

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 28, 1872.—Ordered to be printed.

Mr. LOGAN, from the Committee on Privileges and Elections, submitted the following

REPORT :

The Committee on Privileges and Elections, to whom was referred the memorial of Joseph C. Abbott, claiming to be entitled to a seat in this body as a Senator from North Carolina, for the term commencing on the 4th day of March, A. D. 1871, respectfully submit the following report :

Article 1, section 5, of the Constitution of the United States provides that—

Each House shall be the judge of the elections, returns, and qualifications of its own members.

The duty which devolves upon the Senate in deciding cases that arise under this clause of the Constitution is in the nature of a judicial proceeding, and the cases must be decided upon the evidence presented, and in accordance with legal principles, as established by former parliamentary and judicial precedents and decisions.

The only evidence which is before the committee in relation to the claim of the memorialist Abbott to a seat in the Senate of the United States is as follows:

That, on the second Tuesday of November, 1870, the day prescribed by law, the two houses of the legislature of North Carolina proceeded to the election of a Senator from that State for the term of six years, commencing on the 4th day of March, 1871, with the following results:

In the house of representatives :

	Votes.
Zebulon B. Vance received.....	63
Joseph C. Abbott received.....	32
Scattering.....	10
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Members present.....	105

In the senate :

Zebulon B. Vance received.....	32
Joseph C. Abbott received.....	11
Scattering.....	5
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Members present.....	48
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That the number of members present at the time and so voting constituted a quorum of each house of the legislature; the constitution of North Carolina providing that "neither house shall proceed upon public business unless a majority of all the members are actually present," the numbers so present amounting to a majority of all the members.

On the following day the two houses, in the usual form, declared that Vance had received a majority of the votes cast in both houses, and that he was duly elected as such Senator for said term of six years, commencing on the 4th day of March, 1871.

It is also further in evidence that said Vance was not on said second Tuesday of November, 1870, and at no time since has been, qualified to serve as such Senator, owing to disability imposed by the fourteenth article of amendment of the Constitution.

It is averred that the members of the legislature of North Carolina so voting for Vance, at the time their votes were cast had notice of the ineligibility of Vance, but no evidence on this point has been presented to the committee, the memorialist relying upon the assumption that this was a matter of public notoriety.

It appears, therefore, that Abbott rests his claim to the seat solely upon what he assumes to be the legal result of the conceded ineligibility of Vance, who, although receiving a majority of the votes, is not entitled to take the oath of office or hold the seat. He assumes that it is a conclusion of law that if the candidate who has received the highest number of votes is ineligible, and that ineligibility was known to those who voted for him before casting their votes, that the votes so cast for him are void, and should be considered as nullities, and as though they never had been cast; and, consequently, the candidate receiving the next highest number of votes is elected.

In support of this view of the case the memorialist has called the attention of the committee to a large number of English authorities bearing on this question. While the committee make no question as to the general tenor of the decisions to which attention has been called, yet it is evident that these are based upon a very different rule from that adopted in our country. To show that this rule is different, the committee would refer to the following authorities, which are cited in the very able report of Mr. Dawes from the Committee on Elections, in the case of *Smith vs. J. Y. Brown*, (Report of Committees, No. 11, 2d sess., 40th Cong.)

Haywood on County Elections, 535:

If, before the election comes on, or a majority has polled, *sufficient notice has been publicly given of his ineligibility*, the unsuccessful candidate next to him on the poll must ultimately be the sitting member.

Male on Elections, 336:

If an election is made of a person or persons ineligible, such election is void, where the ineligibility is clear *and pointed out to the electors at the poll*.

In the case of *King vs. Hawkins*, (10 East., 210,) Lord Ellenborough states that such is the law in England, "*after notice of ineligibility*."

In the case of *Claridge vs. Evelyn*, (5 B. and A., 8,) Abbott, C. J., remarks:

I am of the opinion, therefore, that he (the infant) was ineligible, and *due notice of his incapacity having been given to the electors at the time of the election*, their votes are thrown away.

Clerke on Election Committees, 156:

Whenever a candidate is disqualified from sitting in Parliament, *and notice thereof is publicly given to the electors*, all votes given to such disqualified candidate will be considered as thrown away.

This notice, in order to bring the case within the rule, was required to be strictly formal, and was generally given at the polls. And the reason for this is apparent, as by their theory a voter who, after due notice of the ineligibility of a candidate, persisted in voting for him, was deemed guilty of a crime. Therefore, as all crimes are committed

with an intention to commit the offense, it was necessary that the knowledge of the fact by the voter should be clear.

Roe on Elections, 256 :

It will be seen that the latter proposition is that which constitutes the law in cases where misapplication of the franchise by the electors was *willful*, and, therefore, *made in their own wrong*.

But is such a principle applicable in a government based upon the theory that the power emanates from the people? In the British government the case is exactly the reverse, as there the theory is that the power originates with the monarch, and the privileges allowed the people to select representatives are, under that theory, considered as conceded and not as inherent rights. But this government rests upon an entirely different basis. Here the power originates with the people, and that which the government is authorized to exercise is conceded by the people. The right to designate who shall exercise this power has never been delegated. The method by which this choice shall be made known consistent with this theory can never be otherwise than by giving the majority or plurality the right to decide. Any attempt to restrict the right of the voter is an attempt to invade that right; therefore the theory that casting a vote knowingly for an ineligible candidate is in the nature of a crime which may be punished by ignoring the act of the majority and recognizing the act of the minority, is in direct conflict with that most sacred right which the people of this Government have always guarded with jealous care. Such a rule is consistent with the theory of the British government, as it affords one means of preventing the power from passing into the hands of the people; but it is directly at variance with the theory of our Government, as it affords one means by which that right which the people have of selecting their representatives may be abridged.

While, therefore, the general tenor of the English authorities to which he refers us is admitted to be as claimed by the memorialist, yet we do not conceive such a rule to be applicable to and consistent with the political institutions of the United States, where the right of the majority to govern and the government is based upon the consent of the governed is one of the first political lessons to be learned.

There is also another very strong reason why the English authorities relied upon by the memorialist are not applicable in the present case, even if the spirit and fundamental idea of our institutions were insufficient to show this.

The third section of the fourteenth amendment of the Constitution, which imposes the disabilities in question, also contemplates and provides for the removal thereof by Congress. There is no such feature in the English law. The English cases are therefore based upon a very different state of facts from those that exist in this country, and are not precedents for this case.

It is difficult to conceive how the Constitution could grant authority to Congress to remove the disabilities under which an individual who has been elected is laboring, and allow him to take his seat as a member, and yet, at the same time, embrace the idea that such an election is wholly void and the votes cast for him nullities. Yet Congress by its action in numerous instances has given the first construction to this clause of the Constitution, and if the memorialist in this case shall be admitted to his seat the Senate will have to give the second construction.

The English law in question does not obtain in the United States, as is clearly shown from the following considerations :

First. The judicial decisions are against it, there being but one de-

