REFEREE ROBBINS REPORTS.

SAYS FLYNT IS ELECTED SHERIFF OF FORSYTH COUNTY BY TWO VOTES.

Gives Jones, Republican, Middle Fork Township and Flynt, Democrat, Broadbay Township — No Appeal Yet Decided Upon—Text of the Findings in the Case.

Capt. F. C. Robbins, of Lexington, referee in the case of the State of North Carolina on the Relation of D. A. Jones vs. George W. Flynt, filed his report with the clerk of the superior court Monday afternoon at 5 o'clock, the report being in favor of Sheriff Flynt.

The referee decided the vote in Broadbay township in favor of Sheriff Flynt and the vote in Middle Fork township, precinct No. 1, in favor of Mr. Jones, giving Sheriff Flynt the office by a majority of two.

The referee sustains a prima facie case as to Broadbay township and finds as a fact that Jones received 433 and Flynt 214.

He finds as a fact in Middle Fork township that Jones received 196 votes and Flynt 49, giving Flynt a majority of two votes in the county.

The referee finds that in the event he has made an error in overruling a prima facie case as to Middle Fork and that Jones only received 186 votes in this precinct, then Flynt's majority would be 12.

The report of Referee Robbins in the Jones vs. Flynt contest case for the office of Sheriff of Forsyth county and filed Monday was a lengthy document, covering 39 closely type-written pages. Whether or not the case will be argued at this term of court on exceptions filed on questions of law we cannot say, or whether an appeal will be taken or the Referee's decision be accepted as final, or has the counsel for Jones yet decided.

The history of the case is familiar to the readers of **The Republican**, but as a matter of record let us briefly summarize.

Nov. 11, 1910, there was a controversy before the Canvassing Board as to returns from Broadbay and Middle Fork township No 1. The returns gave Flynt, Democrat, the office by a small majority. The Republicans claimed errors in making out returns in these two townships, which if corrected, would give Jones, Republican, the office of Sherif by a small majority.

Jan. 20th, 1911, Attorney General Bickett gave D. A. Jones permission to bring suit in the name of the State for the office of Sheriff of Forsyth county.

Feb. 3rd, 1911, summons was served, entitled State of N. C., in relation of D. A. Jones vs. George W. Flynt, asking that he recover possession of the office of Sheriff of Forsyth county.

Feb. 27th, petition to have the relator appear before the Clerk of the Superior Court to be examined under Sections 865 and 866 of the Revisal of 1905 was made and an order was issued to Coroner W. N. Dalton to notify the relator to be present before the Clerk of the Superior Court on March 7th and on this date the examination of the adverse parties were held.

March 24th answer of the defendant to the complaint of relator was filed.

At May term, 1911, Forsyth Superior Court, by agreement of counsel, the Judge presiding appointed Capt, F. C. Robbins, of Lexington, N. C., as Referee to ascertain the correct votes cast for the two candidates in Middle Fork township, precinct No. 1, and in Broadbay township. All other matters were waived.

July 13th hearing of evidence was begun before Referee at Court House in this city and lasted several days. The stenographic notes of evidence covered 576 typewritten pages. Counsel for the relator put on 44 witnesses in direct examination and 6 in rebuttal. Counsel for the defendant put on 19 witnesses. Counsel for the relator entered 23 exhibits consisting of tally sheets and tickets and counsel for the defendant entered 6 exhibits consisting of the original returns as made to county board of canvassers,

August 30th case was argued before Referee at Lexington, N. C.

Sept. 18, Report of Referee filed with Clerk of the Superior Court.

Referee's Report.

The Republican prints herewith the findings of Referee Robbins, together with his summary of the evidence in both Broadbay and Middle Fork township No. 1. It comprises the essential features of the report. The rest of the document was a review of the evidence, verbatim, as given at the hearing before Capt. Robbins in this city.

To the Superior Court:

In obedience to the order of the court in this action made at May term 1910, appointing the undersigned referee to hear and determine said cause and that the referee shall consider and determine only the votes actually cast for the office of sheriff of said county, in the township of Middle Fork Precinct No. 1, and the township of Broadbay, in said county, for the relator and for the defendant at the election of 1910, the referee makes the following report:

After due notice the referee proceeded on the 11th, 12th and 13th days of July, 1911,in the presence of the parties and their counsels, the relator being represented by his attorneys, Lindsay Patterson, A. E. Holton, R. C. Strudwick and W. P. Bynum, Esqs., and the defendant by his attorneys, C. B. Watson, A. H. Eller, G. H. Hastings, and E. B. Jones, to hear the evidence offered by the respective parties, and on the 30th day of August, 1911, heard arguments of counsel in the case.

To save words, the relator of the plaintiff is spoken of as Mr. Jones, the defendant as Mr. Flynt. "Ex." is used for exhibit and the fire personal pronoun instead of the word referee. * * * * *

As to the precinct, Broadbay, Mr. Jones contends that the county board of canvassers counted for him ten votes less than he was entitled to, that is, that they counted for him 433 votes, whereas he contends that he received and is entitled to have counted for him 443 votes. The evidence he offers in support of his contention is contained in substance in the foregoing recital of it, but since it clusters around his Ex. No. 5, I here give a brief summary of it as consisting of plaintiff's Ex. No. 10, known as the Reynolds return, and the plaintiff's Exs. 13, 14, 15, 16 and 17, being entries made on tickets by the several witnesses on the night of the election, and the telephone message overheard, all of which it is plain to Mr. Jones that he received 443 votes.

Also plaintiff's Ex. No. 18, being the poll book of Broadbay township showing 668 votes cast at that box. Also plaintiff's Ex. No. 21, being duplicate return of votes from Salem precinct, and plaintiff's Ex. No. 22, being duplicate returns of votes from Third Ward Winston, and plaintiff's Ex. No. 23, being duplicate return of votes from Abbott's Creek.

Ex. No. 11 referred to in the evidence was abandoned by Mr. Jones' counsel in the argument and numbers 12 and 20 on account of misunderstanding, do not appear.

And on the other hand Mr. Flynt contends that he received 214 votes at this precinct (about which there is no dispute) and that Mr. Jones received and is entitled to have counted for him only 433 votes at this precinct, and that the same were properly counted for him by the county board of canvassers.

In support of his contention he offers in evidence defendant's Ex. No. 2, which is the original return brought in by W. C. Rominger, registrar, appointed for that purpose, to the county board of canvassers signed and certified by the judges of election, which was passed upon by the board giving Mr. Jones 433 votes, written and in figures, and Mr. Flynt 214, written and in figures. There was also before the board defendant's Ex. No. 3 brought in from the office of Mr. W. T. Wilson, secretary of the county board of elections, where it had been deposited, also signed and certified by said office,r showing for Mr. Jones 433 votes written and in figures and for Mr. Flynt 214 votes written and in figures. Both of these Exs. No. 2 and No. 3, are what are known as the "long sheets," the only official ones, Mr. W. T. Wilson testifies, which were sent out to the several precincts.

Another defendant's Ex. 4, was also introduced, coming from the office of Mr. Wilson, found by him in the envelope with Ex. No. 3 and signed and certified by said officers of election and showing for Mr. Jones 443 votes, written in words, and 433 in figures and for Mr. Flynt 214 votes, written and in figures. This Ex. No. 4 is on what is known as the "short sheet.' These two Exs. 3 and 4 were introduced by Mr. Flynt for the purpose, so his counsel said in the arguments, of contradicting Mr. Reynolds and other witnesses.

Except Ex. 18 all the evidence offered by Mr. Jones was in apt time objected to by counsel for Mr. Flynt, for that it is incompetent to contradict official returns and in many places, in the book of evidence, it appears that the objections was made in general terms. and Ex. No. 21 and 23 were objected to on the ground that they throw no light on the question at issue.

While the statute provides for but one original return, or statement of the result of the election to be sent up by the precinct officers to the county board of canvassers and the declaration of the result of the election by said board issues a right of the one (Mr. Flynt in this case) thereby ascertained to be elected, yet in a proceeding like this the matter is open to examination to determine the correctness and sufficiency of the return and the true result of the election.

While many of the authorities cited by counsel for Mr. Flynt and others I have been able to consult hold that such evidence as is offered by Mr. Jones is incompetent and should be excluded yet I find some conflict on that point in the course of the different statutes; and those cited a number of them apply only to what evidence may be heard by a canvassing board, and moreover one of the presumptions upon which the doctrine that the return is prime facie evidence of the result of the election is based, is that sworn officers will discharge their duties with care. Therefore, in this case, wherein are some peculiar features, with some misgivings as to the soundness of my ruling, I overruled the objection and admitted the evidence offered in behalf of Mr. Jones.

Having considered and weighed it all with care I here state as briefly as possible some of the points in it, which led me to the conclusions reached:

Plaintiff's Ex. No. 10 showing 443 votes for Mr. Jones, written and in figures, and 214 for Mr. Flynt written and in figures, is signed and certified by election officers, and Mr. J. F. Reynolds testifies that he made it out and that it was the first one and put it in an envelope, and Mr. Rominger took it; and Mr. Glenn Hoover one of the judges, testified that after they get through signing returns Mr. Rominger took charge of them; Sidney Teague, the other judge, testifies that he don't know whether Ex. No. 10 was given to Rominger or not. Mr. Rominger brought the sealed envelope of the county vote to the canvassing board and Mr. Bynum, secretary testifies that he took out of that envelope defendant's Ex. No. 2; that there was no other in it and that Ex. 10 was not in it; and Mr. Foy testifies that he saw Mr. Bynum take Ex. 2 out of the envelope.

Reynolds further testifies on his direct examination that he made out but two returns, plaintiff's Ex. No. 10 and defendant's Ex. No. 3, and perhaps one other for congress but on Wilson's examination, when confronted with defendant's Ex. No. 4, he admits that he filled that out also. He also testifies that while making out Ex. No. 10 he did not say, "It is easy to think one thing and write another," in which he is contradicted by Sidney M. Teague one of the judges. And Mr. Langston also testifies that he thinks Mr. Reynolds made that remark.

Also when he came in before the canvassing board he testifies that he walked up to the table and one of the board he thinks passed up to him Ex. No. 10 and said, "There is nothing wrong about this," and he also denies pulling Ex. No. 10 out of his pocket; whereas several witnesses for Mr. Jones, to-wit: May, Tavis, Savage and Boyles, and several witnesses for Mr. Flynt, to-wit: Foy, Shamel, Conrad, Goode, Hinshaw and others, all testify that he first got hold of the wrong return, defendant's Ex. No. 2 and said, "It is not right, or "it is wrong," or some such words; and Mr. Beroth and Mr. Stafford testify that he did not get it, Ex. No. 10, off the table, nor was it handed to him from the table but that he pulled it out of his pocket, Mr. Stafford saying, "out of his left breast-coat pocket." Mr. Hinshaw testifies that when Mr. Reynolds got half way to the table on coming in he saw the paper in his, Reynolds' hand; and Mr. Crouse testifies that that paper was not on the table prior to that time.

This with other evidence on that point shows by the greater weight of evidence that Ex. No. 10 was brought in before the board by Mr. Reynolds.

In filling out defendant's Ex. No. 3 he testifies that he did not say, "No Doc. (M. E. T.) aint that right," and "is that right" but Mr. Langston testifies that he did say it.

It seems to be a matter of some weight, if not of considerable weight, that Mr. Reynolds suggested that the tally sheets, especially that of Mr. Clodfelter be left on the table at the counting of the votes on the night of the election, as Mr. Clodfelter testifies that he did; and again when it was suggested before the canvassing board in the dispute about the vote in Broadbay that the tally sheets be sent for Mr. Reynolds said they were destroyed, so Mr. Foy testifies, and Mr. Bynum says that he thinks Mr. Reynolds said they were destroyed.

Basing his contention that Mr. Jones received 443 votes, upon his inspection of that tally sheet and several of his party friends also pointing to that tally sheet as the source of their entries on tickets it is little short of amazing that Mr. Reynolds did not see to it that that tally sheet was safely preserved.

He is also contradicted about drinking liquor that night and about asking some gentlemen to go by his house for "Wilkes County Corn," and other minor points which appear in the evidence, but which I do not stop to mention.

It is also very significant that after admitting that he took great interest in the election, and while contending for 443 for Mr. Jones is right because he had so written it that night from Mr. Geo. Clodfelter's tally sheet as he says, Mr. Reynolds then wrote out defendant's Ex. No. 3 which for Mr. Jones 443 written and in figures and for Mr. Flynt 214 written and in figures, and then another defendant's Ex. No. 4, which shows for Mr. Jones 443 written and 433 in figures.

It seems to me that these introductions and this sort of action can only be accounted for on the ground that Mr. Reynolds' memory is treacherous, and on the further ground that being anxious for Mr. Jones' election, under the impulse of partizan zeal to run his vote up, he some how or other got those figures 443, into his head under the force of the same zeal now wishes to maintain them.

A number of witnesses on both sides testify that Mr. Reynolds claimed that Mr. Rominger knew how the vote was and insisted on his being examined before the board and yet it is significant that Mr. Rominger, after being sworn as a witness for Mr. Jones, was not examined, although he was one of the election officers which Mr. Reynolds claimed knew all about how the vote was and whether Mr. Jones received 443 votes; and it is also noticeable that neither of the judges of the election Mr. Hoover and Mr. Sidney Teague, testify as to what the vote for Mr. Jones was although both were examined for Mr. Jones.

These two judges testify that they heard the declaration of the result of the vote when the counting was completed. The statute says, "The counting of votes shall be continued without adjournment until completed and the result thereof declared." But I have not been able to find any decision defining the meaning and purpose of the words "the result thereof declared." Whatever its meaning I do not think it can mean simply a declaration made by one tallyman to another, as Mr. Clodfelter says he did to Mr. Teague alone as they added up the tally sheets, although it may have been overheard by three or four men standing around Mr. Reynolds, Mr. Charlie Teague, Mr. Sides and Mr. Stewart, as appears in their testimony.

Andrew Stewart, Cicero Jones, S. A. Sides and J. F. Reynolds all testify that they saw the tally sheet of Mr. Geo. Clodfelter as he ran up the vote and it showed 443 for Mr. Jones and they severally took it down on said Exs.

While it seems to me that it would be competent evidence for one present at the counting and figuring by the judges and who saw and heard what they said at the time of the counting and figuring and saw what they actually did to testify to it; yet it will be observed that the testimony clustering around said Exs. and the entries on the tickets are based on what Mr. Clodfelter, a tallyman, said and did and in the absence of the tally sheet I am in grave doubt whether such evidence is competent at all and if competent, its weight is quite another matter, and declarations of bystanders and excited partisans and entries made by them on tickets under such circumstances are I think entitled to but little weight.

W. A. Hege testifies that he got the vote from Mr. Clodfelter's ticket, 443, and it seems to me that this had less weight than the ones last above mentioned.

What J. A. Nicholson testifies he heard Geo. Clodfelter phone and what Charie Clodfelter heard him say in the store is excluded as hearsay.

Mr. Jones, Cicero Jones testifies that independent of the ticket he remembers the vote was 443 for Jones and 214 for Flynt, but how he got his opinion does not appear.

Dr. M. E. Teague, the other tallyman and a supporter of Mr. Jones and who must have known what his own tally sheet showed, filled out the official return, defendant's Ex. No. 2, sent in to the county board of canvassers signed and certified by election officials, showing for Mr. Jones 443 votes written and in figures and for Mr. Flynt 214 votes written and in figures; and Mr. Reynolds filled out defendant's Ex. No. 3 showing for Mr. Jones 433 votes written and in figures and for Mr.Flynt 214 written and in figures, and both of these Exs., Nos. 2 and 3, were filled out and signed some hours after the entries on tickets as aforesaid.

The sworn election officials when they sign and certify official returns (notwithstanding some carelessness in signing and certifying too many papers) must have known and seen to it that they were sending up a correct return of the votes cast for Mr. Jones and for Mr. Flynt to the county board of canvassers at this precinct. Broadbay, which return shows for Mr. Jones 433 votes written and in figures and for Mr. Flynt 214 written and in figures.

After a careful consideration and weighing of all the evidence, that particularly specified and all the other offered by Mr. Jones, I am freed to the conclusion that he has failed by a preponderance of the evidence to overthrow the prima facie case made in favor of Mr. Flynt on said return passed upon by the canvassing board.

I, therefore, find as a fact that D. A. Jones, relator of plaintiff, received 433 votes and that Geo. W. Flynt, defendant received 214 votes at Broadbay Precinct.

Gives Middle Fork to Jones.

I also find as a fact that D. A. Jones relator of plaintiff, received 196 votes and that Geo. W. Flynt, defendant, received 49 votes at Middle Fork precinct No. 1. If, however, it should be found by the court that I have committed an error in overruling defendant's objection and admitting the evidence offered in favor of Mr. Jones, in that evidence I find as a fact that Mr. Jones received 186 votes and Mr. Flynt 49 at this precinct.

Adding the numbers herein before found for the parties to the numbers respectively admitted for each in the order of reference, I find as a fact that Geo. W. Flynt, defendant, received in the whole county 2,673 (admitted) plus 214 (Broadbay) plus 49 (Middle Fork) making 2,936 and that D. A. Jones, relator or plaintiff received in the whole county 2,305 (admitted) plus 433 (Broadbay) plus 196 (Middle Fork) making 2,934, giving Mr. Geo. W. Flynt a majority of two votes.

Or in the alternative event: Mr. Geo. W. Flynt, defendant, received in the whole county the 2,936 aforesaid: and Mr. D. A. Jones, relator, received in the whole county 2,305 admitted plus 433 Broadbay plus 186 Middle Fork making 2,924 giving Mr. Geo. W. Flynt a majority of 12.

And I find as a conclusion a law in either event that Geo. W. Flynt was duly elected and is entitled to the office of Sheriff of Forsyth County for the term of two years next ensuing the election of Nov. 8, 1910, and that D. A. Jones relator, 'was not elected and is not entitled to said office, all of which is respectfully submitted.

F. C. ROBBINS,
Referee.

The decision of Referee Robbins was a surprise and it was not. **The Republican** had formed one of two conclusions as to the result. First: That he would declare, that while Jones had received a majority of the votes in these two townships, that he, as Referee, could not go behind the decision of the Board of Canvassers and thus throw the question upon the higher courts for decision. Second: That he would divide "honors," giving one township to Jones and one to Flynt, which he did. The contest seems to have been virtually settled per the agreement. Naturally the Republicans still believe that Jones received a majority of votes in Broadbay Township, Middle Fork No. 1 being conceded to him by the Referee, and there are Democrats too, of the same opinion. If there were mistakes in one, it is quite probable that there should be also the same in the other and the Canvassing Board had the right to examine witnesses and inquire into and settle the matter when the vote was canvassed, had they been allowed to do so, the same as was done in Bethania, Old Town, Salem Chapel and perhaps other townships, when no votes for certain officers were given on the returns and they inquired and accepted figures from those present who had them. At the next election, however, the majority for D. A. Jones for Forsyth of Forsyth county, will be such that there will be no need of a contest. The induction of Flynt into the office of Sheriff, this term, under existing circumstances will produce such a result beyond any question of doubt.