had time to prepare a written opinion in this case, but explained that owing to the pressure of business in the courts—one case following another in such rapid succession—it had been impossible for him to do so.

By the official count, he said, the defendant, Allen, had a majority of fifteen votes. The plaintiff contested the election of the defendant, substantially upon the first and fourth grounds provided by the statute, his ground for contesting the first being the malconduct of the board of judges, or any number thereof, and the fourth on account of votes

It had been shown that in poll No. 3, Bingham precinct, thirteen illegal votes were cast for the defendant. It was very evident to his Honor's mind that some of those persons, if not all of them, were practicing a direct fraud. At least seven of the men, he thought, whose names were on the registration list came forward and testified that they were not there on election day; that they lived away from the place and therefore were not legal voters. But their names were still on the registration list somewhere, and some other persons appeared and personated them, and voted. Then the balance of the thirteen men whose names were on the registration list had not been summoned to the court, to testify as witnesses, but the evidence showed that they were not at this place on election day. Perhaps it was not shown so conclusively; but he sought it established the fact that they were not there—that the persons who voted were not authorized to do so. Of course it was possible for several persons of the same name to be living in the voting precinct, and especially in a precinct such as Bingham, with a mining population whence people came and went. He thought the evidence showed, however, that at least six of the thirteen votes were illegal, and bore a very strong suspicion if, indeed, it did not establish the fact that at least one of the judges knew quite a considereble number of those thirteen men whose names were registered, and that when those persons came up to vote he knew they were not the same. Of course it might be that he did not know they were not of the same Christian and surname, but they were certainly not the persons of the same name whom he had previously known. Therefore, taking it all in all, added his Honor, I think the evidence shows that these thirteen votes were illegal, and should be deducted from the number that the defendant received, on the official count.

Now some votes had been gained by error in counting; he could not, just then, state how many, nor did he deem it necessary to examine them particularly; but he seemed to remember one for the plaintiff in Bluff Dale. His reason for his not thinking it necessary for him to go over these and take them out now was, that the election must turn upon whether or not the rejected votes at South Cottonwood were to be counted for the plaintiff. If they were, he thought it would go to decide the election of the plaintiff; if they were not, then the defendant was entitled to retain his seat. He believed it was conceded that of the eighteen persons at Murray before referred to, and claimed to be legal voters, two were not entitled to vote—Green and Wolfley. It seemed hardly to be contended that these men were legal voters.

The question was whether votes could be counted in favor of a candidate when the votes were not cast.

Section 3751 of the Compiled Statutes says:

"No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the malfeasant or improper conduct is such as to procure the person whose right to the office is contested to be declared elected when he had not received the highest number of legal votes."

The next section runs thus:

"When any election held for an office exercised in and for a county is contested on account of any malconduct on the part of the board of judges of any precinct election, or any member thereof, the election cannot be annulled and set aside upon any proof thereof, unless the rejection of the vote of such precinct or precincts, would change the result as to such office in the remaining vote of the county."

Now was it malconduct of the judges at Murray to refuse to receive the votes of men whose names were not on the list? Was it their duty to receive them? Were they confined to the registration list, or might they receive the votes of any person who came up and showed that he was a legal voter, offered to take the regulation oath, and tendered his ballot. Our law, continued his Honor, in regard to contested elections, was substantially the same as that in California, where it had been held that votes not cast cannot be counted, and they even say that the claim that they should be is preposterous.

He quoted the language used by the court in the case of Webster vs. Byrne (34th California, p 273), as follows:

"The court below erred in counting for contestant the supposed votes of Gonsalves, Larkin and Haos, under the pretence that they would have voted for him had they been allowed to vote. In all contests of this character the question is which candidate received the highest number of votes? The idea that the supposed votes of persons who did not vote; but who could have voted had they taken the necessary legal steps to entitle them to do so should be counted for the candidate for whom they would have voted, is simply preposterous."

In Kentucky, also, in the case of Newcombe vs. Kirtley, the same was held. In that case the judges closed the polls before the time, and some two or three who intended to vote testified that they would have voted if the polls had been open. It was claimed, therefore, that their votes should have been counted, because it was no fault of theirs that they did not vote. But the court ruled that only such votes should be counted as were actually cast.

His Honor was aware that in election contests, in the House of Representatives, in Congress, and under some other circumstances, a different rule prevailed. Here it was shown as a general thing, that if a person entitled to vote was deprived of voting his vote should be counted, but legislative bodies had the right to determine for themselves who were the elected members. But so far as the courts were concerned, no authority had been cited to him which said that a vote could be counted which had not been cast. Various reasons were given why they should be; but probably there would be no limit in these cases to the rule if people could go outside the votes cast. Suppose for instance, a successful candidate had caused the arrest of a number of men who would presumably have voted for his opponent: Should their votes be counted? Suppose, again, that a legal voter was prevented by sickness from going to vote, by a high tide of water, or a hundred and one other causes, if such votes were to be counted it would make elections very uncertain. Hence the courts had adopted the rule that the only safe way was to count the votes actually cast, but rejecting any that might have been cast illegally, or were ambiguous or uncertain.

Mention had been made of a decision by Judge Zane in the case of Young vs. Williams, wherein, by some fraud on the part of the judges of election the votes were thrown on the table, destroyed, or not put in the ballot box; but that was a vote actually given by the voter, tendered by him, accepted by the judges of election, and not counted—but destroyed. So that this is not a decision in conflict with these cases to whom he (Judge Anderson) had referred. Other cases were quoted during the trial of Ferguson vs. Allen, besides those of California and Kentucky, but he had not had time since to look into them. Judge Cooley laid it down that votes could not be counted that were not cast. That being the case he (Judge Anderson) thought the defendant was entitled to retain his seat, and would now suggest, in regard to the findings of fact, that they be submitted, so far as could be agreed upon.

Mr. Brown—We shall ask your Honor to say that those sixteen or seventeen men were legal and proper voters, and did all they could to cast ballots, tendering them to the judges of election.

Judge Anderson—Yes, I think you are entitled to that finding, Mr. Brown, and that they were legal voters so far as appears here.

Mr. Brown—Of course the names were on the list that morning. There is no dispute about that.

Judge Anderson—I believe they were simply stricken off by the registration officer, and then the only question is, whether the judges have any power to receive votes not on the registration list. I do not believe they have. I think the idea of that list was for the guidance of the judges.

Mr. Brown—There was no step left that could have been taken that those voters did not take.

Judge Anderson concurred in this expression of opinion; yet their names not being on the registration list, he remarked, the judges could not receive their votes, according to the doctrine laid down in the cases which had heretofore been decided on that question. The courts