

BURSUM-BRATTON ELECTION CONTEST

APRIL 29 (calendar day, APRIL 30), 1926.—Ordered to be printed

Mr. KING (for Mr. ERNST), from the Committee on Privileges and Elections, submitted the following

REPORT

[To accompany S. Res. 215]

Your Committee on Privileges and Elections, acting under Senate Resolution No. 19, submitted by Hon. Seldon P. Spencer on March 9, 1925, to investigate the contest of Holm O. Bursum, hereinafter styled contestant, against Sam G. Bratton, hereinafter referred to as the contestee, to determine which was duly elected and is entitled to a seat as Senator from the State of New Mexico for a term of six years beginning March 4, 1925, respectfully submits the following:

Predicated upon a careful review of the pleadings, testimony submitted in the form of affidavits, documents, exhibits, and the several statements made by the attorneys for the contestant and the statement made by the contestee in person, the committee finds that Sam G. Bratton was duly elected to said office for said term.

The election in question was held November 4, 1924. Thereafter, on January 6, 1925, the contestant filed the following notice of his intention to institute this contest, which had been previously served upon the contestee:

Hon. SAM G. BRATTON:

Take notice that the undersigned here calls to your attention and gives formal notice of the undersigned's intention to contest your right to a seat in the Senate of the United States, at the same time lodging a protest against your occupancy of a seat in the Senate of the United States.

Formal petition in contest and protest will subsequently be lodged with the clerk of the Senate of the United States, a copy of which will be seasonably served upon you and when thus served upon you will inform you of the nature of the charges embraced in the contest and protest.

Respectfully,

HOLM O. BURSUM.

On March 10, 1925, the full committee met and considered the notice of intention to contest above referred to. A subcommittee, consisting of Senators Goff, Shortridge, and King, was appointed to

hear and determine any contest that might be filed and make recommendations to the full committee. On March 12, Senator Spencer, then chairman of the full committee, advised the contestant and the contestee that such subcommittee has been selected and requested that the parties file anything they desired to have considered at the earliest possible moment. On March 20, the subcommittee met, prepared and transmitted to the contestant the following communication:

HON. HOLM O. BURSUM,
Senate Office Building, Washington, D. C.

DEAR SIR: Your formal notice, indicating your intention to contest the right of the Hon. Sam G. Bratton to a seat in the United States Senate, was duly referred to the Committee on Privileges and Elections. This committee, or any subcommittee thereof, has been authorized and directed to investigate any charges or countercharges therein arising, and to sit during sessions of the Senate or in recess of the Senate, and to hold its sessions at such place or places as it shall deem most convenient for the purposes of investigating any matter, fact, or thing touching or affecting the occupancy of a seat by the Hon. Sam G. Bratton in the Senate of the United States.

The Committee on Elections, pursuant to the authority just above mentioned, duly appointed, on March 10, 1925, a subcommittee, consisting of the undersigned, and authorized and directed it to take such step or steps as it might deem necessary to bring such matters to issue and hearing.

As contestant of the right of the Hon. Sam G. Bratton to hold a seat in the Senate of the United States, you are hereby respectfully requested to file your formal petition in contest and protest at the earliest possible date, to the end that the contestee, the Hon. Sam G. Bratton, may likewise be requested to make such answer or reply thereto as he may deem necessary.

It is the purpose of the undersigned, as the duly appointed, authorized, and acting Subcommittee of the Committee on Privileges and Elections, to proceed with all convenient speed, after the matter of such contest and protest is brought to issue, and take each and every step necessary to a full investigation of the matter here involved during the present recess of the Senate, so that the subcommittee may be ready to make its report to the full committee of the Senate upon its reconvening in December, 1925.

The subcommittee was ready at all times following the transmission of such notice to receive any contest filed by contestant and to hear and determine all matters relative to the right of the contestee to occupy a seat in the Senate; that notwithstanding such readiness of the subcommittee and their desire to hear said matter, no contest was filed until the last of October, 1925. A copy thereof was served upon the contestee on November 4. Answer was filed December 18, 1925, and contestee's reply thereto was filed February 5, 1926, thus making up the issues.

The contest shows upon its face that according to the official returns contestant received 54,558 votes and contestee 57,335 votes, thereby making the contestee's plurality over the contestant 2,797; it appears from the contestee's answer, and is conceded in the reply thereto, that the returns from precinct No. 3, of San Miguel County, were changed altered, and mutilated while they were in the custody and possession of the county clerk of said county and before the canvass thereof, by changing the figure 1 in the hundred column to the figure 2 for each and every candidate on the Republican ticket, including the contestant; that the actual vote cast for contestant in said precinct was 185, but that through such change, alteration, and mutilation he was credited with 285, which was included in the official count, thus making the actual plurality of the contestee 2,897.

The petition in contest contained general averments that various employees of the Government and the State, as well as others, voted without possessing the requisite residential qualifications; that

residents of the State who were attending schools and colleges therein voted at the places they were attending school instead of their home precincts; that aliens, minors, and ex-convicts were permitted to vote and certain Indians denied the right; that in one county the county clerk failed to comply strictly with the law in the preparation of the official ballots; and that martial law was improperly declared in one county. A general allegation was made that votes cast for contestant, as well as the candidate on the Progressive ticket, were counted for contestee. Other averments of incidental importance were made.

The answer specifically denied the allegations with regard to votes cast by persons lacking residential qualifications; it raised questions of law respecting the preparation of the ballots above referred to, as well as the right of Indians to vote, and denied all other material allegations. Many hundreds of votes cast for the contestant by persons who were specifically named and identified were then attacked because they voted without being registered, as required by law, and without making and tendering to the judges of election affidavits in accordance with the law of that State; others were challenged because they received assistance in the preparation of their ballots without making the necessary affidavit entitling them to such assistance. Many others were attacked because they lacked residential qualifications, on account of being aliens, minors, ex-convicts, and on other grounds. Other allegations of incidental importance are contained in said answer.

The reply denied the issues of fact and argued the issues of law, but presented no new issues of substance.

A meeting of the subcommittee was held on November 24, 1925, at which the attorney for the contestant stated that a recount of the ballots was all that was relied upon; that the pleading tendered other issues, but that he did not rely upon them, and that if a recount of the ballots did not totally or substantially overcome the contestee's plurality the protest would be dismissed. Another meeting of the subcommittee was held February 5, 1926, at which substantially the same statement was repeated by said attorney. In view of these statements the subcommittee after full argument by one of contestant's attorneys, covering the entire case and the sufficiency of the contestant's pleadings, was of the opinion that the pleading filed by the contestant failed to state grounds justifying the committee in taking steps to impound, open, and recount the ballots cast throughout the State, or for further proceedings, but concluded that the matter should be submitted to the full committee for its consideration. Accordingly, meetings of the full committee were had on the 17th and 26th days of March, 1926, at which said attorney for the contestant was present, as was also the contestee. Said attorney there repeated the statement he had previously made to the subcommittee, namely, that the contestant relied entirely upon a recount of the ballots and that the pleading tendered other issues, but that they were not relied upon; that if such recount failed to totally or substantially overcome contestee's plurality the contest might be dismissed.

The committee adopted the view of the subcommittee as to the insufficiency of the contestant's pleadings but advised contestant's counsel that if he desired he could amend his pleadings so as to set

forth some specific facts or as a bill of particulars showing fraud in the count canvassed and return of ballots or any pertinent and relevant facts which he expected to prove, or that contestant could file affidavits stating such matters and the same would be treated as an amendment to the pleadings. Thereupon contestant's counsel requested 20 days' time within which he proposed to secure and file affidavits showing fraud and facts sufficient to warrant a recount of the ballots, and further stated that if he failed to do so at the expiration of said time the case should be dismissed. Thereupon, the committee granted the request and granted the time asked for.

After the expiration of such period seven affidavits were presented, together with certain documents, much of which was foreign to the subject and related to matters which could not be determined by a recount of the ballots. Two of such affidavits tended to show fraud committed in three precincts in Curry County. When the substance of the two is combined they charge that in precinct 13, 10 votes were cast for the contestant and counted for the contestee; that in precinct 1, 122 Progressive ballots were scratched for the contestant but counted for the contestee; that in said precinct 85 Democratic ballots were scratched for the contestant but counted for the contestee; that the tallies in said precinct were kept on separate paper from the official poll books; that there is confusion and doubt with reference to the variance between the tallies and the certificate, under one view such variance reaches the maximum of 225, under another view it is 75; that in precinct 9 of said county 50 ballots cast for the contestant were counted for the contestee and that 45 were declared to be mutilated when they should have been counted for the contestant. One of these affiants undertook to state facts occurring in the count at three separate precincts. The other does not purport to know any facts except as to one precinct. This is the only attack made upon the entire State, consisting of 31 counties and approximately 715 precincts.

Two other affidavits were presented with certain photographic copies of excerpts from the poll books of precinct 3 of Quay County. These affidavits established the authenticity of such photographs and argued that they tended to show that 65 votes cast in such precinct for A. C. Voorhees, candidate for United States Senator on the Progressive ticket, were counted for the contestee. One of these affidavits sets forth that a careful audit of all the poll books, tallies, and other records of such election in the office of the secretary of state, made soon after the election was held, shows that various discrepancies between the tallies and the certificates throughout the entire State give a gain for the contestant of 217 votes, if the tally marks control over the certificates; that the State canvassing board canvassed the result from the certificates furnished by the various county canvassing boards; that had such State canvassing board canvassed from the duplicate poll books the contestee would have sustained a loss of 516. The substance of such affidavits was embodied in an amended contest filed April 22, 1926.

The contestee interposed a demurrer to such facts upon the ground that if they were true they could not change the result of the election, but could only decrease the size of his plurality. At the same time contestee submitted a joint affidavit made by two election judges of the above-mentioned precinct 3, in Quay County, one being a Republican and the other a Democrat, in which it is affirmatively stated

that the 65 votes in question were not cast for the said Voorhees, but were actually cast for the contestee. Contestee further submitted 28 affidavits made by judges, clerks, and bystanders in the three precincts in Curry County, attacked by the two affidavits hereinbefore referred to, affirmatively showing that no such fraud or miscount occurred or that there was any irregularity whatever in the count and election proceedings.

A hearing was had by the full committee on such demurrer and the record incident thereto, at which Hon. A. B. Renehan, of Santa Fe, N. Mex., attorney for the contestant, reiterated the statement previously made that contestant relied entirely upon a recount of the ballots, and conceded that the showing made was not sufficient to overcome the contestee's plurality of 2,897; he contended that by giving the contestant the benefit of the variance between the certificates and tallies shown in the records of the office of the secretary of state; by decreasing the contestee's vote 516, due to the difference between the duplicate poll books referred to and the certificates of the several county canvassing boards from which the State canvassing board made the canvass; by deducting from the contestee the 65 votes at precinct three, Quay County; by giving full faith and credit to the two affidavits attacking the three precincts in Curry County; that by crediting him with the additional 14 votes omitted at Peralta precinct; after increasing his net loss of 27 sustained at Maxwell precinct, as well as by giving to contestant every other fact stated in his contest which could be determined by a recount, the contestant would gain 1,677 votes, thereby reducing contestee's plurality to 1,220.

The contestee contended that the State canvassing board properly canvassed from the certificates of the several county canvassing boards; that it affirmatively appeared that the 65 votes cast in Quay County were properly counted for him; that if full faith and credit should be given to the two affidavits attacking three precincts in Curry County, and the 28 affidavits controverting the same disregarded; that if contestee is credited with his alleged losses at the Peralta and Maxwell precincts, the only effect would be to reduce contestee's plurality by approximately 500. It was conceded by all parties that under either view the contestee would still have a plurality, the only difference being its amount.

It further appears that according to the official returns of the election in question the Democratic candidate for governor was elected over the Republican candidate by a plurality of 199 votes; that a contest was instituted in the courts of the State by said Republican candidate; that he was represented by Hon. A. B. Renehan, who was then and is now one of the attorneys for the contestant herein; that the contestant aided and assisted the plaintiff in that case and contributed several thousand dollars to the expense thereof, with the hope of securing evidence which would be available in this contest; that the same general issues were tendered by the plaintiff in the gubernatorial contest that are made by the contestant here; that the trial of that case, over which a Republican judge presided, began June 8 and ended September 21, 1925; that during the trial the Democratic candidate made a net gain of 1,911 votes; that such increase, added to the figures shown upon the face of the returns, gave the Democratic candidate a total plurality of 2,110 votes; that

on September 21, 1925, and while the governor's plurality was 2,110, the contest was abandoned and dismissed and the said official is serving out his term of office.

Upon the entire record thus presented, the committee concluded to overrule the demurrer and to decide the contest upon the pleadings, affidavits, documents, photographs, admissions, and statements of counsel and the parties. Upon these it has reached the following:

CONCLUSIONS

1. Upon a careful review of the affidavits and photographs submitted, it clearly appears that the 65 votes involved in precinct 3 of Quay County were cast for the contestee and that he was rightly given credit for them.

2. That no acts of fraud or corruption are shown to have occurred respecting the count, canvass, and return of the ballots in precincts 1, 9, and 13 of Curry County.

3. That it is unnecessary to determine whether the State canvassing board should have canvassed from the duplicate poll books or from the certificates of the several county canvassing boards because the result would be the same regardless of the course pursued. There is much force in the argument that such board pursued the proper procedure. Section 7 of Article XX of the constitution of said State provides:

The returns of all elections for officers who are chosen by the electors of more than one county shall be canvassed by the county canvassing board of each county as to the vote within their respective counties. Said board shall immediately certify the number of votes received by each candidate for such office within such county, to the State canvassing board herein established, which shall canvass and declare the result of the election.

Section 2 of chapter 34, Laws of 1915, of said State, provides:

Within six days after any such election the board of county commissioners of each county shall meet and proceed to canvass said returns and declare the result of said election as to all county officers and members of the legislature from such county and as to propositions or questions affecting such county only and issue the proper certificates of election. As to all elections of officers chosen by the electors of more than one county, for the ratification or rejection of any constitutional amendment or upon any other proposition or question general in character, each board of county commissioners shall immediately certify the number of votes cast in such county for each candidate and for and against such constitutional amendment, proposition or question, to the State canvassing board, which shall meet in the State Capitol on the third Monday after such election and proceed to canvass and declare the result thereof and issue the proper certificates of election.

Chapter 89 of the Laws of 1917 of said State provides a method of absentee voters casting their ballots. Briefly stated, it provides that any person who secures a certificate from the board of registration of his home precinct that he is duly registered, who is more than 15 miles from the polling place of his home precinct, who is unavoidably absent and makes affidavit stating such facts and that he has not voted elsewhere that day and will not do so, may vote for certain enumerated candidates, including those for United States Senator. The election officials are required to enter the name of such person in a separate place on the poll books under the designation "Absentee voters," but no record is made of the ballot. It, together with the certificate and affidavit accompanying the same, is sealed in an envelope and for-

warded to the county clerk of that county, who in turn forwards the same by registered mail to the county clerk of the county in which the voter resides. Such last-mentioned county clerk keeps the same until the county canvassing board assembles to canvass the returns and declare the result, at which time such envelope is opened, the name of the voter entered in the poll book of the precinct in which the voter resides, under the designation "Absent voters," the ballot is tallied, and the returns modified accordingly. Thus the absentee vote is included in the certificates of the several county canvassing boards and is not included in the duplicate poll books forwarded direct to the Secretary of State, and naturally makes a difference between the two.

4. That under the contention of either party, the contestee has a plurality of the vote cast for the office in question. According to the contestant's contention, and giving him credit for everything claimed, such plurality is 1,220; that according to the contestee's contention the facts pleaded by contestant show that such plurality is approximately 2,300.

5. That all other matters set forth in said contest are of such character that a recount of the ballots would have no bearing whatsoever. Contestant having waived and abandoned all such issues, there remains no other question to be determined.

6. That the prevailing rule of law throughout the country with regard to a general recount of ballots without some preliminary evidence tending to cast doubt or suspicion upon the correctness of the official returns may be seen from the following, which are merely a part of the many authorities upon the subject:

435. An application for a recount of the ballots cast at an election will not be granted, unless some specific mistake or fraud be pointed out in the particular box to be examined. Such recount will not be ordered upon a general allegation of errors in the count of all, and giving particulars as to none of the boxes. These rulings were made in cases of applications to the court to order a recount of ballots. Of course, such an order might be accompanied with proper provisions for securing fairness and accuracy, and the result might and would be rejected in case of doubt as to the identity of the ballots; but before ordering it the court held that there must be charges of mistake or fraud sufficiently precise to induce the court to entertain the complaint, and that a general allegation of errors believed to exist was not enough to authorize the perilous experiment of testing the election return by the result of a recount. (McCrary on Elections (4th ed.), p. 316.)

153. Ballot as best evidence: The courts are inclined in election cases to look through formal evidence of the right to office as manifested by the certificate to the right itself, and to set aside the return when necessary to promote the ends of justice. Freedom of inquiry in investigating the title to office tends to secure fairness in the conduct of elections and faithfulness and integrity on the part of returning officers, and weakens the motive for fraud or violence by diminishing the chances that they may prove successful in effecting the objects for which they are usually employed. There is some question, however, as to the readiness with which the courts should open the ballot boxes. In some States the question is settled by statutes which expressly require the production, opening, and inspection of the ballots on demand in any contest. But in the absence of such provision, and where the contestant's case rests on the charge of misconduct on the part of election officers, it has been held that every consideration of public policy should influence the court to be cautious in the opening of ballot boxes, and hence that it will not on mere suspicion and the demand of a contestant or elector, and without any extrinsic evidence tending to impeach the regularity or integrity of the official count and canvass, order a recount of the ballots, but will require a contestant to show in advance some evidence of fraud or misconduct of such officers, reasonably calculated to overcome the universal *prima facie* presumption of the regularity and correctness of official action. On the other hand, it has been pointed out that if such preliminary evidence is contemplated by the law, then a preliminary issue arises with reference to every box containing ballots which is sought to be opened, and evidence showing misconduct or error must be introduced, which will be subject to rebuttal and the trial thereby indefinitely ex-

tended, and that whether there are errors in the returns and a failure to count them properly are questions which can be determined from the ballots themselves when the boxes are opened and the ballots counted. (9 R. C. L., pp. 1163-1164.)

Since the ballots themselves, when their integrity has been established, are the best evidence of the result of an election, it is held by some authorities that in a statutory contest where error, mistake, fraud, misconduct, or corruption in counting the ballots or declaring the result of an election is alleged a recount of the ballots upon request of the complaining parties should be ordered as a matter of course. But a party has no right to demand a recount as a mere fishing excursion, and the better rule seems to be that a resort to the ballots can not be had until the contestant produces evidence which indicates at least a probability that a recount would decide the election in his favor, that there were frauds, irregularities, or mistakes committed in the acceptance of the ballots and return of their count, or that there is error in the record declaring the result of the election; although the actual lawful result as disclosed by a recount will not be defeated by the fact that the recount is ordered before such proof is submitted. (20 C. J. P. 255.)

This language was used by the Supreme Court of Washington in *Quigley v. Phelps* (74 Wash. 73, 132 Pac. 738, Ann. Cas. 1915A, 679):

The real question here presented is this: Must the court, on mere suspicion and demand of any elector, and without any proof aliunde the ballot box tending to impeach the regularity or integrity of the official count and canvass, order a recount of the ballots? In only two of the decisions cited by appellant was this question directly passed upon.

The Missouri case, *Gantt v. Brown*, supra, overruled prior decisions of that court, *State v. Spencer*, 164 Mo. 23, 63 S. W. 1112, and *Montgomery v. Dormer*, 181 Mo. 5, 79 S. W. 913, in which it had been held that the court trying the contest had no authority to order the clerk to open the ballots and compare them by number with the voting lists in order to determine how the individual electors had voted, because that would destroy the effect of a constitutional provision for a secret ballot. The constitution of Missouri (80) article 8, paragraph 3, providing for the secret ballot, contains, however, a proviso that in cases of contest the ballots may be counted and compared with the voting lists; "under such safeguards and regulations as may be prescribed by law"; and the Revised Statutes of Missouri, 1909, paragraph 5939, read as follows:

"Either house of the general assembly, or both houses in joint session, or any court before which any contested election may be pending, or the clerk of any such court in vacation, may issue a writ to the clerk of the county court of the county in which the contested election was held, commanding him to open, count, compare with the list of voters and examine the ballots in his office, which were cast at the election in contest, and to certify the result of such count, comparison and examination, so far as the same relates to the office in contest, to the body or court from which the writ is issued."

Both the proviso in the constitution and the statute are at least capable of the construction that the ballots in any case of contest shall be immediately resorted to. They practically make the ballots themselves the only evidence in any case, without antecedent evidence of misconduct on the part of the election officials or anything impeaching their return. Under these provisions, it is difficult to understand how the Missouri court ever held otherwise.

The New York case, *People v. McClellan*, supra, holds with the appellant's contention here, under a statute similar to ours, but we do not feel warranted in following the broad rule there laid down. Such a rule would, as it seems to us, render the remedy by contest so easy of abuse as to invite a reason of turmoil consuming weeks of the time of our courts after every election, to the exclusion of ordinary litigation and at great public expense. An election contest is not an ordinary adversary proceeding. The public is concerned, and it is the public interest to which the courts will look in such a case rather than the interest of the particular contestants. (*State v. Superior Court*, 72 Wash. 144; 129 Pac. 900, 44 L. R. A. (N. S.) 1209; *Minor v. Kidder*, supra.) For this reason a contestant will not be permitted to take judgment by default. (*Keller v. Chapman*, 34 Cal. 635.) For the same reason it must follow that, in determining whether the ballot boxes shall be opened and the votes recounted on mere suspicion and on mere demand—which is the effect of the complaint before us—and without any evidence impeaching the conduct of the election officers in making the original count and canvass, the courts should view the matter in all of its bearings as affecting the public interest. If the public interest would suffer from such a

course, if the mischiefs resulting therefrom would be great and widespread, as seems to us inevitable, and if it does not appear that such a course is necessary to the reasonable preservation of the purity of the ballot, then the courts are not warranted in adopting that course, in the absence of a statute so directing.

It is certainly not asking too much of a person who, by a sweeping wholesale charge of deliberate misconduct on the part of every election officer of his county, seeks to consume weeks of the time of the court by a recount of all the ballots at the public expense, to require him to show in advance some slight evidence of fraud or misconduct of such officers, reasonably calculated to overcome the universal *prima facie* presumption of the regularity and correctness of official action. That such a presumption exists in this as in other cases of official action is evidenced by the fact that the certificate of election is based upon that action. It will not do to say that the contestant if unsuccessful pays the costs. The taxable costs of such a proceeding are insignificant as compared with the actual expense to the public, direct and indirect. While every good citizen must concur in the sentiment that no price is too great to be paid for a pure ballot, we can hardly conceive that it is necessary to the purity of the ballot that the court upon a mere assertion of an impalpable suspicion, may be used as a dragnet with which to fish for evidence without any antecedent showing of the slightest circumstance tending to impeach the official count. As said in the supreme court of Minnesota in *O'Gorman v. Richter* (31 Minn. 25, 16 N. W. 416):

"It may admit of doubt whether a court is bound to open the ballot boxes and make a recount, unless there be some evidence furnishing ground for supposing that a misconduct might have been made by the judges. If a party can demand a count by the court without any such showing, it could often be resorted to as a mere fishing expedition."

It is true, as said by the Missouri court in *Gantt v. Brown*, *supra*, chiefly relied upon by the appellant:

"When bona fide charges of fraud are made, it should be the policy of the law to unlock all competent evidence to either prove or disprove the charges."

While heartily subscribing to the wholesome rule so announced, we still think that the charge of fraud or misconduct must be a bona fide charge, and that charge which is founded in such vague suspicion that no evidence can be produced as to the conduct of the election officials, aliunde the ballot boxes, tending to show any measure of irregularity or misconduct, does not seem to possess what can be said in law to constitute the essential element of good faith. It smacks rather of recklessness. No bona fide charge is presented between the official canvass and the ballots themselves until some evidence tending to show official misconduct has been adduced. Nor will it do to say that the purity of the ballot is the basis of our institutions, and to fail to protect the one is to jeopardize the other. That is a truism, but it does not warrant the court in disregarding at the threshold the presumption of rectitude which the law has universally accorded to official action, and in giving no weight to the official count in the absence of anything tending to impeach it. The law has entrusted to the duly appointed election officers the duty of counting the ballots. There is a legal presumption that they have done so honestly and carefully. Their returns are entitled to the presumption of regularity. For the court to recount the ballots without any evidence of wrongdoing on their part would be to disregard this presumption. It would be an assumption of a lack of integrity or competency on the part of every one of the 1,173 election officers of King County, without any antecedent proof of misconduct of any of them. If this is necessary to the preservation of the purity of the ballot in King County, then it is necessary in every other county in the State. The whole judiciary of the State may, and logically should be called upon to recount the ballots as to every county office in every county on a mere assertion of suspicion by any elector that mistakes may have been made, and weeks of time so consumed without any tangible foundation for a belief that the result would be changed in any instance.

But even assuming that the trial court may in its discretion disregard the official count and proceed with a recount upon mere demand, can we say that it is an abuse of discretion to refuse to make the recount without some evidence of misconduct in the official count? We think not. As said by the Supreme Court of Colorado in a similar case:

"The order of proof is always discretionary with the trial court, and will not be interfered with by an appellate court except where there is an abuse of that discretion. The reasonable requirement of the trial court that some evidence should first be introduced as to these charges of fraud before going to the expense of bringing in, from the different precincts of the county, the election judges with their keys to open the ballot boxes, was not only within the legal discretion of the

trial court, but commands itself to our judgment as a wise exercise of that discretion." (*Kindel v. LeBert*, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234.)

The above decision in no manner runs counter to the earlier case cited by the appellant from the same court. (*Clanton v. Ryan*, 14 Colo. 419, 24 Pac. 258.) In that case nearly 100 witnesses had been examined, and their evidence tended to show "many gross errors, mistakes, and frauds in the count and return of the votes, and other misconduct of some of the election officers, as alleged in said statement." On this state of facts the court said:

"Under the causes of contest set forth in the sworn statement of the contestor, a recount of the ballots in the precinct where error, mistake, fraud, malconduct, or corruption was charged should have been ordered as a matter of course upon request of the complaining party. A mere recount does not involve any exposure of the secrecy of the ballot. Upon the production of evidence tending to show error, mistake, fraud, malconduct, or corruption on the part of the election board, or any of its members, as charged, in the matter of receiving, numbering, depositing, or canvassing the ballots, or other illegal or irregular conduct in respect thereto, an inspection and comparison of the ballots with the poll lists should also have been allowed in connection with the oral evidence in reference thereto. The secrecy of the ballot is not so important as its purity; and when, in a proper proceeding, there is evidence tending to show that the ballots of electors have been changed, tampered with, or destroyed, either by mistake or by the fraudulent conduct of any member or members of the election board of any precinct, or any other person or persons, it is the right of the public and of the electors themselves, as well as the candidates, to have such matters thoroughly investigated; and the courts of justice under such circumstances should be swift and fearless to assist in all lawful and proper ways to ascertain the truth in respect to such charges and to rectify, so far as possible, any and all wrongs, whether of mistake, negligence, or crime, which may be or have been committed against the elective franchise."

It is manifest that the first sentence of this quotation, which was alone quoted by the appellant, was uttered in view of the proof of fraud and mistakes which had already been made, and that it must be construed in connection with what follows, which we have italicized. So taken, the decision distinctly outlines and clearly supports the views which we have expressed. It exemplifies a sane application of a sound rule.

In the case before us, the only evidence offered as to any irregularity was that the footings made by the election officers on the tally sheets were in many instances wrong; but it is admitted that these errors were all corrected by the canvassing board. They were mere mistakes in addition and did not materially change the result. This was no evidence of fraud or malconduct, nor even of mistake in the actual tally. The sheets themselves furnished the means of correction, and the correction of such errors is the very purpose of the canvass. The canvassing board has no other reason for existence.

The argument that a contestant, though strongly suspecting malconduct, would have no means of proving it outside of the ballots themselves does not impress me. Some evidence of the wholesale conspiracy charged could be produced. All of the 1,173 election officers would be competent witnesses to testify as to the manner of making the count. If there was any irregularity in their action such as would authorize a recount, their testimony would disclose it. (*Packard v. Craig*, 114 Cal. 95, 45 Pac. 1033; *Kindel v. Le Bert*, *supra*.)

In conclusion, we say that if the legislature had intended that the entire vote of any county, and for the same reason, of every county in the State, should be recounted upon mere demand (and that is what the appellant's contention amounts to), it would have been easy to so state. If it was intended that the certificate of election based upon the official count by the election officers should have no force as against an unsupported charge of fraud or incompetence on their part, and that official action shall no longer possess even a *prima facie* presumption of rectitude, then the legislature should have so stated. If such is to be declared the public policy of this State, then the function of election officials will become an idle-form. Much time and expense would be saved by simply limiting their duties to a mere reception and sealing of the ballots and delivering them to the courts for counting in the first instance.

It is therefore concluded that Sam G. Bratton received a plurality of the votes cast in the election held in the State of New Mexico on November 4, 1924, for the office of United States Senator from said State for a term of six years beginning March 4, A. D. 1925, and is entitled to hold said office and exercise the functions thereof.