THE COUNTY ELECTION DECISION.

Judge Miner, in the Supreme Court of the Territory, April 18, delivered the following opinion in the case of Fergus Ferguson, plaintiff and contestant, vs. Clarence E. Allen, defendant and contestee. It was an appeal from a judgment made and entered in the Third District Court in favor of the defendant (J. T. Anderson, Judge):

The plaintiff, Fergus Ferguson, and the defendant, Clarence E. Allen, were each respectively candidates for the office of county clerk of the county of Salt Lake, Territory of Utah, at the August election in 1890, and the only candidates therefor.

At the canvas of the votes by the county canvassers of the precinct returns, that body adjudged that defendant Allen had received a majority of fifteen votes; the said plaintiff having received 3740 votes, and the defendant having received 3755 votes; and a certificate of election was accordingly given to the defendant Allen, who is now in possession of the office.

The plaintiff, within the time required by law, filed his notice of contest, and now claims that there are two distinct errors in that computation, that is:

First — In the Bingham Precinct, three polling places were provided by the Utah Commission, but no division was had of the registration list—the whole registration was left with the judges of each poll; that Poll No. 3 in such precinct was established up the canyon, in the mountains, for the accommodation of the voters at the Brooklyn mine. At this poll forty-one ballots were cast at this election—thirty-nine for the contestee and two for the contestant. Thirteen of the thirty-nine votes cast for contestee Allen were proved to be cast fraudulently, by persons not entitled to vote, and were rejected by the trial court, thus leaving Allen's vote in this precinct twenty-six.

It is now claimed by the contestant that the court erred in not rejecting the entire vote polled at this precinct, for the reason that the whole of the poll was proven fraudulent, and no legal votes were shown to have been cast.

The contestant also claims that he is entitled to have counted in his favor 15 votes in the South Cottonwood precinct, which were not returned by the judges of election, and claims that the facts concerning these 15 voters are that 15 legal voters, whose names appeared upon the registration list, who were entitled to vote, were wrongfully stricken from the registration list by the judges of election themselves, so as to prevent their vote. That the said 15 voters, however, tried to vote, so far as they were able to do so, and that each of them tendered a ballot, together with an affidavit sworn to in due form by each of said persons offering to vote, containing the oath required by the Act of Congress of March 3rd, 1887, known as the Edmunds-Tucker law, and that the judges refused to put their ballots into the box. Each of the voters caused said ballots to be preserved, and his name written upon it, identified and brought into court—so that the ballot was cast by each of the 15 voters as far as it was in the power of the voter to cast it. Each of these votes contained the name of the contestant. Counting these 15 votes, he would have a majority over the contestee of eight votes.

Contestant claims, 1st, that the court erred in not throwing out the entire ballot of the third poll of the Bingham Precinct, and deducting all the 39 votes from Allen's majority, for the reason that the whole of said poll was proven to he fraudulent, and no legal votes were shown to have been cast.

2. The Court erred in not allowing the fifteen votes which it determined to have been wrongfully and illegally kept from the ballot box in South Cottonwood precinct, and found to have been by the votes tendered for Fergus Ferguson, to be counted for him.

The evidence upon which this case was tried in the Court below is not brought before this Court by the record, and the only question before this Court on the record is whether or not the findings of fact, by the lower Court, justify the conclusions and judgment of the Court below, or whether other and different conclusions of law should have been reached upon the facts as found. Upon these points the Court below found, among others, the following facts:

8th. "That at said Poll No. 3, in Bingham precinct, said thirteen ballots were cast by persons who were not qualified electors of said precinct, but who fraudulently personated the names of persons whose names appeared upon the registration list who were not present to vote. That each of said thirteen ballots were cast, counted and returned for the incumbent, contestee Allen, for said office of county clerk."

9th. "That in the precinct of South Cottonwood, in said county, fifteen different persons presented themselves at the polling place on the day of election, and claimed the right to vote, and each tendered to the judges of election a ballot for contestant for said office of clerk of the county court, and with said ballot tendered an affidavit, sworn to before a justice of the peace, by the persons so offering to vote, which affidavit contained the oath required by the Edmunds-Tucker law, and the ballot of each of said persons was refused by the judges for the reason that the name of none of said persons was upon the registry of said precinct."

"That the names of each of the 15 persons had prior to the said day of election been upon the registration list of said precinct, but each of said names had been by the judges of election stricken from said list before the opening of the polls, in accordance with the directions in writing from the deputy registration officer of said precinct. That the right of each of said 15 persons to vote at said election had been objected to by a qualified voter in writing before said deputy registrar, and a hearing had been had upon each of said objections after due notice had been given each of said persons before said deputy registrar, and said deputy registrar had determined on such hearing that the names of each of said persons should be stricken from the registration list of said precinct *which said determination was erroneous and illegal—the said* 15 *persons being qualified voters*—but was duly certified to said judges and the vote of each of said persons was refused by said judges of election for the reason that the name of each had been so stricken from the registration list."

Upon the foregoing facts, as found, the trial court found therefrom the following conclusions of law:

"That to the majority of fifteen for the incumbent, as shown upon the face of the canvass and return, there should be added six votes on account of the matters set out in the fourth, fifth and sixth paragraphs of the foregoing findings of facts, and that from the majority for the incumbent, as thus increased, should be deducted fourteen votes, on account of the matters stated in the third and eighth paragraphs of said findings, leaving the incumbent a clear majority of seven votes out of all the legal votes cast for said office at said election." "That the ballots offered to be cast for contestant in South Cottonwood precinct, as referred to in the ninth paragraph of the said findings of fact, and which were rejected by the judges and were not in fact cast, cannot be counted, nor can any of them be counted nor made available to the contestant in this proceeding." "And upon the foregoing facts and conclusions, it is adjudged and determined by the court that the contestant's complaint be dismissed, and that he take nothing by this proceeding, that the incumbent was legally elected to said office of clerk of the county court of said Salt Lake County and his title and right to said office is confirmed."

The above findings include so much only as may be material in this discussion. On examination of the eighth finding of fact, we are unable to discover that there is any error of the court in its findings of law, so far as they apply to the third poll of Bingham precinct. It is apparent from the findings that 13 ballots were cast fraudulently by persons who were not qualified electors of that precinct, by personating those whose names appeared upon the registration list, but did not vote, and these thirteen votes were properly deducted from the vote of the contestee, Allen.

That there was fraud practiced at this poll there can be no question, but it does not appear from the findings of fact, that the incumbent or any of the officers conducting the election participated in such fraud or knew of it, or that the proceedings were so tarnished with fraud, neglect or improper conduct on the part of the officers that the result of the election was rendered so unreliable and fraudulent as to make it impossible to ascertain the actual vote from other evidence in the case.

Where the result at a poll, as shown by the returns, is false and fraudulent, and it is impossible to ascertain the actual legal vote from other evidence in the case, the vote of such poll must be wholly rejected.

Payne on election, section 499.

Mc. Cary on election, section 488, 489, 490.

Phelps vs. Shroeder, 26 Ohio State, 549.

Ex Parte Murphy, 7 Cowan 153.

Lloyd vs Sullivan, 24 Pac. Rep. 218, 227.

12 Cal., 352.

84 Am. Decisions, 242.

Cooley's Con. Limitations, 280.

State vs. Hillmantell, 23 Wis., 422.

In this case the court was able, from the testimony, to purge the poll of the