for house of delegates; he said he did not know but he never scratched his ticket; then he said he was going to leave Calhoun county and move back to Roane county; then witness warned him he would lose his vote entirely, and he replied his vote would not amount to much, and if he did lose it, he supposed he (witness) would be glad of it. That this conversation took place in Arnoldsburg, Calhoun county, when witness

was a candidate, and was then a member of House of Delegates from Calhoun county.

G. W. Hundley, dep. p. 453, testifies that Wesley McDonald voted at Linden, at said election. His vote is illegal.

H. S. Greathouse, P. S. Greathouse, charge, minors.

G. W. Hundley, clerk, dep. p. 451, testifies that these two parties voted at Spencer, in Roane county, on 6th November, 1888. That he has the custody of the records of Roane county, including the records of births in said county, and that he has examined such record and that it shows that Sherman and Sheridan Greathouse were born on the 26th day of November, 1867, and that Wm. Greathouse is their father and Charly Greathouse is their mother, and that the information of the date of their birth was given by their father.

The said clerk files a certified copy of said record in full on page 452, giving their names and date of their birth, Nov. 26th, 1867. He also testifies to a conversation with the father a few days before the election, in which he said he was going to see that they voted, notwithstanding the record.

I. B. Thompson, dep. p. 450, testifies that he was a physician, and had an extensive practice, and regularly practised in Roane county since 1865; that he was present in his professional capacity when they were born; they were twins and born on the 26th November, 1867; that their father employed him to attend on that occasion and had paid him his fee; that he paid him one dollar on the 27th day of November, 1867, four dollars on the 30th day of November, 1867, and in April, 1868, he paid the residue of his fee. Says he has seen these children frequently since the election, and that his impression is they are republicans. That Wm. D. Greathouse's mother was present on that occasion as also Mrs. Eli Rudebaugh and Mrs. Rogers. He also says it is not true that he was under the influence of liquor at the time.

Mrs. Wm. Springston, dep. p. 451, testifies to circumstances fixing the date of the birth of these children in her mind, and that she is confident they were born in the month of November, 1867, and not earlier than the middle of the month of November, 1867.

Hiram Goff, dep. p. 472, testifies that he has known H. S. Greathouse, commonly called Sherman Greathouse, and P. S. Greathouse, commonly called Sheridan Greathouse, for five years at the least; that they voted at Spencer in said county; that they voted the Republican ticket; that he could distinguish the republican from the democratic ticket, by the thickness and size of the paper on which they were printed. That, on cross-examination, he said he scanned both tickets closely, and that he was one of the commissioners and took the Greathouse tickets when they voted.

J. M. Holswade, dep. p. 477, testifies that he was one of the commissioners of election at Spencer; that both the Greathouse votes were

challenged; that their father, W. D. Greathouse, was present when the votes were challenged and said he could show they were old enough and produced an old Bible which he said contained a record of their births. It was an old well-worn book and the space for records seemed to be taken up and the record of the birth of these boys was written on the *inside margin of the left hand page*; that there was a difference in the tickets voted on that day which could be distinguished with out unfolding; that he was satisfied these boys voted the republican ticket.

The Contestant before any proof was offered by the Contestee and before the foregoing were taken by way of anticipation, took the testimony of sundry witnesses which we will examine, tending to conflict with the Contestee's proof, for it cannot be said to be in rebuttal.

W. D. Greathouse, dep. pp. 151-2, testifies that he is the father of these two boys; that they were born on the 26th October, 1867; that their ages were set down in the bible. He is asked the question by Contestants counsel: "Are you certain that the record made in the bible as to their ages is correct?" His answer is, "*To the best of my recollection it is.*" *I think* they were born in the month of October. He further, in answer, says the record shows the said twins were born on the 26th day of October, 1867. On cross-examination he swears the record was made about one year after the children were born; that Dr. Thompson attended his wife at the time, and that he gave in the report of the births to the assessor of the county; that the births were recorded in his fathers bible a year after they were born.

Charity A. Greathouse, dep. pp. 152-3, testifies that she is the mother of these boys; that they were born October 26, 1867; that the record in the bible is correct as she *remembers* the date of their birth; gives the names of the parties present including Dr. Thompson, and says she don't think he attended her as he should have done. On cross-examination, says she does not remember when the record of their births was first made; that the record in the bible that was at home was first made ten or twelve years ago.

Catharine Bower, dep. p. 153, testifies she is 70 years old, and that the boys were born the 26th day of October, 1867; says she smelt whisky on Dr. Thompson. Her opinion was he was not a very good doctor among women; that some people like him and some don't.

Daniel Bower, dep. p. 154, testifies he was present at the house about an hour after the boys were born and named them. They were born in 1867, October 26th; thinks that Dr. Thompson was under the influence of liquor. Mary Wine, dep. pp. 154-5, testifies that she was present and they were born on 26th October, 1867. She was a sister of Mrs Greathouse; that Dr. Thompson acted as if he had been drinking. She knows the date because her child was born the 13th of January, 1867. This is the substance of Contestant's rebuttal.

Now it is submitted that this testimony is not sufficient to over-

throw the testimony of Contestee. The record of births in the clerk's office of Roane county is certainly the most satisfactory evidence adduced. It was made shortly after the occurrence; was made out from the statement of the father at that time when it was fresh in his memory; was made to the officer of the law who returned the fact. This is supported by Dr. Thompson who denies emphatically that he was under the influence of liquor. He fixes the date of their birth Nov. 26, 1867, fixes the date of the payment of his fees for the service. He is supported by Mrs. Wm. Springston, who gives a good reason for her knowledge of the birth of her twins and says she is confident it was not earlier than the middle of the month of November, 1867. J. M. Holswade proves that on the day of the election W. D. Greathouse produced a bible to prove their age, and that the record was made on the inside margin of the left hand page, evidently showing that it was made there for a purpose which was an afterthought.

Now, on the other side, witnesses for the Contestant are all members of the family, interested in showing these boys to be legal voters and save them from the penalty of the law. They speak about the contents of the two bibles, but do not file any copy from them. But the most significant thing of all is the testimony of W. D. Greathouse, on page 152, when he was pressed by the counsel for the Contestant as to whether he was certain the record in the bible was correct, he answered that it was to the best of his recollection. "I think they were born in the month of October." This proves at once that he had no positive recollection as to the date. It is submitted that the weight and reason of the testimony sustains the charge and that the votes are illegal.

Walton precinct.

The charge that at the precinct at Walton, in said county of Roane, there was such misconduct and neglect and failure to discharge their duty on the part of the commissioners of election who held the election on the 6th day of Nov. 1888, at that precinct as amounted to fraud is fully established.

N. K. Walker, pp. 447-8-9, testifies he was one of the commissioners of election, at Walton, Roane county, on the 6th day of November, 1888, and that the ballot box used upon that occasion was an oblong, firm, wooden box, with a sliding lid, with a hole through the top to receive the ballots. His recollection was there was a lock on the box, but no key to it; the lid would slide easily. That when they adjourned for dinner on the day of the election, Joseph Garvin one of the commissioners, took the ballot box, and we went to dinner together and sat on opposite sides of the table. When witness finished his dinner he looked for Garvin and he was gone; went to hunt him up; he was at Donahoes shoe store, 30 or 40 steps from the hotel. I cannot say whether the box was sealed or not; used a nail to keep the lid from sliding; the nail could be pushed in and pulled out with your fingers. Did not notice when Garvin left dinner table. If the box was not sealed ballots could have been put in and abstracted without

being noticed. Commenced counting ballots the evening of the election, and worked on until about 3 o'clock in the morning, then commenced the morning of the 7th just after breakfast, and finished about 10 o'clock that night. That during the count on the 7th, they halted for a rest, and some of us had occasion to go out of doors, and we pushed the lid-box shut. Mr Rock and I went out together and we left Mr. Garvin one of the commissioners and the two clerks in the room. As I went down the steps I met Chris. Summers coming up stairs. I went on about 25 steps and was there a few minutes and returned to the room, and when I opened the door there was no one in the room but J. C. Garvin and Chris. Summers. They were on opposite sides of the table, standing, and the ballot box was between them. The box was not sealed at this time. Garvin and Summers claim to be republicans, and, in his opinion, are active workers for the republican party, and I consider them strong partisans.

P. G. Cunningham, pp. 468-469 testifies that he was at Walton on the 6th and 7th days of November, 1888, and was acquainted with all the commissioners of election at that election; they were counting the ballots one day and two nights. During the count I noticed Mr. Walker and Mr. Rock away from the place of counting the ballots. I asked them where their ballot box was; they said Mr. Garvin had it up in a room at Riley's where they were doing the counting. My recollection is, it was the day after the election at dinner time and afterward; I think they must have been away at least an half an-hour. I mean Mr. Walker and Mr. Rock were away from Mr. Garvin and the place of counting at least half-an-hour. Witness had a conversation with Mr. Garvin relative to the ballot box. I said to him it appeared to me, he was the only commissioner there was, at least he appeared to be the only man handling the ballot box; that the other two had been absent from the ballot box. His answer was "that he could not be running around after them; that we ought to watch it better." I saw the ballot box at dinner time on the day of the election; it was a wooden box with a sliding lid that pushed in and pulled out, with a hole cut in the lid on top; there had been a lock to the box. The commissioners told me the key had been lost and they could not find it. The lid appeared to work rather loose. There was a paper pasted over the hole on top, but the lid was not confined. I spoke to the commissioners that it was a very careless way to keep the box; that they ought to have it locked; they remarked the key was lost. According to my understanding of the box, there would have been but little trouble in putting in ballots or taking them out, by pulling the lid back and shoving it to again. At the time I speak of, the lid was not fastened, when I talked to the commissioners about the box, Garvin was not present. Garvin always votes the republican ticket, and talks for the republican party. Rock has been a Greenbacker but I think now votes with the democrats. Walker is a democrat. On cross-examination, says the republican majority of Walton has been running along from 60 to 100 or more at the head of the ticket. In answer to question of Contestant's counsel, answers, "The republican majority

was larger than I expected it, and from all the circumstances, taking into consideration the condition of the ballot box, with all the surroundings, I have always been of opinion that it had been tampered with." I am a democrat.

G. W. Hundly, p. 453 testifies that he has examined the poll books at Walton in the district of Walton, and the poll books show that C. B. Smith, received three hundred and three votes and J. M. Jackson received one hundred and seventy-two votes, both being candidates for Congress on the 6th day of November, 1888, in the Fourth Congressional district of West Va.

This is the substance of the evidence touching Walton precinct.

The Contestant offered no evidence whatever to explain the conduct of the commissioners and especially of Mr. Garvin, in the conduct of the election at that precinct. Attention is particularly called to the fact that the Contestant served notice on Contestee that he would take the testimony of Joseph Garvin and Chris. Summers on the 18th day of July, 1889. See copy of the notice on page 764, and that they are the second and third names in said notice. These depositions were not taken, these men did not come forward and even volunteer their testimony in exculpation of themselves. When a party has testimony which he can produce beneficial to himself, and fails to produce it, it shall be taken that if the testimony had been produced it would have been against him, is a familiar rule of evidence.

It was unsafe to put these men on the witness stand, because they would have been compelled to forswear themselves or admit that said box had been tampered with.

The Code of West Virginia, chapter 3, section 14, provides: "The ballot box shall have an aperture in the lid or top thereof to receive the ballots of voters. While the polls are open it shall be kept where it may be seen by the voters, and after the polls are closed, and until the votes are counted and the certificates of the result are signed, shall remain in the immediate custody of the commissioner, or any one of them, with the consent of the others. But it shall not be opened unless two of them at least be present, and if left at any time in the custody of one of the number, shall be carefully sealed so that it cannot be opened or any ballot taken therefrom or entered therein without breaking the seal, and the others shall write their names across the place or places where it is sealed."

We contend that this section of the election law is mandatory, and that it was violated by the officers of election at Walton there can be no doubt. Everything tends also to show that the ballot box was tampered with; the suspicious conduct of one of the commissioners, the being left alone with the ballot box open, unsealed and being with an ardent partizan of the Contestant, in a room by themselves with the ballot box between them all tend to show fraud.

The fact of putting a seal over an aperture or hole in a sliding lid,

unfastened, unlocked, and above all unsealed, is so suspicious of itself that the bare statement would show fraud was intended. The conduct of this officer was clearly of such a character that it violated the very spirit as well as the letter of the law, and was calculated to prevent a correct determination of the result of the election then and there held. It is a serious question whether the returns ought not to be rejected even in the absence of proof tending to show the box was tampered with, but in the presence of such proof the returns will be rejected. *Cox vs. Strait, Smith, 428.*

In the case of *Spencer vs. Morey*, 4th Congressional Election cases, page 437, it was held that the returns should be rejected if it appeared that the conduct of the officers holding the election was such that an opportunity was offered for the commission of fraud.

“While it is well settled that the mere neglect to comply with directory requirements of the law, or the performance of duty in a mistaken manner without bad faith, or injurious results, will not justify the rejection of an entire poll, it is equally well settled that when the proceedings are so tarnished by fraudulent or negligent, or improper conduct on the part of the officers, that the result of the election is rendered unreliable, the entire returns will be rejected, and the parties left to make such proof as they may of the votes legally cast for them.” *Paine on Elections*, section 499, and numerous authorities referred in the note.

That proof certainly exists in this case. It is earnestly contended that the whole vote at Walton precinct should be excluded from the count of the vote for representative in congress in that county, and three hundred and three votes should be deducted from the vote returned to the Governor as being cast for Contestant in Roane county, and that one hundred and seventy-two votes should be deducted from the vote returned to the Governor as being cast for Contestee in Roane county, for the said office of representative in congress from the 4th Congressional district of West Virginia.

WAYNE COUNTY.

William Bradshaw, non-resident.

W. G. Smith, p. 483, testifies he knew Bradshaw; that he had been living with his family in the State of Ohio, for a considerable time before the 6th November, 1888, and that six months after, or less, he moved into Wayne county. He had not resided in the State one year before the election. From what he said himself he was a republican. He affiliated with the republicans in the campaign of 1888. He attended all their meetings.

On cross examination testifies that he voted; that he said he moved to Ohio to get rid of some indictments; that his family lived in the town; did not know where he was; said he believed he voted for Smith. This vote is claimed to be illegal.

Henry Adkins, non-resident of county.

Johnson Fry, p. 484, testifies that he knew Adkins; that he told witness he come to Ceredo to vote, on the day of the election, and thinks he voted on that day; that he had not lived in Wayne county for four or five years before the election; that he came there once and staid two or three months and went from here to Sciotoville, Ohio, and staid there until the morning of the election, and was here in Ceredo, on the day of the election, and he staid here a day or two after the election and left. On cross-examination, in answer to question of Contestant, should say Huntington, Cabell county, was his residence. He stays there continually; every time I go there I see him, and he told witness he rented property there. In joking him, witness asked him if he had quit his work and paid his expenses, and come here and voted the republican ticket, and he said he had.

This charge is sustained, and the vote was an illegal one.

John G. Dickson or, *Dixon*, non-resident of district.

W. E. Wilkinson, p. 264-5, testifies he knew Dickson, that he at one time resided in Stonewall district, Wayne county, but had been in the West for some time under appointment. Had been sheriff of the county, and was born and raised there, and was sure no other John G. Dickson ever lived in that county, and there was no person resided in Grant district, Wayne county by that name. He resides in Huntington now, and has ever since after the election. Heard him talk a great deal since the election and the general drift of his conversation is very bitter against Jackson.

John G. Dickson, p. 285, testifies he went to Cove Creek precinct in Wayne county, a few days before the election, and that he voted there, and that he claimed that as his residence; that he had never lived there; that he was a married man and never took his family there. Declines to answer for whom he voted; that he was at Parkersburg with West Gibson, republican; that he saw Contestant Smith there. The whole testimony of this witness, his manner of answering questions, goes to show conclusively that he was not a resident of Cove Creek precinct, Grant district, in Wayne county, and that he went there only a few days before the election for some purpose other than taking up his residence there. This is conclusively shown by his never having been there a day since the election. It is also proved that he was very hostile to Jackson, and was consorting with republicans, and was closeted with Smith in Parkersburg, but his memory is very faulty as to what took place there. He was a friend of Smith.

C. B. Smith, the Contestant, testifies p. 253, that he knew Dickson; met him about ten months before in Huntington. That he claimed to him he was a republican; that he informed him he was a supporter of his, and had been since he received the nomination. That he met Dickson in Parkersburg in company with Wes. Gibson and were together after night in the Commercial Hotel.

All the testimony in this case goes to show Dickson had no right to vote at Cove Creek precinct, in Grant district, and that he voted for Smith. It requires more than a mere declaration of intention to constitute residence. It must be accompanied with acts fulfilling the intention. This vote is not legal.

John W. Burk, non-resident.

W. E. Wilkinson, p. 264, testifies that he was at Wayne Court House on the day of the election. Saw Burke there on that day. He told witness that he voted at that place and on that day. He is a republican and said he voted the republican ticket for National, State, and Congressional offices, on that day, the 6th. November, 1888. He had been in Wayne county between twelve and twenty days only before the election, not over twenty days. He resided before then and before coming to Wayne county, in Huntington, Cabell county, W. Va. He had not been a resident of Wayne county, W. Va. for sixty days before November 6th, 1888. This evidence is uncontradicted, and therefore this vote was illegal.

WIRT COUNTY.

M. Nolf, charge, pauper.

L. H. Wells, p. 523, testifies he is and was a member of County Court of Wirt county, is acquainted with Nolf, known him for ten or twelve years. Within a year past the county paid for a coffin for his child; we had made arrangements for the coffin; we furnished him with provisions through the Overseer of the Poor.

J. L. McGee, p. 526, testifies he furnished coffin for child of M. Nolf on May 22, 1888, and was paid by an order of the county court. It was a small child of 10 or 15 years of age.

F. D. Pomeroy, p. 528, testifies he knows Nolf, and has for 8 or 10 years; that he claimed to be a republican.

I. J. Owens, p. 532, testifies he knew Nolf for four years, he claimed to be a republican.

J. H. Bumgarner, p. 541, testifies he knew Nolf for about 8 years. He lived within $1\frac{1}{4}$ miles of him. He always claimed to be a republican.

M. Nolf, p. 549, testifies he voted last fall, voted the straight republican ticket. He voted for C. B. Smith, the republican candidate for Congress. That J. L. McGee furnished a coffin for "Josie," and he was told the county paid for it.

Also Z. E. Thorn, pp. 505-6, shows that he knew Nolf, that the poll books show he voted, that he is clerk of the county court and is custodian of the records of the poll books of the county, and files exhibit No. 1, p. 513, showing that Nolf voted. Also, that the records show Dr. Shaw and J. L. McGee were paid accounts for Nolf out of

the Poor fund of the county for the year 1888, and files exhibit No. 10, p. 516, and exhibit No. 12, p. 517, showing what was paid out of the poor fund for and on account of said Nolf. The charge is sustained and the vote is illegal.

A. E. Williams, pauper.

L. H. Wells, p. 523, testifies he knew Williams for 15 or 20 years. He is a republican. That in the year 1888 the county paid his doctor bill, or a part of it out of the poor fund.

Dr. R. H. Thaw, p. 527, testifies he treated A. E. Williams professionally March 2nd, 1888, and was paid by an order from the county court. F. D. Pomeroy, p. 528, T. J. Owens, p. 532, and J. H. Bumgarner, p. 541, all testify he was a republican.

A. E. Williams himself, p. 547, testifies that he voted at Elizabeth, Wirt county, on the 6th day of November, 1888, that he was a republican and voted the republican ticket on that day.

Z. E. Thorn, p. 513, exhibit No. 1, is filed by witness, showing he voted at Elizabeth, also files exhibit No. 11, showing that Dr. Thaw was paid by the county \$17.50, per L. C. Rogers, O. P. (Overseer of Poor). He proves that A. E. Williams is sometimes called Ellis Williams.

The charge is sustained and the vote is illegal.

I. W. Bumgarner, pauper.

L. H. Wells, p. 523, testifies that he knew Bumgarner for 7 or 8 years, that he was a republican; that the court paid for a coffin for his wife and Mrs. Maggie Smith, services for laying her out, in 1888. That his family were destitute at the time the allowance was made.

J. L. McGee, p. 526, testifies he furnished Bumgarner a coffin for his wife February 25, 1888, and was paid by an allowance made by the county court.

I. W. Bumgarner himself testifies, p. 545, that he voted last fall and voted the republican ticket. Exhibit No. 1, p. 513, proves he voted at Elizabeth. Exhibit No. 12, p. 517, proves the item for the coffin. This vote is illegal.

Samuel Bailey, pauper,

L. H. Wells, p. 523, testifies he has known Bailey for 20 years, and that the county had to take charge of his daughter and her children, and the old gentleman remained at the poor farm sometime himself. On cross examination says, the aid given by the county was for his daughter and her children, that his impression is she was over age. She kept house for her father from the time of the death of her mother up to the time she was taken to the poor farm. He is a republican.

F. D. Pomeroy, p. 529, testifies he has known Bailey for 30 years, and he is a republican. Exhibit No. 1, p. 513, proves he voted at Elizabeth. The charge is sustained.

George W. Townsend, pauper.

L. H. Wells, p. 524, testifies he has known Townsend 15 or 20 years. He is a republican, at least he always claimed so in my presence. The county paid the burial expenses of his wife, the record will show the amount.

T. J. Owens, p. 532, and J. H. Bumgarner, p. 542, prove that he is a republican.

Z. E. Thorn, p. 508, testifies that the record on file show that M. R. Lowther received an allowance out of the poor funds of said county for G. W. Townsend or G. W. Townsend's family. Exhibit No. 13, p. 518, shows Lowther was paid for shoes to bury Mrs. Geo. Townsend in.

Geo. W. Townsend, p. 546, testifies that he voted the Republican ticket with the exception of one man. J. H. Bumgarner, says he did not get any assistance from the county, but admits that to-day he heard his wife's funeral materials was gotten and paid for by the county. The weight of testimony in this case is that the charge is sustained.

William Mathers, pauper.

L. H. Wells, p. 524, testifies the county paid for a coffin for one of his children out of the poor fund in 1888. That Mathers is a republican.

Z. E. Thorn, p. 508, testifies that Mathers' child's coffin was gotten of J. L. McGee and paid for out of the poor funds of the county. Exhibit No. 14, p. 518, shows it was gotten on 31st October, 1888, and allowed out of the poor levy 1888.

Wm. Matthers, p. 548, testifies he voted the republican ticket and the republican candidate for Congress; that he received no assistance from the county, that he knew of. The charge is sustained, and the vote is illegal.

Flem. P. Biles, pauper.

L. H. Wells, p. 524, testifies he knows Biles; that prior to the 6th of November, 1888, the county paid orders, issued by Mr. Black, overseer of the poor, of Newark district, for Mr. Biles. Mr Black came to see me about giving him aid, as he was in destitute circumstances.

T. J. Owens, p. 532, testifies he has known him 4 years, and he was a republican.

W. F. Hickman, p. 535, testifies he knew Biles, he was a republican; that he furnished goods to the family of Biles before 6th November, 1888, on an order of the overseer of the poor of Newark district, and received his pay from the county.

M. V. Enoch, p. 536 testifies he knew Biles, and on election day tried to get him to vote for Cleveland, and he replied he was a

straight out republican, and going to vote the straight republican ticket with the exception of sheriff and House of Delegates, and gave his reasons for so doing.

F. P. Biles p. 540, testifies he is a republican, and voted the republican ticket on 6th Nov. 1888, with the exception of sheriff and House of Delegates, and county commissioner. That he voted the ticket that J. H. Bumgarner made up for him; he had no other ticket.

J. H. Bumgarner, p. 542 testifies he filled out Biles' ticket for him, and that it was a Republican ticket with sheriff blank. He put on his own name, and Merrill's. Don't think he scratched Smith's name off, and put Jackson's on. Don't think he bothered the State or National ticket at all.

Z. E. Thorn, p. 509, testifies the records show that Dr. Innis and W. F. Hickman, received allowances out of the poor funds of the county, for goods furnished Biles and his family, and files exhibit No. 18, p. 520, and exhibit No. 20 p. 522. The charge sustained and the vote is illegal.

Perry Hays, pauper.

L. H. Wells, p. 524, testifies that there was allowances made out of the poor fund to Hays within one year prior to the 6th November, 1888.

F. D. Pomeroy, p. 529, testifies he has known Hays for 12 years, and he has told me he voted the republican ticket.

J. H. Bumgarner, p. 542 testifies he was a republican.

Z. E. Thorn, p. 509, testifies he knows Hays. He always told him he was a republican. That within one year prior to the 6th of November, 1888, the records show that Dr. S. Innis received an allowance out of the poor fund of the county of Wirt for medical services rendered to Perry Hays, or some member of his family which services were rendered at the direction of the overseer of the poor for Newark district, and paid out of the county poor fund. The charge is sustained and the vote is illegal.

Alexander Pierce, pauper.

Z. E. Thorn, p. 509, testifies he knew Pierce for several years. He is a republican. That within one year prior to the election in 1888, the records in his office show that Amos Lowther received an allowance out of the poor fund of Wirt county for a coffin furnished to bury one of Pierce's children, and files exhibit No. 19, p. 521, in proof thereof.

T. J. Owens, p. 532, testifies he has known Pierce about 4 years and he is a republican.

J. H. Bumgarner, p. 542, testifies he has known Pierce about ten or twelve years, and he is a republican.

The charge is sustained and the vote is illegal.

Perry Shriner, non resident.

F. D. Pomeroy, p. 528 9, testifies he was sheriff of Wirt county from January 1st, 1885, to January 1st, 1889, and that by virtue of his office he had charge of the tax lists of the county of Wirt, both real and personal, and that Perry Shriner's name does not appear on the tax lists of Elizabeth district in said county. I do not think that a person by the name of Shriner could have had a legal settlement in the district and I not know it. That poll taxes are assessed against every person who is a resident of the district.

Z. E. Thorn, p. 505, testifies he finds the name of Perry Shriner on the poll book of Elizabeth, in Elizabeth district, Wirt county, for the election on the 6th November, 1888.

Samuel Bailey, p. 544, testifies he has known Shriner for 12 or 14 years; that he is now living with his father on Slate Creek, in Wood county, W. Va. That he lived there on the 6th day of November, 1888. That Shriner is a republican. That he the witness (Bailey) is a republican. That whenever he heard of Shriner he was at his father's or John Evan's, in Wood county. The charge is sustained and the vote is illegal.

Richard Hogsden or, Richard Hodgkin, convict.

Z. E. Thorn, p. 506, testifies, R. Hodgkin voted on the day of the election, Shurtzville. Spring Creek district, and files exhibit No. 8, p. 516, as evidence of it.

F. D. Pomeroy, p. 529, testifies he knows Hodgkin, and he is a republican.

T. J. Owens, p. 532, testifies he knows him, and that he is a republican.

D. C. Casto, p. 550, testifies he was present when Hodgkin was being tried in Wood county for felony, and heard he had been convicted and sentenced to the State's prison, and files the record of his conviction, and sentence marked exhibit, with D. C. Casto's deposition, and found on pp 550-551-552, also certificate of the superintendent of the penitentiary, that he served out his sentence. This charge is sustained.

W. R. Wheatcraft, pauper.

Dr. D. S. Stewart, p. 531, testifies he knew Wheatcraft for two or three years, and that he was a republican; that he rendered medical service for him and his family, commencing on May 12th, 1888, and ending on May 10th, 1889. The amount of the bill was \$22.50, and he received his pay from the county. That he rendered the service on an order of the overseer of the poor of Burning Springs district; that he received his pay in the same way that he was paid for medical services rendered other paupers in the district.

M. R. Wheatcraft, p. 538, testifies he was a republican, and voted for the republican candidate for Congress. That he received for his family goods such as breadstuffs and groceries, &c., from the county.

Z. E. Thorn, p. 505, testifies that it appears from the poll book at Burning Spring precinct that Wheatcraft voted as shown by exhibit No. 2, p. 514, and that Dr. Stewart received an allowance out of the poor fund of said county for medical services rendered him or some of his family, and filed exhibit No. 15, p. 519, as showing the service and that it was in 1888, and ordered paid on the 19th day of July, 1888.

The charge sustained and the vote not legal.

Jesse Morris, or J. W. Morris, voting twice.

Z. E. Thorn, p. 503, testifies that at Newark district, in said county, the poll books show that Jesse Morris and J. W. Morris voted at the election on Nov. 6, 1888, and files exhibit No. 4, page 514, as showing the same.

A. E. Black, page 533, testifies he was one of the clerks at Newark precinct on the 6th day of November, 1888; that he knows Jesse Morris or J. W. Morris; knew that he voted as Jesse Morris once, and attempted to vote the second time when his vote was rejected and he was told that he had voted, he said "I have not voted this ticket;" he was holding the ticket in his hand at the time and said, "I have not voted this ticket." Remembered distinctly that he voted as Jesse, because the other clerk asked about his first name, and witness answered Jesse, when his vote was rejected and he went away, one of the Commissioners said he thought that man had voted *twice* before and requested us to look over the poll books, and we found more of the name of Morris than we had voters in the district. That is the reason why I believe he voted twice. Knows of no other man in the district who signs his name Jesse or J. W. Morris. Witness is a Republican and does not know the politics of Morris.

M. V. Enochs, p. 534, testifies that he knew Jesse or J. W. Morris, that he had worked for him considerable, that he always understood him to be a republican. That his recollection is he signed a note, that he paid for him, Jesse W. Morris. That witness was standing at the polls when Jesse or J. W. Morris came up with a ballot in his hand and offered it to the officers and it was rejected, they looked back over the books and claimed he had already voted twice, I don't think he said anything, only that he had not voted that ticket yet. It was the same man for whom I paid the note signed Jesse W. Morris. On cross examination said that it was possible there might have been some other voter in the district by the name of J. W. Morris with whom I am not acquainted; that it was his understanding that the Commissioners decided that Jesse and J. W. Morris was one and the same man, on that day; that he did not know of his own personal knowledge that they were one and the same man, only what they said to him and he did not deny it. That it was his understanding from his

conversation that he was a republican, he told him enough to make him think so, that he worked for him and they had a good deal of conversation about politics.

The charge is proved and the vote is illegal.

James Frazier, pauper.

Z. E. Thorn testifies, p. 505, that Frazier voted. See exhibit No. 4, p. 514. Also, that S. Bradford received an allowance out of the poor funds of Wirt county for goods furnished James Frazier or his family within a year before Nov. 6, 1888. Also on p. 512, says he will file the accounts referred to in his deposition as paid Bradford, which is done. See exhibits, Nos. 16, 17, 18 and 20.

J. H. Bumgarner, p. 542, testifies he has known Frazier 5 or 6 years, and that he is a republican.

The charge is proven and the vote is illegal.

E. J. Manifee, pauper.

Z. E. Thorn, p. 505, testifies he voted at Burning Springs precinct, and filed exhibit, No. 2, p. 514, as evidence of it. On page 508, says he is acquainted with Manifee and always heard that he was a republican. Dr. Steward was paid out of the poor fund of the county for medical services rendered him within a year, and files exhibit No. 15, p. 519, as evidence of it. The vote is illegal.

H. Sheariffe, non-resident.

Z. E. Thorn, p. 505, testifies he voted at Elizabeth and files exhibit, No. 1, page 513, as evidence of it.

I. V. West, p. 543, testifies that at one time he was the father-in-law of Sheariffe, and that he is a republican, and that he voted the republican ticket. He stated that he started at 5 o'clock from Parkersburg and came to his house at 3 o'clock the morning of the election, and went away the day after the election and has not been back since. It was last fall at the Presidential election he voted. He left his house about the 9th September before the election. He had not resided in Wirt county since the 9th September only to come back to the election; witness is a republican. When Sheariffe first came down he calculated to purchase land here and stay here, but he has not yet done so.

On cross-examination, says that he and his wife lived in Marshal county until she died, then he lived with his father and me in Marshal county; that witness came to Wirt county four years ago, and that he has resided with them part of the time, but the greater part of the time he has not. His intention was that if he could make his arrangements to buy land here and make his home in Wirt county. He came here between the 20th of June and 1st of July, and left on 9th September, when he went away.

D. C. Casto, p. 549, testifies he became acquainted with Sheariffe

in August, 1888, when he came to him to buy land, when he introduced himself and told his name, and that he resided in Marshall county in this State. Saw him about the land three or four times in August and the early part of September, 1888. We did not agree, and he told witness he was going back home and gave his address, where witness could write him, if he concluded to accept his offer. This was about the 10th or 12th September, 1888, and did not see him any more until the day of the election, on the 6th November, 1888. Did not know his politics, but challenged his vote. Have not seen him in Wirt county since the day of the election. Mr. West resides on witness' farm, near town. The charge is sustained and the vote is not legal.

In addition to the illegal votes herein enumerated, that should be deducted from the whole vote of Contestant in Wirt county, we claim that Contestee should be allowed five votes for the fraudulent ballots cast at Morris precinct, in which his name was omitted.

D. C. Casto, p. 550, testifies that in the recanvass of the votes at Morris polling place, Tucker district, there was found five democratic ballots containing the names of the various democratic candidates for the various offices voted for at that election, except the office of Representative in Congress. There was no space left on the ticket either for the office of Congressman or for the name of the candidate and no space left on the ticket for the name to be written in. The tickets were headed "Democratic Ticket," and contained the name of Cleveland and the other democratic candidates for the various National, State and county offices, except the office of Congress, aforesaid.

No one can suppose for a moment but that this ticket was fraudulently printed and circulated in the interest of Contestant. And it is certain that the voters were defrauded out of their right to vote for a Congressman and the Contestee was fraudulently deprived of these votes, as everything goes to show the voter voted the ticket, supposing the name of Contestee was printed on it, as a candidate for Congress.

The Code of West Virginia, chapter 5, section 5, specifies what shall be a fraudulent and illegal ballot, and the punishment for persons who may fraudulently print or circulate the same. These ballots voted at Morris precinct, come within the very letter of this law. These voters were fraudulently deceived in the interest of Contestant, and Contestee was defrauded out of these five votes, and should therefore be added to his whole number of votes in Wirt county.

Z. E. Thorn, clerk of the county court, pp. 513-514 and 515, proves who voted on 6th November, 1888, at the several precincts, and files the exhibits found on those pages as evidence thereof.

WOOD COUNTY.

T. G. Smith, clerk of County Court of Wood county, p. 564, proves that all the votes hereinafter canvassed, voted at their several precincts in Wood county, on the 6th day of November, 1888.

Austin Lafferee, unsound mind.

P. F. Wells, p. 580, testifies he knows Lafferee since 1886; he was a man of unsound mind. He voted in 1886. When he came up to vote there was none of the commissioners acquainted with him. His father stood by his side and answered all the questions that were put to him and the ticket was dropped in the box before they had time to consider. The commissioners then considered the matter and considered he was not a legal voter and had the vote checked. The young man commenced to answer two or three questions, and his father spoke up and interrupted him with answers and commenced answering himself. His father was a republican.

Whitten Wells, p. 554, testifies he knew Lafferee's father; his father and brother were republicans.

W. C. Keever, pp. 601-2, testifies he has been practising medicine since 1865; that he knew a young man who had recently died named Lafferee; that on the 6th day of November, 1888, he was generally considered by the neighborhood to be of unsound mind. In his opinion, as a physician and expert and from what he knew of Lafferee, he did not think Lafferee was *compos mentis*—a man of sound mind.

A. F. Bonar, p. 591, testifies he knew a young man who died recently by the name of ——— Lafferee; that he voted at the election on Nov. 6th, 1888; that his father is republican and the family are republicans.

The charge is sustained and the vote illegal.

W. H. Mamel, minor.

Whitten Wells, pp. 582-3, testifies he knew Mamel; that about the 8th of August, 1888, he was brought before him as a justice charged with a misdemeanor, and he said he was not 21 years of age, and his father testified on the hearing that he would not be of age until July or August, 1889. He said that William Henry Mamel was his son. W. H. Mamel is a republican.

T. J. Jack, p. 594, testifies he knows Mamel; that the correct way of spelling his name is Meme!; known him for 15 years. Mamel told him last July while he was at work for him that he was 20 years old that month; he would be 21 years old in July, 1889. His father's name is Henry Mamel, and heard him swear last August that his son was not 21 years old. It was before Esq. Whitten Wells; cannot be mistaken that he told me his birthday was in July.

Asa Pease, p. 597, knows Mamel; he is a republican he supposes; his father is a republican; always had the impression he was republican. H. H. Pennybacker, pp. 605-6, testifies he knows William Henry Mamel; he is a republican or claims to be.

W. F. McGee, p. 637, testifies he knows Mamel; saw him at New England on day of election. Fixed a republican ticket for him by putting on Kellar's name over Buckley's for sheriff, and tore a little notch in the bottom of his ticket about the middle; gave the ticket to

to him and he said afterwards he had voted it. When the votes were counted, I was standing by and saw a republican ticket come out of the box with a notch in the bottom like the one I fixed, and had Kellar's name over Buckley's for sheriff, with a sticker. Witness was present at the trial before Esquire Wells, in summer of 1888. The old man was asked if his son was of age, and he said he was not. He told when he would be 21, but cannot now recollect the month; when he offered to vote he told me he was old enough to vote. The charge is proven, and the vote is illegal.

James M. Cochran, minor.

Whitten Wells, p. 583, testifies he knows Cochran; that the politics of the family is republican; that is the father and brother. After November 6th, 1888 was applied to as President of the Board of Education to let him go to school without pay, as he was under 21 years of age.

A. F. Bonar, p. 591, testifies he knows Cochran: that he voted at the election Nov. 6th, 1888, at Belleville. That he is supposed to be a republican, the family is republican, and he is satisfied he is.

Leander White, p. 595, testifies he knew J. M. Cochran about 8 years; that they were going to Belleville to the convention in 1888, and asked him if he was going to vote in the convention (it was democratic) he said he would not be 21 until in May, 1889, and that if he was old enough to vote, he would vote the republican ticket. His father told me at one time, speaking about another son, that his family record had been burned

Horace Mitchell, p. 669, testifies that he was secretary of the Board of Education in Harris district, and has the custody of the records and returns of sub-district, No. 11, in said Harris district, and that he has the same now with him; that the register and return was made by William T. Cochran; that James Cochran's name appeared on that register, and return, showing what his age was. That W. T. Cochran made oath to it before him; that he is a brother of James. That he now files here a copy of said register and return, marked exhibit "H. M." See the same on pages 670-671. The charge is proven, and the vote is illegal.

Charles Walker, or *Thum Walker*, minor.

Whitten Wells, p. 583, testifies that he knows Charles Walker; that one of the boys is called "Thum" That Charles Walker and Thum Walker are both republican.

H. H. Pennybacker, p. 606, testifies that he knows Charles Walker, nicknamed Thum, for 15 or 18 years; does not know how old he is; he claims to be a republican. See also exhibit J., filed with T. G. Smith's deposition, page 569, showing when he was born as given to the assessor of county.

George T. Ruth, p 622, testifies he knows "Thum" Walker;

that he was born in April or May, 1868 ; was born in 300 yards of my house. My son is older than he is, and he was not twenty years old on the 6th day of November, 1888 ; Ed's birth-day (my son), I think was in February. When this boy was born he was so small they called him Thum, because of Tom Thumb. I will file a record of their births, marked "G. T. R." and will make oath to it. See record p. 624, and affidavit exhibits G. T. R. and G. T. R. No. 2, with Ruth's deposition. The charge is proven and this vote is illegal.

Edward Steed alias Simmon, non-resident.

Anderson B. Kibble, pp. 588-589, testifies he knows Edward Simmons ; that he resided in a boat tied to the Ohio shore below Reedville landing on the 6th November, 1888. He came there the last of June, 1888, and moved out of his boat about the middle of November, 1888. Part of the time his boat was beached on the land ; lived within 400 yards of him and saw him every day. He lived there continuous from June until after Nov. 6th 1888. He had a family that resided on the boat. It was tied to the shore while it was afloat and when it was on shore it was propped up on skids. He was supposed to be republican. His associates were republican.

On cross-examination, says he was a member of the Board of Education in Ohio and stopped Simmons from sending his children to school in Ohio because he had sworn he was a resident of West Va. It was about the 20th November, 1888, I stopped them. He sent his children to our school. All the children between the ages of 6 and 21 that were residents of Reedville special school district, Ohio, were entitled to attend school there. His act showed that he claimed his residence was in Ohio by sending his children to school there ; this is just a matter of opinion.

E. M. Kibble, pp. 590-591, testifies he knew Steed or Simmons. His residence was in a boat tied to the river bank, at Reedville, Ohio, on the 6th November, 1888. He came there with his boat in June or July, 1888. He claimed to be a republican ; advocated that doctrine ; suppose that is what he was. A good part of the time while he was there his boat was beached out on the shore. He left his boat about the 20th November, and now lives on the hill back of Reedville, Ohio. His boat was tied to willows or stakes on the Ohio, and when it was beached it was on the Ohio shore. He lived there in the boat continuously from June or July, 1888, until Nov. 6th, 1888.

Upon cross-examination he answered question of Contestant that so far as he knew Steed claimed his residence in Ohio. Everybody over there thought his residence was over there.

H. H. Pennybacker, p. 604, testifies that he knew Simmons ; that he resided on the 6th November, 1888, in a boat on the Ohio shore, near Reedville, Meigs county, Ohio. On that day it was on the ground—the Ohio shore. Never saw the boat moored to the West Va. shore. The free school commenced in Belleville in September, 1888.

I was one of the trustees ; Simmons made no application to send his children to school there, nor did he ever send them there.

The charge is sustained, and the vote is illegal.

Henry Cunningham, non resident.

A. F. Bonar, p. 591-2, testifies he knew Henry Cunningham ever since he was a little boy ; that he voted at Belleville, November 6th, 1888 ; he told me he had not resided in Wood county sixty days before the election ; that he resided in Jackson county, W. Va. He told me two or three times he had not been in the county 60 days at the time of the election ; although then he thought he had, but that he had since found out his mistake. He told me he voted the republican ticket, save one road surveyor. He is a republican C. B. Smith's name was on the republican tickets voted there.

W. C. Keever, p. 602, testifies he knew Cunningham, that he told him he had not resided in Wood County, sixty days before the election. He told me that he thought at first that he had, but after he counted up the time, he said he hadn't ; he said he was honest in voting. He thought 30 days was the time he had to be a resident.

The charge sustained and the vote not legal.

George Anderson, non-resident.

E. M. Stout, p. 610, testifies he knew Anderson, and that he voted Nov. 6th, 1888 at Lubeck precinct, in Lubeck district, Wood county ; that he voted for C. B. Smith, for Congress ; that he moved him out of this State, to Little Hocking, Ohio, between the 1st and middle of February, 1888 ; and about the 1st April, he moved into Harris district, he remained there about six months, when he moved into Lubeck district ; that he moved his wife and his household and kitchen furniture to Ohio. He said that his wife had formerly lived in Ohio at Little Hocking, and would rather live there, and he would just as leave, and that as she liked it better, he would move back over there ; he told witness that he had rented a house over there, and the man he rented of, said he had rented him a part of his house.

A. T. McMurray p. 614 testifies he knew Anderson for four years ; that he moved to Ohio in the spring of 1888, and moved back again afterwards. He told me he was a republican and voted the straight republican ticket, with the exception of R. H. Smith for prosecuting attorney, and Rector for the Legislature.

B. F. Tracewell, p. 620, testifies he knew Anderson. He had resided in West Va., since the first or 2nd day of April, 1888. Prior to the 1st of April he resided at Little Hocking, Ohio ; he had a wife and no children. In his politics he was republican. The charge is sustained and the vote is illegal.

Isaac Davis, unsound mind and pauper.

E. M. Stout, p. 611, testifies he has known Davis 20 to 25 years ; that he considered him not of sound mind. Was not competent to

manage his own affairs and property. He is accustomed to seek alms. He says he voted and is a republican.

J. I. Tracewell, p. 617, testifies he knew Davis ever since he could recollect; that he was not of sound mind, and that such had been his mental condition ever since he knew him. His father's name was Allen Davis. That several persons had managed his business for him. Davis has not been competent to attend to his own business ever since he knew him. He has always claimed to be a republican. He lived in Lubeck district about five miles from Parkersburg. He has asked me for alms a hundred times I expect.

B. F. Tracewell, p. 620, testifies he knew Isaac Davis. He voted at Lubeck precinct in Lubeck district on the 6th November, 1888. He claims to be a republican; has known him all his (witness') life and he was not a man of sound mind; he was not capable of managing his property. His property has been managed by other parties. He has been a beggar for the last forty years.

J. M. Johnson, p. 680, testifies he has known Isaac Davis all his life; knew his father before him. I don't consider that he ever was right in his mind. He has sought for alms for years. He was a republican when witness was commissioner of elections. He was not permitted to vote, because they did not think he was capable. See also the will of his father, Allen Davis, exhibit L, with Smith's deposition, p. 566-567.

The charge is sustained and the vote illegal.

Pard Robinson, or P. O. Robinson, unsound mind.

E. M. Stout, p. 611, testifies he knew Robinson for 20 or 25 years, generally call him Pard; he is considered not of sound mind. His neighbors call him foolish; he is considered generally not of sound mind. His mental condition has been that way ever since I knew him.

On cross-examination, says he is able physically, but not mentally to take care of himself.

J. I. Tracewell, p. 617, testifies he knows Pard Robinson, his initials are P. O. Robinson, but he is generally called Pard. His own people call him "Pardon." Have known him ever since he could recollect. On the 6th of November, 1888, he was of unsound mind. He was not capable of attending to business. Witness is his committeeman and have been since a year ago last December; he has had three or four committeemen. His father was Benjamin Robinson. He made a will but did not give Pard anything direct but willed that his brothers should give him \$25 a year. John Stout and I together wrote his will, and his father said he was not capable of taking care of anything, and he would leave his property to his brothers and they were to give him \$25 a year. Pardon Robinson professed to be republican.

B. F. Tracewell, p. 620, testifies he knew Pard Robison since he was two years old. He is a republican. He voted at Lubeck precinct on 6th Nov. 1888. He is not of sound mind; he is not capable of transacting business for himself or any body else. This has been his condition ever since he was a child. My brother, J. I. Tracewell, is his committee.

J. M. Johnson, p. 685, testifies he knows Robinson and that he never was considered of sound mind and he has been considered so ever since he was a child. It was scarlet fever brought him to what he is when he was a boy. His father told me he was not right in his mind, and ought not to be required to muster. He is a republican. The charge is proved and the vote is illegal.

John Woernlinger, alien.

John Woernlinger, p. 616, testifies he voted at Petty's school-house on the 6th November, 1888; that he was born in Germany; that he came to this county when he was 18 years old and been here ever since; that he was never naturalized, and that he is a republican. The charge is proved and the votes illegal.

Israel Taylor, non-resident of district.

Israel Taylor, p. 627, testifies he voted at Parkersburg on the 6th day of November, 1888, and that he voted for C. B. Smith for Congress.

On cross-examination he says he lived in Parkersburg on the day of the election. Question by Contestant's attorney, "Were you an actual *bona fide* resident of Parkersburg, West Va., on the 6th day of November last?" Answer, "Well, we own a little piece of ground about half way from here to Williamstown and I have been making my home out there part of the time, and in February last I left the place out there and came to town." The farm is in Williams district, Wood county, West Va.

Thomas H. Murphy, p. 672, testifies that he knows Taylor; that about the middle of Dec., 1888, he had a conversation with Taylor about his moving. He asked me if I would haul him a load; told me he was moving in from his farm and had his furniture coming in on two wagons. Taylor was there and helped load the furniture on the day, and I hauled it to the Kanawha river and we unloaded them on the float.

J. N. Steed, p. 674, testifies he knows Taylor; that he, witness, resides in Williams district, in Wood county; that Taylor resided there on the 6th day of November, 1888. In a conversation he said he was working here in town, boarding, then he was going out home to take care of the children, and Frank was going on the river; he said he was going home out on his place in Williams district; it was a month or so before the election; saw him frequently on his place prior to November 6th; He was going round taking pictures to have them enlarged. He has always been a republican.

A. W. Wright, p. 677, testified he knows Taylor for 8 or 10 years;

that his farm is situated in Williams district; the house is also in Williams district; that Taylor resided on his farm in Williams district from about the 1st of July, 1888, up to 6th November, 1888. He moved from the farm about the 1st of December, or some time in December. He was engaged in taking orders for pictures; I saw him frequently; I live in half a mile of his house. He often spoke to me about going home when in town here. See also exhibits, on pages 570 and 571, showing he was assessed in Williams district. The charge is proven and the vote is illegal.

Robert Alexander, non-resident of district.

J. E. Carle, p. 631, testifies he knew Alexander; have known him for 18 years. He moved away from Volcano, Walker district. When he moved, he moved his family. He is a republican and was a candidate on the republican ticket for assessor, Nov. 6, 1888.

J. L. Showalter, pp. 634-5, testifies he knew Alexander. He moved from Walker district at least one year before the 6th day of November, 1888. I don't know that he voted but he was at the polls all day electioneering for himself and the balance of the republican ticket. He is a republican. See also assessment lists filed by Contestee for the years 1886, 1887 and 1888, pages, 814 to 821 inclusive, showing he was not assessed in Walker district for those years. Charge proven and the vote is illegal.

Oscar Cunningham, non-resident.

D. P. Meyers, p. 643, testifies he knows Cunningham for over a year. He resided in Parkersburg less than six months prior to the 6th November, 1888. He told him he came from Clifton Forge, Virginia. Witness returned here in April, 1888, and he came some time after. Had a talk with him as to how he intended to vote, if he could vote. He said he was a red hot republican, and he was going to vote the republican ticket. He said he didn't know whether he would be able to vote or not, but he thought we both had a right to vote, and he wanted witness to go with him to vote. I did not attempt to vote. He was under the impression he had only to reside here thirty days to have a right to vote; we compared notes frequently, but he had not been here as long as I had; have forgotten when he came here, but it was in 1888. He said after the election he voted the republican ticket; he came to witness the day of the election and said, "they tried to stop me, but I got her in," and told me to go down and chance it. Knew he was a red hot Smith man; knew from the way he damned Jackson that he was a Smith man. The charge is sustained and the vote is illegal.

William White, non-resident.

E. H. Morehead, p. 645, testifies he knew a colored man who called himself Wm. White; first knew him in the spring of 1888; he left here the last of November or in December, 1888; he said he had come from Cleveland, Ohio, here; he came between the first of March and the middle of May, 1888; he told me on the day of the election

he had voted the straight republican ticket and didn't care a damn who knew it ; said if I made any trouble about it, he would make trouble for me ; do not know of any other colored man by that name.

Milton Peyton, p. 648, testifies he knew White ; I heard he voted and I said he had no right to vote, he had not been here a year ; he was a colored man ; he was a republican, he told me he was. He told he came to Wheeling to the state fair and shod horses there—they had the fair the fall before the election ; then he went back to Masillon, Ohio, where he claimed his home—his sister lived there and he makes that his home. He left Parkersburg a month or two after the election. Witness has an extensive acquaintance among the colored people of Parkersburg and has had for years,—there was no other colored man by the name of Wm. White, except this one.

Anthony Willis, p. 656, testifies he knew White ; the first he knew of him was in the summer of 1888 ; met him here and talked with him and said he had been down through Georgia and Alabama ; came from there to Ohio, and crossed over from Ohio and shod some horses in Wheeling, and he went back to where he claimed his home was in Ohio. He left here since the election. Told me he always voted the straight republican ticket. He was a colored man, not married, and in politics a republican.

The charge is proven and the vote illegal.

R. B. Mussetter, non-resident.

J. F. Woodyard, p. 681, testifies he knew Mussetter ; that he taught school in the latter part of 1888, at Locust Ridge, sub-district Tygart district, Wood county. He boarded around among the neighbors near the school house. On the 6th November, 1888 he boarded at H. A. Bennetts ; that is when he boarded, but his home was in Ohio ; he usually goes home just after school is out ; he was a single man ; his school was out in March, 1889, and haven't seen him since. He calls Ohio his home ; he is a staunch republican ; did not see him vote, but he was electioneering for republicans on that day : he always talked to me and all the boys republican.

The charge sustained and the vote illegal.

William Radcliff, pauper.

Dr. J. T. Prickett, p. 687, testifies he knows Radcliff ; knows that during the year 1888, he received assistance from the Overseers of Poor of Wood county. The Overseer of Poor of Tygart district gave orders for him ; I think it was \$2 00 a month. The T. J. Prickett mentioned in exhibit D., with T. G. Smith's deposition is my father. The Wm. Radcliff named in exhibit D. is the same person. My father, as Overseer of the poor furnished the goods. The name is spelled both ways Wm. Radcliff and Wm. Radcliffe. Heard him say he voted at the last election ; he voted for C. B. Smith for representative in Congress. He had been summoned by Judge Jackson and he

supposed that Jackson thought he had been hired to vote for Smith, but he was not, he said he voted for him, because he liked the man.

The charge proved and this vote is illegal.

Jas. Welling alias Jas. Cron, unsound mind.

M. A. Ruckman, p. 692-693 testifies he knows Welling; thinks his correct name is Welling, frequently goes by either name. On the 6th November, 1888, he was not of sound mind. He was kicked by a horse when he was a small boy, and his mind was never right afterward. He was not capable of transacting business or of taking care of himself; he professed to be republican. After the election said he had voted for Harrison and Buckley, and that John A. Phelps gave him his ticket and Phelps is a republican.

The charge is sustained and the vote is illegal.

J. C. Guttermuth, unsound mind.

W. S. Alleman, p. 695, testifies that he knows Guttermuth, and has for about 20 years. He voted at Rallstown Mills, Union district, Wood county, on the 6th Nov. 1888. Don't consider him a man of sound mind; there are times he is not, and other times he would be; his mind has been afflicted ever since he has been here, this last time the last 3 or 4 years. On the 6th November, 1888, he was on what he calls "a high," that is he is "off," that is what it is called in that country. I mean by a "high" that he is not in his right mind, he is very talkative, talks all kinds of talk; he voted the republican ticket that day; he voted for the republican, C. B. Smith, for Congress.

The charge sustained, and the vote illegal.

Edward McDowell, minor.

W. S. Alleman, p. 696, testifies he knows McDowell, and have for three years. Have heard him talk republican. He is a republican I think. Know from the poll books he voted at Murphy's Mills on the 6th November, 1888. On that day he was a resident of Clay district, Wood county, W. Va.

Charles McClead, p. 701, testifies he knew Edward McDowell for about three years; he lived in Clay district. Did not know just exactly his age, but did not look like a man of age in 1888; he goes from his appearance.

Thomas G. Smith, p. 558 testifies that the paper Exhibit "A" filed with his deposition is a true copy of the records; which certificates is found on page 559, and shows that J. W. McDowell gave in his son's Edward A. McDowell's age on the 23rd day of January, 1889, at twenty (20) years.

The charge is proven and the vote illegal.

John Parkins, or John Dobbins, non-resident.

Joseph McClead, p. 698, testifies he knows a young man they call Perkins or Dobbins; he is most called Perkins. I am informed he is a republican; he talked in favor of the republicans. He told me that he had been living down at Letart in Ohio; he was not back here over

30 days before the election; his mother says he is only 19 years old. She told it just before the election in my presence, Charles McClead and John Perkins.

Charles McClead, p. 701, testifies he knew John Perkins—he was sometimes called John Dobbins, but generally known as Perkins. He is 20 years old sometime this year. I married his mother's sister; he had been here 4 or 5 days before the election; he John Perkins lived at Letart, Meigs county, Ohio. He went from here in the spring of 1888, and in the latter part of the winter he was there in Meigs county, Ohio. He was there about two months and he went out to work on a farm for a man in Meigs county, Ohio. Staid there until potatoes were dug in the fall and started for Bridgeport, Ohio. Dobbins claims to be a republican.

The charge proven and the vote is illegal.

Murphy's Mills precinct,

It is fully proved that the law requiring the oaths of the officers holding an election should be properly certified on one of the poll books at each election precinct, or that it was proven that the officers had been sworn, before the Commissioners of the county, has not been complied with so far as this precinct is concerned. See exhibit "H," with T. J. Smith's deposition on pages 563, 564, which is proven by said Thomas G. Smith on page 560. On pages 565, 566, shows whole number of votes cast, 163; that there is no certificate showing it on the poll books, and that the votes are set out on pages 1, 2, 3 and 6, and there are no names on pages 4 and 5 of the poll book. He also exhibits "Y," with O. M. Clemens' deposition on page 690, as also his deposition on pages 689, 690 and 691. We claim that this whole poll of 163 votes should be excluded from the count in Wood county, and that 90 votes should be deducted from Contestant's vote and that 70 votes should be deducted from Contestee's vote, being the amount they respectively received.

Wadesville precinct,

It is fully proved that the law requiring the oaths of officers holding an election should be properly certified on one of the poll books at each election precinct was not complied with, nor was it proven that the officers had been sworn before the commissioners of the county court, so far as this precinct is concerned. See exhibit "F" with T. G. Smith's deposition on pages 562, 563, which is proven by Smith, on page 560. On page 565 it is proven by him that 155 votes were polled at this precinct. See also O. M. Clemens' deposition; see pages 689 and 690, and exhibit "X," filed therewith on those pages. We claim that this vote of 155 votes should be excluded from the count in Wood county, and that 102 votes should be deducted from Contestant vote and 51 votes should be deducted from Contestee's vote being the amounts they respectively received.

The Contestee refers to the discussion of the law, as it effects two precincts to the Ebenzer precinct in Calhoun county and adopts what is said there as applicable to these.

RECAPITULATION OF ILLEGAL VOTES.

Cabell county,....	Jackson,....	2	Smith,....	5.
Calhoun county,..	"	2	"	6.
Jackson county...	"	2	"	10.
Lincoln county...	"	0	"	3.
Mason county....	"	0	"	8.
Pleasants county..	"	1	"	13.
Putnam county....	"	0	"	23.
Ritchie county....	"	1	"	8.
Roane county.....	"	1	"	9.
Wayne county....	"	7	"	4.
Wood county.....	"	0	"	20.
Wirt county.....	"	2	"	16.

Total illegal votes.....18125.

	Jackson.	Smith.
Whole number of votes returned to Governor...	19,837.....	19,884.
Deduct illegal votes of Jackson.....	18	
Deduct illegal votes of Smith		125
	<u>19,819</u>	<u>19,709.</u>

Jackson's whole vote..... 19,819.
 Smith's whole vote..... 19,709.
 Majority for Jackson, having reference only to illegal votes... 110.

	Jackson.	Smith.
Exclude Ebenezer precinct, Calhoun county	17.....	39.
Exclude Kentuck precinct, Jackson county.....	72.....	152.
Exclude Pine Log precinct, Jackson county.....	92.....	139.
Exclude Boyers precinct, Putnam county.....	34.....	74.
Exclude Thomas' School-house precinct, Putnam county.	80.....	184.
Exclude Walton precinct, Roane county	172.....	303.
Exclude Murphy precinct, Wood county.....	70.....	90.
Exclude Wadesville precinct, Wood county.....	51.....	102.

Total..... 588..... 1083.

Jackson's legal vote.....	19,819.....	
Smith's legal vote.....		19,709.
Deduct from Jackson.....	588.....	
Deduct from Smith.....		1,083.
	<u>19,231</u>	<u>18,626.</u>

Jackson's whole legal vote, 19,231.
Smith's whole legal vote, 18,626.

Jackson's majority, 605.

To which should be added votes for Jackson in Wirt county, Morris precinct, 5.

Jackson's majority 610,

including the illegal votes cast and after rejecting the precincts above-named for the reasons stated.

Contestee adopts the note on page 5 of Contestant's brief and the appendix to his brief as being applicable, also to like matters discussed in Contestee's brief.

Contestee therefore respectfully submits, that under the proofs appearing in the Record, he was duly elected by the legal and qualified voters of the Fourth Congressional District of West Virginia, a Representative in the Fifty-first Congress of the United States for said District, and is therefore entitled to hold and occupy his seat for the term prescribed by law as such Representative.

J. W. ST. CLAIR,

J. B. JACKSON,

Attorneys for Contestee.



