Fifty-Seventh Legislature.

SENATE. No. 37.

SIXTEENTH SENATORIAL DISTRICT.

MADIGAN *v.* BURLEIGH.

The Special Committee of the Senate, appointed to investigate all matters presented by the Remonstrance of Edmund Madigan against the right of Parker P. Burleigh to hold a seat as Senator from the Sixteenth Senatorial District, and all matters affecting the right of either of said parties to a seat at this board, have carefully examined and considered the same, and beg leave to submit this

REPORT.

At the time appointed by the Constitution for the assembling of the present Legislature, the situation of the Sixteenth Senatorial District with respect to its representative at this board, was peculiar, and in some of its aspects without precedent in the history of the State. No summons had been issued to any person by the Governor and Council to attend that day and take his seat as Senator from said district; but the certified roll of members elect made to the Secretary of the preceding Senate by the Secretary of State, pursuant to Sect. 21 of Chap. 2 of the Revised Statutes, did not contain, and was not accompanied by any report of a vacancy in said district, but did contain the following certificate in relation to said district, to wit:

By a report of the Governor and Council, under date of December 8th, A. D. 1877, Parker P. Burleigh of Linneus was declared to have received the greatest number of votes for Senator in the Sixteenth Senatorial District, Aroostook County—but the issue of a summons for him to appear and take his seat was not authorized.

This certificate comprised all that is required by the Constitution to entitle a Senator elect to a seat in this Senate, in the first instance, and was based upon the finding of the Governor and

Council. In the early part of this session the Committee on Senatorial Votes made a report with reference to the election of Senator in said District, maintaining the finding of the Governor and Council, and the certificate of the Secretary of State made in pursuance thereof, and Parker P. Burleigh was thereupon declared by the Senate *prima facie* entitled to a seat as Senator from said District, and having taken the necessary oath, forthwith entered upon the discharge of his duties. Thereupon Edmund Madigan presented the following

REMONSTRANCE.

To the Honorable Senate of Maine,

Now in session at Augusta, Maine:

The undersigned respectfully represents that at the last September election he was duly elected Senator for the Sixteenth Senatorial District by a plurality of all the votes cast for said office in said District That the vote stood as follows, viz: For Edmund Madigan two thousand three hundred twenty-four, for Parker P. Burleigh two thousand two hundred twenty, leaving a plurality in favor of said Madigan of one hundred and four, (104)

And said Madigan further says, that if technical objections and defects are to prevail in opposition to the expressed will of the majority, that several of the towns and plantations in said county should have their vote rejected, on account of informalities in their returns and defects in their organization, by reason of which they had not on the tenth day of September last acquired the right to vote and have their votes counted, whereby his majority over said Burleigh could be greatly increased; and said Madigan further says, that said Burleigh was not for the three months next preceding the time of said election a resident of said Sixteenth Senatorial District, and has not since been, and is not now a resident thereof, by reason whereof said Burleigh was at that time and still is ineligible to the said office of Senator for said District, so that no votes can be counted and allowed for said Burleigh for said office in any event, and so said Madigan in the event of a vacancy is the only constitutional candidate for said office, as none but he and said Burleigh have been voted for, therefore said Madigan comes and asks your honorable body to seat him as one of its members.

EDMUND MADIGAN.

Augusta, January 1, 1878.

First. The first question presented for the determination of your Committee was, who received a plurality of all the votes of which the Senate can constitutionally and legally take cognizance.

The returns from the several towns and plantations in said district made in compliance with the constitution and laws in such cases provided, show the vote for senator to be as follows:

For Parker P. Burleigh	2,256
For Edmund Madigan	2,183
Majority for Parker P. Burleigh	73

The returns from the two remaining plantations of Van Buren and Eagle Lake show a majority in those two plantations of 130 votes for Edmund Madigan, and if counted, would give the contestant a plurality of 57 votes in the total vote of the District.

The Constitution provides, Art. 4, Part Third, Sec. 3, that each house shall be the judge of the election and qualifications of its own members. This gives the Senate complete jurisdiction over all questions that may arise in cases like the present.

The Constitution and laws make certain provisions for the management and regulation of elections. The question as to what provisions of the Constitution and laws are mandatory, and what directory, have sometimes caused conflicting opinions.

The case of Noyes vs. Haynes in 1838, when the House rejected all ballots with red lines marked upon them, was overruled in 1868. See Senate Doc. No. 5, of that year where the Committee on senatorial votes counted such ballots under the provisions of the last part of Sec. 29, Chap. 4, Revised Statutes, that no vote should be rejected on this account after it is received into the ballot-box. We think the opinion then expressed correct. Said section 29 provides that certain votes shall not be received, then adds that if received into the ballot box they shall be counted. This section is clearly directory and illustrates the difference between a mandatory and a directory statute.

Section 73, chapter 4, Revised Statutes, provides that the assessors of plantations shall prepare a list of such inhabitants as they deem qualified to vote, and post it up, and section 75, chapter 4, provides that such assessors shall receive the votes of all qualified voters, and declare them in open plantation meeting, in presence of the clerk, who shall form a list of the persons voted for, and make a record in open plantation meeting. In addition to this, said section 75 provides that the clerk shall make out fair copies of the lists of voters so posted up, and of the names of all voters on said list who were actually present and voted at said election, which shall be attested by the assessors and the clerk in open plantation meeting, and the copy of the list of votes and the names of the persons actually present and voting at the election, to be transmitted to the Secretary of State, with the record of votes thereof.

This is a plain command, with no provision to evade it, like that contained in Sec. 29, before cited. A section complete in itself, that cannot be misunderstood. Then to make this section (sec. 75) entirely free from doubt, and amandatory in its provisions, Sec. 77, Chap. 4, provides that unless the provisions of Sec. 75 have been fully complied with, the votes of such plantation shall be rejected and not counted for any of said officers. That plantations may have no excuse, Sec. 77 provides that the Secretary of State shall furnish the clerks of such plantations suitable blanks for all necessary purposes.

The vote of the plantation of Van Buren was rejected, and not counted because the copy of the list of votes and of the names of all voters on said list who were actually present and voted at said election was not attested by the assessors and clerk, as required by said sections 75 and 77.

It was suggested to the Committee that chapter 212 of the public laws of 1877 would apply to the case of Van Buren, and that an attested copy of the list of voters might be substituted under that provision of the section that allows such copy when a return is defective by means of an informality.

This chapter (212) cannot apply to the present case even if it can apply to Sec. 75, Chap. 4, Revised Statutes.

The paper that came from Van Buren was not informal, it was an utter failure to comply with law. Informality is want of form. The paper that came from Van Buren is not attested at all; it is as if no attempt had been made to return a copy of the list of voters. It is not a case where a copy to cure an informality will do; a new and original paper would be required, signed for the first time by the assessors and clerk. If they have a right long after the election to sign and send in to the proper authorities a copy of the list of voters, they would have the same right in regard to the return of votes, and thus might make up all the returns of an election, not in open plantation meeting, but at some other time and place after the election. But it was urged that the envelope that contained the papers from Van Buren had the names of the assessors and clerk upon it, which show that the intention was right, and that putting their names on the envelope was a substantial compliance with the law.

Neither the Constitution nor the laws require that the envelope shall have the names of the assessors and the clerk upon it;

neither is it required that the envelope shall be directed in open plantation meeting, to the Secretary of State,—only that it must be sealed up in open plantation meeting; it may be directed after the meeting. Men might dare to put their names upon an envelope to certain printed statements which the law has nothing to do with, when they would not dare, under oath, to sign an official document. But the law requires them to sign, and punishes them severely if they sign falsely. Most assuredly might this be the case if they knew the pretended returns were false, and feared a contest which might show fraud to hold them criminally.

Section 3, art. 4, part second of the Constitution, provides that ~~[illegible]~~ copies of the list of votes shall be attested by the assessors and clerks of plantations, and sealed up in open plantation meeting. In the case of the plantation of Eagle Lake, the list was not attested by the plantation clerk, therefore the vote of this plantation was rejected and not counted, clearly on a mandatory provision of the Constitution. The next question presented is, can or should the vote of a plantation be thrown out because its officers have not performed their duties?

Among the many cases bearing upon this point the following are cited:

Manchester *v.* Somes, House Doc. No. 15, 1833, the vote of the town of Cranberry Isles was thrown out because the clerk did not attend the town meeting, but appointed a clerk to act for him, who was present at said meeting and did the business of the meeting correctly.

In the case of Farley *v.* Cilley, House Doc. No. 14, 1833, the vote of the town of Thomaston was rejected because the Selectmen did not regularly adjourn the meeting at which there was no election to the meeting at which the election of Mr. Cilley was claimed.

In the case of Chase *v.* Cunningham, House Doc. No. 5, 1838, the vote of the town of Westport was rejected because the town meeting was not legally warned.

See also House Doc. No. 36, 1837, when the vote of Ward one, composed of islands, a part of the city of Portland, was rejected. Here the return of the list of voters was not signed by the warden, a similar case to that of Van Buren.

In 1854, see House Doc. No. 1, the vote of Machiasport was thrown out because the town meeting adjourned near its close to a post office for the purpose of finishing up its business.

In 1872, see Senate Doc. No. 9, the whole vote of the city of Ellsworth was rejected because of the failure of the proper city officers to perform their duties.

In all the cases cited there was no question as to the popular will as determined by the number of votes cast. There was no proof or even suggestion of fraud, nor any evidence that the result would have been different if the election had been held according to law; but on the contrary, the Committee in several instances expressed it as their opinion, that the result would have been the same as to the number of votes, though in most cases these decisions did change the results as to candidates elected.

The votes in all cases cited were rejected because of a non-compliance with the Constitution and mandatory provisions of law.

The design of a representative government is not merely that the people should express their will at the polls, but that that will should be legally and constitutionally expressed. (Opinion of Justices, 6 M., 491.)

But it was contended by the remonstrant that the votes from the following plantations, to wit: Mapleton, Crystal, Silver Ridge, Woodland, No. 11, R. 1, and Bancroft, should be rejected and not counted, because of alleged defects in records of their organization.

The existing provisions of law with reference to the organizations of plantations, are found in chapter 3 of the revised statutes, from section 46 to 52, inclusive; and section 77 of chapter 4, revised statutes, provides that it must appear by the return of the organization made to the office of the Secretary of State, that the plantations have been duly organized. Those provisions were incorporated into the revised statutes from chapter 121 of the public laws of 1870.

Now it is claimed that the vote of Mapleton must be rejected, because it does not appear from the record of its organization that the assessors were sworn, or that the persons petitioning for the warrant of the County Commissioners to organize the plantation were legal voters. But Mapleton was organized June 30, 1859: and section 71 of chapter 4 of the revised statutes of 1857, in force at that date, only required the assessors, after the organization of a plantation, to "forthwith make a written description of the limits of such plantation, sign it, and transmit to the Secre-

tary of State to be by him recorded." Section 77 of the same chapter, in force at that date, required that this return should show that section 71 had been complied with, and the return was only required to show "a written description of the limits." Chapter 106 of the laws of 1859, was not amendatory of section 71 of chapter 4, revised statutes of 1857, and there was no requirement in 1859 that the vote of a plantation must be rejected because all the proceedings had in its organization were not returned to the Secretary of State. But an examination of the copy of the record of the organization of this plantation, now on file in the Secretary's office, sufficiently shows that the officers were sworn. Besides chapter 166 of the resolves of 1873, legalized all the doings of the County Commissioners in organizing plantations in Aroostook county. This meets the objection that the petitioners do not appear to be legal voters. The objection to Mapleton, therefore, cannot be sustained.

The same objections were made to Woodland and Silver Ridge, which were organized April 25, 1861, and July 20, 1862, respectively, and for the same legal reasons, the objections cannot be sustained.

Objection is made to the vote of Crystal plantation, because it is alleged that its organization was annulled by the act of 1859 restricting plantations to one township. Crystal was organized October 19, 1840, and originally comprised two townships. But 1848 one of the townships was taken off and organized as Dayton plantation, now the town of Hersey. Hence the organization of Crystal was in no way affected by the act of 1859. The objection to this vote is therefore untenable.

Objection is also made to the vote of Bancroft, No. 11, R. 1, and Silver Ridge, because the return does not show a sufficient "written descriptions of the limits of the plantations." An examination of the records of the organization of those plantations, in comparison with those of the other plantations in Aroostook county, discloses the fact that the objection applies with equal force to all the other plantations in that county, except Pleasant Ridge, Perham, Reed, Oakfield, Westfield, Woodland and Mapleton. It is true that in 1870 a resolve was passed legalizing the organization of Cyr, Hamlin, Van Buren, St. John, St. Francis, Wallagrass, and Eagle Lake; but it will be seen that all the plantations named in that resolve except Van Buren and Hamlin, have reorganized since

the passage of that resolve, and still have failed to give any written description of the limits.

Thus upon examination, your Committee find that a rigid and impartial enforcement of the doctrine invoked by the contestant with respect to defective organizations, would result in enlarging the plurality for Parker P. Burleigh by 451 votes. But after a careful consideration your Committee arrived at the conclusion upon this point, that the records of the organizations are in substantial compliance with the laws existing at the time they were effected, and that it would not be just to the contestant himself to enforce the objections which he has here raised.

The most important inquiry connected with the organization of plantations is, whether there has been compliance with Sect. 52 of Chap. 3, R. S., requiring an annual return, this being the test which determines the legality of the meeting at which the vote returned is cast; and this objection is not raised by the contestant in any case.

It was further objected, however, by the contestant, that the returns from Blaine, Linneus, Littleton, and Mars Hill, should be rejected, because the whole number of ballots was not stated, and from New Sweden plantation because the number of votes was not written out in words.

The returns from the places above-named, aside from the "irregularities" on account of which objections was made, seemed to have been perfect; and if those irregularities were fatal, which your Committee do not concede, the returns would then be defective by reason of such "informalities" as are referred to in Chap. 212 of laws of 1877, hereinbefore cited, and would be clearly amenable by force of its provisions. It was in evidence by consent of the parties, that certified copies were produced before the Governor and Council in all the cases last named, and also in case of Macwahoc, and made a part of the returns, and that they were to be regarded as before the Committee, and received if legally admissible for the purpose named. Your Committee are of the opinion that they were admissible, and that they would legally operate to cure any defects that may have existed by reason of such "informalities" as those referred to. Under this view the vote of Macwahoc, as well as that of Ashland, was allowed and counted for the contestant.

The difference between the returns from these places which were

attested by all the proper officers, and the paper that comes in from Van Buren, is apparent. The former are attested returns; the latter a paper attested and signed by nobody. The former are returns that may have "informalities" which copies might cure; the latter is a blank, and the only cure is not to amend, but to make a new one—in a word, to do all that now which the law says shall be done only in open plantation meeting. Furthermore, the act of 1877, before-named, manifestly applies only to the returns of votes, and not to the check-list or list of voters actually present and voting.

A question of much importance to both parties was the admissibility of certain affidavits as evidence that 80 aliens voted at the last election in the Madawaska region. These affidavits were offered by Mr. Burleigh, and after some hesitation were received by the committee *De Bone Esse*. Other affidavits upon other points were also received in the same way, but at the close of the hearing it was the unanimous opinion of the committee that they were not proper evidence and were all thrown out of the case as being too uncertain in their character to be used in determining rights so important.

In reviewing the precedents in the State, the kind of evidence admitted before committees in such cases cannot, in most instances be ascertained. Committees state results, not the kind of evidence by which they came to conclusions. That affidavits have been used to a limited extent in this State in contested election cases, there can be no doubt, as clearly appears by House Doc. 15, 1833, Manchester vs. Somes. See also House Doc. 12, 1856, and Senate Doc. 5, 1868; while the practice in New York seems to be to admit affidavits in nearly all cases, still your Committee are of the opinion such a practice is not sanctioned by the laws of this State, and might result in grave wrong if allowed to prevail.

A comparison of the copies of lists of voters in the Madawaska plantations with the census returns and the records of naturalization in Aroostook county, would seem to show that 186 persons foreign born and not naturalized voted at the last election, which corroborates the statements contained in the affidavits; but this question, so vital to the contestant, as well as to a large number of his constituents, was not acted upon by your Committee, the evidence, as before stated, not being sufficient.

But your Committee have reached the conclusion, that under the

constitution and laws of the State, which, as sworn judges they are not likely to disregard, and in accordance with the best considered election cases found among our legislative precedents, the most important of which are heretofore cited, Parker P. Burleigh received a plurality of seventy-three votes, of all those cast for Senator in said district, of which the Senate can properly and rightfully take cognizance.

But it is contended by the remonstrant that if Parker P. Burleigh received a plurality of all the legal votes, that he was not eligible to the office, for the alleged reason that he was not a legal resident of the Sixteenth Senatorial District at the time he was chosen, or for the three months preceding.

It was in evidence before the committee, by the testimony of P. P. Burleigh under oath, that he went to Linneus in Aroostook county, on the 17th day of May, 1830; that from the incorporation of the town of Linneus in 1836 down to the year 1873, he was a legal resident of that town, and voted there every year; that during that time and at the present time, he owns the homestead farm in that town; that in 1873, while holding the office of Land Agent, which at that time required his personal presence in Augusta and Bangor, he decided to make Bangor his temporary place of residence during such term as the duties of Land Agent required; that on the 23d of May, 1876, within five days of the termination of his term of office as Land Agent, in accordance with his original intention, which he had never abandoned, he returned with his wife to his home in Linneus, fully intending then as now to make that his home during the remainder of his life, and took up his residence at the homestead in the family of the lessee, as provided by the terms of the lease previously made, and remained attending to his orchard and garden, as reserved in said lease, until the 12th of June, when he left temporarily, accompanied by his wife, to visit the Centennial at Philadelphia. After visiting Philadelphia and other places, he returned to Linneus in the latter part of August, whither his wife followed him on the 5th day of September, she having tarried a few days in Bangor at the home of her father. On the 14th of the same month she returned to Bangor, in response to a telegram announcing the dangerous illness of her father, and earnestly requesting her presence. In the mean occurred the annual election at which he was chosen a senator to represent that district; that at a meeting of the selectmen of Linneus, all of whom were democrats, held on

the day of the election, for the purpose of determining who might be legal voters, he voluntarily made a statement of facts as to his residence, and upon such statement the selectmen unanimously determined that he was a legal resident of Linneus, and entitled to vote, and accordingly he did vote. He remained in Linneus till Dec. 13th, when he left to take his seat in the Senate, his wife having been detained in the meantime in Bangor by the critical illness of her father.

On the 12th of March, 1877, after the adjournment of the Legislature, he returned to Linneus, and was occupied in making arrangements for carrying on the farm, having purchased seed for that purpose and having plowed 14 acres of land the fall before.

In the meantime occurred the annual March election, at which he was present and voted, no objection being made.

In the latter part of March, while engaged on his farm, he unexpectedly found it necessary to go to Bangor to give his personal attention to an important equity suit involving the earnings of his lifetime; that his absence from Linneus at any and all times since May 23, 1876, has been for a temporary purpose, and that he has been during that time a resident of Linneus, and has paid his poll and other taxes in accordance with his intention to there reside and bear his burden of municipal duties; that he has never owned a house in Bangor, and has never kept house there, and has only hired and used the furniture of a chamber as a measure of convenience in boarding at the house of his wife's father; that he has no regular and established business in Bangor.

The above statements under oath are corroborated in material points and important particulars, by the statements, under oath, of Mrs. Burleigh, the Hon. A. W. Paine and the Hon. Charles Buffum.

The above statements of intention made by Mr. Burleigh are not impeached or contradicted by any testimony offered by the contestant; on the contrary, the habitual custom of Mr. Burleigh of registering while travelling as being a resident of Linneus, together with his uniform practice of declaring Linneus to be his home, would seem to establish his intention beyond a doubt.

The above facts as to his mode of life since May, 23, 1876, are substantially agreed to by the contestant; but the contestant claims that all these do not constitute legal residence as defined by

the decisions of the courts in such cases, and cites several decisions in support of his theory, to wit:

61st Maine, page 460. This case in no way supports the position of the contestant as to Mr. Burleigh's residence; on the contrary, it would seem to settle the question definitely, as the position taken by Mr. Burleigh, the plaintiff in the case, claimed that he was not liable to be taxed in Bangor on the 1st day of April, because he had left Bangor on the 30th of March to take up his residence in New York. Like Mrs. Burleigh, he had been boarding in Bangor, but on leaving his wife did not accompany him, but remained at her boarding place, occupying the same rooms, and living in the same way, after the 30th of March as before, and using the same furniture, which also in part belonged to the plaintiff. It appeared that his wife never went to New York to live, nor did plaintiff himself finally settle in New York, as had been his intention. The Court instructed the jury that if they found the plaintiff was actually present in New York on the 1st of April, with the intention of remaining and living there, as testified by the plaintiff, no matter under what circumstances, or how long it might be shown the plaintiff's wife remained in Bangor after April 1st, the plaintiff was not legally taxable as an inhabitant of Bangor. The Court held that the acts and intentions of the wife do not affect the domicil of the husband. In 12 Gray, page 22, also cited, it appeared that one Bradlee had on the 1st day of May leased a house in Brookline, and made arrangements to reside there with his wife when he should be married. He did not occupy the house in B. till some time after. Was not married till after that time, and after his marriage went on a wedding tour. He was married on the 9th of May in Roxbury, and remained in R. up to the time of his marriage. On the question of residence in Roxbury *vs.* Brookline, the Court held that his intention and the arrangements he had made to reside in B. made him a resident of B., and that his absence being only temporary did not affect his residence in B.

In Sears *vs.* Boston, 1st Metcalf, page 250, David Sears went abroad with the intention of remaining for an indefinite period of time. He leased his dwelling house in Boston and hired one in Paris. At the time of his departure he intended to return, although he was absent with his family nearly two years, the Court held that he continued during the term of his absence to be an

inhabitant of Boston. In delivering the opinion of the Court Chief Justice Shaw said: "Had he returned to Boston a few days before an election, we think he would have had a right to attend and vote."

In 5th Pickering, also cited by contestant, the court refers to the case of Makepeace v. Lee, and being in accordance with the decisions Lee had been an inhabitant of Cambridge, but before the first day of May he went to Newton, and boarded with a tenant of his, and informed the selectmen that he had come there to live. In fact, he returned to Cambridge in August and took possession of his house there .Although, says the court, there is much in this case that looks like evasion and a pretended change of domicil to avoid taxes, it agrees with the principle that an actual removal into a town with the intention to become an inhabitant, made him one. But the contested election case of White vs. Robinson, in Mass. 1848, (see contested election cases, page 571) is more directly in point. It appears that Robinson, in April, went to Boston and took possession of a public house of which he had a lease, and placed his sign over the door as an inn-keeper; that his wife and daughter followed him and helped him in keeping the house; that the house and farm in Petersham, from which place he went, were occupied by his son as tenant. In the month of June he declared himself a citizen of Petersham, in a letter to his son. He also spoke of P. as his residence, and was taxed there. He was returned to the Mass. Legislature, and his seat was contested on the grounds of ineligibility. The committee reported unanimously that the absence of Robinson from Petersham was for a temporary purpose only, with no intention of changing his domicil.

In the case of Averill vs. Holman, Mass. contested election cases, page 647, in Mass., 1852, Holman's election being controverted on the ground that he was not a citizen of Boston, he having built a house in Newton, in which his family resided, it was in evidence that he had declared his intention of continuing to be an inhabitant of Boston, and that he was taxed on his personal property in Boston, and paid such tax. The committee found that the intention was conclusive, and the report of the committee was accepted.

From the testimony in the present case, the Committee find that since May 23, 1876, Parker P. Burleigh has been, and still continues to be, a legal resident of Linneus, and this opinion is further

strengthened by decisions cited by the contestant, as well as from such other cases as your Committee have examined.

In conclusion, upon the facts in the case, your Committee report that Parker P. Burleigh is duly elected Senator in the Sixteenth Senatorial District, according to the requirements of the Constitution and the laws.

J. MANCHESTER HAYNES,
DANIEL F. DAVIS,
JAMES MORRISON, JR.,
MOSES S. MOULTON.

ERRATA.

Page 5, in line 12 from the top, read "fair" instead of "pair."

Page 7, in line 17 from the bottom, after the word "But," insert the word "in."

Page 11, in line 11 from the top, read "seed" instead of "soil."

STATE OF MAINE.

IN SENATE, February 6, 1878.

Submitted by Mr. HAYNES of Kennebec, and on his motion laid on the table and ordered to be printed.

SAMUEL W. LANE, *Secretary.*