Contested Election Case

JOHN J. CARNEY, CONTESTANT,

VS.

DICK T. MORGAN, CONTESTEE.

SECOND CONGRESSIONAL DISTRICT OF OKLAHOMA.

BRIEF OF CONTESTEE.

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I. Statement.

This case comes before this Committee by reason of a contest instituted by John J. Carney, as contestant, against Dick T. Morgan, as contestee, for the purpose of ousting the contestee from his seat in the House of Representatives from the Second Congressional District of Oklahoma and seating the contestant therein.

The contestant admits that the State Election Board canvassed the returns from the various counties composing the district as received by them and determined therefrom that the contestee had received a plurality of 663 votes over the contestant and that it issued to the contestee the certificate of election as member of Congress from said district. The contestant, by a failure to introduce any evidence in denial thereof, also admits that, by the wrongful acts of the Blaine County Election Board, the contestee was defrauded out of a plurality of 228 votes, and that thereby the contestee's real plurality is 891 votes.

The contestant claims that the amendment to the Constitution of the State of Oklahoma, com-

OUTLINE OF ARGUMENT.

I. Statement.

II. Contestee is entitled to have added to his admitted plurality of 663 votes, as determined by the State Election Board a plurality of 228 votes from eleven precincts in Blaine County.

III. The Grandfather Law was strictly enforced in all precincts where negroes voted.

IV. No intimidation is shown sufficient to justify throwing out the vote in any precinct.

V. No fraud is shown to justify throwing out the vote in any precinct.

VI. No showing for whom negroes voted, but if entire negro vote were deducted from contestee's vote, he would still have a plurality of from 113 to 169 votes.

VII. If the vote in all of the precincts in which negroes voted, and in which fraud and intimidation are claimed were thrown out, the plurality of contestee would still be 448 votes.

VIII. The claims of the contestant are not supported by the evidence.

IX. The adoption of the Fourteenth and Fifteenth Amendments to the Constitution of the United States is not in issue.

X. Conclusion.

II. Contestee is entitled to have added to his admitted plurality of 663 votes as determined by the State Election Board, a plurality of 228 votes from eleven precints in Blaine County.

It is the contention of the contestee that the committee, in its consideration of this contest, should take as a basis therefor a plurality for the contestee of 891 votes, rather than the plurality of 663, as admitted by the contestant. It is conceded by the contestant that the contestee's plurality was 663, as is shown by his allegations in the second paragraph of the contestant's notice of contest to the effect that upon a canvas of the returns the State Election Board determined that the contestant had received 23,671 votes, and the contestee 24,334 votes, which figures give to the contestee a plurality over the contestant of 663 votes. The contestee asks that this committee and the House of Representatives add to this plurality of 663 votes, a plurality of 228 votes, same being the plurality which the contestee received over the contestant in 11 precincts in Blaine County in said district, the vote in which precincts were by reason of the fraud of the two Democratic members of the County Election Board, not returned

monly known as the "Grandfather Clause" was not enforced in a few precincts.

The contestee claims that this Grandfather Clause was strictly enforced and that the election was so conducted that the contestee's plurality of 891 should stand.

That the failure to thus include the vote in these precincts in their certificate to the State Election Board and that the fraudulent and wrongful acts on the part of the two Democratic members of this County Election Board resulted in a change in the county's vote from a plurality for the contestee, to a plurality in favor of the contestant and a loss to this contestee of a plurality of 228 votes, is shown beyond all doubt.

As a preliminary to quoting the evidence to this effect, we want to fix firmly in the minds of this committee the system of organization of the various election boards in the State of Oklahoma on the day of the election. As is shown in the record at the bottom of page 168 and top of page 169 the Governor, who was a Democrat, appointed three members of the State Election Board, two of whom were Democrats. This State Election Board appointed three members of each County Election Board, two of whom were Democrats, the County Election Board appointed three members of the precinct election board, two of whom were Democrats, and there were usually four counters, at least two of whom were Democrats. It will be thus seen that at all stages of the elec-

to the State Election Board and were not considered by the latter in its determination that the contestee had received a plurality of 663 votes. This being done, the contestee has a plurality of 891 votes.

Evidence to the following effect is clear and convincing: That after the County Election Board of Blaine County had canvassed the returns from all of the precincts in the county, that after the certificate to the State Election Board of the vote in all of the precints in the county had been once correctly prepared and had been signed by one of the officers of the County Board, that after an envelop to contain the same was addressed, the two Democratic members after conveying the impression to the Republican member that the work of the board was done, thus securing his absence from the county seat, withheld the returns for 6 days, went to Oklahoma City, consulted with certain state officials and politicians and Mr. Gould, the campaign manager of the contestant, returned to the county seat, and in the absence of the Republican member of the board, prepared a new certificate of the vote in the county, omitting therefrom a statement of the vote in 11 precincts of the county.

Proceeding, he says at pages 148-149 of the record:

Q. What occurred after this tabulated sheet had been prepared and signed by Mr. Mosely?

A. Mr. Mosley went to the typewriter, he addressed an envelope to the State Election Board at Oklahoma City and said to Mr. Hogan that he would like for him to sign up this evening, as he wanted to adjourn and get this business concluded, to which Mr. Hogan objected for the reason that we had not counted the mutilated ballots and I said that I had never seen any record of any mutilated ballots. We went thru the returns handed in by the inspectors and found no record of any mutilated ballots, but found a record of 29 spoiled ballots. Mr. Hogan also objected to signing the tabulated sheet to be sent to the State Election Board until he heard from Oklahoma City by telephone message. We adjourned and then I went home. The other members said they were going home and I also told them I was going home.

Q. Did they say—either one of the other members of the election board—say any thing to you about the work being done and being thru, except signing up by Mr. Hogan?

A. Mr. Mosley did.

Q. Did Mr. Mosley tell you from whom he was expecting a telephone message from Oklahoma City?

A. Said Mr. Hogan was expecting one from Mr. Gould, Mr. Carney's manager.

tion held on November 5, 1912, the entire election machinery was in the hands of the Democratic party, of which party the contestant was a candidate.

It would thus appear that if there was any advantage as between the contestant and the contestee, with respect to the conduct of the election, it lay on the side of the contestant.

Now let us see what actually took place in Blaine County:

W. C. Broady, at pages 147 to 150, testifies as follows: That he was at the time of the election and thereafter the Republican member of the County Election Board of Blaine County; that this board met on the evening of November 5, 1912, and reconvened on the morning of November 6, 1912, and met again on November 7th; that while in session they received and tabulated the returns from all the voting precincts in the county including those from the eleven precincts in question; that they finished tabulating the returns of the state ticket and making out the report thereof to the State Election Board in the afternoon of November 7th; that Mr. Mosley signed the tabulation and certificate.

Canton, precinct No. 23; Arapahoe, precinct No. 8; Watonga, precinct No. 20; Cedar Valley, precinct No. 6; East Dixon, precinct No. 9; West Dixon, precinct No. 28; West Lincoln Township, precinct No. 10; East Lincoln, precinct No. 30; Logan, precinct No. 12, and Flynn Township, precinct No. 13.

Q. Did they say anything to you about where they had been since the board had adjourned on the 7th of November, 1912?

A. Yes, sir; they said they had received notice to come to Oklahoma City and they went.

Q. Did they say to whom they had talked there?

A. Said they talked to Attorney General West, Gov. Cruce, Mr. Harrell, the Democratic chairman; Mr. Riley, secretary of the State Election Board; also Mr. Gould, and they were ordered to come back here for an investigation. They came back, made an investigation and went back to Oklahoma City.

* * * * * * * * * * *

Q. What other conversation did you have with either Mr. Mosley or Mr. Hogan concerning the throwing out of these eleven boxes or the vote in these 11 precincts?

A. Mr. Mosley said the reason that they didn't notify me was because they wanted to get ahead of mandamus proceedings. If they told me, I would tell what went on.

* * * * * * * * *

Q. Did they say anything about making up a new tabulated statement to send to the State Board?

Q. Do you know whether or not Mr. Hogan had been telephoning to Mr. Gould before that time?
A. He had been phoning to Oklahoma City, but I could not say whether or not he talked with Mr. Gould.
Q. Did you go home on the evening of the 7th?
A. Yes, sir.
Q. When next did you return to Watonga?
A. On the next Wednesday, the 13th.

* * * * * * * * * * *

Q. When did you return home?
A. On the 5:35 train that evening.

* * * * * * * * * * *

Q. When next did you return to Watonga?
A. The next day—the 14th.
Q. What did you do when you returned to Watonga on the 14th?
A. I went to the Court House.
Q. Did you again try to enter the room that had been used by the county election board?
A. Yes, sir.
Q. What all did you do that day?
A. I found the members in the County Treasurer's office.
Q. State what conversation you had with them at that time?
A. Well, I asked them to go down to the election board's office, which they did, and they told me they had thrown out 11 voting precincts.
Q. What precincts did they say they had thrown out?
A. Had thrown out Carlton, precinct No. 29;

Watonga, Okla., Nov. 8, 1912.
The official returns as shown after 11 precincts were thrown out on account of the election law not being enforced, leaves the official returns as follows:

Carney 814
Morgan 772

T. W. Mosley.

W. C. Broady, at pages 173-175 identifies the sheet or tabulation which he testifies was made out by himself and Mr. Mosley on November 7th and which shows the vote of all of the precincts in Blaine county, the same being Exhibit A shown at pages 181 and 182 of the record. This shows a total vote in this county as between the parties hereto as follows: Carney, 1171; Morgan, 1351, differing from the record made by the County Board on its minutes by only one vote.

Ben W. Riley, secretary of the State Election Board, (Record, 175-177), identifies "Exhibit B," shown at pages 184 and 185 of the record as the return of the Blaine County Election Board received by the State Election Board; that in casting up the total vote received by the parties hereto the State Election Board used this return

A. I think they said they had made out a tabulated statement with 11 precincts not shown.

Mr. E. H. Lookabaugh at pages 151-152 of the record testifies as to conversation had with Mr. Mosley and Mr. Hogan in which they stated they had made up a new certificate and tabulation, omitting the vote in these eleven precincts and had sent it in to the State Election Board, and Mr. Seymour Foose at pp. 153-154 of the record, after testifying substantially the same as Mr. Lookabaugh, testified as to a copy he had made on November 13, 1912, of entries shown on the minute book of the Blaine County Election board which so far as they relate to the issues herein are as follows:

> Watonga, 6-12.
>
> The Blaine County Election Board met for the purpose of receiving the returns from the various precincts of the county and to make an official count of the returns:
>
> Morgan, Dick 1351
> Carney, J. J.....1171
>
> 180

step was to rid themselves of the Republican member of the board by leading him to believe they considered the work of the board finished. Then acting upon a telephone message from Oklahoma City they went to consult with certain Democratic politicians, among whom was Mr. Gould, the campaign manager of the contestant herein. They return to make an investigation, to act in a judicial capacity and to do an act which, on its face, was a wilful misrepresentation and a fraud upon this contestee, to-wit: Make a return to the State Election Board which failed to speak the truth. Could a clearer case of conspiracy be made out to defraud a candidate out of his rights? As to how high up this conspiracy went, as to who all was implicated, we express no opinion, but as to these two Democratic members of this County Election Board we think it clear that they were guilty of a conspiracy to defraud this contestee and in pursuance thereof certified false and untrue returns to the State Election Board.

As contestant in his brief at page 39 thereof says: "The duty of the injured party in such an instance, is to appeal to the courts for redress, or in a Congressional election to the committee on Elections."

which omitted the vote in these eleven precincts and took no account of the vote therein. The committee will note that "Exhibit C" is not in the record but it is identical with "Exhibit B" in showing the precincts in which the vote is missing.

Contestant in his brief at pages 38 and 39 thereof says: "We call your attention to the elementary proposition of law that neither the county election board nor the state election board had judicial powers, that each had to take the returns as sent to them by the precinct election officials * * *. All lawyers know that election officials merely act in a ministerial capacity in the count and canvass of the returns." We believe this to be the true rule, and from this it is clear that these two Democratic members of the Blaine County election board went beyond their authority in failing to return to the State Election Board the vote in these eleven precincts. And the surrounding circumstances show that they are guilty of an even greater offense than merely exceeding their authority. It shows that they conspired together to cheat and defraud this contestee out of his lawful plurality in that county. Their first

vote as compiled from the original returns from these eleven precincts:

TOWNSHIP.	Precinct.	6	8	9	10	12	13	20	23	28	29	30	
Cedar Valley	As shown by the first tabulation made by the County Election Board	Carney	30	27	39	45	52	13	48	55	25	13	10	357
		Morgan	39	47	39	39	80	22	89	104	39	51	30	579
Arapahoe	As shown by the returns from each Precinct	Carney	30	27	33	45	52	13	48	55	25	13	10	351
East Dixon		Morgan	39	47	39	29	80	22	89	104	39	51	30	579
West Lincoln														
Logan														
Flynn														
Watonga														
Canton														
West Dixon														
Carlton														
East Lincoln														
Total Vote														
Morgan's Plurality														

The contestee herein was the injured party and in accordance with the advice of contestant, appeals for redress to this committee, and we respectfully ask this committee to award to this contestee such redress as the above evidence warrants.

We believe that the showing of the vote as canvassed by the County Election Board, "Exhibit A," pages 181 and 182 of the record, is conclusive evidence of the vote in these precincts, but that there might be no question as to the vote and that there might be no question as to the conduct of the election therein, the contestee took the evidence of the precinct election officers in these eleven precincts, identifying the returns from each one made by them to the Blaine County Election Board, which evidence is set out at pages 107 to 146 of the record.

Contestee herewith presents for the consideration of the Committee a table showing the vote as between the contestant and contestee as shown first by the return made out by the County Election Board of Blaine County on the second day after the election and before these eleven precincts had been thrown out, and second, the same

it to have been wrongfully done in certain particulars and not by counting the vote in these eleven precincts, so, for the purpose of these matters the contestant's plea as above set forth may now be taken as true, and if to the above vote there be added 351 votes for the contestant and 579 votes for contestee we have the true returned votes as follows:

Carney . .....23671+351=24022
Morgan .....24334+579=24913

giving Morgan a plurality of 891.

In other words when the committee and the House of Representatives begin their investigation of this contest, the first thing to be done is to add to the plurality of the contestee of 663 votes as determined by the State Election Board, the plurality of the contestee in these eleven precincts of 228 votes. And all computations must be made with a plurality of 891 votes in favor of the contestee.

It will be noted that the only variation in the vote gathered from these two sources is in East Dixon Township, Precinct No. 9, where the former gives Carney 39 votes and the latter 33 votes. In other words, the former gives Morgan a plurality in these eleven precincts of 222 votes, while the latter, which in all probability are correct, the former having been copied from the latter, gives the contestee, in these eleven precincts, a plurality of 228 votes.

As we have shown above, the State Election Board determined that the contestee had received a plurality of 663 votes over the contestant; that in so doing they did not use or count the vote in these eleven precincts in Blaine County. So to determine the true plurality of the contestee over the contestant, there should be added to the 663 plurality of this contestee the plurality of 228 votes for the contestee in these eleven precincts, which give this contestee a rightful plurality of 891.

Or it may be computed in this manner: The contestant pleads that the State Election Board determined that the contestant received 23671 votes, and the contestee 24334 votes. To be sure, he says this was wrongfully done, but he claims

In short, all negroes must have the qualification of being able to read and write any section of the State constitution. Note that it does not say that every negro, each time he presents himself to vote, shall actually read and write any section of the State Constitution, nor does it place upon the inspector the duty of requiring such a test.

If an inspector had tested a negro in the Primary in August next preceeding the election and found that he was able to read and write, there could be no object in requiring him to put such a test again. Or, if an inspector had known a negro for a number of years, had transacted business with him, surely it would be an idle ceremony to have this negro go thru the formality of reading and writing on the day of the election. Or, if an inspector had during the registration in July, preceding the election, tested a negro as to his ability to read and write, before giving him a registration certificate, this law does not contemplate that this test should be again applied at the general elction. In short, it is the possession by the negro of the qualification of being able to read and write that entitles him to vote. And it is the contention of the contestee that with

III. The Grandfather Law was strictly enforced in all precincts where negroes voted.

It is the contention of the contestee that the Grandfather law was enforced according to its letter and spirit in every precinct in the district and in order that it may be clearly shown, not only that the evidence introduced totally fails to prove the contestant's assertions, but, that on the other hand it proves beyond all doubt that, with the exception of fifteen votes in Luther Township, the Grandfather Clause was strictly enforced in every precinct in the district, it becomes necessary to review the evidence introduced on this point.

As a preliminary to this examination we may say that under the terms of this Grandfather Law all persons and the lineal descendants of all persons who were not on the 1st day of January, 1866, or at some time prior thereto entitled to vote under some form of government or who did not at that time reside in some foreign nation, would not be entitled to vote unless they could read and write any section of the Constitution of the State of Oklahoma. It also placed the enforcement of this law in tre hands of the precinct election officials.

even with the strict enforcement of the Grandfather law as shown by the evidence, he was elected by a plurality of 891 votes, and the contestant not having shown how the 15 negroes in Luther Township voted, there has been no evidence whatever offered by the contestant to overcome this plurality. We ask the committee to give their careful consideration to the following extracts from the evidence, keeping in mind that the evidence as to the conduct of the election in Oklahoma and Canadian Counties and the greater part of Blaine County, are all from those who are of the same political faith as the contestant and who therefore have in all probability favored him so far as the actual facts would allow.

With respect to the election in Dewey Township, Oklahoma County, see the testimony of W. I. Davis, Inspector, at pages 33 and 34 of the Record, as follows:

Q. How many negroes besides Aleck Morgan and Joe Ashford wrote out such qualifications before you?
A. I can't tell you exactly to the number, but between 45 and 50.
Q. Now this 45 or 50; they all wrote out their qualifications and took the test?
A. In writing; yes sir.
Q. Did you require them to read any part of the constitution?
A. Those that wrote, I did.

the exception noted above, every negro who voted in this election was able to read and write a section of the Constitution and that this qualification was shown by the fact that every negro was either, (1) tested on the day of the election, or (2) presented a registration certificate, which in itself is *prima facie* proof that he was qualified or, (3) had been tested by the inspector at the primary held in August preceeding the election or in the general election of 1910 and was passed by the inspector on the day of the election by reason of his having passed the test satisfactorily at such prior elections, or, (4) the fact that his being able to read and write was a matter of such common knowledge in the precinct in which he offered to vote, or of personal knowledge by the inspector that the inspector passed him without the test.

And the contestee claims that if the evidence submitted by the contestant shows this to be the case, then the letter and the spirit of the Grandfather Clause was observed, the election was fairly held, and the contestant has failed to evercome the plurality of 891 votes given to the contestee and the election of the contestee should stand. In other words, this contestee claims that

A. Didn't ask them to.
Q. Now as regards Brice, what do you say he does?
A. He was a school teacher.
Q. You didn't ask him to qualify?
A. No; I didn't.
Q. J. B. Smith—did you ask him to qualify?
A. Yes; and the clerk of the election board vouched for him. I didn't know the man and didn't know whether he could read and write; so he vouched for him being able to read and write; and he voted.

Regarding the same Township, see testimony of T. J. Clark, pages 38, 39 and 40, of the record, as follows:

Q. You saw Mr. Davis testing these negroes, did you?
A. Some of them.
Q. You were in the same room?
A. Yes, sir.
Q. And he was testifying correctly when he said he tested about 40 negroes there?

Mr. Giddings: We object to that as calling for a conclusion of the witness.

Q. Answer the question.
A. I think Mr. Davis did not just understand that question, or else I have got it wrong. I didn't think Mr. Davis tested any of the negroes that day that he tested at the primary election; that is that he passed on at the primary election, except a few. That was my judgment; now I would not say positively, but that was my judgment of the way the thing was done.

Q. Now you say there were several who came to your voting precinct there—came in to the voting place and admitted that they could not vote?
A. That they could not qualify under the Grandfather Clause.
Q. That they could not qualify under the Grandfather Clause?
A. Yes, sir.
Q. Now, they didn't vote, did they?
A. There was two who presented themselves that attempted to qualify.
Q. And could not make it?
A. And admitted then that they could not make it.
Q. Now, were there any negroes in that precinct who voted, who did not qualify by writing some part of the Constitution of the State of Oklahoma?
A. Yes.
Q. How many were there?
A. I believe four.

* * * * * * * * * *

Q. And now there is four who voted without qualifying? Y. A. Watson—can he read and write?
A. Yes; he was a justice of the peace.
Q. Answer the question.
A. Yes.
Q. Now, W. H. Anderson, the school teacher; can he read and write?
A. He was vouched for, and a school teacher, and he was allowed to vote by being vouched for by one of the—
Q. You didn't require him to take the test?
A. No.
Q. You didn't require Y. A. Watson to take the tests?

will hurry things; we want everybody to vote.

* * * * * * * * * *

Q. I am asking you—were there any negroes there who voted on that day who can't read and write that you know of, and if so give their names?

A. I know lots of them who can't read their own writing after they write it.

Q. I am asking you; read the question.

(Question read.)

A. I would not; I don't know as I could give their names.

Q. Do you know of any?

A. I don't know—

Q. You don't know of any?

A. I know there was lots that I would not pass; when I was inspector, I didn''t pass them.

Q. But all you voted there you either know that they could read and write or they pass some sort of a test that day?

A. I guess so.

Q. That is right, isn't it?

A. I think they did.

* * * * * * * *

Q. Did they have some sort of table over there where Mr. Davis tested these negroes?

A. I think on the desks; it was in the school house.

Q. You, you noticed negroes over there writing and trying to copy the Constitution, didn't you?

A. Yes, sir.

Q. And copying it and handing in their papers to Mr. Davis?

Q. In other words your remembrance of it is—
A. I was pretty busy and didn't have much time.
Q. In other words your remembrance of it is that Mr. Davis passed those without testing whom he had tested in the last primary?
A. That is my judgment. I vouched for some myself, and he didn't test them I know
Q. Do you know Mr. Y. A. Watson?
A. Yes, sir.
Q. Was he tested?
A. No sir, I vouched for him.
Q. You vouched for him; you know that he can read and write??
A. I do.
Q. And W. H. Anderson?
A. I didn't for him.
Q. Do you know Mr. Anderson?
A. I know him when I see him.
Q. He is a school teacher out there?
A. I have heard he was; but I don't know it.
Q. This Mr. Brice, what are his initials?
A. I don't know him at all.
Q. Do you know J. B. Smith?
A. Yes, sir.
Q. Can J. B. Smith read and write?
A. Yes, sir.
Q. You vouched for him?
A. Yes, sir; if you will let me explain this, I can do it so you will understand what I mean. Davis told me anybody that we knew was all right; there was no use in putting them to the test—and he says that anybody that you know is all right and you let me know—they will go. It

went ahead and tested 10 or 15 negroes in accordance with the Grandfather Clause; is that right?

A. Yes, sir.

Q. And these 90 negroes who you didn't test, you didn't test them because you say you knew from previous experience or from your information of them that they could pass the test?

A. They had been voters before.

Also regarding Luther Township see testimony of B. B. Moore, Clerk of the Election Board, at pages 48, 49 and 50, of the record.

Q. Now, leaving out of consideration these 14 or 15—the remainder of the negroes who voted there that day were either qualified to vote under the Grandfather tests by reason of common knowledge, knowing that they could read and write or they were tested, were they not?

A. Yes, sir.

Q. So that at most there would not be more than 15 votes cast there who were not qualified to vote under the Grandfather Clause?

A. Not to my knowledge, there wasn't.

* * * * * * * *

Q. Lots of these negroes would have been qualified if it had not been for this circular on voting, wouldn't they—I say there were lots of negroes there who voted who would not have voted if you could have applied to them the qualification test?

A. With the exception of these 15 negroes the rest of them were passed all right. They passed the test we put to them.

A. Yes, sir.
Q. And he passing on them?
A. When I had time to notice anything I did.

Respecting Luther Township, Oklahoma County, see the testimony of Louis Vorel, at page 43 of the record:

Q. You say you tested and gave the tests prescribed by the Grandfather Clause to 10 or 15 negroes; is that right?
A. Outside of these 15 already mentioned; yes.
Q. Now, how did these 10 or 15 come out on their tests?
A. Very near all qualifying.
Q. How many did qualify?
A. Well, sir, I don't know. I am ready to say all of them.
Q. Now, there were 10 to whom you gave the tests there and they qualified, or 15 was it?
A. Yes, sir.
Q. And then there were, you say, 120 negroes voted?
A. About that many, yes sir.
Q. So there were 90 that voted without any tests who were qualified?
A. I think so; yes, as nearly as I remember. People that had been recommended in previous elections and voted, and some that we knew personally.

* * * * * * * * * *

Q. Now, Mr. Vorel, notwithstanding the fact that a paper similar to that heretofore in evidence as contestant's Exhibit A, you

all known by everyone—common knowledge there in the town that they were all able to read and write?

A. Generally known to the election officers, yes sir.

As to Choctaw Township, Oklahoma County, see evidence of Frank L. Kenyon, Clerk of the Election board, at page 54, of the Record:

Q. You say five or six negroes voted?

A. I said six or seven; there possibly might have been only five but the best of any knowledge was there was seven negroes voted out there.

Q. What was the names of those negroes who voted?

A. Oh, I could not attempt to remember them. I kept no record of it only on the stubs of the ballot.

Q. These negroes were allowed to vote by the inspector—passed by him, were they?

A. Those of them that qualified to readily read the Constitution and that could legibly write their names.

MR. MORGAN: They were allowed to vote?

A. Yes, sir.

Q. And none were allowed to vote except those who did pass the test?

A. No sir.

Respecting Oklahoma A Precinct, Oklahoma County, note the evidence of Morris S. Baker, Inspector, at page 56 of the Record:

Q. These negroes who did vote were tested, were they not?

Q. Was the test as it would have been had it not been for this circular?
A. I think so.

As to Luther City, see evidence of T. H. Ray, Inspector, at page 51, of the record:

Q. Those that voted could all read and write?
A. Yes, sir.
Q. You knew of your own knowledge that they could read and write without testing?
A. There was one of them tested—Jule Thomas.
Q. Jule Thomas was tested?
A. Yes, sir.
Q. The balance you know can read and write?
A. Yes.

Also as to Luther City, see testimony of H. E. Norman, Clerk of the Election Board, at page 52 of the Record:

Q. These five or six negroes out there were all qualified to vote, were they not, under the Grandfather Clause; that is, they can read and write?
A. Yes, sir; they can read and write.
Q. How many were tested that day?
A. I don't think they tested but the one on the Grandfather Clause. They possibly tested another one as to his residence. I think there was a question—
Q. The balance of the negroes who voted there, the five or six besides the one who was tested and who passed the test, were

to read and write a section of the Constitution?

A. I don't think so.

* * * * * * * *

Q. These negroes who did vote were all tested under the terms of the Grandfather Clause by the inspector?

A. Yes, sir.

As to Hartzel Township, Oklahoma County, see testimony of C. B. Jack, Clerk, at page 59 of the Record:

Q. Do you know whether of not these negroes who voted were qualified under the Grandfather Clause—that is, were they tested by the inspector, if you know?

A. Those that voted?

Q. Yes.

A. Every one of them was qualified, so far as we understood, under the Grandfather Clause.

As to the conduct of the election in Precinct 6 of Ward 2 in Oklahoma City, Oklahoma County, see the evidence of J. W. Sorrels, Inspector, at page 64 of the Record:

Q. Were there any negroes who voted out there who didn't have registration slips showing that they were registered voters of this city?

A. No.

Q. Then all of them had registration slips?

A. Yes.

* * * * * * * *

A. Yes, sir.
Q. By having them read and write—read or write the Constitution?
A. Yes, sir.

Respecting Crutcho Township, Oklahoma County, see the evidence of Frank Redding, Inspector, at pages 57 and 58 of the Record, as follows:

Q. You say there were 15 or 20 negroes voted?
A. I think there was something like that. I would not make a positive statement, because I didn't count them at the time.

* * * * * * * *

Q. Eighteen—I got it down as 15. These 15 or 18 negroes that voted were tested under the terms of what is known as the Grandfather Clause, were they?
A. Well, part of them were—that I had seen tested at the primary and knew by doing business with them—knew they were capable of reading and writing—were not tested.
Q. Speak louder, please.
A. The one I didn't know, I did, and the others that I have known for a number of years and had business with them and knew they could read and write, I voted them without the tests.
Q. You didn't test them and let them vote without the test, because you knew they could read and write?
A. Yes, sir.
Q. No negroes voted there who were not able

A. I don't think there was except—well, I don't remember as there was. Now, there has been—well, that wouldn't have any bearing in this case. I don't think there was that I know of.

Q. To the best of your knowledge, then, there was no negroes voted in Precinct 9, Ward 2, Oklahoma City, except they had registration certificates in due form properly signed?

A. I don't think there was. There was some of them there that had registration tickets that wasn't in due form that we didn't let vote.

Q. Now, did you understand, Mr. Lucas, that if a negro applied to vote in your precinct there on election day and had a registration certificate that it was your duty to test him under the terms of the Grandfather Clause?

A. Well, that was my understanding about it.

Q. That it wasn't your duty?

A. That it was my duty. Well, if I had any doubt that he wasn't a qualified voter, Mr. Morgan, it was my opinion that I had a right to test him.

Regarding Springer Township, Oklahoma County, see testimony of W. W. Barker at pages 76, 77 and 78 of the Record, as follows:

Q. Who was it tested the negroes, Mr. Lowp or yourself?

A. Mr. Lowp would test them when they asked for a ticket.

Q. What sort of test would he apply to these negroes who presented themselves?

Q. You knew if they had registration slips that they had qualified under the Grandfather Clause to get them, did you not?
A. Well, there was—I think that they are supposed to; yes.
Q. And notwithstanding the fact if a negro should apply to vote and had a registration slip you proceeded to test them again, did you?
A. I didn't give them—no, it would not be called a test. I made them write their names.
Q. They all wrote their names?
A. All that voted. There was one man came there that didn't have a registration certificate, and could not read or write, either.
Q. Did he vote?
A. No.
Q. You turned him down?
A. Yes.
Q. Any other negroes you turned down?
A. No; these are all.
Q. And you say they all, with the exception of this one, had registration slips?
A. Yes.
Q. In due form?
A. All of them had registration slips.

Regarding Precinct 9, Ward 2, Oklahoma City, Oklahoma County, see testimony of J. E. Lucas, Inspector in that Precinct, at page 65 of the Record:

Q. Mr. Lucas, did any negroes vote there, Mr. Lucas, except those who had registration certificates in Precinct 9, Ward 2?

them, and I don't think he missed any of them on that.

Q. Now, the negroes he knew could read and write from his previous experience with them—he didn't test them? Now, all the rest of the negroes who votes there that day were required by him to read, you say—that is right, isn't it?

A. No.

Q. That is what I understood you to testify—

A. No, I don't think he missed any of them much on the reading.

Q. He required all of them to read?

A. He might have passed one or two, maybe, but he was just as familiar with them—some of them were school-teachers, you know.

Q. Now, the rest outside of those school teachers—he had all of them read?

A. All of those who voted.

A. Yes; he would have them read; if they started off all right, he would tell them to stop.

Q. If they started to read, he would stop them?

A. Yes, just enough to convince him, is all.

Respecting Deep Fork Township, Oklahoma County, see the testimony of C. E. Burnsworth, Inspector of the Election Board, at pages 81 and 82 of the Record, as follows:

Q. Did you compel any of these negroes to read and write a section of the Constitution?

A. Not at the general election, but at the primary I did.

A. He would ask them if they could read and write.
Q. If they would say they could, would he pass them?
A. No; he generally put them under test.
Q. Put all of them under test?
A. And then he would pass them out—
Q. You say all the negroes who voted there were tested by Mr. Lowp according to the best of your knowledge?
A. Yes; I think they was.
Q. Did you turn any of them down?
A. No.
Q. But he did test them all?
A. Yes, sir.
Q. And had them write some part of the Constitution of the State of Oklahoma?
A. No; I think he had them to read, mostly.

* * * * * * * *

Q. You mean by testing them they would say yes, they could read and write, or something like that, and that would be about all the test that Lowp would apply to them?
A. If a man would tell he could read and write, Harry is like I am; he knows most of them; he has loaned them money and taken their notes, and he pretty nearly knows; he is pretty well posted.
Q. But he wouldn't apply the strict test of the Grandfather Clause to them?
A. No, no; he didn't have none of them to write, but reading—if he doubted a man could read, he would let him try it.
Q. Now, Mr. Barker, those whom Mr. Lowp knew could read and write—he didn't apply the test to those?
A. Well, as I told you, he would ask all of

Q. So you tested five?
A. I think it was five.
Q. And turned those down?
A. Yes, sir.
Q. And the balance of the negroes who voted, you knew them, and had tested them at the primary election?
A. Yes, sir.
Q. And let them vote? That is all.

It will be noted that we have presented above evidence of Democratic election officials in all of the precincts of Oklahoma County in which evidence was taken as to the qualifications of the negro voters; we have quoted the evidence of each witness, whose evidence is quoted by the contestant in his brief, and we have shown by contestant's own witnesses that this law, which he claims in his brief was not enforced, was enforced to the letter. It would seem that this would be conclusive, but that we may not be accused of not presenting all of the evidence, we will quote from the evidence of various precinct election officers in Blaine County, even though all of this evidence was given over the emphatic protest of the contestee that it was all the clearest sort of improper cross-examination:

As to the conduct of the election in Precinct No. 9, East Dixon Township, Blaine County, see

Q. At the general election, that is what I am asking about?

A. From the simple fact I had tested them at the primary and I knew.

* * * * * * * *

Q. Now, you say Mr. Burnsworth, you didn't compel all the negroes to read and write the Constitution at the last general election as a test?

A. No, sir.

Q. Because of the fact you had tested most of them at the primary and knew whether or not they could read and write?

A. Yes, sir.

Q. That is right. How many of this 70 that you say voted had been tested by you in the primary?

A. I could not say exactly.

Q. About how many?

A. Well, I put all—most all—of them to the test at the primary.

Q. And those that you had tested at the primary you didn't require the test of them at the general election in November, 1912?

A. Nothing; only I would just ask them the question, from the simple fact I remembered whether or not the test at the primary.

Q. Now, then, about how many negroes did you test at the general election?

A. I think it was five.

Q. What was the result of that test?

A. They could not read and write, and I refused them a ballot.

* * * * * * * *

Q. Now, who did this testing out there, Mr. Burnsworth?

A. I did it myself, most of it.

A. Yes, sir.
Q. Now, the remainder of the negroes who voted—how did you come to let them vote without testing them?
A. I think I was satisfied with their test in the election before.
Q. You were inspector before and had tested them?
A. Yes, sir.

Regarding Precinct No. 29, Carlton Township, Blaine County, see evidence of John McGee, Inspector in that precinct, at page 129 of the Record, as follows:

Q. Mr. McGee, what can you say in reference to negroes voting in your preinct, and about the test regarding their ability to read and write being applied to them?
A. I never did test them; this time.
Q. Now, just state, Mr. McGee, why it was you did not test them this time.
A. Simply because I tested them two years ago, and I thought that was sufficient.

Respecting the conduct of the election in Precinct No. 30, Lincoln Township, Blaine County, see the evidence of Henry Spreitzer, Inspector in that precinct, at page 133 of the Record:

Q. Did any of the negroes vote in your precinct?
A. Yes, sir.
Q. Do you know the number?
A. No, sir.
Q. Did you give them the test as to whether

the evidence of W. L. Beals, Judge of the Election Board, at page 114 of the Record:

Q. How many negroes voted without taking the test?
A. What test do you mean?
Q. I have reference to the test as to whether or not they were able to read and write any section of the State Constitution.
A. I think there were three.
Q. Why was the test not applied to these three?
A. The freedman act; their father was a white man.
Q. Is that what they claimed?
A. Yes, sir.
Q. The election officers just took their word for it, did they?
A. Yes, sir.

With respect to Precinct No. 9, East Dixon Township, Blaine County, see the testimony of R. G. Raycroft, Inspector, at page 117 of the Record, as follows:

Q. All of the negroes who voted except two were tested, were they not?
A. No, sir, I think not. There were about three or four that were not tested.
Q. Then, as I understand you, 7 of the 11 negroes were tested?
A. Six of the seven were tested as to their qualifications to read and write and the others signed affidavits.
Q. These affidavits you speak of were the affidavits referred to above where those negroes swore that their grandfather was a white man?

evidence before it, we present it here, as follows:

Q. I will ask you, Mr. Neff, if on that date, before negroes were permitted to vote, if they were tested as to their ability to read and write sections of the Constitution, as provided by the laws of Oklahoma?

A. I have given all the negro voters, with a very few exceptions, that test, but not on this date; but the negroes who can't make it, as a rule, are shy of coming to the polls. We turned, I think, two down that day that we didn't think could vote intelligently. That's the best of my recollection.

Q. Then, as I understand you, Mr. Neff, the laws of Oklahoma, as they existed at that time, applicable to negro voters, was not enforced in that precinct at the general election of 1912?

A. Well, we think that we enforced the laws.

Q. Well, before permitting those negroes to vote, did you require each and every one of them to read and write some section of the Oklahoma Constitution?

A. Not on that date, we didn't.

* * * * * * * * *

Q. Do you know of any negro having voted at that election who was not qualified under the law to vote at that time?

A. To the best of my knowledge there was not.

Q. To what extent were you informed as to the qualifications of the negroes that were allowed to vote? State fully.

A. Well, I personally did not think that it was necessary to put this test every time

or not they were able to read and write?
A. Those that I was in doubt of I did.
Q. Did any negro vote who was not able to read and write?
A. Not that I know of.

As to Precinct No. 20, Watonga Township, Blaine County, note the evidence of R. I. Temple, Inspector, at page 143 of the Record:

Q. Mr. Temple, did any negroes vote in your precinct?
A. Yes, sir.
Q. How many?
A. I do not know for sure.
Q. Give your best judgment.
A. Probably 20 or 25.
Q. Out of this number how many did you apply the test to concerning their qualifications under the State laws?
A. To all but two.
Q. Just state whether or not these two were able to read and write.
A. I think they were.

The evidence of Sherman Neff, Clerk in Precinct A of Ward Two of the City of El Reno, Canadian County, and that of H. D. Fortner, Inspector in the same precinct, was taken out of time, as a comparison of the date of the service of answer on the contestant and the date of the taking of this evidence will clearly disclose. But in order that the committee shall have all of the

> the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."

So, that when we seek for the qualifications of electors in the election held on the 5th day of November, 1912, we must look to the laws of the State of Oklahoma, and for the purposes of argument we shall consider this Grandfather Law as the law of Oklahoma, and that all negroes who vote should be required to have the qualifications prescribed by it. It reads as follows:

> "No person shall be registered as an elector in this State, or be allowed to vote in any election herein, unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto entitled to vote under any form of government, or who, at that time, resided in some foreign nation, and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution.
>
> "Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers when electors apply for ballots to vote."

Now, let us see what the courts of the State of Oklahoma have said in construing this law, in

> that these fellows wanted to vote, as I was acquainted with them and had given it to them once prior to that time—to most of them.

Note also the evidence of Fortner, as follows:

Q. Now, what test was required, as you understand it?
A. To be able to read and write a clause of the Constitution of the State of Oklahoma.
Q. Do you know that there was a negro voted at that election who could not do this?
A. No, sir.

A careful consideration of the above evidence can lead to but one conclusion, to-wit: that except for the 15 votes in Luther Township, every negro who voted in this election was a qualified elector.

The Supreme Court of the United States has held and indeed the Constitution of the United States provides that the qualification of a person to vote for member of Congress is the qualification which the State in which the vote is cast has prescribed as necessary to vote for member of the most numerous branch of the State Legislature. See the Constitution of the United States, Article 1, Section 2:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and

court discusses the question of the necessity of Blakemore's showing himself qualified to vote under the terms of the Grandfather Clause as follows at page 209 of the Record:

> "Under the statute the making and filing of the prescribed affidavits and not the person's qualification in fact entitle him to vote. This is not true of the Constitutional provision. Under that provision it is the fact of the possession of the qualification therein prescribed, and not the making and filing of an affidavit thereof which entitles to vote. No person, with certain exceptions, shall be registered as an elector or be allowed to vote in any election unless he be able to read and write any section of the Constitution is the language used; not that such person shall not be allowed to vote until he makes affidavit that he can read and write any section of the Constitution. And we have no doubt that the people initiating and adopting this Constitutional amendment did not contemplate or intend that the qualifications therein prescribed should be established, and that, in disputably and conclusively solely by the affidavits prescribed in Section 4 of the Act approved March 28th, 1910. We think under the Constitutional provision the election officers when it appears that the person offering to vote was not registered in October, and was not on January 1, 1866, or at some time prior thereto, entitled to vote under any form of government and did not on said date reside in some foreign nation, and is not a lineal descendant of such a person, in the absence of further legislation may lawfully apply to such person any reasonable test as to his ability to read and write a sec-

defining what it means in its actual operation, and its enforcement.

The case of *in re Show* (Okla.), 113 Pacific Reporter, is set out in full at pages 200 to 210 of the Record. It arose upon a writ of habeas corpus sued out by the defendant in a criminal prosecution for defrauding an election of his vote in that the said defendant, an inspector, had refused to allow one Blakemore to vote. The question presented was whether the defendant was guilty of a crime by refusing Blakemore the privilege of voting, it being admitted that Blakemore was within the prohibited class under the Grandfather Clause, that he was not able to read and write and his ancestors not being entitled to vote under any form of government on January 1, 1866, that he had been properly registered in July, 1910, and has presented to the defendant an affidavit prescribed in Section 4 of the Act approved March 28th, 1910 (Session Laws 1910, page 242), showing his qualification as an elector of the precinct in which he presented himself to vote, but which affidavit did not include a statement as to Blakemore's qualification of being able to read and write under the Grandfather Clause. This Grandfather Clause having been passed in August, 1910, the

This ruling has since been followed, and affirmed in the case of *Snyder* v. *Blake* (Okla), 129 Pacific 34.

> "Note that the Grandfather Clause does not say that no person shall be allowed to vote unless he actually reads to and writes for the inspector at the time he presents himself to

ERRATA.

Paragraph beginning "note that" and closing "allowed to vote" appears as a quotation by mistake.

> lowed to vote unless he be able to read and write any section of the Constitution. It prescribes a condition or state of being, not that certain things shall be done by him before he shall be allowed to vote."

And the Supreme Court of the State of Oklahoma in the Show case takes this view when it says "under that provision it is the fact of the possession of the qualification therein prescribed * * * which entitles to vote." And further on the Court says "if the election officers know that such person possesses the requisite qualifications they need not apply the test."

So the question of the alleged illegality of the votes claimed by the contestant to be illegal must be determined, not by whether the election officers

> tion of the Constitution. If the election officers know that such persons possess the requisite qualifications they need not apply any test. If they are satisfied from the person's affidavit that he can read and write any section of the Constitution, they may act upon that and permit him to vote. If they are not satisfied therefrom they may lawfully apply the ultimate test of requiring such person in their presence to read and write a section of the Constitution of not unreasonable length."

Respecting the right of the election officials to test an applicant when he presents a registration certificate, showing that he is duly registered, note what the same opinion says at page 210 of the Record:

> "On the other hand, if he had registered in October and duly presented his certificate of registration to the election officials when he applied to vote, in the absence of fraud in his registration, of which there is no legal presumption, he would have been entitled to vote; and if, under these circumstances, the petitioner (defendant in the criminal case and the inspector) had insisted upon applying to him the test alleged, intending under color and pretense of such test to defraud Blakemore of his right to vote, a right which, so far as the educational test was concerned had already been determined at the time and by the person designated by the amendment to determine it, such act would have constituted an offence."

This ruling has since been followed, and affirmed in the case of *Snyder* v. *Blake* (Okla), 129 Pacific 34.

> "Note that the Grandfather Clause does not say that no person shall be allowed to vote unless he actually reads to and writes for the inspector at the time he presents himself to vote any section of the Constitution of the State of Oklahoma. Nor does it say that the precinct election officers shall, before they allow a person to vote, require him to read and write any or some section of the Constitution. It merely says that no person shall be allowed to vote unless he be able to read and write any section of the Constitution. It prescribes a condition or state of being, not that certain things shall be done by him before he shall be allowed to vote."

And the Supreme Court of the State of Oklahoma in the Show case takes this view when it says "under that provision it is the fact of the possession of the qualification therein prescribed * * * which entitles to vote." And further on the Court says "if the election officers know that such person possesses the requisite qualifications they need not apply the test."

So the question of the alleged illegality of the votes claimed by the contestant to be illegal must be determined, not by whether the election officers

the "Grandfather Clause." Not only that, but every witness placed on the stand testified affirmatively that in all cases where the inspector was not satisfied beyond all doubt that a negro possessed the necessary qualifications, an actual test was applied sufficient to satisfy him that the qualifications of the voter were up to the standard set by both the letter and the spirit of the Grandfather Clause. It is not claimed by the contestee that each inspector tested each negro on the day of the election by actually requiring each negro to read and write some section of the State Constitution, but the contestee does claim that the evidence, given, a greater part of it, by partisans of the contestant, shows that every negro voter, with the above exception, was either (1) tested on the day of the election, (2) was duly registered, (3) has been tested by the inspector at the primary held in August, 1910, or at some previous election and was allowed to vote by the inspector because of such satisfactory test at such time, or (4) the fact of the possession of the qualification of the voter was a matter of such common knowledge in the precinct in which he voted, or was a matter of such personal knowledge to the inspector that the inspector allowed him to vote without any test whatever.

in those precincts did on the day of the election actually require the negroes who voted to actually read and write some section of the Constitution, but upon whether the negro did actually possess the qualifications prescribed in the Grandfather Clause. In other words, the test is not whether the election officials required them on that day to read and write, but whether they were able to read and write.

And the rule is that if the inspector is satisfied that the voter who presents himself to vote is qualified to vote, and he does allow the voter to vote, then the burden of proving that the voter did not possess the necessary qualifications rests upon the one who alleges it. In other words, when the inspector is satisfied that the elector is qualified and expresses his decision to that effect by allowing the elector to vote, then this makes out a *prima facie* case of the qualification of the elector, and the burden is on the other party alleging the lack of qualification to prove the same.

And in the case at bar, with the exception of the fifteen votes in Luther Township, there was not a line, a word or a syllable of evidence offered or given to rebut this presumption that every negro who voted in this election was qualified under

IV. No intimidation is shown sufficient to justify throwing out the vote in any precinct.

We do not question the correctness of the rule of law as quoted from 10 A. & E. page 776 in contestant's brief at the top of page 43. However, it has no application to the facts of our case. There is a great difference between intimidation which prevents persons from voting and that which has the effect of allowing them to vote. In the first case the courts will go to great length to throw out the entire poll because it is impossible to determine just how many were prevented from voting. A large number may testify that they would have voted if they had not been prevented by intimidation when on the day of election they had no idea of trying to vote. The courts take cognizance of this unsatisfactory evidence and realizing that the question of what the vote would have been is often one impossible of determination, throw out the entire poll. But when the claim is made that because of intimidation illegal voters were allowed to vote we do not have these same reasons for throwing out an entire poll and neither do we have the rule to that effect. This contestant, at the time for taking his evidence,

We trust that the committee will not be misled by the exaggerated claims made by contestant in his brief and that it will not overlook this evidence showing, as it does, that not to exceed fifteen unqualified negroes voted at this election. And to make his claims all the more preposterous, he failed to show for whom even these fifteen voted, so that he is left without even these fifteen negroes upon which to base his claim that the contestee should be unseated.

quotation at the top of page 45 of contentant's brief and requires that the intimidation be "practiced over men sufficient in number to affect the result" of the election.

Counsel for contestant evidently realizing the weakness of his case and his failure to show by the evidence that any election officers were really intimidated cites the solitary case of *Patton* v. *Coates,* 41 Ark. 111, to show that the intimidation need not be sufficient to influence men of ordinary firmness. This is clearly against the weight of authority. Counsel for contestant has made numerous quotations from 10th A. & E. and we cite 10 A. & E., page 777, in support of our contentions, as follows:

> "It is not every disturbance or breach of the peace in the election district, or at the polls, on the day of election, that will be considered as sufficient to set aside the election on the ground of violence or intimidation. The violence or menace must be of such a character that a man of ordinary firmness would be deterred from attempting to vote, and the time and circumstances of its exercise must have been such as to render it highly probable that the result was rendered uncertain. The precise degree of violence or intimidation required to avoid the election is difficult to determine, as much depends on the circumstances of each particular case—the habits

had at his command the names and addresses of every person who voted at the election; their qualifications were the same as on the day of the election and it was within his power to prove by evidence any ellegal votes cast at that election. But he has not seen fit to produce any evidence of this character. We would call attention to the fact that counsel for contestant in their brief have not cited a single case which supports their contention. The reading of the facts of the cases cited will bear us out in the statement that every case cited by them under this subject is a case of persons being prevented from voting by reason of intimidation.

Again, it is to be noted by reference to this rule of law as laid down in counsel's brief, to the cases cited by him and to the quotation from the case of Hurd v. Romeis set out at page 45 that before intimidation can have any effect on an election or the returns of an election two essential things must be made out. The first will be gleaned from a reading of the cases themselves and is to the effect that the intimidation complained of must be definitely proved and shown to be of such a character that men of ordinary firmness would be intimidated. The second is from the

illegal votes to be cast and counted to change the result of the election. We have heretofore pointed out in this brief that nowhere in contestant's evidence is it shown that more than 14 or 15 votes were cast, concerning which there could be any question, those being the 14 or 15 negroes who voted in Luther Township. And yet these figures would have no effect on contestee's plurality to change the result of the election. The House of Representatives has time after time refused to consider evidence of intimidation for the simple reason that even if it had the effect that was claimed for it yet the result of the election would not be changed. The same is true in this case. The following are a few of the numerous cases on this point:

Bowen v. *Buchanan,* 51st Congress, Rowell 193.

Jones v. *Mann,* 40th Congress, 2 Bart. Cong. Elec. Cas. 471.

Norris v. *Handley,* 42nd Congress, Smith 68.

Bromberg v. *Haralson,* 44th Congress, Smith 355.

Harrison v. *Davis,* 36th Congress, 1 Bart. Con. Elec. Cas. 341.

Now, let us examine the evidence further and see just what facts give rise to the allegations of contestant's notice of contest and the argu-

> of society, and the character of the ordinary gatherings of the people. Of course if voting were in fact arrested, and the officers were compelled to suspend the election, or compelled by force to make false returns, no election could be upheld." * * *

Our contention that it is not every slight disturbance or the use of coarse or threatening language about the polls that will constitute such intimidation as to change the result of an election but rather that it must be such as will intimidate men of ordinary firmness, finds support in the following cases passed upon by the House of Representatives:

> *Mudd* v. *Compton,* 51st Congress, Rowell 147.
>
> *Harrison* v. *Davis,* 36th Congress, 1 Bart. Cong. Elec. Cas. 341.
>
> *Bruce* v. *Loan,* 38th Congress, 1 Bart. Cong. Elec. Cas. 482.
>
> *Bromberg* v. *Haralson,* 44th Congress, Smith 355.
>
> *Chaves* v. *Clever,* 40th Congress, 2 Bart. Cong. Elec. Cas. 467.

The second requirement pointed out above is that the alleged intimidation must have been practiced over men sufficient in number to affect the result of the election, or applying the rule more directly to the facts of this case, that it must have had the effect of allowing a sufficient number of

two and thinks they could read and write. Again, the testimony of C. E. Burnsworth, inspector of Deep Fork Township, which testimony is fully set out in contestant's brief at page 37, testifies that he was put in fear of federal prosecution and that if it hadn't been for the receipt of these circulars the result of the election in his precinct would have been different. Yet he testifies at page 81-82 that he had previously tested all but five negroes who voted and was satisfied that they were qualified to vote and that these five upon failing to pass the tests were refused ballots. Could it be said that contestant should be allowed to take advantage of facts or circumstances which prevented election officers from illegally depriving qualified voters from voting? And yet this would seem to be his contention, for even when it is shown that the receipt of these circulars caused the officials to do no more than perform their duty, enforce the law and apply the tests, yet he complains that voters were allowed to cast their ballots who under that law and under those tests were qualified. So when they testify that they were afraid to enforce the law and yet testify to facts which show that they did enforce it we must accept the latter testimony and disregard the

ments of his brief with regard to intimidation. We want to know whether there were in fact any officers of election really intimidated. Counsel for contestant at pages 28-38 quotes the strongest evidence he has from the election officers to show the effect of the alleged intimidation on them. We have in this brief, under the third proposition quoted mostly from the cross examination of those same officers where they admit in spite of their statements "that they were afraid to enforce the law and give the tests" that they did give these tests. This was all that could possibly have been required of them, so of what can the contestant reasonably complain?

Still others testify that these circulars had the effect of intimidating them into allowing some negroes to vote whom they would not otherwise have allowed to vote and yet they testify that all of these negroes were qualified to vote. Such is the testimony of R. I. Temple, inspector of Watonga Township, Precinct 20 of Blaine County, where at the bottom of page 144 he testifies, "Yes, there were some negroes voted whom I would not have permitted to vote had I been sure there would be no federal prosecutions," and at the middle of page 143 says that he tested all but

Q. Did any one threaten you with personal violence?
A. No, sir.
Q. Everything was orderly about the polls that day?
A. Yes, sir; except a little fuss outside the door, crowding in.

And of B. B. Moore, Clerk in Luther Township, at pages 47-49:

Q. (By Mr. Giddings) What was the mood and conduct of these negroes at the polls that day? Sullen or was it the same as usual?
A. It was about the same as usual.
Q. Was their sullenness exhibited there that day upon their part or any—
A. Only in one case.
Q. What was that case?
A. A fellow who could not take the tests and who would not say he could neither read nor write, and we would not let him vote until he did. He said he would give us trouble about it.
Q. Did the negroes at the polls that day seem to know about this circular.
A. I could not say whether they did or not.

* * * * * * * * *

Q. You were not threatened with any physical violence there that day, were you?
A. Not particularly, no.

And of T. H. Ray, Inspector in Luther City, at page 51:

Q. Did you receive any other threats, or things of that sort, other than these circulars?

former. It is not the conclusions and opinions of these witnesses, given in response to leading and suggestive questions, which creep into their testimony, but the facts regarding which they testify by which this case must be decided.

Note further the evidence of these same officers upon whose testimony contestant relies, as to the conditions existing on the day of the election to the effect that some of them didn't even receive these circulars; others received them but admitted that they had no effect on them and that all negroes were tested just the same and those failing to pass the tests were refused ballots; still others testify that there was no violence, in fact there is no testimony in the record of any violence at any of the polls, and others that the election was just about the same as all other elections.

See the testimony of Louis Vorel, Inspector of Luther Township, at pages 43-45:

Q. Now, Mr. Vorel, notwithstanding the fact that a paper similar to that heretofore in evidence as contentant's Exhibit A, you went ahead and tested 10 or 15 negroes in accordance with the Grandfather Clause; is that right?

A. Yes, sir.

* * * * * * * * *

Q. Unless you know—
A. Not that I know. I may have seen something in the papers.

And of J. W. Sorrells, Inspector in Precinct 6 of Ward 2, Oklahoma City, at page 64:

Q. They all wrote their names?
A. All that voted. There was one man that came there that didn't have a registration certificate, and could not read or write either.
Q. Did he vote?
A. No.
Q. You turned him down?
A. Yes.

And of J. E. Lucas, Inspector in Precinct 9 of Ward 2, Oklahoma City, at page 65:

Q. To the best of your knowledge, then, there were no negroes voted in Precinct 9, ward 2, Oklahoma City, except that they had registration certificates in due form properly signed?
A. I don't think there was. There was some of them there that had registration tickets that wasn't in due form that we didn't let vote.

And of W. W. Barker, Clerk in Springer Township, at page 77:

Q. Now, Mr. Barker, was there any disturbance there on election day among the negroes—any trouble of any sort?
A. No.
Q. No threats of personal violence made

A. No, not to my recollection.

MR. GIDDINGS: That is all.

Cross-Examination by Mr. Morgan.

Q. Mr. Ray—

A. Just a minute in regard to that last question. I did, through the mail; there were a few people who talked to me about them, and said you want to be a little careful how you enforce the Grandfather Clause, and things of that sort. But, then, it hadn't any particular effect on me.

And of Morris S. Baker, Inspector of Oklahoma A Precinct, at page 55:

Q. Did you receive previous to the last general election—he is going to answer "No" so you need not make any objection to it —similar circulars to the ones I handed you, marked "A" and "B" respectively?

A. I didn't get one of those, Mr. Giddings; I don't think I ever saw it until I saw it here in your office.

Q. Did you know at the time you acted as Inspector of Oklahoma A Precinct at the last election of the conviction of Beall and Guinn in Enid for enforcement of the Grandfather Law?

A. No, sir; I don't remember of it.

Q. Do you remember about Beall and Guinn, election officials in Kingfisher County, who have been convicted?

A. No, sir.

Q. In the Federal Court for enforcement of this law?

A. I may have. Well—

And of J. C. Dimmett, Judge in Carlton Precinct, Blaine County, at pages 126-127:

Q. Now did you see this letter of Mr. Boardman, United States Attorney, in reference to enforcement of the Grandfather Clause at any time before the close of election?

A. I can't say on what day I got that.

Q. Did you get it before the close of election, before the polls closed?

A. Well, I can't say when I got that letter.

Q. Did you know of that letter on the day of election?

A. I think it came the evening after the polls closed. I think I got it that day. I wouldn't be postive about that.

And of John McGee, Inspector of Carlton Township, Blaine County, at page 129:

Q. Did you ever see that letter of Mr. Boardman, United States District Attorney, and also that article, "Talk it over with your wife," before the close of the polls on the day of election?

A. I ain't got no wife.

Q. Mr. McGee, I have reference to that article which was sent out with the letter of Boardman, and the article was entitled "Talk it over with your wife."

A. Well, I talked it over with myself and the rest of the board.

Q. Well, now what effect did this letter of Boardman and the article have on yourself, and on the election board, with reference to the enforcement of the Grandfather Clause?

A. I don't know as it had any effect on me.

against you or Mr. Lowp, if you didn't let the negroes vote?

A. By whom?

Q. By the negroes or by anyone?

A. No.

Q. You heard nothing of that kind.

A. No.

And of F. H. Morris, Clerk in Deep Fork Township, at the bottom of page 79 where to show that this election was not unlike all other elections he says "* * * we generally have the same rounds with that bunch every election."

And of C. E. Burnsworth, Inspector in Deep Fork Township, at page 81:

Q. Now how many negroes did you test at the general election?

A. I think it was five.

Q. What was the result of that test?

A. They could not read and write and I refused them the ballot.

And of L. R. Howell, Judge of Elections in Flynn Township, Blaine County, at page 110:

Q. Do you remember of receiving, prior to the last election, a letter from Mr. Boardman, together with an article entitled. "Talk it over with your wife" in regard to enforcing the Grandfather Clause on the negro?

A. Not to my knowledge.

Q. Did you hear of such a letter, Mr. Howell?

A. I did not.

nothing about it, to presume that this committee will recommend that this election be set aside or that the result will be changed would be to presume that it will go to greater length than congressional committees have ever gone in any previous election case before Congress, and further than the courts of this country have ever gone in similar cases. Indeed the record taken as a whole shows this election to have been one of the most peaceful and orderly elections that it would be possible to hold.

Of the six cases cited by contestant in his brief at pages 45-46, to sustain his contention regarding intimidation, in only three was the degree of intimidation found sufficient to change the result of the election. Let us briefly examine the facts of those cases. In the case of *Wallace* v. *Simpson,* 41st Congress, we quote from the findings of the committee as follows:

> "Clubs were formed; resolutions passed; laborers discharged for voting their sentiments; men denounced, custom taken from them; their property burned, their houses fired into; some stripped and flogged; others crippled, scourged, waylaid and robbed; pictures of Union men taken and sent around to Democratic roughs, so that they might know whom to murder; cannot fired all of the night before the election, so as to frighten the

And of Henry Spreitzer, Inspector of Lincoln Township, Blaine County, at page 133:

Q. Did you know or hear of this letter of Boardman's before the close of the polls on the day of the election?
A. I believe I did.
Q. What effect, if any, did this letter have on yourself and the election board in reference to the enforcement of the Grandfather Clause?
A. Well, we talked it over. We were uneasy but we done what we thought was right.

And of H. D. Fortner, Inspector of Precinct A of Ward 2, of El Reno, Canadian County, at page 214:

Q. Do you recall, at this time, whether or not, prior to the general election of 1912, you received from any federal official any card or instructions or advice against the enforcement of the test required of negro voters by the laws of Oklahoma?
A. No, sir; I didn't receive any.

In the face of this evidence to the effect that there was no violence at any of the polling places, and that the officers of some of the precincts didn't even receive the circular and letter complained of and with the further positive uncontradicted evidence that the contestee, Dick T. Morgan nor any of his managers had anything to do with the sending out of the circular and letter and knew

V. No fraud is shown to justify throwing out the vote in any precinct.

Counsel for contestant in their brief, at page 47, quote from 10th A. & E., page 774, on the effect of fraud in general to the effect that "Fraud destroys the value of the returns as evidence." It will be noted by reference to the text that "the reception of illegal votes, where no fraud is charged upon the election officers, will not affect the election, unless the number of votes received was great enough to change the result." There is no evidence that this would be the fact here and there is no allegation of fraud on the part of the election officials. There are thirty-two cases cited under this quotation from 10th A. & E. page 774. We have read all of these cases and every one is a case of fraudulent acts or fraudulent conduct on the part of the election officials and not the mere reception of some illegal votes. The reason for throwing out the entire result where fraud on the part of the election officials is proven is plain. As said by Mr. McCrary, in his Treatise on Elections, Section 536: "If an officer of the election is detected in a wilful and deliberate fraud upon the ballot-box, the better opinion is

> negroes and keep them from the polls; the whole district filled with Winchester rifles (fourteen shooters); many Union men, both white and black, hung up to the trees and shot down in the woods and in the streets; and many others compelled to vote the Democratic ticket against their will, in order to save their lives.''

Again, in the case of *Giddings* v. *Clark,* 42nd Congress, the town where the election was held was occupied by an armed and organized force; pickets were stationed on all roads leading to the town, and no person was allowed to enter without a pass; many did not vote and the committee concluded, ''It is clear that they abstained from doing so for reasons which most men would consider good and sufficient.'' In the case of *Smalls* v. *Tillman,* 47th Congress, the committee found that the election was controlled by violence and intimidation on the part of organized and armed bodies of white men directed entirely against the colored voters, and that they were prevented from voting in large numbers and sufficient to change the result of the election. In the other three cases cited by contestant the House of Representatives refused to take any action.

The two cases cited by counsel on page 47, to sustain their contention that the entire poll should be rejected, are both cases of fraud on the part of the election officers and decided by the House of Representatives. In the case of *Knox* v. *Blair,* 1 Bart. El. Cas. 526, the evidence showed that the election officials had knowingly and fraudulently permitted 88 illegal voters to vote in a body; that one of the judges exchanged places with a violent partisan of the sitting member during part of the day while he himself electioneered for contestee, and that the polling place was under the practical control of another violent partisan of the sitting member. It was found that these acts amounted to fraud on the part of the election officers, and in the light of that finding the quotation from the report of the committee to the effect that "where the result * * * is so tainted with fraud, * * * the precedents, as well as the evident requirements of the truth, not only sanction, but call for the rejection of the entire poll * * * " is readily explained. In the case of *Morey* v. *Spencer,* 4 Cong. El. Cas. 447, especially cited and relied upon to sustain contestant's contention "there was evidence that the commissioner who received the ballots had changed

that this will destroy the integrity of his official acts, even though the fraud discovered is not of itself sufficient to affect the result. The reason of the rule is that an officer who betrays his trust in one instance is shown to be capable of the infamy of defrauding the electors, and his certificate is therefore good for nothing." But where merely illegal votes were cast there is no reason for throwing out the whole precinct vote, but rather allow it to stand as *prima facie* evidence of the true result and be corrected by proof. This rule is laid down in the paragraph immediately following the one cited and quoted from 10th A. & E. 774, and expressly takes the case under consideration out from the rule quoted by counsel because it limits its application to cases of actual fraud on the part of the election officials. It is as follows:

> "2. Fraud of Third Persons. — There seems to be a difference in the effect of fraudulent acts of third persons and of officers of election upon the value of the returns as evidence; and if the officers of election act in good faith, and frauds are committed without their knowledge, it has been held that the reception of a number of illegal votes, fraudulently cast, would not affect the credibility of the returns as *prima facie* evidence, but that they could be corrected by proof. 10th A. & E. 774-775."

cast, if he would change the result certified by the election board.

Thus we see that the question of whether the whole result shall be thrown out or the complaining party be required to show by evidence any facts which he claims to change the result is really a question of whether there was fraud on the part of the election officials or merely some illegal votes cast. The rule is well stated in the case of Wise v. Young, decided by the Fifty-fifth Congress, as follows:

> "The distinction is between mere *illegality* and fraud in the conduct of elections. The first does not deprive the candidate of any votes save those proven to have been illegally cast for him; the second, by destroying the value of the returns as evidence, causes the rejection of the entire poll and deprives the candidates of *all* the votes cast for them, as well the *legal* as the illegal ones, unless otherwise proved."

The application of this rule is best seen in the case of *Knox County* v. *Davis,* 63 Ill. 405, where the court, for the reasons stated above, rejects a part of the returns of an election and accepts others. It was a suit brought to impeach the election returns of an election held to determine whether the county seat of Knox County, Ill., should be removed from Knoxville to Gales-

some of them before putting them into the box and that he had been handing out greenbacks to the voters with their registration tickets'' and that ''there was evidence that part of the signatures to the return counted by the State board were forged.''

In the light of these and other similar facts from the other thirty cases cited in the note to counsel's quotation from 10th A. & E. 774, we agree with the rule as laid down, but we strongly contend that it is a misapplication to the facts of the present case. There is no allegation in contestant's notice of contest and there was no proof offered by him to show that there was any fraud on the part of the election officials; but on the other hand the evidence all shows that the election officials in every precinct where any evidence was taken, acted in the best of faith and honestly, and there is no reason to doubt that their returns show the true vote cast. The most that can be claimed by contestant under the allegations of his Notice of Contest is that some votes, illegal under the Grandfather Clause, were counted. It then devolves upon the contestant to show, ''by proof,'' for whom these votes were

be unable to see each person when he presented his ballot, only leaving a small opening through which it could be passed, as was done by the officers at Knoxville. There is no evidence that they permitted persons whom they knew to repeatedly vote during the day, nor that they permitted mere boys to vote or persons to do so under ficticious names whom they knew; and when called on to testify and to produce the poll lists, they did so freely, fully and fairly; nor did they refuse to answer questions lest it might lead to their crimination; and they testify that they, in all things, endeavored to hold the election fairly and to discharge their entire duty, * * * In all respects their conduct stands in bold contrast with that of the officers who held the election at Knoxville. We fail to find evidence that can or should impeach their returns and the court below decided correctly in receiving them as *prima facie* evidence of all they contained subject to be corrected by proof."

See to the same effect the case of *Martin* v. *McGarr,* (Okla.), 117 Pac. 323, where it is stated:

"2. While a contestant in an election may always object to the counting and consideration of fraudulent or illegal votes, yet the reception of the same will in no instance result in the avoidance of the election except where the entire poll is so tainted that the good votes cannot be separated from the bad, and it is impossible to ascertain for whom the majority of the valid votes were cast. The general rule obtaining throughout all the states of the Union is that an election is not to be held invalid except as a last resort, the correct doc-

burg. The court found that the officers of the election in the town of Knoxville had been guilty of gross frauds in holding the election and in making the returns; "that persons were permitted by them to vote many times during the day; that mere boys were permitted to vote, as were also persons that were not legal voters; that persons were permitted to vote under assumed and fictitious names and even the farce of receiving the vote of a dog was perpetrated; and finally, when the polls were returned showing a vote of over 1500, when at no previous election had there ever been polled at that place much, if any, more than half of that number," threw out the entire poll.

It was contended that the poll from the city of Galesburg should also be thrown out, but of it the Court said:

> "It is on the other hand insisted that there were similar frauds at the various voting places in the city of Galesburg. On a careful examination of the evidence, we fail to find that such is the fact. That there was fraudulent voting at each of the polls is true; and it is a matter of regret that our general assembly have been compelled to impose such heavy penalties to prevent a wrong that they must have regarded so common and to only be checked by such severe punishment. But there is no evidence that the election officers at Galesburg boarded up the window so as to

yet the entire poll will not be rejected unless it is impossible to ascertain the result of the election. How much less reason there should be for throwing out the poll when no fraud is alleged or proven on the part of the election officers as in this case. This doctrine so plainly stated and sanctioned by the Supreme Court of the State of Oklahoma should have great weight in determining the result of an Oklahoma election.

trine being announced by Judge Brewster in the case of *Batturs* v. *McGary,* 1 Brews. (Pa.) 162, as follows: 'The courts have the power to reject an entire poll, but only in the extremest case—as where it is impossible to ascertain the true vote. Impossibility is the test.' The rule thus annunciated finds support in the following authorities: McCrary on Elections (4th Ed.), Secs. 523-524; Paine on Elections, Sec. 513; 10 A. & E. 770; *Windes* v. *Nelson,* 159 Mo. 51, 60 S. W. 129; *Ferguson* v. *Allen,* 7 Utah 263, 26 Pac. 570; *Woolley, Etc.,* v. *Louisville So. Ry. Co.,* 93 Ky. 223, 19 S. W. 595; *State ex rel Kellog* v. *Sullivan,* 44 Kan. 43, 23 Pac. 1054; *Atty Gen'l. ex rel* v. *McQuade,* 94 Mich. 439, 53 N. W. 944. In the case last cited the same doctrine is stated by the Supreme Court of Michigan, with numerous authorities to sustain it, as follows: 'Where fraud on the part of the officers of election is established, the poll will not be rejected, unless it shall prove impossible to purge it of the fraud.'' Under this rule, therefore, plaintiff cannot raise the question of the reception of illegal ballots and insist that the election be held void on this account, for, should they be established, the consequence would not be to avoid the election, but to reduce the votes to those which were legal and valid and from which the result would be determined. There is no averment that they could not be eliminated and the true result ascertained.''

And thus we see that it is the well settled rule of the courts of all the States that even where there was fraud on the part of the election officials

as probable that an ignorant negro who could neither read nor write voted for contestant as for contestee? If not, why were not the ballots introduced in evidence?

But without conceding the facts alleged to have been proven by contestant in his brief or the conclusions drawn therefrom we wish to point out to the committee that even giving him the benefit of his wildest claims as to what that evidence shows and for the moment disregarding its flimsy and unsatisfactory character, yet, it is insufficient to change the result of this election. If contestant should prevail he must overcome by some means the proven plurality of 891 for contestee as heretofore determined and established by the admissions of contestant and competent evidence. The means by which he undertakes to do this are narrowed down to two—either to show that a sufficient number of illegal votes were cast and counted to change the result or that by reason of fraud and intimidation, etc., the whole of certain precinct polls should be thrown out. In either event it depends upon the casting of the negro vote and it will therefore be interesting to know just how many negroes voted in the election complained of.

VI. No showing for whom negroes voted, but if the entire negro vote were deducted from contestee's vote, he would still have a plurality of from 113 to 169 votes.

It is our contention that contestant has not by competent or satisfactory evidence changed the result of the election between these parties one single vote. His evidence is of the most unsatisfactory nature throughout. In no place does he name or in any other way identify a single voter and show that his vote was illegal or should not be counted for any other reason, and in no place does he show how any alleged illegal voter voted. His evidence was in every instance mere estimates and conclusions. The evidence of Louis Vorel at page 44 and of B. B. Moore at page 50, who were respectively inspector and clerk of the election in Luther Township, where the 14 or 15 negroes voted without passing the tests, showed that the 14 or 15 ballots cast by them were marked protested and strung on a separate string at the time they were voted. These ballots were all preserved and at the disposal of the contestant when he took his evidence and yet he didn't bring them in to show how those negroes voted. Isn't it just

one or two instances the witnesses were very indefinite in their testimony. Note the testimony of Frank Redding at page 57—"Well, there must have been something like 18 or 20 I suppose;" of E. A. Wagner at page 58—"I should judge, between 20 and 25;" and of J. W. Sorrells at page 63, where he does not state the number of negroes voting but says "It would have made quite a lot of difference if the negroes had been kept from voting. It would have been about 80 or 90 different;" and of W. W. Barker at page 74—"Oh, I would say in the neighborhood of 60;" and of F. H. Morris where we have used the figure of 95 in the above table from his indefinite statement, "let me see,—about 70 per cent of the Republican vote there is negroes, and I don't know what the Republican vote there is; I can't remember it from time to time. It is probably, though, about 135 or 140 Republican votes, and I think there is at least 70 per cent of them negroes;" and of R. I. Temple, at p. 143, "Probably 20 or 25;" and of C. B. Jack, at p. 59, "I don't remember, but somewhere between 8 and 12, I should judge, or 13," and of Sherman Neff, at p. 212, "Well, I think about 40, but now I wouldn't say positive as to that."

Contestant evidently ralizing his utter failure to make out his case by the evidence introduced has not seen fit to attempt in his brief to sum up the number of negroes voting, from that evidence. For this purpose we will do so here, remembering of course that we are necessarily limited to the consideration of precincts of which contestant complained in his notice of contest. Counsel for contestant in their brief at the top of page 8 refer to the registration lists introduced in evidence and draw from it the conclusion that 900 negroes "voted in Oklahoma County alone." Counsel certainly knows that the fact that a person was registered is no evidence whatever that he voted and those lists did not purport to be anything more than registration lists, made up three months prior to the election. And inasmuch as counsel has only trusted his memory in arriving at the figure of 900 we will say that from actual count the number disclosed was not to exceed 594.

We cannot here make use of this evidence without calling attention to its flimsy character and unreliability. We have referred to the testimony of the election officials as to the number of negroes voting as *estimates* and we believe they will admit of no stronger designation. With the exception of

Contestant also took some evidence in a few precincts in Oklahoma and Blaine Counties of which he had made no complaint in his notice of contest, either as regards fraud, intimidation or any other irregularity, and in Precinct A, Ward 2 of El Reno, Canadian County, after the time for his taking evidence had passed, but without waiving the immateriality of this evidence it will be noticed that even by allowing it to be considered to the same effect still the contestee's plurality would not be overcome.

TOWNSHIP.	Name of Officer Testifying.	Page of Record	Estimate.....	VOTE. Carney.....	VOTE. Morgan.....
Oklahoma County—					
Greely	Needham, Inspector..	53	5	81	65
Oklahoma A.....	Baker, Inspector....	55	5 to 7	86	71
	Ballard. Clerk.....	56	5 to 7		
Hartzel	Jack, Clerk.....	59	8 to 13	59	39
Blaine County—					
East Dixon 9.....	Beals, Judge.....	113	6 or 7	33	39
	Rycroft, Inspector...	116	11		
Canadian County—					
El Reno "A" of	Neff, Clerk.....	212	40	77	73
Ward 2.....	Fortner, Inspector...	214	50 or 60		
			64 to 96	336	287

Adding the total of this last table to the total of the first table, we find it estimated that from 722 to 778 negroes voted in this election between contestant and contestee, and there is no other evi-

But taking this evidence for what it is worth, precinct by precinct as it is found in the record, we find that the number of negroes voting at this election, as estimated by the election officials, is from 658 to 682, as follows:

TOWNSHIP.	Name of Officer Testifying.	Page of Record.	Estimate.....			VOTE. Carney.....	VOTE. Morgan.....
Oklahoma County—							
Dewey	Davis, Inspector	32	48			35	80
Luther	Vorel, Inspector	41	120			22	152
	Moore, Clerk	48	120				
Luther City	Ray, Inspector	51	5	or	6	33	48
Choctaw	Kenyon, Clerk	54	6	or	7	41	57
Crutcho	Redding, Inspect'r	57	18	to	20	97	105
	Wagner, Clerk	58	20	to	25		
6th Precinct of Wd. 2, Okla. City	Sorrels, Inspector	63	80	or	90	70	109
9th Precinct of Wd. 2, Okla. City	Lucas, Inspector	64	200			70	151
Springer	Baker, Clerk	74	60			97	129
Deep Fork	Morris, Clerk	78-9	95			47	103
Blaine County—							
Flynn	Howell, Judge	110	6			13	22
Watonga	Temple, Inspect'r	143	20	or	25	48	89
			658	to	682	573	1045

Thus we see that the estimates of the Democratic election officials in the above precincts, as to the number of negroes who voted, do not show a sufficient number to overcome contestee's plurality, even if the committee should go to the extreme of saying that every negro who voted, voted for Morgan, and that the whole number should be deducted from his plurality. Of this there is not a scintilla of evidence.

VII. If the vote in all of the precincts in which negroes voted, and in which fraud and intimidation are claimed were thrown out, the plurality of contestee would still be 448 votes.

Again, taking contestant's other contention that the whole precinct poll should be thrown out by reason of alleged irregularities, fraud and intimidation, yet we find that the result would not be changed. For from the whole sixteen precincts tabulated above, Carney received 909 votes and Morgan received 1,332 votes, giving Morgan a plurality of 423 votes in those precincts, but this would have no effect on his proven plurality of 891, nor on his admitted plurality of 663.

In East Lincoln township of Blaine County, the only other precinct where there is any evidence that an election officer received a letter similar to Contestant's Exhibit B to his notice of contest, gave Carney 10 votes and Morgan 30 votes. So, by adding this precinct, and thus including every precinct in the entire district where there was any evidence of any nature whatsoever offered on behalf of contestant, we find Morgan's plurality in those precincts was only 443 votes, and this could have no effect on his admitted plurality.

dence whatsoever that any negro votes were cast.

And yet this is not enough to change the result of the election or entirely wipe out contestee's plurality.

So, at this time, we most emphatically deny the first proposition laid down in contestant's brief and stated at page 1 thereof, that large numbers of negroes voted for contestee *"without which he could not have received the certificate of election."* Failing in facts to support this assertion, made by him at the outset, of what interest is it to us here whether the Fourteenth Amendment was ever adopted? for upon this assertion is the whole argument based. And we challenge contestant now, as he has been challenged ever since the commencement of this contest, to sustain these claims by the evidence.

officers of any precinct where it is not directly shown by the evidence, especially in view of the fact that even after he and his counsel had scoured the district for such evidence a number of those called on to testify stated that they received no such letter or circular or that the receipt of them had no effect upon them. Contestant, in his brief at page 27, seeks to avoid the burden of proof in this respect by saying: "There is no dispute in the pleadings or evidence, but what this letter and this circular were scattered broadcast throughout the Second Congressional District of Oklahoma." That such was a fact was specifically denied in contestee's answer, and the fact that proof has been offered to show that they were received in only 16 out of 497 precincts in the District is no evidence to warrant the statement that they were "scattered broadcast."

So, in the light of these figures, we have no hesitancy in unqualifiedly denying the Second proposition laid down in contestant's brief at page 2 thereof, in which he concludes "that contestant is elected when these negro precincts are rejected." On the other hand the undisputed evidence shows that by rejecting the vote in every precinct where there was any evidence to show that any negroes voted, the contestee still has a plurality over contestant of 448.

By what process of reasoning contestant would seek to change the result of the election on the above figures is beyond our comprehension. We have, for the sake of argument, given him the benefit of every doubt, and pointed out and summed up from his own evidence what he in his abstract arguments and exaggerated statements would not do, but rather seeks to avoid. It cannot be presumed that negroes voted in other precincts over the district in the same proportion as estimated by the officials where evidence was taken when it is a well-known fact that contestant secured the evidence in every precinct where any appreciable number of them even resided. Neither can it be presumed that the alleged warning circular and Boardman letter were received by the

such, and has not the weight of an official document as evidence.

It will be further noted that these exhibits were mere *ex parte* affidavits, and it is well settled in all State and Federal Courts, as well as by the rulings of the House of Representatives, that such affidavits will not be considered as evidence.

See to this effect:

Allen, 23rd Cong. Report, 110.
Giddings v. *Clark,* 42 Cong., Smith, 96.
Blair v. *Barnett,* 36th Cong., 1 Bart, 314.
Knox v. *Blair,* 38th Cong., 1 Bart, 526.
Jones v. *Mann,* 40th Cong., 2 Bart, 474.
Foster v. *Conode,* 41st Cong., 2 Bart, 524.
Holmes v. *Wilson,* 46th Cong., 1 Ells, 323.
Hill v. *Catchings,* 51st Cong., Roswell, 806.

In Holmes v. *Wilson, supra,* it was said:

"There is no law, and no practice of the Committee on Elections, as we understand it, authorizing the use, by the committee of *ex parte* affidavits to determine questions of fact in deciding the merits of an election case. * * * The importance of election cases demands that the testimony should be taken on notice to all persons interested with the rights on their part to cross-examine witnesses and to exhibit testimony in reply so far as their rights may be affected by the inquiry."

VIII. The claims of the contestant are not supported by the evidence.

Exhibits K-5 to K-14 inclusive should not be considered by the committee.

This is urged from three grounds: First, they are not official documents; second, they are mere *ex parte* affidavits; third, they are so contradicted by evidence subsequently given by the affiants that they are entitled to no weight.

These exhibits are headed "Amended returns," but a cursory reference to Sections 3114 and 3084 of the Compiled Laws of the State of Oklahoma, 1910, will convince the committee that the laws of Oklahoma make no provision for such a return.

As counsel for contestant says in his brief, at page 39: "All lawyers know that election officials merely act in a ministerial capacity in the count and canvas of the returns." When they have so counted and canvassed the vote, their duties are at an end. They could not, at the time of the canvass, nor thereafter, declare that the election was invalid. Such an affidavit is not an official document, is not admissable in evidence as

Now let us test the statements made in these affidavits by the evidence given by these same parties at the hearing:

W. L. Davis, Inspector in Dewey Township, who signed Exhibit K-5, testified at pages 30 to 36 of the record, and while in this affidavit he states that many illegal voters of the negro race voted, yet in his testimony given at the hearing he says that all negroes were tested except four, and these were all men who were admittedly able to read and write. T. J. Clark, who was clerk of this Election Board, testifies at pages 38 and 39 of the record that Davis tested several negroes, many he had tested in the primary, and that these same four negroes, school teachers, etc., he let vote without a test because he was sure they were qualified.

Exhibit K-6 is an affidavit signed by A. L. Moore, judge of the Election Board in Luther Township, Oklahoma County. He was not called as a witness, but Louis Vorel, inspector, and B. B. Moore, clerk of this same election board, testified, and we can test his statements by their testimony. Exhibits K-7 and K-14 are both signed by Louis Vorel. They purport to say that there was wholesale fraud, intimidation and illegal vot-

The reason for the rule excluding *ex parte* affidavits, is that experience has proven that they are unreliable in showing the entire transaction as it really happened since the opposite party is usually absent and has no opportunity to cross-examine the affiant. Perhaps no better instance could be cited as to the unreliability of *ex parte* affidavits than is here shown. For an examination of these statements and a comparison of them with the evidence of these affiants subsequently given, shows that the statements therein are mere conclusions of the affiant and based upon no facts whatever.

In considering these affidavits, it will be noted that Exhibits K-5, K-6, K-7, K-8, K-9 and K-10 are all in identically the same words, with the exception of the date, the voting precincts, the names of the affiants, and the officer before whom they were sworn. The same statement applies to Exhibits K-11, K-12, K-13 and K-14. We believe it to be within the bounds of reason to conclude that some partisan of the contestant, or a partisan of some candidate on the Democratic ticket, prepared these affidavits, rushed out to these election officers and secured their signatures to them. The danger in accepting as true statements in affidavits thus prepared and procured is readily seen.

liable that the committee should give them no consideration.

Exhibits K-8 and K-13 are affidavits by C. E. Burnsworth, inspector in Deep Fork Township, the former reciting that many illegal negro votes were cast in that precinct, the latter saying there were three or more such votes cast.

Exhibits K-9 and K-12, word for word as K-8 and K-13 respectively, are affidavits made by F. H. Morris, clerk of the election board in this precinct. Exhibits K-10 and K-11 are affidavits by G. W. Swails, a counter in this precinct, and are worded the same as Exhibits K-8 and K-13, respectively.

The worth of these affidavits will be best shown by a quotation from the testimony of Mr. Burnsworth at page 81 of the record, as follows:

Q. Now, you say, Mr. Burnsworth, you didn't compel all the negroes to read and write the Constitution at the last general election as a test?
A. No, sir.
Q. Because of the fact that you had tested most of them at the primary and knew whether or not they could read and write?
A. Yes, sir.
Q. That is right. How many of the 70 that you say voted had been tested by you in the primary?
A. I could not say exactly.

ing in this precinct, the former saying specifically that many illegal negro votes were cast, yet at page 43 of the record the same Vorel says:

Q. Now, Mr. Vorel, notwithstanding the fact that a paper similar to that heretofore in evidence, contestant's Exhibit "A," you went ahead and tested 10 or 15 negroes in accordance with the Grandfather Clause; is that right?
A. Yes, sir.
Q. And these 90 negroes whom you didn't test, you didn't test them because you say you knew from previous experience, or from your information of them that they could pass the test?
A. They had been voters before.
Q. That is right, is it not?
A. Yes.

So when the broad sweeping statements of his affidavit are boiled down to actual facts all the intimidation and fraud amount to nothing and the many illegal negro votes simmers down to fourteen or fifteen.

Mr. Vorel's testimony is corroborated by that of B. B. Moore in his testimony at pages 46 to 51 of the record.

We cannot escape the conclusion that these three Exhibits, K-6, K-7 and K-14, grossly misrepresent the actual facts and are therefore so unre-

larly taken in the presence of both parties, and where the witness may be cross-examined."

And since we have shown that the statements in these affidavits are really only conclusions on the part of the affiants, that the affidavits are not official documents and taken *ex parte,* the conclusion is irresistable that their contents should be cast aside by the Committee.

And this appears to be the proper place to say that the brief of contestant seems to have been prepared in much the same manner as these affidavits.

Exaggerated statements are made, seemingly in the hope that the facts may be so magnified that the latter will in some mysterious manner measure up to the former. Both these affidavits and contestant's brief lack qualifications essential to both, to-wit, facts.

To illustrate: Counsel for contestant, at page 6 of their brief, say: "There will be found in the record amended return after amended return of these precinct election officers that, etc.," and again at page 38 of contestant's brief it is said: "We call your attention to the affidavits beginning at page 100 of the record and running all

Q. About how many?
A. Well, I put all—most all—of them to the test at the primary.
Q. And those that you had tested at the primary you didn't require the test of them at the general election in November, 1912?
A. Nothing; only I would just ask them the question, from the simple fact I remembered whether or not the test at the primary.
Q. Now, then, about how many negroes did you test at the general election?
A. I think it was five.
Q. What was the result of that test?
A. They could not read and write and I refused them a ballot.

And see again at page 82 of the record the testimony of this same inspector:

Q. Now, who did this testing out there, Mr. Burnsworth?
A. I did it myself, most of it.
Q. So you tested five?
A. I think it was five.
Q. And turned those down?
A. Yes, sir.
Q. And the balance of the negroes who voted, you knew them, and had tested them at the primary election?
A. Yes, sir.

As was said in the case of *Giddings* v. *Clark*, 42nd Cong. Smith 96: "These affidavits, if admissible as evidence on the trial of this case upon the merits at all—of which there is great doubt—are entitled to much less weight than testimony regu-

county was based upon the U. S. Census of 1910, and the specific statement as to the number of illiterate negroes in each county was made so that this committee might be convinced beyond all doubt that the extravagant statements made by contestant in his notice of contest were entirely unfounded and, in fact, could not be true. And in order that we might say, as we do now, that if the contestant had shown that every illiterate negro in the district had voted, and had shown that all of them had voted for the contestee, neither of which the contestant even attempted to show by anything except statements made in his notice of contest and his brief, that even then the contestant would not have made a sufficient showing to overcome contestee's plurality of 891 votes.

As another example of the extravagant claims made by contestant we desire the committee to note that at page 6 of the record contestant alleges in his notice of contest that in two precincts in Alfalfa County there were 81 illegal votes cast by reason of matters alleged in his notice, clearly refering to the manner of the enforcement of the Grandfather Clause, thus leading this committee to believe that 81 illiterate male negroes over the age of 21 years were illegally allowed to vote in that

through the testimony of contestant.'' Could it be said that ten affidavits covering three precincts constituted ''Amended return after amended return?'' Surely not. Nor could it with any greater conformity to the facts be said that affidavits covering five pages out of a total of 80 pages of contestant's testimony, concerning three precincts out of a total of 497, in the district, gives any justification for the assertion of counsel for contestant that these affidavits ''run all through the testimony'' of contestant.

These statements are on a par with the argument of contestant at page 39 of his brief, where basing his argument on the proposition that admissions in pleadings obviate the necessity of proof on the issues thus admitted, points out that the contestee alleges in his answer that there are 386 illiterate negroes in the Second District and at the top of page 40 of his brief, says that the contestee does not allege that these illiterate negroes did not vote. This is clearly untrue and a clear misrepresentation of the facts, for as a precaution against any such statement, the contestee in his answer denied every allegation in the contestant's notice of contest not specifically admitted. The statement as to the number of illiterate negroes in each

tered therein'' (page 35 of contestant's brief). But the registration list of Oklahoma City does not help contestant, for this list was made up in July, 1912, at least three months before the letter and circular of which they complain was sent out. Clearly the registration officers could not be influenced in July by a letter and circular which came into their hands in November following.

Neither could the stubs of the ballot books be any excuse of such exaggeration, for, as both the contestant and his attorneys well know, these stubs merely show the name of the voter and his residence. An examination of ''Exhibit I,'' introduced by contestant at page 94 of the Record, will show that it could not disclose whether the votes were white, black, red or yellow. It would seem that counsel seek to convince this Committee that 900 illiterate negroes voted, by using the word ''innumerable.''

We have cited these examples to convince this Committee that the contestant dare not rest his case upon the facts; that his notice of contest was prepared with no real knowledge of the actual facts, and now, when contestant and his counsel know the facts they seek in their brief to so en-

county. And the contestant at page 8 of the record swore that this statement was "true as he verily believed." Well, perhaps he did verily believe it, but if he did he was verily mistaken, for the United States Census of 1910 shows that there was not a single illiterate male negro over the age of 21 years in that entire county, to say nothing of there being 81 such in two precincts thereof.

As still another instance of contestant's extravagant claims, see page 7 of this brief where he says "* * * and there being over 900 illegal negro votes according to the test of the law." See also at page 50 of his brief where he says, "We have shown that over 900 illegal negro votes were cast." See again at pages 7 and 8 of his brief where it is said: "We introduced in evidence * * * the number of negroes who registered and voted in Oklahoma County alone, the number being over 900 if we remember the record aright."

Now these statements cannot be based upon the record as we have shown above under Section VI of this brief.

Counsel may contend that he relies therefor upon "all the registration lists and sheets of the election showing the innumerable number of negroes who voted in Oklahoma City and who were regis-

IX. The adoption of the Fourteenth and Fifteenth Amendments to the Constitution of the United States is not in issue.

We have carefully examined the argument of contestant respecting the adoption of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. We have examined all his assertions with reference thereto, and about the only statement made with which we are prepared to agree is the one made at page 8 of his brief, where it is said:

"The serious matter involved in the urging of its non-adoption is to get serious consideration thereof." We believe that to get serious consideration of it is such a serious matter for the contestant that we shall not waste the time of the Committee with any extended answer to his extremely technical argument; and were it not for the fact that deserved silence on the part of the contestee to so large a part of contestant's brief might be construed by the Committee as an acquiesence therein, we should be content to reply to it by an absence of argument which it so richly deserves.

large and magnify fifteen votes that the actual, proven and admitted plurality, 891 votes, may be overcome thereby.

by the House of Representatives of the proposition advanced by contestant in his brief.

But, waiving for the purpose of argument, this total failure to prove the statements upon which contestant bases his argument respecting the adoption of these amendments, let us consider his argument. From a reading of contestant's brief one is led to believe that he actually believes that the right to vote for members of Congress is based upon these amendments, and that they alone prescribe the qualification of an elector for members of the House of Representatives.

Contestant's argument, in brief, is this: The fourteenth and fifteenth amendments have never been legally adopted, therefore no person of African descent is a legal voter, and therefore all negro votes cast for either the contestant and contestee should be thrown out.

In the first place, we would say that the Constitution of the United States provides in *Section Two* of *Article One* thereof as follows:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the same qualifications requisite for electors of the most numerous branch of the State Legislature."

We would say at the outset that the contestant has utterly failed to introduce any evidence whatsoever in support of the contention so valiently urged by him in his brief. We take it to be settled beyond dispute that if a party desires to rely upon any statement or allegation set out in his pleading which has been denied by the other party in the answer thereto, then the burden of proving such a statement rests upon the party affirming the same. At page 7 of the Record, contestant asserts "that the so-called Fourteenth and Fifteenth Amendments to the Constitution of the United States have never been legally adopted." At page 20 of the Record, contestee, in his answer, says: "And this contestee denies that the Fourteenth and Fifteenth Amendments to the Constitution of the United States of America have never been legally adopted * * * and specifically demands of the said contestant that he be placed upon strict proof of said allegations." We believe that the state of the pleadings demanded of the contestant that he prove his statement by some sort of competent evidence. There has been no proof offered in this case which would command or even, by the furthest stretch of the imagination justify the consideration by the committee or

to register and vote because of his inability to so read and write sections of such Constitution.

Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers when electors apply for ballots to vote.''

In other words, with respect to the qualifications of electors to vote for members of the most numerous branch of the State Legislature of Oklahoma, this law, in effect, provides that, if the person be one who or the lineal descendent of one who, was not on the 1st day of January, 1866, entitled to vote under some form of government, that is, a negro, then such elector must be able to read and write any section of the Oklahoma Constitution. And since the Constitution of the United States provides that electors for a member of the House of Representatives shall have the qualification requisite for electors of the most numerous branch of the State Legislature, therefore the qualification of a negro elector to vote for member of the House of Representatives in the Second District of the State of Oklahoma on the 5th day of November, 1912, is that he must be

In other words, when we seek to define the qualification of an elector to vote for a member of the House of Representatives from the State of Oklahoma, we must turn to the laws of the State of Oklahoma and find the qualifications requisite for electors of the most numerous branch of the Legislature of the State of Oklahoma, and when we have determined this, then we have determined the qualification of an elector to vote for a member of the House of Representatives from the State of Oklahoma, for the Constitution of the United States says that the determination of the State of Oklahoma respecting the former shall be a determination of the latter.

With respect to the right of a negro to vote for a member of the lower house of the legislature, and therefore his right to vote for member of Congress, the State of Oklahoma has said in Section 4a of Article Three of its Constitution:

> "No person shall be registered as an elector of this State, or be allowed to vote in any election held therein, unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendent of such person, shall be denied the right

In the last case the court said:

> "The privilege to vote in any state is not given by the Federal Constitution or by any of its amendments * * * In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as may to it seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution. A state, so far as the Federal Constitution is concerned might provide by its constitution and laws that none but native born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated; altho it may be observed that the right to vote for member of Congress is not derived exclusively from the state law. (Fed. Const., Sec. 2, Art. 1.) But the elector must be one entitled to vote under the state statute."

That the 14th and 15th amendments to the Federal Constitution have nothing to do with the right of a person to vote for the most numerous branch of the State Legislature, that is, that they do not confer any additional right of suffrage upon any one, except that the fifteenth amendment confers the right not to be discriminated against on account of race, color or previous condition of

able to read and write any section of the Constitution of the State of Oklahoma.

See as a clear exposition of the proposition contended for by the contestee, *ex parte Yarbrough,* 110 U. S. 651, 28 Law Edition 274, where the court, after quoting Article One, Section Two of the Constitution of the United States, says:

> "The states, in prescribing the qualifications of the voters for the most numerous branch of their own legislatures, do not do this wtih reference to the election for members of Congress. Nor can they prescribe the qualification *eo nominee.* They define who are able to vote for the popular branch of their own legislatures and the Constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualification of its own electors for members of Congress."

That the contestant is clearly wrong when he supposes that the Fourteenth Amendment conferred the right of suffrage upon any person, see:

Minor v. *Happerset,* 21 Wall 162, 22 Law Edition 627.

Wiley v. *Sinker,* 179 U. S. 58, 45 Law Edition 84.

Swafford v. *Templeton,* 185 U. S. 487, 46 Law Edition, 1005.

Pope v. *Williams,* 193 U. S. 621, 48 Law Edition 817.

Judge Robert L. Williams, who wrote the opinion of the same court in the case of *Atwater* v. *Hassett,* referred to by contestant in his brief at page 40 as "one of the ablest opinions it, or any other court, has ever rendered with regard to the constitutionality of election laws." See *Cofield* v. *Farrell,* (Oklahoma) 134 Pacific Reporter 407, where it is said:

> "If the right of voting had been secured to all citizens of the United States by the Fourteenth amendment, there would have been no necessity for the subsequent proposal and adoption of the fifteenth amendment to protect its citizens against any exclusion from voting 'on account of race, color or previous condition of servitude.' For such right would already have been guaranteed by the fourteenth amendment, and nothing could have been accomplished by the adoption of the fifteenth amendment—a mere surplusage act, or at most a specific guaranty of what was embraced in the more comprehensive provisions of the fourteenth amendment.
>
> * * * * * * * * * * *
>
> The fourteenth amendment does not restrain the authority of the states from in any way regulating the voting franchise by any qualifications or limitations they may see fit to adopt.
>
> * * * * * * * * * * *
>
> Before the fourteenth amendment was adopted, the whole subject of the elective

servitude, see *U. S.* v. *Reece,* 92 U. S. 214, 23 Law Edition 563, where the court says:

> "The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the States or the United States, however, from giving preference in this particular to one citizen of the United States, over another on account of race, color or previous condition of servitude. Before its adoption this could be done."

The case of *United States* v. *Cruikshank,* 92 U. S. 542, 23 Law Edition 588, follows the last case. *Pope* v. *Williams* above also gives a clear exposition of this proposition. And this theory and holding has been followed by a number of State Courts, as will be shown by an examination of the following cases:

Van Valkenburg v. *Wallace,* 43 California 43, 13 American State Reports, 136.
Hedgeman v. *Board,* 26 Michigan 51.
Anthony v. *Halderman,* 7 Kansas 50.

We would be content with the citation of the authorities above, most of them from the Supreme Court of the United States, but that the committee may be fully convinced that contestant is wrong in assuming that the Fourteenth Amendment gave any one the right to vote, we quote from an opinion of the Supreme Court of Oklahoma, written by

that to determine such qualifications one should, with the exception above noted, ignore entirely these amendments and look solely to the state laws respecting the qualifications of electors to vote for members of the most numerous branch of the State Legislature. In short, all of the argument of counsel for contestant respecting the legality of the adoption of this amendment is not in point in this case and should be entirely ignored in its consideration.

And for still another reason is the discussion of contestant respecting the adoption of these amendments entirely useless. Contestant says, at page 24 of his brief: "The Fifteenth amendment attempts as citizens to give them the right to vote." Surely the word "attempts" was used advisedly, for with the Oklahoma Grandfather Law enforced, that amendment is entirely abrogated. It is no secret that this Grandfather law was adopted for the sole purpose of evading the force of the Fifteenth Amendment. And while the Fifteenth Amendment was adopted to bring about the enfranchisement of the negro, this Grandfather law was adopted for the purpose of disenfranchising the negro. By means of it, so far as the right of a negro to vote is concerned, the Fifteenth Amend-

> franchise was in the exclusive control of the several states. The right or privilege of voting was not affected by the adoption of the fourteenth amendment, and is still a right or privilege resting under the Constitution or laws of each state, in no manner being a right or privilege derived from the Constitution or laws of the United States. Further, notwithstanding the adoption of the fifteenth amendment the entire control over suffrage and the power to grant the right or privilege and to regulate its exercise is still left or retained with the several states, with the single restriction that it must not be denied or abridged 'on account of race, color or previous condition of servitude.' ''

And after quoting from practically all of the cases which we have cited above and many others, the opinion concludes:

> "It seems clear, therefore, that limitation upon suffrage by the states, no matter in what form enacted, asserted, or practiced, was not within the purview of the fourteenth amendment."

From the above it seems clear that the question of the qualification of an elector to vote for member of Congress is not determined or affected in any manner by either the fourteenth or fifteenth amendments to the Constitution of the United States, except that certain discriminations shall not be made, but on the other hand we see

X. Conclusion.

In conclusion, we believe that we have shown that the contestee's plurality is 891 votes; that the Grandfather Law was strictly enforced all over the district; that no fraud or intimidation was shown sufficient to justify the throwing out of the vote of a single precinct; that it has not been shown that any negro voted for the contestee; that if the evidence had shown that all of them voted for the contestee and if this number should be deducted from the contestee's vote, he would still have a plurality of votes; that if all of the votes in all of the precincts where negroes voted and where fraud and intimidation are claimed by the contestant, were thrown out, contestee would still have a plurality; that none of the claims of contestant are supported by the evidence and that the adoption of the Fourteenth and Fifteenth Amendments to the Constitution of the United States is not in issue in this case.

In other words, we have shown that the case of the contestant rests upon nothing more substantial than the notice of contest and contestant's brief; that the former was based upon nothing except the earnest hope that, in the proof thereof,

ment is as effectually banished from Oklahoma as if it never had been written. Under its exactions, comparatively few negroes can vote, and fewer still, attempt to vote.

In short, the Fourteenth Amendment gave no person a right to vote, the Fifteenth Amendment did give a right not to be discriminated against on account of certain characteristics, but with the Grandfather Law enforced, this right amounts to nothing, and so far as the right of a negro to vote is concerned, it might as well never been adopted. Thus, the argument of contestant that they were never adopted is of no effect in this case. The right of the few negroes who did vote does not depend upon them, but upon Section Two of Article Two of the Federal Constitution and the Grandfather Clause of Oklahoma.

the facts might in some mysterious manner be transformed to measure up to its statements; that the latter is nothing more than the product of a mind annoyed at the failure of this transformation to materialize.

To pharaphrase contestant's statement most prominently made, the naked claim that because the contestant has had the desire for the office, and that his counsel want him to have it he should have it will not avail, for the notice of contest and statements of counsel are neither competent nor persuasive evidence.

We respectfully submit that the contest of the contestant should be dismissed and that the contestee should retain his seat in the House of Representatives.

Respectfully submitted,

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