42D CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 41.

SILAS L. NIBLACK vs. JOSIAH T. WALLS.

JANUARY 21, 1873.—Laid on the table and ordered to be printed.

Mr. MCCRARY, from the Committee on Elections, made the following

REPORT:

The State canvassers certify that the sitting member received 12,439 votes, and the contestant 11,810, showing a majority for the sitting member of 629. But in reaching this result they rejected the returns from the following counties:

	Niblack.	Walls.
La Fayette	152	...
Suwannee	318	230
Taylor	177	...
Calhoun	101	62
Sumter	314	60
Manatee	153	...
Brevard	30	3
Monroe	359	428
	1,604	783

The sitting member admits that by virtue of the waiver of certain technical objections made by the contestee, the returns of Suwannee, Calhoun, Sumter, and Monroe Counties are to be accepted by the committee and the House.

No question is made in the argument upon the returns of Taylor County, and we think none can be made.

This narrows our inquiry, so far as it relates to the rejection of county returns, to the counties of La Fayette, Manatee, and Brevard.

LA FAYETTE COUNTY.

The returns from this county show 152 votes for contestant, and none for the sitting member. The evidence taken shows that the county canvassers rejected three of the precincts of the county and counted but two.

This return is rendered worthless by the testimony of William D. Sears, sheriff of La Fayette County, and a member of the board of county canvassers.

This witness swears that at New Troy precinct, which is one of the two precincts counted, there were at least 42 votes cast and counted out for the sitting member; a fact he knows from having been present at the counting of the vote, and yet by the return every vote is given to contestant.

The same facts, in substance, are shown by the evidence of Redden B. Hill, another member of the board of canvassers. (See pages 11 to 14, inclusive, of evidence.)

Other objections are raised to this return, but they need not be considered, for this testimony successfully impeaches it, and shows that it is tainted with fraud, and must therefore be rejected.

We are left, then, to the inquiry, what votes have been proven by evidence outside of this return?

Upon looking into the evidence upon this point, we find that there is no proof whatever as to the actual state of the vote at the precincts of New Troy and Summerville, which are the two which purport to have been included in said return, except the proof already mentioned, that the sitting member received at New Troy at least 42 votes. The vote of these two precincts, in which contestant claims 152 votes, must therefore be rejected, because the return is shown to be void for fraud, and no secondary evidence is offered to take its place.

It is suggested by counsel that we might allow the 152 votes which, according to this return, were cast for contestant, and also allow the sitting member the 42 votes which are shown to have been cast for him and not returned. But the committee hold, that it having been shown that the return is fraudulent and false in a matter so material as the suppression altogether of the whole of the sitting member's vote, it cannot be received for any purpose.

The contestant cannot complain of this ruling, for he took the testimony of several of the election officers of this county, and had notice of the fraudulent character of these returns, and yet chose to rely upon them, and failed to inquire of a single witness as to the actual vote of these precincts.

Testimony has been taken to show the actual vote in the three precincts rejected by the canvassers, and with the following result:

	Niblack.	Walls.
Cook's Hammock precinct	16	None.
California precinct	18	None.
Governor's Hill precinct	34	None.
	68	

As counsel for the sitting member concedes that there is sufficient proof of these votes, we need not refer to the evidence.

MANATEE COUNTY.

The returns from this county were thrown out for the following reasons:

1st. Because the returns made by the county board, which, by the statute, are required to be duplicates, are not such. One return states that the board met and canvassed the votes "on the 29th day of November, 1870," while the other states that the board met and canvassed the vote "on the 1st day of December, 1870," and the former is dated November 29, and the latter December 1.

2d. Because the vote of said county was not canvassed and the returns

made out and forwarded to the State officers authorized to receive them within twenty days from the day of election, as required by statute.

3d. Because said returns were not forwarded by mail, addressed to the secretary of state and governor, as expressly required by statute, but were in fact sent in an envelope addressed to contestant, by a private messenger, and delivered to, and opened by, one W. H. Pearce, of Polk County, who afterward placed it in the hands of the board.

These objections were considered by your committee at the last session of Congress, and it was considered by the committee very desirable to obtain more reliable evidence as to the actual vote cast in this county.

It was thought that it would be unsafe to establish a precedent of accepting as evidence a return which, instead of being transmitted from the county to the State board by mail, as the law requires, was sent by the hand of a private individual, and by him delivered to one of the candidates, to be by him delivered to the State board.

Accordingly, your committee recommended, and the House, on the 29th of May last, adopted the following resolution:

"*Resolved*, That the contested election case of Niblack *vs.* Walls be continued until the next session of this Congress, and that in the mean time the parties have leave to take further evidence as to what was the true vote cast in the counties of Brevard and Manatee, and Yellow Bluff precinct, in Duval County, and also as to whether the election in said counties and in said precinct was conducted fairly and according to law."

Under this resolution the sitting member has taken no evidence, but the contestant has called and examined E. E. Mizell, county judge, and John F. Bartholf, clerk of Manatee County, and who were two of the three canvassing officers for that county.

These witnesses each identify a paper shown them as a true copy of the return as made out by them as canvassing officers.

The copy is identical with the return which was rejected by the State board, the difference of one day between the dates of the two papers filed as duplicates, being considered immaterial.

This evidence seems to be sufficient to show that the returns from this county were not tampered with, and that, notwithstanding the irregular and illegal mode adopted for their transmission from the county, to the State board, they are in fact correct and reliable.

This return is also certified (as well as sworn to) by the clerk of the county, who, by the statute of that State, is the legal custodian of the original record of the canvass.

The vote of this county should therefore be counted.

BREVARD COUNTY.

The statute of Florida requires that the returns shall be signed by the judge of the county court, the clerk of the circuit court, and one justice of the peace.

The return from this county relied upon as proof of the vote of the county is signed by but one of these three officers, the county judge.

The committee are of opinion that where the law requires the certificate to be made by three officers, a majority at least must sign, to make the certificate evidence.

This is not a merely technical rule; it is substantial, because the refusal or failure of a majority of the board to sign the return raises a presumption that it is not correct.

It is fair to infer that if it had been free from objection a majority of the board at least would have signed it.

It is enough, however, to say that the law requires the certificate of the three officers, and all the authorities agree that at least two must certify or the certificate is inadmissible.

Although leave was given at the last session to take further evidence with regard to this county, none has been taken.

We hold, therefore, that it was the duty of the contestant to have proven the vote of the county by competent evidence, and as he has not done so the votes alleged to have been cast therein, to wit, 30 for Niblack and 3 for Walls, cannot be admitted.

GADSDEN COUNTY.

The sitting member claims that33 legal voters offered to vote for him at Quincy, in Gadsden County, and that they were prevented from so doing by fraud, violence, or intimidation, and he asks that their votes be counted as if cast for him.

We are satisfied from the evidence that there was an organized effort on the part of the friends of contestant to prevent a full vote being cast at this poll for the sitting member, and that it was partially successful.

This conspiracy was carried out by creating a disturbance at the election by threats of violence and the exhibition of deadly weapons, and particularly by crowding about the polls in such numbers as to prevent many colored voters from reaching the polls to deposit their ballots, and with this intent.

This conspiracy was led by one A. K. Allison, or at least he was conspicuous in it, and for his connection with it he has since been indicted by a grand jury, and tried and convicted before a jury on the charge of conspiracy with others to prevent certain citizens from exercising their right to vote, and of carrying out such conspiracy by threats, violence, and force.

It is insisted on behalf of contestant that the only remedy for violence and intimidation practiced at an election is the rejection of the poll or polls at which the violence occurs.

This remedy in the present case would only add to the injury, inasmuch as the sitting member received a majority, and this shows the necessity for some other remedy.

This is to be found in the rule, which is well settled, that where a legal voter offers to vote for a particular candidate, and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote should be counted.

The principle is that the offer to vote is equivalent to voting.

We find in the record of the testimony of twenty-nine witnesses, each one of whom testifies that he offered to vote for Mr. Walls and made the proper effort to do so, and was prevented.

See pages 71 to 90, inclusive, of the evidence. We are of opinion that these twenty-nine votes should be counted for the sitting member.

FORT OGDEN.

Under the leave granted by the House, the contestant has also proven the vote of Fort Ogden precinct in Manatee County, (rejected by county canvassers,) to wit: thirty-nine votes for contestant, and these must also be counted for him.

Votes proven.

It is conceded also that contestant has proven the following votes, which were cast in Duval County and not included in the county returns:

	Niblack.	Walls.
Mayport precinct	28	8
Baldwin precinct	30	4

LAKE CITY, COLUMBIA COUNTY.

The sitting member asks that the vote of City Hall precinct, at Lake City, Columbia County, be rejected upon the ground of intimidation and violence. We do not find any allegation in the answer which covers this point; but, waiving this consideration, let us look into the evidence.

It does not appear that there was actual violence at the polls.

All the voters of the county were required to vote at Lake City, and as some of them had to travel a long distance to reach that place, a large number assembled there the night previous to the election, and on that night there was a disturbance, which occurred as follows:

The colored people held a meeting, and after its close they formed in procession and marched through the streets. In the course of this march they came in collision with a crowd of white people. Much harsh language was used, and a personal conflict between a colored and a white man ensued. This, however, was of no great consequence, and was very soon quelled, when the procession moved on its way. After this there was some firing of guns—probably commenced by some one firing upon the procession—wounding one of the colored men slightly. A number of shots were fired by both parties, but no one except the colored man above mentioned was injured. By the efforts of the better class of citizens, both white and colored, this disturbance was speedily quelled. It is thought by some of the witnesses that a number of voters, principally colored men, were afraid to go to the polls on election day because of these disturbances of the previous night; but as to the number of persons thus deterred, and as to what, if any, efforts they made to exercise their right, the evidence is wholly unsatisfactory. One witness puts the number at "several," while another estimates it at forty. The number who were intimidated (with or without sufficient reason) was evidently not so great as to justify the rejection of the entire poll. By the use of proper diligence the sitting member could have called the voters themselves, or some of them, and could have thus shown their number and the facts as to their intimidation and offer and efforts to vote.

In this case, as in the recent case of Norris *vs.* Handley, the proof of intimidation being unsatisfactory, we deem it proper to refer to the report of the Census Bureau for 1870, for the purpose of determining whether an unusually large proportion of the voting population have failed to vote. From this source we learn that in a population of 1,397 male citizens over the age of 21 years in Columbia County, 1,181 votes were cast, leaving but 216 who did not vote. This is an ordinarily full vote, as will be seen by reference to the statistics of elections; and it leaves but a small margin, if any at all, over and above the number who habitually fail or neglect to vote. At all events, it is perfectly clear that, in view of the finding of your committee upon other points in the case, the small number of votes which, by an extremely liberal construction of the evidence, might be excluded on the ground of intimida-

tion at this poll, cannot affect the result. If we allow 10 per cent. of the whole voting population as the number who remained away from the polls for ordinary causes, there will remain but 77 persons who could have been kept away by fear.

JACKSON COUNTY.

There were disturbances at the polls in Marianna, where three polls were opened, and where the whole county voted. One or two personal collisions occurred, some harsh language was used, and some persons were, doubtless, frightened away; but as to the number who left, and as to whether they left without voting, and as to the candidate for whom those who left without voting intended to vote, the evidence is wholly unsatisfactory. Several witnesses are called on the part of the sitting member, who testify that, in their opinion, from 100 to 200 colored persons were deterred from voting; but this is a mere conjecture, and the census, already referred to, shows that it is wholly incorrect. By the census report of 1870, it appears that at the time the census was taken (which was but a short time prior to the election) there were in the county of Jackson 1,879 male citizens over the age of twenty-one years, and the returns before us show that 1,752 votes were actually cast, leaving only 127 voters who failed, from all causes, to exercise their right. This is an exceedingly small percentage, being less than ten per cent., and shows conclusively that the allegation that some 400 voters were intimidated, and thereby deprived of the privilege of voting, is not true. On the contrary, we must conclude, in view of the unusually large vote polled, that nothing can be deducted from the vote returned for the contestant on the ground of intimidation in this county.

Having now considered all the material questions presented, it remains only for us to sum up the result, as determined by the foregoing views, which is as follows:

	Niblack.	Walls.
Canvassed vote	11,810	12,439
Suwannee County	318	230
Taylor County	177	.....
Calhoun County	101	62
Sumter County	314	60
Manatee County	153	.....
Monroe County	359	428
Cook's Hammock	16	.....
California	18	.....
Governor's Hill	34	.....
Mayport	28	8
Baldwin	30	4
Gadsden County	.....	29
Fort Ogden	39	.....
	13,397	13,260

Majority for Niblack, 137.

Your committee, therefore, recommend the adoption of the following resolutions:

Resolved, That Josiah T. Walls is not entitled to a seat in this House from the State of Florida.

Resolved, That Silas L. Niblack is entitled to a seat in this House from the State of Florida.