HOUSE....No. 36.

Commonwealth of Massachusetts.

House of Representatives, February 4, 1858.

The Committee on Elections, to whom was referred the Petition of Calvin R. Taft, of Williamstown, for the seat in the House of Representatives now occupied by John M. Cole, have considered the same, and respectfully submit thereon the following

REPORT:

The first Representative District in Berkshire County, is composed of the towns of Williamstown, Lanesborough, Hancock and New Ashford, and is entitled to one representative. At the last election in said district, the whole number of votes cast for representative was six hundred and sixty-five, of which John M. Cole received two hundred and ninety; Calvin R. Taft, two hundred and eighty-three, and William E. Johnson ninety-two. It thus appearing that John M. Cole had received a plurality of the votes, he was forthwith declared duly elected according to law.

It is alleged, however, by the petitioner, in his Petition, that thirteen of the ballots counted by the selectmen of the town of Williamstown (twelve of which were votes for John M. Cole, and one a vote for Calvin R. Taft), should have been rejected

because of their illegality in having been cast in *unofficial* envelopes, that is to say, envelopes not bearing the emblematic seal of the Commonwealth; and that if the aforesaid thirteen ballots had been rejected, the petitioner, and not the present incumbent of the seat, would have been elected.

The fact here presented by the petitioner was not denied by Mr. Cole; and it has been made to appear beyond doubt by the testimony of several witnesses before the Committee.

The whole question, therefore, to be determined in the present case, is, of the legal admissibility of the thirteen ballots contained in the unofficial envelopes aforesaid, to be counted as such by the selectmen. If the selectmen were justified by law in counting the said ballots, then the sitting member was duly elected and is lawfully entitled to the seat: if they were not so justified by law, then the petitioner, Calvin R. Taft, having received a plurality of the legal votes, was duly elected, and is lawfully entitled to the same.

The question has been ably argued by learned counsel, and the Committee have given to it that careful consideration which it was entitled to receive. Solicitous that the will of the people, when legally ascertained, should not be defeated by any mere technicality, or error of form, they have endeavored to construe the law applicable to the present case, in the same spirit of liberality, by which they have been governed in the cases of contested elections which have preceded it. But the question involved has been one of considerable difficulty, and the Committee have experienced somewhat of embarrassment in its decision.

Were the ballots contained in the unofficial envelopes, legal ballots, and, as such, entitled to be counted by the selectmen, in ascertaining the result of the election? that is the question.

By reference to an Act of the legislature, entitled "An Act concerning the manner of voting," approved March 2, 1853, (Laws and Resolves, 1852–3, p. 371,) the following pertinent provision of law is found, namely:—

"SECT. 2. Self-sealing envelopes of uniform size and color, bearing the emblematic seal of the Commonwealth, shall be furnished at the expense of the State, (as heretofore, in accordance with the provisions of a law passed in the year 1851,) to all

persons who may desire, at any election herein before specified, to deposit their ballots therein, and no other envelopes shall be used at the polls."

It will be perceived that the title of this Act, as well as the tenor of the section above quoted, contemplates, not merely the acts of the officer who shall preside at elections, but also the acts of the voters themselves; and that, after providing that State envelopes shall be furnished to such persons as may desire them, it proceeds, in express terms, to say that "*no other envelopes shall be used at the polls.*"

Your Committee are unable to regard the last clause of this section of the Act of 1853 as directory merely; it is, in their opinion, peremptory, and more emphatically so, from the fact that it is prohibitory in expression and effect. It does not say simply that a certain thing *shall be done;* but it declares in unequivocal terms, that a certain thing *shall not be done.* The language of the Act is not to the effect that *State envelopes* shall be used at the polls, in which case it might perhaps have been regarded as directory; but it is to the effect that *no other envelopes* shall be so used, and, therefore, must be considered, in the sense of prohibition, as peremptory.

The learned counsel for the sitting member, in presenting this point, argued, that because the Act of 1853 repealed the Act of 1851, in which there was express provision that all ballots contained in unofficial envelopes should be rejected, and because no such provision was re-enacted in the Act of 1853 itself, that therefore the Act of 1853 intended to legalize such ballots and justify their being counted by the officers who preside at the polls.

Although it is true, what the argument assumes, that no provision that such ballots shall be rejected is contained in the Act of 1853, in so many words, yet, your Committee are of the opinion that there is less doubt in determining that this was the real purpose of the Act, intended to be expressed in the phrase, "no other envelopes shall be used at the polls," than in adopting a contrary conclusion, by reason of an implied meaning, to be inferred, upon a construction of this Act in connection with another Act which it repeals. The words of the Act of 1851 are undoubtedly more explicit upon the point in con-

troversy, than are the words employed in the Act of 1853; but is not this fact suggestive of a thought consonant with the construction given to the latter by the Committee? If the legislature which passed the Act of 1853 had intended to change the pre-existing provisions of law upon the subject, and admit such ballots as are here in question, to be counted, would it have left its intention in so important a matter to be ascertained by implication only? And yet, the argument amounts to this, and asks that an express provision of law shall be entirely disregarded, in order that a questionable implication of law may be allowed to prevail. This, in the opinion of the Committee, it would not be wise and proper for them to do.

The Committee are confirmed in their opinion that the Act of 1853 cannot be considered as merely directory, by still another view of the question.

It has been observed that, in parenthesis, in the section of that Act above quoted, it is enacted, that State envelopes shall be furnished to all persons who may desire to deposit their ballots therein, "*in accordance with the provisions of a law passed in the year* 1851."

By reference to the Act of 1851, (Laws and Resolves 1849–51, p. 695,) we find that, in so far as it relates to the matter in hand, it reads as follows:—

"SECT. 4. It shall be the duty of the selectmen of each town, and the wardens and inspectors of every ward in each city within the State, to obtain from the clerks of their several towns and cities, and provide at the polls, on the day of election, a sufficient quantity of the envelopes aforesaid, and to appoint two or more suitable persons to take charge of the same, *and supply each person claiming to be a voter in the said town or city, on his personal application, and no others, with such a number as the pending election may require*, and to return to the clerk aforesaid all envelopes not used."

Now, bearing in mind the fact, that these provisions are ingrafted in, and constitute a part of, the Act of 1853, the Committee derive support therefrom in aid of their construction of that Act; for, in the absence of proof to the contrary, it is to be presumed that the public officers performed their duty,

and that all these provisions of law were complied with in the present case. And in this relation, when your Committee reflect upon the restrictive terms of this enactment, and consider how carefully it provides as to the time when, place where, and manner in which, the State envelopes are to be supplied to the voters of any town or city,—limiting the number thereof to such number as the pending election may require,—they are satisfied that their construction of the Act of 1853 is a correct one, and that the unofficial envelopes in the present case were not legal and should have been rejected by the selectmen.

Upon the premises of undisputed fact in the case, therefore, and upon the legal considerations applicable to the same, which have thus been presented, the Committee are unanimously of the opinion that John M. Cole is not entitled to the seat in the House of Representatives now occupied by him, and that the petitioner, Calvin R. Taft, having been legally elected a representative, is entitled to the same.

For the Committee,

RICHARD S. SPOFFORD, Jr.