42D CONGRESS, 2d Session. } SENATE. { REPORT No. 58.

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
Members present	105

In the senate:

Zebulon B. Vance received	32
Joseph C. Abbott received	11
Scattering	5
Members present	48

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.

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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-

cision which sustains it, namely, the Indiana case of 14 Ind., page 927, while on the other hand are the decisions in Maine, New Jersey, Pennsylvania, Wisconsin, and California, to which your committee would refer, and from which the following quotations are made:

1795. The State *vs.* Anderson, (1 Cox, N. J. Rep., 318:)

Anderson was elected sheriff of Hunterdon. He had not been three years a freeholder, and was therefore absolutely disqualified, the statute of 1788 having declared that no person shall hereafter be eligible to the office of sheriff in any county in this State, unless he shall be and hath been an inhabitant thereof and possessing a freehold estate in his own right in fee-simple, in the same county, *for three years previous to his election.*—(324.)

Held by the court—

That Anderson was disqualified, but that his election was not void. The election of an unqualified person as sheriff is not *ipso facto* void; it is only voidable.—(Syllabus, 318.) Still, however, we think the election not *ipso facto* void.—(Opinion, 327.)

1849. State *vs.* Giles, *ex rel.* Dunning, &c., (1 Chand., Wis. Rep., 112:)

Two questions arose in this case:

1st. Whether the person holding the office of sheriff at the time of the adoption of the constitution was eligible to that office at the next ensuing election.

2d. If the then sheriff was ineligible, whether the person who, at that election received the next highest number of votes could be considered as entitled to the office.—(13.)

"The mere ineligibility of a person to hold a particular office, and who receives the greatest number of votes, such votes are not a mere nullity, but should be counted by the canvassers. A contestant for the same office, and receiving a lesser number of votes, though eligible, cannot be regarded as elected, and does not thereby become invested with the right to the office."—(Syllabus, 112.)

It is proper to say that *we are all of the opinion* that the mere ineligibility of a candidate does not, as the law now is, render void the votes cast for him; that such votes should not be rejected, but should be counted by the canvassers, and that in the event of such ineligible person having the highest number of votes, the person having the next highest number is not thereby elected. If any public embarrassment is apprehended from this, such as that an office may remain indefinitely vacant, by reason of a majority of the electors obstinately persisting in voting for an ineligible person, it is within the undoubted power of the legislature to prevent it, by enacting that all such votes shall be deemed void and not be counted.—(Opinion, 117.)

And this remedy is so reasonable and practical that we may well ask, if it is intended that the English rule shall prevail in this country, why has it not been resorted to? Our answer is, that such an idea is contrary to the spirit of our institutions, and opposed to the principle that all power granted is by the consent of the governed. When we decide that a minority of votes may elect, we strike a blow at the very heart of this republican principle.

1855. 38 Maine Rep., 597:

A majority of the votes at the election in Sagadahoc County were cast for Abel C. Dinslow for county commissioner. There was no such person in being. The governor submitted to the judges the question whether it was competent "to throw out the votes for Abel C. Dinslow and issue a new commission to such person, who is eligible to said office, as shall appear to have the highest number of votes?"

The judges answered in the negative.

They were further asked whether the office was vacant.

The judges answered *it was.*

1861. State *ex rel.* Off. *vs.* Smith, (14 Wis., 497:)

The remaining questions are: 1st. Whether the defendant, being an alien, and not a qualified elector at the time of his election, was eligible to the office. 2d. If he was ineligible, whether the relator, who received the next highest number of votes cast, is entitled to the office.

The last question has been already settled in this State by the case of the State *vs.*

Giles, (1 Chand., 112.) It was there held by the unanimous judgment of the court that in the absence of a statute declaring it so, the mere ineligibility of a candidate does not render void the votes cast for him; that such votes should not be rejected, but should be counted by the canvassers; and that in the event of such ineligible person having the highest number of votes, the person having the next highest number would not be thereby elected.—(Opinion, 498.)

1867. Commonwealth *vs.* Cluley, (56 Penna., 270:)

The votes cast at an election for a person who is disqualified from holding an office are not nullities. They cannot be rejected by the inspectors, or thrown out of the count by the return judges. The disqualified person is a person still, and every vote thrown for him is formal. Even in England it has been held that votes for a disqualified person are not lost or thrown away so as to justify the presiding officers in returning as elected another candidate having a less number of votes, and if they do so a quo warranto information will be granted against the person so declared to be elected, on his accepting the office. (See Cole on Quo Warranto, 141–2; Regina *vs.* Hiorns, 7 Ad. & E., 960; 3 Nev. & Perry, 184; Rex *vs.* Bridge, 1 M. & S., 76.) Under institutions such as ours are there is even greater reason for holding that a minority candidate is not entitled to the office if he who received the largest number is disqualified. We are not informed that there has been any decision strictly judicial upon the subject, but in our legislative bodies the question has been determined. It was determined against a minority candidate in the legislature of Kentucky, in a case in which Mr. Clay made an elaborate report and was sustained. In 1793 Albert Gallatin, elected a Senator from this State, was declared by the Senate of the United States disqualified, because he had not been a citizen of the United States nine years, and his election was declared void for that reason, but the seat was not given to his competitor. *Nobody supposed the minority* candidate was elected. There have been several other cases of contested elections in which the successful candidates were decided to have been disqualified, and denied their offices. John Bailey's case is one of them. He was elected to Congress from Massachusetts, and refused his seat in 1824. But neither in his case, nor in any other with which we are acquainted, were the votes given to the successful candidate treated as nullities, so as to entitle one who had received a less number of votes to the office. There is a class of cases in England apparently, but not really, asserting otherwise.—(Opinion of the court by Strong, J.)

This able opinion by Judge Strong, now on the supreme bench of the United States, is well worth careful consideration. Your committee would call special attention to that sentence where it is stated that "the *disqualified person* IS A PERSON STILL, and every vote thrown for him is formal." The act of Congress prescribing the time and manner of electing Senators specifies what the vote shall be for in order to make it available in the count; for it says "each House shall openly, by a *viva-voce* vote of each member present, *name one* PERSON *for Senator*." The vote must be for a person, not a blank in fact, not for a myth, but for a person. But if the vote is cast for *a person for Senator in Congress from that State*, this statute has been formally complied with, and no construing can change the fact. Vance is a *person;* 63 *viva-voce* votes in the House, and 32 *viva-voce* votes in the Senate, were given for him for Senator in Congress from North Carolina on the day and at the place required. Then the provisions of the act of July 25, 1866, have been strictly and formally complied with. What power, then, has the Senate of the United States, or any court, to declare these votes were never *cast for a person;* for this it seems to your committee must be said before the memorialist could be entitled to the seat he claims. But even this conclusion must result in a decision adverse to his claim; for if these votes are declared nullities, then no quorum voted. (Also Saunders *vs.* Hayes, 13 Col., pp. 145, 156; 10 Col., Whitman *vs.* Maloney.)

Secondly. The legislative decisions are against the idea that the English law obtains in this country. So far as any action has been taken in the Senate which bears upon the question, it has been decidedly against the English law.

In the case of Mr. Gallatin, from Pennsylvania, in 1793, although deciding him to be ineligible and his election void, yet, by resolution, the

governor of that Commonwealth was simply notified of this action.—(Cont. El., 3d Cong., 1st sess., p. 859.)

The case of Mr. Shields, of Illinois.—(Cont. El., Cong., from 1834 to 1865, p. 606.)

The case of Yulee *vs.* Mallory, of Florida, where blank votes were taken into the count.—(Cont. El., p. 608, 32d Cong.)

The cases of Mr. Thomas, of Maryland, and Miller, of Georgia, where the oath of office was modified, is a declaration on the part of the Senate of the American rule.

In the House of Representatives the same rule has so far prevailed.

The case of Mr. Bailey, of Massachusetts, 1824, where the candidate receiving the highest vote was declared ineligible, yet the votes given to him, as Judge Strong remarks in the case of Cluley, "were not treated as nullities."—(Cont. El. from 1789 to 1834, p. 254.)

The case of Smith *vs.* J. Y. Brown, 1868, where the present question is ably discussed in the report by Mr. Dawes from the Committee on Elections, and it is decided that a minority cannot elect.—(Cont. El. from 1865 to 1871, p. 395.)

In the case of McKee *vs.* J. D. Young, 1868, although the claim of the contestant was decided on other grounds, yet the opinion is re-affirmed that a minority cannot elect.—(Cont. El., 1865 to 1871, p. 422.)

The case of Christy *vs.* Wimpy is of a similar character.—(Cont. El., 1865 to 1871, p. 464.)

Also the case of Jones *vs.* Mann, 1869.—(Cont. El., 1865 to 1871, p. 471.)

The case of Wallace *vs.* Simpson, 1870, has been referred to as sustaining the English rule. But an examination of that case shows that it was decided on wholly different grounds. That the proposition "that when one of two candidates is ineligible the votes given for him are of no effect, and the other candidate is elected," was maintained by but one member of the sub-committee, Mr. Cessna, while it is expressly stated that the other two members, Mr. Hale and Mr. Randall, dissented from the proposition.—(Cont. El., 1865 to 1871, p. 731.)

In the case of Zeigler *vs.* Rice, of Kentucky, 1870, it is decided that even where there is notice of ineligibility of the successful candidate this does not entitle the minority candidate to take his seat. The majority report of the committee in this case states:

> The committee are well satisfied that the *acts of the contestee were well understood by the voters of said district at the time contestee was voted for, but do not agree with contestant that as contestee was ineligible, the candidate who was eligible is entitled to the seat.*—(Cont. El, 1865 to 1871, p. 884.)

The removal of disabilities by the action of Congress, of the same nature as these under which Vance labored, is a decision in the strongest possible terms that such votes are not nullities; that the election of such candidate is not void but voidable only. For if they were nullities, and the election of such candidate void, then Congress, by such action as it has taken, has elected members to one of its own houses without reference to the action of the people. As an example, we may refer to the case of R. R. Butler, of Tennessee, (Contested Election Cases 1855–'71, p. 464;) also case of Young, of Georgia.

But suppose that it is admitted that the English rule is applicable here, do the facts in this case bring it within that rule? Were the votes for Vance cast in willful obstinacy for a candidate the voters knew, or had good reason to believe, would not be entitled to take his seat? The memorialist avers that the fact that Vance was known to be ineligible is not controverted. That his ineligibility was a matter of public notoriety in North Carolina is doubtless true, and that it was known to most if not