EXECUTIVE DEPARTMENT,
ST. PAUL, Jan. 6, 1860.

Hon. IGNATIUS DONNELLY,
President of the Senate,

SIR: As requested by a resolution of the Senate, of this day, I herewith return an enrolled bill presented for my signature, being—

S. F. No. 29. A bill for an act to appropriate money for certain purposes therein named.

Respectfully,
ALEX. RAMSEY.

Mr. Hodges moved that in accordance with the request of the House of Representatives, the Secretary is hereby directed to return S. F. No. 29, for the purpose specified in the resolution of the House.

Carried.

The special order of the hour was then taken up.

Mr. Heaton read and submitted a majority report as follows:

The majority of the committee appointed by the Senate under the following resolution, viz:

"*Resolved*, That a committee of three be appointed by the President of the Senate to examine the certificates whereby Messrs. H. W. Holley and Reuben Wells, and O. B. Bryant and I. F. O'Ferrall of Fillmore county, respectively claim seats in this body, and to report as soon as practicable, who are, *by said certificates entitled to membership*."

Have had the same under careful consideration, and beg leave to present the following report and resolution for the consideration of the Senate:

It will be observed by the language of the resolution above quoted, that the committee was appointed by the Senate for the purpose of reporting, who, "by said certificates are entitled to membership."

This leads to an examination of the certificates in question, presented by all four of the claimants. The certificates issued to H. W. Holley and Reuben Wells read as follows.

"OFFICE OF CLERK OF THE BOARD OF COUNTY SUPERVISORS,
October 25, '58.

I hereby certify that Reuben Wells was duly elected State Senator at the general election held in Fillmore county, Minnesota, on the 12th day of October, A. D. 1858.

C. M. COLBY, Clerk.

[Seal of the Clerk of the Board.]

OFFICE OF CLERK OF THE BOARD OF COUNTY SUPERVISORS,
October 25, '58.

I hereby certify that H. W. Holley was duly elected State Senator at the general election held in Fillmore county, Minnesota, on the 12th day of October, 1858.

C. M. COLBY, Clerk.

The certificates held by Messrs. O'Ferrall and Bryant are as follows:

STATE OF MINNESOTA, Fillmore county—ss. In pursuance of an order issued out of the Supreme Court of said State, and commanding me to issue a certificate of election to Ignatius F. O'Ferrall to the office of State Senator for said county, I hereby certify that at the general election held on the 12th day October, A. D. 1858, in and for said county, Ignatius F. O'Ferrall having received the largest number of votes, was duly elected to the office of State Senator for said county.

In testimony whereof I have hereunto set my hand and affixed my seal of office this 8th day of February, A. D. 1859.

H. D. BRISTOL, County Auditor.

The certificate to Bryant the same.

It will be observed that there is a very wide difference between the certificates issued to the first and second parties named. The certificates held by Messrs. Holley and Wells appear to have been issued in the usual and customary manner. They come from the clerk of the Board of Supervisors of Fil more county, after a canvass made in accordance with the law in such cases made and provided. They are such certificates as have been issued to every Senator on this floor, and to every member in the other branch of the Legislature. There appears to be nothing wanting, no imperfection about them, and according to all precedent in the legislative history of this State or the Territory preceding, would entitle the holders thereof to the indisputable right of taking seats in this body, in advance of any other claimants.

The certificates presented by Messrs. O'Ferrall and Bryant, are without example, so far as the history of this State is concerned, and it is very questionable whether a parallel can be produced in the experience in legislation of any State in the Union, having a constitution similar to our own. They do not, in reality, come from any authorty prescribed by the law for the purpose of issuing such certificates. Although they purport to be signed by the Auditor of the County of Fillmore, yet on examination, they are found not to be substantially his certificates, because they were not issued by any voluntary act of his own, and so far as he was personally or officially concerned, would probably never have been issued by him. On their very face they unfold the manner in which they were issued, and the true source from whence they emanated. They are the offspring of the Supreme Court. They were issued by the mandate and at the command of that tribunal. It would be no imputation, and scarcely a misnomer, to term them what they evidently purport to be—*the certificates of the Supreme Court.* They never would have had an existence—never come to light without the order of that body. The mere issuing of them was simply a manual and mechanical performance on the part of the Auditor. He was carrying out the will of his supposed superiors in authority in this case. He merely did what his predecessor had left undone or could not do. Certificates in this case had been once issued to the proper persons, after a fair canvass, in compliance with the language and meaning of the law. The Auditor had no more to do in procuring the issuing of these second certificates, than a Clerk of a Court of record has in the rendition of any order, judgment or decree which he simply records in the records.

It seems, then, to be a plain matter for this body to decide,—a question which ought to have *precedence* in this case, *certificates issued by the clerk* in conformity with law, immediately after the canvass was made, or *certficates of the Supreme Court*, several months subsequent. An examination of those held and presented by Messrs. Holley and Wells, shows that they are dated as far back as the 12th of October, 1858. They are the first certificates in point of time, a consideration of too much importance to be overlooked in coming to a correct conclusion of this matter. They were issued near four months before those coming from the Supreme Court. In the opinion of the majority of the Committee, these certificates clearly conferred the right on Messrs. Holley and Wells to take seats at the organization of this body.—this right still exists; it has never been abrogated, and the fact that they have been, thus far excluded, makes it an act of injustice and wrong, and the Senate is bound to repair this wrong by giving them the rights which they originally possessed.

The act providing for the organization of the Legislature, passed August

2d, 1858, should surely determine this question. Section 2d reads as follows: "That the certificate of election from the Register of Deeds of the proper county, shall be held and considered as *prima facie* evidence of the right to membership of the person certified therein, to be elected for all purposes of organization of either branch of the Legislature."

No one disputes but what these certificates are in strict compliance with the law specially provided for the organization of this body. Is there any authority in the State which can interfere with this, the only act of the Legislature, on the subject? With these cirtificates Messrs. Holley and Wells would have taken their seats, had not an effort been made to prevent them by a peremptory mandamus from the Supreme Court. It may, perhaps, appear to be assuming high grounds for a Committee to question the authority and the power of the highest judicial tribunal, to issue, in this case, such a peremptory writ. The position that the courts in this country are infallible, has been shaken very materially within the last few years. General Jackson felt prompted to give potency to the idea that such an event was likely to happen, very frequently, as the commission of an error on the part of our courts. He persisted in this idea with great tenacity for a long time, and some of his sentiments on the subject seem to have taken a strong hold in different quarters of the country. Had he been a member of our Senate to-day, it is hardly probable that he would have acquiesced, at least, quietly, in the course which has been taken by the Supreme Court in this matter.

In view of the law and the facts in this instance, we feel it incumbent upon us to say in distict terms, that we do deny the authority of the court to issue a peremptory mandamus in such a case as we have under consideration.

The constitution never meant to allow any act to be performed or authority exercised which would come in contact with a power distinctly granted to, and meant to be exclusively exercised by the Senate. That the Senate has, by the Constitution, the supreme authority of settling all questions in relation to the "eligibility of its own members," there can be no doubt The writ in qestion, tends to destroy this right, to make it obedient to the authority of another, and different branch of the goverment. It says, substantially, that a writ by said court, shall give a claimant "*prima facie* evidence of membership," and that by the evidence thus conferred he may take his seat in advance of any other party and thus aid in the organization of the Senate. In allowing this doctrine to prevail, the power of the Senate would soon become obsolete, for all practical purposes, destroyed. This point surely deserves the greatest consideration. If any one can cast a vote upon this subject, in favor of giving these certificates emanating from the Supreme Court the pre-eminence—without entertaining a doubt that it will in any way interfere with a sovereign rightof the Senate, let him do so without hesitation.

We deny, in the second place, that this writ can be issued, because the law plainly points out a remedy. And here it seems proper to remark, that no denial has or will be made, but what the parties who claimed to have been aggrieved in this case—had a remedy—that the law provided one, in the most specific manner.

The law in relation to the "writ of mandamus" and which has been alluded to in this case will be found in chapter 73, in relation to "special" proceedings"—section IV and V; section IV reads as follows in reference to said writ: "It may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially requires, as a duty resulting from an office, trust or station, but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion."

Now, it will be observed, that the writ may be issued to any "inferior tribunal," etc. If the direct result of the issuing of this writ in question is to control and govern the Senate in the admission on their certificates of Messrs. O'Ferrall and Bryant to seats, in preference to Messrs. Holley and Wells, then the conclusion follows that the Senate must be one of those "inferior tribunals" spoken of. Is there any Senator prepared to go to this extent?—Is the melancholy admission to go abroad that this body has become an "inferior tribunal" in comparison with other departments of the government possessing no power adequate to its own protection? Did the framers of the Constitution mean this? Was this the intention of the Legislature in framing the law in relation to the writ of mandamus? Does not the very result which attends the issuing of such a writ in such a case as this, prove conclusively that it was not intended to be so issued? It is a writ to be employed only in special cases and was never intended to be subject to abuse, and hence the emphatic language following that so much depended upon, and cited in the Minority Report, and which is contained in section V, of said act, saying, "this writ ought not to be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law." That adequate remedy was afforded by the statute in relation to contested elections. In "the ordinary course of the law" there provided, Messrs. O'Ferral and Bryant had the opportunity in case they considered that an error had been committed by the Clerk of the Board of Supervisors, of bringing the case before the Senate, and there having it fairly determined. Is this one "adequate" and plain remedy not sufficient? Is it the intention of the law to confer several remedies?

The fact that the Senate is the *only* authority to determine such a case has been presented, is so plainly stated in the Constitution, as to make it appear unnecessary to elaborate upon this point. It is declared in Art. IV, Sec. 3d of that instrument, that "each House shall be the judge of the election returns and eligibility of its own members." With this constitutional authority, the Senate cannot be at a loss as to what its powers and duties are in the premises.

Again to return to the object for which this committee was appointed: we think it has been misconceived. The purpose and the object was to see "who, by said certificates are entitled to membership." The mere examination of these certificates surely does make it necessary to go into an examination of the whole history of the matter preceding their issuance. The certificates held by Messrs. O'Ferrall and Bryant, do not make it incumbent to look into the papers and pleadings brought before the Court, for the purpose of learning therefrom that they received *more* votes than their opponents, Messrs. Holley and Wells. If such a wide range as this is allowed, the whole merits of the case on each side may now be gone into, but this was not intended. We do not hesitate to say that if such was the course indicated, that we are very certain that we could have produced evidence to have shown that the basest frauds were committed on the ballot box in the Chatfield precinct, and that being brought to the attention and notice of the canvassrs, they regarded it as their sworn duty to exclude the returns therefrom, and give the certificates to Messrs. Holley and Wells. We cannot resist the belief, from what we have seen and heard, that it can be shown that, with the honest and legal votes all counted from that precinct, on both sides, it would show Messrs. Holly and Wells elected in the county by a decided majority. But these matters were intended to be deferred for full examination at another period. There is enough to do at present, by confining ourselves to an examination of of the certificates. Their date, the authority from whence they come, their language, and the object for which they were evidently issued—by whom they were signed, surely presents enough for our consideration, to determine from them who are *prima facia* entitled to membership. In reference to the power of the Court in this matter, admitting the jurisdiction to compel the

Board of Canvassers to issue certificates, while in session, it is insisted that such action *after* the adjournment of the Board, and the termination of the office of the Auditor, was not only a usurpation of power, but entirely unprecedented in the anuals of legal proceedings.

It appears that one C. M. Colby, the Clerk of the Board of County Commissioners of Fillmore County, and acting as a member of the board of canvassers, had issued certificates of election as State Senators to Messrs. Holly and Wells. These certificates are by law made *prima facia* evidence of the right of these gentlemen to their seats in this body, because coming from an officer who is required to canvass his votes, the means of knowledge are presumed to be within his control, and his certificate of the facts are therefore in the first instancs of higher authority than evidence from other and non official sources.

It further appears that after the adjournment of the board of canvassers, and after the expiration of Mr. Colby's term of office, a writ to show cause on a writ of alternative mandamus, is served upon him, commanding him to appear before the Supreme Court at a day certain, and show cause why a peremptory writ should not be issued, directing him to issue certificates of election to Messrs. O'Ferrall and Bryant; to this writ Mr. Colby makes his return, and upon the day appointed appears by his counsel before said court, The case then assumes the character of a civil action, in which Messrs. O'Ferrall and Bryant are plaintiffs and Colby defendant; the matter is tried and determined against the defendant, and the peremptory writ based upon such decision issued, commanding not Colby, but one H. D. Bristol, the person who has no privity with the defendant, who has received no notice, been served with no process, and had no opportunity to be heard in the matter, to issue his certificate of the election to Messrs. O'Ferrall and Bryant. Certainly a strange anomaly in judicial proceedings, and one which does great credit to the ingenuity of the learned tribunal to whose mandate the Senate is requested to bow. Why the certificate of Mr. H. D. Bristol is entitled to the dignity of *prima facie* evidence, rather than that of any other citizen of Fillmore County, we are at a loss to determine. It is not claimed that he was present at the canvass; there is no evidence that he has ever even seen the poll books, as returns. All laws are intended at least to be based on reason. The fact that the clerk as a member of the board of canvassers is the only person having the means of knowledge of the result of an election within his possession is the reason and the sole reason that entitles his certificate to be regaded as *prima facie* evidence, and it is a familiar principle of law that the "reason ceasing the law ceases" Mr. H. D. Bristol did not and could not know whether he was enunciating truth or falshood when he signed these certificates. When the Supreme Court then arrogate to themselves the power to compel by their mandate, a sworn public officer, to certify to facts of which in the nature of things he must be ignorant, our respect for a co-ordinate branch of the government should not prevent us from offering at least a mild remonstrance.

But it may be urged that as a successor in office to Mr. Colby, the writ properly lay against Bristol, in short the mandamus lies to the office and not the incumbent. This is pressing an abstraction indeed. The writ of mandamus lies upon the refusal of an inferior tribunal or an individual to perform an act especially enjoined by law as a duty resulting from an office, trust or station, to compel such performance. The board of canvassers was that tribunal, and Mr. Colby, as a member of that Board, was the individual to whom such a writ should have been issued if it should have been issued at all, he only had refused to issue the desired certficates. There is no evidence that Mr. Colby would not have been ready to have issued them; Bristol, as County Auditor, though the successor of Colby, as Clerk of the Board of County Commissioners, was not his successor as a member of the Board of Canvassers, in which capacity alone Mr. Colby acted in issuing certificates.

The position assumed that the duties and powers of the Clerk and Justices of the Peace in canvassing the election returns, are merely ministerial—that there is no discretionary authority, is surely very erroneous. The position taken by the Supreme Court is not an authority to control or influence the the action of this body on this subject. Each Senator is surely left to be his own judge, and the Senate, as a body, is at perfect liberty under the Constitution, to decide the matter for itself.

That the Clerk and Justice called to his aid, are possessed of large discretionary power, is made evident by the language of the statute. The fact is the duties to be performed are of the greatest responsibility and importance, involving the exercise of judgment, and discretion; he is required to "take to his assistance" two Justices of the Peace. It is made their duty to canvass the matter, This process of "canvassing" implies discretion and the exercise of judgment, and hence the propriety of calling upon two Justices of the Peace to aid in the determination of the matter. To canvass, means to investigate, to examine, to discuss and to deliberate. Our most approved Lexicons give the meaning to the term,

That it is the part of wisdom and prudence in our law to give such a discretion to such a canvassing board, no one upon mature reflection can scarcely deny. The returns are sent to them for the purpose of being fully examined, and upon this examination depends the important result who are to take seats in our Legislative Councils and determine in a great measure, the destiny of our State. They are to award credentials,—the certificates by which this seat is to be attained. With the oath they have taken to perform their duties honestly and faithfully, it is certainly incumbent upon them to prevent the success of corruption and fraud. When it is made evident to them that certain returns are fraudulent, the public interest and public safety demands that they should at once exclude them. How can they in view of their oath give a certificate to a party based upon frauds? Where is the person acting in public capacity, who would desire to assume such a responsibility as this?

This doctrine that official incumbents having in charge the performance of such responsibilities, are possessed of no discretion, no power to examine and decide, but must act as mere inanimate machines, is as unsound and unreasonable, as it is impolitic and dangerous. The idea that all returns must be counted in, was never contemplated by the statute. In this way, the ballot which was intended to be used to subserve and protect the dearest right of freemen, might be converted into an instrument of despotism, destruction and anarchy.

Any number of ballots that never were cast in an honest or legal way, could thus be returned: and in the absence of any discretion upon the part of the "canvassing board" would have to be counted. If, "upon the face of the returns," they appeared to be fair and "in due form," although this face might conceal or cover up the greatest schemes of fraud and villainy imaginable, yet according to this fossil doctrine of "ministerialism," there is no possible escape,—they must be received and go to determine the issue, as great as it may be. It is to prevent such outrages upon the elective franchise, that this canvassing board is in part instituted.

We have a most striking example in the history of the scenes of disorder in Kansas, of the necessity of the exercise of such a discretionary power.—About the time of the commencement of the difficulties in relation that odious Lecompton Constitution, Governor Walker and Secretary Stanton were made the officers to canvass the election returns and to award certificates of election. When the notorious Oxford returns were made, then the time had come when

they concluded it was their duty to put into practice this discretionary power. They marched squarely up to their duty, but in the performance of it, brought down upon their heads the bitter condemnation of the Federal Administration. By the friends of the Lecompton Constitution it was argued again and again that they were merely "ministerial officers," that they have no authority or discretion in the performance of this truly noble act. The verdict of the country, however, has been uttered in the most potent manner; Kansas is to-day in possession of rights and privileges which will long stand as speaking monuments of the patriotism, prudence and courage of these truly faithful public servants.

It is a matter to be much regretted that a proper disposition of this case has been necessarily delayed until this period in the session. There surely was no good cause for this delay, and the consequent obstruction of the public business. The matter in controversy, could, and ought to have been disposed of at an early day. The great error was on the organization of the Senate. When the four claimants to seats presented themselves, an unjustifiable assumption was made on part of the President, who undertook to decide the matter, by swearing in Messrs. O'Ferrall and Bryant, and giving them seats, and refusing to administer the oaths of office to Messrs. Holley and Wells. This act was done without authority under the law or the constitution. It was taking the power out of the hands of the Senate, to which it exclusively belonged, of adjusting and settling for the time being, the very important point who are entitled to membership. As soon as the fact was discovered that there were two sets of claimants from Fillmore Co., the matter should have been referred to the Senate by the President. By attempting to settle the case for this body, a violation was surely committed, of that high constitutional guarantee which declares, "that each house shall be judge of the election returns and eligibility of its own members." It was a blow at the authority of this important branch of the legislative department, which cannot, nor ought not to be tolerated. It was a dangerous precedent, against the rights and privileges of the Senate. It should be distinctly understood that no tribunal or person can be allowed to take from this body a power, absolutely necessary for its own government and protection.

With all the foregoing facts, the majority of the committee has no hesitancy in reporting and recommending for adoption the following resolution—

Resolved, That the certificates of election presented by H. W. Holley and Reuben Wells dated October 25th, 1858, are held and considered by this body as *prima facie* evidence of their right to membership, and that they are hereby declared as exclusively entitled to seat as senators from the said county of Fillmore:

Provided, That nothing contained in this resolution shall interfere with the privileges of the said I. F. O'Ferrall and O. B Bryant to contest the right of the said Holley and Wells to seats according to law in such cases made and provided.

DAVID HEATON.
JAMES M. WINN.

Mr. Cowan read and submitted a minority report as follows:

The minority of the committee appointed under the following resolution to wit:

Resolved, That a committee of three be appointed by the President of the Senate to examine the certificates whereby Messrs. H. W. Holley and Reuben Wells, and O. B. Bryant and I. F. O'Farrell, of Fillmore county, respectively

claim seats in this body, and to report as soon as practicable who are by said certificates entitled to membership.—

Have attended to the duty assigned them, and beg leave to submit the following report:

The facts so far as they appear from an examination of the certificates and the authority by which they were issued, are these:

That on the 12th day October, 1858, an election was held in the county of Fillmore, for the purpose, among others, of electing two Senators to represent that county in this body.

That on the 25th day of October, 1858, C. M. Colby, at that time the county Auditor, and the officer authorized and required by law to canvass the votes of that county and to issue certificates of election to the persons having the highest number of votes, did issue certificates of election to the office of State Senators to Reuben Wells and H. W. Holley.

That on the 4th day of January, 1859, on the application of I. F. O'Ferrall and O. B. Bryant, who were at the election aforesaid competitors of Reuben Wells and H. W. Holley for the office of State Senators from Fillmore county, the Supreme Court of the State issued a writ of mandamus directed to H. D. Bristol, the successor in office of C. M. Colby, commanding him to cause to be issued and delivered to I. F. O'Ferrall and O. B. Bryant certificates of election to the office of Senators of the State of Minnesota, in and for the districts embraced within the county of Fillmore

That in obedience to said writ, said Bristol, on the 8th day of February, 1859, issued certificates of election to I. F. O'Ferrall and O. B. Bryant.

Your Committee have had some difficulty in deciding upon the proper scope and limit of their enquiry under the resolution prescribing their duty—whether they are to examine the certificates themselves, rejecting all other evidence—or whether they are to take into consideration facts of general notoriety, and inquire into the manner of issuing the certificates and the authority by which they were issued. The result of the examination may turn upon the decision of this question.

If, as strangers to all the admitted facts, your Committee should confine its examination to the certificates alone, its report in the matter must be very meagre and unsatisfactory, and could scarcely afford the Senate any information which it does not now possess. For instance, the certificates afford us no information as to the number of Senators to which Fillmore county is entitled, yet in making this report it would be ridiculous to ignore that information. It seems, therefore, that such an "examination of the certificatates" as the resolution contemplates, involves a recognition of the undisputed facts in the case, and an inquiry into the manner of issuing the certificates and the authority by which they were issued.

The certificates of Holley and Wells are identical in form, excepting the names of the parties. Each is as follows:

"OFFICE OF CLERK OF THE BOARD OF COUNTY SUPERVISORS,
October 25, 1858.

I hereby certify that ———— was duly elected State Senator at the general election held in Fillmore county, Minnesota, on the 12th day of October, 1858.

C. M. COLBY, Clerk."

[Seal of the Clerk of the Board.]

The certificates, while they are somewhat informal, are nevertheless apparently signed and sealed by the proper officer; and while uncontradicted, are *prima facie* evidence of rights to seats in the Senate. They carry with them

the presumption that the officer who issued them did so in accordance with law. They carry with them the presumption that the Clerk of the Board of Supervisors received all the returns from the election precincts in his county, that he canvassed all the votes, and that he issued these certificates to Holley and Wells, as the persons who by such returns had the highest number of votes. The presumption in favor of the validity of these certificates remains until the contrary is shown.

It remains then to inquire in what way the contrary may be shown to the Senate by O'Ferrall and Bryant, whether it must be by appeal to the Senate in the first instance, or whether there is another legal mode of rebutting these presumptions, and of bringing the Senate to a knowledge of the fact that these presumptions are overcome.

The certificates of O'Ferrall and Bryant are identical, excepting the names of the parties to whom issued. Each is as follows:

"STATE OF MINNESOTA, } ss.
Fillmore County. }

In pursuance of an order issued out of the Supreme Court of said State, and commanding me to issue a certificate of election to ———— to the office of State Senator for said county, I hereby certify that at the general election held on the 12th day of October, A. D. 1858 in and for said county, ———— having received the highest number of votes was duly elected State Senator for said county.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office, this 8th day of February, A. D. 1859.

H. D. BRISTOL, County Auditor."

[Seal of the Clerk of the Board.]

An examination of these certificates of O'Ferrall and Bryant, for the purpose of determining their validity, involves an inquiry into the right of the Supreme Court to compel the Auditor to issue certificates of election *in this case*: and this inquiry involves an examination into the manner of bringing the question of right to a certificate before the Supreme Court, and, in short, into the whole history of the case before Court, so far as it appears from the records.

Let us first examine briefly the representations in the application for the writ. They are mainly as follows, to wit:

That at an election held on the 12th day of October, 1858, I. F. O'Ferrall, O. B. Bryant, H. W. Holley and R. Wells were severally candidates for the office of State Senators for Fillmore county. That two Senators were to be elected from said county. That at said election said O'Ferrall received 1106 votes; that said Bryant received 1092 votes; that said Holley received 1076 votes; and that said Wells received 1079 votes; and that O'Ferrall and Bryant were therefore duly elected. That C. M. Colby was the officer authorized and required by law to canvass the votes of Fillmore county, and to issue certificates of election to the persons having the highest number of votes. That before twenty days after said election said Colby had receivrd the election returns from all the precincts in the county, and that the poll books returned from the several prescincts showed the numbev of votes cast for the several candidates as above stated. That O'Ferrall and Bryant demanded certificates of election, but that said Colby refused to deliver them. That Colby in making an abstract of the votes of the county, neglected or refused to include in his abstract, the votes returned from Chatfield precinct.

Upon these representations, the applicants, O'Ferrall and Bryant, pray the Court to issue a writ of mandamus to compel Colby to issue certificates of election to the pe sons entitled thereto.

Let us now examine in what way and to what extent the affidavit of Colby in answer to the application, contraverts the representations therein; and what reason or excuse it sets up for not performing duties obligatory upon the Auditor to perform, and which the application charges that he did not perform.

The points in his affidavit are these:

That he was at the time stated in the application the canvassing officer of Fillmore county. That he did receive all the election returns of Fillmore county. That within twenty days after the election he called to his aid two justices of the peace, and that the three, as a board of canvassers, did on the 25th day of October, make out an abstract of the LEGAL votes contained in the returns. That thereupon he issued certificates of election to Holley and Wells, they being the persons who had the highest number of votes as *appears by said abstract*. That he denies that O'Ferrall and Bryant were duly or legally electad.

Now what allegations in the application does this affidavit deny? Does it deny that O'Ferrall had 1106 votes? Does it deny that Bryant had 1092 votes? Does it claim more than 1076 for Holley? or more than 1079 for Wells? Does it allege that any votes cast in Fillmore county were *illegal*? or does it attempt to show in what the illegality consisted? Nothing of the kind! It claims that an abstract of the *legal* votes was made and that by the *abstract* Holley and Wells appeared to be entitled to certificates. Such allegations in legal papers amount to nothing. They raise no issue on the allegations in the application. They controvert nothing contained therein. They admit all the essential allegations in the application by failing to deny them. Then the final denial that O'Ferrall and Bryant were duly and legally elected, without accompanying the denial with a statement of facts showing that they were not so elected, is a mere conclusion of law, and is worse than useless in a legal paper. Or even admitting that such an allegation in the affidavit was of any effect, does the Auditor assume to decide who are and who are not legally elected to the Senate? The Senate has the sole power of making such decisions. The Auditor seems in his insinuations (for they are nothing else) in his affidavit to have mistaken the duties of his office. His duty is to count votes and "issue certificates to the person or persons who *by the returns*" made to him from the several precincts "appear to have the greatesst number of votes." It is the prerogative of the *Senate* to decide what votes properly returned to him from the several precincts are legal, and what illegal.

In section 31, chapter 6, revised statutes, we find the following: "On the 20th day after the close of any election, or sooner if all the returns be received, the Clerk of the Boaad of county Commissioners (now county Auditor) taking to his assistance two justices of the peace of the county, shall proceed to open said returns and make abstracts of the votes in the following manner." He is to open the returns and make abstracts of *the votes*, not the "*legal* votes"

Section 41 in the same chapter says: "No election returns shall be refused by any Clerk of the Board of county Commissioners, for the reason that the same may be returned or delivered to him in any other than the manner directed in this chapter; nor shall he refuse to include any returns in his estimate of votes, for any informality in holding any election, or making returns thereof, but *all* returns shall be received and the votes canvassed by such clerks, and a certificate given to the person or persons who may *by such returns* have the greatest number of votes."

Here is the duty of the canvasser "specially enjoined." It is charged in the application that he has not issued certificates of election to the persons

who *by the returns* had the greatest number of votes. He does not deny the charge, but evades by alleging that he has issued certificates to the persons who appear *by his abstract* to have the greatest number.

We are of opinion then, after examining the application, and the affidavit of Colby in answer thereto, that it was admitted and plainly appeared to the Court, that the Auditor had neglected or refused to perform two separate acts which the law "specially enjoins as duties resulting from his office," namely, to canvass the Chatfield returns, and to issue certificates to the persons who by the returns from all the precincts of Fillmore county had the greatest number of votes.

This being the case, could the Supreme Court grant to O'Ferrall and Bryant the relief prayed for in their application, viz.: a writ of mandamus compelling him to issue their withheld certificates?

Section 4, chapter 73, revised statutes concerning the writ of mandamus, says: "It may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act, which the law specially enjoins as a duty resulting from an office, trust or station." It would be an insult to the common sense of any intelligent man to undertake to *prove* to him, that canvassing the votes of a county, and issuing certificates of election to the person or persons who by the returns have the greatest number of votes, are duties which the law specially enjoins upon the Auditor as resulting from his office. The proposition is too plain to be susceptible of other proof than the statement of the proposition itself. If the Auditor had refused to issue any certificate, no one will deny that a mandamus was the proper process to compel him to perform that duty. But if the Auditor has performed an act without authority of law, or contrary to law, can it be contended that he is thereby relieved from performing an act specially enjoined by law? If the Auditor, *without law*, issues certificates to the person who by the returns has the *lowest* number of votes, does that act relieve him of the duty enjoined *by law* of issuing certificates to the person who by the return has the *highest* number of votes? Yet this is the case before us—the Auditor does not deny—it stands admitted that O'Ferrall and Bryant were the persons who by the returns had the highest number of votes.

Your Committee are of opinion then that the Court lawfully and rightfully granted the writ, and that it was the only remedy whereby O'Ferrall and Bryant could obtain the certificates to which it is admitted that by the returns they were entitled.

It may be urged that O'Ferrall and Bryant had a "plain, speedy and adequate remedy," by direct appeal to the Senate; and that therefore the "writ ought not to have been issued"—but the object of the writ was to secure the certificates to which they were entitled. The Senate does not issue certificates of election to its members, neither can it compel the canvassing officer to issue them.

If the foregoing reasoning is correct, your Committee cannot avoid the conclusion, that by the certificates submitted to their examination, I. F. O'Ferrall and O. B. Bryant are entitled to seats in this body as Senators from the county of Fillmore.

All of which is respectfully submitted.

THOMAS COWAN,
Minority of the Committee.

Mr. Hall moved that the reports be laid on the table and printed.

A division of the question being called for, and the vote to lay the reports on the table being taken,

It was lost.

The question recurring upon the motion to print,

It was lost.

Mr. Heaton moved the adoption of the majority report of the committee.

Mr. Hall offered a substitute for the resolution appended to the majority report of the committee, and moved its adoption.

And the yeas and nays being called for and ordered, there were yeas 11, nays 20, as follows:

YEAS.

Mr. Adams,	Mr. Cruttenden,	Mr. Nelson,	Mr. Stevens,	
Andrews,	Galloway,	Norris,	Taylor,	
Clark,	Hall,	Pettit,		11

NAYS.

Mr. Averill,	Mr. Cook,	Mr. Hodges,	Mr. Rogers,	
F. E. Baldwin,	Cowan,	Kennedy,	Stannard,	
J. F. Baldwin,	Evans,	King,	Stewart,	
Bartholomew,	Frost,	McKusick,	Watson,	
Bishop,	Heaton,	McLaren,	Winn.	18

So the motion was lost.

Mr Cowan moved a call of the Senate.

Mr. King moved that further proceedings under the call be dispensed with.

And the yeas and nays being called for and ordered, there were yeas 21, nays 10, as follows:

YEAS.

Mr. Averill,	Mr. Evans,	Mr. King,	Mr. Stannard,	
F. E. Baldwin,	Frost,	Kennedy,	Stewart,	
J. F. Baldwin,	Galloway,	McKusick,	Taylor,	
Bartholomew,	Hodges,	McLaren,	Watson,	
Bishop,	Heaton,	Rogers,	Winn.	
Cook,				21

NAYS.

Mr. Adams,	Mr. Cowan,	Mr. Norris,	Mr. Pettit,	
Andrews,	Cruttenden,	Nelson,	Stevens,	
Clark,	Hall,			10

So the motion was carried.

The question recurring on the adoption of the resolution contained in the majority report,

Mr. McLaren moved the previous question, which was seconded by the Senate.

Mr. Cowan moved to refer the resolution to the committee on the Judiciary.

And the yeas and nays being called for and ordered, there were yeas 11, nays 20, as follows:

YEAS.

Mr. Adams,	Mr. Cowan,	Mr. Nelson,	Mr. Stevens,	
Andrews,	Cruttenden,	Norris,	Taylor,	
Clark,	Hall,	Pettit,		11

NAYS.

Mr. Averill,	Mr. Cook,	Mr. Hodges,	Mr. Rogers,	
F. E. Baldwin,	Evans,	Kennedy,	Stannard,	
J. F. Baldwin,	Frost,	King,	Stewart,	
Bartholomew,	Galloway,	McKusick,	Watson,	
Bishop,	Heaton,	McLaren,	Winn.	20

So the motion was lost.

The previous question, "Shall the main question be now put?" was then carried.

And the main question ordered.

And the yeas and nays being called for and ordered, there were yeas 11, nays 18, as follows:

YEAS.

Mr. Averill,	Mr. Evans,	Mr. King,	Mr. Stannard,	
F. E. Baldwin,	Frost,	McKusick,	Stewart,	
Bartholomew,	Heaton,	M Laren,	Watson,	
Bishop,	Hodges,	Rogers,	Winn.	
Cook,	Kennedy,			18

NAYS.

Mr. Adams,	Mr. Cowan,	Mr. Hall,	Mr. Pettit,	
Andrews,	Cruttenden,	Nelson,	Stevens,	
Clark,	Galloway,	Norris,	Taylor,	12

So the motion was carried, and the report of the committee adopted.

Mr. J. F. Baldwin was excused from voting.

Reuben Wells and H. W. Holley then came forward, took and subscribed the oath of office, and took their seats.

Mr. Cowan offered the following resolution:

Resolved, That a committee of five be appointed by the chair to inquire and report who are of right entitled to seats in this Senate from Fillmore county, and that the said committee are instructed to report within —— days.

Adopted.

On motion, the Fireman was excused from attendance on the Senate until Monday.

On motion of Mr. Taylor,

The Senate then adjourned.

IGNATIUS DONNELLY, President.

Attest: A. B. WEBBER, Secretary.

TWENTY-FIFTH DAY.

SATURDAY, January 7, 1860.

The Senate met pursuant to adjournment and was called to order by the President.

The roll being called, the following members answered to their names:

Messrs. Andrews, Averill, F. E. Baldwin, Bartholomew, Bishop, Clark, Cook, Cruttenden, Evans, Frost, Galloway, Gluck, Holley, Hodges, Kennedy, King, Norris, Pettit, Robinson, Rogers, Stannard, Stevens, Stewart, Taylor, Watson, Wells and Winn.

Prayer by the Chaplain.

The Journal of yesterday was read and approved.

On motion of Mr. Stannard,

The Senators from Washington county were excused from attendance on on the Senate.

Mr. King, on leave, introduced—

A bill for an act regulating the rate of interest on money goods or things in action.

Which had its first reading.

Mr. Stewart, on leave, introduced—

A joint resolution authorizing the printing of all trust deeds, mortgages, agreements and contracts executed by the different railroad companies of this State.

Which had its first reading.

Mr. Stewart gave notice that on to-morrow, or some future day, he would introduce

A bill for an act to amend the charter of the City of St. Paul.

Mr. Galloway gave notice that on to-morrow or some future day he woud introduce

A bill for an act to provide for the collection of taxes in towns where the collectors may have resigned.

The President announced that he had appointed Messrs. Cowan, Stannard Averill, Hall and Frost as the committee on the Fillmore county contested election case in pursuance of the resolution passed yesterday.

Mr. Andrews, in pursuance of previous notice, introduced—

A memorial to the President of the United States for the occupation of Fort Abercrombie.

Which was read the first time.

The committee on Printing having been instructed by resolution of the Senate to confer with the Printing committee of the House, in relation to printing the Governor's message in different languages, made the following report:

The committee on Printing beg leave to report, that the expense of translating, printing, &c, of 1000 copies of the Governor's message into the Norwegian language will be $175; 800 copies of the same, into German, $155; 500 copies of the same into Welch, 125.

All of which is respectfully submitted.

J. H. STEWART,
THOS. COWAN,
E. L. KING,
Committee.

The committee on Towns and Counties, to whom was referred S. F. No. 20, reported the bill back to the Senate with amendments, and recommended ts passage.

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SENATE

OF THE

SECOND LEGISLATURE

OF THE

STATE OF MINNESOTA.

500 COPIES PRINTED BY ORDER OF SENATE.

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NEWSON, MOORE, FOSTER & COMPANY,
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1860.