

Chapter XXI.

THE HOUSE THE JUDGE OF CONTESTED ELECTIONS.

1. Provision of the Constitution. Section 634.¹
 2. Functions of Elections Committee. Sections 635, 636.
 3. House not bound by returns of State authorities. Sections 637, 638.
 4. Relations of House to acts of canvassing officers. Sections 639–645.²
 5. House ascertains intent of voter when ballot is ambiguous. Sections 646–650.
 6. Discretion of House in investigating elections. Sections 651–653.³
 7. Practice in making decisions. Sections 654–656.⁴
 8. Privileges of contestant and returned Member in debate. Sections 657–672.⁵
 9. General practice. Sections 673–677.⁶
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634. The House is the judge of the elections, returns, and qualifications of its own Members.—“Each House shall be the judge of the elections, returns, and qualifications, of its own Members.”⁷

¹House may not delegate this constitutional function. (Sec. 608 of this volume.) Elections of Delegates as well as those of Members investigated. (Sec. 772 of this volume.)

²House respects the State laws. (Sec. 822 of this volume, and secs. 967 and 1011 of Vol. II.) As to duty of House to respect the construction of State laws made by State officers and courts. (Secs. 346, 352, 423, 521, 525, 574, 608, 630, 731 of this volume, and secs. 856, 909, 959, 996, 1002, 1041, 1048, 1056, 1069, 1071, 1105, 1121 of Vol. II.)

³House may set aside procedure prescribed by law for conducting contests and prescribe new procedure in whole or in part. (Secs. 330, 339, 559, 597, 598 of this volume, and secs. 965, 1042, and 1070 of Vol. II.) But the House does not unnecessarily set aside the recommendations of the law. (Sec. 719 of this volume and 852 of Vol. II.)

See also the cases of *Letcher v. Moore* (sec. 53) and *Blakely v. Golladay* (sec. 322).

⁴Senate decisions that an election case once decided is *res adjudicata*, and not to be reopened. (Secs. 344, 357, 546, 629, 825, 833.) House reopens the Mississippi case in 1837. (Sec. 518.)

Effect of laying on the table a resolution relating to the right of a Member to his seat. (Secs. 461, 467, 618.)

Effect of negative votes on affirmative declarations as to Member's right to his seat. (Sec. 2588 of Vol. III.)

⁵Instance wherein the privileges of the floor were denied to a claimant to a seat. (Sec. 315.)

Senate declines to admit contestant to the floor (sec. 546); and also declines to hear contestant in debate (sec. 392).

⁶A contest was maintained although the returned Member had resigned. (Sec. 985 of Vol. II.)

A proposition relating to the right of a Member to his seat presents a question of privilege. (Secs. 2579–2596 of Vol. III.)

⁷Constitution, Art. I, sec. 5.

635. The House has declared that an election committee should act as a judicial body, according to the rules of law.—On January 24, 1870,¹ Mr. Albert G. Burr, of Illinois, proposed the following resolution:

Resolved, That from the nature of its duties the Committee of Elections of the House of Representatives is a judicial body, and in deciding contested cases referred to such committee the members thereof should act according to all the rules of law, without partiality or prejudice, as fully as though under special oath in each particular case so decided.

A motion to lay this resolution on the table was decided in the negative, yeas 44, nays 129.

The resolution was then agreed to, yeas 140, nays 23.

At a later day in this session—February 9²—this resolution was referred to in debate, several Members explaining their attitude.

636. Instance wherein a Member of the House was authorized to act as a member of the Elections Committee during the consideration of certain cases.—On December 7, 1869, the House adopted a resolution authorizing Mr. Michael C. Kerr, of Indiana, to act as a member of the Committee on Elections in the consideration of the pending election cases from the State of Louisiana.³ Mr. Kerr had been a member of the committee in the preceding Congress.

637. The Georgia election case of Spaulding v. Mead in the Ninth Congress.

The certificate of the governor of a State as to the election of a Member is only prima facie evidence of the fact.

The certificate of a State executive, issued in strict accordance with State law, does not prevent examination of the votes by the House, and a reversal of the return.

Discussion of the House's right to judge of the elections and returns of its Members, as related to State laws.

The Elections Committee in 1805 declined to examine a contention sought to be established by ex parte testimony.

On December 18, 1805,⁴ the Committee on Elections reported in the contested election case of Spaulding v. Mead, of Georgia. The committee found that the law of Georgia required the county magistrates presiding at the election to transmit their returns to the governor of the State within twenty days after closing the poll; and required the governor, within five days after the expiration of the said twenty days, to count the votes returned, and immediately thereafter to issue his proclamation declaring the result, and grant a certificate thereof under the great seal of the State. The votes of three counties were not returned within the twenty days, nor within the further term of five days thereafter.

The governor, complying with the terms of the law, issued a certificate to Cowles Mead, who had a majority of the votes so far as received when the certificate was issued. When the returns from the three counties were received it appeared that they changed the result and gave the majority to Thomas Spaulding. It does

¹ Second session Forty-first Congress, Journal, p. 190; Globe, pp. 709, 710.

² Globe, pp. 1158–1160.

³ Second session Forty-first Congress, Journal, p. 28; Globe, p. 22.

⁴ First session Ninth Congress, Contested Elections in Congress from 1789 to 1834, p. 157.

not appear that irregularities sufficient to change this majority for Mr. Spaulding were alleged in the three counties. The committee declined to examine the contention sought to be established by *ex parte* testimony, and disputed by contestee, that the delay in forwarding the late returns was caused by a hurricane which injured the roads.

The committee found that, as the votes in the three counties in question were good and lawful, no action either by voters or candidate requiring their forfeiture, they should be counted by the House, the certificate of the governor although made in accordance with the State law being only *prima facie* evidence, and not conclusive on the House.

Therefore the committee reported that Cowles Mead was not entitled to the seat, but that Thomas Spaulding was entitled to it.

The report was debated at length on the constitutional point as to what extent the House was judge of the elections and returns of its own Members. It was contended on the one side that the House must exercise its right in accordance with the fixed rules of the State of Georgia, that State having the constitutional right to prescribe them, and they being conclusive until revoked by Congress. On the other hand, it was contended that the power of judging the returns was different from the State power of determining time, place, and manner of elections. The law of Georgia could only be considered as constituting the governor the organ of information to this House, the only tribunal to which the returns can ultimately be made. The fact that the governor had counted only a part of the votes could not prevent this House counting all of them. The power of the House to Judge could not be concluded by a State law or executive.

The House decided, yeas 68, nays 53, that Cowles Mead was not entitled to the seat; and by a vote of yeas 68, nays 53, that Thomas Spaulding was entitled to a seat.

638. The New York election case of Colden v. Sharpe in the Seventeenth Congress.

Votes fairly and honestly given should not be set aside for the omission or error of the returning officer.

Instance wherein the House decided an election contest against a returned Member who had not appeared to claim the seat.

On December 12, 1821,¹ the House concurred with the report of the Committee on Elections in the case of Colden *v.* Sharpe, from New York, seating Mr. Colden and declaring Mr. Sharpe not entitled to the seat.

It appeared that the majority of votes were cast for "Mr. Cadwallader D. Colden," but that by errors of returning officers 220 votes were returned as for "Cadwallader D. Colder" and 395 for "Cadwallader Colden," although all these votes had really been cast for the contestant under his appropriate name, as was shown by testimony.

The committee forbear to adduce arguments to show that votes fairly and honestly given should not be set aside for the omission or mistake of a returning officer.

¹First session Seventeenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 369.

Mr. Sharpe, as appeared by testimony, was notified of the intention to contest the seat, but took no testimony and made no resistance to Mr. Colden's claim. Indeed, it did not appear affirmatively that Mr. Sharpe had obtained from the governor of New York a certificate of election, but it was presumed that he had. It appears that Mr. Sharpe did not take a seat in the House.¹

639. The Virginia election case of McKenzie v. Braxton in the Forty-second Congress.

The House may go behind the ballot to ascertain the intent of the voter, so as to explain what is ambiguous or doubtful.

In dealing with ballots whereon occurs an error in a name, the limitations of the House are very different from those of canvassing officers.

Discussion as to the effect of the use of initials or the omission of a middle letter of a name on a ballot.

On January 9, 1872,² Mr. George W. McCrary, of Iowa, from the Committee on Elections, submitted the report of the committee in the Virginia case of McKenzie v. Braxton.

The official returns gave Lewis McKenzie 10,259 votes, Elliot M. Braxton 9,065, E. M. Braxton 3,654, and L. McKenzie 935. The report says:

The board of canvassers decided that the votes set down in the above abstract as cast for E. M. Braxton should be counted for the sitting Member, and that those set down in said abstract as cast for L. McKenzie should be counted for contestant, and they awarded the certificate to the sitting Member. It will be seen that if this decision of the board was correct, and if no votes are rejected for any other cause, the majority of the sitting Member is 1,525 votes.

The contestant, among other things, denied the correctness of the decision, and on this point the committee found that the case turned. The law as to the imperfect ballots is thus discussed:

The proof in this case clearly shows that the sitting Member is known throughout the district as well by the name of E. M. Braxton as by that of Elliott M. Braxton, and that he is familiarly called Elliott Braxton; also, that there is no other person in the district, except the sitting Member's infant son, who bears the name of Elliott M. Braxton, E. M. Braxton, or Elliott Braxton, and that the sitting Member was regularly nominated for Congress by the Democratic or conservative convention of the district; that his letter of acceptance was signed E. M. Braxton; that he canvassed the district and was the only person of the name of Braxton who was a candidate. These facts are not disputed by contestant; but we are asked to throw out a large number of votes, unquestionably cast in good faith for the sitting Member, upon the purely technical ground that his name was printed upon the ballots E. M. Braxton or Elliott Braxton, instead of Elliott M. Braxton. The grounds upon which the contestant makes this claim seem to be—

1. That we are not permitted to look beyond the ballot to ascertain the voter's intent; and
2. That the ballots in question can not, upon their face, be held to have been intended for Elliott M. Braxton.

It may, and doubtless is, sometimes necessary to sacrifice justice in a particular case in order to maintain an inflexible legal rule, but all just men must regret such necessity and avoid it when possible to do so. Your committee are clearly of the opinion that no such necessity exists here. So far from demanding such a sacrifice of right the law as well as equity forbids it.

The contestant asks the House to apply the strict rule which has sometimes, though not always, been held to govern canvassing officers whose duty is purely ministerial, who have no discretionary powers, and can neither receive nor consider any evidence aliunde the ballots themselves. It is mani-

¹Journal, pp. 4, 23, 682.

²Second session Forty-second Congress, House Report No. 4; Smith, p. 19; Rowell's Digest, p. 265.

fest that the House, with its large powers and wide discretion, should not be confined within any such narrow limits. 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. If, therefore, it were conceded that the canvassers erred in counting for the sitting Member the votes cast for E. M. Braxton and Elliott Braxton, it would not determine the question as to what the House should do. What, then, is the true rule for the government of the House in determining what votes to count for the sitting Member? Your committee are clearly of the opinion that where the ballots give the true initials of the candidate's name that is sufficient, and we, therefore, without hesitation, hold that the ballots given for E. M. Braxton must be counted for the sitting Member.

Another objection, urged with much more zeal by contestant's counsel, is to the votes cast for Elliott Braxton, 235 in number. These, it is urged, can not be counted for Elliott M. Braxton, the sitting Member. Even if we were not permitted to look beyond the ballots themselves, we could have little doubt as to our duty; but, under some circumstances, and for certain purposes, evidence outside of the ballots themselves is admissible. It is true that no evidence aliunde can be received to contradict the ballot, nor to give it a meaning when it expresses no meaning of itself; but, if it be ambiguous or of doubtful import, the circumstances surrounding the election may be given in evidence to explain it and to enable the House to get at the voter's intent. We see no reason why a ballot, ambiguous on its face, may not be construed in the light of surrounding circumstances in the same manner and to the same extent as a written contract.

Thereupon Cooley on Constitutional Limitations, *Attorney-General v. Ely* (4 Wis., 430), *People v. Ferguson* (8 Cowan, 102), *People v. Cook* (14 Barbour, 259), *People v. Seaman* (5 Denis, 409), and *People v. Cicote* (16 Mich., 283). The latter case is quoted from at length.

The report then says:

The cases are numerous where an imperfect ballot, by the aid of extrinsic evidence, can be made clear and perfect. No harm can result from admitting such extrinsic evidence so long as it is only admitted to cure or explain such imperfections and ambiguities as could be cured if they occurred in the most solemn written instruments, and to this extent and no further would we carry it. Thus guarded and qualified, the rule is most salutary and most just.

Since, therefore, the testimony clearly shows that the votes cast for Elliott Braxton were intended for the sitting Member, we deem it our duty to count them for him. We might, with great propriety, rest this ruling upon another and different ground. The doctrine is well settled that the law knows but one Christian name, and accordingly the courts have uniformly held that the omission of the middle name, or the initial thereof, is not a material or fatal omission. The following are among the authorities upon this point: *People v. Cook* (14 Barb., 259, and same case, 4 Selden, 67), where this rule is applied to a contested-election case very much like the one before us; *Milk v. Christie* (1 Hill, N. Y., 102); *Bratton v. Seymour* (4 Watts, Pa., 329); *Franklin v. Talmadge* (5 Johns., 84).

The sitting Member might with safety have relied upon this doctrine and insisted that the ballots cast for Elliot Braxton designated Elliott M. Braxton with sufficient certainty. He has, however, gone further, and proved the facts necessary to show clearly that such designation was intended by the voters.

Contestant insists that the committee and the House ought to adopt and follow an opinion given in 1860 by the attorney-general of Virginia to the then governor of that State, and which it is insisted covers the question now under consideration. An examination of that opinion will show that the question decided by the attorney-general was not the same as that now before us.

Where a wrong initial is given, the case is, of course, very different from one where the first name is correctly given and the middle initial omitted; and so, if the Christian name is given as Anthony when it should have been Andrew, or where the surname is erroneously given. These are very different questions from the one before us, which is simply whether votes for E. M. Braxton and for Elliot Braxton shall be counted for Elliott M. Braxton. We leave out of view, for the present, votes cast for C. M. Braxton and Braxton. The opinion of the attorney-general, then, does not cover this case.

But a further and still more conclusive answer to this position of contestant is found in the fact

that the opinion of the attorney-general was given to an executive officer to guide him in the discharge of purely ministerial duties, and not intended to be a rule for the guidance of courts or legislative bodies in the exercise of their judicial functions. The opinion in question may, and possibly does, lay down the correct rule for the government of ministerial officers whose powers are limited to a consideration of what appears upon the face of the returns themselves; but, as we have already seen, a very different rule applies when the parties in interest come before a body clothed with full power to pass upon their rights in the light not only of the returns themselves, but of all competent evidence.

640. The election case of McKenzie v. Braxton, continued.

The contestant in an election case must confine his proof to the allegations of his notice.

In the absence of any statutory prohibition and no injury being shown to complainant, the numbering of the ballots was held not to invalidate the election.

The failure of an officer to certify properly a return does not prevent the admission of secondary evidence to prove the actual state of the vote.

The committee also passes on the following questions not vital to the determination of the case—

1. The contestant objected to the vote of certain precincts because the ballots were numbered, and in his argument included Murkham precinct, which was not mentioned in the notice of contest. "The House has often held," says the report, "that the contestant must confine his proof to the allegations of his notice."

2. The "numbering of the ballots cast at an election, in the absence of a statute expressly so declaring, does not of itself invalidate an election, unless some injury is shown to have resulted to the party complaining." The former Virginia law had required the numbering of the ballots, and at a few precincts the officers, unaware of the repeal of the law, continued the practice. Although this numbering rendered if possible to show how each person voted, it is not claimed that it was done in this case, or that the tickets were numbered for any such purpose or for any improper or unlawful purpose. Therefore the committee concluded that the votes should not be thrown out.

3. As to the failure to certify certain returns, the report says:

Of course the returns of an election must be certified by the proper officers. If not so certified, they prove nothing, and when offered in evidence, if objected to, they must be rejected. It was so held by the House in *Barnes v. Adams* in the last Congress. It does not, however, necessarily follow that the vote cast at such an election is lost or thrown away. An uncertified return does not prove what the vote was—that is all. The duly certified return is the best evidence, but if it be shown that this does not exist, we doubt not secondary evidence would be admissible to prove the actual state of the vote. The failure of an officer, either by mistake or design, to certify a return, should not be allowed to nullify an election, or to change a result, if other and sufficient and satisfactory evidence is forthcoming to show what the vote actually was.

In accordance with their findings the committee reported a resolution confirming the title of sitting Member to the seat.

On January 18¹ the resolution was agreed to without debate or division.

641. The South Carolina election case of Lee v. Rainey in the Forty-fourth Congress.

While canvassing officers must return votes as they are cast, the House is not bound by the return.

¹Journal, p. 182; Globe, p. 470.

The House may go behind the ballot to ascertain the intent of the voter so as to explain what is ambiguous or doubtful.

The name of a candidate being written wrongly on a ballot, the House examined testimony as to the intent of the voter.

On May 24, 1876,¹ Mr. John T. Harris, of Virginia, submitted the report of the committee in the South Carolina case of *Lee v. Rainey*. The report says:

In this case the main question to be determined is, whether 669 ballots bearing "JAS H RAINEY," in the county of Georgetown, were intended for and cast for "Joseph H. Rainey," for if those ballots are counted for Joseph H. Rainey, then he has a decided majority and is duly elected; while, on the other hand, if the same are not counted for him he is not elected. As this question is clearly decisive of the case, the committee have not deemed it necessary to consider the other questions raised by the notice of contest and answer. There is a question of law and a question of fact involved. The question of law is, whether the House can look beyond the ballot to ascertain the voter's intent. The committee think it clear, although canvassing officers charged with purely ministerial duties may not go outside of the ballot, whatever may be the defect in the same, but must make their return upon the ballots as they appear on their face, that the House, as the final judge of the elections, returns, and qualifications of its Members, has not only the right but the duty, when a ballot is ambiguous or of doubtful import, to look at the circumstances surrounding the election explaining the ballot, and to get at the intent and real act of the voter.

This will not give the right to contradict the ballot itself, but simply to explain what is uncertain and ambiguous in reference to it. This rule of law has become too well settled to admit of question. (McCrary on Elections, chap. 7, and cases there cited; *Gunter v. Wilshire*, first session Forty-third Congress, Report 631.)

Such being the law, the remaining question is purely one of fact, viz: For whom did those who cast the ballots "JAS H RAINEY" intend to vote and for whom did they vote? What are the facts upon this point? It appears that only two candidates were nominated, viz: Samuel Lee and Joseph H. Rainey. No other persons appear to have been named in connection with the office of Representative to Congress from that district. There is no pretense that any person by the name of James H. Rainey, other than Joseph H. Rainey, was a candidate for that office, and it is not seriously contended by any one that any person who cast the ballot "JAS H RAINEY" cast it intentionally for any other than Joseph E. Rainey, the sitting Member.

The evidence clearly shows that the ballots printed "JAS H RAINEY" were printed for "Joseph H. Rainey," and the fact that such was the case was explained to the voters to whom the tickets were given by the party who had them printed. (Evidence of Joseph Bush, p. 27; Charles H. Sperry, p. 28.) There is no evidence in this case showing that there was at the time of the election any man in the district by the name of James H. Rainey, who was eligible to the office of Representative to Congress, or who had ever been spoken of for that office, or that any person did vote for "James H. Rainey," except one Russell Green (p. 41), and he testified "that he did not know that Joseph H. Rainey was running," and then says "that he had made up his mind before going to the poll that he did not intend to vote for Joseph H. Rainey." His evidence is not of such a character as to entitle it to weight, and your committee are far from being satisfied that he ever knew that the name "JAS H RAINEY" was upon the ticket he voted. The fact that no person by the name of Rainey other than Joseph H. Rainey was named in connection with the office of Representative to Congress is a fact entitled to the greatest weight in determining the intent of the voter.

The report goes on to say that it is clear that those who voted for Jas. H. Rainey did it ignorantly or with the intention of casting blank ballots. It could not be presumed that 669 voters thus intended to cast blank ballots. And the evidence showed clearly that they intended to vote for sitting Member. The report says:

If this House can not consider at all the surrounding circumstances attending the election to learn the intention of the voter, then how is it to determine the identity of the person voted for? How

¹First session Forty-fourth Congress, House Report No. 578; Smith, p. 589; Rowell's Digest, p. 313.

will it determine between two men of the same name if it can not look to the surrounding circumstances to determine who was voted for? The House must, in such a case, certainly look to something besides the face of the ballot; it must inquire into the intent of the voter. It would, indeed, be a singular position for this House to assume that, because there are two men bearing the same name as the one voted for in a district, it has no power to determine who was voted for or elected. If it can not, how can it determine the elections, returns, and qualification of its Members? It has always examined into the intent of the voter when it did not clearly appear by the face of the ballot, where it could be done without contradicting the ballot.

The report then quotes the cases of *Gunter v. Wilshire* and *McKenzie v. Broxton*, and further says:

The decision of the committee to count these votes for Joseph H. Rainey can be fully sustained upon the ground that Joseph H. Rainey was, on election day, in the county of Georgetown, known by the name "JAS H RAINERY" as well as by the name Joseph H. Rainey. There is evidence that the voters were so informed at the polls; were informed that JAS H RAINERY was the same as Joseph H. Rainey, and there is every reason to believe that the voters so regarded it, and in a criminal case this would be evidence tending to show that he was known by the one name as well as by the other, and upon this evidence the House has not only the right, but is bound so to find, if satisfied of the fact. Your committee believe that great injustice will be done the First district of South Carolina should the House, where there is really no serious question made by any one but that the ballots for "JAS H RAINERY" were intended for Joseph H. Rainey, fail to count them for him.

The report further points out that there is equal reason for the decision which is reached, if the name was printed wrong with fraudulent intent.

Therefore the committee report a resolution confirming title of sitting Member to the seat, and on June 23¹ the House agreed to the resolution without debate or division.

642. Declaration of a House committee that returning boards with judicial authority are dangerous.—In a report submitted on March 3, 1879,² Mr. Clarkson N. Potter, of New York, from the committee appointed to investigate alleged frauds in the Presidential election of 1876, included the following:

When the Democrats recovered control of Louisiana they abolished the returning board, and there no longer exists in the United States any tribunal having discretion to receive or reject at pleasure the votes cast. No such body ought ever again to be permitted. If the wisdom of the fathers and the experience of free government have settled anything, it is the necessity of keeping the functions of judging and of administering the laws separate. No tribunal ought to be clothed with such a discretion; no persons ought to be trusted with absolute powers, upon the exercise of which the success of their own party and their own power and that of their friends depend.

643. The Texas election case of Houston v. Broocks in the Fifty-ninth Congress.

The House does not change the returned result of an election because of frauds and irregularities unless they be sufficient to change the result.

Instance wherein an elections committee considered a question not raised in the notice of contest.

The name of a candidate for United States Senator on the ballot was held not to be such distinguishing mark as would destroy the secrecy of the ballot.

¹Journal, p. 1143; Record, p. 4076.

²Third session Forty-fifth Congress, House Report No. 140, p. 64.

On June 23, 1906,¹ Mr. M. E. Driscoll, of New York, from the Committee on Elections, No. 3, submitted the report of the committee in the case of *Houston v. Brooks*, from Texas. As to the status of the case, the report says:

The said election took place on the 8th day of November, 1904. Thereafter the votes cast at said election for the office of Representative in Congress were counted and canvassed, and as the result of said count and canvass, the Hon. M. L. Brooks, the contestee, was declared to have received 13,119 votes, and in like manner the Hon. A. J. Houston, the contestant, was declared to have received 4,161 votes, and in pursuance of said count and canvass the Hon. M. L. Brooks received the certificate of election by a plurality of 8,958 votes.

Three questions were involved in decision:

1. The committee, without dissent, held as follows as to the merits of the election:

While there was some evidence of fraud, irregularity, and intimidation in several of the counties of said district, your committee is of the opinion that such frauds, irregularities, and intimidations, separately or combined, were not so gross, general, or far-reaching as to account for the large plurality of votes cast and counted for the contestee, and your committee does not feel justified in rejecting a sufficient number of the votes cast for the contestee on these grounds to give the contestant a plurality, nor is your committee of the opinion that the refusal of Democratic officers empowered by law to appoint judges and clerks of elections, to appoint Republican judges and clerks where requested by Republican voters so to do, justifies it in rejecting a sufficient number of votes which were cast and counted for the contestee to give the contestant a plurality and to say that he was under the law fairly elected Representative in Congress from said district.

2. The next question was one which was not referred to in the notice of contest, but which the committee nevertheless notice in their report:

The point is made in the evidence and in contestant's brief that all the Democratic ballots cast in the Second Congressional district of the State of Texas were illegal, invalid, and void, for the reason that on them appeared the name of C. A. Culberson for United States Senator, on the ground that this was a distinguishing mark or device. The names of party candidates for United States Senator were not on other party tickets, and it is claimed that this was a distinguishing mark or device. With this claim we can not agree. The words, "For United States Senator, C. A. Culberson," were no more a distinguishing mark or device than were the words, "For Congressman, Second district, M. L. Brooks."

Both names were on the same ticket next to each other. The names of all the State Democratic electors were on the same ticket. It was the intention to give notice to all that it was the regular Democratic ticket for that district, for the words, "Official ballot, Democratic party," were distinctly written at the top of the ticket above all the names. It is difficult to see how the name of Senator Culberson could distinguish and identify those ballots, which were without that fully identified and distinguished from all others. This name can hardly be said to be a "picture, sign, vignette, device, or mark," and did not disclose the secrecy of the ballot. This point is very technical, and is not mentioned in the notice of contest. Election contests should be decided on the substantial merits. The will of the electors as expressed in their ballots should be recognized and respected, and your committee does not believe that all of the ballots cast for the contestee in said election should be rejected on account of this error, which did not affect the result.

644. The case of *Houston v. Brooks*, continued.

It being charged that the State laws establishing qualifications of voters violated the reconstruction laws and the Constitution of the United States, a divided committee considered the question one for the courts.

¹First session Fifty-ninth Congress, Record, p. 9036; House Report No. 4998.

The laws of Texas have a poll-tax qualification for suffrage, which discriminates between residents of the city and the country.

The validity of the election laws of a State being impeached and the question not being determined, the House declared a contestant not elected, but did not affirm the title of returned Member, who had a majority of the votes cast.

3. The real issue in the case was set forth by the majority of the committee:

The serious question for the consideration of your committee and of the House in the determination of this contest is involved and set forth in the first and second counts in the notice of contest. These counts may be considered together, because each of them questions the constitutionality of the election law of the State of Texas, which was approved April 1, 1903, and under and in pursuance of which the elections in the State of Texas were conducted in the year 1904. That law makes the payment of a poll tax a necessary qualification for the right to vote by any citizen or class of citizens of the United States. That poll tax in cities of 10,000 inhabitants or upward, is \$2.75, and in small towns and rural districts \$1.75, and it must be paid on or before the 1st day of February to enable the person paying it to vote at the following November election. In this particular case no man otherwise qualified to vote for Representative in Congress was permitted to vote on the 8th day of November, 1904, unless he had paid his poll tax on or before the 1st day of February, 1904, and produced his receipt for such payment, or otherwise proved that he had paid it.

It is claimed by the contestant that this law is illegal, invalid, and unconstitutional, because it is in direct conflict with and in violation of the act of Congress approved March 30, 1870, as follows:

AN ACT to admit the State of Texas to representation in the Congress of the United States.

Whereas the people of Texas have framed and adopted a constitution of State government, which is Republican; and whereas the legislature of Texas, elected under said constitution, has ratified the fourteenth and fifteenth amendments to the Constitution of the United States; and whereas the performance of these several acts in good faith is a condition precedent to the representation of the State in Congress: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said State of Texas is entitled to representation in the Congress of the United States. * * *

* * * *And provided further,* That the State of Texas is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions: First. That the constitution of Texas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided,* That any alteration of said constitution prospective in its effects may be made in regard to the time and place of residence of voters. * * *

It is also claimed by the contestant that this poll-tax qualification for citizens of the United States violates the fourteenth and fifteenth amendments of the Federal Constitution. It is further alleged that the enforcement of this poll-tax law disqualified and prevented from voting a very large number of colored voters, citizens of the United States, who would except for this law and its enforcement have been qualified to vote for Representative in Congress at the election held on the 8th day of November, 1904; that the overwhelming majority of those colored voters who were disfranchised by said poll-tax law and its enforcement were Republicans, and would have voted for the contestant at said election, and that were it not for said poll-tax law and its enforcement the contestant would have received a majority of the votes cast at said election and would have been duly elected as Representative in Congress from said Congressional district.

These allegations and the evidence taken under them directly question the constitutionality of the Texas constitution adopted in the year 1902, and the Texas election law passed in the year 1903, and applied to the election in this particular case. If this Committee on Elections and the House of Representatives should hold that the election laws of the State of Texas are violative of the Federal

Constitution, the conclusion would necessarily follow, not that the contestant was elected, but that the whole election was null and void, and that the Second Congressional district of the State of Texas is not entitled to representation in Congress.

This is the only election contest from that State before the House of Representatives for determination. But the decision in this case, construing the election laws of the State of Texas, applies to the whole State, and if the contestee in this particular case is not legally entitled to retain his seat, then none of the sixteen Representatives from that State are legally entitled to seats on the floor of this House, and none of them will in the future be entitled to seats if elected under the present law in their State. Therefore the gravity of the question involved in this particular case is manifest. Texas is one of the great States of the Union, and is entitled to its full delegation in Congress. But its constitution and laws should conform to the Constitution and laws of the United States so as to leave no cloud on the title of that delegation to their seats.

Your committee appreciates the unusual responsibility which devolves on it in the determination of this question, and each Member has applied himself to its consideration with as much honesty, patriotism, and ability as he possessed. If we declared this election void and our report were confirmed by the House, all the Representatives from that State, and the State itself, would suffer a great and irreparable wrong. On the other hand, if this House should adopt a resolution that the contestee was duly elected Representative in Congress from the Second Congressional district, with reference to which several members of this committee, at least, entertain grave doubt, that action would stamp with approval the present constitution and election laws of the State of Texas. We have therefore concluded to follow neither course.

We report that the contestant was not elected, but do not report that the contestee was elected. We are silent on that phase of the case. We realize that we may be accused of shirking our responsibility. To this we answer that the responsibility is so great, and the consequences of a mistake would be so serious and far-reaching, that we respectfully request that this important question be referred to the Supreme Court of the United States for their decision. Your committee is aware that a decision in this case concerns not alone the State of Texas. That many other, if not all, of the reconstructed States have in recent years adopted constitutions and enacted election laws which are claimed to be in violation of the Federal Constitution and laws. That election contests are brought before every Congress, predicated on the alleged violation of the Federal Constitution and laws by the constitutions and laws of the States from which these contests come. All those questions are substantially alike, and a decision in this case would be a precedent in many others which may arise.

We have precedents which may be considered authority for our action in this case, which in effect advise the reference of this constitutional question to the Supreme Court. In the last Congress, two years ago, the contested election case of Prioleau *v.* Legaré, from the State of South Carolina, was referred to this committee. The question presented in that case was substantially the same as the one in this. While the constitution and election laws of the State of South Carolina are not exactly like those of Texas, the constitutionality of the election law was raised, and the question was practically the same as the one under consideration. This committee advised the contestant, Mr. Prioleau, and his counsel to make a case and present the question to the courts for determination, and did not submit a report or resolutions to the House.

Also, in the last Congress, the contested election case of Dantzler *v.* Lever, from South Carolina, involving exactly the same questions, was referred to the Committee on Elections No. 1. That committee submitted a resolution, which was adopted by the House, that the contestant was not elected, and the report, written by the chairman, Mr. Mann, of Illinois, recommended that the constitutional question be referred to the Supreme Court for decision. Four contested election cases were brought from the same State to this Congress, all of which were referred to the Committee on Elections No. 1, and we are informed that the same disposition will be made of them. Since the questions in those cases are exactly the same as the one raised two years ago in Dantzler *v.* Lever, no other conclusion can be expected. Therefore, this committee, in order to be consistent with its action in the last Congress, and in deference to the decision of the House in the other cases referred to, notwithstanding the individual opinions of some of its Members, feels constrained to submit this report and the resolution in pursuance thereof.

If this House, with its large Republican majority, should declare the election held in the Second Congressional district of Texas void and unseat the contestee in this case, such action would very likely

be looked upon as a partisan decision. And if perchance the next Congress should have a Democratic majority and the same question should arise, the strong probabilities are that it would be decided the other way. Such conflicting decisions would lead only to confusion, uncertainty, and possibly to more serious consequences. The Supreme Court is a continuing body. We are led to believe that the members thereof are not influenced by political considerations; that partisan spirit is eliminated as far as possible. The people respect that tribunal and bow with deference to its judgments. The constitutional questions presented by the election laws of Texas and other reconstructed States should be submitted to that court for final determination. Such a decision would be recognized by the people of those several States and by the Congress as the law of the land, and would be a positive benefit to all concerned.

If the election laws of Texas are violative of the Federal Constitution and the reconstruction acts, those laws should be repealed or so amended as to conform with the decision and opinion of the Supreme Court. If they should be held to be legal and valid, then its Representatives would hold their seats without any question or cloud on their titles. Furthermore, the Democrats as well as the Republicans of that great State and other States similarly situated should unite and assist one another in submitting those issues to the Supreme Court, and in obtaining from that great tribunal a comprehensive and positive decision on their merits, in order that those people may know what are their political rights.

Mr. Henry Bannon, of Ohio, did not concur in the opinion of the committee, but filed minority views, as follows:

It seems to me that the propositions to be considered in this case are the following:

1. Texas was admitted to representation in Congress as a State of the Union under the provisions of an act of Congress approved March 30, 1870, by the terms of which it was provided, as a fundamental condition to admission—

“That the constitution of Texas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State.”

2. On July 28, 1868, the proclamation was issued that the fourteenth amendment had been ratified. Section 2 of said amendment reads as follows:

“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”

3. On April 1, 1904, Texas enacted a law making the payment of a certain poll tax on or before February 1 preceding the November election a condition precedent to the right to vote. This legislation has deprived some citizens of the United States residing in Texas of the right to vote.

It is contended in this case that Texas has deprived herself of the right to any representation in Congress; but, if not, that the contestant was duly elected as a Representative from that State.

There is nothing in the proof that would warrant a finding that contestant was elected. That is sufficient to dispose of that contention.

I do not think that the present election laws of Texas deprive that State of all representation in Congress. If these laws deprive some of her citizens of the right to vote, the remedy is not to deny all representation in Congress, but the remedy is found in the second section of the fourteenth amendment. That remedy, I think, is exclusive of all others. If Texas has deprived some of her citizens of the right to vote, her representation in Congress should be proportionately reduced.

The obligation to do this is with Congress, and not the judiciary. In the case of *Giles v. Board of Registration* (189 U. S., 488), decided by the Supreme Court of the United States on April 27, 1903, the court, in the Alabama election-law case, said:

“Apart from damages to the individual, relief from a great political wrong, if done as alleged, by

the people of a State, and the State itself, must be given by them or by the legislative and political departments of the Government of the United States.”

In my opinion there is nothing in these cases that can be submitted to the courts. The obligation is upon the legislative department of the Federal Government to ascertain whether the right to vote has been denied any of the citizens of Texas, and if so, its representation in Congress should be reduced proportionately.

In accordance with their conclusions, the majority of the committee recommended this resolution, in which Mr. Bannon also concurred:

Resolved, That A. J. Houston was not elected a Member of the Fifty-ninth Congress from the Second Congressional district of Texas and is not entitled to a seat therein.

The resolution was agreed to without debate or division.

645. The election case of the California Members in the Forty-ninth Congress.

After examination of precedents the Committee on Elections and the House followed the interpretation of a State law given by the highest court of the State.

On May 11, 1886,¹ Mr. Robert Lowry, of Indiana, presented the report of the Committee on Elections in the California case. The report states the case thus:

It is claimed on behalf of contestants that the votes cast at the Congressional elections of the 4th day of November, 1884, in the State of California, should have been compared and estimated under the apportionment law existing in that State prior to the 13th day of March, 1883, and not in accordance with the act of the legislature of that State of the day named, entitled “An act to divide the State of California into congressional districts.” Under the prior law the State was divided into four districts, with two Representatives at large. Under the latter act the State was apportioned into six Congressional districts, each one of which was entitled to one Representative, and none at large. In order to sustain the contention of the contestants, it is obligatory upon them to show that the act of March 13, 1883, is invalid, and this they attempt to do.

The claim is that this act was not passed in accordance with section 15, Article IV, of the State constitution, which requires that every bill should be read on three several days in each house.

Passing by a number of immaterial points upon which testimony was taken in this contest, we proceed at once to the substantial ground urged against the sitting Members. That, we think, has been fully and definitely settled in a decision of the supreme court of the State of California in a case reported in volume 8, West Coast Reporter, page 29, entitled “People, ex rel. Leverson, v. Thompson, secretary of state.”

After quoting in full the opinion, the report proceeds:

It will be seen that the foregoing case was an application by these contestants to the supreme court of the State of California for a writ of mandate to compel the secretary of state to compare and certify to the votes cast at the last elections, in accordance with the law in force in California prior to the passage of the act the validity of which is brought in question by this contest.

It is not denied in this case that the bill itself was read in accordance with the constitutional provisions, but it is said that there was an amendment thereto which should also have been read “upon three several days.”

The Miller case was presented for decision in the State of Ohio, entitled “Miller v. The State” (3 Ohio St. Rep., 479). The point was very satisfactorily disposed of by Judge Thurman, who was then upon the supreme bench of that State. He admits in his decision that there might be some plausibility in the argument that an amendment radically changing the subject-matter should be read three times, the same as a bill, but holds that to bring an amendment within that objection it should be of such a character as to change the subject or proposition of the bill wholly, and where the amend

¹First session Forty-ninth Congress, House Report No. 2338; Mobly, p. 481.

ment does not effect any such radical change in the purpose, aim, and scope of the bill, that it does not come within the constitutional requirement that it should be read three times.

The decision cited of the full bench of the supreme court of the State of California seems to be fully definitive of the principles involved here. Such being the case, your committee, in conformity with an almost invariable rule, follow the construction of the statutes given by the court of last resort of the State from which the cases come.

Such is the rule of the Supreme Court of the United States, and we do not perceive why one so well based upon reason and common sense should be departed from in this case.

In *Leavenworth v. Barnes* (94 U. S. Rep., 70), the validity of a statute of the State of Kansas being assailed as having been improperly passed, the Supreme Court said:

“The recent decision upon this identical statute by the supreme court of Kamm, in a suit against this county, relieves us from all embarrassment upon this question. It gives effect and construction to one of its own statutes, and, according to well-settled rules, will be followed by this court.”

In support of this rule of construction a number of well-considered cases are cited in the opinion.

The same rule has been followed by the House of Representatives in election contests. In the matter of the election of a Representative from the State of Tennessee, in the Forty-second Congress, the Elections Committee said:

“It is a well-established and most salutary rule that when the proper authorities of the State government have given a construction to their constitution and statutes, that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious workings of our complex government, State and national, and your committee are not disposed to be the first to depart from it. In the case of *Birch v. Van Horn* (2 Bartlett, 205) the House refused to go into an inquiry as to the validity of the new constitution of Missouri, upon the ground that it had been recognized as valid by all the departments of the State government.”

While the conclusion arrived at by Justices Ross and Myrick is not authority to the full extent to which the opinion of the full bench is thus recognized, we present their views as embodying what we regard to be a reasonable construction of that clause of the constitution of California bearing upon the question raised. It is one, we think, which we would not hesitate to adopt did the controversy turn upon the question of constitutional construction alone.

This disposes of everything requiring notice in these cases.

The contestants only received a vote running from six to fifty each, and upon no ground that would be recognized under any rule of law, or commend itself to any principle of justice, can either one of the contestees be unseated. Even if they could, it is quite clear that no one of the contestants is entitled to a seat.

Your committee therefore recommend the adoption of the following resolutions:

Resolved, That Barclay Henley, James A. Loutitt, Joseph McKenna, W. W. Morrow, Charles N. Felton, and H. H. Markham were duly elected as Representatives from the State of California to the Forty-ninth Congress, and are legally entitled to their seats.

Resolved, That Alexander M. McKay, Montague R. Levenson, and Archibald McGrew were not elected as such Representatives, and are not entitled to seats in this body.

The resolutions were agreed to in the House without debate or division.¹

646. The Massachusetts election case of Turner v. Baylies in the Eleventh Congress.

The House held that ballots wherein the word “junior” was omitted from the candidate’s name should be counted on proof that they were intended for the candidate.

The House unseated a person returned as elected at a second election on ascertaining that another person had actually been chosen at the first election.

Instance of a House election contest instituted by petition.

¹Journal, p. 1571.

One of the parties to an election case having failed to attend the taking of testimony after notification, the House considered the testimony, although ex parte.

On May 24, 1809,¹ a petition was presented on behalf of Charles Turner, jr., who contested the right of William Baylies to a seat in the House of Representatives from one of the Massachusetts districts. The facts in this case, as found by the Committee of Elections, were as follows:

At the election held in conformity with State law on the first Monday of November, 1808, the votes were returned to the governor as follows: For "Charles Turner, junior, esq.," 1,443; for "Charles Turner, esq.," 430; a total of 1,873 votes for the two names. These 1,873 votes constituted the required majority for an election, but the governor, finding that a majority of votes had not been cast for any one name, and exercising a prerogative lawful in cases where no candidate received a majority of votes, ordered another election for January 19, 1809. At this second election William Baylies received a majority of the votes and, receiving the certificate of the governor, took his seat in the House.

The committee received testimony showing that the votes cast for "Charles Turner, junior, esq." and for "Charles Turner, esq.," must have been meant for one and the same person. The sitting Member had been cited to appear during the taking of this testimony and had neglected to do so. Therefore the Committee of Elections admitted the testimony, although in fact taken ex parte.

The conclusions of the committee were embodied in the following resolutions:

Resolved, That the election held in Plymouth district in November last was legal and proper.

Resolved, That William Baylies is not entitled to a seat in this House.

Resolved, That Charles Turner, jr., is entitled to a seat in this House.

On June 23, the House agreed to the first resolution, yeas 58, nays 13; to the second, yeas 60, nays 40; to the third, yeas 62, nays 41.

Thereupon Mr. Turner appeared and qualified.

647. The New York election case of Williams, jr., v. Bowers in the Thirteenth Congress.

The House held that ballots wherein the word "junior" was omitted from the candidate's name should be counted on proof that they were intended for the candidate.

On July 2, 1813,² the Committee on Elections reported in the contested election case of Williams, jr., v. Bowers, from New York, that the return of the votes for the district was as follows:

	<i>Votes.</i>
John M. Bowers	4,287
Isaac Williams, jr	4,129
Isaac Williams	434
John M. Bowey	1
Several other persons, in all	17

It appeared to the committee that there were residing within the district three persons by the name of Isaac Williams, one of whom was distinguished by the

¹First session Eleventh Congress, Contested Elections in Congress, from 1789 to 1834, p. 234.

²First session Thirteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 263.

addition of “junior.” It was also admitted by the sitting Member that Isaac Williams, jr., was the only candidate opposed to him, within his knowledge. The committee also found that in each of four towns of the district nearly 100 votes were given for Isaac Williams, and not one for Isaac Williams, jr. It therefore appeared to the committee that the votes given for Isaac Williams were intended for Isaac Williams, jr., but considered that further evidence was necessary.

So the subject was postponed until the next session, and on December 16, 1813, the committee again reported, finding that in the towns of Exeter, Milford, and Westford, 322 votes were, through the mistakes of the local inspectors of election, returned for Isaac Williams. From the testimony of these inspectors it appeared that these 322 votes were given to, and ought to have been returned for, Isaac Williams, jr. Adding these votes to the poll of Isaac Williams, jr., gave him a majority of 164 votes over Mr. Bowers. Therefore the committee submitted the following resolutions, which were unanimously agreed to by the House:

Resolved, That John M. Bowers is not entitled to a seat in this House.

Resolved, That Isaac Williams, jr., is entitled to a seat in this House.

648. The New York election case of Willoughby v. Smith in the Fourteenth Congress.

Election officers having omitted the word “junior” in returning the vote of a candidate in two towns, the House seated the candidate on finding that the error had affected the result decisively.

On December 11, 1815,¹ the Committee on Elections, to whom had been referred the case of Willoughby, jr., v. Smith, of New York, reported that it appeared from the testimony of certain local inspectors of elections, that in the towns of German Flats and Litchfield, 299 votes were, through the mistake of the said inspectors, returned for Westel Willoughby, although in fact they were given for Westel Willoughby, jr., and that in the said towns no votes were given for Westel Willoughby without having the word “junior” added thereto. The 299 votes above mentioned being added to the poll of Westel Willoughby, jr., gave him a majority of 255 votes over William S. Smith. The committee therefore recommended resolutions that Mr. Smith was not entitled to the seat, and that Westel Willoughby, jr., was entitled to it.

On December 15 the House agreed to the recommendation of the committee, and Mr. Willoughby took his seat.

649. The New York election cases of Guyon, jr., v. Sage and Hugunin v. Ten Eyck in the Sixteenth and Nineteenth Congresses.

The omission of the word “junior” in the return of a candidate’s vote was corrected by the House on being shown by testimony.

Instance wherein the House decided an election contest against a returned Member who had not appeared to claim the seat.

On January 12, 1820,² the Committee on Elections reported in the contested

¹First session Fourteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 265.

²First session Sixteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 348.

case of Guyon, jr., *v.* Sage, of New York, which had been instituted by a petition. The committee found that votes were cast as follows:

	<i>Votes.</i>
For Ebenezer Sage	2,085
For James Guyon, jr	1,701
For James Guyon	396

The evidence showed that the 396 votes were actually cast for “James Guyon, jr.,” but that the word “junior” was omitted through the mistake of certain returning officers.

The committee therefore submitted the following resolutions, which were agreed to by the House on January 14, 1820:

Resolved, That Ebenezer Sage is not entitled to a seat in this House.

Resolved, That James Guyon, jr., is entitled to a seat in this House.

The committee also found that Mr. Sage had not appeared to claim his seat, and no evidence had been adduced of his intention to make such claim.

On December 15, 1825,¹ in the case of Hugunin, jr., *v.* Ten Eyck, of New York, the House unseated Mr. Ten Eyck and seated Mr. Hugunin, because a correction of the returns showed that the omission of the word “junior” in certain returns had deprived the latter of enough votes actually cast for him to secure his election. The question was not discussed, since the principle had been discussed and passed on several times.

650. The New York election cases of Wright, jr., *v.* Fisher and Root *v.* Adams in the Twenty-first and Fourteenth Congresses.

The omission of the word “junior” in the return of a candidate’s vote was corrected by the House on being shown by testimony.

Instance wherein a person declined to take a seat assigned him after a contest as to final right.

On January 19, 1830,² the Committee on Elections reported in the case of Wright, jr., *v.* Fisher, of New York. It appeared that at the election in November, 1828, there were given to “Silas Wright, junior,” 42 votes in the town of Edwards, which were returned for “Silas Wright;” and there were given for “Silas Wright, junior,” in two other towns a total of 130 votes which, by mistake of election officers, were not returned for him.

The addition of these votes to the poll showed the election of Silas Wright, jr.; and in accordance with this showing the committee reported a resolution unseating Mr. Fisher and declaring Mr. Wright entitled to the seat.

On February 5 the House agreed to the resolution.

Mr. Wright, not having appeared, on February 13³ it was

Resolved, That the Speaker of this House inform the executive of New York that the seat in the present Congress, for the Twentieth Congressional district, occupied by George Fisher, has been, by a resolution of the House, awarded to Silas Wright, jr.

¹First session Nineteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 501.

²First session Twenty-first Congress, Contested Elections in Congress from 1789 to 1834, p. 518.

³Journal, p. 293.

Mr. Wright did not appear, and on March 9 a letter from him declining the seat was presented to the House.¹

On December 26, 1815,² the Committee on Elections reported in the contested election case of Root *v.* Adams, of New York, that John Adams was not entitled to a seat in the House, and that Erastus Root was entitled to the seat.

In this case it appeared from the sworn statement of a clerk in one of the counties that his deputy had returned the votes of certain towns as cast for "Erastus Rott" instead of "Erastus Root," for whom they were in fact cast. The sitting Member admitted the truth of this statement, and as the number of votes so incorrectly returned was sufficient to change the result of the election in favor of the sitting Member, the House, concurred in the report of the committee. Mr. Root therefore qualified and took his seat.

651. The South Carolina election case of McKissick *v.* Wallace in the Forty-second Congress.

Contestant's evidence being too indefinite to establish his case, the House confirmed the title of sitting Member although irregularities in the election were evident.

On May 7, 1872,³ Mr. G. W. Hazelton, of Wisconsin, from the Committee on Elections, submitted the report of the committee in the case of McKissick *v.* Wallace, of South Carolina. The sitting Member had been returned by a certified majority of 3,304. The contestant claimed that the election was irregular.

The committee found the evidence voluminous, but not sufficiently definite and tangible to warrant the committee in assailing the apparent or *prima facie* right of the sitting Member to the seat. The report says:

Indeed, there is no evidence of the actual vote certified in the several counties of the district on which the certificate of election was predicated.

There is some reason for the belief that irregularities may have occurred in some localities, but the evidence of the contestant falls short of determining to what extent these irregularities were carried, or affording any means of ascertaining their effect upon the actual vote of the district.

The law under which the election was held seems to be well calculated to cover, if not to encourage, fraud, inasmuch as it neither requires registration of the voters nor a public canvass of the votes at the close of the polls, but allows the managers of each precinct, or one of them, to retain possession of the boxes containing the ballots uncounted for three days, at the end of which time they are required to deliver them over to the commissioners of election for their county, together with the poll list, and these latter officers may retain the boxes for ten days longer before making the canvass.

But the committee, having no power over this law, must content itself with simply calling attention to it.

Therefore the committee recommended a resolution confirming the title of sitting Member to the seat.

On May 9⁴ this report was agreed to by the House without division.

652. The House in the Fifty-eighth Congress declined to investigate the election of a Delegate to the Fifty-ninth Congress.—On February

¹Journal, p. 394.

²First session Fourteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 271.

³Second session Forty-second Congress, House Report No. 66; Smith, p. 98.

⁴Journal, pp. 831, 832; Globe, p. 3243, 3244.

22, 1905,¹ Mr. Martin E. Olmsted, of Pennsylvania, submitted, from the Committee on Elections No. 2, the following report:

The Committee on Elections No. 2, to which was referred the following memorial, viz:

“Memorial² of the Independent Home Rule party of Hawaii praying for the appointment of a commission to investigate the recent election in that Territory.

“RESOLUTIONS.

“Whereas the official printed ballots used in every election precinct throughout the Territory of Hawaii on the Tuesday (November 8) after the first Monday in November, 1904, were ballots attached to a numbered stub, and in the right corner of said ballot, which corner is perforated for purposes of detachment therefrom, is contained the number of said ballot, corresponding with the number printed upon the stub aforesaid; and * * *

“Be it resolved, That Congress is hereby memorialized and requested to send as soon as practicable a commission to this Territory to inquire and investigate into the illegal ballots as aforesaid, or order the governor of this Territory to send to Congress one or two ballot boxes containing the aforesaid numbered and perforated ballots or sample thereof; and * * *

respectfully begs leave to report that it has also received from citizens of Hawaii a numerous signed “Palapala Hoopii,” asking “that the territorial election held on Tuesday, November 8, 1904, be declared by the Congress of the United States null and void,” for reasons therein set forth, which are substantially those contained in the foregoing memorial. No person desiring such action has appeared before your committee or submitted any proof of the allegations contained in the memorial. But the Hon. A. L. C. Atkinson, the secretary of the Territory of Hawaii, the official referred to in the said memorial, has appeared, submitted a sample showing the form of ballot used, and explained its use.

After describing the ballot, the committee continues:

Upon this point it would, perhaps, be improper for your committee or for this House to express an opinion, in view of the fact that it will in any event have to be passed upon by the Fifty-ninth Congress in a contest which has been filed against the person returned as elected to be a Delegate therein. So far as the eight senators and thirty representatives elected to the territorial legislature are concerned, no reason has been shown us why the legality of their elections may not, or might not have been, determined upon proper proceedings instituted before the designated local legal tribunals.

We therefore submit that there is no occasion for the present Congress to send a commission to Hawaii or to take any action in the premises, and recommend the adoption of the following resolution:

Resolved, That it is inexpedient for this House, at this time, to take any action in relation to the election of senators and representatives to the territorial legislature in Hawaii, or the election of Delegate to the Fifty-ninth Congress.

After short debate this resolution was agreed to without division.³

653. The Senate election case of Lane and McCarty v. Fitch and Bright, from Indiana, in the Thirty-fifth Congress.

In 1868 the Senate decided that a decision once made in an election case should not be revised or reversed.

¹Third session Fifty-eighth Congress, Record, p. 3075.

²This memorial had been referred in the regular course.

³In 1890 the Senate considered the case of Fred T. Dubois, of Idaho. (Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 763.) December 30, 1890, the credentials of Mr. Dubois, as Senator from Idaho for six years beginning March 4, 1891, were laid before the Senate and referred to the Committee on Privileges and Elections. January 5 that committee reported that it was not customary to consider any questions arising on the credentials of a Senator until the term for which he claimed to be elected, and recommended that the credentials be placed on file. The credentials were filed accordingly.

On June 12, 1858,¹ the Senate had declared Messrs. Graham N. Fitch and Jesse D. Bright, of Indiana, entitled to their seats, after proceedings on a memorial objecting to the validity of their election.

At the next session of Congress Messrs. Henry S. Lane and William M. McCarty appeared, bearing credentials as Senators-elect from Indiana. The question was referred to the Committee on the Judiciary, which on February 3, 1859, reported.² This report, after reviewing the history of the case, said:

It appears by the memorial that the legislature of Indiana, at its recent session in December last, assumed the power of revising the final decision thus made by the Senate of the United States, under its unquestioned and undoubted constitutional authority to "be the judge of the qualifications of its own members." Under this assumption, it also appears by the journals of the senate and house of representatives of the State of Indiana, the legislature of Indiana, treating the seats of the Senators from that State as vacant, proceeded, subsequently, by a concurrent vote of the senate and house of representatives of the State, to elect the Hon. Henry S. Lane as a Senator of the United States for the State of Indiana, to serve as such until the 4th of March, 1863, and the Hon. William Monroe McCarty as a Senator for the same State, to serve as such until the 4th of March, A. D. 1861. Under this action of the legislature of Indiana those gentlemen now claim their seats in the Senate of the United States.

It may be conceded that the election would have been valid and the claimants entitled to their seats had the legislature of Indiana possessed the authority to revise the decision of the Senate of the United States that Messrs. Fitch and Bright had been duly elected Senators from Indiana, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863.

In the opinion of the committee, however, no such authority existed in the legislature of Indiana. There was no vacancy in the representation of that State in the Senate, and the decision of the Senate, made on the 12th of June, 1858, established finally and (in the absence of a motion to reconsider) irreversibly the right of the Hon. Graham N. Fitch as a Senator of the State of Indiana until the 4th of March, 1861, and the right of the Hon. Jesse D. Bright as a Senator from the same State until the 4th of March, A. D. 1863.

The decision was made by an authority having exclusive jurisdiction of the subject; was judicial in its nature; and, being made on a contest in which all the facts and questions of law involving the validity of the election of Messrs. Fitch and Bright, and their respective rights to their seats, were as fully known and presented to the Senate as they are now in the memorial of the legislature of Indiana, the judgment of the Senate then rendered is final, and precludes further inquiry into the subject to which it relates.

There being, by the decision of the Senate, no vacancy from the State of Indiana in the Senate of the United States, the election held by the legislature of that State at its recent session is, in the opinion of the committee, a nullity, and merely void, and confers no rights upon the persons it assumed to elect as Senators of the United States. The committee ask to be discharged from the further consideration of the memorial of the legislature of Indiana.

The minority combated these views, as follows:

The power of the Senate to judge of the election and qualification of its own members is unlimited and abiding. It is not exhausted in any particular case by once adjudicating the same, as the power of reexamination and the correction of error or mistake, incident to all judicial tribunals and proceedings, remains with the Senate in this respect, as well to do justice to itself as to the States represented, or to the persons claiming or holding seats. Such an abiding power must exist to purge the body from intruders, otherwise anyone might retain his seat who had once wrongly procured a decision of the Senate in his favor by fraud and falsehood, or even by papers forged or fabricated.

In what cases and at whose application a rehearing will at all times be granted is not now necessary to inquire; but when new parties, with apparently legal claim, apply, and especially when a sovereign State, by its legislature, makes respectful application to be represented by persons in the Senate legally elected, and insists that the sitting members from that State were never legally chosen, we consider

¹ First session Thirty-fifth Congress, Globe, p. 2981.

² 1 Bartlett, p. 632; Globe, p. 772.

that the subject should be fully reexamined, and that neither the State, the legislature, nor the persons now claiming seats can legally or justly be estopped, or even prejudiced, by any former proceedings of the Senate to which they were not parties.

* * * * *

In the case of the State of Mississippi, in the House of Representatives in the Twenty-fifth Congress, the power to reexamine a decision made on an election of Members was fully considered and decided. Gholson and Claiborne were, at a special election held on the proclamation of the governor, chosen Representatives from that State to a special session of Congress called by the President. At that session exception was taken to them, but after some objection they were admitted to their seats. Their case and papers were referred to the Committee of Elections, who made report, and thereupon, on full and elaborate discussion, it was resolved that they were duly elected Members of the Twenty-fifth Congress and entitled to their seats. This was in September. In November following an election was holden in said State, and Prentiss and Ward were elected Members of the Twenty-fifth Congress, who, in December following, presented their credentials and claimed their seats. It was then insisted in that case, as it now is in this, that the decision so before made was conclusive of the right of Claiborne and Gholson to their seats as Members of the Twenty-fifth Congress, and the whole matter was res adjudicata. But on full examination and after full discussion, the former resolution declaring said Claiborne and Gholson as duly elected Members of the Twenty-fifth Congress was rescinded.

On February 11 the question was debated, especially with reference to the right of review, and the Senate by a vote of yeas 31, nays 20 the subject laid on the table. So Messrs. Fitch and Bright retained their seats.

654. The House, overruling its Speaker, held that a negative decision on a resolution declaring a person not entitled to a seat was not equivalent to an affirmation of the title.—On March 19, 1822,¹ the House was considering the contested election case of Reed *v.* Causden, from the State of Maryland, the Committee on Elections having reported the resolutions, which, as amended by the Committee of the Whole, came before the House as follows:

Resolved, That Jeremiah Causden is not entitled to a seat in this House.

Resolved, That Philip Reed is not entitled to a seat in this House.

The first resolution was agreed to by the House; and on the question of agreeing to the second resolution there were, yeas 74, nays 75.

The Speaker² voted in the affirmative, thereby making an equal division, and, as provided by the rule, announced that the question was lost. The resolution being lost, he decided, as a necessary consequence thereof, that the converse of the proposition contained in the said resolution was affirmed, to wit, that Philip Reed is entitled to a seat in this House.

Mr. Henry Baldwin, of Pennsylvania, appealed, and the decision of the Speaker was overruled, after debate.

Mr. Romulus M. Sanders, of North Carolina, then moved this resolution, which was agreed to—yeas 82, nays 77:

Resolved, That Philip Reed is entitled to a seat in this House as one of the Representatives from the State of Maryland.

Mr. Reed thereupon appeared and qualified.

655. In voting on election cases the negating of one proposition is not regarded as affirming its converse.—On January 29, 1881,³ majority and

¹ First session Seventeenth Congress, Journal, pp. 368–370; Annals, pp. 1321–1323.

² Philip P. Barbour, of Virginia, Speaker.

³ Third session Forty-sixth Congress, Record, pp. 1050, 1051.

minority resolutions were before the House in a contested election case, the minority resolutions being the converse of the majority in their declarations. After the minority proposition, which had been offered as an amendment in the nature of a substitute, had been rejected, the point of order was made that this action decided the majority proposition, and that a further vote was unnecessary. The Speaker pro tempore (Mr. Adlai E. Stevenson, of Illinois) held that, as the substitute had been voted on, the question was then on the majority resolution.

656. A resolution declaring a Delegate (already seated on prima facie showing) entitled to his seat being laid on the table, his status was not thereby affected.—On July 23, 1868,¹ the House considered these resolutions:

Resolved, That William McGrorty is not entitled to a seat in this House as a Delegate from the Territory of Utah.

Resolved, That William H. Hooper is entitled to a seat in this House as a Delegate from the Territory of Utah.

The contestant, Mr. McGrorty, charged the sitting Member, Mr. Hooper, with having, as a Mormon, taken oaths inconsistent with his duties as a Delegate, with suspicious connection with the perpetrators of the Mountain Meadow massacre, etc. The official canvass showed, however, that Mr. Hooper received 15,068 votes and Mr. McGrorty 105. The contestant having been heard, the first resolution was agreed to and the second resolution was laid on the table.

As Mr. Hooper had already taken the oath and exercised his functions as a Delegate, the laying on the table of the resolution declaring him entitled to the seat did not affect his status. He continued to be a Member through this Congress.²

657. In 1792, 1804, and 1841 the House permitted parties in election cases to be heard by attorneys at the bar of the House.—On March 10, 1792, at the time of the trial of the contested election case of Jackson *v.* Wayne, leave was granted to the sitting Member “to be heard by his counsel at the bar of the House.”³

658. On March 1, 1804,⁴ in the contested election case of Moore *v.* Lewis, it was—

Resolved, That the memorialist and the sitting Member shall, if they desire it, be heard by counsel before the bar of the House.

On March 3 Mr. Lewis was heard by his counsel.

659. On September 4, 1841,⁵ the House agreed to a resolution that David Levy, claiming a seat as Delegate from Florida, be heard in person or by counsel at the bar of the House.

660. In 1836 the House, after full discussion, declined to permit the contestant in an election case to be heard by counsel at the bar of the House.—On March 2, 1836,⁶ when the House was about to proceed to the con-

¹Second session Fortieth Congress, *Globe*, pp. 4383–4389.

²Third session Fortieth Congress, *Journal*, p. 181.

³First session Second Congress, *Contested Elections in Congress, from 1789 to 1834*, p. 49.

⁴First session Eighth Congress, *Journal*, pp. 609, 615.

⁵First session Twenty-seventh Congress, *Journal*, p. 460.

⁶First session Twenty-fourth Congress, *Journal*, pp. 445, 468, 499, 500; *Debates*, pp. 2664, 2759.

sideration of the contested election case of Newland *v.* Graham, from North Carolina, a motion was made that the petitioner, David Newland, have leave to appear at the bar and address the House on the subject of his petition.

Mr. Jesse A. Bynum, of North Carolina, moved as an amendment to this motion "that he have leave to address the House by himself or counsel on the main question."

Over this motion a debate arose as to the propriety of allowing the petitioner to be heard by counsel. In support of his motion Mr. Bynum cited precedents in 1789 and 1804 in which the petitioner was heard by counsel.

On March 5 Mr. Bynum's amendment was disagreed to by the House, yeas 67, nays 112.

On March 12 a motion to reconsider this vote was decided in the negative, yeas 91, nays 96. Then the original motion that the petitioner have leave to appear at the bar and address the House was agreed to.¹

661. The House, in 1856, declined to permit a contestant who could not speak the English language to be heard by counsel at the bar of the House.—On May 8, 1856,² Mr. William R. Smith, of Alabama, from the Committee on Elections, submitted the following resolutions:

Resolved, That José M. Gallegos is not entitled to a seat in this body as a delegate from the Territory of New Mexico.

Resolved, That Miguel A. Otero is entitled to a seat in this body as such Delegate.

Resolved, That the parties to this contest be allowed to appear before this House, either in person or by counsel, to defend their respective claims.

The House proceeded first to the consideration of the last of the series of resolutions, which was reported principally for the reason that Mr. Gallegos could not speak the English language.

The subject was considered at length, Mr. Alexander H. Stephens, of Georgia, going into a careful examination of the precedents, and favoring the resolution as a result of that examination. But on May 9 the resolution was disagreed to.³

662. The contestant in an election case is sometimes permitted to address the House in his own behalf.—On January 30, 1896,⁴ Mr. John J. Jenkins, of Wisconsin, from the Committee on Elections No. 3, made a report in the case of Rosenthal *v.* Crowley, and gave notice that he would call up the case on the next day. Thereupon he asked unanimous consent of the House that the contestant be allowed one hour to debate when the case should come up.

The request was granted, there being no objection.

¹ On March 11 Mr. Bynum made an elaborate argument in favor of allowing the petitioner to be heard by counsel, citing numerous precedents, both American and English. (Debates, pp. 2737–2746.) This was replied to on March 12, also with a learned discussion of precedents. (Globe, p. 230.)

On July 16, 1840, in the New Jersey case, a proposition was made that the contestants be heard on the floor of the House by themselves or counsel; but was ruled out, the previous question having been ordered. (First session Twenty-sixth Congress, Journal, p. 1295.)

² First session Thirty-fourth Congress, Journal, pp. 943, 947, 952; Globe, pp. 1162, 1179, 1186.

³ Subsequently, on May 26 (Globe, p. 1302; Journal, p. 1045), Mr. Stephens presented from Mr. Gallegos 9, speech written in English and giving his case, which was ordered to be printed. Mr. Stephens presented this as privileged, but no issue was raised.

⁴ First session Fifty-fourth Congress, Record, pp. 1120, 1168.

663. The House in early years gave the privileges of the floor to contestants during discussion of the reports on their cases, with leave to speak on the merits.—On January 5, 1820,¹ Mr. John W. Taylor, of New York, chairman of the Committee on Elections, offered the following order to give privilege to a contestant for a seat:

Ordered, That Rollin C. Mallary have leave to occupy a seat on the floor of this House, pending the discussion of the report of the Committee on Elections upon his petition; and that he have leave to speak on the merits of the petition, and the report thereon.

The order was agreed to.

664. On January 6, 1824,² it was—

Resolved, That Parmelio Adams, who contests the election of Isaac Wilson, returned a Member of this House, be permitted to appear within the bar, and be heard in support of his petition, during the discussion of the report of the Committee on Elections on said petition.

665. In 1830,³ during consideration of the Tennessee contested election case of Arnold *v.* Lea, the contestant had as usual been admitted to the floor and had addressed the Committee of the Whole (wherein the case was considered), and had concluded. Thereupon the sitting Member was recognized and proceeded to address the committee. When he had concluded, the contestant requested recognition. A question being made as to his right to be heard, the chairman⁴ declared that he did not have the right, as it was not proper to have any collision between the petitioner and the sitting Member.

666. The House, in 1841, indicated its opinion that the returned Member might speak of right in his own election case, but that the contestant needed the consent of the House.—On January 5, 1841,⁵ the House, after some debate, voted that Charles J. Ingersoll, a contestant for the seat occupied by Charles Naylor, of Pennsylvania, have leave as well as Mr. Naylor, to address the House. This resolution created debate. The propriety of allowing Mr. Ingersoll to speak seems to have been admitted, but it was objected that the form of the resolution seemed to imply that the sitting Member also needed the permission of the House, whereas, it was contended, he had as much right to the floor as any other Member. Therefore the resolution, before being adopted, was amended by striking out the reference to Mr. Naylor.⁶

667. Form of resolution used in 1848 to give to a contestant the right to be heard in person at the bar of the House.—On March 29, 1848,⁷ the House agreed to the following resolution:

Resolved, That James Monroe, who contests the seat of David S. Jackson, have leave to be heard in person at the bar of this House.

¹First session Sixteenth Congress, Journal, p. 107 (Gales & Seaton ed.); Annals, p. 860.

²First session Eighteenth Congress, Journal, p. 119; Annals, p. 940.

³First session Twenty-first Congress, Journal, p. 137; Contested Elections (Clarke), p. 643.

⁴Mr. George McDuffie, of South Carolina.

⁵Second session Twenty-sixth Congress, Journal, p. 145; Globe, pp. 83, 84.

⁶A question arose as to whether, in view of the fact that the proceedings had arisen from a petition of people of the district, Mr. Ingersoll appeared as a claimant or as attorney for the people. It was shown that Mr. Ingersoll also had claimed the seat by petition, and the House, by a vote of 139 to 42, confirmed to him the privilege of being heard.

⁷First session Thirtieth Congress, Journal, p. 626; Globe, p. 549.

668. A contestant having the privilege of the floor with leave to speak “to the merits of said contest and the report thereon,” was permitted to speak on a preliminary question.—On January 27, 1858,¹ the contestant in the contested election case of *Vallandigham v. Campbell*, of Ohio, was, by resolution, allowed to occupy a seat on the floor “pending the discussion of the report” of the committee, and was given leave to speak “to the merits of said contest and the report thereon.”

On February 3 there arose a question as to whether the contestant could be on the floor and participate in the discussion of a resolution relating to extending the time for taking testimony in the case. By laying on the table a motion to reconsider the House permitted the contestant to be present and participate in the decision of the preliminary question. Precedents were cited to show that this was in accordance with the practice.

669. The practice of giving general permission to claimants for seats to enjoy the privileges of the floor was embodied in a rule in 1880.

The House in one case included the right to speak to the merits with a general permission to contestants to enjoy the privileges of the floor.

On July 5, 1861,² the House agreed to the following resolution:

Resolved, That the several gentlemen who shall have contests for seats pending before this House have the privilege of the floor during such contest, with the right to speak with regard to their respective cases.

Before this the above permission had been granted in each case as it came up.

670. On July 5, 1867,³ the House gave leave to contestants for seats to have the privileges of the floor until their cases should be disposed of.

671. In the Thirty-ninth Congress (1865–67)⁴ contestants for seats were, in each case from a loyal State, admitted by special resolution to seats on the floor, generally with the right to speak on the case. These resolutions were passed generally early in the session, giving the contestant the privilege during the time the case was being considered in committee, as well as during the time of actual consideration by the House.

But a general resolution giving the privilege of the floor to claimants from States lately in rebellion was negative yeas—40, nays, 111—on December 11, 1865.⁵

On December 12, 1865,⁶ a resolution reciting the loyalty of the persons claiming seats from Tennessee and granting them the privileges of the floor was laid on the table—yeas 90, nays 63—and then a resolution inviting these persons as individuals to seats on the floor, but not referring to them as claimants, was agreed to, yeas 133, nays 35.

672. In 1880,⁷ when the rules of the House were revised, a provision was inserted in Rule XXXIV allowing the privileges of the floor to “contestants in election cases during the pendency of their cases in the House.”

¹ First session Thirty-fifth Congress, *Globe*, pp. 452, 558.

² First session Thirty-seventh Congress, *Journal*, p. 20; *Globe*, p. 12.

³ First session Fortieth Congress, *Journal*, p. 165.

⁴ First session Thirty-ninth Congress, *Journal*, pp. 17, 41, etc.; *Globe*, pp. 9, 20, etc.

⁵ *Journal*, p. 47; *Globe*, pp. 21, 22.

⁶ *Journal*, pp. 53–55; *Globe*, p. 33.

⁷ Second session Forty-sixth Congress, *Journal*, p. 1552.

673. A resolution for the employment of a handwriting expert in an election case was admitted as privileged.—On January 13, 1904,¹ Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 3, offered, as involving a question of privilege, the following:

Resolved, That Committee on Elections No. 2 shall be, and is hereby, authorized to employ an expert in handwriting to pass upon such matters or questions as shall be submitted to him by said committee or any subcommittee thereof in the contested election case of *Bonyng v. Shafroth*, from the First Congressional district of Colorado, the expense of employing such expert to be paid out of the contingent fund of the House.

The resolution was entertained as a question of privilege,² and was agreed to by the House.

674. A proposition relating to the pay of a contestant for a seat is not a question of privilege.—On May 17, 1864,³ the House had disposed of the contested election cases of Joseph Segar and L. H. Chandler, of Virginia, when Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted, as a question of privilege, a resolution providing for payments out of the contingent fund of the House to the two claimants of sums equal to mileage and pay for the session up to the time of the decision of the cases.

Mr. William S. Holman, of Indiana, made the point of order that the resolution was not privileged.

The Speaker⁴ said:

The resolution would certainly not be privileged if delayed until after the subject had passed away from the House, but the Chair thinks that, offered in connection with the subject, it has been usually regarded as privileged.

675. On June 17, 1870,⁵ after the disposition of the contested election case of *Whittlesey v. McKenzie*, from Virginia, a resolution was presented for compensating the contestant.

Objection being made, the Speaker⁶ said:

The unqualified privilege of the Committee on Elections in regard to a report as to the right to a seat does not carry with it as privileged a resolution as to compensation. * * * Such a resolution is not privileged.

676. Reference to the laws relating to payment of contestants and contestees in an election case.

The amount for which a party to an election case may be reimbursed for expenses is limited by law.

A party to an election case must file a detailed account and vouchers in support of his claim for expenses.

Allowances for witness fees in an election case must be in strict conformity to section 128, Revised Statutes.

¹ Second session Fifty-eighth Congress, Journal, p. 142; Record, p. 721.

² Joseph G. Cannon, of Illinois, Speaker.

³ First session Thirty-eighth Congress, Globe, p. 2323.

⁴ Schuyler Colfax, of Indiana, Speaker.

⁵ Second session Forty-first Congress, Globe, p. 4519.

⁶ James G. Blaine, of Maine, Speaker.

The statutes¹ provide:

That hereafter no contestee or contestant for a seat in the House of Representatives shall be paid exceeding two thousand dollars for expenses in election contests; and before any sum whatever shall be paid to a contestant or contestee for expenses of election contests he shall file with the clerk of the Committee on Elections a full and detailed account of his expenses, accompanied by vouchers and receipts for each item, which account and vouchers shall be sworn to by the party presenting the same, and no charges for witness fees shall be allowed in said accounts unless made in strict conformity to section one hundred and twenty-eight, Revised Statutes of the United States.

677. Payments for the expenses of either party to an election case, may not be made by the House out of its contingent fund or otherwise.

The statutes provide:

No payment shall be made by the House of Representatives, out of its contingent fund² or otherwise to either party to a contested election case for expenses incurred in prosecuting or defending the same.³

¹20 Stat. L., p. 400.

²On February 19, 1861, a resolution was agreed to providing for the payment of the expenses of the contested elections out of the contingent fund of the House. (Second session Thirty-sixth Congress, Journal, p. 350; Globe, p. 1030.)

³Revised Statutes, sec. 130.