

STATE OF MINNESOTA,

Thirty-Fifth Legislature.

In the Matter of the Appeal of James D. Denegre from the action and decision of the County Canvassing Board of the County of Ramsey and State of Minnesota, declaring J. D. O'Brien to have been elected to the office of Representative for the Representative District, embracing that portion of the Thirty-sixth Legislative District, designated as the Fourth Ward of the City of St. Paul, Minnesota.

CONTESTANT'S ACCOUNT OF EXPENSES.

Witnesses fees, twelve witnesses, . . . . .	\$ 13.34
Constable fees, service and mileage, . . . . .	15.00
Stenographer's fees, record on appeal with one copy for Contestant and one copy for Contestee, . . . . .	92.16
Fees of H.L.Mills and J.L.Johnson, Justices of the Peace, (one-half), . . . . .	32.00
Referees' fees, K.Todd, J.C.Otis and H.W.Lyons, three days at \$10.00 each per day on re-count (one-half), . . . . .	45.00
Counsel fees, as per attached itemized bill of Durment & Moore, . . . . .	1000.00
	\$1197.50

STATE OF MINNESOTA, )  
  ) ss.  
COUNTY OF RAMSEY.    )

JAMES D. DENEGRE came before me personally, and being duly sworn on his oath deposes and says: That he is the contestant in the above entitled Legislative contest; that the foregoing is a true and correct statement of the expenses of the contestant in the above entitled <sup>contest</sup> action, and that all of the items thereof have been actually paid or incurred therein by and on behalf of the contestant.

Subscribed and sworn to before me personally  
this 25<sup>th</sup> day of February, A. D. 1907.

*Wm. L. Lewis*  
Notary Public, Ramsey County, Minnesota.

My Commission Expires 29 June 1909.

1842

ST. PAUL, MINN.,

February 20, 1907.

James D. Denegre.

To

DURMENT & MOORE

DR.

To services from November 12, 1906 to February 7,  
1907 in the matter of the contest involving a seat in  
the House of Representatives- - - - -

-\$1,000.00

MEMORANDUM.

An itemized statement of these services is hereto attached.

February 20, 1907.

## Itemized statement of Services in the Election Contest of

James D. Denegre vs J. D. O'Brien.

1906.

Nov. 12 Retained by Mr. Denegre in matter of contest.

" 12-15 Prepared notice of contest, specification of points of contest, etc.  
Prepared petition to District Court in and for the Second Judicial District for appointment of Referee to recount ballots.

" 24 Attending hearing, drew and obtained order appointing J. C. Otis, Kay Todd and D. F. Lyon Referees.

" 12-30 Conferences with contestant and others, and investigation as to illegal voting, etc.

" 30 Obtained order from O. B. Lewis, District Judge, requiring G. T. Redington, City Clerk to produce ballot boxes before referees, authorizing him to break the seals thereon, reseal the same, etc., etc.

" 30 Attending session of referees recounting ballots  
" " " " " "

Dec. 1st " " " " " "

" 3rd " " " " " "

" 4th Reviewing authorities at State Library.

" 10 Conference with contestant in re witnesses,

" 11 Taking testimony before Justices of the Peace,

" 18 Conference with Contestant and others,

" 19 " " " " "

" 20 Taking testimony before Justices

" 27 " " " "

1907.

Jan 1st Half day spent in preparation,

" 4th Taking testimony before Justices ,

" 5th " " " "

" 7th " " " "

" 15-21 Preparation for argument before legislative Committee including preparation of written brief,

" 21 Presenting case of contestant before Committee on Elections,

" 22 Presenting case of contestant before Committee on elections,

" 23, Presenting case of contestant before Committee on elections,

Feb. 4th Consultation with Chairman of Committee on Elections

" 7th Contest closed.

Much detail work was done which is not included in the foregoing itemized account and a large number of supposed cases of illegal voting were investigated.

S T A T E O F M I N N E S O T A.

Thirty-Fifth Legislature.

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 In the Matter of the Appeal of James D. Denegre  
 from the action and decision of the County  
 Canvassing Board of the County of Ramsey and  
 State of Minnesota, declaring J. D. O'Brien  
 to have been elected to the office of Re-  
 presentative for the Representative District,  
 embracing that portion of the Thirty-Sixth  
 Legislative District, designated as the  
 Fourth Ward of the City of St. Paul, Minnesota.  
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BILL OF EXPENSES INCURRED BY CONTESTEE.

Referees' fees, K. Todd, J. C. Otis and D. F. Lyons, three days at \$10.00 each per day on re-count, (one-half)-----	\$ 45.00
Witness fees,-----	9.84
Constable fees,-----	7.00
Fees of H. L. Mills and J. L. Johnson, Justices of the Peace, (one-half),-----	32.00
Incidentals,-----	25.00
Attorney's fees, as per attached itemized bill of Daniel W. Lawler,-----	1000.00
	\$1118.84

State of Minnesota, :  
 :SS  
 County of Ramsey. :

JOHN D. O'BRIEN came before me personally, and being  
 duly sworn on his oath deposes and says: That he is the contestee in  
 the above entitled Legislative contest; that the foregoing is a true and  
 correct statement of the expenses of the contestee in the above entitled  
 action, and that all of the items thereof have been actually paid or incurred  
 therein by and on behalf of the contestee.

Subscribed and sworn to before me this  
 4th day of March, A. D. 1907. :

*J. D. O'Brien*  
 \_\_\_\_\_

*Anna Gall*  
 \_\_\_\_\_  
 Notary Public, Ramsey County, Minnesota.

ST. PAUL, MINN., March 4, 1907

Dr. J. D. O'Brien,

St. Paul, Minnesota,

IN ACCOUNT WITH

DANIEL W. LAWLER,

ATTORNEY AT LAW,

403 NEW YORK LIFE BUILDING.

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For services from November 15th, 1906 to February 7th, 1907  
in Election Contest, as per attached itemized statement,

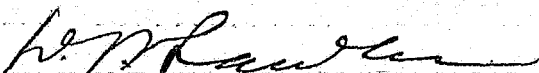
\$1000.00

ITEMIZED STATEMENT OF SERVICES  
 IN THE ELECTION CONTEST OF JAMES D. DENEGRE VS. J. D. O'BRIEN.

November 15th, 1906, retained by J. D. O'Brien, Contestee.  
 November 20th, 1906, prepared notice to contestant.  
 November 24th, 1906, attended Special Term hearing before Judge Kelly  
 for the appointment of inspectors to inspect ballots.  
 November 30th, 1906, attended inspection of ballots and recount.  
 December 1st, 1906, " " " " " " " " " " " " " " " "  
 December 3rd, 1906, " " " " " " " " " " " " " " " "  
 December 11th, 1906, attended hearing before Justices Mills and Johnson.  
 December 20th, 1906 " " " " " " " " " " " " " " " "  
 December 27th, 1906 " " " " " " " " " " " " " " " "  
 January 4th, 1907 " " " " " " " " " " " " " " " "  
 January 5th, 1907 " " " " " " " " " " " " " " " "  
 January 7th, 1907, " " " " " " " " " " " " " " " "  
 January 21st, 1907, attended hearing before Legislative Committee  
 on Elections.  
 January 22nd, 1907, attended hearing before Legislative Committee on Elections  
 Four days preparation of brief and for hearing and argument.  
 February 7th, 1907, contest ended. Report signed by Committee.

In addition to my services I employed D. F. Lyons and James  
 Cormican, attorneys at law to assist me at the recount of the ballots, at  
 the hearings before the Justices and the Committee on Elections in the  
 preparation of my brief and in such general work as came up during the  
 pendency of the contest.

Furthermore a great many consultations were had during the  
 contest, from the time it was begun, November 15th, 1906 until it was  
 finally settled, February 7th, 1907.

  
 Attorney for Contestee.

STATE OF MINNESOTA.  
HOUSE OF REPRESENTATIVES.

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O'BRIEN - DENEGRÉ ELECTION CONTEST.  
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Brief and Argument For Contestee.

Daniel W. Lawler,  
Attorney for Contestee.

William McKinley in the Election Contest of Wallace  
vs. McKinley, in the 48th Congress, First Session said:

"I rise more particularly to say, and indeed it is about  
all I desire to say, that I claim nothing from tech-  
nicalities. I would not if I could retain my seat  
for one hour upon a mere mistake or technicality or  
inadvertence of election officers."

"So I say Mr. Speaker, that in all this controversy - I say  
to my friends on this side, I say to my friends on the  
other side, that I invoke no technicality or legal quibble  
to retain my seat in this House."

Congressional Record, Volume XV, Part VI, Appendix, page 415.



Precinct.	Official Return of County Canvassing Board for J.D. O'Brien.	Findings of Referees for J. D. O'Brien.	Official Return of County Canvassing Bd. for J.D. Denegre.	Findings of Referees for J. D. Denegre.	Total No. of Ballots.	Blanks.	Referred.
1	75	73	50	50	<del>135</del> 135	8	4
2	74	73	73	72	162	16	1
3	46	46	55	54	120	19	1
4	26	26	38	37	70	5	2
5	46	46	42	42	92	4	8
6	137	131	82	82	239	18	8
7	119	118	196	195	325	8	4
8	127	127	82	81	216	6	2
9	55	56	34	32	94	5	1
10	35	35	43	43	90	11	1
11	67	63	103	97	177	14	3
12	74	70	78	77	159	8	4
Total,	<del>881</del>	864	876	Total 862	<del>1879</del>	122	31

STATE OF MINNESOTA.  
HOUSE OF REPRESENTATIVES.

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O'Brien - Denegre Election Contest.  
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POWER AND AUTHORITY OF LEGISLATURE IN DECIDING ELECTION CONTESTS.

It is proper that at the very outset in a contest of this sort we should have a definite understanding of the power and authority of the body that is to decide all questions that may arise. The Constitution of the State of Minnesota, Section III, Article IV provides that "Each House shall be the judge of the election, returns and eligibility of its own members."

This provision insures to the Legislature that full authority that rightfully belongs to it as one of the three co-ordinate branches of the Government. To assert that in a matter of this sort the Legislature should be in any way bound by any act or decision of either the judicial or executive branch of the Government is to claim something that is totally foreign to the fundamental principles of our system of government. The judicial branch of our Government has in two decisions of our Supreme Court recognized this fact.

In the case of State vs. Peers, 33 Minn. 81, Chief Justice Gilfillan said, in speaking of the powers of the two Justices who may take testimony in election contests:

"The constitution (section 3, article 4) makes house judge 'of the election, returns and eligibility of its own members.' Under this, not only must each house determine, in case of a contest, who is elected to be a member, but must determine upon what evidence it will decide the question, and how it will procure such evidence. Over the proceedings the judiciary has no control, and could not have without trenching on the independence of the house. When testimony in case of a contest is taken, as provided by Gen. St. 1878, c. 1, Par. 49, 50, 51, it is for the house to which it is sent, and not for the courts, to decide whether it is properly taken. The powers vested in the two justices of the peace by those sections are not judicial, but rather such as might be vested in commissioners, or in a committee

of one of the houses. They decide nothing. If they take improper testimony ~~offered~~, the house may reject it; if they refuse to take proper testimony offered, the house may remand the matter to them, with directions to take and return the testimony offered. Over their actions the courts have no supervision any more than over the action of a committee of one of the houses."

Again in the case of State vs. Searle, 59 Minn. 489, 492 Judge Mitchell said referring to the law which provides for the appointment of three persons to act as referees to examine and inspect ballots cast at a general election:

"There is no force in the suggestion that, as thus construed, the act is in conflict with the Constitution, Art 4, Sec. 3. It in no way interferes with the right of the legislature to judge of the election of its own members any more than would a law providing for the taking of depositions to be used on the trial of the contest before that body. It binds nobody and determines nothing. The whole matter is still with the legislature who can receive or reject the evidence secured by the inspection and examination of the ballots, and, if they receive it, give it only such weight as they see fit."

Judge Cooley in his treatise on Constitutional Limitations says in speaking of the powers of the Legislature:

"It chooses its own officers, except where, by constitution or statute, other provision is made; it determines its own rules of proceeding; it decides upon the election and qualification of its own members. These powers it is obviously proper should rest with the body immediately interested, as essential to enable it to enter upon and proceed with its legislative functions without liability to interruption and confusion. In determining questions concerning contested seats, the house will exercise judicial power, but generally in accordance with a course of practice which has sprung from precedents in similar cases, and no other authority is at liberty to interfere."

Congress has from the very beginning in numerous contested election cases affirmed its right to act as the sole judge of the election of any of its members and has declared its freedom from interference from any other branch of the Government. It has declared in many cases that in deciding election contests it is its privilege and its duty to disregard technicalities and to proceed to decide the matter not with reference to technical rules of law, but regarding rather the truth and justice of each particular case.

We cite here some extracts from reports made by committees of election of the House of Representatives in which the power of the House

in such matters is clearly and accurately stated.

"The House possesses all the powers of a court having jurisdiction to try the question who was elected. It is not even limited to the powers of a court of law merely, but under the constitution clearly possesses the functions of a court of equity also." So even if it be conceded that ministerial officers can not always count for a candidate votes clearly intended for him, the House is not prevented from doing so. McKenzie vs. Braxton, 42d Cong. Rowell's Digest of Contested Election cases in the House of Representatives, 1789-1901, page 720, Smith, 21.

"Neither the committee nor the House is bound by the usual rules of evidence in their letter and strictness, but should proceed upon more liberal principles in the investigation of truth. A contested election is not to be regarded as a mere private litigation, but a great public inquiry, where the real parties are not so much the returned member and the contestant as the voters of the district." The distinction claimed to exist between an ordinary forensic court and a legislative assembly is recognized not only in Parliament and Congress, but in the courts themselves, and from a very early period." Vallandigham vs. Campbell, 35th Cong. 1 Bart, 230, Rowell's Digest, 720.

"It is the duty of the committee to approach as nearly as possible the ballot box, and, by an examination of all the testimony, see that no legal voter is deprived of his just right to the elective franchise."-----"This committee and the House are not circumscribed by the formalities that regulate proceedings of a board of return judges." Koontz vs. Coffroth, 39th Cong. 1 Bart, 142, Rowell's Digest, 720.

"By the Constitution, in all matters pertaining to the election, returns, and qualifications of its members, the House is made 'a law unto itself', and has no other rule forced upon it for the determination of these questions than the sanction of the oath of its members, and that due regard for the rights of constituencies which the representatives of constituencies, from the nature of their own duties and relations, must have and feel. Not that the technical rules of the law applicable to evidence and weight of evidence, the duties of officers, etc. may not be called in to aid in the proper investigation of a case, but that when called in they shall not be regarded as greater than the rights to be affected by their application." Wallace vs. Simpson (majority report) 41 st Cong. 2 Bart, 556, Rowell's Digest, 720.

"Courts will invoke the aid of technical rules to prevent gross injustice, but they should not be permitted to stand in the way of equal and exact justice unless of such a rigid character and so firmly embedded in the law as to compel adhesion to them. Doubts on such questions are always resolved in favor of justice and against wrong." Lowry vs. White (minority report) 50th Cong. Mobley, 644, Rowell's Digest, 720.

"The House of Representatives, with its broad and indeed limitless powers respecting the settlement of contested-election cases, is only desirous of arriving at the truth. While it will not depart from wise and well-settled rules of law, it will not hedge itself about with technical rules which do manifest wrong." Mitchell vs. Walsh, 54th Cong. Report, 1849, Rowell's Digest, 720.

"The Constitution of the United States makes each House of Congress the exclusive judge of the qualifications, election, and returns of its own members. In making the inquiry involved in this constitutional provision the House will carefully keep in view the customs and precedents which have heretofore prevailed in such matters. The prime object in all such cases is, if possible, to ascertain who was the people's choice at the election in question. This can only be accurately ascertained by giving close and fair attention to all the surroundings, facts and circumstances connected with the case under consideration." English vs. Hilborn, 53rd. Cong. Report 614, p. 9, Rowell's Digest, 721.

It is clear, therefore, that the Legislature in deciding this case is unfettered by precedents or authorities or the decisions of the courts of this or of any other state. We, of course, realize the value of authorities and the decisions of the courts and intend to use them, but they should not be advanced either by the contestant or by the contestee as binding upon this Legislature. They can only be used to throw light upon the questions that arise and to assist in arriving at a just conclusion. The decision of any court in an election contest other than a contest over a seat in the Legislature is, of course, binding upon that court in subsequent decisions, but it in no way binds this Legislature. This contest is of interest not only to the parties directly involved, but more particularly to the citizens of the 36th Legislative district. The only question that is before the Legislature is whether a greater number of voters in the Fourth Ward of the City of St. Paul desired to have Mr. O'Brien represent them in the Legislature rather than Mr. Denegre and went to the polls and registered their intention. In determining this question the Legislature may disregard mere technicalities and arrive at the actual facts of the case and decide from them which of these two men is entitled to a seat in the Legislature.

Notes for Argument Before Committee.

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ALLEGED ILLEGAL VOTES, FIVE IN NUMBER. (Must not deduct from O'Brien).

The Contestant is the moving party and he must show by clear and convincing evidence that any vote is illegal before the House will be justified in throwing it out.

McCrary on Elections, Section 466 a. page 342, Fourth Edition.

"A vote accepted by the judges or commissioners holding an election is prima facie legal. Before it can be thrown out for illegality it must be satisfactorily shown to have been cast by one not legally qualified to vote--that is to say, the presumption of legality must be overcome by a clear preponderance of competent evidence."

The witnesses proffered by the contestant should be unbiased, impartial, without personal motive to testify falsely. Where the voters whose votes are claimed to be illegal are citizens of good standing and repute there is no reason why trickery or artifice should be resorted to and above all, the witnesses should not be politicians, office-holders or partisans of the contestant.

1. Harry Lauer not instructed by us not to answer. Mr. Lauer was not registered as shown by registration list although he claims to have registered at the Armory precinct. The burden is on the contestant to prove that Lauer voted for O'Brien. Lauer refused to answer of his own accord. He was not advised by contestee's counsel. (See Moore's brief page 9). His right to refuse to answer. Secret ballot. Only evidence offered by contestant that Lauer voted for O'Brien is that of Constable Miller. (Page 92). Republican constable. Lauer told him at once, but refused to testify when deposition was taken. Bazille lied to Franke. Lauer could have had no improper motive in refusing to testify as to whom he voted for. If guilty of illegal voting person voted for made no difference, guilty because not registered. Counsel's statement in brief about darkness of morning, etc. Lived at 107 West Third Street between

Franklin and Exchange. Walked around the corner to vote at the Armory. Not a repeater, not a criminal. Richardson advised students not to answer on same ground.

2. Math Franke. Dr. Franke Not on stand and not advised. Illegal vote because he lived in the Ninth Ward. Registered in eighth precinct of Fourth Ward. Gave his right address, 640 St. Peter Street, corner of Iglehart and St. Peter. Testimony does not show that he voted for O'Brien. Committee is entitled to Franke's testimony under oath or explanation why it is not given. Subpoena served but no attachment issued for Franke. Billy Bazille and Donaldson are produced by contestant to show that Franke voted for O'Brien. Billy Bazille son of pioneer, brother of Republican Probate Judge, Deputy Clerk in office of Republican Clerk of Courts, Chairman of Republican Precinct Organization of Fourth Ward. Gets busy after election. Disregards his duty of examining poll list before election. After election and after contest commenced takes Donaldson with him, goes to Franke's house on Sunday, December 2, 1906 and according to Billy's own testimony liest to Franke about rheumatism and about difference of two votes. A man who will lie this way will lie under oath. Donaldson simply brought along to bolster up Bazille.

Cite the following from Cooley on Constitutional Limitations to show that a voter has a right to refuse to disclose how he voted and that public policy shuts out testimony such as Bazille gave.

"The system of ballot-voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time. The courts have held that a voter, even in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally, or by trick or artifice have acquired knowledge on the subject should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it; his ballot is absolutely privileged; and to allow evidence of its contents when he has not waived the privilege is to encourage trickery and fraud, and would in effect establish this remarkable anomaly, that while the law from motives of public policy establishes the secret ballot with a view to conceal the elector's

action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public." Cooley on Constitutional Limitations, Seventh Edition, 1903.

3. James Thomas, colored man, registered in second precinct of Fourth Ward. Resides 57-1/2 West Third Street. Did not advise him. Properly registered. On election day had moved and lived at 158 West Third Street in the first precinct of the Fourth Ward.

- a. Admitted that Thomas was a voter in the ward and had been for years.
- b. Implied admission by Moore that Thomas had a right to vote in having Thomas testify that he voted for Dr. O'Brien by mistake.
- c. Registered just before election. (Get <sup>from</sup> registration list exact date of registration).

4/ O. J. Johnson. Not proved an illegal voter. Had testified about his residence. Lived in Jerry O'Brien's livery barn.

Contestant claims:

1. Did not live in precinct. Evidence convincing on this point. Lived in the barn. Trunk there. See Moore's Brief, page 6, referring to trunk and Johnson's appearance. Cosgrave testified that he had lived for years in the ward.
2. Claim that ballot was marked by Jerry O'Brien without oath having been administered to him. Evidence does not show that Jerry O'Brien marked it. Depends on Cosgrave's testimony. Rambling and unsatisfactory. See page 51. "Only stood there". See page 68 and 69 Cosgrave's testimony. "Johnson might have been one." Head turned, didn't know." "Don't remember having seen their faces before." "Knew Johnson for years." Page 70. Rambling and gibberish. Since election Johnson told him that Jerry O'Brien marked his ballot. Hearsay testimony



probably inspired by Bazille. Same kind of work. Gunther, witness produced by contestant, testifies at page 73 and 74 that Albert Ernst marked ballot of Patrick Mitchell. Thinks but not positive that Jerry O'Brien marked Johnson's. Dr. McGinn's testimony should be disregarded. He does not know. Point out to the committee that it is on this weak self-contradictory testimony that contestant asks that Johnson's ballot should be invalidated. No colonizing, no fraud. "Dens of vice."

5. Joseph Lick. A legal voter. Cormican marked his ballot. Claim that vote is illegal because ballot was marked by James Cormican not a voter in the precinct and because oath of inability of voter to mark his ballot was not administered. Claims merely technical and artificial. No fraud in this or any other voter. Moore. Durment. Lick lived in the ward, property owner and resident since 1869. See page 108. Did not know that oath of inability was necessary or that person who marked ballot should be elector of the district. Mr. Cormican did not know what the law was on this point. Lick had always had ticket marked. (Page 11). Here Cosgrave comes in again top of page 68 and testifies to the contrary. Lick in his testimony tells how he has always had his ballot marked and how Judge Mills, one of the presiding Justices of the Peace taking the depositions had often marked it for him. (Page 112). This alone shows Cosgrave unworthy of belief. Call attention to Cosgrave's testimony correcting his testimony about Dr. O'Brien marking for Lick. "Small or little mistake". Page 121. See Cosgrave's testimony page 120, where he testifies that Lick told him that the ballot was marked for O'Brien. Above shows that this testimony should be disregarded as unworthy of belief.

Refer again to McCrary, Section 466a. as above cited.

"A vote accepted by the judges or commissioners holding an election is prima facie legal. Before it can be thrown out for illegality it must be satisfactorily shown to have been cast by one not legally qualified to vote--that is to say, the presumption of legality must be overcome by a clear preponderance of competent evidence."

Value of franchise. Seriousness of a decision taking away the right to vote. Witnesses: Bazille, Cosgrave, Letford. Alleged spoiled ballot. Congratulated Durment. Every facility. All evidence rafted together.

#### INITIALED BALLOTS.

Eight ballots marked for O'Brien, two ballots marked for Denegre with voters initials on back claimed by contestant to be illegal. For reasons previously given decisions of the Supreme Court do not govern this house in determining validity of these ballots, but the State decisions even do not support contestant's claim.

Contestant relies mainly on Elwell vs. Comstock. Comment on this authority.

#### EIGHT INITIALED BALLOTS MARKED FOR O'BRIEN.

The testimony affirmatively shows positively that six of these ballots were not marked for identification by the voters, but under the mistaken idea given them by the Judges of Election that they should put their initials on the back of the ballots. Of the O'Brien ballots so initialed five are in the sixth precinct. The two initialed Denegre ballots are also in this precinct. The testimony conclusively shows good faith and mistake with regard to three of the five O'Brien ballots in this precinct.

Call attention to testimony of Dr. Mecay, page 27, of Martin Kelly and of B. Clay, all of the same tenor.

The Committee is justified in assuming from this testimony that C. H. Dobson and J. Zolner who cast the other two O'Brien ballots in this precinct voted under the same mistake as the above precincts.

The following ballots are explained by testimony along the same lines:

O'Brien ballots:

A. B. Enocksen, 12th precinct. Explained.

W. Y. Engelman, 1st precinct. Explained.

C. P. Lussier, first precinct, explained.

Refer to Engleman's testimony.

The two Denegre ballots initialed H. A. T. and J. H. D. also cast in the sixth precinct are unexplained. Admit they should be counted for Denegre.

#### THE ELEVEN BALLOTS.

After pairing a number of ballots there remained eleven as to the disposition of which counsel are unable to agree. We shall discuss them in the order in which counsel for contestant took them up before the Committee.

#### O'BRIEN'S EXHIBIT 1. FIRST PRECINCT.

"O'Brien's Exhibit 1 was a ballot marked for Denegre and O'Brien, but the O'Brien mark was somewhat blurred or erased; it was not as plain as the Denegre ballot." (Record page 8).

The contestee claims that this ballot should be thrown out on the authority of Section 302, Paragraph 1 which provides that

"When a voter has placed a mark (X) against two or more names for the same office, where only one is to be elected, his vote shall not be counted for either candidate."

The ballot does not show that there was a clear attempt on the part of the voter to erase the mark opposite Mr. O'Brien's name and it may well be that this slight blur occurred at the time that the Judges were counting the ballots.

O'BRIEN'S EXHIBIT 4. "Must go with Denegre's Ex. 2."

"This ballot was marked by the voter with a figure that looked like the figure "8" laid down; we could not agree as to whether or not there was an "X" on the ballot for other offices; that this ballot had the mark I have just described opposite the name of Mr. Denegre."

Voter used a sort of  $\sphericalangle$  in all cases but one and that mark was enough like an X so that we can throw out this ballot if Denegre can throw out Denegre's Exhibit 2. We think both should be counted.

O'BRIEN 'S EXHIBIT 5.

"O'Brien's Exhibit 5 was a ballot on which there was a cross opposite the name of Mr. Denegre and a slanting straight line opposite the name of Mr. O'Brien."

Denegre	X
O'Brien	l

We are willing to have this counted for Denegre if Denegre's Exhibit 15 is counted for O'Brien.

O'BRIEN'S EXHIBIT 8.

"O'Brien's Exhibit 8 was a ballot upon which there was a cross - there were two lines which crossed each other, the point of intersection seemed to be below the space opposite Mr. O'Brien's name. Each of the lines projected up into the space opposite Mr. O'Brien's name. The greater part of the lines that I have described was below the space opposite Mr. O'Brien's name, and the space opposite Mr. Denegre's name was blank."

Denegre	
O'Brien	X

Should be counted for O'Brien on authority of Sec. 302, Par. 3 Revised Laws 1905.

Mr. Moore cited cases in which mark was in space below. Our X is partly in proper space. Showing intent of voter.

O'BRIEN'S EXHIBIT 10. (A Denegre Ballot).

"O'Brien's Ex. 10 was a ballot upon which there was a cross in the space opposite Mr. Denegre's name, and in the space opposite Mr. O'Brien's name were the words "to yung". This was not written in the square opposite his name, but near his name. On this same ballot that I have been describing there was a line drawn through the name of Judge Brill and in the proper blank space on that portion of the ballot which was reserved for the district judges was the name ~~Olmostead~~ "Olmostead", with a cross in the square opposite. The name was written in the blank space."

"To Yung" is marked near O'Brien's name.

We concede this to be a Denegre vote if Denegre's Ex. 2 (The "John Jones" ballot) is given to O'Brien.

If initialed ballots are thrown out, then we further claim "To Yung" is a mark of identification.

DENE GRE'S EXHIBIT 2. SECOND PRECINCT.

Must be taken in connection with O'Brien's Exhibit 4.

"The ballot that we could not agree upon was designated as Denegre's Exhibit 2. This ballot showed that it was cast for Mr. O'Brien if for any one. We found that the figure '8' had been used rather than the usual cross mark and we were unable to agree as to whether or not there was a perfect cross on the ballot opposite other names."

The only basis for the contestant's claim that this ballot should be thrown out is found in Section 302, paragraph 7, Revised Laws of 1905 which reads as follows:

"When a voter uses uniformly a mark other than (X) in marking his ballot, clearly indicating his intent to mark against a name, and does not use (X) anywhere else on the ballot, his vote shall be counted for each candidate so marked."

This section was interpreted by the Supreme Court in the case of Pennington vs. Hare, 60 Minn. 146 as follows:

"The evident purpose of the proviso is to prevent the elector from placing upon his ballot any distinguishing mark, whereby it may be certified to others how he voted. A ballot so marked cannot be counted; otherwise, a corrupt candidate might, by previous agreement, arrange with his purchased creatures to place a particular mark after his name, whereby he could ascertain, when the ballots were canvassed, that they had kept faith with him, and were entitled to the purchase price of their honor."

This ballot is clearly not one of that sort. An inspection of the ballot will show that the mark which contestant claims is an X is in reality exactly the same sort of mark as all the others upon the ballot and was so intended by the voter. There can be no doubt but that this ballot should be counted for O'Brien.



DENEGRÉ'S EXHIBIT 4. SIXTH PRECINCT.

"Denegre's Exhibit 4 was a ballot on which there appeared opposite Mr. O'Brien's name a slanting straight line. The referees were unable to agree as to whether this line had been crossed by another. The other crosses opposite other names voted for on the ballot were clear."

This is another ballot that one needs to see in order to arrive at the correct conclusion as to its validity. The contestee claims that an inspection of the ballot will show that it was undoubtedly the intent of the voter to vote for O'Brien and should be counted for him under the authority of Section 302 of Revised Laws 1905 which reads:

"All ballots shall be counted for whom they were intended, so far as such intent can be clearly ascertained from the ballots themselves."

DENEGRE'S EXHIBIT 12. EIGHTH PRECINCT.

Considered with O'Brien's Ex. 10.

"Denegre's Exhibit 12 was a ballot upon which there was a cross opposite the name of Mr. O'Brien, but in the blank space of that part of the ballot which is reserved for the district court judges was written the name of John Jones with a cross in the square opposite; and in the space reserved for the judge of the probate court, in the blank space there was written the words 'Dick Tinpin' or some such name, with a cross in the square opposite his name so written."

At the hearing before the Justices Mr. Denegre testified (Trans. page 124) that there was not in Ramsey County at the time of the last general election any person by the name of John Jones who was learned in the law.

Mr. Lyons (Trans. page 134) testified that the name of John Jones appears nine times in the St. Paul City Directory for the year 1906. Upon what authority this ballot should be called invalid and not counted for Mr. O'Brien, simply because the voter voted for one John Jones for District Judge, a man who may or may not have been learned in the law, it is hard to imagine. If John Jones had received more votes than either of the other candidates for the office of District Judge then, of course, the questions of his qualifications would have to be decided before he could take office. This, of course, could not in any way invalidate the ballot as far as the vote for Mr. O'Brien is concerned.

DENEGRE'S EXHIBIT 13. TENTH PRECINCT.

"We found that there were eleven blanks (in this precinct) and there was one ballot upon which we could not agree, and this was a ballot upon which there was a cross upon the extreme right of the ballot opposite the square opposite Mr. O'Brien's name. This ballot we found in the box but it was not strung with the other ballots. My impression of it was that it was folded, that it was not wrapped around - it was folded separately from the other bunch; it was not wrapped around - sort of an accordion business. My recollection of the ballot is that it was folded back and forth accordion fashion, that is, I mean the end was not taken to meet the other end; it was folded by itself distinct from other ballots in the box. The other ballots were rolled in a round roll after having been strung; we found them in that condition, with the exception of this ballot. Counting the ballot I have just described, the total number of ballots found in the box was the same as the number returned <sup>as voted</sup> by the Judges of election."

Mr. R. B. Letford, one of the Judges of Election in the tenth precinct testified that there was a spoiled ballot and that he put this spoiled ballot in the ballot box and locked the box. (Trans. page 20).

Mr. Albert L. Wagner, Deputy City Clerk testified that there were ninety names on the poll list of the tenth precinct, that is that ninety men must have voted in that precinct. Now inasmuch as it is necessary to count this ballot in order to make up the full number of ninety ballots it follows that Mr. Letford must be mistaken. Ninety men voted and there are but ninety ballots when this ballot is counted. This ballot must, therefore, be counted for Mr. O'Brien.

DENEGRE'S EXHIBIT 14. ELEVENTH PRECINCT.

"One of these ballots which we could not agree upon was marked Denegre's Exhibit 14. This ballot had no mark or cross opposite the name of Mr. Denegre nor was there any mark in the square opposite the name of Mr. O'Brien. In the space, however, between Mr. O'Brien's name and the square opposite his name there was a slanting straight line which extended into the space below and which started on a line with his name. To the right of the blank square opposite Mr. O'Brien's name and slightly lower than the center of such square was a cross. The referees were unable to agree as to whether the point of intersection of the two lines so making this cross was above or below the line below Mr. O'Brien's name, if extended."

This is another ballot which one needs to see in order to judge of it fairly. Under the authority of paragraph 3, Section 302 Revised Laws of 1905 this ballot must be counted for O'Brien.

"When a mark (X) is made out of its proper place, but on or so near the name or space as to indicate clearly that the voter intended to mark such name the vote shall be counted as was intended."

Mr. O'Brien is clearly entitled to this vote.

DENEGRE'S EXHIBIT 15. ELEVENTH PRECINCT.

Considered with O'Brien's Exhibit 5.

"The last ballot was designated as Denegre's Exhibit 15 and was a ballot upon which there appeared in the proper space opposite the name of Mr. O'Brien a cross. There was, however, on this ballot, near the name of James Tracy, a slanting straight line somewhat resembling the figure '1'".

The mark on this ballot was clearly accidentally made by the voter and in no way invalidates the ballot. There can be no question that this vote must be given to Mr. O'Brien.

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