47TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 931.

CONTESTED-ELECTION CASE OF LYNCH vs. CHALMERS.

APRIL 6, 1882.—Ordered to be printed.

Mr. CALKINS, from the Committee on Elections, submitted the following

REPORT:

Your committee, to whom was referred the above-entitled contested-election case, having had the same under consideration, beg leave to report:

That the contest in this case was commenced by contestant, and the following facts were set out by him in his notice as the grounds on which he relied, to maintain it:

First. He alleges, as a fact, that he received the highest number of legal votes cast in the sixth Congressional district in Mississippi for Representative in the Forty-seventh Congress.

Second. That the true result and return was suppressed and made to appear the other way by reason of frauds and violation of law, more particularly set forth as follows:

a. In Adams County, city of Natchez, Jefferson Hotel and Washington precincts, republican voters were purposely and fraudulently hindered and delayed in voting, until the time arrived for the closing of the polls, leaving several hundred voters standing around the polls, anxiously waiting to vote, of which privilege they were deprived by a systematic course of delay set on foot and carried out by prominent democrats and the election officers.

b. That in Washington, Kingston, Pine Ridge, and Beverly precincts the ballot-boxes were tampered with and stuffed, and the further violations of the law in refusing to allow the United States supervisors to be present and witness the counting of the votes after the election closed; and at Palestine and Dead Man's Bend precincts, in said county, the election officers fraudulently and unlawfully refused to count the votes polled, whereby 214 votes majority in those precincts were lost to contestant.

c. Jefferson County.—At Rodney precinct, where the contestant received 145 majority, the officer in charge of the returns on his way to the county seat, with the papers declaring the result of the election, was intercepted, the returns forcibly taken from him and destroyed, whereby that result was lost to the contestant.

d. Claiborne County.—At the precinct of Grand Gulf, the United States supervisor of elections was refused the right to be present to witness the count, and the ballot-box was stuffed.

e. Warren County.—That the commissioners of election threw out 2,029 lawful votes cast for the contestant, and refused to count them.

f. Issaquena County.—That the commissioners of election threw out 785 lawful votes cast for the contestant, and refused to count them.

g. Washington County.—At the voting precincts of Stoneville Refuge and Lake Washington, 170 votes for the contestant were thrown out. At Greenville, Robb, and Stone precincts the ballot-boxes were taken away and counted in the absence of the United States supervisor of election, and without his consent and against his protest. At the Court-House precinct, as well as at the said precincts of Robb and Stone, ballot-boxes were corruptly stuffed.

h. Bolivar County.—At the precincts of Australia, Holmes Lake, Bolivar Landing, and Glencoe, 678 legal votes for the contestant were excluded by the officers of election without cause.

i. Coahama County.—That the officers of election excluded and refused to count any of the votes polled in any of the various precincts of that county, except Friar's Point, whereby 700 votes were lost to the contestant.

To this notice the contestee, answering, denied the allegations of fraud in Adams County, and denied specially the other allegations of contestant's notice relative to the various precincts therein, except Palestine and Dead Man's Bend. In those two precincts the contestee alleged that the ballots were rejected strictly in accordance with the laws of Mississippi.

2d. As to Rodney precinct, the contestee admits that there were 247 votes cast for the contestant and 92 for the contestee, and that they were destroyed, but that they ought not to be counted unless it is shown they were in accordance with section 137 of the Revised Code of Mississippi of 1880.

3d. As to Claiborne County, it is denied that the boxes were stuffed, or that the United States supervisor was refused permission to be present at the counting of the ballots.

4th. As to the votes in Warren County, the contestee alleges in answer specially, that 628 of the 2,029 ballots were not counted for the following reasons; (*a*) that at Bovenia precinct 174 ballots were too wide; (*b*) that at the Fourth ward precinct, city of Vicksburg, 214 ballots had marks upon them; (*c*) that at Pryor's Church precinct, 240 ballots had marks upon them; (*d*) that at the other precincts in said county there were 1,821 ballots marked in violation of law, and were not counted, which makes a total of 2,049, of which 2,029 had on them the name of contestant, and 20 the name of contestee.

5th. As to Issaquena County the contestee alleges that the officers of election rejected the returns made from Skipworth, Ben Lomond, Ingomar, and Hayes' Landing precincts, because the officers of election did not comply with the law, and that the ballots and tally list did not correspond by from 40 to 60 votes, and that at Hayes' Landing precinct, in addition to the above grounds, the whole crew of a steamboat landed there that day and voted without being registered.

6th. As to Washington County, a general denial is put in, and in addition contestee alleges that the Stoneville box was rejected because the officers did not comply with section 139 of the Code of Mississippi, and that the box had been taken out of the sight and control of the officers by one Johnson, a partisan of contestant. The Lake Washington box was not counted because the ballots were not sent up to the commissioners of election, but the statement signed by the clerks and sent up showed a majority of 116 for contestee.

7th. As to Bolivar County, contestee makes a certificate signed by the commissioners of election of that county a part of his answer, and affirms, as we understand it, the legality of their action. They report

that they threw out the Australia precinct box—30 Democratic and 192 Republican votes,

Because the returns were not certified to by the inspectors or the clerks. We have thrown out the Holmes Lake precinct, because the box was not opened nor the ballots counted by the inspectors and numbered by the clerks, and no returns or tally-sheet made.

We have thrown out the Bolivar precinct, 45 Democratic and 311 Republican votes, because there was no certified return from the inspectors and clerks. The tally-sheets sent in the box show the names of the electors of the Democratic and Republican parties of James R. Chalmers, John R. Lynch, G. B. Lancaster, M. Rolous, James Winters, ——— Fleming, and James White, but does not not show for what office they were voted for. The tally is kept on four different sheets of paper. The total can only be guessed at, but not ascertained correctly.

We have rejected the Glencoe precinct vote, 27 Democratic and 233 Republican votes, because the vote was counted out in part by all the inspectors and clerks and then discontinued until next day, when the count was finished by one inspector and one clerk, and a very imperfect tally-sheet and return sent in by these two not certified to.

JOHN H. JARNAGIN,
RILEY ROLLINS,
W. A. YERGER.
Commissioners of Election.

8th. As to Coahoma County the contestee denies the allegations of contestant, and affirms that the acts of the election officers were strictly in accordance with the laws of Mississippi. Appended to contestee's answer the following notice is addressed to the contestant:

Notice to Hon. J. R. Lynch.

And now, having answered all of your specifications, you will take notice that I will insist and endeavor to prove and maintain:

1. That you did not receive a single legal vote in the sixth Congressional district of Mississippi for member to the Forty-seventh Congress of the United States; that all your tickets were marked so that they could be, and were, easily distinguished by persons who could not read, from the Democratic ticket, and also from the regular Republican ticket, printed at Jackson, Miss., under the supervision of the executive committee of the Republican party, and that your tickets were illegal because not such as is prescribed by section 137 of the Revised Statutes of Mississippi, 1880.

2. That these marked tickets were examined and approved by you before they were circulated, and that you paid four dollars per thousand for these marked tickets, when you could have procured from the Republican Executive Committee legal tickets for your district for one dollar per thousand.

3. That you made false representation to the Secretary of State of Mississippi about the printing of your tickets, when attempting to prevent him from issuing to me a certificate of election.

4. That your friends and partisans, in violation of law, and contrary to the very essence of voting by ballot, stood at the polls and kept a list of the voters and how each voted as the ballots were handed in.

5. That at Stoneville and Refuge precinct, in Washington County, your friends and partisans, some of whom were United States supervisors of election, browbeat, bullied, and intimidated a number of colored voters who desired to vote for me, and prevented them from so voting.

6. I will insist and maintain that you were unpopular with your own party for many reasons, and especially because you opposed the nomination of General Grant for President, and that a large number of leading colored Republicans supported me on the stump and at the polls; that I was elected, and that you were not.

JAS. R. CHALMERS.

LEGAL PROCEEDINGS.

It appears from the record that on the 16th day of November, 1880, the contestant went before the Hon. J. A. P. Campbell, one of the supreme judges of the court of Mississippi, and acting as chancellor of the chancery court of Hinds County, Mississippi, and tendered his sworn bill of complaint, in and by which he sought to enjoin the Hon. Henry C. Meyers, secretary of state, from declaring the contestee

duly elected a Representative in the Forty-seventh Congress from the 6th Congressional district of Mississippi. Among other things in his bill of complaint the contestant alleges that the returns filed in the secretary of state's office from the several counties showed that he received the votes following:

Adams County	1,194
Bolivar County	1,715
Claiborne County	288
Coahoma County	1,112
Issaquena County	1,118
Jefferson County	386
Quitman County	83
Sharkey County	175
Tunica County	506
Warren County	2,086
Washington County	1,298
Wilkinson County	814
Total number of votes	10,775

And that the contestee received the following votes:

Adams County	1,419
Bolivar County	403
Claiborne County	1,061
Coahoma County	553
Issaquena County	173
Jefferson County	1,043
Quitman County	153
Sharkey County	484
Tunica County	239
Warren County	1,034
Washington County	1,963
Wilkinson County	1,691
Total number of votes	10,216

He also alleges that there was deducted from the vote thus received for him in the counties of—

Adams	316
Bolivar	736
Coahoma	760
Issaquena	785
Jefferson	250
Warren	2,029
Washington	526
Total votes rejected	5,402

And from the vote of said Chalmers in the counties of—

Adams	32
Bolivar	102
Coahoma	328
Issaquena	114
Jefferson	92
Warren	20
Washington	356
Total votes rejected	1,044

And he claimed that the deductions made from his vote were unauthorized and unlawful, and he asked the intervention of the court to prevent the issuing of a certificate of election to the contestee.

Judge Campbell made the following indorsement on the bill of complaint:

I decline to grant the injunction prayed for in the annexed bill, because the House of Representatives of the Congress of the United States is the exclusive judge "of the

elections, returns, and qualifications of its own members" (made so by the Constitution of the United States), and a decision of the question as to the election of a member of Congress by any other tribunal would not be authoritative or final. Besides this, the chancery court is not authorized to decide contested elections, and whatever its right, if any, to enjoin in aid of a contest inaugurated in a court of the State, which such court could lawfully determine, it appears to be clear that interference by injunction to prevent an executive officer from performing a duty prescribed by law, in reference to an election as to which no court can decide, so as to conclude anybody or thing, would be without the semblance of right.

J. A. P. CAMPBELL,
One of the Judges of the Supreme Court of Mississippi.

JACKSON, MISS., *November* 17, 1880.

By the revised code, 1880, of Mississippi, the following provision is made relative to the writ of *mandamus:*

SEC. 2542. On the petition of the State by its attorney-general, or a district attorney, in any matter affecting the public interest, or on petition of any private person who is interested, the writ of *mandamus* shall be issued by a circuit court commanding any inferior tribunal, corporation, board, officer or person to do or not to do an act, the performance or omission of which the law especially enjoins as a duty resulting from an office, trust, or station, and *where there is not a plain, adequate, and speedy remedy in the ordinary course of law.*

Under this section the district attorney of Tunica County filed his petition in the circuit court of that county against the election commissioners to compel them to reassemble and reject 506 ballots which had been counted for the contestant, Mr. Lynch, and which were claimed to be illegal because they contained marks and devices in violation of the election laws. The petition was denied, and an appeal was taken to the supreme court of the State. The case is reported in 58 Mississippi, 502, and is as follows:

IRA D. OGLESBY, DISTRICT ATTORNEY,
vs.
J. I. SIGIMAN ET AL., COMMISSIONERS OF ELECTION.

Appeal from circuit court, Tunica County, Hon. Sam. Powell, judge.

On the 9th of December, 1880, Ira D. Oglesby, district attorney for the third judicial district, filed a petition in the circuit court of Tunica County for a mandamus to compel the commissioners of election in that county to reassemble and recanvass the returns made to them by the inspectors of election of the votes cast at the election on the 2d of November, 1880, for a member of Congress from the sixth Congressional district, and to make a statement of the result of such recanvass to the secretary of state within a time to be prescribed by the court. The petition alleged that the commissioners of election had counted 506 ballots which were illegal, because bearing certain marks and devices prohibited by the statute on elections, and prayed that in the recanvass they be required to reject such illegal ballots. The petition was filed under section 2542 of the Code of 1880, and stated as jurisdictional facts that the public is deeply interested in getting a construction of the election law of this State as to the duties of the inspectors and commissioners, concerning which conflicting views are entertained; that these officers are liable to criminal prosecutions, under the laws of the State and of the United States, for any omission or violation of their duties; and that the commissioners of Warren County have already been indicted and arrested for their acts, under the election law. A *fac simile* of the ballots alleged to have been illegally counted was attached to the petition, and is as follows:

REPUBLICAN NATIONAL TICKET.

For President,

JAMES A. GARFIELD.

—o—

For Vice-President,

CHESTER A. ARTHUR.

For Electors for President and Vice-President,

HON. WILLIAM R. SPEARS.

HON. R. W. FLOURNOY

DR. J. M. BYNUM,

HON. J. T. STETTLE

CAPT. M. K. MISTER, JR.,

DR. R. H. MONTGOMERY,

JUDGE R. H. CUNY,

HON. CHARLES W CLARKE

—o—

For Member of the House of Representatives from the 6th Congressional District.

JOHN R. LYNCH

The writ of mandamus was issued, and the commissioners of election appeared and demurred to the petition on the following grounds:

1st. That they are merely ministerial officers, and have no power to reject ballots that have been counted by the inspectors.

2d. That the marks on the ballots for which it is claimed they should be rejected are mere printer's dashes, and are not such distinguishing marks as were contemplated by the statute.

The court sustained the demurrer and dismissed the petition, and the petitioners appealed to this court. The provisions of the election law, code 1880, bearing directly upon the questions involved in this case, are these:

SEC. 137. All ballots shall be written or printed in black ink, with a space not less than one-fifth of an inch between each name, on plain white printing newspaper, not more than two and one-half, nor less than two and one-fourth, inches wide, without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the ticket; but this shall not prohibit the erasure, correction, or insertion of any name by pencil mark or ink upon the face of the ballot; and a ticket different from that herein prescribed shall not be received or counted.

SEC. 138. When the results shall have been ascertained by the inspectors, they, or one of them, or some fit person designated by them, shall by twelve o'clock noon

of the second day after the election, deliver to the commissioners of election, at the court house of the county, a statement of the whole number of votes given for each person and for what office, and the said commissioners of election shall canvass the returns so made to them, and shall ascertain and disclose the results, and shall, within ten days after the day of said election, deliver a certificate of his election to the person having the greatest number of votes for any office, &c.

SEC. 139. The statement of the result of the election at their precincts shall be certified and signed by the inspectors and clerks, and the poll-book, tally-list, list of voters, ballot-boxes, and ballots shall be delivered as above required to the commissioners of election.

SEC. 140. The commissioners of election shall, within ten days after the election, transmit to the Secretary of State, to be filed in his office, a statement of the whole number of votes given in their county for each candidate voted for, for any office at such election, &c.

The case was submitted by counsel without brief or oral argument.

Campbell, J., delivered the opinion of the court:

This case presents for adjudication three questions, namely:

1. Whether the commissioners of election have the right to reject illegal ballots cast and counted by the inspectors of election and returned to them with the statement of the result at the precincts.

2. Whether the ballots which the commissioners of election for Tunica County refused to reject should have been rejected by them as being illegal, for having on them a device or mark by which one may be known or distinguished from another.

3. Whether the action of the commissioners was final, or whether they may be required by mandamus to meet and act in the matter again, as the court may order.

We think it clear that the commissioners of election have the right, which they should exercise, to reject ballots returned to them by the inspectors of the election as having been cast at any of the precincts of their county which show themselves on inspection to be illegal. The law devolves on the commissioners of election the duty to prepare for the election, by revising the register of electors, and the poll-books of the several precincts, so that they may show who are qualified electors, and by appointing inspectors and an officer to keep the peace at each voting place and by distributing ballot-boxes and poll-books. The inspectors are to judge of the qualification of electors so as to receive or reject ballots offered by them, and when the polls are closed, the ballots are to be counted, and a statement of the whole number of votes given for each person and for what office is to be made, and this statement, certified and signed by inspectors and clerks, and the poll-book, tally lists, list of voters, ballot-boxes, and ballots are to be promptly delivered to the commissioners of election, at the court-house of the county, to the end that they may canvass the returns so made to them, and see that the result of the election at each precinct, as certified to them by the inspectors and clerks, is correct, according to the returns. They are to canvass the returns, that is, they are to scrutinize the acts of those engaged in holding the election at the different places of voting, as shown by the returns made to them in pursuance of law, and determine from such returns who received the greatest number of legal votes, and who is entitled to receive their certificate of election in cases in which they give such certificate, and what return they shall make to the Secretary of State.

It is true that commissioners of election are not judicial officers, in the sense of trying causes, hearing evidence, and pronouncing final judgment between parties seeking office, but they are charged with the duty of canvassing returns, which includes the list of voters and list made in counting, and the ballots, and they must examine such returns and declare the legal result and certify it. If they find an error in computation, they must correct it. If they ascertain from the lists of voters that persons not registered, and therefore not legal voters, have cast ballots, they cannot correct that, because of inability to ascertain which ballots are legal and which not; but if they find in the ballot-boxes ballots declared by law to be illegal, and such as shall not be counted, it is their plain duty to reject them; and if in canvassing the returns they ascertain that the inspectors, in disregard of law, have counted ballots it says shall not be counted, that error should be corrected by the canvassers as certainly as an error of arithmetic should be. The law makes the inspectors judges of the qualifications of electors, from necessity, because they are to receive the ballots, and, when received and deposited in the box, it is not supposed by the law to be possible to identify them, but the ballots show for themselves whether or not they conform to law, and there is neither difficulty nor uncertainty in rejecting ballots as being illegal, because of what is shown by them upon inspection. We think the effect of section 137 of the code of 1880 is to condemn as illegal, and not be received or counted, every ballot which has on its back or face any device or mark other than names of persons, by which one ballot may be distinguished from another.

This statute does not condemn devices or marks on the outside of a ballot merely, but clearly embraces the face of the ballot as well. That is apparent from the exception contained in it, and a device or mark on the face of the ballot is as much

within what we suppose to have been the object of this provision as one on the outside or back of it. It is apparent from the provision that its object is not only to preserve secrecy as to what ballot an elector casts, which is the leading idea of statutes in some other States, which prohibit any device or mark on a ballot folded which betrays the secret of the voter; its object is to secure absolute uniformity as to the appearance of ballots, in order that intelligence may guide the electors in their selection, and not a mere device or mark by which ignorance may be captivated. The legislature was trying to prevent multitudes from "being voted," and being guided by a mere device or mark by which they should distinguish the ballots they were to use in the process without a knowledge of the names of persons for whom their ballots were being cast. Elections are a contrivance of government which prescribes who are electors and how they may express their will, and it is a legitimate exercise of power to prescribe the description of ballots which shall be used. Section 137 of the code of 1880 does this, and requires all ballots to be written or printed with black ink, with a minimum space between names, on plain white news printing paper of a certain width, and without any device or mark by which one ticket may be known or distinguished from another, &c.; and it declares that a ticket different from that prescribed shall not be received or counted. Considerations of policy dictated the description of ballots prescribed, and it was deemed of such importance to secure an observance of the requirement that it is declared that ballots not conforming to the description prescribed shall not be received or counted.

It would have been competent to impose a penalty on the circulation or use of such ballots, but the means by which their use is sought to be prevented is the rejection of the ballot when offered or from the count. It is not penal for an elector to use a ballot differing from the legal pattern, but it shall not be counted, and thus he fails to express his will through such an instrumentality. If the device or mark is external, and observed by the inspectors, they should not receive the ballot. If it is received, and on being opened is discovered to be of the kind condemned as illegal, it is not to be counted; but if the inspectors count such ballots in disregard of law and their duty the commissioners of election, assembled at the court-house, with time and opportunity afforded to scrutinize and correct, as far as may be done by the data furnished by the face of the returns, without a resort to evidence *aliunde*, should reject, as the inspectors should have done, ballots which the law says shall not be counted. The only safe guide as to what ballots are illegal because of devices or marks is the statute. It excludes any mark or device by which one ticket may be known or distinguished from another. A distinction between ballots by means of devices or marks instead of by means of the names on them is what the statute aims to prevent, and we are not at liberty to confine the broad language of the statute to any particular description of devices or marks, for ingenuity would evade any such limit. The law should be enforced as written.

There is no room for distinction between what is directory and what is mandatory, what is essential and what is not. The requirement that ballots shall be written or printed with black ink, with a space not less than one-fifth of an inch between names, seems to have been designed to guard against confusion and mistake as to names of the persons voted for for the different offices, while the requirement of plain white news printing paper of a designated width within narrow limits, and the exclusion of any device or mark by which one ticket may be known or distinguished from another, must have been intended to secure uniformity in the appearance of ballots, so that ignorance and blind party devotion might not be led to the adoption of ballots by the guidance of some mark and devices, as to which they were instructed by their leaders, and which, instead of intelligent comprehension of whom or what they are casting their ballots for, should determine their selection of ballots to be cast. It was well known that ballots are prepared beforehand under the direction of political managers, and are distributed for use among electors; and it was further known that captivating marks and devices on ballots, appealing to ignorance and blind party zeal, were a favorite resort as an electioneering device deemed legitimate and freely practiced with much effect; and the purpose of section 137 was to stop this pernicious practice, and to make the prohibition effective by prohibiting any mark or device by which one ticket can be distinguished from another, and by rejecting any ballot in violation of its requirements. It was assumed that ballots would still be prepared beforehand by party managers or persons interested in having them legal, and that, as all would be alike, the advantage to one party over another should not consist in tickets, but that ballots must be selected not by devices and marks, but because of the names to be voted for.

We do not think that the commissioners of election can be required to meet and recanvass the returns of the election. Having made their canvass and declared the result, and transmitted a statement of it to the secretary of state, their connection with the returns ended. Any error committed by them is not to be corrected by requiring them to reassemble and correct it. The legality of their action may be the

subject of judicial investigation in cases in which provision is made for contesting the election by an appeal to the courts of the State, but only in those cases.

The House of Representatives of the Congress of the United States is the judge of the elections, returns, and qualifications of its own members, and the courts of the State have nothing to do with this matter.

This case might properly have been disposed of without considering any of the questions made by the record except that last mentioned, but the attorney-general informed us from the bar that doubts exist as to the proper interpretation of the election law of 1880, and that criminal prosecutions have been instituted against the commissioners of election of some of the counties for supposed violations of the law in reference to their duties, and we have complied with his request in declaring our view of the several questions presented by the record.

Judgment affirmed. To be reported.

Chalmers, C. J., took no part in the decision of this case.

I. D. Oglesby, district attorney, *vs.* J. J. Sigman *et al.*

I concur entirely in the opinion of the court, as drawn up by Judge Campbell. The duty to examine and reject illegal ballots rests on every officer or court required or authorized by law to count them. The statute prohibits the use of any mark or device on a ballot by which one "ticket may be known or distinguished from another." That the mark or device adopted is a mere printer's mark, commonly used for ornamentation, makes no difference. The statute prohibits any distinguishing mark whatever, and no court has a right to do away with the effect of the statute by holding that marks which are mere printer's ornaments may be used. It is wholly unimportant whether the marking on the ticket was the result of ignorance or a design to evade the statute. The inspectors and commissioners have no power to inquire nto motives; nor has the statute made motives important. It condemns as illegal every ballot or ticket which is so marked "that it may be known or distinguished from another." The ticket used in this case and made an exhibit to the petition is thus marked, and should have been rejected. We have nothing to do with the policy or impolicy of the statute. The language is plain and does not admit of construction; and it is the duty of the courts and other officers to obey and enforce it in the sense the words clearly indicate.

GEORGE.

We have set out the decision of the supreme court in full, and, before discussing it, we might as well say here, that so far as the views of the minority or the decisions of the Committee on Elections in former Congresses on this point is concerned (which have been referred to by the contestee), we fully concur in the views there expressed, and adhere to them, with the exception of that part of the report in Yeates *vs.* Martin, in the Forty-sixth Congress, referring to marked ballots. We dissent from the view expressed by the majority of the committee in that case, as did also the minority of the Committee on Elections at the time it was rendered.

It is seriously contended by the contestee that the decision of the supreme court of Mississippi construing the sections of the election laws of that State, ought to be followed by Congress, and that it is against the settled doctrine of both Congress and the Federal judiciary to disregard the decisions of State tribunals in construing their own local laws. This is too broadly asserted, and cannot be maintained. It is true that where a decision or a line of decisions has been made by the judiciary of the States, and those decisions have become a "rule of property," the Federal judiciary will follow them. Not to do so would continually place titles to property in jeopardy, and disturb all business transactions. The rule as to all other questions is well stated in Township of Pine Grove *vs.* Talcott (19 Wall., 666–'67), as follows:

> It is insisted that the invalidity of the statute has been determined by two judgments of the supreme court of Michigan, and that we are bound to follow these adjudications. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. * * * The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of States where the cases arise; it must hear and determine for itself.

There is still another reason why Congress should not be bound by the decisions of State tribunals with regard to election laws, unless such

decisions are founded upon sound principles, and comport with reason and justice, which does not apply to the Federal judiciary, and it is this: Every State election law is by the Constitution made a Federal law where Congress has failed to enact laws on that subject, and is adopted by Congress for the purpose of the election of its own members. To say that Congress shall be absolutely bound by State adjudications on the subject of the election of its own members is subversive of the constitutional provision that each House shall be the judge of the election, qualifications, and returns of its own members, and is likewise inimical to the soundest principles of national unity. We cannot safely say that it is simply the duty of this House to register the decrees of State officials relative to the election of its own members.

The foundation of this contention is that if the Congress of the United States fails to enact election laws, and makes use of State laws for its purposes, it adopts not only the laws thus enacted, but the judicial construction of them by the State courts as well.

We do not agree that this is the rule except as it may apply to a "positive statute of the State, and the construction thereof, adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character." (Swift *vs.* Tyson, 16 Peters, 1–18.) As to matters not local in their nature, the Supreme Court of the United States has uniformly held that the decisions of the State courts were not binding upon it.

Election laws are, or may become, vital to the existence and stability of the House of Representatives; and to hold it must shut itself up in the narrow limits of investigating solely the question as to whether an election has been conducted according to State laws as interpreted by its own judiciary would be to yield at least a part of that prerogative conferred by the Constitution exclusively on the House itself.

It may be stated generally that the House of Representatives will, as a general rule, follow the interpretation given to a State law regulating a Congressional election by the supreme court of a State, where decisions have been continued and uniform in such a way and for such time as to become the fixed and settled law of a State. The processes of determining the election, and all questions relating to the honesty and *bona fides* of ascertaining who received the highest number of legal votes must of necessity forever reside exclusively in the House.

Where decisions have been made for a sufficient length of time by State tribunals construing election laws so that it may be presumed that the people of the State knew what such interpretations were would furnish another good reason why Congress should adopt them in Congressional election cases. But this reason would be of little weight when the election had been held in good faith before such judicial construction had been made, and where there was a conflict of opinion respecting the true interpretation of a statute for the first time on trial.

There is still another cogent reason why this House may, and perhaps should, disregard the decisions of State courts, when such decisions are made in cases where there is confessedly no jurisdiction in the court to pass upon the question which it assumes to pass upon, or where the court assumes to pass upon questions not properly involved in the case before it.

We cannot express in better language the effect which *obiter dictum* in judicial opinions should have on future decisions than that employed by Mr. Justice Curtis in Carroll *vs.* Carroll, 16 How., 279–87. After con-

sidering the maxim at common law of *stare decisis*, the learned judge proceeds to discuss the 34th section of the judiciary act in connection with the maxim, and then says:

> And therefore this court, and other courts organized under the common law, has never felt itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties.

Citing some cases he continues:

> And Mr. Chief Justice Marshall said, "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used." If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relations to the case decided, but their possible bearing on all other cases is seldom completely investigated. The cases of Exparte Christy, 3 How., 292, and Jenness et al. *vs.* Peck, 7 How., 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as binding authority unless the case called for its expression. Its weight of reason must depend on what it contains.

There is abundance of authority running through all the reports of the judicial opinions of the various States, and also through the reports of the Supreme Court opinions of the United States, that they will not be bound by the *obiter* of their own decisions, much less that of other courts. And where there is a conflict in the decisions of a State supreme court, other State courts and the Supreme Court of the United States will adopt, not the later, but that line of decisions which best speaks the reason and common sense of the proposition elucidated, except in those cases purely local, as pointed out in Swift *vs.* Tyson, *supra*.

Another suggestion in argument needs greater amplification than we can give it now, which is: that by adopting the machinery of the States to carry on Congressional elections this House stands in the nature of an appellate court to interpret these election laws so far as they relate to Congressional elections; that it ought not in this view to be bound by the decisions of the State courts at all, unless the reasons given by them are convincing to the judicial mind of the House while acting in the capacity of a court.

It need, however, hardly be added that a line of carefully considered cases in the States, in which such courts have undoubted jurisdiction, so far as they would apply in principle, would go a long way towards settling a disputed point of construction in any State election law. In fact it may be said that it would probably be the duty of Congress to follow the settled doctrine thus established.

It now becomes necessary to review the opinion of the supreme court of Mississippi in Oglesby *vs.* Sigiman. As will be seen by an examination of the case it was a mandamus proceeding, under a section of the Mississippi Code, to compel the commissioners of election in Tunica County to reassemble and recount the votes cast in that county on the 2d day of November, 1880, for member of Congress in the sixth Congressional district of Mississippi. The allegations, substantially, are that the election commissioners counted 506 ballots for the contestant in this case, Mr. Lynch, which had upon them marks and devices, and which were illegal under the provisions of sections 137, 138, 139, and 140 of the Mississippi Code, and ought to have been rejected, instead of being counted as they were. A *fac simile* of the ballots challenged is set out on the record, and on the ticket is found certain printers' dashes, which are similar to those challenged in the pending contest, and which are the distinguishing marks complained of. The Oglesby-Sigiman case

"was submitted by counsel without brief or oral argument," as we are informed by the contestee's brief. The judge who delivered the principal opinion in this case closes the opinion of the court with this remark:

> The House of Representatives of the Congress of the United States is the judge of the elections, returns, and qualifications of its own members, and the courts of the State have nothing to do with this matter.
>
> This case might properly have been disposed of without considering any of the questions made by the record except that last mentioned, but the attorney-general informed us from the bar that doubts exist as to the proper interpretation of the election law of 1880, and that criminal prosecutions have been instituted against the commissioners of election of some of the counties for supposed violations of the law in reference to their duties, and we have complied with his request in declaring our view of the several questions presented by the record.

The point, as remarked by the judge, on which the case might have been disposed of, was as to whether the official life of the election commissioners was *functus officio*, and they were therefore incapable of being brought together to perform official duties; which, being determined in the affirmative, the court had nothing to do but to dismiss the petition, as it did when it refused to entertain a petition on behalf of Mr. Lynch, made on the 9th day of December, 1880, to prevent the governor of the State from issuing to the contestee a certificate of election as member of Congress from the sixth Congressional district of Mississippi, on the ground that it had no jurisdiction of the subject-matter of the action.

Had the Mississippi supreme court stopped here the question of how far the decision of State courts in construing their own election laws ought to bind this House would be free from embarrassment; but the court, after remarking upon its want of jurisdiction on the first two points, stated in the beginning of its opinion, and having disposed of the third on the ground that the official duties of the election officers were at an end and that they could not be reassembled, proceeded to construe the law relative to distinguishing marks, and decide what were such by the terms of the Mississippi Code so far as it could do so, the same being confessedly not before it.

It is sufficient to say that if the argument sustaining the conclusions reached by the Mississippi court met our views of the true construction of the law, a further analysis of the opinion would be unnecessary; but, as we cannot agree with the argument or the conclusion of the court, it becomes necessary to give some of the reasons why we do not concur, and why we do not feel bound by it.

First. The court declared in terms it had no jurisdiction of the subject-matter embraced in the first and second grounds stated in the opinion. The third ground does not involve a construction of the law, and of course cannot be considered in determining the question raised in the pending contest.

It is with great hesitation and reluctance that we feel compelled to disagree with the eminent gentleman who concurred in the opinion, and we do so in no spirit of unjust criticism, for we would much prefer to follow rather than dissent from it. Had the opinion been rendered before the election of 1880, or become one of settled law of Mississippi, we do not say but that it would have such weight with us that, though we might disagree with it in logic, we might feel compelled to follow it. We think that the decision is against the current of authority and contrary to the well-settled doctrine heretofore discussed; that it can be regarded as *obiter dictum* merely, and as the opinion of eminent gentlemen learned in the law, but not as a judicial construction of the code. It may happen, should the supreme court of Mississippi adhere in the

future to the reasons advanced in this case, in cases where it has jurisdiction, that this House will adopt them; but until the happening of this event we cannot say that the reasons given in the Oglesby-Sigiman case are controlling.

The general doctrine in construing election statutes is, that they are to be construed liberally as to the elector and strictly as to the officers who have duties to perform under them. A statute directing certain things to be done by election officers ought to be followed by them with a high degree of strictness, but duties to be performed by the electors, as declared by statute, are directions merely, which, if not observed, it is true, may in some instances defeat his ballot; but when there is an honest intention to obey the law, and the voter is not put in fault by any laches or negligence which he, by the use of reasonable diligence, might or could avoid, or where there is no palpable intention of violating the law apparent, in order to maintain the inestimable right of voting, courts have generally adopted the most liberal construction.

In an almost unbroken line of precedents, from the foundation of the government, in all the States this rule has been declared. (McCrary on Elections, sec. 403; Kirk *vs.* Rhoades, 46 Cal., 398; Prince *vs.* Skillen, 71 Me., 493; People *vs.* Kilduff, 15 Ill., 492; Millholland *vs.* Bryant, 39 Ind., 653; The State, ex. rel., *vs.* Adams, 65 Ind., 393, Pradut *vs.* Ramsey (5 Morris), 47 Miss., 24, and many other cases not necessary to cite.)

In the present case we find, as a matter of fact, that there was no intentional violation of the law, and we further find, as a matter of fact, that every precaution was taken which a reasonably prudent man would be likely to take under similar circumstances; that the contestant in person applied to those whom he might reasonably believe to be well versed in the art of printing, and, with the law in their hands, discussed the question of distinguishing marks, and was assured that tickets would be prepared and printed strictly within the letter of the statute. After the tickets were printed the contestant was assured that they were lawful, and might be relied upon as not being obnoxious to the law. It does not appear that the printer's dashes which appear on the ticket were observed by the contestant or his friends, at least until the morning of the election, after they were all distributed, and it was too late to furnish other tickets; and when the dashes were discovered it was stoutly contended that they were not distinguishing marks within the meaning of the law. It also appears that there was no intention on the part of any one, either those connected with the printing of them, or those for whose use they were designed, to print the dashes in the tickets for the purpose of distinguishing them from any other ballots of any other party.

It is also proved that tickets precisely similar to those that are questioned in this contest, in so far as the printer's dashes are concerned, were printed and furnished to the opposing party in at least one of the counties in the sixth Congressional district of Mississippi, and were unquestionably voted without a suspicion that they were obnoxious to the law. To further illustrate the entire good faith with which these tickets were printed and used, and how they would be regarded by practical printers, the testimony of Charles Winkley, one of contestee's witnesses, becomes very important; it is as follows:

Cross-interrogatory 2. Are you a practical printer, and have you critically examined the "marks," so called, on the tickets of Lynch, rejected from Warren County? If so, were not these only the usual printer's dashes to be found generally in newspaper articles and upon tickets generally?

Answer. I am a practical printer; I have not critically examined the tickets, but

the dashes used are such as any printer of taste would either put in or leave out, according as he wanted to lengthen or shorten the ticket to suit the paper, or otherwise.

Cross-interrogatory 3. If you were called upon generally to print tickets, without any special instructions, is it likely that you would have printed the tickets similar to those complained of and rejected from Warren County?

Answer. I might or might not, just as it might have seemed to strike me at the time.

And further deponent saith not. (Rec., p. 261.)

It further appears that printer's dashes, such as were used on the tickets in this case, are universally known among printers as punctuation marks; in fact, most of the characters which appear upon these tickets are set down in Webster's Unabridged Dictionary, under the head, "marks of *punctuation*." It is known to the most casual reader of print that printer's dashes frequently occur in books, newspapers, and publications of all kinds, and to the common understanding to argue that they are of themselves "marks or devices" would not meet approval.

We have already found that they were not used or placed upon the tickets for the purpose of distinguishing them from any other ballots, nor as a device for that purpose, and not being of themselves devices we cannot say that they are inimical to the statute. It is true that printers' dashes *may* be intended and used as a mark or device, and so may different kinds of type, ~~or punctuation~~ marks of different kinds. Arrangement of names and heading of tickets may also be made "marks and devices," and it seems to us that the reasonable interpretation of the law would be, first, in the use of these appliances, which are ordinarily used in printing, were they so arranged as that they become "marks and devices"? and were they so used and arranged for that purpose? and, secondly, was the unusual manner of their being used such as might or ought to put a reasonably prudent man on his guard?

This view of the law would be the extreme limit to which we think we would be justified in going under well-established principles of construction in like cases. No case has been called to our notice which goes this far.

What we have here remarked does not, of course, apply to the marks or devices ordinarily used on tickets, such as spread eagles, portraits, and the like; those would be considered "marks and devices" of themselves, and not necessary in the ordinary mechanical art of printing. The use of the latter would be considered a violation of the statute in any aspect of the case, while the use of the former seems to us, in any view of the law, ought to be restricted to an intentional or manifest misuse.

The evident object and intention of prohibitory legislation against "marks and devices" is to secure the freedom and purity of elections, to preserve the secrecy of the ballot, and place the voter beyond the reach of improper restraint or influence in casting his ballot, and we cannot better express ourselves upon this subject than by quoting the supreme court of California in Kirk *vs.* Rhoades, *supra*, which is as follows:

> The object of these provisions is to secure the freedom and purity of elections, and to place the elector above and beyond the reach of improper influences or restraint in casting his ballot. When all the ballots cast are similar in appearance, and without any distinguishing mark or characteristic, the most dependent elector in the county may vote with perfect freedom, as his employer or other person upon whom he is dependent has no means of ascertaining for whom he voted.
>
> It will be observed that there are two classes of things required by section 1191. Over one class the elector can have no control; over the other he has perfect control.

For instance, whether the paper on which his ballot was printed was furnished by the secretary of state or not, or upon paper in every respect *precisely* like such paper, or whether it is four inches in width and twelve inches in length, or falls short of this measurement by an eighth, or a sixth, or a fourth of an inch, or whether it is printed in long primer capitals or not, or whether it is single or double leaded—these are matters over which the great majority of electors have no control, and about some of which they are entirely ignorant. The ballots are always furnished on the day of election by committees appointed for the purpose by the respective political parties, or by independent candidates or their friends. The elector in but few instances ever sees these tickets until he approaches the polls to cast his ballot, and it would be absurd in the extreme to require him to have a rule by which he could measure and ascertain whether his ticket exceeded or fell short of twelve inches in length by a sixth of an inch, or only by an eighth of an inch, or whether the color of his ticket was of the exact shade of the paper furnished by the secretary of state.

Again, not one elector in five hundred knows the difference between long primer capitals or any other capitals, or whether his ticket is single or double leaded. It is impossible that he should know or be able to determine these facts. This very case presents a striking instance of the absurdity of requiring the elector to judge of these facts.

The respondent, Rhoades, by his counsel, objected to counting twenty-two ballots for Kirk, upon the grounds that they were not printed in long primer capitals, and that the lines were double-leaded.

Such was this case. Section 1208 *expressly* required a ballot found in the box not conforming to the requirements of section 1191 to be rejected. This section did not, as the Mississippi law *does*, omit to state that this rejection should be of the prohibited ballots when and after found in the box, and yet the court held expressly that as to all matters regarding character of the type, the paper, the width and length of ticket, they were matters that ordinarily were not under the control of the voter, and that the statute should be held *directory* as to such matters, and that the claim of respondent that the 22 votes for Kirk should be rejected on account of *not being printed* in long primer capitals, and that the lines were *double-leaded*, was by the court overruled. In the conclusion of its opinion the court said:

"To defeat the will of the people in any election it would only be necessary to furnish the electors, or a portion of them, with tickets in which the printed lines were one-forty-fourth part of an inch further apart than required by the code—a difference which cannot be detected except by an expert. There are, however, other requirements of the code within the power of the elector to control, and these, if willfully disregarded, should cause his ballot to be rejected. He can see, for instance, that his ballot is free from every mark, character, device, or thing that would enable any one to distinguish it by the back, and if, in willful disregard of law, he places a name, number, or other mark on it, he cannot complain if his ballot is rejected and he loses his vote."

The above language quoted from this case is the language of the court below. The supreme court, after quoting this language in the opinion, closes its opinion in these words:

"We agree with the county judge in his conclusion that the twenty-two ballots spoken of were properly counted for Kirk, and that the motion to strike them from the count was properly denied. Judgment affirmed."

We do not feel called upon to give our reasons why we dissent from much that is said in the opinion in the Mississippi case. It may not be out of place to remark that some of the reasons on which the opinion is based appear to be directly opposed to the current of authority upon which like legislation is maintained. It is remarked that "its object is to secure absolute uniformity as to the appearance of ballots, in order that intelligence may guide the voter in his selection, and not a mere device or mark by which ignorance may be captivated."

Our understanding has been that these laws were designed to protect the weak and ignorant against undue restraint by the strong and powerful, to make the ballot secret and free, and place the dependent on the same plane as the most favored; and that laws of this character ought not to be so construed as to become a snare to the very persons for whose protection they were designed. The learned and powerful need no such protection. The laws are designed for the protection of the weak and unlearned. It seems to us that the construction given to

this law inevitably establishes a basis of intelligence—of being able to read, at least, for if you strip all ballots of every punctuation mark, and all dissimilarity in print, and make them of the same paper, of the same size, and similarly spaced, the man who is unable to read will be entirely at the mercy of his more favored neighbor, and thus you will defeat the very thing which the law was intended to prevent.

It is urged that the construction given to this law defeats one of the provisions of the constitution of Mississippi, which extends the right of suffrage to all without reference to illiteracy. This point not having been referred to by the court in Mississippi, we infer that it escaped their attention, and we do not care to go into the question. It is quite evident to us that these laws must pass under judicial notice frequently in the future, and we are quite content not to anticipate the results which may be hereafter reached.

We have examined the question of "printers' dashes," in the first instance, because if we arrived at the same conclusion respecting their illegality as the contestee did, it was manifest to us from the beginning that we would not have to go farther, as this would control the case. Having arrived at a conclusion adverse to contestee, it becomes material to next examine exceptions filed by him to certain of the testimony printed in the record. His exceptions are as follows:

JOHN R. LYNCH, CONTESTANT,
vs.
JAMES R. CHALMERS, CONTESTEE.

The contestee comes in proper person and excepts to so much of Exhibit D filed as additional testimony in this case, and appearing from page 225 to page 243, inclusive, of the record:

1. Because there is no such officer as chief supervisor of elections for either the northern or southern district of Mississippi known to the laws of the United States and authorized to make such reports.

2. Because there is no law authorizing the supervisors of elections to make any reports of the election in any district outside of a city of twenty thousand inhabitants.

3. Because these pretended reports are not signed by both of the pretended supervisors at each precinct.

4. Because there is no evidence that the parties signing these reports as supervisors were, in fact, appointed United States supervisors of elections.

5. Because there is no evidence that the parties whose names appear to be signed to said reports actually signed the same.

6. Because the pretended reports were not presented as an exhibit to contestant's deposition when taken, and were gathered up by contestant and filed here long after the time for taking testimony in this case.

7. Because the pretended certificate of Orlando Davis appears on its face to have been signed September 13, 1881, long after the time for taking testimony in this case.

8. Because said papers appear on their face to be filed with the Clerk of the House of Representatives only on the 21st of December, 1881, long after the time for taking testimony in this case, and do not appear to have been transmitted by any authorized officer of law.

JAS. R. CHALMERS,
Contestee.

Before passing upon the question we call attention to the sections of the Revised Statutes bearing on the question of supervisors' returns. Sections 2011 and 2012 authorize the judge of the circuit court, on the application in writing of ten good citizens, to appoint in each election precinct, at which a Representative in Congress is to be voted for, two citizens of different political parties as supervisors of elections. Section 2025 requires the circuit court to designate a circuit court commissioner to act as chief supervisor for the district. Section 2017 specifies the duties to be performed by them, among which are to personally scrutinize the manner in which the voting is done, and in which the poll-books, tally, or check-books are kept. Section 2018 requires that,

to the end that each candidate for Representative in Congress shall obtain the benefit of every vote cast for him, the supervisors shall scrutinize personally the count, and canvass each ballot, and make and forward to the chief supervisor (Sec. 2025) certificates and returns of all such ballots as such officer may require.

Section 2026 requires the chief supervisor to "receive, preserve, and file all oaths of office of supervisors of election, and of all special deputy marshals, appointed under the provisions of this title, and of all *certificates, returns, reports, and records* of every kind and nature contemplated or made requisite by the provisions hereof, save where otherwise herein specially directed."

The contestant contends that these sections apply to country supervisors as well as to supervisors appointed in cities of 20,000 or more inhabitants; while the contestee claims that section 2011 is made up partly of the acts of 1871 and 1872; that sections 2012 to 2027, inclusive, are taken from the act of 1871, and have no reference to supervisors appointed in counties or parishes on the petition of ten citizens, and that 2029 is also taken from acts of 1872. Reference is made by the contestee to the Congressional Globe, page 4455, second session Forty-second Congress, to the debate had when this provision was pending in the House.

It is needless to enter into an extended history of this legislation. The disputed question between parties is this: The contestant claims that the statute requires the supervisors of elections in country precincts to make and keep an official record of the result of the votes polled, of the manner of conducting the election, the truth or fairness of the canvass and its conduct, and the honesty of the count, if the chief supervisor shall so direct, and return the same to the chief supervisor, who shall keep and preserve them, and in accordance with law file a certified copy with the Clerk of the House of Representatives; that these returns, or duly certified copies of them, are competent evidence in contested election cases. We copy the following strong statement made by contestant's counsel in support of this contention:

That where the law—either statutory or other—makes a document a public record or file, and requires it to be preserved as such, and puts the custody thereof in the hands of an officer, there, as a matter of common law, and without statutes authorizing the custodian to certify to copies of such record, the common law will admit the copy certified by the custodian as evidence of what is provable in any case by the original, is a matter of elementary law. The opposing brief seems to controvert this, as, for example, at the bottom of page 29, where it cites section 104 of McCrary's Election Laws. That citation wholly fails to meet or negative the last preceding proposition. That section 104 is a statement simply to this effect:

"That statute-certifying officers can only make their certificates evidence of the facts which the statute requires them to certify; and when they undertake to go beyond this and certify other facts, they are unofficial, and no more evidence than the statement of an unofficial person."

We admit there is much force in this argument. But the conclusions we have reached do not make it necessary for us to decide this question, and we do not. We present the following analysis of the various precincts upon the view that it is unnecessary to look to the supervisors' reports for any purpose.

WARREN COUNTY.

We correct the returns made in this county as follows: The vote as returned to the secretary of state was: Lynch, 57; Chalmers, 1,014; we add the rejected vote, Lynch, 2,029; Chalmers, 20.

The vote returned by the inspectors to the commissioners of election,

and by the commissioners of election to the secretary of state, appears in the subjoined tabulated statement.

Counties.	Inspectors' returns to commissioners.		Commissioners' returns to secretary of state.	
	Lynch.	Chalmers.	Lynch.	Chalmers.
Adams	1,214	1,419	898	1,387
Bolivar	1,713	403	979	301
Claiborne	288	1,061	288	1,061
Coahoma	1,221	576	352	225
Issaquena	1,122	174	333	59
Jefferson	383	1,043	136	951
Quitman	83	153	83	153
Sharkey	175	484	175	484
Tunica	506	239	506	239
Warren	2,086	1,034	57	1,014
Washington	1,208	1,963	772	1,607
Wilkinson	814	1,691	814	1,691
Total	10,903	10,240	5,393	9,172
	10,240			5,393
Majority for Lynch	663			
Majority for Chalmers				3,779

The tabulated statement below shows the number of votes rejected by the commisioners of election from the counties named:

	Votes rejected by commissioners.	
	Lynch.	Chalmers.
Adams	316	32
Bolivar	734	102
Coahoma	869	351
Issaquena	789	115
Jefferson	247	92
Washington	526	356
	3,481	1,048

ADAMS COUNTY.

The returns from Dead Man's Bend precinct were rejected by the commissioners of election on the ground that there was no list of voters sent up with the returns by the precinct officers. At page 75 of the record, William J. Henderson, one of the commissioners of election, testifies that the vote of that precinct was: For Lynch, 85; for Chalmers, 15. (See also record, page 88.) We think the vote of this precinct should be counted. It was rejected for unsubstantial reasons; no fraud is charged, and it would, to our mind, be the grossest injustice to deprive the voters of their right to participate in a choice for their Representative on this ground.

Palestine Precinct.

As to this precinct, Mr. Lynch proves by William J. Henderson, at record, page 75, of his testimony, that the box was rejected because there were 35 more ballots found therein than there were names on the list of voters kept by the clerks. Mr. Henderson says:

The Palestine returns were rejected because the box contained 35 more ballots than were accounted for in the list of voters as kept by the clerks. * * * To the best

of my recollection, the inspectors sent up their returns, stating that there were in the box 17 votes for Chalmers and 270 votes for Lynch, the latter number including 35 votes which were found to be in excess of the list of voters as kept by the clerks.

Lennox Scott, another witness, who was a United States supervisor, testifies, on record, page 187, that to his own personal knowledge 231 votes were cast at this precinct for Mr. Lynch. An effort was made to explain how the excess of 35 votes appeared. The evidence on this subject is not very satisfactory, but we think, on the whole, that Mr. Lynch should receive 231 votes and Mr. Chalmers 17 from this precinct. (See also record, page 191, testimony of H. C. Bailey.)

BOLIVAR COUNTY.

Under section 138 of the Mississippi code, the inspectors of elections are required to send up to the commissioners the whole number of votes cast at the poll, and the commissioners under section 140 of the code are required to "transmit to the secretary of State, to be filed in his office, a statement of the whole number of votes given in their county for each candidate."

This duty being enjoined by statute, their certificate is evidence of the fact that the number of votes which they certify were given. That return was put in evidence from which it appears they returned Lynch 979, Chalmers 301. It further appears by a certificate signed by the commissioners of election that they threw out Australia precinct, containing 30 Democratic votes and 192 Republican votes, because the returns were "not certified to by the inspectors or the clerks."

Bolivar Precinct.

It appears from the same certificate that in this precinct they rejected 45 Democratic votes and 311 Republican votes for the same reason. Another informality is noted which is that the "tally sheets" were kept on four pieces of paper, and that they do not show what offices the persons whose names appear on the tally sheets were voted for. This can hardly be considered to be a good ground when the ballots were before them, and they could have looked and seen.

Holmes' Lake precinct.

As to Holmes' Lake precinct it appears that the ballot-box was never opened, and the ballots counted by the inspectors and clerks. The commissioners refused to open and count the votes, and perhaps were not authorized to do so by law. The voters of this precinct are deprived of the right to participate in the choice of their Representative, by the conduct of their present officers.

Glencoe precinct was rejected because the vote was not entirely counted on the night after the election, and the returns were signed by only two of the election officers, not a majority. The commissioners certify that these imperfect returns show that 27 Democratic votes and 233 Republican votes were rejected on account of this informality. In right and justice these votes ought to be counted, but we do not do so on the statement made by the commissioners.

ISSAQUENA COUNTY.

There are two statements in the record which, taken together, enable us with reasonable certainty to arrive at the vote cast in three of the

four rejected precincts of this county. The first is the certificates of election made by the commissioners of election to the secretary of State, and found on page 17 of the record.

Hay's Landing.

They say with regard to this poll, that they find 75 votes reported by the election officers, on four of the ballots all the names are scratched off, and they reject the poll because there was no separate list of voters kept. At page 89 of the record, Richard Griggs, clerk of the chancery court for Issaquena County, certifies, under the seal of said court, that the paper appearing on that page of the record is a true and correct transcript of the election returns made by the election officers as appears of record in his office, by which it appears Chalmers received 34 votes, and Mr. Chalmers 29 votes for member of Congress. The commissioners of election for that county certify to the secretary of State that they rejected this precinct return, and the clerk of the court certifies that that return is on file in his office, a copy of which he gives. The two statements taken together are *prima facie* evidence of the vote received at that poll. The highest number of votes appearing on the tally-list as certified by the clerk agrees with the number the commissioners say were returned from that poll. The commissioners are authorized by law to certify as a fact the number of votes cast; and the clerk of the court is authorized by law, as the keeper of public records, to give certified transcripts thereof.

For the reasons given in reference to Hay's Landing precinct, we also count Ben Lomond and Duncansby precincts; by reference to which it will be seen that Lynch's vote was 332 and Chalmers's 20 in the former (Record, pages 17 and 90), and 371 for Lynch, and for Chalmers 45, in the latter.

JEFFERSON COUNTY.

The only precinct in dispute in this county is the Rodney precinct poll, the vote of which is admitted to be 247 for Lynch, and 92 for respondent. This is shown also by the report of the commissioners, at page 19 of the Record. Having come to a conclusion adverse to contestee in reference to marked ballots, we count this poll as returned.

WASHINGTON COUNTY.

The evidence in the record, at page 23, shows that the Stoneville precinct was rejected by the commissioners for want of a statement signed by the inspectors of election. Page 206, John Jones testifies that at this poll there were 315 cast for Mr. Lynch and 60 for Mr. Chalmers. He says: "I saw the votes counted, and know that to be the fact and correct." This testimony is uncontradicted, and is sufficient to put the returned member to proof to show why the vote should not be counted. It was the unquestioned duty of the inspectors to make return of this vote as it was cast. The election appears to have been conducted in a quiet and peaceable manner, and no sufficient reason having been given by the commissioners of elections why they did not return the vote, we think it right and fair to count it as the testimony shows it was cast. As to Lake Washington and Refuge precincts, there is no testimony in the Record showing what the vote as cast was. If the supervisors' returns are rejected, and the contestee's exceptions sustained, it leaves us without means to ascertain the true vote at these precincts.

COAHOMA COUNTY.

In this county the commissioners in making the certificate to the secretary of state omit to state what the vote was in the rejected precincts. There were elections held in seven precincts in this county, six of which were rejected by the commissioners and one, Friar's Point, was counted There is in the Record, at page 98, a certificate made by R. N. Harris clerk at the circuit court, giving a transcript of the tally-lists signed by the inspectors of four precincts: Clarksdale, which shows that Lynch received 307 and Chalmers 117 votes; in Sunflower, Lynch received 32 and Chalmers received 77; Doublin, Lynch 70, Chalmers 63; Magnolia, Lynch 109, Chalmers 23. At the Delta precinct the inspectors and clerks did not count the votes, and this box was, therefore, in the same condition as the one at Holmes Lake. The Jonestown precinct is omitted because the clerk fails to certify. The clerk's certificate is probably evidence that these papers are on file in his office, and that they are the returns sent up by the precinct election officers. As to whether they are evidence as to the fact whether so many voters voted for the persons named for the offices named, is submitted to the House.

FRAUDULENT RETURNS.

At Kingston precinct, in Adams County, it is conclusively shown by the testimony of Jerry Taylor, Henry B. Fowles, Abraham Teltus, Smith Kinney, Harry Smith, jr., and William H. Lynch, that the vote as cast was 350 and for Chalmers 59. The vote as returned by the precinct election officers was Lynch 160, Chalmers 249. It is shown that there was abundant opportunity for tampering with this box at the noon recess, when it was taken to the residence of one Dr. Farrar, and the Republicans were excluded from the presence of the box, and the aperture was not sealed. The Republican inspector who had the key could not have stuffed the ballot-box in its absence. We think under the evidence this vote should be corrected, so as to show the true vote as cast, as testified to by these witnesses who are uncontradicted. We therefore add 190 votes to Mr. Lynch's aggregate and deduct that number from Mr. Chalmers.

The corrected vote of the parties will stand thus:

	Lynch.	Chalmers.
Returned vote	5,393	9,172
Add rejected votes:		
Warren County	2,029	20
Deadman's Bend	85	15
Palestine	231	17
Australia	192	30
Bolivar	311	45
Hay's Landing	39	24
Ben Lomonde	332	20
Duncansby	371	45
Rodney	247	92
Stoneville	315	60
	9,545	9,540
From which we deduct		190
And add that number to Lynch's vote to correct the returns in Kingston precinct, Adams County	190	
Which makes total	9,735	9,350
Majority for Lynch	385	

We have not added the vote of the rejected precincts in Coahoma County, as shown by the clerk's certificate, nor have we corrected the

vote in Robb's precinct, in Washington County, where it is charged the ballot-box was tampered with, and about which there is a conflict of testimony.

In three precincts in Adams County it is claimed the returns should be thrown out because of mismanagement, misconduct, and abuse of power on the part of the managers in contestee's interests, and peace officers and challengers acting on behalf of and in contestee's interests. And at Washington precinct, in Adams County, they excluded the United States supervisor of elections from the presence of the box from the time of adjournment in the evening to the time of commencing the counting of the vote in the morning. In precincts of Court-House and Jefferson Hotel it is claimed that the Republican voters were prevented from voting by a systematic course of vexatious questions and inexcusable delays, whereby 300 or 400 voters were prevented from voting at all. The evidence on this subject is conflicting, and doubt exists in the minds of the committee whether it is sufficient to exclude these boxes from the count, and we therefore decide to let them stand. As to Washington precinct, it may be gravely questioned whether it ought not go out, but as it can make no difference in the final result, we decide to let it stand.

If the precincts in Coahoma County shall be counted the tabulated statement would be as follows:

	Lynch.	Chalmers.
Returned vote	5,393	9,172
Add rejected votes:		
Warren County	2,029	20
Deadman's Bend	85	15
Palestine	231	17
Australia	192	30
Bolivar	311	92
Hay's Landing	39	24
Ben Domondo	332	10
Duncansby	371	45
Rodney	247	92
Stoneville	315	60
	9,545	9,540
From which we deduct		190
And add that number to Lynch's vote to correct the returns in Kingston precinct, Adams County	190	
Which makes total	9,735	9,350
Clarkesdale	307	117
Sunflower	32	77
Dublin	70	63
Magnolia	109	23
Total	10,253	9,630
Majority for Lynch	623	

If you add the votes as shown by the supervisors' returns, the following table will exhibit the vote:

	Lynch.	Chalmers.
Returned vote	5,392	9,172
Add rejected votes:		
Warren County	2,029	20
Deadman's Bend	85	51
Palestine	231	17
Australia	192	30
Bolivar	311	45
Hay's Landing	39	24
Ben Lomondo	332	20
Duncansby	371	45
Rodney	247	92
Stoneville	315	60
	9,545	9,540

From which we deduct		190
And add that number to Lynch's vote to correct the returns in Kingston precinct, Adams County	190	
Which makes total	9,735	9,350
Clarkesdale	307	117
Sunflower	32	77
Dublin	70	63
Magnolia	109	23
	10,253	9,630
Glencoe	231	27
Dumbarton, or Duval	47	26
Jonestown	351	71
Refuge	99	67
Lake Washington	112	229
Total	11,093	10,050
Majority for Lynch	1,043	

These tabulated statements are made for the information of the House. The first tabulated statement shows the result which the undersigned members of the committee all concur in, and upon which the report is based.

Your committee therefore recommend the adoption of the following resolutions:

Resolved, That James R. Chalmers was not elected, and is not entitled to his seat in the Forty-seventh Congress from the sixth district of Mississippi.

Resolved, That John R. Lynch was elected, and is entitled to his seat in the Forty-seventh Congress from the sixth district of Mississippi.

W. H. CALKINS.
A. H. PETTIBONE.
FERRIS JACOBS, JR.
G. W. JONES.
A. A. RANNEY.
S. H. MILLER.
JNO. T. WAIT.
GEO. C. HAZELTON.
WM. G. THOMPSON.
J. M. RITCHIE.
JOHN PAUL.

○

Mr. ATHERTON, from the Committee on Elections, submitted the following

AS THE VIEWS OF THE MINORITY:

We cannot concur in the views expressed by the majority of the committee in this case. There are three legal propositions in this case necessary to sustain the report as presented by the majority, either one of which, decided in the negative, will defeat the claim of the contestant.

1st. Will Congress receive and count votes of which there is no evidence, except the certificate of a chancery clerk, as to what purports to be a transcript of election returns of record in his office, when there is no law in Mississippi authorizing any record to be made of election returns by any officer and when neither the chancery nor circuit clerk, nor any other officer in Mississippi, is by law made the custodian of the election returns after they have been counted by the commissioners of election?

2d. Can Congress count votes which were rejected by the county commissioners because they were not certified to by the inspector, as required by law, when there is no other proof of their validity except the fact that the commissioners of election in their statement of the result give the number of ballots so rejected?

3d. Will Congress refuse to follow the construction of a State statute of election given by a State court?

That the essentiality of these points in this case may be clearly understood we present the result reached by the first tabulated statement made by the majority upon which alone they all concur and upon which they say their report is based:

	Lynch.	Chalmers.
Returned vote	5,393	9,172
Add rejected votes:		
Warren County	2,029	20
Deadman's Bend	85	15
Palestine	231	17
Australia	192	30
Bolivar	311	45
Hay's Landing	39	24
Ben Lomonde	332	20
Duncansby	371	45
Rodney	247	92
Stoneville	315	60
	9,545	9,540
From which we deduct		190
And add that number to Lynch's vote to correct the returns in Kingston precinct, Adams County	190	
Which makes total	9,735	9,350
Majority for Lynch	385	

ISSAQUENA COUNTY.

From this statement it will be seen that the vote of Issaquena County at Hay's Landing, Ben Lomonde, and Duncansby, amounting in the aggregate to 742 votes for Lynch and 89 for Chalmers, are counted to make a majority of 385 claimed for Lynch, and it is clear that if these are not counted, there is a majority of 315 for Chalmers. Now, these votes are counted on the certificate of Richard Griggs, chancery clerk of Issaquena County, as confirmatory or auxiliary evidence. The majority say:

There are two statements in the record which, taken together, enable us with reasonable certainty to arrive at the vote cast in three of the four rejected precincts of this county. The first is the certificates of election made by commissioners of election to the secretary of state, and found on page 17 of the record.

"Hay's Landing.

"They say, with regard to this poll, that they find 75 votes reported by the election officers, on four of the ballots all the names are scratched off, and they reject the poll because there was no separate list of voters kept. At page 89 of the record, Richard Griggs, clerk of the chancery court for Issaquena County, certifies under the seal of said court that the paper appearing on that page of the record is a true and correct transcript of the election returns made by the election officers as appears of record in his office, by which it appears Lynch received 34 votes, and Mr. Chalmers 29 votes for member of Congress. The commissioners of election for that county certify to the secretary of state that they rejected this precinct return, and the clerk of the court certifies that that return is on file in his office, a copy of which he gives. The two statements taken together are *prima facie* evidence of the vote received at that poll. The highest number of votes appearing on the tally-list as certified by the clerk agrees with the number the commissioners say were returned from that poll. The commissioners are authorized by law to certify as a fact the number of votes cast; and the clerk of the court is authorized by law, as the keeper of public records, to give certified transcripts thereof.

"For the reasons given in reference to Hay's Landing precinct, we also count Ben Lomonde and Duncansby precincts; by reference to which it will be seen that Lynch's vote was 332 and Chalmer's 20 in the former (Record, pages 17 and 90), and 371 for Lynch, and for Chalmers 45, in the latter."

Now, it is clear that the certificate of the commissioners to the secretary of state is not of itself sufficient to prove the votes rejected in this county, and the majority do not so pretend. It is equally clear that the certificate of the chancery clerk if it was evidence for any purpose would fully prove the vote by itself without any aid from the certificate of the commissioners, but the majority do not claim this for that certificate. But because the number of votes stated by the commissioner to have been rejected corresponds with the pretended certificate of the clerk, we are asked to receive this as corroborating evidence. But in order to reach this conclusion, the majority say that "the clerk of the court is authorized by law, as the keeper of public records, to give certified transcripts thereof." That is true when the clerk is "the keeper of the record," but the election returns form no part of any public records in Mississippi, and therefore neither the chancery clerk nor any

other officer is the keeper of election returns after they have been counted, and can give no certified transcripts thereof.

That there may be no mistake about this we give all the election laws of the Code of 1880 of Mississippi bearing even remotely on this question.

Sec. 105. "The books of registration of the electors of the several election districts in each county and the poll-books as heretofore made out shall be delivered by the county board of registration in each county, if not already done, to the clerk of the circuit court of the county, who shall carefully preserve them as records of his office, and the poll-books shall be delivered in time for every election to the commissioners of election, and after the election shall be returned to said clerk."

Sec. 106. "The clerk of the circuit court of each county shall register on the registration book of the election district, of the residence of each person, any one entitled to be registered as an elector upon his appearing before him and taking and subscribing the oath required by article 7, sec. 3, of the constitution," &c.

Sec. 107. "When an elector duly registered shall change his residence to another election district in the same county he may be registered in the election district to which he has removed by appearing before the circuit clerk and requesting him to erase his name from the register of election in the district of his former residence and to place it on that of his present residence, which said clerk shall do."

Sec. 108. Provides no person convicted of felony shall be registered, or if convicted after registration the circuit court shall erase his name from the registration book.

Sec. 116. Fixes the pay of the circuit court clerk for acting as registrar.

SEC. 126. The commissioners of election in each county shall procure, if not already provided, at the expense of the county, which shall be paid by order of the board of supervisors, a sufficient number of ballot-boxes, which shall be distributed by them to each election precinct of the county before the time for opening the polls which, boxes shall be secured by good and substantial locks, and if an adjournment shall take place after opening the polls and before all the votes shall be counted the box shall be securely closed and locked, so as to prevent the admission of anything into it during the time of adjournment, and the box shall be kept by one of the inspectors and the key by another of the inspectors, and the inspector having the box shall carefully keep it and neither unlock nor open it himself, nor permit it to be done, or permit any person to have any access to it, during the time of such adjournment.

SEC. 137. All ballots shall be written or printed in black ink, with a space not less than one-fifth of an inch between each name, on plain white printing newspaper, not more than two and one-half nor less than two and one-fourth inches wide, without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the ticket; but this shall not prohibit the erasure, correction, or insertion of any name by pencil mark or ink upon the face of the ballot; and a ticket different from that herein prescribed shall not be received or counted.

SEC. 138. When the results shall have been ascertained by the inspectors, they, or one of them, or some fit person designated by them, shall, by twelve o'clock noon of the second day after the election, deliver to the commissioners of election, at the court-house of the county, a statement of the whole number of votes given for each person and for what office; and the said commissioners of election shall canvass the returns so made to them, and shall ascertain and disclose the results, and shall, within ten days after the day of said election, deliver a certificate of his election to the person having the greatest number of votes for any office, &c.

SEC. 139. The statement of the result of the election at their precincts shall be certified and signed by the inspectors and clerks, and the poll-book, tally-list, list of voters, ballot-boxes, and ballots shall be delivered as above required to the commissioners of election.

SEC. 140. The commissioners of election shall, within ten days after the election, transmit to the secretary of state, to be filed in his office, a statement of the whole number of votes given in their county for each candidate voted for for any office at such election, &c.

From this it will be seen that neither the circuit clerk nor chancery

clerk is the keeper of any public record which contains election returns, and that the certificate of Griggs in this case is a nullity. The law on that subject is as follows:

The law is well settled that statute-certifying officers can only make their certificates evidence of the facts of which the statute requires them to certify, and when they undertake to go beyond this and certify other facts they are unofficial and no more evidence than the statement of an unofficial person. (*Sweetzler* vs. *Anderson*, 2 Bartlett, 374.) This rule of course applies to election returns and to all certificates which are by law required to be made by officers of election, or of registration, or by returning officers. *They can only certify to such facts as the law requires them to certify.* —(Am. Law of Elections, sec. 104.)

In the United States district court in the case of the *United States* vs. *Souder* it was held—

In New Jersey a copy of the return of the township election filed with the clerk of the county and sent to the office of the secretary of state, accompanied by the clerk's certificate that it is a full and perfect return of said election as filed in his office, is not so made and certified, and does not come from such a source, as to constitute it an official paper.—(2 Abbott C. C. Rep., 456.)

I. Greenleaf, sec. 498—Certificates.

In regard to *certificates given by persons in official station*, the general rule is, that the law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. (Willes, 549, 550, per Willes, Ld. Ch. Justice.)

If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated.

But as to matters which he was not bound to record, his certificate being extra-official, is merely the statement of a private person, and will therefore be rejected. (*Oakes* vs. *Hill*, 14 *Pick.*, 442, 448; *Wolfe* vs. *Washburn*, 6 Cowen, 261; *Jackson* vs. *Miller*, 6 Cowen, 751; *Governor* vs. *McAffee*, 2 Dev., 15, 18; *United States* vs. *Buford*, 3 Peters, 12, 29; *Childers* vs. *Cutter*, 16 Miss., 24.)

Rejecting, therefore, the vote added by the majority report in Issaquena County, on the certificate of Griggs, the chancery clerk, and taking the other returns as made out by the majority, the result is as follows:

	Lynch.	Chalmers.
Returned vote	5,393	9,172
Add rejected votes:		
Warren County	2,029	20
Deadman's Bend	85	15
Palestine	231	17
Australia	192	30
Bolivar	311	92
Rodney	247	92
Stoneville	315	60
	8,803	9,498
Add 190 to Lynch and take same from Chalmers, at Kingston	190	190
	8,993	9,308
		8,993
Leaving majority for Chalmers of		315

BOLIVAR COUNTY.

But to accomplish even this reduction of the proper majority of Chalmers the votes claimed by contestant in Bolivar County at Australia and Bolivar precinct are counted. The returns from these precincts

were rejected by the commissioners of election because they were not certified to. In other words, the commissioners had no legal evidence that the ballots returned in these boxes were ever cast by voters. They might have been stuffed in by any one on the road from the precinct to the court-house.

That returns not certified to can never be counted is stated to be law by every writer on election cases. The certificate is essential.

The rule of law on that subject has been thus stated in the American Laws of Elections by Hon. George W. McCrary:

SEC. 174. "It is the duty of the party seeking to avail himself of a vote which is not legally certified and returned, to make the necessary proof to supply the place of the usual formal certificate, and if he fails to do so such vote cannot of course be received."

SEC. 363. "The general rule is that when the return is set aside both parties must prove their votes by other evidence."

SEC. 365. "It is impossible to state more definitely than we have done the general rule which should govern in determining whether a return should be set aside, and the parties on either side required to prove their actual vote by other evidence."

SEC. 391. "It is very clear that if the returns are set aside no votes not otherwise proven can be counted."

The majority of the committee do not deny this principle of law, but they contend that the votes, though rejected for a lawful reason by the commissioners, must now be counted, because the commissioners in their certificate to the secretary of state show how many votes were rejected. They say:

BOLIVAR COUNTY.

Under section 138 of the Mississippi code, the inspectors of elections are required to send up to the commissioners the whole number of votes cast at the poll, and the commissioners, under section 140 of the code, are required to "transmit to the secretary of state, to be filed in his office, a statement of the whole number of votes given in their county for each candidate."

This duty being enjoined by statute, their certificate is evidence of the fact that the number of votes which they certify were given.

The majority are mistaken in this statement of the duty of the inspectors under the law of Mississippi. Their duty under section 138 is not "to send up to the commissioners the whole number of votes cast," but "a *statement* of the whole number of votes," &c., and by section 139 it is required that the statement shall be certified as correct by both the inspectors and their clerks. (See sections 138 and 139, above set out.)

Now, it is clear that the certificate is essential to identify and make certain the return, and that without the certificate it is no legal return and cannot be counted or considered as evidence in any way.

Without the certificate the commissioners, who know nothing of their own knowledge as to the election, can certainly make no statement of the votes that would import verity as to the result. They are required to report to the secretary of state as follows:

SEC. 140. The commissioners of election shall, within ten days after the election, transmit to the secretary of state, to be filed in his office, a statement of the whole number of votes given in their county for each candidate voted for, for any office at such election, &c.

If these commissioners had undertaken to count and to transmit to the secretary of state a statement of votes not certified by the inspectors to them, this would have been clearly illegal, and yet when the commissioners of Bolivar County refused to receive and count returns not certified to them, and in the appendix to their statement to the secretary of state stated that they had rejected these votes because not certified, Congress is asked to count them without any other proof that

they are good and valid votes, except the appended statement of the commissioners as to the number of votes rejected and for whom they purported to be cast.

The commissioners conceived it to be their duty in giving a statement of the whole number of votes to give what they deemed legal and what illegal returns, and because they did this the majority of the committee say—

This duty being enjoined by statute their certificate is evidence of the fact that the number of votes which they certify were given.

We give the report of the commissioners in full as follows:

Statement of the whole number of votes cast at the general election held in Bolivar County, State of Mississippi, on the 2d day of November, A. D. 1880, as compiled from statements certified to by inspectors from the different precincts in this county, this 4th day of November, A. D. 1880.

FOR PRESIDENTIAL ELECTORS.

(Names voted for.)

For Hancock and English:	
1. F. G. Barry	259
2. C. P. Neilson	259
3. C. B. Mitchell	259
4. Thos. Spight	259
5. Wm. Price	259
6. William H. Luse	259
7. Robt. N. Miller	259
8. Joseph Hirsh	259
For Garfield and Arthur:	
1. William B. Spears	1,016
2. R. W. Flournoy	1,016
3. J. M. Bynum	1,016
4. J. T. Settle	1,016
5. M. K. Mister	1,016
6. R. H. Montgomery	1,016
7. R. H. Cuny	1,016
8. Chas. W. Clark	1,016
For Weaver and Chambers:	
1. R. H. Peele	24
2. M. M. McLeod	24
3. J. J. Dennis	24
4. S. L. Harmon	24
5. T. N. Davis	24
6. H. B. McGee	24
7. John T. Hull	24
8. J. D. Webster	24
For member of Congress from sixth Congressional district:	
James R. Chalmers	301
John R. Lynch	979

We, the undersigned, commissioners of election for the county of Bolivar, and State of Mississippi, do hereby certify that the above is correct.

Rosedale, Bolivar County, Miss., November 4, 1880.

JNO. H. JARNAGIN,
RILEY ROLLINS,
W. A. YERGER,
Commissioners of Election.

To Hon. H. C. MYERS,
Secretary of State, Jackson, Miss.

The following statement accompanied the foregoing returns:

ROSEDALE, BOLIVAR CO., Miss.,
November 4, 1880.

To Hon. HENRY C. MYERS,
Secretary of State, Jackson, Miss.:

DEAR SIR: We have this day duly met and canvassed the returns of this county, and complied with the law in every respect, as we construed the same after duly con-

sulting the best legal authority in the county, and we now inclose to you our certified report of the same. We have thrown out the Australia precinct box, 30 Democratic and 192 Republican votes, because the returns were not certified to by the inspectors or the clerks. We have thrown out Holmes Lake precinct, because the box was not opened nor the ballots counted by the inspectors and numbered by the clerks, and no returns nor tally-sheet made. We have thrown out the Bolivar precinct, 45 Democratic and 311 Republican votes, because there was no certified return from the inspectors and clerks. The tally-sheets sent in the box show the names of the electors of the Democratic and Republican parties, of James R. Chalmers, John R. Lynch, G. B. Lancaster, M. Roland, James Winters, Fleming and James White, but does not show for what office they were voted for. The tally is kept on four different sheets of paper. The total can only be guessed at, and not ascertained correctly. We have rejected the Glencoe precint vote—27 Democratic, 233 Republican votes—because the vote was counted out in part by all the inspectors and clerks, and then discontinued until next day, when the count was finished by one inspector and one clerk, and a very imperfect tally-sheet and return sent in by those two not certified to.

JNO. H. JARNAGIN,
RILEY ROLLINS,
W. A. YERGER,
Commissioners of Election.

If the majority are right as to the effect of the commissioners' certificate, it will be seen that the certificate covers only the votes they counted, and the appended statement, which was no part of the certificate, gives the rejected votes and the cause of their rejection.

We claim, therefore, that Australia and Bolivar precincts should be rejected, and the result, then, allowing votes claimed by the majority, and not so far expected by us, would stand as follows:

	Lynch.	Chalmers.
Returned vote	5,393	9,172
Add rejected votes:		
Warren County	2,029	20
Deadman's Bend	85	15
Palestine	231	17
Rodney	247	92
Stoneville	315	60
	8,300	9,376
From which we deduct		190
And add that number to Lynch's vote to correct the returns in Kingston precinct, Adams County	190	
	8,490	9,186
		8,490
Leaving majority for Chalmers		696

COAHOMA COUNTY.

The votes claimed by contestant in Coahoma County are not counted by the majority, but they are put into a tabulated statement, it is said, for the information of Congress. For the same information we state that the vote claimed depends for proof entirely upon United States supervisors' certificate and the certificate of the circuit clerk that certain election returns were on file *in the ballot-boxes* in his office. This was a more farcical certificate than that of Griggs in Issaquena County, and the majority, who could not agree that supervisors' certificates were evidence, did not count this vote as claimed by contestant.

UNITED STATES SUPERVISORS.

The majority of the committee have not claimed that the certificates made by United States supervisors of election in districts outside of cities of 20,000 are evidence, but as they have submitted that question

to the House we hold that these supervisors are mere witnesses, whose testimony must be obtained like any other witnesses by depositions properly taken.

The history of the passage of the act of 1872, the declarations of Mr. Garfield, who reported the bill, and others who took part in the debate, and the very language of sections 2018 and 2029, show that supervisors in Congressional districts outside of cities of 20,000 inhabitants are mere witnesses, and have no power to make certificates.

We quote from the brief of contestant.

Now, in the light of this history when county supervisors were created, what was meant by the words of limitation used, and now found in section 2029, Revised Statutes, as follows:

> The supervisors of election appointed for any county or parish, or any Congressional district at the instance of ten citizens, as provided in section 2011, shall have no authority to make arrests or to perform other duties than to be in the immediate presence of the officers holding the election and to witness all their proceedings, including the counting of the votes and the making of a return thereof.

Contestant's brief argues that it was only intended to prevent the county supervisors from making arrests. If this be true, then the words "or to perform other duties than to be in the immediate presence of the officers holding the election, and to witness all their proceedings, including the counting of the votes and the making of a return thereof," have no meaning whatever.

It is claimed in contestant's brief that section 2018 gives all supervisors the power to make returns and certificates.

Let us look at the language.

Section 2018 of the Revised Statutes is as follows:

> To the end that each candidate for the office of Representative or Delegate in Congress may obtain the benefit of every vote for him cast, the supervisors of election are, and each of them is, required to personally scrutinize, count, and canvass each ballot in their election district or voting precinct cast, whatever may be the indorsement on the ballot, or in whatever box it may have been placed or be found; to make and forward to the officer who, in accordance with the provisions of section 2025, has been designated as the chief supervisor of the judicial district in which the city or town wherein they may serve acts, such certificates and returns of all such ballots as such officer may direct and require, and to attach to the registry list, and any and all copies thereof, and to any certificate, statement, or return, whether the same, or any part or portion thereof, be required by any law of the United States, or of any State, territorial, or municipal law, any statement touching the truth or accuracy of the registry, or the truth or fairness of the election and canvass, which the supervisors of the election, or either of them, may desire to make or attach, or which should properly and honestly be made or attached, in order that the facts may become known.

We have asserted that the words "city or town wherein they may serve," found in the eleventh line of this section, shows clearly that it could not apply to county supervisors, even if this chapter as it appears in the Revised Statutes, had been passed as a whole, though it was not. But contestant's brief claims that "the allusion in section 2018 to the words 'city or town' wherein the supervisor may serve, is a clause merely *descriptive* of the officer to whom returns are to be made, to wit, the chief supervisor."

A glance at the section will show this is not true. The language is "the city or town wherein *they* may serve," not *he* may serve, and is descriptive of the supervisors, who are to act in the city or town, and is not descriptive of the chief supervisor. If so, it would have said "in the city or town where *he* may serve." Again, contestant claims that section 2018 of Revised Statutes is directed to supervisors generally, and embraces all persons "sworn as supervisors."

If section 2018 covers the supervisors in county districts, and author-

izes them to make reports, then every other power or duty conferred on supervisors by this section must also be conferred on them. Section 2018 requires supervisors "to personally scrutinize, count, and canvass," "to make and forward * * * such certificates and returns of all such ballots," "and to attach to the registry list and any and all copies thereof, and to any certificate, statement," &c., by whomsoever made; "any statements as to the truth or accuracy of the registry, or the truth or fairness of the election and canvass," &c., which they may desire to make, and any one can see at a glance that this is utterly incompatible with section 2029.

It would be absurd to provide in section 2029 that they should only be present and witness the count made by others, if by section 2018 they were required to count themselves. Again, if by section 2018 they are required to make return it is worse than ridiculous to say in section 2029 they should only witness the returns made by others.

If, therefore, we refuse to receive the certificate of United States supervisors of election on the certificates of clerks who were not custodians of election returns and could make no certificate about them, the contestee is entitled to retain his seat by 315 majority.

And unless we torture the statement of rejected votes into a certificate of their validity, the contestee must hold his seat by 696 majority. This would be sufficient to settle this case, but as the majority of the committee have made what we regard as a fatal and hurtful mistake in refusing to follow the supreme court of Mississippi in construing its own election statute, we proceed to discuss that question.

If that be decided as it heretofore has been, it would, as the majority of the committee admit, end this contest at once and leave the sitting member in undisputed possession of his seat.

OBITER DICTUM.

But before proceeding to the consideration of that question we wish to dispose of two points of objection made by the majority report to the case of Oglesby *vs.* Sigman, 58 Miss. R. They are, first, that the decision is a mere obiter dictum, and the second, that it is confessedly without jurisdiction. An obiter dictum is an expression of opinion by way of argument or illustration, and rendered without due consideration as to its full bearing and effect. To show the want of authority of an obiter dictum the majority quote from Carroll *vs.* Carroll, 16 How. 286–7.

The court say: "If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the common law, an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question to be determined to fix the rights of the parties and decide to whom the property belongs." There can be no doubt about the judicial mind being directed to the construction of the Mississippi election laws. The court say they considered them and that they were asked to consider them. This decision is, therefore, not *obiter* as to the marked ballots, because it is one of the very points carefully considered and directly decided.

An obiter dictum is exactly what its term imports. A saying of the judge outside of and beyond the point decided. Therefore it cannot be said that the decision of one of the very questions submitted, and to which the judicial mind was especially directed is *obiter*. But if we should admit that the case of Oglesby *vs.* Sigman was obiter we have

still another decision from the same court on the same subject and of the same import. This case cannot be called a partisan decision because a Democratic court gave the office to a Republican contestant. The opinion in Perkins *vs.* Carraway says:

> Certain ballots were rejected from the count because the names of persons voted for for representatives in the legislature were found to be less than one-fifth of an inch apart, and, urged by counsel, we pass upon that question also. Section 137 of the Code prescribes the kind of tickets to be used, and, among other things, directs that there shall be a space of *not less* than one-fifth of an inch between the names of persons voted for; and declares that "a ticket different from that herein prescribed shall not be received or counted." The language is unmistakable and imperative. The preceding section indicates plainly the meaning of the word "*ticket.*" It is a "scroll of paper, on which shall be written or printed the names of the persons for whom he intends to vote." Ballot is sometimes used by the statute to signify ticket, but the latter is never used as synonymous with the former. The "ticket" describes the paper, and names of persons, and the offices for which they are voted for. It includes all. The statute says: "A ticket different from that herein prescribed shall not be received or counted." This applies to the entire "scroll of paper," and excludes it as a whole. The language cannot be satisfied by limiting the exclusion from the count to the ballot for the office in which the vice exists, and we must give effect to the language of the law. It excludes the ticket.
>
> Judgment affirmed.

This is but a repetition of the doctrine laid down in Oglesby *vs.* Sigman that section 137 must be strictly construed. Here then is a line of decisions carefully considered, and while it may be true that they construe their statute more strictly than some decisions in other States, we must permit the Supreme Court of Mississippi to construe its own statutes or abandon the rule heretofore held to be essential to the preservation of our complex system of government.

The majority of this committee refused to follow the supreme court of Mississippi clearly announced in two opinions, and ask Congress to regard section 137 as directory and not mandatory, because the supreme court of California has construed its similar statute to be partly directory and partly mandatory. The argument that a strict enforcement of this law is impossible is contradicted by the facts. In five districts of the State the law was strictly complied with in 1880. Another election was held in 1881, and no marked ballots were used in the State.

The argument that marks are essential to enable ignorant men to distinguish their ballots is an argument against the law and not the decision. The same argument would compel raised tickets to be furnished for the use of blind men. The majority report criticises the object of the law given by the court as follows:

> Its object is to secure absolute uniformity as to the appearance of ballots in order that intelligence may guide the electors in their selection, and not a mere device or mark by which ignorance may be captivated.

They maintain that this is prescribing an educational qualification for voting in violation of the Mississippi constitution. This is a clear misapprehension of the meaning of the court. When marks are relied on to distinguish ballots, ignorant men can be, and usually are, deceived by shrewd political opponents. The prohibition of marks protects the ignorant against such deception. Without marks the ignorant voter will not rely on himself, but trust to the intelligence of his friends to distinguish his ticket. Suppression of marks was also essential to preserve the secrecy of the ballot, and yet the contestant admitted that the colored men were ordered or directed to vote an open ticket. This was in violation of the law of Congress which requires voting by ballot. This was equivalent to *viva voce* voting, and subjected to odium all colored men who refused to vote an open ticket. This the contestant said was the mark he adopted, and it was clearly a device by which one ticket might be distinguished from another.

HAD THE COURT JURISDICTION?

But the majority say—

First. The court declared in terms it had no jurisdiction of the subject-matter embraced in the first and second grounds stated in the opinion; but the court, after remarking upon its want of jurisdiction on the first two points, stated in the beginning of its opinion, and having disposed of the third on the ground that the official duties of the election officers were at an end and that they could not be reassembled, proceeded to construe the law relative to distinguishing marks, and decide what were such by the terms of the Mississippi Code so far as it could do so, the same being confessedly not before them.

This is neither legally nor historically true of this decision. The court did not anywhere admit its want of jurisdiction, nor did it, after admitting that a decision of one point in the case might have been sufficient to decide the whole case, proceed to decide the other two points first stated. Historically, it decided first the two first points, and then the third. It is a general rule that where a court has decided one point which is decisive of a case it will not decide others, but this rule is by no means universal. (See Ram on Legal Judgments, 258–9, and the cases there cited.) But it is an unheard-of proposition to say where there are several distinct and vital points in a case and the court decides them all, the opinion is not authority except on one point if that would have been decisive of the case.

Thousands of cases can be found where all the points presented are decided, though the decision of one might have been sufficient. The most notable instance is the case of *ex parte* Siebold, 10 Otto. In that case it was only necessary to decide that sec. 5515 of the Revised Statutes United States was constitutional, and that would have settled the whole case, but the court proceeded to settle all the questions that had arisen or perhaps could arise under the United States elections laws, including the power of United States marshals to keep the peace at the polls and the power of United States judges to appoint supervisors of election.

We presume no one will say that opinion was either obiter or without jurisdiction on any point decided. How, then, can it be said that the supreme court of Mississippi was without jurisdiction to pass upon questions which it assumed to pass upon? Want of jurisdiction might result, first, from general lack of power to adjudicate any question as where the pretended judges have never been elected or qualified; second, where the court has acquired no jurisdiction of the persons of the parties. Third, where it has no jurisdiction of the subject-matter of the action. It is not claimed that the supreme court of Mississippi was not a properly constituted tribunal, nor is any question made touching its jurisdiction over the parties, but that it had no jurisdiction to decide what were and what were not legal ballots. To determine this, let us look at the questions presented and how they were presented. A new election law had been enacted in Mississippi, and the first election held under it. It required marked ballots to be rejected, and they had been by the commissioners of Warren County. These commissioners had been arrested and tried as criminals in the United States court for obeying what they conceived to be the plain language of the law in the discharge of their duty. There was great doubt in the public mind as to what the law meant by marked ballots, and as to who should reject them.

Other commissioners were arrested and threatened with prosecution for their acts in discharge of what they conceived to be their duty under this new election law. The public was greatly excited over these prose-

cutions, and citizens were saying they would not act as commissioners of election if they were to be prosecuted in the United States courts for exercising their discretion in deciding on their duty.

Under these circumstances, the district attorney, Mr. Oglesby, at the suggestion of the attorney-general, filed a petition for *mandamus*, prepared under the direction of the attorney-general, to settle these questions. The statute under which it was filed read as follows:

SECTION 2542 OF THE CODE OF MISSISSIPPI; 1880.

On the petition of the State by its attorney-general, or a district attorney, in any matter affecting the public interest, or on petition of any private person who is interested, the writ of *mandamus* shall be issued by a circuit court commanding any inferior tribunal, corporation, board, officer, or person to do, or not to do, an act, the performance or omission of which the law especially enjoins as a duty resulting from an office, trust, or station; and *where there is not a plain, adequate, and speedy remedy in the ordinary course of law.*

The jurisdictional facts were stated in the petition, and were certainly matters greatly affecting the public interest. It asked that the commissioners of election be required to reassemble and perform a duty required of them by law, to wit, the rejection of certain marked ballots which had been counted by them. It was directed to an inferior tribunal commanding them to do an act "which the law enjoined as a duty."

The case being decided adversely to the petitioner in the court below, was appealed to the supreme court.

Campbell, J., delivered the opinion of the court.

This case presents for adjudication three questions, namely:

1. Whether the commissioners of election have the right to reject illegal ballots cast and counted by the inspectors of election and returned to them with the statement of the result at the precincts.

2. Whether the ballots which the commissioners of election for Tunica County refused to reject should have been rejected by them as being illegal, for having on them a device or mark by which one may be known or distinguished from another.

3. Whether the action of the commissioners was final, or whether they may be required by mandamus to meet and act in the matter again, as the court may order.

A negative answer to the first question would have rendered further consideration of the case unnecessary. An affirmative answer to the first and a negative answer to the second question would have rendered the determination of the third unnecessary. Each of these questions was purely local and each required the construction of a State statute. Suppose the court had decided that the commissioners could not reject ballots counted and returned to them by the inspectors; this would have decided the case. Would any one have said such decision was without jurisdiction? If the court had decided that the commissioners could reject illegal ballots returned, but that ballots with printer's dashes on them were not illegal, this would have decided the case. Would any lawyer say such decision was without jurisdiction? It was necessary to decide these questions first before the court was called on to decide the third proposition. If the court had jurisdiction to decide that ballots marked with printer's dashes were not illegal and thus decide this case, had they not jurisdiction to decide the converse of the proposition? It would be a novel legal idea that a court had full jurisdiction to decide a question submitted in one way, but if it decided the same question the other way it was *obiter* or without jurisdiction. The right to determine the case at all carries with it the right to decide either way and upon all points involved.

The court was called on to compel, by *mandamus*, the election commissioners to make right a wrong they had committed. The first thing to

be settled was whether they had done any wrong. If the court had decided that the commissioners did right in counting the marked ballots, that would have ended the case, and it would have been unnecessary to go further.

The court held, however, that the commissioners did do wrong, but that it had no power to make them reassemble and right that wrong.

It might be said the court should have stopped short with this declaration, but it did not. It proceeded to show what was the proper remedy for the wrong. It said the remedy was in a contested election. That in State cases this contest must be made before State tribunals and in Congressional elections before Congress.

To claim that this decision can have no weight in a contested election before Congress, because the court said Congress must settle Congressional contests, would lead to the conclusion that it could have no weight in a contest before a State tribunal, because it said the State tribunal must settle State contests.

THE MISSISSIPPI DECISION RIGHT ON PRINCIPLE.

The majority of the committee contend that the case of Oglesby *vs.* Sigman is not sustained by other authority.

The first and leading case on the subject of marked ballots was in Pennsylvania in the case of the Commonwealth *vs.* Woelper, 3 S. and R., 29. The opinion was delivered by Chief Justice Tighlman and concurred in fully in separate opinions by Justices Yeates and Gibson, and they all held that the law should be strictly construed as written. The court said:

> The tickets in favor of those persons who succeeded in the election had on them the engraving of an eagle. The judge who tried the case charged the jury that these tickets ought not to have been counted. The case is certainly within the words of the law. The tickets had something more than the names on them. But is it within the meaning of the law? I think it is. This engraving might have several ill effects. In the first place, it might be perceived by the inspector, even when folded. This knowledge might possibly influence him in receiving or rejecting the vote. But in the next place, it deprived those persons who did not vote the German ticket of that secrecy which the election by ballot was intended to secure to them. A man who gave in a ticket without an eagle was set down as an anti-German and exposed to the animosity of the party. Another objection is that the symbols of party increase that heat which it is desirable to assuage. We see that at the election some wore eagles in their hats. The case thus falling within the words and practices of this kind leading to inconvenience, I think the court ought not exercise its ingenuity in support of these tickets. Let us at least prevent future altercations at elections by laying down such plain rules for the conduct of inspectors as cannot be mistaken. I am for construing the by-law as it is written, and rejecting all tickets that have anything on them more than the names. This objection strikes at the root of the election, for the evidence is that all the tickets in favor of the defendants were stamped with an eagle. Whatever, therefore, may be the law on other points, it is clear, upon the whole, that the defendants were not duly elected.

The precise same doctrine was held in Oregon. The court say:

> Section 30, page 572, of the Code provides that "all ballots used at any election in this State shall be written or printed on a plain white paper without any mark or designation being placed thereon whereby the same may be known or designated." The voter in this instance is conclusively presumed to have had knowledge of this requirement and to have had it in his power to comply with it by using a proper ballot. It was a matter entirely under his own control, and if he chose to disregard the law, he cannot complain if the consequence was that his vote was lost. (The State *vs.* McKinnon, 8 Oregon, 500.)

This fully sustains the Mississippi decision, even if we admit the distinction taken by the majority report that the voter is only bound to observe so much of the law as he could by the exercise of proper dili-

gence in matter under his control. The California case cited by the majority, though it differs from the case of Perkins *vs.* Carraway recently decided in Mississippi, as to the spaces between the names on on the ticket, sustains Oglesby *vs.* Sigman as to the marks. The court say:

There are, however, other requirements of the Code within the power of the elector to control, and these, if willfully disregarded, should cause his ballot to be rejected. He can see, for instance, that his ballot is free from every mark, character, device, or thing that would enable any one to distinguish it by the back, and if, in willful disregard of law, he places a name, number, or other mark on it, he cannot complain if his ballot is rejected and he loses his vote. (Kirk *v.* Rhoades, 46 Cal., 398.)

The same doctrine was held in Alabama.

Before Hon. Louis Wyeth, Judge of the Fifth Judicial Court.

THE STATE OF ALABAMA, *Cullman County:*

CHARLES PLATO
vs. } Contest of election.
JULIUS DAMUS.

In this case Charles Plato contests the election of Julius Damus to the office of mayor of the town of Cullman, in the county of Cullman, claiming to have been elected to that office himself by a majority of the votes cast at the election held on the first Monday in April, 1879.

The respondent claims to hold the office under the certificate of election issued by the proper officers under the provisions of the "act of assembly to establish a new charter for the town of Cullman." (Pamphlet Laws of 1879, p. 304, section 9.)

On examining and counting the votes it appears that fifty-four of them were cast for the contestant, and twenty-seven for the respondent; of these fifty-four votes given for the contestant, fifty-two had printed on them at the top of the ballot the words "Corporation Ticket," and of the twenty-seven votes cast for respondent three had in like manner printed thereon the same words, and the question for me to decide is whether or not those words rendered the ticket on which they were printed illegal ballots, and such as must be rejected.

The act approved February 12, 1879, Pamphlet Laws, pp. 72-3, requires that the ballot must be a plain piece of white paper without any figures, marks, rulings, characters, or embellishments thereon, * * * on which must be written or printed * * * *only* the names of the persons for whom the elector intends to vote, and must designate the office for which each person so named is intended by him to be chosen, and any ballot otherwise than described is illegal, and must be rejected.

The law under which the election now being considered was held, in section 4, Pamphlet Laws 1879, p. 305, declares "that the election provided for in this charter shall be regulated by the general State election law."

The judicial officer of the State has nothing to do with the propriety of a statute. If not void by reason of a constitutional inhibition, the judicial duty is limited to their construction and enforcement.

These ballots had more than *only* the names of the persons for whom the elector intends to vote, or the designation of the office, and must be rejected because illegal. Such is the mandate of law, and so I must declare it.

It is considered, adjudged, and ordered that the election of Julius Damus, as mayor of the town of Cullman, in the county of Cullman, be confirmed, and that the contestant pay the costs of this court.

LOUIS WYETH,
Judge, &c.

JUNE, 9, 1879.

Precisely the same doctrine was held by this committee in the case of Yeates *vs.* Martin, and the opinion on that point prepared by Mr. Field, now on the supreme bench of Massachusetts. It said:

One hundred and eight votes for Mr. Martin were thrown out not counted, because they had on them the words "Republican ticket," at or near the head of the ticket, on the same side as the name of the candidate and office. They were thrown out on the ground that the words "Republican ticket" were a device within the meaning of the laws of North Carolina.

If these words constitute a device within the meaning of the law, the statute is plain that the ballots are void and are not to be counted.

Either way, we think that words prominently printed on a ticket, and intended to designate or describe it, and which have a distinct meaning in themselves, such as, if untrue, might mislead the voter, and whether true or untrue would render the ticket easily distinguishable, must be held to be a device within the meaning of the law. (McCrary on Elections, § 401.) These votes were rejected by the State authorities, and we think rightfully.

It is a simple question whether this statute is mandatory or merely directory.

McCrary, in American Laws of Elections, section 401, says:

It is quite clear where the statute distinctly declares that ballots having distinguishing marks upon them shall not be received or shall be rejected, it should be construed as mandatory and not merely directory.

The Indiana courts hold their statute mandatory if the marks appear on the back of the ticket. The language of the Mississippi statute shows it was intended to apply to marks on the face as well as the back. After prohibiting marks or devices, it says:

But this shall not prohibit the erasure, correction, or insertion of any name by pencil mark or ink upon the face of the ballot.

This exception as to one kind of marks on the face of the ticket clearly shows that any other marks on the face of the ticket are prohibited. We can see the marks on contestant's ticket ourselves, and it would be our duty to reject them without any decision from the supreme court of Mississippi. We hold therefore that the statute was mandatory, and the decision right in itself. If the court had decided as the majority of this committee now decide, it would have produced the utmost confusion in the State.

A strict construction of the law is always safest and best, and especially of law which refers to political powers, duties, or rights.

When we launch into the broad sea of latitudinous construction we have neither chart nor compass, and the law becomes a dangerous instrument in the hands of those who construe it and who may contract or expand it to suit the demands of those in power.

A contrary decision would have launched every board of election commissioners in the State on a sea of uncertain speculation as to what were and what were not marks within the meaning of the law. Fraud and corruption could be covered under their discretion to determine this question, and the whole election machinery could be converted into a political engine for partisan use. Certainty in law is essential to the preservation of civil rights, and the case of Oglesby *vs.* Sigman gave certainty to the election laws of Mississippi.

There is no longer any doubt or uncertainty. This alone being a matter of great "public interest" would have justified the district attorney, Oglesby, in suing out his petition for mandamus; and if there were no other ground for it, this alone would sustain the jurisdiction of the court. It was not a case of Lynch *vs.* Chalmers to settle a Congressional election, but of the district attorney *vs.* the election commissioners to settle great questions of public interest.

THE EFFECT OF STATE DECISIONS OF STATE STATUTES.

If any rule of law can ever be regarded as settled, certainly the rule that Federal authorities would follow the construction of State statutes by State courts must be regarded as settled by a long line of able and unbroken decisions. The only exceptions made to this rule by the Su-

preme Court of the United States are where the State courts have made conflicting decisions, as in the case of the city of Dubuque, 1 Wall., 175, or in cases arising under the twenty-fifth section of the judiciary act.

From the time of the case of Shelby *vs.* Gray, in 11 Wheaton, 361, through Green *vs.* Neal, 6 Peters, 291; Christy *vs.* Pritchett, 4 Wallace, 201; Tioga Railroad *vs.* Blossburg Railroad, 20 Wallace, 137, down to Elmwood *vs.* Macey, 2 Otto, 289, an unbroken line of decisions will be found.

The court say, in the case of Green *vs.* Neal:

> The decision of this question by the highest tribunal of a State should be considered as final by this court, not because the State tribunal, in such a case, has any power to bind this court, but because a fixed and received construction by a State in its own court makes it part of the State law.

In the case of the Tioga Railroad Company *vs.* the Blossburg Railroad, in 20 Wallace, 143, the court uses the following language:

> These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles.

See Jefferson Branch Bank *vs.* Skelly, 1 Black, 443; Gut *vs.* The State, 9 Wallace, 37; Randall *vs.* Brigham, 7 Wallace, 541; Secomb *vs.* Railroad Company, 23 Wallace, 117; Polk's Lessee *vs.* Wendell, 9 Cranch, 98; and Nesmith *vs.* Sheldon, 7 Howard, 818. Numerous other adjudications of that court could be cited to the same effect.

It is now maintained that this doctrine applies only as a rule of property. The only excuse for this new idea to be found in the decisions in the Supreme Court is where the court say they will not follow the last decision of a State court changing the construction of its laws after the first decision has become a rule of property; otherwise the Supreme Court of the United States would follow the new construction given by the State court. To say that the Supreme Court of the United States will only follow a State court "on a rule of property" is a total misconception of the principle announced by the court. But whatever may be the rule in the Supreme Court of the United States, Congress has in every case, without exception, followed this rule, and in the Tennessee cases in the Forty-second Congress, and the Iowa cases in the Forty-sixth Congress, extended the rule to following the construction of the State laws given by the governor of a State. The same rule was followed, and on the question of marked ballots, in case of Neff *vs.* Shanks in the Forty third Congress, and Yeates *vs.* Martin in the Forty-sixth Congress. The same rule was followed in Bisbee *vs.* Hull, and the doctrine broadly laid down as correct in Boynton *vs.* Loring in the same Congress. We cite the language of the committee in these cases.

CONGRESS FOLLOWS THE STATE DECISIONS.

This rule was first established in the Forty-second Congress in what is called the Tennessee cases, when the report was made by the Hon. G. W. McCrary:

> In a report from the Committee on Elections, adopted by this House April 11, 1871, in the matter of the Tennessee election (Digest of Election Cases, compiled by J. M. Smith, p. 1), the committee say:
>
> "It is a well-established and most salutary rule that where the proper authorities of the State government have given a construction to their own constitution or statutes, that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex government, State and national, and your committee are not disposed to be the first to depart from it.

This decision was cited with approbation in the Forty-sixth Congress

in the Iowa cases, and in the report on these cases, signed by Messrs. Field, Keifer, Calkins, Camp, Weaver, and Overton, they say:

We are not disposed to be the first to depart from it, and we certainly think that such a decision, made in good faith and acquiesced in at the time by the people of the State, and followed by a full and fair election, should not be overthrown or questioned, except for the gravest reasons, founded on an undoubting conviction that it was plainly an error, and that the error had worked some substantial injury.

In the same case Mr. Beltzhoover says:

2. The question whether the constitution of the State of Iowa "must be amended in order to effect a change in the election of State officers," is one which it is the exclusive right of the State to decide. The persons to whom the constitution and laws of Iowa confide this decision have made it, and their determination is a finality, and is conclusive on all parties. The committee have not the right to review the decision.

The case of Curtin *vs.* Yocum, in the Forty-sixth Congress, turned upon the construction of the constitution of Pennsylvania, and the minority report, which was made by Mr. Calkins, and signed by Messrs. Keifer and Weaver, relied upon the construction of the State court, and used this emphatic language, speaking of an unregistered voter:

We think this question, under the present constitution and laws of Pennsylvania, not an open one. The highest court of judicature of the State has decided it; at least it has given a construction to that part of the new constitution under consideration, and we quote therefrom.

This minority report was adopted by Congress, and a Greenbacker was permitted to retain his seat in a Democratic House.

In the case of Bisbee *vs.* Hull, in the Forty-sixth Congress, the decision of the supreme court of Florida was held to be conclusive by the committee and the House. When the admission of Mr. Hull, who held the governor's certificate, was under discussion, Mr. Calkins said:

How can this certificate stand, even as establishing a *prima facie* right, when the basis upon which it rests has been swept away *by a decision of the supreme court of the State of Florida?*

When the case was considered on its merits, the committee unanimously followed the decision of the supreme court of Florida, and a Democratic House unseated a Democrat and seated a Republican under it.

The report made by Mr. Keifer uses this emphatic language:

The opinion of the supreme court of Florida, pronounced by the chief justice, on the question of canvassing the vote of the county of Madison, will be found in the Record, p. 221.

* * * As already stated, duly certified copies of these returns were put in evidence by the *contestee;* they are signed by all the officers of the election; they are perfect in form, clear and explicit in the statement of the votes cast, *and have all been adjudged by the unanimous opinion of the supreme court of Florida, in a case before it, to be good and valid returns of the election at these polls."* (17 Florida Rep., p. 17.)

Again, in the case of Boynton *vs.* Loring, the report, which was prepared by Mr. Calkins, and signed by every member of the committee except Mr. Weaver, contains this clear and explicit announcement of the doctrine we contend for. It says:

But it is not necessary for us to decide this question, and we do not, much preferring that the courts of Massachusetts shall first construe their own statutes, and when they have undergone judicial construction we would follow the decisions of the courts of that State.

The Committee on Elections is as much a continuing body in contemplation of law as a court, and should have as much respect for its own rulings as a court has for its decisions, and "stare decisis" should be our rule. Under the rule that Federal authorities follow the construction

given by State authorities to their own statutes, two Tennessee Republicans were seated in the Forty-second Congress, Shanks a Republican was seated in the Forty-third Congress, Yocum, a Greenbacker, Bisbee from Florida, and three Republicans from Iowa were seated in the Forty-sixth Congress. To undertake now to change this rule or limit it to a rule of property, may subject us to the same severe rebuke for oscillation administered to a State court by the Supreme Court of the United States. To say in one Congress we will follow the decision of the supreme court of Massachusetts in construing its statute when made, and in the next Congress refuse to extend the same rule to the supreme court of Mississippi, is glaring inconsistency or invidious distinction between States. If we have respect for ourselves, we should make no radical change of ruling that may subject us to the charge that we "immolate truth, justice, and law because party has erected the altar and decreed the sacrifice."

LIMITATIONS ON THE RULE.

But while the majority of the committee have expressed some views looking to a change in this rule said to be essential to the preservation of our complex system of government, they do not go to that extent. They say:

It need, however, hardly be added that a line of carfully considered cases in the States, in which such courts have undoubted jurisdiction, so far as they would apply in principle, would go a long way towards settling a disputed point of construction in any State election law. In fact it may be said that it would probably be the duty of Congress to follow the settled doctrine thus established.

We have here two new limitations on the old rule. First, it must not be a single decision, but "a line of carefully considered cases." Second. the court must, in the opinion of Congress, when collaterally considering the subject, have had jurisdiction of the case. It is a new and somewhat startling proposition that the opinion of a supreme court is not to be considered authority until it has been repeated. If the citizens of a State acquiesce in a decision of their own supreme court it may and often does happen that the court is not called on to reaffirm its opinion, because no one doubts or disputes its first ruling on the subject, and yet Congress is now asked not to regard as authority anything less than a line of well-considered cases.

DO STATE LAWS BECOME FEDERAL LAWS?

Again the majority report says:

Another suggestion in argument needs greater amplification than we can give it now, which is: that by adopting the machinery of the States to carry on Congressional elections this House stands in the nature of an appellate court to interpret these election laws so far as they relate to Congressional elections; that it ought not in this view to be bound by the decisions of the State courts at all, unless the reasons given by them are convincing to the judicial mind of the House while acting in the capacity of a court.

The suggestion made in argument was that the State election laws became Federal laws when Congressmen were elected under them, and therefore Congress had the same right to review the decision of a State court in construction of these laws that the Supreme Court of the United States had to review the decision of a State court on any question arising under the twenty-fifth section of the judiciary act. This was an ingenous suggestion, but it is completely refuted by the Supreme Court of the

United States in *ex parte* Siebold, 10th Otto. The court say, "The objection that the laws and regulations, the violation of which is made punishable, by the act of Congress are State laws and have not been adopted by Congress is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by *State laws*." Again "the paramount character of those made by Congress has the effect to supersede those made by the State so far as the two are inconsistent and no further." The great question in this case was whether Congress could make a law to punish a man for the violation of *State election laws* in Congressional elections, and the able opinion of the court would have been wholly unnecessary if the new theory now advanced were true that the State laws become Federal laws simply because Congressmen are elected under them. Such an idea is wholy repugnant to the Constitution, which expressly provides that the States may make laws for the election of Congressmen while Congress may make, alter, or amend them.

THE SHOESTRING DISTRICT.

There is one satisfactory result flowing from this contest. The public have been led to believe that there was 17,000 Republican majority in the sixth district of Mississippi, familiarly called the "shoestring district," being five hundred miles long and only forty miles wide, and yet the majority of this committee, after a thorough investigation, only claim a majority for contestant of three hundred and eighty-five votes. The counties of Claiborne, Quitman, Sharkey, Tunica, and Wilkinson are shown by the census to have 5,795 majority of colored over white voters, and yet there is no complaint made by the contestant, and no contest over the votes in these counties, although they gave 1,762 majority for the sitting member. Again, the public have been led to believe that great frauds have been practiced in this district, and yet the only fraud now claimed by the majority report is a change of one hundred and ninety votes at Kingston, in Adams County.

There is no dispute about the vote in the counties of Claiborne, Quitman, Sharkey, Tunica, and Wilkinson, and the vote in these counties, as shown by the sworn bill in chancery of Mr. Lynch, is as follows:

Counties.	Chalmers.	Lynch.	
Claiborne	1,061	288	See Record, p. 10.
Quitman	153	83	" "
Sharkey	484	175	" "
Tunica	239	506	" "
Wilkinson	1,691	814	" "
Five counties	3,628	1,866	

Majority for Chalmers, 1,762.

In the disputed counties the returns certified to the secretary of state are as follows:

Counties.	Chalmers.	Lynch.	
Adams	1,387	898	See Record, p. 13-14.
Bolivar	301	979	" " 14-15.
Coahoma	225	352	" " 15-16.
Issaquena	59	333	" " 17-18.
Jefferson	951	136	" " 19-20.
Warren	1,014	57	" " 20-21.
Washington	1,607	772	" " 22-23.
	5,544	3,527	

Majority for Chalmers, 2,017.

Total majority, 3,779.

If we follow the supreme court of Mississippi, and reject the marked ballots, Chalmers is elected by a large majority.

If we count the marked tickets rejected in Warren County, 2,029 for Lynch, and 20 for Chalmers; the Rodney box in Jefferson, which is admitted, 247 for Lynch, and 92 for Chalmers; the Stoneville box in Washington County, 315 for Lynch, and 60 for Chalmers; Deadman's Bend and Palestine, in Adams County; if we further change the vote at Kingston, as it is claimed by the contestant, giving him 190 votes, and take the same from contestee, the result is:

	Lynch.		Chalmers.
Returned vote	5,393		9,172
Add rejected votes, Warren	2,029		20
Rodney box in Jefferson	247		92
Stoneville, in Washington	315		60
Deadman's Bend, Adams County	85		15
Palestine, Adams County	231		17
	8,300		9,376
Change Kingston box, adding	190	Subtracting	190
	8,490		9,186
			8,490
Leaves majority for Chalmers			696

So that the contestant is clearly defeated, unless the certificates of the United States supervisors of elections and the certificates of clerks as to election returns over which they have no control and no power to certify are received as legal evidence. We therefore recommend the adoption of the following resolution:

Resolved, That John R. Lynch was not elected and is not entitled to a seat in the Forty-seventh Congress from the sixth district of Mississippi.

Resolved, That James R. Chalmers was elected and is entitled to his seat in the Forty-seventh Congress from the sixth district of Mississippi.

GIBSON ATHERTON.
S. W. MOULTON.
L. H. DAVIS.