WHAT THE ISSUE WAS

Points That Were Argued in the Lloyd-Sullivan Case.

The Two Leading Features in the Brief Submitted Before the Supreme Court in the Silver Bow Contest.

In the Sullivan-Lloyd case, as it came before the supreme court, the admirable brief for the respondent was prepared by John W. Cotter and M. Kirkpatrick. The material questions discussed are those re-lating to the qualification of certain regis

tered voters at precincts 34 and 26. It was contended by the contestant (Lloyd) that a declaration of intention to become a citizen must be made either before the court or in the clerk's office; that the place is of the essence of the act or ceremony, and if not there made it is null and void and confers ,no right whatever

n the declarant. The respondent's argument showed that, in Michigan, the exact question involved was passed upon by the supreme court, which said: "We cannot require the action of the clerk under the naturalization law to be held in any par-ticular spot, or room or building without adding to the law a qualification of our own not indicated by its language and not required by any of its purposes."

It appears from the evidence, continues the orief, and from finding 10 of the court, that it has been a usual practice in the county of Silver Bow since its organization to make such declaration of inten-tion before the clerk or his deputies away from as well as at the office of the clerk. Moreover this same practice has prevailed in the territory of Montana since its or-ganization—the original act of congress permitting such declarations before the clerks of courts having been passed in 1824. It has never been considered essential that such declarations should be made at the office of the clerk, but clerks or their deputies, especially in the more populous mining counties, have usually attended for this purpose at places conven-ient of access for the laboring popula-tion, and taken the declarations and administered the oaths prescribed by the act. Nor has the Montana practice in respect been singular or unprece

There is another important question to which we now direct the attention of the court. It was alleged in the replication filed by the contestant that 100 of the votes registered and cast at precinct 34 for respondent were not at the time they so roted qualified electors in that they had not before voting taken an oath to support the government and constitution of the United States. On the part of the respondent a motion was made to strike out that portion of the replication on two grounds: 1. That the alleged fact if a valid and sufficient ground of contest, should have been set forth in the complaint or statement of contest, and came too late in the replication. 2. That the fact alleged was irrelevant and immaterial, and did not constitute a valid ground of contest. The court granted the motion and those allegations were stricken from the replication. This action of the court is assigned as error.

1. This involves first a matter of pleading, and whether a new and substantive ground of contest can be set up in the

ing, and whether a new and substantive ground of contest can be set up in the replication, and whether it must be alleged replication, and whether it must be alleged in the complaint or in an amendment thereto made in due time. It will be observed that there was not application to amend the complaint by making the allegations in question a part thereof—they were left to stand or fall as part of the replication, filed long after the time limited by statute for setting forth the grounds of contest in such cases. (Com. Stat. Mont.) On this ground alone, we submit, the ruling of the court is justified upon the ordinary principles of pleading.

2. As to sufficiency of the alleged fact itself. And as to this we remark in the first place, that the presumption of law is that all voters are legal voters. It is the ordinary presumption that all persons are presumed to obey, and not to violate the law. Here then it was alleged that the first place the state of the stat

that all voters are legal voters. It is the ordinary presumption that all persons are presumed to obey, and not to violate the law. Here then it was alleged that 100 of the votes cast for Sullivan at precinct 34 were illegal votes. Why? Solely for the reason, as alleged, that the voters had not before voting taken an oath to support the government and constitution of the United States, then it was not incumbent on them to take that oath. Is there any presumption that they were not native born citizens of the United States, then it was not incumbent on them to take that oath. Is there any presumption that they were not native born citizens of the United States? No; the presumption is the other way—in favor of the legality of their votes, and it must be alleged and proved by the contestant that they were not citizens, and not being so that they had voted without taking the required oath. But there was no allegation that the voters referred to or any of them were not citizens. It is merely alleged that they were illegal voters for that they had not taken a specified oath. But "non constat" that they were required to take the oath; for all that appears they may each of them have been a native born American citizen. That fact, in favor of innocence, will be presumed, until the contrary is not even alleged. It is no answer to say that the simple allegation of illegality was enough without assigning a specific ground; for even if that extreme view could be admitted, a specific ground in this case is assigned, and that ground is insufficient. And here the discussion on this exception might close, for it is too clear for further argument that upon common elementary principles of law, the ruling of the trial court granting the motion to strike out, is well supported.

3. But even had the allegation been in form and substance sufficient, we maintain that it was not a legal prerequisite to the right to vote at the general election on the first Tuesday in October, 1889, that the voter should take an oath to support the gove

spon the right of suffrage, and the practice thereunder.

Going back to the Organic Act of May 36, 1864, the constitution of the territory, we have in the fifth section the provision, "that all citizens of the United States and those who have declared their intention to become such, and who are otherwise described and qualified under the fifth section of the act of congress providing for a temporary government for the Territory of Idaho, approved March 3d, 1863, shall be entitled to vote at the said first election and shall be elegible to any office within the said territory, but the qualifications of voters and of holding office at all subsequent elections shall be such as shall be prescribed by the legislative assembly."

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At the first session of the legislature, January 17, 1865, it was enacted that all male citizens of the United States, and those who have declared their intention to become such shall be entitled to vote for delegate to congress, and for territors. for delegate to congress, and for territor-ial, county and precinct officers, provided they shall be citizens of the United States,

and shall have resided in the territory twenty days, and in the county ten days next preceding the day of election."

The proviso of the section being repug-nant to the letter and intent of the enact-ing part, would probably be considered void.

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At the fourth session, November 22, 1867, the legislature amended the above section of the act of January 17, 1865, re-enacting the section with the words in the proviso, "they shall be citizens of the United States," omitted.

This was followed by a declaratory act of the same session, December 10, 1867, declaring that "nothing in the above amendatory act should be construed to conflict with or abridge the rights of any person enfranchised by the law of congress of January 24, 1867."

An act of congress, amendatory of the organic act approved March 2, 1867, disapproved of the laws passed at the two sessions of the legislature held in 1866, the second and third session, except such as should be re-enacted, and went on to authorize the governor to district the territory, and to provide for the election of a legislature in accordance with the election laws passed at the first session, and provided that "the qualifications of voters shall be the same as that prescribed by the organic act, excepting the distinction therein made on account of race and color."

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The legislature authorized by this act of congress, known as the fourth session, exacted the amendments to the election laws of the first session above recited, removing the ambiguity in the original

exacted the amendments to the election laws of the first session above recited, removing the ambiguity in the original act.

At the seventh session, January 12, 1872, a revision and compilation of the laws was enacted and section one of chapter 23 "concerning elections," is as follows: "All male citizens of the United States above the age of 21 years shall be entitled to vote at any election for delegate to congress, and for territorial, county and precinct officers, provided they shall have resided in the territory six months and in the county 30 days."

This section depriving persons who had declared their intention to become citizens of the right of suffrage was promptly amended by restoring the right of voting to such persons, at the extra session of 1873, by act of April 25, 1873.

And the same section was again amended to make assurance doubly sure, at the eighth regular session, February 13, 1874, by again including such declarants.

Again at the niuth session, February 11, 1876, the same provisions are again enacted, declaring all citizens and all persons who had declared their intention to become citizens, entitled to vote, with some change as to period of residence.

The revised statutes of Montana of 1879, enacted by the twelfth legislative assembly, being a codification of laws in force on the 21st of February, 1879, reenacts the same provisions as to the right of suffrage.

At the same twelfth session the above section is re-enacted with a change in period of residence of voters.

We next have the revision or "Compiled Laws" of 1889, the volumes now in general use, being a compilation of all laws in force on January 10, 1887.

Section 1007 repeats the same provisions as to qualifications of voter.

Thus we have the territorial law on the subject brought down the 10th of January, 1887. Citizens and those who have declared their intention to become such are entitled to vote for all elective officers, and still there is no requirement in this or any previous territorial enactment that such declarants

ment and constitution of the United States.

See also the general school law and the oath therein prescribed for voters, to-wit: "You do solemnly swear that you are a citizen of the United States or have declared your intention to become such."

And the provisions of the registry law, enacted March 8, 1889, at the 16th and last session of the legislative assembly, held under the territorial organization, show with the utmost clearness and precision the intention of the legislature to extend the right of suffrage to all those who had declared their intention to become citizens, regardless of whether they

court the authority to take such declarations of intention, and had gone back to the original statute requiring such declarations to be made before a court of record (R. S. Sec. 2160) a mistake which was speedily corrected by congress in the set of February 1, 1676, restoring the power of clerks in that regard. Construing these statutes together there is no reason doubt that the declaration is intention required in Sec. 180 might also be made before the clerks of sundandard. Now, the purision of the law of congress in the particular in question, has been entirely such a set of the law of congress in the particular in question, has been entirely such as the legislation of the territory. It is no reply to say that the law of congress is the law of the territory, and that the territorial law must be read with reference thereto, and as though it contained the provision in terms. Because the question here is, what did the legislators, the courts, the bar and the people of Montana understand that legislation? On this point there can be no dispute. It is notorious, a matter of public history, that persons who have simply declared their intention to become citizens have always voted in Montana; that the oath taken by such declarants never contained a clause to support the constitution and government of the United States; that never historic has it been objected that any declarant was not entitled to vote because he had not taken such an oath.

Congress, we submit, is charged with notice of this public history, this long continued course of territorial legislation, this open and notorious practical construction put upon that legislation, and public action in conformity with it, continued for nearly twenty years after the enactmant of this conformity with it, continued for nearly twenty years after the enactmant of this conformity with it, continued for nearly twenty per an anitation. Such knowledge on the part of the legislative power are vested in a governor who is appointed. The principal part of the legislative power

elected by legal votes.

It is now seriously proposed to dis-

show with the utmost characters and present the control the registry of soften the registry of soften the registry of soften the registry of soften the registry of the regist

its own enactment, that this class of voters must have taken, before voting, an oath to support the constitution and government of the United States. This is further emphasised by the language of the twenty-fifth and last section of the enabing act: "That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said territories or by congress, are hereby repealed." And it is unquestionably true that the members of the constitutional convention were in fact elected under the territorial rule; the class of voters in question freely participating in the election without challenge or objection from any one.

5. The same inference arises even more strongly from the power given in the twenty-fourth section of the constitutional convention, and the action of the convention thereunder: "Section 24. That the constitutional convention may by ordinance provide for the election of officers for full state governments, including members of the legislature and representatives in the fifty-first congress."

Under this power the constitutional con-

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Under tims power the constitutional convention by ordinance second, provided for an election to be held throughout the territory on the first Tuesday of Oct. ber, 1889, for the ratification or rejection of the constitution and for the election of a full set of state, district, county and township officers, and especially provided that "all persons who are then qualified electors under the law of this territory shall be qualified to vote" at said election.

There can be no doubt as to the sense in which the convention used the words "qualified electors under the laws of this territory. It would be wild and irrational to suppose that it was intended to exclude a large class of voters who had participated in the election of the members of the convention, and who from the organization of the territory had always exercised unquestioned the right of suffrage under the territorial statutes.

This being so, we have here the supreme power, the constitutional conventions taself, the creator of the state, representing the ultimate sovereignty of the people from whose flat there is no appeal, declaring in unequivocal terms the qualifications of the voters who should participate in the election on the first Tuesday in October, 1889, and at that election by a clear majority of legal votes, possessing the qualifications prescribed and intended by the convention and by the laws of Montana, the respondent, Eugene D. Sullivan, was elected to the office of sheriff of the court. It is, we think, a grave question whether under the system of voting established by the registry and secret ballot laws of Montana, any judicial inquiry, whatever can be made subsequent to the election into the qualifications of voters. All evidence of this character was objected to by respondent in the trial court, but the objection was overruled. We limit the proposition to a judicial inquiry, for doubless legislative bodies, being judges of the election of their own members, may conduct their investigations in accordance with their own members, may cond

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3.50		**		1.75 & 2.00	7.50	**	**				4.90
4.00		**			8.00	**	**				5.00
4.50		**		2.50	8.50	**	**				5.50
5.00	**	**		3.00	9.00	**	2.2				5.50
5.50	**	**		3.50	9.50	**	**				6.00
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