

PROTEST AGAINST THE SEATING OF HON. NATHAN B.  
SCOTT.

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MARCH 20, 1900.—Ordered to be printed.

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

REPORT AND VIEWS OF THE MINORITY.

[To accompany Senate Res. No. 213.]

The Committee on Privileges and Elections, to whom was referred a certain memorial of John T. McGraw, a citizen of West Virginia, and a certain memorial of John J. Cornwell and others, members of the senate and house of delegates of West Virginia, each memorial protesting against the seating of Hon. Nathan B. Scott as a Senator from that State, have considered the same and respectfully report:

The certificate of the governor of West Virginia, in due form, of the election of Mr. Scott by the legislature constituted a prima facie title in Mr. Scott to a seat in the Senate, and thereupon he was admitted to take the oath of office. The remonstrants insist that he is not entitled to a seat in this body.

The matter was submitted to the committee upon the memorials, the journals of each house, an agreed statement of facts, and certain oral arguments and admissions of counsel at the hearing. The remonstrants offered to prove certain declarations of several State officials, of members of the general assembly, and of attorneys in argument before legislative committees; also certain acts of persons, detailed in certain alleged depositions, submitted in printed form, but the committee was of opinion that there was no proffer of sufficient evidence of fraud or intimidation affecting the election to warrant such investigation by the committee.

On January 24, 1899, the two houses of the legislature of West Virginia each balloted, but failed to concur in the appointment of a Senator, and on the next day both house met in joint assembly, and upon the first ballot the whole number of votes cast was 95, of which Mr. Scott received 48, Mr. McGraw 46, and Mr. Goff 1. Thereupon the presiding officer of the joint assembly declared that Nathan B. Scott having received a majority of the votes cast by both branches of the legislature voting in joint assembly he is duly elected a Senator

in the Congress of the United States. The joint assembly thereupon adjourned.

A quorum of the joint assembly and a quorum of each house was present and voted. The proceedings were regular and resulted in the election of Mr. Scott, unless certain admitted facts constitute a valid objection to his election.

The memorial of John J. Cornwell and other members states briefly, and the memorial of John T. McGraw states fully, the objections of the remonstrants to Mr. Scott's title to a seat in this body.

The objections stated by Mr. McGraw are five in number.

The first objection assigned is, that Mr. Scott did not receive a majority of the votes constituting such joint assembly, that there were in said body 97 votes, a majority of which is 49, and that Mr. Scott received but 48 votes.

The journal of the joint assembly on January 25, 1899 (House Journal, p. 189), shows 25 senators and 70 members of the house of delegates present and voting; shows 95 to be the whole number of votes cast, and of these Mr. Scott received 48 votes—a majority of all votes cast.

Under the apportionment the senate contained one more member and the house one more member. The journal of the joint assembly discloses nothing concerning these two. It does not appear therefrom whether they were present. It does not show that they were entitled to vote, or that they in any manner claimed or waived the right to vote. Prima facie, from the journal of the joint assembly, either they were not entitled and were not present, or if present did not claim or waive their right to vote. Therefore this journal shows that Mr. Scott received a valid majority of the joint assembly, consisting of 95 members.

As was said in Lapham and Miller (Senate Election Cases, p. 602):

The ground alleged is that there was not a majority of the whole legislature actually voting for the members chosen. In our opinion that is not necessary. There was a quorum of each house present in the joint assembly; there was a majority of that quorum actually voting for the members chosen. In our opinion that was a valid election.

See also Clark and Maginnis *v.* Sanders and Power (Senate Election Cases, 637); Davidson *v.* Call (Senate Election Cases, 711).

The journals of the senate and house explain the nonparticipation of the senator from the fourth senatorial district and the member of the house of delegates from Taylor County.

On January 20, 1899 (Senate Journal, p. 66), a resolution was introduced in the Senate declaring that Kidd, the sitting member, was not elected and that Morris was duly elected, directing that Kidd vacate his seat and Morris be sworn in.

On January 23, 1899 (Senate Journal, 91-94), this resolution was considered and a substitute was adopted reciting the contest between Kidd and Morris, the reference to and pendency of the contest before the committee on privileges and elections, and the opinion of the senate that Morris was entitled to the seat pending the contest, wherefore the senate resolved that Kidd was not entitled and that Morris was entitled to a seat in the senate from the fourth senatorial district pending the contest, and that Morris be sworn in. Morris took the oath and was seated.

On January 25, 1899 (Senate Journal, p. 1081), the senate adopted a resolution that the contested election case of Morris *v.* Kidd be the

special order for consideration and determination on its merits on February 7, 1899, with leave to either party to take testimony, "and that pending the determination of such contest neither Morris nor Kidd shall be entitled to vote or sit as a member of this body."

The journal of the house shows the following proceedings in the contest over the seat of delegate from Taylor County:

The secretary of state, under chapter 3, section 70, of the Code of West Virginia, returned to the house when it assembled the list of delegates entitled to participate in its organization, and among them Brohard, of Taylor County, who was sworn in. (House Journal, p. 5.)

On January 12, 1899, the house referred to the committee on privileges and elections the question of the right of Brohard to be sworn in, with instructions to report the person *prima facie* entitled to be sworn in as member from Taylor County. On January 16, 1899, the house adopted a resolution reported from said committee that, pending determination of the title to the seat, neither Brohard nor Dent (the contestee) "be permitted to participate in the proceedings of this house."

On January 24, 1899, the majority of said committee reported a resolution that Dent was elected a delegate from Taylor County, and that he at once be qualified and take his seat.

On January 25, 1899, the house unanimously resolved that the consideration of the majority and minority reports concerning the contest in relation to the delegate from Taylor County be postponed until February 7, with leave to either party to take testimony.

The judgment of the senate was a finality in respect of Morris and Kidd. The judgment of the house was a finality in respect of Dent and Brohard. Each of them was adjudicated not qualified to participate or vote in the house wherein he claimed a seat, pending the final decision of the body which by the constitution of West Virginia (article 6, section 24) is made "the judge of the election returns and qualifications of its own members."

Therefore, on January 25, 1899, only 95 members had the right to participate and vote in the two houses; only 95 members had the right to participate and vote in the joint assembly. Of these Mr. Scott received 48 votes—a majority. Therefore the first objection, that there were 97 votes in the joint assembly, and that a majority was 49, is unfounded.

The second objection assigned is, that "of 48 votes received by Mr. Scott were the votes of Senators Getzendanner and Pearson, cast and received against a protest spread upon the journal of the joint assembly, and showing that these senators had, under article 6, section 13, of the State constitution, forfeited their seats as senators in the legislature by the acceptance of lucrative offices under the Federal Government, and likewise their right to vote in said joint convention."

These protests show that Senators Getzendanner and Pearson accepted commissions in the Second Regiment of West Virginia Volunteers and discharged the duties and received the pay of captain and lieutenant, respectively, while in the service of the United States during the Spanish war. These facts are admitted, and it is further admitted that these senators were "hold-over senators," who, between the session of the last legislature and the assembling of the new legislature in 1899, had accepted, had served, and had resigned their commissions prior to the twenty-fourth regular session of the State legis-

lature. The protest further recites that these two senators had vacated their seats and forfeited their right to vote in the joint convention, as stated in the second objection.

It appears by the journal of the joint assembly that Senators Getzendanner and Pearson were present therein and voted for Mr. Scott.

The constitutional provision is that—

No person holding a lucrative office under this State, the United States, or any foreign office \* \* \* shall be eligible to a seat in the legislature.

On January 20, 1899, resolutions of like tenor and effect with these protests were offered in the senate, declaring that by virtue of this constitutional provision and the acceptance of said commissions each of these senators "thereby became ineligible and forfeited his right to a seat in this body." These resolutions were referred to the committee on privileges and elections, and on January 23, 1899, that committee reported in lieu of said resolutions a substitute declaring that Getzendanner and Pearson are legally qualified and entitled to hold their membership in the senate, and have not vacated their seats therein under the provisions of section 13 of article 3. The senate adopted the substitute on January 24, 1899.

This judgment of the senate of West Virginia upon the title of Senators Getzendanner and Pearson to their seats therein is a finality. The Senate of the United States can not reverse it. As before said, the State senate is, under the State constitution, "the judge of the elections, returns, and qualifications of its own members." Such constitutional powers have effect, not only to make the members of each house the judge in each case, but also to forbid that the members of any other tribunal shall be judges thereof to review or reverse such original judgment. The jurisdiction of each of the houses of the State legislature is original and exclusive. (Case of H. A. Du Pont, Fifty-fourth Congress, first session, Report No. 289, p. 104.)

The senate of West Virginia is the only tribunal which could either hear or determine lawfully these objections to the qualifications of Senators Getzendanner and Pearson. Its judgment in their favor is final. The Senate of the United States has not authority to originate, hear, or determine any objections to the qualifications of those who acted and voted as members of the senate of the State. Where the title of an individual member of the legislature who has once been seated has been determined by a subsequent adjudication of the house to which he belongs, such judgment will not be here disturbed or inquired into. (*Potter v. Robbins*, Senate Election Cases, 88; *Clark and Maginnis v. Sanders and Power*, Senate Election Cases, 652; the case of David Turpie, Senate Election Cases, 625; the petition of H. A. Du Pont (minority report), Fifty-fourth Congress, first session, Report No. 289, pp. 98-104; *Sykes v. Spencer*, Senate Election Cases, 521.)

It should be noted that the Senate of the United States, in *Stanton v. Lane* (Senate Election Cases, 180), upon a similar case came to a like conclusion with the senate of West Virginia. James H. Lane was elected a Senator from Kansas in April, 1861, and took his seat July 4, 1861. It appears that on June 20, 1861, President Lincoln appointed him brigadier-general of volunteers; that he accepted the appointment and qualified to perform its duties, but had resigned the office. The governor of Kansas appointed Frederic P. Stanton to fill the vacancy, but on January 16, 1862, the Senate voted that Lane was entitled to

