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HINDS' PRECEDENTS

OF THE

HOUSE OF REPRESENTATIVES

OF THE

UNITED STATES

INCLUDING REFERENCES TO PROVISIONS
OF THE CONSTITUTION, THE LAWS, AND DECISIONS
OF THE UNITED STATES SENATE

By
ASHER C. HINDS, LL.D.
Clerk at the Speaker's Table

VOLUME I

PUBLISHED BY AUTHORITY OF THE ACT OF CONGRESS
APPROVED MARCH 4, 1907

WASHINGTON
GOVERNMENT PRINTING OFFICE
1907

INTRODUCTION.

The value of precedents in guiding the action of a legislative body has been demonstrated by the experience of the House of Representatives for too many years to justify any arguments in their favor now. "We have no other means of building up parliamentary law, either in the Mother Country or here," said a great lawyer, who was also an experienced legislator,[1] "except by instances as they arise and treatment of them and disposition of the law and of the good reasons that should govern these considerations." And a great legislator, who had served a lifetime in the House of Representatives and the Senate[2] concluded that "the great body of the rules of all parliamentary bodies are unwritten law; they spring up by precedent and custom; these precedents and customs are this day the chief law of both Houses of Congress."

In the House of Representatives, as in other legislative bodies, the memories of the older Members, as they might be corroborated by the journals, have been the favorite and most readily accessible repository of the precedents; but as the generations of statesmen come and go much is lost, and many useful precedents cease to be available except as from time to time the voluminous pages of the journals may be searched hastily under the stress of some pressing question.

It is manifestly desirable, on a floor where high interests and great passions strive daily, that the rules of action should be known definitely, not only by the older members, but by all. Not only will the Speaker be enabled to make his decisions with more confidence and less fear that he may be swayed by the interests of the moment, but the Members, understanding the rules of his action, will sustain with commendation what they might have criticised with asperity. Thus, good order and dignity will be preserved to the body.

Mr. Jefferson, quoting with approval the famous English Speaker Onslow, has dwelt on the necessity of an adherence to the rules of procedure in order that the minority, as the weaker party, may be protected from the abuses "which the wantonness of power is but too apt often to suggest to large and successful majorities." The protection of the minority in its proper functions of examining, amending, and sometimes persuading the House to reject the propositions of the majority is an essential requirement of any sound system of procedure. Edmund Burke, when commiserated on his toilsome and apparently fruitless years as an opposition statesman in the House of Commons, explained that he found his reward in the fact that the minority which he led had caused many wise modifications of ministerial measures, and had also caused others to be abandoned in view of

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[1] William M. Evarts, in the United States Senate. First session Forty-ninth Congress, Record, p. 7353.

[2] John Sherman, in the Senate. First session Forty-fourth Congress, Record, p. 433.

the honest and intelligent criticism which they would meet. When Mr. Jefferson wrote no one had seriously conceived that a minority might go further than this lofty and useful duty. But as the House of Representatives grew in size the rules and practice put into the hands of the minority the power of obstruction. This power grew to such proportions during the portentous legislative struggles preceding and following the civil war that at last it amounted to the absolute power to stop legislation entirely. Not only was the power justified because it was established, but it attained a certain degree of respectability as it enwrapped itself in the theory that on great questions the wisdom of the few should be permitted to thwart the rashness of the many. The abundant checks and balances devised by the framers of the Constitution to save the Government from popular passions were considered by a large school of statesmen inadequate without the added check of obstruction. Mr. Speaker Reed, in 1890, destroyed this system by the enunciation of the principle that the processes of a legislative body might not be used to destroy its powers; and since that day the minority has been remitted to its historic functions. The rulings then made constitute the only important reversal in the lines of precedent which as a whole have built up for the minority a safeguard for its legitimate duties, and for the majority a flexible and effective instrumentality for its necessary achievements.

In another respect the value of precedent to the House of Representatives should not be overlooked. The framers of the Constitution experienced little uncertainty as to the functions and powers of the House. In the Colonial Assemblies there was existing a political institution, indigenous to America, and proven by the long conflict arising from the attempts of the English Kings to establish arbitrary power. The people of America had fought the first battle of liberty in the Colonial Assemblies. Nowhere else, among the great nations of the earth, did the people possess such a perfect means of expressing their will. It was natural, therefore, that the framers of the Constitution should at once have conceived of a National House of Representatives, framed on the model of the Colonial Houses, and should have guaranteed to it the powers and privileges necessary for its preservation as the organ of the will of the whole people. It is a duty and a national necessity that those powers and privileges be preserved in their pristine vigor; and there is no surer way to this end than perfect information on the part of every Member of the House as to what they are. One of the chief ends proposed by this work has been the collection and classification of the precedents relating to this subject in such a way that they may always be clearly before the membership of the House. If the prerogatives of the House are wen understood, other branches of the Government are less likely to encroach on them; and if there be encroachment, it is more likely to be met with promptness, intelligence, and firmness.

It has been the habit of a certain school of statesmen to picture a fancied decay of the importance of the House as a branch of the Government. A critical examination of the present and past condition of its powers and privileges affords no foundation for this theory, which derives dignity only from the fact that it has been advanced from time to time for nearly a century. Perhaps it is to be explained by a confusion of ideas, resulting from the undoubted fact that

with the great increase of membership the individual Representative has lost much of freedom and opportunity. This is a condition of all large bodies, well understood as long ago as when Thackeray, in writing the pages of Pendennis, caused his chief character to be informed that as a young member of Parliament his only duty would be to do as he might be directed by the leaders. From the ruling by which Mr. Speaker Clay repressed the superabounding individuality of John Randolph to the latest rulings by Mr. Speaker Cannon, the pages of these volumes show a constant subordination of the individual to the necessities of the whole House as the voice of the national will.

A hall of business, not always orderly and usually noisy, appeals to the imagination less favorably than a quiet and dignified school of debate. But if beneath the apparent confusion there can exist a system of procedure, just to all the members and at the same time conducive to an efficient performance of the duties of the body, the great objects of the House will be attained, and its place in the confidence and respect of the people will be unassailable. If the precedents which are gathered in these volumes can contribute to the perfection and maintenance of such a system, and cause it to be understood and appreciated within the House and without, the labor of their preparation will not have been in vain.

It can not, of course, be claimed that the system of the House's procedure is perfect, or that changes will not result in the future as in the past from the multiplied experiences of successive Congresses. And it is of the highest importance that those changes proceed on a basis of sound principles, having in view the maintenance of efficiency as a legislative body, integrity in methods of determination, freedom and fairness in deliberation, and as great privileges to the individual as are consistent with the rights of all. This happy development WM be promoted if from these precedents it shall be possible to understand readily and accurately the fundamental theories of the House's law.

Abundant references have been made to precedents of the United States Senate where they are of such a nature as to throw light on principles related to the procedure of the House, but no attempt has been made to make a complete collection of them. Some of those that are given are of the highest value, representing conclusions formed after careful examination.

In references to dates and volumes of debates and journals many thousands of footnotes are given. It is not reasonable to hope that no errors have crept in, but the system of double reference to dates and paging is such that the text of the work may be corroborated without difficulty from the pages of the journals and debates.

ASHER C. HINDS

PORTLAND, ME., *September 3, 1907.*

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THE MEETING OF CONGRESS.

1. **Provisions of Constitution and Statutes. Sections 1 and 2.**
2. **Assembling of the First Congress as fixing beginning of terms. Section 3.**[1]
3. **Time of assembling as governed by proclamation, law, and Constitution. Sections 4–13.**

1. The Constitution provides for the annual meeting of Congress.—Section 4, Article I of the Constitution, provides:

> The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Also, in section 3 of Article II, the further provision is made that the President of the United States "may, on extraordinary occasions, convene both Houses, or either of them."[2]

2. In certain exigencies the President may convene Congress at a place other than the seat of government.

The District of Columbia is the seat of government.

Section 34 of the Revised Statutes, reenacting the law of April 3, 1794 (1 Stat. L., p. 353), provides:

> Whenever Congress is about to convene and from the prevalence of contagious sickness or the existence of other circumstances, it would, in the opinion of the President, be hazardous to the lives or health of the Members to meet at the seat of government, the President is authorized, by proclamation, to convene Congress at such other place as he may judge proper.[3]

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[1] The term of the Member must be coincident with the term of the Congress (see sec. 388 of this volume); but in the earlier practice this was not necessarily so as to a Delegate from a Territory (see sec. 403 of this volume).

[2] Congress has frequently met on a day other than the first Monday in December, being convened sometimes by a law and sometimes by the President. (See Journals of the House for the First, Second, Fifth, Eighth, Tenth, Eleventh, Twelfth, Thirteenth, Twenty-fifth, Twenty-seventh, Thirty-fourth, Thirty-seventh, Fortieth, Forty-first, Fortysecond, Forty-fifth, Forty-sixth, Fifty-third, and Fifty-fifth Congresses.) Sometimes Congress, having been convened before the first Monday in December, has continued its session to and beyond that day, and having adjourned sine die has not, if it was a first session, convened again until the first Monday of the next December. (See Journals of the House for the Second, Eighth, Tenth, Eleventh, and Twelfth Congresses.) A Congress expires on March 3 of the odd year, and its successor may be convened on the next day, March 4 (See Journal of House for Fortieth Congress), although by the Constitution it would naturally not meet until the first Monday of the succeeding December.

[3] The act of July 16, 1790 (1 Stat. L., p. 130) had provided that the seat of government should be transferred to the District of Columbia by the first Monday of December, 1800.

3. By resolution of the Continental Congress the First Congress under the Constitution met on March 4, 1789.

The term of a Congress begins on the fourth of March of the odd-numbered years, and extends through two years.

A Member elected to fill a vacanty serves no longer time than the remainder of the term of the Member whose place he takes.

The House sometimes appoints a committee to act with a similar committee from the Senate in relation to some question of moment.

On April 30, 1790,[1] the House agreed to the following:

Resolved, That a committee of this House be appointed, to join with a committee to be appointed by the Senate, to consider and report their opinion on the question when, according to the Constitution, the terms for which the President, Vice-President, Senators, and Representatives have been respectively chosen, shall be deemed to have commenced.

Messrs. Egbert Benson, of New York; George Clymer, of Pennsylvania; Benjamin Huntingdon, of Connecticut; Andrew Moore, of Virginia, and Daniel Carroll, of Maryland, were appointed a committee.

To these the Senate joined[2] Messrs. Oliver Ellsworth, of Connecticut; Rufus King, of New York; and Robert Morris, of Pennsylvania.

On May 18[3] the House agreed to report as follows:

That the terms for which the President, Vice-President, Senate, and House of Representatives of the United States were respectively chosen, did, according to the Constitution, commence on the fourth of March, 1789. And so the Senators of the first class, and the Representatives, will not, according to the Constitution, be entitled, by virtue of the same election by which they hold seats in the present Congress, to seats in the next Congress, which will be assembled after the third of March, 1791. And further, that whenever a vacancy shall happen in the Senate or House of Representatives, and on election to fill such vacancy, the person elected will not, according to the Constitution, be entitled, by virtue of such election, to hold a seat beyond the time for which the Senator or Representative in whose stead such person shall have been elected, would, if the vacancy had not happened, have been entitled to hold a seat.

The committee recommended the passage of a law regulating the choice of electors, etc.

This report had been previously agreed to in the Senate.[4]

The first session of the First Congress assembled, as shown by the Journal of the House—

on Wednesday, the fourth of March, 1789, pursuant to a resolution of the late Congress, made in conformity to the resolutions of the Federal Convention of the 17th of September, 1787.

The late Congress, which was the Continental Congress, it being ascertained that the required number of States had ratified the Constitution, had on September 13, 1788—[5]

Resolved, That the first Wednesday in January next be the day for appointing electors in the several States, which, before the said day, shall have ratified the said Constitution; that the first Wednesday in February next be the day for the electors to assemble in their respective States and vote for a President, and that the first Wednesday in March next be the time and the present seat of Congress the place for commencing proceedings under the said Constitution.

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[1] Second session First Congress. Journal, p. 207 (Gales & Seaton, ed.); Annals, p. 1603.

[2] Annals, p. 1006.

[3] Journal, p. 218 (Gales & Seaton, ed.); Annals, p. 1638.

[4] Journal, p. 216 (Gales & Seaton, ed.); Annals, p. 1010.

[5] Journal of Continental Congress, edition of 1823, Vol. IV, p. 866.

4. It being desirable that the hour of the first meeting of a Congress should be later than 12 m., the purpose was effected by a joint resolution.— In 1869 a law provided that the next Congress should, as had the current Congress, meet on the 4th day of March. As the 4th day of March, 1869, would be the day of the inauguration, Congress passed a joint resolution providing that the time for the regular meeting of the House of Representatives should be postponed from 12 o'clock meridian on March 4, 1869, to the hour of 3 o'clock in the afternoon of the same day.[1]

5. The First Congress by law appointed for its second meeting a day later than the day fixed by the Constitution.

The First Congress having met once in each of its two years of existence, a doubt existed as to whether or not it would legally meet again on the day appointed by the Constitution.

Instance wherein Congress in adjourning fixed by resolution the time of meeting of the next session on the constitutional day.

Instances of laws fixing the time of annual meeting of Congress.

The First Congress met on March 4, 1789,[2] in accordance with the terms of a resolution of the Continental Congress.[3] This session continued until September 29, 1789. Before adjourning the following law was enacted, being approved September 29, 1789:

> That after the adjournment of the present session, the next meeting of Congress shall be on the first Monday in January next.[4]

Thus it will be observed that the law fixed a date later than the first Monday in December specified by the Constitution. The second session extended from January 4, 1790, until August 12, 1790.[5] The third session began on the constitutional day, the first Monday of December, 1790, but apparently some doubt existed as to whether the Constitution would require a meeting on that day, for, on August 10,[6] near the close of the second session, the House Journal has this entry:

> A message from the Senate by Mr. Otis, their Secretary:
>
> Mr. Speaker: The Senate have come to a resolution that the resolution of the 6th instant, authorizing the Speaker of the House of Representatives and President of the Senate to close the present session by adjourning their respective Houses on this day be repealed, and that instead thereof they be authorized to adjourn their respective Houses on the 12th instant, to meet again on the first Monday in December next; to which they desire the concurrence of this House.

And then he withdrew.

The House proceeded to consider the said resolution, and, the same being read, was agreed to.

The journal of December 6, 1790,[7] the first day of the third session, has these introductory words in reference to the date: "On which day, being the day appointed by adjournment of the two Houses for the meeting of the present session."

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[1] Third session, Fortieth Congress, Journal, pp. 404, 405, 486; Globe, pp. 1425, 1582.

[2] First session, First Congress, Journal, p. 3 (Gales & Seaton ed.).

[3] Journal of Continental Congress, edition of 1823, Vol. IV, p. 866.

[4] 1 Stat. L., p. 96.

[5] Journal, pp. 134, 298.

[6] Journal, pp. 296, 297.

[7] Journal, p. 330.

6. Early Congresses, having by law met on a day earlier than the constitutional day, remained in continuous session to a time beyond that day.

In 1797 the Congress assembled on the day constitutionally provided by law, although it had already held a session that year.

The early laws fixing the time for the meeting of Congress specified the day but not, the hour.

At the last session of the First Congress the following law was enacted, being approved March 2, 1791: [1]

> That after the third day of March next, the first annual meeting of Congress shall be on the fourth Monday of October next.

Accordingly the first session of the Second Congress met October 24, 1791,[2] and it continued in session until May 8, 1792. No attention was paid to Monday, December 5, 1791 (the day appointed for the assembling of Congress ordinarily), the sessions of the House proceeding uninterruptedly over that period.

At this first session of the Second Congress this law [3] was enacted, being approved May 5, 1792:

> That after the adjournment of the present session, the next annual meeting of Congress shall be on the first Monday in November next.

Accordingly the second session met on November 5, 1792,[4] and continued in session through Monday, December 3, 1792, the day prescribed by the Constitution.

7. The first session of the Third Congress met on the constitutional day, December 2, 1793,[5] but it was provided by law that the second session should meet on the first Monday in November.[6] So accordingly it met on November 3, 1794[7] and continued in session without interruption through Monday, December 1, the constitutional day.

Both sessions of the Fourth Congress met on the days appointed by the Constitution.[8]

The act of March 3, 1797,[9] provided that the next meeting of Congress should be on "the [first?] Monday of November in the present year;" but the President convened the Fifth Congress in extraordinary session on May 15, 1797.[10] This session lasted until July 10. Then, on Monday, November 13, 1797,[11] the "day appointed by law," as the Journal says, the regular session began. This continued through Monday, December 4, the constitutional day, without interruption.

The third session of the Fifth Congress met on the day appointed by the Constitution.

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[1] Stat. L., p. 198.

[2] First session Second Congress, Journal, p. 433 (Gales & Seaton ed.).

[3] 1 Stat. L., p. 267.

[4] Second session Second Congress, Journal, p. 609.

[5] First session Third Congress, Journal, p. 3.

[6] 1 Stat. L., p. 370.

[7] Second session Third Congress, Journal, p. 223.

[8] Journal, pp. 364, 606.

[9] 1 Stat. L., p. 507.

[10] First session Fifth Congress, Journal, p. 3.

[11] The statute says first Monday, but the House met November 13, which was the second Monday.

8. The first session of the Sixth Congress met on the day appointed by law; but the act of May 13, 1800,[1] convened the second session on the third Monday of November, 1800. It met on that day and continued in session through Monday, December 1, 1800,[2] the day appointed by the Constitution.

The second sessions of both the Tenth and Eleventh Congresses were convened by law; but in neither of these laws nor in any of the previous laws convening Congress was the hour of meeting specified in the law.

9. On May 22, 1809,[3] the day appointed by law[4] for the meeting of the session, the first session of the Eleventh Congress convened, and remained in session until June 28, 1809. At this session the following law[5] was passed:

> That after the adjournment of the present session, the next meeting of Congress shall be on the fourth Monday of November next.

On November 27, 1809,[6] in accordance with the law, the Congress met in its second session, and continued in session until May 1, 1810. When the first Monday in December, 1809, arrived (the day prescribed by the Constitution for the meeting of Congress ordinarily) the House continued its session without any recognition of the day.[7]

The second sessions of both the Fifteenth and Sixteenth Congresses were convened by law on a day earlier than the constitutional day, and remained in sessions through that day. Neither of these laws specified the hour of meeting.

10. Early Congresses, convened either by proclamation or law on a day earlier than the constitutional day, remained in continuous session to a time beyond that day.

In the later but not the earlier practice the fact that Congress has met once within the year does not make uncertain the constitutional mandate to meet on the first Monday of December.

Instances wherein Congress has been convened by proclamation or by law.

Instance wherein a law convening Congress specified the hour as well as the day.

At the second session of the Seventh Congress, by the act approved March 3, 1803,[8] it was provided:

> That after the adjournment of the present session, the next meeting of Congress shall be on the first Monday of November next.

But by proclamation of the President the Eighth Congress was convened on October 17, 1803,[9] and remained in session until March 27, 1804. The session

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[1] 2 Stat. L., p. 85.

[2] Second session Sixth Congress, Journal, p. 733.

[3] First session Eleventh Congress, Journal, pp. 3, 102 (Gales & Seaton ed.).

[4] 2 Stat. L., p. 514. This law, passed by the Tenth Congress, provided: "That after the adjournment of the present session, the next meeting of Congress shall be on the fourth Monday of May next."

[5] 2 Stat. L., p. 549.

[6] Second session Eleventh Congress, Journal, pp. 105, 428.

[7] See also journals of the First, Second, Third, Fifth, Sixth, Eighth, and Tenth Congresses, when sessions were convened before the arrival of the constitutional day.

[8] 2 Stat. L., p. 242.

[9] First session Eighth Congress, Journal, p. 401.

continued without break through Monday, November 7,[1] the day appointed by law, and through Monday, December 5,[2] the day appointed by the Constitution.

The second session of the Eighth Congress met November 5, 1804,[3] in accordance with a law approved March 26, 1804,[4] and continued in session through and beyond Monday, December 3, 1804, the day appointed by the Constitution.

No law changed the constitutional date for the first meeting of the Tenth Congress, but it was convened by proclamation of the President on October 26, 1807,[5] and remained in session until April 2, 1808, without any break for the constitutional day of meeting, Monday, December 7.[6]

A law approved April 22, 1808,[7] provided that the second session of the Tenth Congress should meet November 7, 1808, and it did so meet and continued in session through Monday, December 5,[8] the day appointed by the Constitution.

The first session of the Twelfth Congress was convened by proclamation of the President on November 4, 1811,[9] and continued in session until July 6, 1812, no change in the ordinary proceedings occurring on Monday, December 2, 1811,[10] the day appointed by the Constitution for the assembling of Congress ordinarily.

By act approved July 6, 1812,[11] the time for the meeting of the next session was fixed on "as the first Monday of November next," and on that day the House assembled and continued in session through Monday, December 7, 1812, the day appointed by the Constitution.[11]

The first and second sessions of the Thirteenth Congress were called by law, the second session adjourning on April 18, 1814. At this second session a law was passed and approved April 18, 1814,[12] fixing "the last Monday in October next" for the next meeting of Congress. But the President, by proclamation, convened the session before that day, on September 19, 1814,[13] and it continued in session through Monday, October 21, the day appointed by law, and Monday, December 5, the day appointed by the Constitution.[14]

11. The first session of the Thirteenth Congress met, in accordance with law,[15] on May 24, 1813, and ended August 2, 1813. At this session the following law was passed, being approved on July 27, 1813:[16]

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[1] Journal, p. 438.

[2] Journal, p. 467; Annals, p. 641. Nathaniel Macon, of North Carolina, was Speaker.

[3] Second session Eighth Congress, Journal, pp. 3, 29.

[4] 2 Stat. L., p. 293.

[5] First session Tenth Congress, Journal, p. 4.

[6] Journal, p. 66: Annals, p. 1058. Joseph B. Varnum of Massachusetts, was Speaker.

[7] 2 Stat. L., p. 490.

[8] Second session Tenth Congress, Journal, p. 374.

[9] First session Twelfth Congress, Journal, pp. 3, 49. Henry Clay, of Kentucky, was Speaker.

[10] First session Twelfth Congress, Annals, p. 395.

[11] 2 Stat. L., pp. 781, 782; second session Twelfth Congress, Journal, pp. 537, 575.

[12] 3 Stat. L., p. 128.

[13] Third session Thirteenth Congress, Annals, p. 750.

[14] Journal, third session, pp. 447, 509, 562. Langdon Cheves, of South Carolina, Speaker.

[15] 2 Stat. L., p. 804.

[16] 3 Stat. L., p. 48.

That after the adjournment of the present session, the next meeting of Congress shall be on the first Monday of December next.

When the second session assembled on Monday, December 6, 1813, the Journal records that it was "the day appointed by law," rather than the day appointed by the Constitution.[1]

In the Twenty-fifth, Twenty-seventh, Thirty-fourth, Thirty-seventh, Forty-sixth, Fifty-third, and Fifty-fifth Congresses special sessions were called by the President; but in no case was it thought necessary by law to fix the next meeting after the special session, but the provision of the Constitution was left to operate.[2]

The Fortieth, Forty-first, and Forty-second Congresses were convened in accordance with the terms of the following law, approved January 22, 1867:[3]

That in addition to the present regular times of meeting of Congress, there shall be a meeting of the Fortieth Congress of the United States, and of each succeeding Congress thereafter, at twelve o'clock meridian,[4] on the fourth day of March, the day on which the term begins for which the Congress is elected, except that when the fourth day of March occurs on Sunday, then the meeting shall take place at the same hour on the next succeeding day.[5]

At no one of the special sessions called by this law was it thought necessary to provide by law for the next session to begin on the constitutional day (the first Monday of December), but the Congress convened that day in obedience to the Constitution.

12. One Congress having by law provided a time for the meeting of the next Congress, that Congress nevertheless met at an earlier day on call of the President.

Early sessions of Congress convened by law.

An early instance wherein the proclamation of the President convening Congress was not printed in the Journal.

On March 3, 1797,[6] the President approved the following law:

That after the end of the present session, the next meeting of Congress shall be on the first Monday of November, in the present year.

But on the 25th of March, 1797, the President (John Adams) by proclamation convened Congress to meet on May 15, 1797, to consider "divers weighty matters."[7]

Some question arose in the House as to the effect this extra session would have on the session provided for by law, and a conference with the Senate on the subject was proposed by the House, but declined by the Senate.[8]

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[1] Second session Thirteenth Congress, Journal, p. 159.

[2] See Statutes at Large, vols. 5, 11, 12, 21, 28, and 30.

[3] 14 Stat. L., p. 378.

[4] This is the first time that the hour of meeting is specified in a law providing for a meeting of Congress.

[5] Repealed by law of the Forty-second Congress.

[6] Second session Fourth Congress, 1 Stat. L., p. 587. The following sessions were, as to date of beginning, fixed by law: Those beginning on first Mondays of January, 1790, of October, 1791, of November, 1792, of November, 1794, of November, 1797. See I Stat. L., pp. 96, 198, 267, 370, 507.

[7] First session Fifth Congress; Annals, p. 50. This proclamation does not appear in the House Journal.

[8] First session Fifth Congress, Journal, pp. 50, 52 (Gales & Seaton ed.); Annals, pp. 28, 377.

On the first Monday of November the regular session met as provided by law.[1]

13. The statutes provide that in case of the removal, death, resignation, or inability of both President and Vice President during a recess of

[1] On January 29, 1904 (second session Fifty-eighth Congress, Record, pp. 1401, 1402), the urgent deficiency appropriation bill was under consideration in Committee of the Whole House on the state of the Union, and the committee were considering the question of the mileage of Members and the constitutional question involved therein.

In the course of the debate Mr. Allan L. McDermott, of New Jersey, raised an incidental question:

"My understanding of the Constitution is that there are two kinds of sessions of Congress. One what might be called the President's session, the other the constitutional session. The constitutional session has this provision in the Constitution, that neither House shall adjourn for more than three days without the consent of the other. Now, the session of Congress which I may designate as the Presidential session is under the control of the Executive. I call the gentleman's attention to page 23, section 3, of the book that he has in his hand.

"On extraordinary occasion on which the President may convene both Houses in case of disagreement between them in respect to the time of adjournment, he may adjourn them to such time as he shall think proper. Now, if there has not been in its relation to the Executive any change in the session—in other words, if it is not another sitting as contemplated by the Constitution—then the President can adjourn Congress to-day to such time as he think fit, if there be a disagreement.

"* * * The President has no power to intervene unless the session is an extraordinary one. In other words, the President's session is to be held until they agree to adjourn, or until he tells them to adjourn. The question can not arise at a regular session. The President of the United States can not adjourn Congress as it is now constituted. We can remain in session for two years, from one session to another, and he can not adjourn it. Therefore the session which is called by the President of the United States has a constitutional distinction from that session which is called by the Constitution Itself." (Mr. McDermott later elaborated his discussion of this question. See Appendix of Record, p. 72.)

On January 30 (Record, pp. 1411, 1412), the debate continuing, Mr. Charles E. Littlefield, of Maine, said:

"I wish to say just a word with reference to the suggestion very pertinently and forcefully made last evening by the distinguished gentleman from New Jersey [Mr. McDermott], and that is with reference to the question as to whether the clause providing that the President may adjourn Congress from time to time is limited in its operations to a special or extraordinary or Presidential session, so called. If so limited, beyond any question it would create a constitutional distinction between the two sessions, which undoubtedly would settle the question pending.

"Since the adjournment last evening I have taken occasion to examine Madison's Journal of the Constitutional Convention, and the Federalist, upon that precise point, for the purpose of ascertaining what light, if any, might be derived from that source, and I should be glad to give the committee the benefit of the investigation.

"I find in the report of the committee on detail, made on August 6, 1787, that the clause in question appears in Article X, section 2, which reads as follows:

"'Sec. 2. He shall from time to time give information to the Legislature of the state of the Union. He may recommend to their consideration such measures as he shall judge necessary and expedient. He may convene them on extraordinary occasions. In cases of disagreement between the two Houses with regard to the time of adjournment he may adjourn them to such time as he thinks proper. He shall take care that the laws of the United States be duly and faithfully executed. He shall commission all the officers of the United States, and shall appoint officers in all cases not otherwise provided for by this Constitution. He shall receive ambassadors, and may correspond with the supreme executive of the several States. He shall have power to grant reprieves and pardons, but his pardons shall not be pleadable in bar of an impeachment. He shall be Commander in Chief of the Army and Navy of the United States and of the militia of the several States.

"'He shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during his continuance in office. Before he shall enter on the duties of his Department he shall take the following oath or affirmation: "I, ———, solemnly swear (or affirm) that I will faithfully execute the office of President of the United States of America." He shall be removed from his

Congress, the Secretary who acts as President shall convene Congress in extraordinary session.

office on impeachment by the House of Representatives, and conviction in the Supreme Court of treason, bribery, or corruption. In case of his removal, as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties until another President of the United States be chosen, or until the disability of the President be removed (Journal of Constitutional Convention (Madison). Scott, Forseman & Co., editors, vol. 11, p. 457.)'

"This is the first time the clause appears in the proceedings of the convention. It appears in a section defining the powers and duties of the President with the clause authorizing the convening of Congress in an extraordinary session, where they would naturally be expected to appear. It will be observed that the two propositions are found in separate and distinct sentences. One sentence reads:

"'He may convene them on extraordinary occasions.'

"And the other—

"'In case of disagreement between the two Houses with regard to the time of adjournment, he may adjourn them to such time as he thinks proper.'

"In this section the argument of juxtaposition as a reason why the clause in question is a limitation upon the so-called 'Presidential session' clearly fails.

"In the report on the committee on style, which had no power to change any substantive provision of the Constitution and only had the power to perfect the language and arrangement, made on September 12, 1787, these two independent sentences are grouped together, making two clauses of one sentence in Article II, section 3 (ibid., 709), reading as follows:

"'He may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper, etc.'—

"transposing the first sentence and slightly varying the second. Article X, section 2, down to and including the clause 'He shall commission all officers of the United States,' in the report of the committee on detail, appears in the report of the committee on style, in Article II, as section 3. The substance of the remainder of section 2, considerably transposed and with considerable change of verbiage, is found in sections 1 and 2 of Article II, in the report of the committee on style.

"Under these conditions the argument of juxtaposition seems entitled to but little weight. There is nothing said, so far as I can find in the debates in the convention, upon the construction of this clause—simply the report of the committee on detail, and later on the report of the committee on style.

"In the Federalist, in No. 68, written by Mr. Alexander Hamilton, who was also a member of the committee on style, reporting the Constitution in the language in which it now stands, this clause is referred to and construed. This is the great paper in which Mr. Hamilton is defining the powers and the limitations upon the power of the President of the United States, and with reference to this specific point he says:

"'Fourthly. The President can only adjourn the National Legislature in the single case of disagreement about the time of the adjournment,'

"I ask the Chair to note this. If this clause is limited to a special session, it is a very important and significant limitation. Mr. Hamilton is undertaking to define in this paper the limitations upon the Presidential power, and he fails to cite this important and significant limitation. Therefore it is a fair inference that in his judgment—he having made the report or taken a part in the report of the committee on style, and responsible for the language as it now stands—it was not limited in its operation to a special session, but applied generally. His first illustration of an analogous power is that 'the British monarch may prorogue or even dissolve Parliament.' This illustration, of course, can not be confined to special sessions, but applies to all sessions. Further, by way of illustration, he says:

"'The governor of New York may also prorogue the legislature of this State for a limited time; a power which, in certain situations, may be employed to very important purposes,—

"Applicable, apparently, to every session.

"Of course it is not conclusive, but it is significant, and if the Chair please, I point to the fact that while Hamilton elaborates the proposition, he in no sense intimates that it is confined in its application to a special session of Congress. If it is true that this clause is confined to special sessions, it is a most important limitation, and should have been emphasized rather than omitted by Hamilton. To hold that Hamilton omitted it is to impeach either his intelligence or candor, neither of which can be done successfully."

The act of January 19, 1886,[1] provides that "in case of removal, death, resignation, or inability of both the President and Vice-President of the United States," then the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Treasury, and so on to the Secretary of War, the Attorney-General, the Postmaster-General, the Secretaries of the Navy and Interior, shall act as President if they be eligible and not under impeachment; and it is further provided—

That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting.

[1] 24 Stat. L., p. 1.

CHAPTER II.

THE CLERK'S ROLL OF THE MEMBERS-ELECT.

1. **The statutes governing the making of the roll. Sections 14, 15.**
2. **Early usage as to examination of credentials. Sections 16–18.**
3. **Corrections of the Clerk's roll by the House. Sections 19–25.**
4. **Enrolling names of Members deceased, resigned, or disqualified. Sections 26–29.**[1]
5. **Enrolling on the strength of irregular credentials. Sections 30–39.**[2]
6. **Enrolling on the strength of conflicting or imperfect credentials. Sections 40–60.**
7. **Enrollment of Delegates. Sections 61, 62.**
8. **Withdrawal of credentials. Section 63.**

14. The law of 1863 makes it the duty of the Clerk of the preceding House to make a roll of the Representatives-elect whose credentials show them regularly elected.—Section 31 of the Revised Statutes, reenacting legislations of March 3, 1863,[3] and February 21, 1867, provides:

Before the first meeting of each Congress the Clerk of the next preceding House of Representatives shall make a roll of the Representatives-elect, and place thereon the names of those persons, and of such persons only, whose credentials[4] show that they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States.

15. The duty of making up the roll of Members-elect, in event the Clerk can not act, devolves on the Sergeant-at-Arms, and next on the Doorkeeper.—Section 32 of the Revised Statutes, reenacting the law of February 21, 1867 (14 Stat. L., p. 397) provides:

In the case of a vacancy in the office of Clerk of the House of Representatives, or of the absence of inability of the Clerk to discharge the duties imposed on him by law or custom relative to the preparation of the roll of Representatives or the organization of the House, those duties shall devolve on the Sergeant-at-Arms of the next preceding House of Representatives.

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[1] Clerk declines to enroll when bearer of credentials is not of required age. (Sec. 418 of this volume.)

[2] See sections 328, 366, and 376 of this volume for other cases of informal credentials, and sections 317, 388, 522, and 523 of this volume for cases wherein the Clerk declined to enroll because of election in excess of apportionment or doubts as to legal time of election.

[3] The act of 1863 (12 Stat. L., p. 804) was in substantially the present form. The act of 1867 (14 Stat. L., p. 397) made temporary provisions relating to the States lately in secession.

[4] In 1877 a bill was introduced to prescribe the form of credentials and directing the manner in which the roll should be made up. But it was not reported from the committee to which it was referred. (First session Forty-fifth Congress, Record, p. 253; Journal, p. 165.)

SEC. 33. In case of vacancies in the offices of both the Clerk and the Sergeant-at-Arms, or the absence or inability of both to act, the duties of the Clark relative to the preparation of the roll of the House of Representatives or the organization of the House shall be performed by the Doorkeeper of the next preceding House of Representatives.

16. In the early years of the House the credentials were examined by the Committee on Elections; but this practice fell into disuse.—On April 18, 1789,[1] a report was submitted from the Committee on Elections that the committee had, according to order, examined the certificates and other credentials of the Members returned to serve in this House, and had agreed to a report thereupon; which was twice read and agreed to by the House.

The report stated:

It appears to your committee that the credentials of the following Members are sufficient to entitle them to take their seats in this House. [The names follow.]

On October 28, 1791,[2] at the opening of the Second Congress, the procedure was the same.

17. On February 19, 1838,[3] Mr. John Quincy Adams of Massachusetts, proposed the following resolution:

Resolved, That at the commencement of the first session of every Congress of the United States, every person claiming a seat in the House of Representatives shall, before taking his seat, furnish the. Clerk of the House the credentials authenticating his election as a Member of the House; and, in calling over the roll of Members appearing to take their seats, the Clerk of the preceding House shall not include in the call any person who appears without producing his credential.

Debate arising over this resolution, its consideration was deferred, and it was not acted on.

18. On January 28, 1839, Mr. John Quincy Adams, of Massachusetts, presented a resolution that every Member of the House ought, before taking his seat, to produce at the Clerk's table or deposit in the Clerk's office, the credentials by virtue of which he claims his seat. Mr. Adams, in presenting his resolution, explained that he had offered it in consequence of the disuse of a practice which formerly existed, and which he believed to be the practice of every other deliberative body. This practice had been adopted at the beginning of the Government, and had been continued until the last eight or ten years. Since then every gentleman had come and taken his seat without presenting any evidence of his right to do so. Mr. Adams's resolution was not acted on.[4]

About this period the journals show a discontinuance of the old practice of the Committee on Elections reporting on the Members who have presented proper credentials.

19. The House reserves to itself the right to correct the Clerk's roll of Members-elect by striking off or adding to.

On July 4, 1861,[5] at the time of the organization of the House, and while the

[1] First session First Congress, Journal, p. 16. (Gales & Seaton, ed.)

[2] First session Second Congress, Journal, pp. 443, 453, 455. (Gales & Seaton, ed.)

[3] Second session Twenty-fifth Congress, Journal, p. 482; Globe, p. 190.

[4] Third session Twenty-fifth Congress, Journal, p. 395; Globe, p. 143.

[5] First session Thirty-seventh Congress, Journal, p. 13, 14; Globe, pp. 7–9.

oath was being administered to Members-elect, Mr. Thaddeus Stevens, of Pennsylvania, offered the following:

Resolved, That the Clerk of the House be directed to insert the name of John M. Butler upon the roll of Members, as the Representative from the First Congressional district of Pennsylvania, and that William E. Lehman shall be entitled to contest the seat of the said John M. Butler by giving him the required notice at any time within three months.

Mr. Lehman had been placed on the roll by the Clerk and had voted for Speaker. The Clerk explained to the House that he had placed his name on the roll because the governor of Pennsylvania had included him with the other Members from Pennsylvania in the proclamation which the law of the State required him to make of the persons returned as elected. This proclamation had been presented by Mr. Lehman as his credentials, and the Clerk had considered it his duty to be governed by this proclamation, rather than by returns of election judges which showed the election of Mr. Butler.

Mr. Stevens contended that the proclamation of the governor was of no binding force, since the law of the State required the governor to proclaim the result of the returns, and transmit the returns to the House. The proclamation was not in accordance with the returns filed, and no returns showing the election of Mr. Lehman had been sent to the House, nor had the proclamation. Returns showing Mr. Butler elected were presented.

On the other hand, it was urged the returns had been fraudulently made up, and that the governor in his proclamation had taken cognizance of this.

After debate the resolution was laid on the table, yeas 91, nays 48, and the oath was administered to Mr. Lehman.

20. On July 4, 1861,[1] during the organization of the House, and after the oath had been administered to the Members, the name of Samuel G. Daily, as Delegate from the Territory of Nebraska, was called.

On motion the question of administering the oath to Mr. Daily was postponed until after the completion of the organization of the House.

On July 5 Mr. William A. Richardson, of Illinois, moved that the name of Mr. Daily be stricken from the roll, and that the name of J. Sterling Morton be inserted in lieu thereof, and that said Morton be sworn in as such delegate.

It appeared from the debate that on November 2, 1860, the governor of Nebraska issued a certificate to Mr. Morton, the votes having been canvassed according to law by the governor, chief justice, and district attorney. Later, on April 29,1860, the governor issued another certificate to Mr. Daily, wherein it was declared that the first certificate was revoked, because of the discovery of fraud which had credited to Mr. Morton more votes in one county than he, in fact, received, and the results of which being eliminated showed Mr. Daily to have been elected. It was urged by Mr. Richardson that the governor issued the second certificate without action of the board of canvassers provided by law, and therefore had usurped the authority of the House of Representatives in passing on the election and returns. On the other hand, it was urged that Mr. Daily had received the highest number of votes and had the certificate of the governor.

[1] First session Thirty-seventh Congress, Journal, pp. 35, 36; Globe, pp. 13–16.

The House, by a vote of yeas 57, nays 75, disagreed to the motion of Mr. Richardson.

The House then voted that the oath be administered to Mr. Daily.

21. On December 7, 1863,[1] the Clerk of the preceding House called the assembled Members-elect to order, and called the roll of Members by States, as made out by him under the act of March 3, 1863, which provided that he should place on the roll the names of "all persons, and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States."

After the roll had been called, the Clerk announced that other gentlemen had filed credentials which, in his opinion, did not meet the requirements of the law of 1863. The Clerk then read the credentials of five Members from Maryland, and the same having been read, Mr. Henry L. Dawes, of Massachusetts, offered the following:

Resolved, That the names of John A. J. Creswell, Edwin H. Webster, Henry Winter Davis, Francis Thomas, and Benjamin G. Harris be placed on the roll of the House of Representatives from Maryland.

A motion that this resolution be laid on the table having been decided in the negative, yeas 74, nays 94, the resolution was then agreed to.

Similarly the credentials of certain Missouri Members whose names had not been put on the roll by the Clerk were read, and a resolution that their names be put on the roll was offered.

Mr. William S. Holman, of Indiana, made the point of order that it was not in order thus to instruct the Clerk, but the Clerk overruled the point.

Then credentials were read of the Members from Oregon, Kansas, and West Virginia, and resolutions were offered and agreed to directing that their names, respectively, be placed on the roll.

The credentials of certain Members-elect from Virginia not being satisfactory to the House, a resolution directing their names to be placed on the roll was laid on the table, yeas 100, nays 73.

22. A motion to proceed to the election of Speaker has been held to be of higher privilege than a motion to correct the Clerk's roll.

In one or two cases it has been held that the Clerk may not entertain a motion to correct the roll which he makes up under the law.

Instance wherein, during the organization, the Clerk of the preceding House declined to entertain an appeal from his decision.

On October 15, 1877,[2] after the Clerk had called the roll of Members, Mr. Fernando Wood, of New York, as soon as the Clerk had announced that a quorum was present, moved to proceed to the election of a Speaker viva voce and demanded the previous question thereon.

Mr. Eugene Hale, of Maine, as a question of privilege, submitted the following preamble and resolution:

Whereas James B. Belford presents the only certificate of election as a Representative in the Fortyfifth Congress given by the duly constituted authorities of the State of Colorado; and

Whereas the Clerk of the House of Representatives of the Forty-fourth Congress has set aside said

[1] First session Thirty-eighth Congress, Journal, pp. 6-8; Globe, pp. 4-6.

[2] First session Forty-fifth Congress, Journal, p. 10; Record, p. 53.

legal certificate presented by said James B. Belford, thereby without law assuming rights and authority which only belong to the House: Therefore,

Resolved, That the name of Thomas M. Patterson be stricken from the roll of this House as Representative in the Forty-fifth Congress from the State of Colorado, and that the name of James B. Belford be placed upon said roll as a Representative in said Congress.

Mr. Samuel S. Cox, of New York, made the point of order that the resolution was not in order, the Clerk having absolute control over the roll of the House.

The Clerk[1] sustained the point of order, and stated the question to be on seconding the demand for the previous question.

Mr. Hale appealed from the decision of the Clerk.

The Clerk declined to entertain the appeal, on the ground that it was not competent for the Representatives-elect to instruct the Clerk in the performance of a duty imposed upon him by law, and for the further reason that a higher question of privilege was pending on which the previous question had been demanded.[2]

Mr. Wood's motion was then agreed to.

23. On March 4,1869,[3] at the time of the organization of the House, after the roll of Members-elect had been called and the Clerk had announced that a quorum was present, Mr. George W. Woodward, of Pennsylvania offered this resolution:

Resolved, That the roll of Members of the Forty-first Congress be amended by the addition of the name of Henry D. Foster, as the Representative of the Twenty-first Congressional district of Pennsylvania, and that said Foster be called and admitted as the sitting Member prima facie entitled to represent said district.

Mr. Elihu B. Washburne, of Illinois, claiming the floor on a question of privilege, moved that the House do now proceed to the election of a Speaker.

The Clerk [4] said that the gentleman from Illinois had risen to a question of privilege which had precedence of the resolution of the gentleman from Pennsylvania, and therefore the question before the House was on the motion to proceed to the election of a Speaker.

24. On December 2, 1873, at the time of the organization of the House after the roll of Members-elect had been called and the presence of a quorum had been announced, Mr. Samuel S. Cox, of New York, announced his wish to make the motion that the name of John E. Neff be placed on the roll as Representative-elect from the Ninth Congressional district of Indiana.

The Clerk said:

The Clerk thinks it would not be in order. He has always declined to receive such a motion at this stage * * *. The Clerk must decline to entertain the motion.

25. The Clerk's roll may be corrected during organization by reference to the credentials.—On December 5, 1881, at the time of the organization of the House, while the roll of Members-elect was being called, an error appeared in the Clerk's roll, whereby, instead of the name of Mr. William W. Grout, Member-

[1] George M. Adams, of Kentucky, Clerk.

[2] For similar cases, see Congressional Globe, first session Forty-first Congress, p. 3; Record, first session Fortythird Congress, p. 5. Motions to amend the roll were formerly quite common, first session Thirty-eighth Congress, Journal, p. 7.

[3] First session Forty-first Congress, Globe, p. 3.

[4] Edward McPherson, of Pennsylvania, Clerk.

elect of Vermont, the name of the governor of that State was called, an error having been made in making up the roll from the credentials, whereby the name of the signer of the credentials was substituted for that of the bearer. This error, being corrected by reference to the credential, Mr. Grout's name was called, and the organization of the House proceeded.[1]

26. The Clerk takes notice of the deaths or resignations of Members-elect and informs the House thereof at the time of organization.—At the beginning of each Congress, at the time of the organization, the Clerk submits to the House a table of the changes in membership since the election-that is, he presents the names of those who were placed on his roll but have been stricken off because of death or resignation. This seems to show that the Clerk may take cognizance of death and resignation in making up his roll.[2]

27. On December 3, 1883,[3] the time of the organization of the House, the Clerk,[4] when he had called the roll as far as the Seventh district of Virginia, announced that John Paul, who had been elected to represent that district, had resigned his office, the resignation to take effect September 5, 1883. Therefore the name of Mr. Paul was not called.

28. On December 3, 1883,[5] at the time of the organization of the House, after the Clerk[4] had completed the calling of the roll by States as far as North Carolina, he announced that he had information that Mr. Walter R. Pool, who was elected at the November election in 1882 to represent the First district of North Carolina, died on August 25, 1883. No certificate of the election of a successor had been filed with the Clerk. Therefore the name of Mr. Pool was not called.

29. An instance wherein the Clerk omitted from the roll the name of a disqualified Member-elect.—On March 4, 1871,[6] at the organization of the House, after the roll of Members-elect had been called, the Clerk said:

> Mr. Sion H. Rogers, one of the Representatives from North Carolina, requested the Clerk this morning that when his name was reached on the call it should be omitted.

Mr. Rogers's name had been omitted, not being called with the other North Carolina Members-elect. No explanation was given at this time for this action.

Mr. Rogers's name remained off the roll until May 23, 1872,[7] when he was sworn in. It then appeared that he had deferred qualification until the passage of the law removing political disabilities.

30. Where it is not specifically stated that the bearer is elected in accordance with the law of the State and the United States, the credentials may be honored by the House, if not by the Clerk.—On December 7, 1869,[8] Mr. Halbert E. Paine, of Wisconsin, from the Committee of Elections, made

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[1] First session Forty-seventh Congress, Record, p. 7.

[2] See instance at the first of any recent Congress, first session Fifty-second Congress, Journal, p. 6.

[3] First session Forty-eighth Congress, Record, p. 4.

[4] Edward McPherson, of Pennsylvania, Clerk.

[5] First session Forty-eighth Congress, Record, pp. 3, 4.

[6] First session Forty-second Congress, Record, p. 6.

[7] Second session Forty-second Congress, Journal, p. 936; Globe, p. 3783.

[8] Second session Forty-first Congress, Globe, p. 22.

an oral report on the credentials of the Members from the State of Alabama. He said that the credentials were not in form sufficient to justify the Clerk of the House in putting their names on the roll had they appeared at the beginning of the Congress, because the credentials did not say that they were elected in pursuance of either the laws of Alabama or of the United States. Yet the credentials were in form sufficient to satisfy the Committee, and he thought the House also. Accordingly he moved that the gentlemen be sworn. The motion was agreed to and the oath was administered.

31. In 1871 a certificate from Arkansas, which bore on its face evidence that it was not issued within the time required by law, and concerning the proper execution of which there was doubt, was rejected.—On March 4, 1871,[1] at the time of the organization of the House, after the calling of the roll of Members-elect, the Clerk[2] said:

The certificate from the Third district of Arkansas bears upon its face evidence that it was not issued within the time required by law, nor within two months thereafter; besides, there is serious doubt whether the officer who executed it had at that time the right to do so. The circumstances surrounding the issue of this certificate are so suspicious that the Clerk feels compelled to reject it.

32. In 1871 the Clerk accepted the credentials from Mississippi which, though irregular in form, met all the substantial requirements of the military reconstruction acts.—On March 4, 1871,[3] at the time of the organization of the House, the Clerk after he had called the roll of Members-elect, said:

A question has been raised before the Clerk upon the credentials from Mississippi. While being peculiar in form, owing to the fact that the reorganization of the State was effected under the military reconstruction acts, they appear to him to meet all the substantial requirements of the law, and are therefore accepted by him.

33. In 1871 the Clerk enrolled the Tennessee delegation, although the credentials were at marked variance with the usual form and there appeared a question as to the time of holding the election.—On March 4, 1871[4] at the time of the organization of the House, the Clerk[2] after he had called the roll of Members-elect, said:

Regarding the certificates from Tennessee, the Clerk desires to state that they differ essentially from the credentials issued to the Representatives from that State elected to the Forty-first Congress; that, strictly judged, they are both vague and evasive and that the changes made are so marked and special as to create a belief that they were purposely made to produce uncertainty. The Clerk has been in doubt as to his duty concerning them, but has finally concluded to give them this time the benefit of the doubt and accept them. The point which has been argued, that the election was not held on the day fixed by the laws of Tennessee, involves a construction of the constitution and of several of the laws of that State; and the Clerk has, under the circumstances, concluded not to rule upon it.

The Tennessee Members had been called on the roll.

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[1] First session Forty-second Congress, Globe, p. 6.

[2] Edward McPherson, of Pennsylvania, Clerk.

[3] First session Forty-second Congress, Globe, p. 5.

[4] First session Forty-second Congress, Globe, pp. 5, 6.

34. A credential from Indiana not meeting the requirements of the law in 1873, neither claimant to the seat was enrolled.—On December 2, 1873,[1] at the organization of the House, after the calling of the roll of Members-elect, the Clerk[2] said:

In Indiana the paper issued by the governor respecting the Ninth district can not be accepted as a credential within the meaning of the law, and neither of the claimants is enrolled.

35. Conflicting credentials, signed by different persons as governor, being presented from Louisiana in 1873, the Clerk declined to enroll the bearers of either credentials.—On December 1, 1873,[1] at the time of the organization of the House, after the roll of Members-elect had been called, the Clerk[2] said:

In Louisiana there are two unchallenged certificates from the Third and Fifth districts only. In the remaining three districts and the Representatives at large two conflicting sets of papers have been presented, each certifying the election of a different person and each purporting to have been issued by a proper State officer. There is no substantial difference in form. The one set of papers purports to have been executed on the 4th of December, 1872, and to have been signed by Governor Warmouth, though not transmitted by him to the Clerk's office. They were received, one of them early in March last, another later in that month, and two of them in the latter part of April, 1873. The other set of papers purports to have been executed on the 30th of December, 1872, and to have been signed by Acting Governor Pinchback, and transmitted by him to the Clerk's office by mail, and received early in January last. The Clerk accordingly enrolls the two unchallenged Members.

36. The credentials from West Virginia in 1873 showed a doubt as to the true day of election, so the Clerk enrolled only one Member-elect, who was indisputably elected on each day.—On December 1, 1873,[1] at the time of the organization of the House, after the roll of Members-elect had been called, the Clerk[2] said:

In West Virginia there is a peculiar complication. There were two elections in 1872 at which Representatives in the Forty-third Congress were voted for—one of them in August, at the time of the adoption of the new State constitution, and the other on the fourth Thursday of October. In the First and Second districts different persons were chosen at these elections; in the Third district the same person was chosen at both. The proclamation and certificates of the governor reciting these various facts have been filed in the Clerk's office. The certificates of election are issued in the alternative, setting forth the due election of these respective parties, provided the time at which they were chosen was the time prescribed by law for holding the election. The Clerk considers these certificates inadmissible for enrolling either of the claimants in the First and Second districts. Assuming that the one or the other of those days was the legal day of election, Mr. Hereford, who was chosen at both, would appear to be entitled to be enrolled, notwithstanding the technical defect in each of his certificates separately considered. He has accordingly been enrolled.

A fresh series of certificates, dated November 22, 1873, and issued under an act of the legislature of that State dated November 15, 1873, by a new canvassing board specially created for that purpose and intended to supersede the papers issued by the governor under the then existing law, and which certify in form the due election of the persons who received a majority of the votes at the October election of 1872, have been presented, but appear to the Clerk to be of doubtful validity, and have not been accepted by him as credentials within the meaning of the law.

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[1] First session Forty-third Congress, Record, p. 5.

[2] Edward McPherson, of Pennsylvania, Clerk.

37. The Arkansas election case of Gunter v. Wilshire in the Fortythird Congress.

The Clerk declined to enroll a person bearing as credentials a mere abstract of returns, although certified by the governor under seal of the State.

The House very reluctantly gave prima facie effect to a certified abstract of returns not in the form of credentials as required by law and issued after the time prescribed by law.

An instance wherein the claimant seated on prima facie showing was unseated after examination of final right.

On December 1, 1873,[1] at the organization of the House, the Clerk announced that but two valid certificates had been presented from the State of Arkansas. The certificates of the Members-elect from the First and Third districts were in question, and their names were not on the roll. On December 2[2] the House—

Resolved, That the credentials and papers in the possession of the Clerk of the House in the cases of the contested elections from the First and Third districts of Arkansas be referred to the Committee on Elections, with instructions to report on the earliest day practicable who of the contesting parties are entitled to be sworn in as sitting Members of the House.

On February 9, 1874,[3] Mr. C. R. Thomas, of North Carolina, from the Committee on Elections, submitted the report on the prima facie right. The report first describes the papers presented as evidence—

1. An "abstract and certificate of the secretary of state" showing 12,522 votes cast for W. W. Wilshire, 11,961 cast for Thos. M. Gunter, 407 for Thos. M. Gunther, and 1,127 scattering. This abstract is accompanied by a certificate of the secretary of state of Arkansas, dated January 13, 1873, that "the above abstract is a true copy of the original now in my office, and exhibits a true statement of the votes cast for Congressman, etc., * * * according to the returns in my office; and I also certify that the same was cast up and arranged by me in the presence of Acting Governor O. A. Hadley within the time and in the manner prescribed by statute." Also, on November 20, 1873, the secretary of state certified to the returns of an additional county received after the first certificate was made. The belated returns increased the plurality for Mr. Wilshire.

2. A proclamation, dated February 18, 1873, signed by Elisha Baxter, governor, and duly countersigned by the secretary of state, under seal, proclaiming the result.

3. A certificate of election issued by Governor Baxter, giving the same abstract of votes as given in the proclamation, with footnotes, and in form as follows:

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[1] First session Forty-third Congress, Record, p. 5.

[2] Journal, p. 18; Record, p. 19.

[3] Report House of Representatives, No. 92; Smith, p. 131; Rowell's Digest, p. 286.

Abstract of the returns of the election held in the Third Congressional district of the State of Arkansas on the 5th day of November, A. D. 1872, for Representative in Congress.

Counties composing the Third Congressional district.	Votes polled for W.W. Wilshire.	Votes polled for Thos. M. Gunter.	Votes polled for Wilshire.	Votes polled for Gunther.
Benton	255	1,189	.....	.....
Boone [1]	188	746	.....	.....
Carroll	272	330	.....	.....
Crawford	932	590	.....	.....
Clark	1,317	806	.....	.....
Franklin	529	259	.....	.....
Johnson	119	75	.....	.....
Little River	505	276	.....	.....
Madison	434	557	.....	.....
Marion	140	684	.....	.....
Montgomery [2]	177	.....	.....	407
Newton [2]	278	.....	.....	184
Pulaski [3]	3,160	1,621	12	.....
Perry	168	81	.....	.....
Pope	521	310	.....	.....
Pike	226	125	.....	.....
Polk	120	342	.....	.....
Sebastian	1,017	578	.....	.....
Sevier	264	425	.....	.....
Washington [4]	702	1,218	.....	.....
Yell	536	1,011	.....	.....
Saber [5]	784	276	.....	.....
Total	12,644	11,499	12	591

[1] Boone County has not been made a part of the Third Congressional district by any act of the legislature.

[2] The votes given to "Gunther" from Montgomery and Newton counties were probably intended for Thomas M. Gunter.

[3] The scattering vote in Pulaski County given to "Wilshire," "Guntee," "S. M. Gunter," "T. M. Guntee," "Thos. M. Guntee," "T. Ros Gunter," and "Thos. M. Crenter" is a literal copy of the clerk's returns.

[4] A certificate of the clerk is appended to the returns from Washington County, questioning the validity of the election in Richland Township. If this objection is allowed the vote will stand: For Wilshire, 686, and Gunter, 1,125.

[5] Saber County has not been made a part of the Third Congressional district by any act of the legislature.

Scattered votes polled for Guntee, S. M. Gunter, T. M. Guntee, Thos. M. Guntee, T. Ros Gunter, and Thomas M. Crenter in Pulaslki County, 1,456.

There are no returns from the clerk of Scott County.

"STATE OF ARKANSAS, *Executive Office:*

"Whereas the acting governor failed to issue a certificate of election to the person who received the highest number of votes for Representative in Congress from the Third Congressional district of Arkansas at the election held in said district on the 5th day of November, A. D. 1872; and whereas on the 14th day of February, A. D. 1873, the secretary of state, in my presence, did cast up the votes polled for said Representative at said election from the returns on file in his office: Now, therefore, I, Elisha Baxter, governor of the State of Arkansas, do certify that the foregoing statement, with the explanatory notes, is a full, true, and correct exhibit of the votes polled for Representative from the Third Congressional district of Arkansas at the election held in said district on the 5th day of November, A. D. 1872, as appears from the returns of said election on file and certificates of clerks deposited in the office of secretary of state.

"In testimony whereof I have hereunto set my hand and caused the seal of the State to be affixed, at Little Rock, on this 18th day of February, A. D. 1873.

[L. S.]

"ELISHA BAXTER, *Governor.*

"By the governor:

"J. M. JOHNSON, *Secretary of State.*"

The law of Arkansas provided:

"Sec. 50. It shall be the duty of the secretary of state, in the presence of the governor, within thirty days after the time herein allowed to make returns of elections to the clerks of the county courts, or sooner, if all the returns shall have been received, to cast up and arrange the votes from the several counties, or such of them as have made returns, for such persons voted for as Members of Congress; and the governor shall immediately thereafter issue his proclamation, *declaring the person having the highest number of votes to be duly elected* to represent the State in the House of Representatives of the Congress of the United States, *and shall grant a certificate thereof,* under the seal of the State, *to the person so elected.* "

The law of Congress provided:

"That before the first meeting of the next Congress, and of every subsequent Congress, the Clerk of the next preceding House of Representatives shall make a roll of the Representatives elect and place thereon the names of persons claiming seats as Representatives elect from States which were represented in the next preceding Congress, and of such persons only, *and whose credentials show* that they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States."

The most usual kind of credential is a certificate of the governor of a State, and such kind is required by the law of Arkansas. No particular form of one has heretofore been considered necessary by the House; and while such certificate, when it showed that the person named therein was regularly elected, etc., has always been admitted and held to be competent and satisfactory evidence of prima facie right to a seat, the House has frequently decided that the want of it from any reason would not impair or prejudice such prima facie right of a Member elect, but only remit him to other evidence to establish it.

Do the credentials and papers referred to the committee by the House resolution, any one or all of them, show that either Mr. Wilshire or Mr. Gunter was regularly elected in accordance with the laws of Arkansas, or do they establish the prima facie right of either to a seat?

In the opinion of the committee they furnish satisfactory evidence to establish the prima facie right of W. W. Wilshire to his seat. In their opinion the certificate of Governor Baxter is in itself sufficient in form and substance and legal intendment to establish such right of Mr. Wilshire. It indicates, or shows, that W. W. Wilshire received 12,644 votes, being a majority of 1,145 votes for Mr. Wilshire by the "abstract of the returns of the election held in the Third Congressional district of the State of Arkansas on the 5th day of November, 1872, for Representative in Congress;" and assuming that, as matter of law, the votes of the counties of Boone and Sarber should not have been counted or "arranged and cast up," because these counties had "not been made parts of the Third Congressional district by any act of the legislature," then the said certificate shows that Mr. Wilshire received a majority of 1,195 votes. And the certificate of Governor Baxter is to the effect that W. W. Wilshire was "duly elected," and is in accordance with the laws of Arkansas before cited and mentioned.

The failure, from whatever cause it arose, of the acting governor, O. A. Hadley, in whose presence the secretary of state did cast up and arrange the votes from the several counties, etc., to issue the proclamation and grant the certificate—a duty which the laws of the State devolved upon him, and the act of Congress of May 31, 1870, as well (and said act made it a criminal offense in that he neglected or refused to do so)—could not prejudice the right of the people of the Third Congressional district, or of the person who had been chosen by them as Representative to the Forty-third Congress in pursuance of their obligation under the national Constitution. Such a failure, in any instance, ought not to be allowed by the House to hinder, impede, or delay the right of representation of the people of a district, or the right of the person chosen by them to a seat pending a contest upon the merits, when "that amount of proof which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt," is produced in a case before it.

The report goes on to say that section 50 of the Arkansas laws above quoted is directory and that Governor Baxter was required to issue the certificate upon the omission of his predecessor to do so.

The majority did not conceive that the omission of the words "duly elected" or "other words declaratory of the fact or result would be nonessential, if not surplusage." The report continues:

A strict adherence to any prescribed or particular form of credential, or to legal rules of evidence on a prima facie case of election, would tend to prejudice the rights of the party claiming to have been elected, and of the people as well, and to prevent the organization of the House.

The case of Giddings v. Clark was referred to.

The majority of the committee, therefore, reported a resolution giving Mr. Wilshire the prima facie right to the seat, without prejudice to the right of Mr. Gunter to contest.

Mr. Lucius Q. C. Lamar, of Mississippi, submitted minority views, which say, after citing the law:

The question then arises, Does W. W. Wilshire present to the committee, and, through the committee, to this House, a certificate in due form from the governor of the State, declaring W. W. Wilshire "to be duly elected to represent the State in the House of Representatives of the Congress of the United States?"

There can be but one answer to this inquiry. He does not and can not present such a certificate.

There is a certificate filed by him, issued by the governor of the State of Arkansas, which does not declare or show him to be duly elected, but simply gives a statement of the votes cast, from which statement it can not be ascertained who was elected; and a certificate is on file, in every respect identical in substance and letter, which was issued at the same time to his competitor, Thomas M. Gunter.

It can not, therefore, be said that the governor has issued a certificate of election to Mr. Wilshire.

After commenting on the action of the Clerk in not putting any name on the roll, the minority say:

Now, if the construction which a majority of the committee have put upon this resolution of the House is the true one, and it necessarily confines the investigation of the committee to the instrument by which the prima facie right is established, it follows that they should not have extended their inquiries beyond the face of this certificate, nor thrown before this House any information derived from evidence and proofs of a secondary character. Upon their construction of the resolution the proper course, in the opinion of the undersigned, would have been to have reported a resolution to the House that no prima facie right to a seat on this floor existed in this case.

Let us now examine this certificate and see if, from the facts therein stated, the committee had before them data sufficient to determine who, in the absence of any proof to the contrary, was the person duly elected. We have seen that no person was therein declared to have been duly elected.

The certificate shows that 12,644 votes were cast for W. W. Wilshire; that 11,499 votes were cast for Thomas M. Gunter, eo nomine, and that 1,456 votes were returned in unspecified proportions for Thomas M. Gunter and Thomas M. Crenter, those for Thomas M. Gunter being returned under different designations, each, however, clearly indicating Thomas M. Gunter as the person voted for. Now, can it be said that there is here any evidence that W. W. Wilshire received a larger number of votes than Thomas M. Gunter? It is clear that if Thomas M. Crenter received only 30 or 40 of these 1,456 votes, Thomas M. Gunter is the person duly elected. It is also equally clear that if Thomas M. Crenter received a larger proportion of the 1,456 votes than Thomas M. Gunter, then W. W. Wilshire is elected. But it is impossible to determine from anything on the face of this certificate what was the actual vote cast for Thomas M. Crenter, and therefore equally impossible to determine which candidate received the most votes, W. W. Wilshire or Thomas M. Gunter. This is fatal to the certificate as the credentials of Mr. Wilshire. To ascertain who was elected, it becomes necessary to refer to other proofs, which opens an inquiry into the merits of the case, and involves an abandonment of the prima facie consideration. The only alternative, therefore, as it seemed to the undersigned, was to enter at once upon the question of the fact of the election, and if the committee deemed it had not power to do so under the resolution of the House, to ask of the House an enlargement of its powers.

While the undersigned believe that if the governor's certificate shows no prima facie title to the seat on account of the doubt as to the identity of Thomas M. Crenter, it is the duty of the committee to inquire at once into the merits of the case, and to consider all the proofs bearing upon the merits, including the depositions as well as the documentary proofs; they are at the same time clearly of the opinion that the documentary proofs, outside of the certificates, show a large majority in favor of Mr. Gunter.

The minority thereupon proceed to argue that the tabulation of the secretary of state was under suspicion, and to show its defective nature proposed to introduce the returns of Pulaski County, saying:

> If it is said that this return from Pulaski County and these proofs just cited can not be considered in a prima facie case, we reply that we have referred to them, not for the purpose of showing any prima facie case for Mr. Gunter, but simply to show that, so far from remedying the defects of Mr. Wilshire's claim, based on the certificate either of the governor or the secretary, they show Mr. Gunter to have been elected.
>
> We have shown that neither the governor's certificate nor the secretary's casting up, standing by itself, establishes any prima facie right to the contested seat in W. W. Wilshire. If it is said that the two supplement each other, each supplying the deficiency of the other, in answer we reply that discrepancies and direct contradictions in these documents are so glaring and numerous as to neutralize the effect and destroy the validity of both as instruments of evidence.

In accordance with this line of argument the minority proposed a resolution that the case be recommitted with instructions that the committee report on the merits of the case.

The report was debated at length on February 17.[1] In this debate it was pointed out that the acting governor had in another Arkansas district certified that "O. P. Snyder was duly elected a Member of Congress," but that in this case the governor did not certify that either of the gentlemen was elected. It was also urged by Mr. George W. McCrary, of Iowa, that the footnotes made it a moral certainty that all the scattering votes were intended for Mr. Gunter.

In reply it was denied that the table made it certain that the scattering votes were intended for Mr. Gunter. The governor had not expressly declared in his certificate who was elected, but by incorporating the table be made it a part of the certificate, and thus showed who was elected. The fact that the words "duly elected" did not appear in the certificate was not fatal. There was no form of certificate prescribed by the House, and the State of Arkansas had not fixed the form. The footings of the table showed who was prima facie entitled to the seat.

The question being taken on the motion to substitute the minority proposition for the majority, there appeared, yeas 116, nays 117.[2]

The question then recurring on the passage of the resolution recommended by the majority of the committee, there appeared, yeas 118, nays 96. So the resolution was passed.

A motion to reconsider was made and disposed of on the next day.

Thereupon Mr. Wilshire appeared and took the oath.

38. The Arkansas election case of Gunter v. Wilshire—Continued.

A notice of contest served within thirty days of the issuance of the governor's proclamation was held sufficient, although the proclamation was not issued within the time prescribed by law.

Original returns of the precincts being lost, the House by testimony proved that certain votes returned as "scattering" because of misnomer were actually cast for contestant.

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[1] Record, pp. 1563–1578.

[2] Journal, pp. 458, 460; Record, pp. 1577, 1601, 1602.

An instance wherein the House seated a contestant belonging to the minority party.

On June 3[1] Mr. J. W. Robinson, of Ohio, presented the report on the question of final right to the seat.

At the outset a preliminary question arose, which was disposed of as follows:

The contestee claims that the contest should be dismissed because the notice of contest was not served on him within thirty days from the day fixed by law for canvassing the returns and determining the result of the election.

The returns were first canvassed by the secretary of state, in the presence of Governor Hadley, on the 14th of December, 1872, but no proclamation of the result was made, nor any certificate of election issued to anyone, both of which the statute of the State required the governor to do immediately. (See sec. 50.) Afterward Elisha Baxter, being inaugurated governor, having, on the 18th day of February, 1873, caused the votes to be again canvassed by the secretary of state in his presence, made proclamation of the result, and issued his certificate.

This proclamation and certificate constitute the only announcement of the determination of the result of the election in that district, and the committee are of the opinion that, in view of all the circumstances, the service of notice of contest on the 13th of March is sufficient, and overruled the motion to dismiss the contest.

As to the merits of the case, the committee were unanimous in their conclusions:

By some strange mishap the original returns of the precincts where these scattering votes were cast have been lost or destroyed.

The testimony submitted satisfies the committee that the contestee and the contestant were the only candidates for Congress in that district; that 1,433 of the "scattering" votes referred to in the governor's certificate as being given for "Guntee," "T. M. Guntee," "Thomas M. Guntee," and "T. Ross Gunter," were, in fact, given for Thomas M. Gunter, and should be counted for him; and that 1 vote, referred to as given for "S. M. Guntee," and the 32 given for "Thomas M. Crenter," about which no evidence was offered, are not proven to have been cast for Thomas M. Gunter. The testimony on this point is voluminous, but entirely satisfactory, and the 1,433 votes are added by the committee to the credit of contestant Thomas M. Gunter. So, also, the 407 votes in Montgomery County, and the 184 votes in Newton County, returned for "Gunther," were cast for Thomas M. Gunter; also, the 12 votes in Pulaski County, returned for "Wilshire," were cast for the contestee, and should be credited to them, respectively.

Correcting the canvass of the returns, as above indicated, the committee find the whole vote returned, and to be counted for contestant, Thomas M. Gunter, to be 13,513, and for the contestee 12,656, giving the contestant a majority of 857 votes.

In the foregoing schedule no votes are canvassed from Scott County, and but 194 from Johnson County. In both of these counties returns were made which, if counted, would increase the majority of the contestant 1,003.

In accordance with their conclusions, the committee reported resolutions declaring Mr. Wilshire not entitled to the seat, and declaring Mr. Gunter, the contestant, elected.

On June 16,[2] the House without debate or division agreed to the resolutions, and Mr. Gunter was sworn in.[3]

39. In 1875 a paper of unusual form was submitted to the House at the time of organization by the Clerk, who had declined to make an en-

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[1] Report No. 631; Smith, p. 233.

[2] Journal, pp. 1192, 1193; Record, p. 5046.

[3] It is worthy of notice that contestant belonged to the party in a minority in the House, and the unseated Member belonged to the majority party.

rollment on the strength thereof.—On December 6, 1875,[1] at the organization of the House, after the calling of the roll of Members-elect, the Clerk[2] said:

For the Thirty-third district of New York the vacancy on the roll caused by the death of the gentleman originally returned has not been filled. The action of the State board of canvassers upon the returns of the late election has been received at the Clerk's office, but, being of unusual form, is submitted for action of the House.

40. In 1875 the Clerk enrolled the names of those bearing credentials signed by the recognized de facto governor of Louisiana, although there were other conflicting credentials.—On December 6, 1875,[1] at the time of the organization of the House, after calling the roll of Members-elect, the Clerk[2] said:

Respecting Louisiana, the Clerk begs to say that he has received two sets of certificates as to the first five districts—one signed by William Pitt Kellogg, as governor of Louisiana; the other signed by John McEnery, as governor of Louisiana. The Kellogg certificates were all received by the Clerk prior to the adjournment of the Forty-third Congress. One of the McEnery certificates was also received during that session; the others at different dates during the last summer and fall. The two sets of certificates agree in declaring the same persons elected in the First, Second, Third, and Fourth districts. In the Fifth the Kellogg certificate declares Mr. Frank Morey elected; the McEnery certificate declares Mr. William B. Spencer elected. As to the Sixth district, no McEnery certificate has been presented. The Kellogg certificate declares Mr. Charles E. Nash elected. The Clerk has enrolled all the gentlemen bearing the Kellogg certificates as coming from the de facto governor recognized by the last House.

41. Of three sets of credentials presented from Louisiana in 1877 the Clerk honored those which conformed to the requirements of State law.— On October 15, 1877,[3] at the organization of the House, after the roll of Members-elect had been called, the Clerk[4] said:

In reference to the State of Louisiana, the Clerk, if there be no objection, will take occasion here to remark that there were received from the State of Louisiana three different sets of credentials, one set signed by John McEnery, as governor of Louisiana, bearing date December 20, 1876, and declaring certain persons elected from the First, Fourth, and Sixth districts, but silent as to the persons elected from the other districts of said State. Inasmuch, however, as said McEnery was never de facto governor of Louisiana, and never, in point of fact, exercised or performed the functions of that office, it is not deemed necessary to make here any statement concerning the regularity or irregularity of the credentials coming from that source.

Another set of credentials is signed by William Pitt Kellogg, as governor of Louisiana, with the seal of the State attached, all of which not only bear different dates, but also reached the hands of the Clerk at different times and through different channels, and simply declare the persons elected from each of the districts of said State, respectively, except the Second district, as to which no certificate seems to have been issued by said Kellogg in favor of anyone. The law of Louisiana prescribing the character of the credentials by which the elections of its Representatives in Congress shall be authenticated and known provides as follows:

"That as soon as possible after the expiration of the time of making the returns of the election of Representative in Congress, a certificate of the returns of the election for such Representatives shall be entered upon record by the secretary of state, signed by the governor, and a copy thereof, subscribed by said officers, shall be delivered to the persons so elected and another copy transmitted to the House of Representatives of the United States, directed to the Clerk thereof."

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[1] First session Forty-fourth Congress, Record, p. 167.

[2] Edward McPherson, of Pennsylvania, Clerk.

[3] First session Forty-fifth Congress, Record, pp. 51, 52.

[4] George M. Adams, of Kentucky, Clerk.

These credentials signed by Governor Kellogg are in no sense a compliance with the requirement of the laws of Louisiana. They do not even purport to be entered on the record by the secretary of state and there signed by the governor, but are, on the contrary, a simple declaration by him that certain persons are elected, without even stating the sources of his information, and do more constitute credentials within the meaning of the laws of Louisiana than a simple statement from the treasurer or other State official would be. They are not such papers as the law of Louisiana has prescribed as the credentials by which the election of its Representatives in Congress shall be authenticated and known, and could not therefore be recognized by the Clerk as such, whose duty it is, under the law, to place on the roll the names of those, and only those, whose credentials show that they are elected in accordance with the laws of their respective States or the laws of the United States.

The other set of credentials is signed by Francis P. Nichols, as governor of Louisiana, and Oscar Arroyo, as assistant secretary of state, with the seal of the State attached. All of them bear date February 27, 1877, and all of them reached the hands of the Clerk at the same time, and through the channels prescribed by law. They declare the persons elected in each of the districts of Louisiana, respectively, and conflict with the certificate signed by Governor Kellogg in reference to two districts only. These credentials comply, it is thought, with the laws of Louisiana in every respect, and the Clerk has accordingly placed on the roll the names of the persons contained in these credentials.

42. In 1877 the Clerk disregarded credentials issued by the governor of Colorado in due form, holding that they showed the election to have been held on a day unauthorized by law.—On October 15, 1877,[1] at the time of the organization of the House, during the call of the roll of Members-elect the Clerk[2] said:

The Clerk will make a Statement with reference to the reasons by which he was controlled in not placing on the roll the names of anyone from the State of Colorado. There has been received by the Clerk a credential, signed by Governor J. L. Routt as governor of that State, with the seal of the State attached, declaring the election of James B. Belford on the 3d day of October, 1876. The law of Congress, in term, declares that the Clerk shall place upon the roll the names of those Representatives, and of those only, whose credentials show that they are elected in accordance with the laws of their States, respectively, or the laws of the United States. The Clerk does not think that there is any law inexistence, either in the State of Colorado, or any law of the United States, which authorizes the election of a Representative of the Forty-fifth Congress on the 3d day of October, 1876. That being the case, and the certificate which Mr. Belford brings showing on its very face that he was elected at a time unauthorized by either the laws of the United States or of his State, the Clerk could see no way in which he could possibly place the name of Mr. Belford on the roll.

The Clerk read the certificate, as follows:

"Certificate of election.

"STATE OF COLORADO, *State Department, ss:*

"I, John L. Routt, governor of the State of Colorado, hereby certify that at an election held on the 3d day of October, A. D. 1876, James B. Belford received 13,249 votes, being a majority of all the votes cast for Representative in the Forty-fifth Congress of the United States.

"He is therefore hereby declared duly elected Representative in said Congress.

"In testimony whereof I have hereunto set my hand and caused the great seal of the State to be affixed at the city of Denver this 6th day of November, A. D. 1876.

[SEAL.]

"JOHN L. ROUTT, *Governor.*

"By the governor:

"WILLIAM M. CLARK, *Secretary Colorado."*

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[1] First session Forty-fifth Congress, Record, p. 52.

[2] George M. Adams of Kentucky, Clerk.

There was also received by the Clerk a protest, signed by John M. Patterson, claiming to be Representative-elect from the State of Colorado, and accompanying that protest a certified copy of an abstract of the votes cast in each county on the Tuesday after the first Monday in November for Representative to the Forty-fifth Congress from the State of Colorado. This certified copy of the abstract of the votes cast at said election shows, however, that those votes were never canvassed by any board of canvassers and that no certificate was ever issued to anyone declaring the result of said election.

While the Clerk is of the opinion that the laws of the United States and of the State of Colorado required an election to be held in November, at which time Mr. Patterson claims to have been elected, still, inasmuch as Mr. Patterson does not present credentials regular in form, such as the Clerk feels would justify him in placing his name upon the roll, he will submit the credentials of Mr. Belford and Mr. Patterson, such as they are, to the consideration of the House after it shall have organized.

43. Of two conflicting credentials from Florida in 1877 the Clerk honored the one issued in accordance with a decision of the supreme court of the State.

A second credential being issued by a governor because of a decision of the State court, but not showing the result called for by the rule of that court, the Clerk honored the first credential.—On October 15, 1877,[1] at the time of the organization of the House while the roll of Members-elect was being called, the Clerk[2] said:

From the State of Florida certificates were received, signed by Marcellus L. Steams as governor of Florida, with the seal of the State attached, certifying that William J. Purman was elected in the First and that Horatio Bisbee was elected in the Second district of said State. These certificates bear date, respectively, December 9 and December 14, 1876, and seem to be regular in form.

But in reference to the First district two certificates were subsequently received, signed by George F. Drew, governor of Florida, with the seal of the State attached and bearing date, respectively, January 12 and February 26, 1877. These certificates recite the fact that the canvass of the vote upon which the certificate in favor of Mr. Purman was based had been declared by the supreme court of the State of Florida illegal and that another canvass had been made, in obedience to the order of the supreme court of Florida, which canvass resulted in the election of Robert H. M. Davidson as Representative from said district.

Under such circumstances the Clerk felt bound to place on the roll from the First district of Florida the name of Robert H. M. Davidson, whose credentials show that he was elected in accordance with the laws of the State of Florida as interpreted by the supreme court of that State.

In reference to the Second district of Florida, a certificate was also subsequently received, signed by George F. Drew, governor of Florida, with the seal of the State attached, which certificate does not, however, like the subsequent certificate signed by George F. Drew in reference to the First district, show that the second canvass, made in pursuance of the order of the supreme court, resulted in the election of any other person than Mr. Bisbee, to whom Governor Stearns had previously issued a certificate; but, on the contrary, it simply declares that by counting the votes in a certain precinct in Clay County, which the board of State canvassers rejected, and which the supreme court in their opinion say could not be legally counted, then in that event J. J. Finley would be elected. Under such circumstances the Clerk could not see how the subsequent certificate declaring the election of Mr. Finley by doing what the supreme court declared could not be legally done could in any way invalidate the certificate which had previously been issued by Governor Stearns to Mr. Bisbee; and hence, whatever may be the merits of this case in a contest before the House, it seems clear to the Clerk that the prima facie right, with which alone the Clerk can deal, is with Mr. Bisbee, whose name was therefore placed on the roll.

44. The Mississippi election case of Chalmers v. Manning in the Forty-eighth Congress.

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[1] First session Forty-fifth Congress, Record, p. 52.

[2] George M. Adams, of Kentucky, Clerk.

No credentials being received, the Clerk declined to enroll either claimant, although one of them filed documents tending to show his election.

The House declined to order that the oath be taken by a person who had credentials perfect in form, but who had not presented them to the Clerk and did not desire to assert prima facie right.

In ordering an investigation as to prima facie right, the House referred, with the credentials, documents showing the state of the returns.

On December 3, 1883,[1] at the time of the organization of the House, the Clerk[2] after he had called the names of the Members-elect, made a statement respecting the Second district of Mississippi. He stated that James R. Chalmers, who claimed to have been elected there, had filed with him four exhibits in support of his claim to be enrolled as a Member-elect. These exhibits, which the Clerk gave at length, tended to show that the secretary of the state of Mississippi, in making on the 18th of November, 1882, the canvass of the vote of the district, had credited to J. R. Chambless enough votes to make, with those credited to J. R. Chalmers, enough to elect the latter over his leading competitor, Mr. Van H. Manning. After the canvass had been made papers had been filed with the secretary of state showing that the votes credited to J. R. Chambless were really cast for Mr. Chalmers, the error in the name being the error of a clerk of the commissioners in one county. The affidavit of this clerk was one of the papers filed by Mr. Chalmers as part of his exhibits.

The Clerk further stated that he had received no certificate from the governor based on the canvass of the secretary of state. Therefore, as the exhibits were not, in his opinion, sufficient ground for the enrollment of Mr. Chalmers, he had enrolled no one.

Later, after the organization of the House, Mr. George L. Converse, of Ohio, stated that Mr. Manning had not desired to present his credentials until there had been action by the House. But believing that the vacancy should be filled Mr. Converse would present them, and offered the following resolution:

> Whereas Van H. Manning holds the certificate of the governor of the State of Mississippi in due form, giving him the prima facie right to a seat on this floor as a Representative of the Second district of Mississippi in the Forty-eighth Congress: Therefore,
>
> *Resolved,* That the said Van H. Manning immediately quality as a Member of this House as a Representative of said district without prejudice to the final right to the seat.

Mr. John A. Kasson, of Iowa, questioned whether the House had the right to order a man to be sworn in who did not claim a seat, but Mr. Converse denied that Mr. Manning did not claim a seat.

The previous question was then ordered on the resolution, by a vote of 163, nays 128.

Pending a motion to recommit with instructions, the House adjourned.

On the next day the request was made on behalf of Mr. Manning that the question of his prima facie right to a seat be referred. Therefore the proceedings of the previous day were rescinded, and the House agreed to this resolution:

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[1] First session Forty-eighth Congress, Journal, pp. 14, 17; Record, pp. 3, 6, 25.

[2] Edward McPherson, of Pennsylvania, Clerk.

Resolved, That the certificate and all other papers in the contested election case of Chalmers v. Manning, from the Second Congressional district of the State of Mississippi, be referred to the Committee on Elections, when appointed, with instructions to report immediately whether upon the prima facie case as presented by said papers said Manning or Chalmers is entitled to be sworn in as a Member, pending the contest on the merits, and not to affect the final right to said seat.

45. The Mississippi election case of Chalmers v. Manning continued.

In determining prima facie right the House went behind a certificate in due form, the bearer of which waived his prima facie right, and consulted the returns.

The House declined to give prima facie title to a contestant on the strength of the returns, although the bearer of the credentials waived his prima facie right.

An instance wherein the House seated neither of two claimants on prima facie showing, deferring the administration of the oath until the ascertainment of final right.

A contention that the admissions of a claimant might not waive a prima facie title in which the people of the district were interested.

An affidavit intended to explain a clerical error in returns was given little weight by the Elections Committee because of its ex parte character.

On February 8, 1884,[1] Mr. Henry G. Turner, of Georgia, presented the report of the majority of the Committee on Elections in the question arising as to the prima facie right to the seat preliminary to decision as to the final right in the Mississippi case of Chalmers v. Manning. The report of the majority thus states the preliminary facts:

In the Second Congressional district of Mississippi, composed of the counties of Benton, De Soto, Lafayette, Marshall, Panola, Tallahatchie, Tippah, Tate, and Union, an election for Representative in the Forty-eighth Congress was held on the 7th day of November, 1882, at which election Van H. Manning and James R. Chalmers were opposing candidates. When the Forty-eighth Congress assembled, on the 3d day of December last, before the organization of the House, the Clerk informed the House that—

"The Clerk has not enrolled the name of anyone as a Representative for the Second district of Mississippi, for the reason that no paper which can be considered a certificate of election in the sense of the law has been presented to him."

After the organization of the House, on the same day, Mr. Converse, of Ohio, submitted the following resolution:

"Whereas, Van H. Manning holds the certificate of the governor of the State of Mississippi in due form, giving him the prima facie right to a seat on this floor as a Representative of the Second district of Mississippi in the Forty-eighth Congress: Therefore,

Resolved, That the said Van H. Manning immediately qualify as a Member of this House as a Representative of said district without prejudice to the final right to the seat."

Pending the consideration of this resolution the House adjourned, and on the next day Mr. Converse stated that at the request of Mr. Manning he submitted the following resolution, which was adopted:

"Resolved, That the certificate and all other papers in the contested election case of J. R. Chalmers v. Van H. Manning, from the Second Congressional district of the State of Mississippi, be referred to the Committee on Elections when appointed, with instructions to report immediately whether upon the prima facie case as presented by said papers said Manning or Chalmers is entitled to be sworn in as a Member pending the contest on the merits, and not to affect the final right to said seat."

At the outset a question arose as to the effect of this action of the House. The majority say:

[1] First session Forty-eighth Congress, House Report No. 283; Mobley, p. 7.

This action of the House was either a refusal of the seat to Mr. Manning by the House, on the usual evidence of the governor's certificate, or it was a renunciation by him of his right to demand such seat upon the governor's certificate alone; perhaps it was both.

The minority views, submitted by Mr. John C. Cook, of Iowa, took issue with this construction of the resolution:

We conclude, therefore, in the light of all the surrounding facts, and upon a fair reading of the resolution, that the House, in adopting it, did not deny Mr. Manning's seat upon regular credentials, but required us to ascertain and report whether he or Mr. Chalmers held such credentials. Any other conclusion would place this House in the singular attitude of denying to Mr. Manning, without reason, a well-defined and established legal light. If the chairman is right in his construction of the resolution, certainly it would be better if the House would repeal it than that it should permit its error to ripen into wrong. We submit, however, that neither by his own action nor by the action of this House has Mr. Manning been placed beyond the pale of law, reason, and precedent, but that he is clearly entitled to a seat on this floor pending a contest on the merits, the same as any other Member duly returned.

The majority assume that by the terms of the resolution they are expected to examine and give weight to other papers besides the certificate of the governor. Their report says:

Among the papers referred to us we find a commission issued by the governor of Mississippi to Mr. Manning based on the certificate of the secretary of state, who by law is charged with the duty of canvassing the returns of elections and certifying the result to the governor. This commission bears the great seal of the State, and is otherwise unexceptionable in form; and could we have confined our inquiry as to the prima facie right to the disputed seat to this paper alone we would unhesitatingly have affirmed Mr. Manning's right to occupy the seat pending the contest. Except in extraordinary cases and in rare instances we find that the commission or certificate concludes all inquiry as to which of the claimants of a seat shall occupy it until the contest on the merits is determined. And every consideration of prudence and safety admonishes us to adhere to this practice.

The minority views hold—

In determining their report upon the question, our associates are pleased to speak of the facts in this case which relate to the merits. In doing so they say, "Mr. Manning's admission and his failure to file his certificate with the Clerk and take his seat in the usual way make this case without a parallel in the annals of Congress," and, ergo, justify them in going behind the certificate.

The committee could not have known anything about the alleged admissions until they had violated the law which forbade us from going behind the credentials, and can not justify their violation by subsequent developments. If the law is that you can look behind every certificate to see what the facts are, and then may or may not consider such facts in determining the prima facie right, as the committee may or may not consider them without parallel, the law that the certificate is conclusive of the prima facie right, so explicitly and uniformly laid down in the books, is but a delusion and a snare.

But we are advised that Mr. Manning's delay in filing his certificate is not unparalleled, and that heretofore such delay has not even excited comment. He offered his certificate the day on which Congress met, and certainly his failure to file it with the Clerk in vacation infringed no law and affected only his individual convenience.

But if we must be surprised by this delay, surely no one will seriously contend that it amounted to a waiver or a resignation of his right, or in any other way known to the law and practice of legislative assemblies defeated or impaired it.

This proposition, as to whether the House might at this stage go behind a certificate which was regular and not impeached by anything on its own face, was debated at length. The chairman of the committee, in his opening speech,[1] reviewed the older usage of the House in effecting, organization, showing, that in the early

[1] Record, p. 1092.

days the Members-elect appeared on the first day and presented their credentials, which were read. Whenever a Member's credentials were assailed the question was determined at once from an inspection of the credentials alone. The phrase "prima facie case" was used to define the effect of the usual credentials prior to organization, and to distinguish that case from a trial on the merits. But when a case was taken out of the House and sent to a committee for determination without an investigation of the entire case on all the merits it was the usual practice to define the limits of the inquiry by the committee in the resolution of reference. In the case of Hunt *v.* Sheldon it was settled that the prima facie right might depend on something besides the certificate alone. The case of Gunter *v.* Wilshire was also cited. And in concluding the debate [1] the chairman reaffirmed the principle that in determining the prima facie right after the organization had been effected the House was not restricted to examination of the governor's certificate.

In opposition it was argued [2] that the question of prima facie right was really the question, "Who has the return?" In this case Mr. Manning had the return, and the committee might not consider in this connection the other question as to who was actually elected.

The minority report also says:

We maintain the constitutional right of the Second Congressional district of Mississippi to representation on this floor.

It is admitted that her citizens voted at the proper time and places, that her officers did all the law required them to do, from the beginning to the issuance of the proper certificate of election; indeed, that all was done there that was done in any district in the United States.

It is further admitted that Mr. Manning is here her duly accredited Representative. His credentials are from the proper authority, perfect in form, and verified under the great seal of the sovereign State of Mississippi; indeed, that his credentials are as valid as the credentials of any Member occupying a seat upon the floor of this House. Yet, while every other district is represented, as they have a right to be, without reference to whether there is or is not a contest over the seat, the majority of the committee maintain that the right of said district to representation must be denied, and Mr. Manning kept out of a seat upon this floor until they can decide this contest upon its merits.

We must protest against this conclusion, which is at war with reason, with all precedents, and with the fundamental right of representation.

We assert that Mr. Manning's credentials are absolutely conclusive of his right to be sworn in as a Member of this House, and represent the Second Congressional district of Mississippi on this floor until the House shall, in the exercise of its constitutional right, determine that he was not elected.

This principle is elementary, sanctioned by the wisdom of centuries, clearly announced by every text writer on the subject, supported by innumerable precedents, and unassailed at any time, by anybody, in any quarters, except in this case, at this time by the majority of this committee.

The majority report proceeds to an enumeration of the papers other than the credentials which were referred to the committee.

Pursuing the instructions of the House, we find from the papers referred to us that the secretary of state certified to the governor in due form that Van H. Manning received 8,749 votes, J. R. Chalmers 8,257, H. C. Carter 129, and J. R. *Chambless* 1,472. It appears from this certificate that 1,472 votes counted for J. R. *Chambless* were cast in Tate County, and that J. R. Chalmers received no votes in that county. On looking to the return of the election in Tate County, certified by the commissioners of election for that county, duly authenticated, and referred to us, we find that these commissioners certify that at the election in that county J. R. Chalmers received 1,472 votes, and add these words to the certificate: "All of which fully appears by the tally sheet on the opposite side of this page, which we certify

[1] Record, p. 1172.

[2] Especially by Mr. J. Randolph Tucker, of Virginia, Record, p, 1159.

to be a true and correct tally sheet of the votes cast in said Tate County." On the back of this certificate we find not a "tally sheet" but a tabular statement, which seems to count 1,472 votes for J. R. Chambless, and omits altogether the name of Chalmers. This tabular statement is without any caption; but if it is intended by the words "tally sheet," we think, that the secretary of state should have been guided by the face of the certificate, which was complete in itself, and counted these 1,472 votes for J. R. Chalmers. This course would have resulted in the election of Chalmers, according to the face of the returns, by a plurality over Manning of 980 votes. On the other hand, if this tabular statement on the back of the returns from Tate County is to be taken as a part of the return, this construction would render that return so absurd as to void it altogether, and in that view it should have been excluded altogether from the canvass by the secretary of state. This course would have resulted in the election of Chalmers by a plurality of 674 votes.

We also find among the papers referred to us another return of the election in Tate County, certified by the commissioners of election for that county, dated seven days after their first return, and giving 1,472 votes to J. R. Chalmers. But we think their functions had ceased with their first return; and this subsequent statement, being unofficial, can not be regarded as evidence.

We also find among the papers referred to us an affidavit made by one J. M. Williams, relating to the returns of the election in Tate County, to the effect that he was one of the clerks of the commissioners of election who canvassed the returns of the votes in said county, that he made out the "tally sheet," etc., that there was no vote returned for J. R. Chambless, and that if that name appeared in said tally sheet it was a clerical error, etc., but this affidavit being ex parte, and not having the character of official evidence, we have not in this inquiry given it much weight. The official returns of the votes cast at the various voting places in Tate County, or copies thereof properly authenticated, would have been better evidence than either the second return made by the commissioners of election for that county or this affidavit of Williams.

We also find among the papers referred to us certified copies of a verdict and judgment on a mandamus instituted by Mr. Chalmers in the circuit court in and for the first district of Hinds County, Miss., against Henry C. Myers, secretary of state, in which proceeding the issues involved in this contest over the prima facie right to the seat seem to have been determined by the court in favor of Mr. Chalmers on the 24th day of January, 1883, the commission having been awarded to Mr. Manning by the governor on the 18th day of November, 1882. It does not appear that the governor was advised of this proceeding, although it does appear from a recital in said verdict and judgment that the secretary of state certified the canvass of the vote after service of a prohibitory order upon him from the court. But it seems that the supreme court of Mississippi afterwards, on the 11th day of June, 1883, reversed the judgment of the circuit court, as appears from a certified copy of the judgment of the supreme court, among the papers referred. The ground of the reversal of the judgment of the lower court is not shown in the record. Mr. Manning was no party to this proceeding in either court.

On examining the issues between the parties to this contest, as stated in the notice of contest, and the answer thereto, we find that Mr. Chalmers denies Mr. Manning's prima facie right to the seat as well as his ultimate title; and Mr. Manning in his answer, after denying various charges in the notice of contest, and stating the circumstances under which the prohibitory order before mentioned in this report was obtained, and averring that it was properly disregarded by the secretary of state, makes this statement:

"I deny that any frauds were attempted or practiced by my friends, or that they were guilty of fraudulent or illegal practices, or that you received a majority of 1,332 votes as a Member of the Forty-eighth Congress from said Congressional district, though I admit that the inspectors and clerks of the several election precincts did certify to the county commissioners of election in their respective counties that you received a majority of the votes cast; and I further admit that the 1,472 votes which the commissioners of Tate County returned as cast for J. R. Chambless were in fact cast for you, and that the name Chambless was inserted in the return by clerical error instead of your name. And in this connection, I state that because of said error to your prejudice, I will not take a seat in said Congresor ask the clerk to enroll my name as a Member thereof until I have vindicated and the House shall have affirmed my right thereto."

Mr. Manning, in his answer, also charges against the contestant a resort to bribery, corrupt use of official patronage, and intimidation. All the papers referred to us, and hereinbefore specified, are exhibited in an appendix in this report.

This case is without precedent. The admissions of Mr. Manning his refusal to present his commission and take his seat in the usual way, and the instructions of the House, are without a parallel in the annals of Congress.

Guided by the instructions of the House, and having considered carefully the documentary evidence referred to us, we are unable to agree that Mr. Manning should be seated upon his prima facie title. Mr. Chalmers having no such credentials as the law contemplates, we do not think that he ought to be seated pending the contest.

The minority views declare that they can not agree—

that the admissions of Mr. Manning shall be held to affect the title to a seat in Congress, in which the citizens of the Second district of Mississippi are more deeply concerned than Mr. Manning.

The minority views go on to argue:

Now this question is not a new one; there is nothing startling nor unparalleled about it.

It is just as well settled that the returned Member has the right to hold the seat pending a contest on the merits with the person who would have been returned had not the clerical error of a returning officer intervened as that you can not go behind the certificate in determining who should hold the seat pending a contest on the merits. Indeed, the last stated rule, which all admit, grows out of and is founded upon the first.

If the person who ought to have been returned was entitled to the seat pending a contest with the Member who is returned no rule would ever have been made excluding the evidence by which the party who ought to have been returned could establish his right. Because the evidence, if admitted, does not establish any right, is the reason for excluding it. (See Cushing, sec. 144, 140, and authorities before cited.) The admission of a fact by Mr. Manning in his answer can not give any right which proof of the fact would not give.

Rights are dependent upon facts, and a defendant can neither give rights by admitting them nor abridge rights by denying them. If you should hold that the man who ought to have been returned is entitled to occupy the seat pending a contest on the merits, then it makes no difference whether the fact that the person ought to have been returned lies on the surface of the investigation in the shape of an admission or is buried under volumes of proof.

Such a precedent would double the labor in every contest. We would first have to examine the pleading and proof to ascertain who was elected on the face of the returns. After seating such person we would have to institute a second investigation to ascertain who was elected in very truth. Now, as it is apparent that the person who has the majority on the face of the returns has no more right to a seat than the person who is returned, since the right to the seat is vested all the time in the person really elected, legislative bodies have wisely determined, in the interest of economy, of their time and the public treasury, to have no intermediate investigation which does not reach the merits of the contest. As the man elected ought to be returned, and as fraud at the ballot box should be as promptly corrected as any errors committed by returning officers, you can not say who ought to have been returned until you have fully investigated the merits of the case.

The committee are not prepared to report that Mr. Manning ought not to have been returned, because they have not investigated his allegations that Mr. Chalmers was not only not elected but that the precinct officers would have returned a large aggregate majority for him but for the bribery and corruption of the voters by Mr. Chalmers. A little thought will make it apparent that you must hold either that a contest vacates a seat until a decision on the merits or that the returned Member shall bold the seat pending such contest, no matter what facts lie behind the certificate. Any effort to ingraft exceptions upon the settled rule leads inevitably to confusion, disorder, injustice, and a denial of the right to representation.

The great right here for your adjudication is the right of one hundred and fifty thousand citizens to representation on this floor while the individual contest between Messrs. Manning and Chalmers is being determined.

Consideration for that right and a deep sense of necessity of having fixed rules for the exercise of that right led to the adoption and has secured the maintenance up to this time of the rule that the returned Member shall hold the seat pending the contest on the merits.

The attempt of the majority of the committee to evade that rule leads to a denial of that constitutional right of representation which the rule was framed to protect.

And we call your attention now to a startling fact in this case.

The committee have reported unparalleled action on the part of this House and on the part of Mr. Manning, but they have not found anything to criticise upon the part of the people of the Second district of Mississippi, whose dearest right they assail and ask you to disallow.

In any and every aspect of this case this district is entitled to representation. Reason, analogy, precedent, and established rules unerringly point to Mr. Manning as the one person entitled to represent it.

Instead of being able to defend their conclusion behind the resolution of this House, some of the committee have confessedly gone outside of and beyond any authority you gave them. They say, "We are unable to agree that Mr. Manning should be seated upon his prima facie title." Your instructions were to find out whether he had a prima facie title. They have found that he has such prima facie title, and then proceed without warrant and without direction or solicitation from you to advise that he should not be allowed the right his prima facie title insures.

We respectfully submit that you never questioned his right to the seat if it appeared in our investigation that he had a prima facie title to it.

In view of the great interests and important principles involved, and of our clear convictions as to the right, we are impelled to submit this report and the following resolutions for your adoption:

Resolved, That the Hon. Van R. Manning holds perfect credentials, issued in due form and by lawful authority, as Member-elect to the Forty-eighth Congress from the Second Congressional district of the State of Mississippi.

Resolved, That being the duly returned Member he is entitled to be sworn in and occupy the seat on this floor pending a contest on the merits over it.

The majority recommended this resolution:

Resolved, That the Committee on Elections be discharged from the further consideration of the prima facie right to the seat in the contested election case of J. R. Chalmers *v.* Van H. Manning.

The report was very fully debated on February 13, 14, and 16, 1884,[1] and on the last day the question was taken on the proposition included in the first resolution of the minority. This was disagreed to, yeas 106, nays 139.

The second resolution of the minority was then disagreed to, yeas 91, nays 157.

The resolution proposed by the majority was then agreed to, ayes 113, noes 55.

46. The Mississippi election case of Chalmers v. Manning, continued.

The majority of the Elections Committee, in a sustained case, concluded that the House was not concerned about undue influence used in the nomination of a candidate.

A contestant, employed after the election as assistant to a United States district attorney, was held qualified to be seated, especially as his employment ceased before Congress met.

Instance wherein a contestant belonging to the party in the minority in the House was seated.

On June 20, 1884,[2] Mr. John C. Cook,. of Iowa, presented the report of the majority of the committee on the question of final right to the seat. At the outset it admits that Mr. Chalmers received a majority of the votes.

A subordinate question was presented by charges and testimony relating to use of money and Federal patronage in the district, and the report says:

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[1] Record, pp. 1091, 1126, 1156-1174; Journal, pp. 586-589, 591.

[2] Report H. of R. No. 1599; Mobly, p. 34.

Believing that it is the duty of the House, whenever it is shown that the election of a Member is the result of this influence, to declare the election void; and believing. further, that the testimony in a case is to be taken in connection with contemporaneous historical facts, your committee has given careful attention to the record and evidence in this case. We conclude that it can not fairly be said that the election of Mr. Chalmers was secured by such undue influence; that is to say, that without it be would not have been elected, especially in view of the large majority he received. It was perhaps more instrumental in making him the candidate of the Republican party and suppressing other aspirants for party support. But with this we think the House has no concern.

A large part of the evidence is calculated[1] to show that the contestant was deceitful in his politics, treacherous to his political friends, and unworthy of so high an office. This, however, must address itself to the voters of his district, and the House has no right to render an unjust decision because a man lawfully elected may be subject to this criticism more or less.

The minority views presented by Mr. Ambrose A. Ranney, of Massachusetts, in behalf of himself and five others of the committee, dissented from any conclusions that would imply credence in the charges.

The main issue in the case is thus stated and decided in the majority report:

It is next claimed that Mr. Chalmers, if legally elected, has since his election disqualified himself from holding this office by accepting another office from the United States and performing its duties within the term of office of a Member of the Forty-eighth Congress, under the following provision of the Constitution:

"And no person holding any office under the United States shall be a Member of either House during his continuance in office."

Because on the 9th day of December, 1882, Mr. Chalmers was by the Attorney-General of the United States employed or appointed "special assistant to the district attorneys for the northern and southern districts of Mississippi," and that by retaining this position he had vacated his office as Representative.

Your committee, however, passing the question of whether this is an office within the meaning of the Constitution, find that Mr. Chalmers was retained for a special purpose, and that prior to the time for the convening of Congress the matter for which he was appointed or employed had been disposed of. His account had been rendered to and closed by the Department. No resignation had been made—none was necessary. Practically his connection with the office of district attorney had ceased.

We recommend to the House for adoption the following resolution:

Resolved, That James R. Chalmers was duly elected as a Representative in the Forty-eighth Congress from the Second district of Mississippi, and is entitled to be sworn in as a Member of this House.

The minority views presented by Mr. Ranney practically concurred in this decision:

It has been contended that contestant was not eligible, or rather that he had lost his right to a seat, because employed December 9, 1882, by the Attorney-General, to act as counsel and aid the district attorneys in the prosecution of some criminal cases in Mississippi. His employment was a special one in the line of his profession, and it was in no sense an office which was incompatible with his holding the position of Representative to Congress. He was not awarded a certificate of election as the chosen Representative, but the same was awarded to and was held by another person, to wit, the contestee. He was only a contestant claiming the seat. He was employed and retained after the day of election for a special purpose, to assist the district attorneys for the northern and southern districts of Mississippi in the prosecution of certain criminal cases. The employment was authorized under the statutes of the United States. It was a special contract employment for special pay according to what he did, and not an appointment to fill any office created by law, with duties prescribed and a salary attached. There is no good reason for a claim that it was the holding of an office under the United States which was incompatible with his being a Member of this House under the provisions of the Constitution, even if he had been a Member of that body. But whether it was or not, inasmuch as he was not then accredited as a Member and another person was, and especially inasmuch as his employment had ceased, his services

[1] It was explained in debate that "intended" was the word which should have been used.

having been fully performed and ended before the Forty-eighth Congress met, he could not in any event properly be held to come within the provision of the Constitution referred to either in its letter or spirit. (Contested Elections in Congress, 1779–1837, p. 122; Hammond *v.* Herrick, in same, p. 287; Earle's case, p. 314; Mumford's case, p. 316; Schenck's case; McCrary, secs. 238, 244.)

But Mr. L. H. Davis, of Missouri, presented views wherein it was argued at length that an assistant district attorney was an officer within the meaning of the Constitution. Mr. Davis discussed the law and the precedents at length.

The report was debated on June 25,[1] the main issue being on the question as to whether or not the office of assistant district attorney was incompatible with that of Member of Congress. Several Members who thought that the offices might be incompatible, nevertheless considered that the contestant had the power of electing which office he would accept as soon as it should be determined that he was entitled to the seat in the House.

The question was first taken on the following resolution proposed by Mr. Davis in his minority views:

Resolved further, That said Chalmers having accepted the office of special assistant United States district attorney for the northern and southern districts of the State of Mississippi, since the said election, and holding said office up to and beyond the Ist day of February, 1884, is ineligible to a seat in this Congress, and a vacancy exists in the Second Congressional district of the State of Mississippi.

This resolution was disagreed to—ayes, 36; noes, 98.

Then the question was taken on a second resolution proposed by Mr. Davis:

Resolved, That the means and methods employed by the Federal Administration in securing the election of James R. Chalmers as a Member of the House of Representatives of the Forty-eighth Congress are, as appears by the majority report and the evidence on file, repugnant to and subversive of true representative government, and the said election is therefore declared void.

This resolution was disagreed to—yeas, 56; nays, 163.

Then the resolution of the majority declaring contestant elected was agreed to without division, and Mr. Chalmers appeared and took the oath.

It should be noted that Mr. Chalmers belonged to the minority party in the House, and Mr. Manning to the majority party.

47. No credentials being received from a district prior to the meeting of Congress, the Clerk placed no name on the roll for that district.

The Clerk, while presiding at the organization, declined to open a paper addressed to the Speaker, although it was supposed to inclose a missing credential.

On October 15, 1877,[2] at the organization of the House, while the roll of Members-elect was being called, the Clerk[3] said:

From the State of Missouri there is one district, the third in number, from which no credential of any kind has been received in favor of any person, and consequently no name has been placed upon the roll from said district. There has been handed to me at this instant a paper from the State of Missouri, addressed to the Speaker of the House of Representatives. It is suggested that, as there is no Speaker, the Clerk should open it.

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[1] Record, pp. 5591-5606; Journal, pp. 1548, 1550, 1553.

[2] First session Forty-fifth Congress, Record, p. 52.

[3] George M. Adams, of Kentucky, Clerk.

Several Members having objected, the Clerk said:

The Clerk prefers, inasmuch as it might raise a question about which, at this late hour, he is not prepared to determine what he should or should not do in reference to the roll, to leave it for the House to determine when it shall have organized.

48. A Member-elect having been enrolled on the strength of credentials in due form, the Clerk declined to strike him from the roll on the strength of later papers.—On March 18, 1879,[1] at the time of the organization of the House, after the roll of Members-elect had been called, the Clerk[2] said in reference to one of the seats from the State of Florida:

He (the Clerk) received a certificate of election signed by the governor and authenticated by the seal of Florida, as prescribed by the following provision in the statutes of that State: "Whenever any person shall be elected to the office of elector of President or Vice-President, or Representative in Congress, the governor shall make out and sign and cause to be sealed with the seal of the State and transmit to such person a certificate of his election," duly accrediting Mr. Hull as a Representative-elect to the Forty-sixth Congress. He subsequently received a number of papers, among which was a certified copy of a canvass of the votes in the Second district of Florida, made by the board of State canvassers in pursuance of an order of the supreme court of that State, from which canvass it appears that Mr. Horatio Bisbee, Jr., was elected; but those papers were not accompanied by the certificate of the governor, authenticated by the seal of the State, as required by the statute just cited. The Clerk did not feel at liberty to regard anything as a credential within the meaning of the law governing him in making up the roll except a certificate made out and signed by the governor and sealed with the seal of the State, as prescribed by this provision of the statutes of Florida; and as Mr. Bisbee, who claims to have been elected, presented no such certificate, the Clerk could not regard him as possessing the prima facie evidence of an election which the laws of Florida requires that he should have, and consequently omitted his name from the roll.

49. On August 7, 1893,[3] at the time of the organization of the House, the Clerk,[4] after the State of Michigan had been called, made the following statement:

The Clerk begs leave to state, in reference to the certificate of election from the Fifth Congressional district of Michigan, that on December 22, 1892, there was filed in his office a certificate of election to the House of Representatives from that district in due and authorized form, showing the election of Hon. George F. Richardson as a Representative to the Fifty-third Congress of the United States, and the name of said George F. Richardson was, by the Clerk of the House, then duly placed upon the roll of Representatives-elect. Exactly similar certificates in every respect, certified to by the same State officers, were filed at other dates, as late as April 3, 1893, showing the election of Representatives to Congress from all the other districts of Michigan, and similar action was taken in each case.

On February 20, 1893, there was delivered to the Clerk an alleged certificate of election, signed by other persons (the State officers required by law to certify the election of Members of Congress having been changed in the interim), which said certificate, accompanied by sundry papers, claimed to show the election of Hon. Charles E. Belknap from the Fifth Congressional district of Michigan as a Representative to the Fifty-third Congress. The Clerk refused to strike off the roll the name of George F. Richardson as a Member-elect from this district, having already exercised the authority given to him by the law. The matter is therefore submitted to the House, which, when organized, is, under the Constitution and the law, judge of the elections, returns, and qualification of its own Members.

50. In 1879 the Clerk honored the regular credentials from the governor of Iowa, although papers presented in opposition thereto raised a

[1] First session Forty-sixth Congress, Record, p. 4.

[2] George M. Adams, of Kentucky, Clerk.

[3] First session Fifty-third Congress, Record, p. 200.

[4] James Kerr, of Pennsylvania, Clerk.

doubt as to the lawful day of election.—On March 18, 1879,[1] at the time of the organization of the House, after the roll of Members-elect had been called by the Clerk,[2] he said:

There were presented to the Clerk certificates duly signed by the governor of the State of Iowa, under the seal of the State, accrediting the nine gentlemen whose names have been announced as Representatives duly elected on the 8th day of October, 1878. Sundry papers were also presented to the Clerk in reference to an election claimed to have been held on the Tuesday next after the first Monday in November, 1878. These papers, however, do not conform to the requirements of the laws of Iowa. They are not signed by the governor; they are not under the seal of the State; they are simply papers which came unauthenticated and in no sense constitute credentials within the meaning of the laws of Iowa. Whatever may be the fact, therefore, in reference to the time at which the election should have been held in the State of Iowa, even though it were definitely and clearly settled that the election should have been held in November instead of October, the Clerk could not in any event place on the rolls the names of those persons in whose behalf papers have been filed in reference to the November election for the reason that these papers do not comply with the laws of the State of Iowa and do not constitute credentials.

As to whether the election should have been held in October or in November there are grave doubts in the minds of those learned in the law. It is a question about which he confesses he has not been able to arrive at so clear and satisfactory conclusion as he himself could have desired. But in the discharge of the duty imposed upon him, unless he could arrive at a clear and satisfactory conclusion that those gentlemen were not elected on the proper day, he did not feel at liberty to withhold their names from the roll of Members-elect, but thought it proper to give the benefit of the doubt in favor of representation and to remand that question for the consideration of the House when it shall have organized.

51. In 1879 the Clerk declined to honor a regular credential for a Representative at large to which the State was not entitled by law.—On March 18, 1879,[1] at the organization of the House, after the roll of Members-elect had been called, the Clerk[2] said:

He (the Clerk) has received a certificate accrediting an additional Representative from the State of Kansas as elected from the State at large; but as he is not aware of any law authorizing that State to have more than three Representatives, he has not placed the name of the person who is claimed to have been elected for the State at large upon the roll.

52. In 1885 the Clerk honored the Nebraska credentials which, although they did not fully comply with the law, were identical in form with certificates sent from that State to former Congresses.—On December 7, 1885,[3] at the time of the organization of the House, when the State of Nebraska was reached in the calling of the roll, the Clerk[4] said:

The Clerk desires to state that he has some doubt as to whether the certificates from the State of Nebraska fully comply with the law, but as they are identical with the certificates filed with the Clerk of the House of Representatives of the Forty-seventh and Forty-eighth Congresses, and as there is no protest or contest, he has placed the names upon the roll.

53. The Kentucky election case of Letcher v. Moore in the Twenty-third Congress.

In 1833 the House declined to sustain the action of the Clerk in en-

[1] First session Forty-sixth Congress, Record, p. 4.

[2] George M. Adams, of Kentucky, Clerk.

[3] First session Forty-ninth Congress, Record, p. 106

[4] John B. Clark, of Maryland, Clerk.

rolling a person whose credentials on their face failed to comply with the requirements of the State law.

An instance wherein, at the organization of the House, before the enactment of the law as to the Clerk's roll, two claimants to a seat were present and participated in the proceedings.

In 1833 the House decided that a person bearing defective credentials should not be called on the roll call until after the election of Speaker and other officers.

In 1833 the House declined to seat either claimant until the final right should be determined.

Form of resolution used in 1833 to authorize the institution of a contest.

On December 2, 1833,[1] at the organization of the House, while the Clerk of the last House was calling the names of the Members-elect, and had called as far as the State of Kentucky, Mr. Chilton Allan, of that State, arose and objected to the calling of Thomas P. Moore, returned to serve as the Member for the Fifth Congressional district of said State, on the ground that the said Thomas P. Moore had not been duly elected and that the return of the said Thomas P. Moore was not in the form prescribed by the laws of the State of Kentucky.

Debate at once arose. Some question was made as to the competency of the body of unqualified Members to make a decision; a proposition was made that a chairman be chosen to preside, etc.

It appeared from the debate that the Clerk had put the name of Mr. Moore on his roll of Members-elect, and the Members called for the reading of the papers on which the Clerk had acted. He therefore produced Mr. Moore's certificate, which was signed by the sheriffs of three of the five counties composing the Congressional district, although the law required it to be signed by the sheriffs of all the counties. This certificate, on the face of it, stated that the votes of one county were not taken into account. Both Mr. Moore and his opponent, Mr. Robert P. Letcher, were present. Mr. Moore spoke on the question, and the report of debates indicates that Mr. Letcher was also heard to the extent of making a proposition that both withdraw until after the election of Speaker.

By general consent it was agreed that Mr. Moore should not be called until the House should have become organized by the election of Speaker and other officers.

On December 4 the subject was resumed and gave rise to an extended debate, during which the insufficiency of the credentials of Mr. Moore was urged. Finally, on December 5, the House agreed to these resolutions:

Resolved, That the Committee of Elections, when appointed, inquire, and report to this House, who is the Member elected from the Fifth Congressional district of the State of Kentucky and, until the committee shall report as herein required,

Resolved, That neither Thomas P. Moore nor Robert P. Letcher shall be qualified as the Member from said district.

Resolved further, That the Committee of Elections shall be required to receive as evidence all the affidavits and depositions which may have been heretofore, or which may hereafter be, taken by either of the parties, on due notice having been given to the adverse party, or his agent, and report the same to this House.

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[1] First session Twenty-third Congress, Journal, pp. 3, 26, 27; Debates, pp. 2130–2135, 2139–2160.

54. The Kentucky election case of Letcher v. Moore, continued.

The House considered the constitution and laws of the State in which the election was held as affording the rule by which irregularities should be tested.

Although the State constitution required that every vote be given viva voce, the Elections Committee in a report which failed, evidently for other reasons, to be sustained decided that the votes of certain mutes might be counted.

In an inconclusive case the House reversed the decision of its committee, that residence while attending a school was not such residence as entitled one to the suffrage.

In 1834 in an inconclusive case the Elections Committee gave the word "residence" the same meaning as "home" or "domicile."

In an inconclusive case in 1834 the Elections Committee held that right of suffrage was not lost by removal from the State unless there was an intention to remain away or proof of permanent location elsewhere.

The law requiring the presence of the sheriff at the voting, the committee rejected votes cast in his absence, but the House reversed this ruling.

In 1834 the Elections Committee adopted the rule that depositions must be signed by the witness, unless State law made the certificate of a magistrate sufficient.

On May 6, 1834,[1] the Committee on Elections reported in the case of Letcher *v.* Moore, from Kentucky, the first paragraph of the report explaining the situation:

> The subject presented itself as one entirely new and unprecedented. Thomas P. Moore, esq., had a certificate from three only of the five sheriffs, and Robert P. Letcher, esq., a majority of the votes upon the poll books of the five counties composing that district. As Mr. Letcher had no certificate, and that of Mr. Moore was not signed by all the sheriffs, as required by the law of Kentucky, neither could produce a satisfactory testimonial of his election, and consequently neither was permitted to take his seat.

The partial certificate was the result of the action of the sheriff of one county, who withheld the poll book and thus prevented the issuing of a certificate to Mr. Letcher, who, with that county poll, would have been elected so far as the face of the returns went. The minority of the committee, united with the majority in condemning the conduct of the sheriff, and in the opinion that the certificate of three of the five sheriffs was insufficient to entitle Mr. Moore to a seat. But the minority did contend that certified copies of the poll books constituted sufficient evidence of the election to entitle the person in whose favor they showed a majority to take the seat, subject of course to future contest and final decision of the House.

This view did not prevail, however, the House not considering this aspect further, and neither party took the seat on prima facie right.

The committee gave to the contestants a certain time in which to take testimony, and then allowed the contestants an opportunity to examine the testimony and make briefs. Both contestants also presented arguments.

The committee found in their examination nearly 400 votes objected to, these objections arising principally as to the qualifications of voters, but some as

[1] First session Twenty-third Congress, contested elections in Congress, from 1789 to 1834, p. 715.

to the conduct of officers of the election. The constitution and laws of Kentucky were the rule of the election, and the committee examined the objections with reference to that constitution and system of laws.

First, in relation to the qualification of voters. The constitution of Kentucky provided that "in all elections by the people" the "votes shall be personally and publicly given viva voce." Three deaf-mutes, able to read and write, voted, but objection was made that it was physically impossible for them to comply with the requirements of the constitution. The committee finally concluded that under a liberal construction of the constitution the votes might be received.

The State constitution also allowed every male over the age of 21 to vote in the county where he was actually residing, provided he had resided in the State two years. The commttee gave to the term "residence" the same meaning as "home," or "domicile;" and three men who had been in another State five years were still considered entitled to vote. Also all men living in the county for the time being, unless the business bringing them there was merely temporary, were allowed to vote unless they had actual home or domicile in another part of the State. This principle determined the votes of laborers residing where they could get work. But the students of a theological seminary were rejected in accordance with the following principle laid down by the committee: "That the residence of young men from other States and counties, at schools, academies, or colleges, as scholars or students, is not such a residence as entitles them to the right of suffrage in the county where they are for the time being." The committee also laid down the following principle in reference to removal from the State: "An individual having the right of suffrage in Kentucky does not lose it by removal from the State merely, but there must be an evidence of his intention at the time he departs to leave the State permanently or proof of his permanent location elsewhere to forfeit his rights as a voter."

In their investigation the committee also laid down the following rules in regard to voters:

> That no name be stricken from the polls as unknown, upon the testimony of one witness only that no such person is known in the county; and that where a man of like name is known, residing in another county, some proof, direct or circumstantial, other than finding such a name on the poll book, will be required of his having voted in the county or precinct where the vote is assailed.
>
> That all depositions not subscribed by the witness be excluded, unless the certificate of a magistrate be sufficient according to the law of Kentucky.
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> That votes recorded upon the poll books as given to one candidate can not be changed and transferred to the other by oral testimony.
>
> That all declarations or statements made by voters after the election, relative to their right of suffrage, be rejected.
>
> That when a man is found on the poll book, proof that an individual of that name resides in the county, who is a minor, is not sufficient to strike the name off the poll book, and that some proof, direct or circumstantial other than finding the name on the poll book, will be required of the vote having been given by such minor in the county or precinct where the vote is assailed.

In that branch of the case relating to the conduct of election officers the law of Kentucky provided for the appointment of two judges and a clerk for the county by the county court, and that in case of failure to appoint, or failure of any or all of the appointees to attend, the sheriff should, immediately preceding the election, appoint proper persons to act in their stead; that the sheriff or other presiding officer should "open the polls by 10 o'clock in the morning" of the day of election;

that the judges and clerk should be sworn and attend to receiving the votes until the completion of the election and the return; that voting should be done publicly and viva voce "in presence of said judges and sheriff."

In Garrard County one judge declined serving, and the other not having appeared at 9 a.m. when the sheriff opened the election (the law requiring him to do it "by l0") the sheriff appointed the second judge. About 10 o'clock, when the originally appointed judge appeared, the second appointee of the sheriff resigned the duties. On the second day of the election the sheriff was absent for three hours, the two judges continuing to receive votes in his absence.

The committee held that the sheriff was not authorized to appoint the second judge until 10 o'clock, as the law intended to allow until that time for the arrival of the judges. Not until that time could a judge be said to have failed to attend. Therefore the committee rejected the votes taken before 10, during the officiating of the second appointee, who resigned as soon as the regular judge arrived and did not "attend to receiving the votes" until the election and return were completed.

The committee also rejected the votes taken in the absence of the sheriff, since, under the letter of the law, the voting must be in his presence. The State had prescribed the "manner" of holding the election, and the votes were not taken in the prescribed manner. In support of this action the committee cited the cases of Jackson and Wayne (1791), Patton (1793), Morris (1795), Lyon and Smith (1795), McFarland and Purviance (1804), Spaulding and Mead (1805), McFarland and Culpepper (1807), Bassett and Bayley (1813), Scott and Easton (1816).

As a result of the corrections made in accordance with the above principles, the committee found Thomas P. Moore entitled to the seat and so reported.

55. The Kentucky election case of Letcher v. Moore, continued.

The House in 1834 reversed the decision of its committee that recorded votes on the poll book could not be changed by oral testimony.

The House reversed the rule of its committee that a vote might be rejected from the poll on the testimony of more than one witness that the voter was unknown in the county.

There being doubt as to the regularity of the appointment of an election judge, the committee rejected the votes cast while he officiated; but the House reversed the ruling.

It being impracticable for the House to determine with any certainty who was elected, the seat was declared vacant.

The case was considered in the House during the period from May 13 to June 12, the House disregarding the report and going into the case itself. On June 4 the House decided that the votes cast in Garrard County while the second judge appointed by the sheriff was officiating should be counted; also that the votes cast during the absence of the sheriff should be counted.

The House also reversed the action of the committee in the case of the theological students and decided that their votes should be counted.

Also the House reversed the principle laid down by the committee that recorded votes, on the poll book could not be changed by oral testimony; also votes which the committee rejected on the testimony of more than one witness, that the voters were unknown in the county, were restored by the House.

On June 12 a proposition that Mr. Letcher was entitled to the seat was decided in the negative, yeas 112, nays 114. And then, after unavailing efforts to amend, the House agreed, by a vote of 114 yeas to 103 nays, to a resolution that there be a new election, "it being impracticable for the House to determine with any certainty who is the rightful representative."

56. The prima facie election case of Belknap v. Richardson, from Michigan, in the Fifty-third Congress.

An instance wherein the Clerk and the House honored credentials, regular in form and issued legally by the proper officer, but annulled by the State supreme court.

There being conflicting credentials, the House honored those first issued, although by reason of a revision of returns the court had annulled the said prior credentials.

On August 7, 1893,[1] during the organization of the House, and while the Speaker was administering the oath to Members, the State of Michigan was called and Mr. Julius C. Burrows, of that State, objected to the oath being administered to Mr. George F. Richardson.

The Speaker directed Mr. Richardson to stand aside.

The other Members and Delegates having been sworn in, Mr. Charles T. O'Ferrall, of Virginia, offered this resolution:

Resolved, That George F. Richardson be now sworn in as a Representative for this Congress from the Fifth district of the State of Michigan.

Mr. Burrows offered the following substitute for this:

Whereas the credentials upon which George F. Richardson claims a seat in the Fifty-third Congress from the Fifth Congressional district of the State of Michigan have been annulled and made void by reason of the judgment of the supreme court of that State; and

Whereas in pursuance and compliance with such judgment and with the laws of said State, the State board of canvassers of Michigan have determined, declared, and certified that Charles E. Belknap is duly elected a Representative to the Fifty-third Congress of the United States of America from the Fifth Congressional district of the State of Michigan; Therefore,

Resolved, That Charles E. Belknap is entitled to be sworn in as a Member of this House on his prima facie case.

By unanimous consent the consideration of these resolutions was deferred until the organization of the House should be perfected.

On August 8, after debate and after a motion to commit had been negatived, by a vote of yeas 128, nays 193, the substitute was negatived, yeas 114, nays 199, and Mr. O'Ferrall's resolution was agreed to. Then the oath was administered to Mr. Richardson.

On this case, as stated in the Clerk's explaination, both parties presented regular credentials, those presented by Mr. Richardson being exactly similar to those on which the other Michigan Members were seated. But in the case of Mr. Richardson there had been in one of the counties of his district—the county of Ionia—a recount which the supreme court of the State had declared illegal, and as a result of the action of the court there appeared a plurality of votes for Mr. Belknap. So a new certificate was issued, signed by the same officials who signed the Richardson cer-

[1] First session Fifty-third Congress, Record, pp. 201, 202, 226–238.

tificate (although not by the same individuals, there having been a change in the State government), and certifying the election of Mr. Belknap. The certificate furthermore stated that Mr. Belknap had the largest number of votes and was elected "in accordance with the laws of said State and the decision of the supreme court of Michigan annulling the certificate heretofore illegally issued to George F. Richardson and is issued in lieu thereof."

In the course of the debate the action of Clerk George M. Adams in the Florida case was cited.

A resolution was adopted to allow Mr. Belknap to contest.[1]

57. The Florida prima facie election case of Bisbee v. Hull in the Forty-sixth Congress.

The Clerk and the House honored credentials, regular in form and issued by a competent officer, although the fact was notorious that the State courts had found a different result.

On March 18, 1879,[2] while the Speaker was administering the oaths to Members at the time of the organization of the House, the State of Florida was called and Mr. Noble A. Hull presented himself to be sworn. Mr. William P. Frye, of Maine, requested that he stand aside, objecting to the administration of the oath to him.

When the oath had been administered to the other Members, Mr. John T. Harris, of Virginia, offered this resolution:

Resolved, That Noble A. Hull be now sworn in as a Representative in this Congress from the Second district of the State of Florida.

Mr. Frye offered the following as a substitute:

Whereas the credentials upon which Noble A. Hull claims a seat * * * have been annulled and made void by the judgment of the supreme court of that State; and

Whereas, in pursuance and in compliance with such judgment and with the laws of said State, the State board of canvassers of Florida have determined, declared, and certified that Horatio Bisbee, jr., is duly elected a Representative, etc.; Therefore,

Resolved, That Horatio Bisbee, jr., is entitled to be sworn in as a Member of this House on his prima facie case.

On March 19 Mr. Frye withdrew the preamble and resolution and offered the following:

Resolved, That the question of the prima facie as well as the final right of Horatio Bisbee, jr., and Noble A. Hull, contestants, respectively, claiming a seat in this House from the Second district of Florida, be referred to the Committee of Elections, hereafter to be appointed; and until such committee shall have reported in the premises and the House have decided such question neither of said contestants shall be admitted to a seat.

Mr. Frye stated in support of his resolution that because of irregularities in the count in two of the counties of the district, the majority which should have been for Mr. Bisbee had been changed so as to show the election of Mr. Hull. The supreme court of the State ordered a review by the State canvassing board, which resulted in the demonstration that Mr. Bisbee had been elected. But the governor, who had already issued a certificate to Mr. Hull, on the first return of the canvassing board, declined to revise his action and issue a certificate to Mr. Bisbee. Mr. Bisbee

[1] Record, p. 1359.

[2] First session Forty-sixth Congress, Record, pp. 6, 27; Journal, pp. 12, 20, 21.

applied to the supreme court of the State for a mandamus to compel the governor to issue the certificate. The court held that the governor ought to issue the certificate, but that the court could not compel him to. A dissenting judge held that the court might compel the governor. Mr. Frye cited the case of Davidson and Purman in the preceding Congress, where there were two certificates from two governors, and where the Clerk placed on the roll the name of the claimant whose certificate was in accordance with the law of the State as interpreted by the supreme court. In behalf of Mr. Bisbee, Mr. Frye and others claimed that the action of the supreme court, and the second canvass had shown the certificate issued to Mr. Hull to be void, and therefore that the prima facie right to the seat did not belong to Mr. Hull.

On the other hand, it was contended that Mr. Hull had the certificate of the governor, issued according to law and regular in form. Therefore he should be seated. The facts brought forward on the other side might be reason for an inquiry as to the final right to the seat, but not as to the prima facie right.

The question being taken on the resolution proposed by Mr. Frye it was disagreed to—yeas 137, nays 140.

The resolution proposed by Mr. Harris was then agreed to—yeas 140, nays 136.

Thereupon Mr. Hull appeared and the oath was administered to him.

58. A certificate regular in form and legally issued by a competent officer was honored by both Clerk and House, although the successor of that officer had issued conflicting credentials.—On October 15, 1877,[1] at the organization of the House, while the Members-elect, whose names had been placed on the roll by the Clerk, were being sworn, Mr. Richard H. Cain, of South Carolina, was challenged and stood aside. On the succeeding day, after the disposal of the case of Mr. Joseph H. Rainey, of the same State, Mr. John B. Clarke, of Kentucky, offered the following:

Resolved, That the question of the prima facie, as well as the right of M. P. O'Connor against Richard H. Cain, contestants, respectively, claiming a seat in this House from the Second district of South Carolina be referred to the Committee of Elections, hereafter to be appointed. And until such committee shall have reported in the premises and the House has decided such question neither of said contestants shall be admitted to a seat.

In this case Mr. Cain had the regular certificate, as did Mr. Rainey, and the secretary of state (successor to the one who had issued the certificate) had issued an impeaching certificate.

In the debate it was urged that the law of elections laid down the principle that a certificate did not constitute a prima facie title to a seat in cases where there was a second impeaching certificate. In this case the same officer issued the first certificate, and also the certificate that impeached the first. It did not matter that the officer was not, in the two cases, the same person. Both certificates were from the secretary of state of South Carolina. It was not sufficient to say that one came from one political partisan and the other from another political partisan. Against this it was urged again, as in the case of Rainey, that the certificate was regular in form, in conformity with law, and must be followed.

[1] First session Forty-fifth Congress, Journal, p. 16; Record, pp. 65–68.

The House, by a vote of yeas 181, nays 89, adopted the following substitute:

Resolved, That Richard H. Cain be now sworn in as a Representative, etc.

The oath was accordingly administered to Mr. Cain.

59. Neither the Clerk nor the House honored credentials issued by a lieutenant-governor in the temporary absence of the governor, revoking regular credentials.—On October 15, 1877,[1] at the organization of the House while the oath was being administered to the Members-elect, whose names had been placed on the roll by the Clerk, objection was made to Mr. C. B. Darrall, of Louisiana, and he stood aside. On the succeeding day Mr. Randall L. Gibson, of Louisiana, by whom he had been challenged, stated that he had objected because the lieutenant-governor of Louisiana, acting in the temporary absence of the governor, had issued a certificate in effect revoking the certificate originally issued to Mr. Darrall, and certifying J. H. Acklen as the Representative. Mr. Gibson proposed the following resolution, which was agreed to without opposition:

Resolved, That Mr. Darrall, of the Third district of Louisiana, be sworn in, and that the credentials of Mr. J. H. Acklen, of said district, with the papers thereunto attached, be referred to the Committee of Elections, when appointed, with instructions to report upon his right to a seat in this House from said district.

Mr. Darrall then appeared and took the oath.

60. The House confirmed the action of its Clerk who had enrolled the bearers of credentials which conformed strictly to the law, although less formal credentials had been issued at an earlier date by a recognized governor.

In making up the roll the Clerk disregarded entirely credentials issued by a person claiming to be governor, but who never exercised the functions of that office.

On October 15, 1877,[2] at the organization of the House, after the roll had been called by the Clerk,[3] that official explained as follows:

There were received from the State of Louisiana three different sets of credentials, one set signed by John McEnery as governor of Louisiana, bearing date December 20, 1876, and declaring certain persons elected from the First, Fourth, and Sixth districts, but silent as to the persons elected from the other districts of said State. Inasmuch, however, as said McEnery was never de facto governor of Louisiana, and never in point of fact exercised or performed the functions of that office, it is not deemed necessary to make here any statement concerning the regularity or irregularity of the credentials coming from that source.

Another set of credentials is signed by William Pitt Kellogg as governor of Louisiana, with the seal of the State attached, all of which not only bear different dates, but also reached the hands of the Clerk at different times and through different channels, and simply declare the persons elected from each of the districts of said State, respectively, except the Second district, as to which no certificate seems to have been issued by said Kellogg in favor of any one. The law of Louisiana prescribing the character of the credentials by which the elections of its Representatives in Congress shall be authenticated and known provides as follows:

"That as soon as possible after the expiration of the time of making the returns of the election for Representatives in Congress, a certificate of the returns of the election for such Representatives shall be

[1] First session Forty-fifth Congress, Journal, p. 20; Record, p. 69.

[2] First session Forty-fifth Congress, Journal, pp. 20–24; Record, pp. 51, 52, 73–76, 85–88, 89–92.

[3] George M. Adams, of Kentucky, Clerk.

entered upon record by the secretary of state, signed by the governor, and a copy thereof, subscribed by said officers, shall be delivered to the persons so elected, and another copy transmitted to the House of Representatives of the United States, directed to the Clerk thereof."

These credentials signed by Governor Kellogg are in no sense a compliance with the requirements of the laws of Louisiana. They do not even purport to be entered on the record by the secretary of state and there signed by the governor, but are, on the contrary, a simple declaration by him that certain persons are elected without even stating the sources of his information, and no more constitute credentials within the meaning of the laws of Louisiana than a simple statement from the treasurer or other State official would be.

The other set of credentials is signed by Francis P. Nichols as governor of Louisiana, and Oscar Arroyo as assistant secretary of state, with the seal of the state attached. All of them bear date February 27, 1877, and all of them reached the hands of the Clerk at the same time, and through the channels prescribed by law. They declare the persons elected in each of the districts of Louisiana, respectively, and conflict with the certificates signed by Governor Kellogg in reference to two districts only. These credentials comply, it is thought, with the laws of Louisiana in every respect, and the Clerk has accordingly placed on the roll the names of persons contained in these credentials.

Accordingly, the Clerk had placed on the roll the names of Messrs. J. B. Elam and E. W. Robertson, bearing the credentials of Governor Nichols. These names were challenged, at the time of administering the oath, and Messrs. Elam and Robertson stood aside. On October 16 and 17 their cases were considered on motions that their cases, with those of Messrs. George L. Smith and Charles E. Nash, holding certificates from Governor Kellogg,, should be referred to the Committee of Elections with instructions to determine the prima facie right.

It was urged in behalf of the Kellogg certificates that Governor Kellogg was indisputably governor de facto, that the returning board under the law having jurisdiction made returns of the election of November, 1876, and that the governor on those returns on December 27, 1876, issued certificates in form the same as used in years previous and recognized by the House as sufficient in the Forty-third Congress and on other occasions. Furthermore, it was urged that the certificates of Governor Nichols, issued after the Kellogg government expired, were based on the canvass of a new returning board provided for by a law passed after Governor Nichols came in and after the election, and that that returning board did not in fact have the returns before it.

On behalf of the Nichols certificates it was urged that the House, in determining prima facie right, had no right to travel outside of the record presented on the face of the certificates. And on the face of the certificates the credentials of Governor Nichols were exactly according to the requirements of law, and the credentials of Governor Kellogg were not. The full language of the two forms of certificates were presented to show that the Nichols certificate corresponded exactly to the technical requirements of the law, while the Kellogg certificate did not.

The House in the case of Mr. Elam adopted a substitute providing that he should be sworn in by a vote of 144 yeas to 119 nays.

Mr. Elam accordingly appeared and took the oath.

In the case of Mr. Robertson similar action was taken without any roll call, and the oath was administered.

61. It has been held that there is no roll of Delegates which the Speaker is obliged to recognize at the time of swearing in Members-elect

at the organization of the House.—On December 5, 1881,[1] during the organization of the House, the Speaker announced that all the Members had been sworn in and that the next business would be the election of a Clerk.

Mr. Martin Maginnis, Delegate from Montana, rising to a question of privilege, asked if the next business in order was not the swearing in of the Delegates from the Territories.

The Speaker[2] said:

The next business in order to complete, under the law, the organization of the House is the election of a Clerk. The matter of swearing in the Delegates will follow.

On December 6 all the Delegates were sworn in except the Delegate from Utah. It seems that the name of Mr. George Q. Cannon had been placed on the roll by the Clerk of the preceding House.[3] The governor of the Territory, however, had given a certificate of election to Mr. Allen G. Campbell.

The Speaker stated that there were two certificates held, respectively, by two different gentlemen, and this involved a question which could not be determined in advance by either the old or the new Clerk. The Clerk of the preceding House was required to make up the roll of Members by States. But that obligation did not extend to a roll of Delegates from the Territories. There was no roll of the Delegates from the Territories which the Chair was bound to recognize.

Mr. Dudley C. Haskell, of Kansas, offered this resolution:

Resolved, That Allen G. Campbell, Delegate-elect from Utah Territory, is entitled to be sworn in as a Delegate to this House on his prima facie case.

Mr. Samuel S. Cox, of New York, made the point of order that the roll was in existence and that under the law the names of Members and Delegates whose names were on the roll should be sworn in unless objection should be made. He quoted the Revised Statutes as follows:

SEC. 31. Before the first meeting of each Congress the Clerk of the next preceding House of Represenatatives shall make a roll of the Representatives-elect, and place thereon the names of those persons, and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States.

SEC. 38. Representatives and Delegates-elect to Congress, whose credentials in due form of law have been duly filed with the Clerk of the House of Representatives, in accordance with the provisions of section thirty-one, may receive their compensation monthly, etc.

After debate the Speaker said:

The Chair regards this question as one of importance, because in some view its decision may be regarded as a guide to the action of the Clerk hereafter. Should the Chair decide with reference to these Delegates that the Clerk had the right to put their names on the roll and in that way control to some extent the matter of their being sworn in, such decision might affect future cases.

As the Chair understands it, there is a difference between the swearing in of a Member and the swearing in of a Delegate, because at all stages, even though the Clerk may place upon the roll the name of a Member of Congress from a State, the House might decide not to swear him in, notwithstanding his name is on that roll. We are therefore dealing here with a question that stands exactly as though there was before the House a Member from a State in regard to whose certificate there was a contest.

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[1] First session Forty-seventh Congress, Record, pp. 14, 23, 38.

[2] J. Warren Keifer, of Ohio, Speaker.

[3] See House Report No. 557, p. 12, first session Forty-seventh Congress.

The Chair reads section 31 of the Revised Statutes in the light of the object of that section, which was to repose power somewhere, to confer some authority, to make up a roll of Members to be called at the beginning of Congress, so that the House might be enabled to take the first step in its organization; that is, the election of a Speaker, and following that, perhaps, after the Members are sworn in, the election of a Clerk. There was no object in putting upon such a roll the names of Delegates, who have no right to vote, unless the Congress of the United States proposed to vest in the outgoing Clerk the sole power of determining who was entitled to seats in the incoming Congress. As the Chair understands it, that power has been vested nowhere, by law at least; not in the Speaker, and certainly not in the Clerk, but is left where it belongs, to be determined under the Constitution and laws by the House of Representatives.

The language of section 31, which has been so often read, clearly indicates that it was intended to direct that there should be placed upon the roll the names of Members of Congress elected under the "laws of their States, respectively," not under the laws relating to Territories. It is true the section refers to their being elected under "the laws of the United States;" and section 4, of Article 1, of the Constitution of the United States provides that laws may be passed by Congress directing the mode of electing Members of Congress from States. In the opinion of the Chair, that power also rests in Congress, if it chooses to exercise it.

Section 38 of the Revised Statutes, so much relied upon by some Members, refers, to use the language of the section, to "credentials in due form of law of Representatives and credentials filed with the Clerk of the House of Representatives." These words are used also, "in accordance with the provisions of section 31." A careful reading of section 31 of the Revised Statutes will show nothing at all in that section on the subject of filing credentials. It is a singular fact that section 38 refers to a section that contains nothing upon the matter of filing credentials. It furnishes us no guide, no reason, by implication or otherwise, for the inference that Delegates, as well as Members, were included in the words of section 31. The Chair therefore overrules the point of order made by the gentleman from New York.

62. It was held that under the law of 1867 the Clerk had no authority to make up the roll of Delegates.—On March 5, 1867,[1] on the second day of the session and after the Members had been sworn in, a question arose as to the swearing in of Delegates, and after debate the Speaker[2] said:

Until the enactment of the law under which this Congress has assembled and organized, the Clerk placed upon the roll the names of such as he saw proper to place there * * *. The law states that the Clerk shall place on the roll only the names of Representatives from those States represented in the preceding Congress[3] * * *. The Chair has conferred with the Clerk upon the subject, and the Clerk says that he does not think he has the right under the law to decide upon the prima facie credentials of Delegates or place their names upon the rolls without further direction of the House.

Later the House ordered the names of such delegates as had not contests for their seats pending to be placed on the roll, and they took the oath.

63. The Senate, after debate, permitted a claimant to a seat to withdraw his credentials.—On December 14, 1875,[4] the Senate debated at length the propriety of allowing a claimant for a seat to withdraw his credentials. The vote was finally in favor of allowing the withdrawal.

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[1] First session Fortieth Congress, Globe, p. 7.

[2] Schuyler Colfax, of Indiana, Speaker.

[3] This law, dated February 9, 1867, provided for the making up of the roll by the Clerk (14 Stat. L. p. 397). It is not now in force.

[4] First session Forty-fourth Congress, Record, pp. 200–2–04.

Chapter III.

THE PRESIDING OFFICER AT ORGANIZATION.

1. **Clerk calls House to order and presides. Sections 64, 65.[1]**
2. **Election of a chairman in place of Clerk. Sections 66, 67.**
3. **Early practice of Clerks to decide questions of order. Sections 68–72.**
4. **Later practice as to authority of Clerk. Sections 73–80.[2]**

64. A rule—which, however, is not operative at the time the House is organized—provides that the Clerk shall call the new House to order and preside until the election of a Speaker.

At the organization of the House the Clerk calls the roll of Members by States in alphabetical order.

Pending the election of a Speaker or a Speaker pro tempore the Clerk preserves order and decorum and decides questions of order, subject to appeal.

Present form and history of section I of Rule III.

Section 1 of Rule III provides:

> The Clerk shall, at the commencement of the first session of each Congress, call the Members to order, proceed to call the roll of Members by States in alphabetical order, and, pending the election of a Speaker or a Speaker pro tempore, call the House to order, preserve order and decorum, and decide all questions of order subject to appeal by any Member.

This rule was adopted on January 27, 1880,[3] in Committee of the Whole, while the revised code was under consideration. The committee had at first recommended a section providing only that the Clerk should, pending the election of a Speaker, preserve order and decorum and decide all questions of order subject to appeal to the House, taking, in fact the latter half of the old rule, 146, which dated from March 19, 1860,[4] and provided:

> * * * and pending the election of Speaker, the Clerk shall preserve order and decorum, and he shall decide all questions of order that may arise, subject to an appeal to the House.

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[1] Thanked by the House for presiding. Section 222.

[2] Decisions as to motions to correct the roll and appeals. (See sec. 22 of this volume.) Declines to open a communication addressed to the Speaker. Section 47.

[3] Second session Forty-sixth Congress, Record, p. 555.

[4] First session Thirty-sixth Congress, pp. 1211, 1237.

As the rules are not adopted until after the Speaker is chosen, this rule is evidently of persuasive effect only at the time of organization.

65. In 1820 there arose a question as to the right of the Clerk, presiding during organization, to rule a motion out of order.—On November 15, 1820,[1] after twenty-one ineffectual ballotings for Speaker, under the rule which provided that "a majority of the votes given shall be necessary to an election; and, when there shall not be such a majority on the first ballot, the ballot shall be repeated until a majority be obtained," Mr. Peter Little, of Maryland, moved a resolution that the lowest on each ballot should be dropped at the succeeding ballot, and that any votes given for such lowest person should not be taken into account.

The Clerk of the House[2] declared that, under the rules of the House which prescribed the mode of election by ballot, he could not receive this motion.

Mr. John Randolph, of Virginia, protested against what he pronounced an assumption of power on the part of the Clerk, and asserted the right of any Member to propound any question to the House through the Clerk, or from himself if he thought proper. Mr. Little asserted his right to make the motion, but waived the right to save time.

66. In 1837 a proposition was made that the Members-elect choose one of their number to preside during organization; but it was laid on the table and the Clerk of the last House continued to act.—On September 4, 1837,[3] at the organization of the House, the Clerk of the last House was calling the roll of Members-elect by States, when, in the State of Massachusetts, the name of Mr. Caleb Cushing was called. Mr. Cushing arose in his place and said that before responding he wished to say a few words in explanation. He saw before him many Members who were said to be elected, but there was no authentic knowledge on the subject. They were not, in his opinion, Members of the House until a Speaker had been elected and they had qualified. He was aware that it had been the usage of the House that the Clerk should prepare a roll as he had done, should call the Members individually, and should also officiate at the organization of the House. The standing rule of the House provided that he should be Clerk until a successor should be appointed. But the arrangement which should be adopted would be for the gentlemen present to be organized under the presidency of one of their own number.

The roll call having been completed and a question as to the election of two Members from Mississippi having been raised, Mr. R. Barnwell Rhett, of South Carolina, submitted this motion:

> That Lewis Williams, of North Carolina, being the oldest Member of the House of Representatives, be appointed chairman of this House, to serve until the House be organized by the election of a Speaker.

Mr. Williams opposed this motion, and urged that the Clerk be allowed to preside over the organization as he had from the beginning of the Government. To this Mr. Henry A. Wise, of Virginia, replied that there was no Clerk of this House, and that the rule of the last House continuing the Clerk until his successor should be elected had no force in this House.

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[1] Second session Sixteenth Congress, Annals, pp. 437, 438.

[2] Thomas Dougherty, of Kentucky, Clerk.

[3] First session Twenty-fifth Congress, Journal, p. 4; Globe, pp. 1–3.

On motion of Mr. Isaac Toucey, of Connecticut, the motion of Mr. Rhett was laid on the table without a division.

67. The Clerk of the last House having declined to put any motions except the motion to adjourn during organization of the new House, the Members-elect chose one of their number chairman.

The Clerk presiding during organization declined to put a question, whereupon a Member-elect put the question from the floor.

A clerk, presiding at the organization, having proposed to read a paper explaining his reasons for certain acts, the Members-elect declined to permit him to do so.

Discussion of the functions of the Clerk of the former House presiding at the organization of a new House.

On December 2, 1839,[1] the day fixed by the Constitution for the meeting of Congress, at 12 o'clock meridian, Hugh A. Garland, Clerk to the late House of Representatives, called the Members to order; and suggested that, if not objected to, he would proceed to call over a list of Members of the Twenty-sixth Congress for the purpose of ascertaining who were present and whether a quorum was in attendance.

No objection being made, the Clerk commenced the call of the roll by States, beginning with the State of Maine; and, having called as far as the State of New Jersey, and having called the name of Joseph F. Randolph from that State, he rose and stated that five seats from New Jersey were contested; that it was not for him to undertake to decide who were entitled to them; and that, if it was the pleasure of the House, he would pass by the further call from New Jersey, and complete the call of the roll, when he would submit the documents and evidence in his possession to the House, who alone were capable of deciding upon them.

This course was objected to by Mr. William Cost Johnson, of Maryland.

The reading of the credentials of John B. Aycrigg, William Halstead, John P. B. Maxwell, Charles C. Stratton, and Thomas Jones Yorke, was then called for; and being read, Mr. Charles F. Mercer, of Virginia, asked that the law of New Jersey relative to elections of Members of the House of Representatives of the United States be read; when Mr. Cave Johnson, of Tennessee, asked that the credentials of Philemon Dickerson, William R. Cooper, Joseph Kille, Daniel B. Ryall, and Peter D. Vroom, claiming to be Members of the House of Representatives of the United States from the State of New Jersey in place of John B. Aycrigg and his associates, be also read.

Before either the law or credentials were read, debate arose. It was urged that as Messrs. Aycrigg and his associates held credentials from the governor of New Jersey, under the broad seal of the State, and precisely similar to the credentials by virtue of which Mr. Randolph of that State had already been called, they had a prima facie right to be called and participate in the organization of the House. There was objection to this, and a proposition that the subject of the New Jersey contest be laid aside until the roll of the residue of the Members should have been called.

[1] First session Twenty-sixth Congress, Journal, pp. 1–6; Globe, pp. 1–20.

The Clerk, in the course of the day's proceedings, declared that, under the present imperfect state of the organization of the House—no quorum having answered to their names, and there being no rules in existence for the government of the body—he did not feel authorized, under these circumstances, to put any question to the House except by general consent.

A motion being made to adjourn, the Clerk decided that he could not submit that motion to the House, and so the House, by general consent, adjourned until the next day, without a question put to that effect. On the succeeding day, also, the House adjourned without motion put by the Clerk; but on December 4, after a motion to adjourn had been made, the Clerk stated that, on the two preceding days, he had not adverted to that clause of the Constitution of the United States which provides that less than a quorum may adjourn from day to day. Having now adverted to that clause, he had changed the opinion heretofore given, that he could not, in the present state of the organization of the House, put the question on an adjournment; that he would now put a question on a motion to adjourn, but on no other motion.

On December 3 the Clerk stated that he had reduced his reasons for the course he had taken to writing, and asked permission of the House to read them. This was refused.

In the discussion which arose as to the functions of the Clerk, Mr. Henry A. Wise, of Virginia, speaking of the present Clerk, said it was true that he was not technically an officer of the House. But by the law of usage and necessity he was always permitted to hold the office which he now held. He was the quondam Clerk of the last Congress, and presented himself here, firstly to render to his successor the records of the office; and, secondly, he was here by the law of usage. The ordinance of 1785 imposed upon the Clerk (Secretary) of the preceding Congress the duty of keeping a roll of Members of Congress, and of calling over that roll at their meeting. There was also a resolution of 1791 relating to this duty of the Clerk. Thus the Clerk was bound by the law of usage.

Mr. John White, of Kentucky, contended that the ordinance of 1785 and the resolution of 1791 were of no more binding effect than the rules of the last House.

Mr. Daniel B. Barnard, of New York, contended that the Clerk was not only the Clerk of the last House of Representatives, but also the Clerk of this House. And he would so continue until his successor should be appointed. It was a cardinal principle of the common law that the public interests should never be permitted to suffer for want of an incumbent to fill important offices, and by the common as well as by the parliamentary law the functionary holds over until his successor is appointed. It was in analogy to the common law that the parliamentary rule was adopted that the clerk of the House of Commons should hold over until his successor should be appointed. This was the settled parliamentary rule in this country as well as in England. The Clerk, in assuming his seat and calling the House to order, was doing nothing more than he was fully warranted in doing. More than that, he undoubtedly had the authority to put questions—any question which the House in its partially disorganized condition might entertain.

The Clerk still persisted in declining to put any question except the motion to adjourn. Various propositions were submitted: To call the uncontested names,

and, a quorum of such having been ascertained, to let them decide the contested cases before proceeding to the election of a Speaker; to choose a temporary Speaker and a committee of elections, for the consideration of the contests, and after the settlement to choose a permanent Speaker; to proceed and call the New Jersey claimants having the certificates from the governor; to allow those to whose election there was no objection to pass upon the right of challenged gentlemen to participate in the organization.

The Clerk putting the question on none of these propositions, Mr. John Quincy Adams renewed the proposition to call the names of the gentlemen having the certificates from the governor of New Jersey, and on this proposed to put the question himself.

At this point Mr. R. Barnwell Rhett, of South Carolina, asked the Clerk if he would put questions to the House. To this the Clerk replied that he would put no question except to adjourn; but said that, with the consent of the House, he would put questions as chairman of a meeting of the gentlemen present, if instructed to do so by the Members present, but he would not do so as Clerk of the House of Representatives.

Mr. William Cost Johnson objected to his putting questions as chairman.

Mr. Rhett then moved that Mr. Lewis Williams, of North Carolina, the oldest Member of the House, be appointed Chairman of the House, to serve until the election of a Speaker. Mr. Williams declining to serve, Mr. Rhett read in his place the following resolution:

Resolved, That the Hon. John Quincy Adams be appointed Chairman of this House, to serve until the election of a Speaker.

Mr. Rhett then put the question on the said resolution to the Members, and it passed in the affirmative.

Mr. Adams was then conducted to the chair by two Members of the House, and proceeded to discharge the duties of the position.

Mr. Charles F. Mercer, of Virginia, then moved that the rules of the late House of Representatives, so far as applicable to this body in its present state of organization, be the rules for the government of its proceedings.

And the question on this motion being put by the Chairman, it passed in the affirmative unanimously.

68. In the earlier days the Clerk of the last House presiding at the organization declined to decide questions of order and referred them to the House.—On December 4, 1843,[1] at the time of the organization of the House and after the presence of a quorum had been announced, but before the election of a Speaker, Mr. Daniel D. Barnard, of New York, arose and proposed to read in his place a paper in the nature of a protest of himself and other Members of the House against the participation of the Representatives of certain States in the election of Speaker.

Objection was made that it was not in order to read the paper pending the election of Speaker.

[1] First session Twenty-eighth Congress, Journal, p. 7; Globe, pp. 2, 3.

The Clerk[1] begged respectfully to state to the House that, in its present state, he should feel it to be his duty to put the question on granting leave, to the House, and not, in his humble capacity, undertake to decide a question of that magnitude.

A motion being submitted, the Clerk put the question that Mr. Barnard have leave to read the paper, and the motion was decided in the negative, 59 ayes and 124 noes.

69. On December 21, 1849[2] before the election of a Speaker, Mr. Samuel W. Inge, of Alabama, moved that the resolution adopted on the 14th instant, prohibiting debate until the election of a Speaker, be rescinded.

Mr. Robert Toombs, of Georgia, having taken the floor, proceeded to debate the motion.

Mr. Joseph M. Root, of Ohio, called Mr. Toombs to order for debating.

Mr. Toombs declined to surrender the floor, but proceeded in spite of the protests of Members.

The Clerk[3] requested Mr. Toombs to allow the motion to be put.

Mr. Toombs declined to yield, and proceeded amidst much confusion, declaring that the Clerk could not put the question while he held the floor.

Mr. John Van Dyke, of New Jersey, called Mr. Toombs to order.

The Clerk (Mr. Toombs continuing to speak) put the question whether the gentleman from Georgia, being called to order, should be allowed to proceed.

Mr. Toombs continued to speak, but the Clerk, having put the question, declared that the point of order was sustained by the House, and that the gentleman from Georgia was decided out of order.

Mr. Toombs continued to speak, but the Clerk proceeded to put the question on the motion of Mr. Inge, and the question being put, the yeas and nays were demanded and ordered.

The Clerk thereupon began to call the roll, and Mr. Toombs continued his speech, concluding during the roll call.

70. In the Thirty-first Congress the House did not choose a Speaker until December 22, 1849, nineteen days after the assembling of the Congress. The Clerk[3] of the preceding House presided during this time. He did not decide questions of order, but submitted them to the House for decision. Thus, on December 5[4], a motion was made to lay a pending resolution on the table, and the question was asked whether the motion to lay on the table was debatable, no rules having been adopted. The Clerk referred the question to the House, which decided that the motion was not debatable.

Again, on December 6[5], the question arose again, and Mr. William Duer, of New York, made the point of order that the motion to lay on the table was not debatable. The Clerk said that it was a point for the House to decide. The Clerk could not call any gentleman to order.

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[1] Matthew St. Clair Clarke, Clerk.

[2] First session Thirty-first Congress, Globe, pp. 61, 62.

[3] Thomas J. Campbell, Clerk.

[4] First session Thirty-first Congress, Journal, p. 34; Globe, pp. 6, 8, 17.

[5] Globe, p. 8.

Again on December 11[1], a motion for a call of the House was pending and a motion to amend it was made. Mr. Jacob Thompson, of Mississippi, asked if the motion was in order. The Clerk declared that it was for the House and not the Clerk to decide the question of order.

71. On December 5, 1859,[2] before the election of a Speaker, Mr. John B. Clark, of Missouri, rose and proposed to submit some remarks.

Mr. Henry C. Burnett, of Kentucky, raised the question of order that debate was not in order since no question was before the House.

The Clerk[3] said:

The Clerk having no power to decide the point of order which has been raised, will submit it to the House. * * * The Clerk will state that he has carefully examined this subject, and can find no authority conferred upon him as Clerk of the former House, except to put questions, when raised, to the House for its decision. He will not, therefore, take upon himself the power to decide this question.

Mr. Clark having been permitted to proceed, Mr. Israel Washburn, Jr., of Maine, made the point of order that the gentleman from Missouri must confine himself to the question.

The Clerk said:

The Clerk can not undertake to decide whether the gentleman from Missouri is confining himself to the question of order or not. If the point of order be insisted on, he must submit the question to the House.

72. On December 6. 1859,[4] before the election of a Speaker, Mr. Horace Maynard, of Tennessee, asked of the Clerk whether he would make decisions of questions of order, or refer them to the House to be settled by majorities.

The Clerk[3] said:

The Clerk, in answer to the inquiry of the gentleman from Tennessee, begs leave to read from the Manual, in order that the House may understand the power which the Clerk has in deciding questions which may arise. This is the only authority the Clerk has been able to find upon the subject.

"When but one person is proposed and no objection made, it has not been usual in Parliament to put any question to the House; but without a question the Members proposing to conduct him to the Chair. But if there be objection, or another proposed, a question is put by the Clerk. As are also questions of adjournment."

"That being all that the Clerk can find, he does not feel authorized to decide questions of order as they arise."

73. Discussion of the functions and authority of the Clerk of the former House presiding at the organization of the new House.—On December 8, 1859[5] before the election of a Speaker, a question arose as to the power of the Clerk of the preceding House, who was presiding, to decide questions of order. The Clerk[6] had repeatedly declined to decide such questions, and when the precedent of December 26, 1835, was quoted, explained that the Clerk in the Thirty-fourth Congress, while suggesting his opinions on points of order, in no instance claimed the right to make a final decision.

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[1] Globe, p. 17.

[2] First session Thirty-sixth Congress, Globe, pp. 2, 3.

[3] James C. Allen, Clerk.

[4] First session Thirty-sixth Congress, Globe, p. 19.

[5] First session Thirty-sixth Congress, Globe, p. 66.

[6] James C. Allen, of Illinois, Clerk.

Mr. John S. Millson, of Virginia, in the discussion of this question, said:

The Clerk is not the presiding officer of this House in any sense of the word. When the Clerk puts a question to the House, it is the House putting a question to itself, selecting its own officer as its organ. When the Clerk propounds a question to this House, he has no more control over the House and exercises no other function than the reading clerk when he calls the yeas and nays. It is the House calling the roll through its own appointed agent. No man can preside over the House of Representatives who is not a Member of the House of Representatives. It is in this respect that we differ from the Senate of the United States, over which, by the Constitution, the Vice-President of the United States is appointed to preside. The mistake has originated altogether from the convenient usage of permitting, by the sufferance of the House, the Clerk of the former House to propound questions, for in the absence of any other constituted agent there must be some one to address the House; but the person so speaking is not a part of the House, but simply the mouthpiece of the House. And I submit to gentlemen, if they would protect the dignity of this body, that they would never consent to regard the Clerk in any other light than as one who for convenience sake is permitted to propound questions to the House, just as the reading clerk is permitted for convenience sake to call the names of Members when the yeas and nays are ordered.

On the other hand, Mr. Horace Maynard, of Tennessee, voiced the opposite opinion:

It is not Mr. Allen, as I understand, who is temporarily the presiding officer of the House; it is the Clerk of the last House, who by law is placed for the time being as the presiding officer over this unorganized body; who is placed there for the very purpose of giving it organization; who is placed there with the power of general parliamentary law in his hands to exercise, and who is, to all intents and purposes, the presiding officer of the House as long as it remains in its present inorganic condition. When that organization shall be effected by a selection of a gentleman of our own body as the Speaker and presiding officer, the Clerk then becomes for that purpose functus officio, but till that time he is, ex vi termini, compelled to be the presiding officer of the House; and, like any other presiding officer, he must, under the parliamentary law, exercise the power which that law confers upon him and clothes him with. One of these powers is to decide questions of order as they arise; and unless practically be decides these questions— although he may not formally do it—the wheels of business will be blocked, and we could not go forward a single step. He is, unconsciously perhaps, deciding questions of order continually. He does so in giving the floor to this or the other Member, in asking a Member's permission to allow an interruption, and in many other ways which I need not instance.

74. Before the election of a Speaker the Clerk recognizes Members.— Before the election of a Speaker in 1859 the Clerk, Mr. James C. Allen, of Illinois, recognized Members who were to address the House, and when complaint was made by a Member, on December 21, explained that he was governing the recognitions so as to give an opportunity to all Members who applied for time.[1]

75. In 1855, while the Clerk was presiding at the organization of the House, a question of order was decided by him, and the decision sustained.—On December 26, 1855.[2] before the election of a Speaker or the adoption of rules, the House was considering a proposition that the Hon. James L. Orr, of South Carolina, be invited to preside over the House until the election of Speaker, and on this Mr. Lewis D. Campbell, of Ohio, had demanded the previous question.

Pending this, Mr. George W. Jones, of Tennessee, moved that the House take a recess until 11 o'clock and 59 minutes to-morrow.

Mr. Joshua R. Giddings, of Ohio, submitted as a question of order that it was not competent to take a recess pending the demand for the previous question.

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[1] First session Thirty-sixth Congress, Globe, p. 209.

[2] First session Thirty-fourth Congress, Journal, p. 181; Globe, p. 87.

The Clerk[1] decided that the motion to take a recess was in order.

Mr. Giddings having appealed, the appeal was laid on the table.

76. In 1863, at the organization of the House, the hold-over Clerk disclaimed authority to enforce the rules, but decided points of order as authorized by a rule of the last House.—At the organization of the House on December 7, 1863,[2] Clerk Emerson Etheridge held that he had no power to preserve order, having no power to enforce the rules. No rules had been adopted, but the rules Nos. 146, 147, dated March 19, 1860, provided that "these rules shall be the rules of the House of Representatives of the present and succeeding Congresses, unless otherwise ordered," and that "pending the election of a Speaker, the Clerk shall preserve order and decorum, and shall decide all questions of order that may arise, subject to appeal to the House."[3]

77. On December 7, 1863,[4] the Clerk[5] of the last House presided at the organization of the House, and ruled on points of order on two several cases. No objection was made, and in the first case no appeal was taken. In the second case Mr. Thaddeus Stevens, of Pennsylvania, appealed from the decision of the Clerk, but withdrew his proposition before a vote on the appeal.

78. Before the completion of the organization of the House, in 1869, the Clerk refused to entertain a motion referring to a committee a subject relating to the election of a Member.—On March 4, 1869,[6] at the organization of the House, after the roll of Members-elect had been called and the presence of a quorum had been announced, Mr. George W. Woodward, of Pennsylvania, offered this resolution as a question of privilege:

Resolved, That the returns of the election from the Twenty-first district of Pennsylvania be referred to the committee of elections to be appointed, with instructions to report at as early a day as practicable which of the claimants to a seat in this House has the prima facie right thereto.

Mr. Glenni W. Scofield, of Pennsylvania, made the point of order that the Clerk could not, at the organization, entertain a motion for reference to a committee.

The Clerk[7] sustained the point of order.[8]

79. In 1869 the hold-over Clerk, basing his authority on the law of 1863, declined to entertain a question of order or an appeal pending the motion to proceed to election of Speaker.—On March 4, 1869,[9] at the time of the organization of the House, the previous question had been ordered on the motion to proceed to the election of a Speaker, when Mr. James Brooks, of New

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[1] John W. Forney, Clerk.

[2] First session Thirty-eighth Congress, Journal, p. 1051; Globe, p. 5.

[3] The House has come definitely to the conclusion that one House may not impose its rules on a succeeding House. (See secs. 6743–6745 of Vol. V of this work.)

[4] First session Thirty-eighth Congress, Globe, pp. 5, 6.

[5] The Clerk was Emerson Etheridge.

[6] First session Forty-first Congress, Globe, p. 3.

[7] Edward McPherson, of Pennsylvania, Clerk.

[8] For discussions in House and Senate on the law of 1866 relating to the organization of the House, including the designations of the officers to act in case of the death, disability, etc., of the Clerk, see Globe, second session Thirty-ninth Congress, pp. 66, 67, 379.

[9] First session Forty-first Congress, Globe, p. 4.

York, announced that he rose to a question of order, and proceeded to call attention to the alleged fact that the Clerk had omitted, in calling the roll of States, to call the names of the Members from Georgia and Louisiana.

The Clerk [1] said:

The gentleman is out of order. The question is upon the adoption of the resolution that the House now proceed to the election of Speaker.

Mr. Brooks having proposed to appeal, the Clerk declined to entertain the appeal, and when Mr. Brooks persisted, directed him to take his seat, saying:

The Clerk by law is Clerk of the House until his successor is elected and qualified * * *. The Clerk will take pleasure in saying to the gentleman that he (the Clerk) is governed by the law of the land and the rules of the House. * * * The Clerk has no desire whatever to make any decision doing violence to the feeling of any gentleman of the House. He has no desire to do an act officially calculated to bring the body into confusion, but at the same time he is compelled, under the obligations which are resting upon him, so to administer the law and the rules as to effect, as a prime duty, the organization of the House. He regrets very much if any decision which he felt called upon to make has been held by any of the gentlemen affected as an invasion of their personal rights, for it was not so intended; and the Clerk begs, inasmuch as the question has proceeded thus far, that the persons indicated as tellers may take their places and the organization be effected.

80. In 1867 the Clerk, acting under the law of 1863, declined to entertain any proposition not consistent with the organization of the House.

The Clerk, presiding at the organization, has declined to entertain a protest, although it related to the organization.

On March 4, 1867,[2] at the organization of the House, the Congress having assembled in accordance with the act of January 22, 1867, the Clerk had called the roll of Members-elect, and had announced the presence of a quorum.

Mr. James F. Wilson, of Iowa, moved that the House proceed to the election of a Speaker viva voce.

Mr. James Brooks, of New York, being recognized in debate, proceeded to present the protest of Members of the minority party of the House against proceedings for its organization until certain States should be represented. Mr. Brooks asked that this protest be entered on the Journal.

The Clerk [1] said:

The Clerk declines to entertain any paper of the character of that indicated by the gentleman from New York, or any other matter pending the action of the House. The Clerk is now acting under the law; his duties are clearly prescribed, and it is impossible for him to entertain any motion or any business not consistent with the organization of the House.

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[1] Edward McPherson, of Pennsylvania, Clerk.

[2] First session Fortieth Congress, Globe, pp. 3, 4.

Chapter IV.

PROCEDURE AND POWERS OF THE MEMBERS-ELECT IN ORGANIZATION.

1. **Forms of proceeding at organization. Section 81.**
2. **Status of House before organization. Section 82.[1]**
3. **Call of the roll of Members-elect. Sections 83–86.**
4. **Sessions, adjournment, etc., during organization. Sections 87–92.[2]**
5. **Adoption of rules. Sections 93–102.[3]**
6. **Participation of contesting delegations in organization. Section 103.[4]**
7. **Fixing the hour of daily meeting. Sections 104–117.[5]**
8. **Illustration of a body called to order at organization by an old member. Section 118.**
9. **The drawing of seats. Sections 119–121.**
10. **As to action by one House before the other is organized. Sections 122–126.**

81. Proceedings and forms at the organization of the House in a new Congress.

Election of Speaker and other officers, administration of the oath to Members and officers, notification of the President and Senate, and drawing of seats at the beginning of a Congress.

Forms of procedure at the opening of the second or subsequent sessions of a Congress.

When a new Congress assembles on the first Monday in December, the Members-elect are called to order at 12 m. by the Clerk of the preceding House,[6] standing at his desk. After prayer by the Chaplain of the last House, the Clerk announces:

Representatives-elect: Under the provisions of the Constitution of the United States this is the hour fixed by law for the meeting of the House of Representatives of the———Congress of the United States of America. The Clerk of the House of Representatives of the———Congress will read the names of those whose credentials show that they were regularly elected to this body in pursuance of the laws of their respective States and of the United States.[7] As the roll is called, following the alpha-

[1] Status with reference to transaction of business. (Secs. 6647–6650 of Vol. V.)

[2] Adjournment for more than one day before organization. (Sec. 221 of this volume.)

[3] A refusal to adopt rules until the Members-elect were sworn. (Sec. 140 of this volume.)

[4] See also cases of Letcher *v.* Moore (sec. 53 of this volume) and Ingersoll *v.* Naylor (Sec. 803 of this volume).

[5] Discussion as to why the House of Representatives meets at 12 m. at its first sitting, before organization. (Sec. 210 of this volume.)

[6] In accordance with section 1 of House Rule III. (See sec. 64 of this work.) In case the Clerk can not for any reason officiate, the duties devolve on the Sergeant-at-Arms, and next upon the Doorkeeper. (See Revised Statutes, secs. 32 and 33.)

[7] This roll is made up in accordance with section 31 of the Revised Statutes.

betical order of the States, those present will please answer to their names, that we may discover if there is a quorum present.[1]

When the roll call has been completed, the Delegates being called last, the Clerk presents a tabulated statement of the changes in the membership that have occurred since the regular election.

Then, if a quorum be present, the Clerk announces the fact, and declares that the next business in order is the election of a Speaker.[2] Nominations are made from the floor, simply by naming the candidates.[3]

The House has for many years elected its Speaker by viva voce vote.[4] The Clerk appoints four tellers, from the Members-elect, representing the parties making nominations,[5] who, seated at the Clerk's desk, make the record as each Member-elect, when the roll is called, alphabetically, announces the name of his choice. The roll call being completed, one of the tellers, usually the one first named, announces the result of the vote, the Clerk having previously read over the names of those voting for each candidate.

The Clerk, having restated the vote as reported by the tellers, announces that—

Mr.———, a Representative from the State of———, having received a majority of all the votes cast, is duly elected Speaker of the House of Representatives of the———Congress.

The Clerk then designates certain Members, usually the other candidates who have been voted for, to conduct the Speaker-elect to the chair.

The Speaker-elect having taken the chair and addressed the House, the Clerk designates the Member-elect present who has served longest continuously[6] as a Representative to administer the oath of office to the Speaker-elect.[7]

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[1] Form used by Clerk James Kerr, of the Fifty-third Congress, in calling to order the House of the Fifty-fourth Congress, December 2, 1895. (Congressional Record, p. 2.)

[2] See sections 6747–6750 of Volume V of this work for controversies as to transaction of business before organization. Also see Congressional Record, first session Fifty-first Congress, p. 80, and first session Fifty-fifth Congress, p. 15.

[3] Sometimes a resolution to proceed to election of Speaker is adopted; but very early as well as very late precedents exist for proceeding without the resolution. See case December 8, 1829, when, without resolution or motion, the House proceeded to ballot for Speaker. (First session Twenty-first Congress, Journal, p. 7.)

[4] See section 187 of this work for rule relating to viva voce election and its origin. The rules, however, are not adopted until the House is organized.

[5] See Congressional Record, first session Fifty-fifth Congress, p. 15.

[6] This does not always seem to have been the custom. Thus, in 1815, the oath was administered to Speaker Clay by Mr. Robert Wright, of Maryland, who was much younger as a Member than either Nathaniel Macon, of North Carolina, who had served since 1793, or Richard Stanford, of the same State, who had served since 1797, and both of whom were present. (First session Fourteenth Congress, Annals, p. 374.)

But on December 5, 1825, we find Speaker Taylor conducted to the chair by Mr. Thomas Newton, of Virginia, "the father of the House," who also administered to him the oath. (First session Nineteenth Congress, Journal, p. 8; Debates, p. 795.) Again, in 1829, Mr. Newton is spoken of as the father of the House when he administered the oath to Speaker Stevenson. (First session Twenty-first Congress, Debates, p. 471.) Again, in 1835, Mr. Lewis Williams, of North Carolina, "the oldest Member in the House," administers the oath to Speaker Polk. (First session Twenty-fourth Congress, Journal, p. 8; Debates, p. 1946.) Again, on December 16, 1839, Mr. Williams, "the oldest Member," administers the oath to Speaker Hunter. (Journal, first session Twenty-sixth Congress, p. 80.)

[7] This oath is the same as that administered to Members-elect. (See sec. 128 of this work.) It does not seem to have been the invariable custom for the Speaker to address the House first. Thus, in 1815, Mr. Clay took the oath first. (First session Fourteenth Congress, Journal, p. 7.)

After the administration of the oath the Speaker administers the oath to the Members-elect and Delegates,[1] who are usually called to the area in front of the Speaker's desk several at a time, by States. The Delegates are sworn last. Members of whose election there is no question, but whose certificates have not arrived, may be sworn in by unanimous consent.

The election of the remaining officers of the House is next in order. The rule prescribes that these elections shall be viva voce.[2] It is usually accomplished, however, by the adoption of a resolution of five paragraphs, each in this form:

That——— ———, of the State of———, be, and he is hereby, chosen———of the House of Representatives,

and relating to the Clerk, Sergeant-at-Arms, Doorkeeper, Postmaster, and Chaplain, in the order named.

The minority party usually present their candidates in a similar resolution, which they move as a substitute.

The Speaker having administered the oath of office to the officers elected, the organization of the House is completed, whereupon the following resolutions are presented and agreed to:

Resolved, That the Clerk be instructed to inform the President of the United States that the House of Representatives has elected——— ———, a Representative from the State of———, Speaker, and——— ———, a citizen of the State of———, Clerk of the House of Representatives of the——— Congress.

Resolved, That a message be sent to the Senate to inform that body that a quorum of the House of Representatives has assembled; that——— ———, a Representative from the State of———, has been elected Speaker, and——— ———, a citizen of the State of———, Clerk; and that the House is ready to proceed to business.

Resolved, That a committee of three be appointed by the Speaker on the part of the House of Representatives to join the committee appointed on the part of the Senate to wait on the President of the United States and notify him that a quorum of the two Houses has assembled, and that Congress is ready to receive any communication he may be pleased to make.[3]

Resolved, That until otherwise ordered the rules of the House of Representatives of the———Congress be adopted as the rules of the House of Representatives of the———Congress.[4]

Resolved, That until otherwise ordered the daily hour of meeting of the House of Representatives shall be 12 o'clock meridian.

Resolved, That the House do now proceed to draw seats for Members and Delegates of the present Congress in pursuance of Rule XXXII of the———House, and when names of Members absent from the city or on account of sickness are called, that seats be selected for them by their colleagues.[5]

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[1] This order is according to the old form. (First session Second Congress, Journal, p. 434.)

[2] See section 187 of this work. The rules, however, are not usually adopted until after the officers are elected, the old rule that the rules should continue in force from Congress to Congress having been dropped in the Fifty-first Congress. See debate of May 15, 1797, where the point was raised and discussed that the rules of the former House were not binding in the election of a Clerk. (First session Fifth Congress, Annals, p. 51.)

[3] Such a resolution is in accordance with the most ancient precedents of the House. (First session First Congress, Journal, p. 134.)

[4] While this resolution is usually adopted, the House sometimes, as in the Fifty-first Congress, proceeds under general parliamentary law until rules are adopted permanently.

[5] These resolutions are the forms used in organization of Fifty-fourth Congress. (Congressional Record, first session, Fifty-fourth Congress, pp. 5 and 6.)

Before the drawing begins the Members usually permit by unanimous consent one or two Members of long service to select their seats.[1] Also, if the political parties are disproportionate in size an understanding is usually arrived at as to the portions of the Hall which they are to occupy.[2]

When the Congress assembles by proclamation of the President, before the first Monday of December, the formalities are the same, excepting that the Clerk reads the proclamation of the President instead of the usual announcement[3]

At the opening of sessions other than the first the Speaker calls the House to order, and, after prayer by the Chaplain, directs the Clerk to call the roll of Members by States. This roll having been called and the number of Members present having been ascertained, the Speaker announces that a quorum is present, if such be the fact, and that the House is ready to proceed to business.

Resolutions are then adopted providing for notifying the President and the Senate, as follows:

Resolved, That a committee of three Members be appointed on the part of the House to join the committee appointed by the Senate to wait upon the President and inform him that a quorum of the two Houses has assembled, and that Congress is ready to receive any communication he may have to make.

Resolved, That the Clerk of the House inform the Senate that a quorum of the House of Representatives has appeared, and that the House is ready to proceed to business.[4]

82. A discussion as to whether or not the House is a House before its organization.

Congress may not by law interfere with the constitutional right of a future House to make its own rules.

A proposition to regulate the organization of the House by law.

On March 2, 1861,[5] Mr. Albert G. Porter, of Indiana, made a report from the Committee on the Judiciary on the bill (H. R. 867) "to provide for and facilitate

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[1] These favors are generally divided between the two large parties, and ex-Speakers are usually the recipients, but the favor may be granted to any distinguished Member.

On February 13, 1847 (second session Twenty-ninth Congress, Globe, p. 418), while the House was in Committee of the Whole House on the state of the Union, and while Mr. W. Hunt was speaking, Mr. John Quincy Adams, of Massachusetts, for the first time since his attack of paralysis, entered the Hall. The committee rose in a body to receive him. Mr. Hunt suspended his remarks, and Mr. Andrew Johnson, of Tennessee, arose and said: "In compliance with the understanding with which I selected a seat at the commencement of the present session, I now tender to the venerable Member from Massachusetts the seat which I then selected for him, and will furthermore congratulate him on being spared to return to this House." Mr. Adams having briefly acknowledged the courtesy, the business proceeded.

In the organization of the Fifty-fourth Congress, ex-Speaker Charles F. Crisp (Fifty-second and Fifty-third Congresses) and ex-Speaker Galusha A. Grow (Thirty-seventh Congress were accorded this favor. (Record, first session Fifty-fourth Congress, p. 8.) Also, in the Fifty-second Congress, ex-Speaker Thomas B. Reed and the two oldest Members on the two sides, Messrs. Holman, of Indiana, and O'Neill, of Pennsylvania, were designated by resolution for the favor.

[2] The Republicans sit on the left of the Speaker and the Democrats on the right. But when one of these parties is a small minority, the excess of the majority party goes to the extreme left or right. (See Congressional Record, first session Fifty-fourth Congress, p. 6.)

[3] See Congressional Record, first session Fifty-fifth Congress, p. 13, when Clerk Alexander McDowell called the House to order.

[4] Congressional Record, second session Fifty-fourth Congress, p. 12.

[5] House Report No. 102, second session Thirty-sixth Congress.

the organization of the House of Representatives of the United States on the assembling of each Congress." This bill undertook to prescribe the evidence which should authorize one who claimed to be a Representative to vote; the mode by which that evidence should be presented; the manner of voting for a temporary presiding officer, for the Speaker, and other officers; the order of business previous to the organization, and the number of votes requisite to elect the several officers.

The committee came to the conclusion that these provisions prescribed "rules of proceedings" for the popular branch of future Congresses, and to be, therefore, in contravention of Article I, section 5, clause 2 of the Constitution: "Each House may determine the rules of its proceedings," etc. The report continues:

> It seems to have been thought by some persons that the term "House" in the clause just quoted applies to the House after it has been organized by the election of a Speaker and other officers; in other words, that it is not a House until thus organized. But a reference to the clause in the same article which provides that "the House of Representatives shall choose their Speaker and other officers" shows this interpretation to be erroneous. That clause recognizes the body of Representatives assembled as being a "House" before the Speaker has been elected.4

The bill was suggested by the troubles at the organization of the Thirty-fourth Congress. It seems never to have been acted on by the House.[1]

83. With a single exception the call of the roll of Members at the beginning of a session has been by States and not alphabetically.—On December 4, 1893,[2] at the beginning of the second session of the Congress, the roll was called alphabetically, and not by States.

Mr. Joseph Wheeler, of Alabama, made the point of order that the roll should be called by States.

The Speaker (Mr. Crisp) said:

> No rule of the House requires the roll to be called or recorded in the manner which the gentleman suggests; on the contrary, the rules require that the roll be called alphabetically, except that upon the organization of the House and when in the absence of the Speaker the Clerk discharges the duty of calling the House to order, the rules require him to have the roll called by States. In other cases the rule is that the roll be called alphabetically.

In the Journal, however, the roll call appears as if called by States.

On December 5 Mr. Wheeler presented to the House the precedents from the foundation of the Government to show that at the beginning of a second session the roll had always, with the exception of this instance, been called by States.

84. The call of the roll of Members-elect may not be interrupted, especially by one not on that roll.—On December 4, 1865,[3] at the time of the organization of the House, while the roll of Members-elect was being called by States, Mr. Horace Maynard, of Tennessee (whose name was not on the roll), rose and was proceeding to address the Chair, when the Clerk[4] declined to allow any interruption of the roll call.

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[1] Journal, p. 479.

[2] Second session Fifty-third Congress, Journal, p. 3; Record, pp. 13, 36.

[3] First session Thirty-ninth Congress, Globe, p. 3.

[4] Edward McPherson, of Pennsylvania, Clerk.

85. The House declined before organization to add to the roll the name of a Member-elect whose credential had been lost; but after organization permitted him to take the oath.—On December 4, 1905,[1] at the organization of the House, and immediately after the roll had been called by States to ascertain the presence of a quorum, Mr. Asle J. Gronna, of North Dakota, stated that the certificate of his colleague, Mr. Thomas F. Marshall, had been lost, and asked that his name be added to the roll.

Mr. Sereno E. Payne, of New York, said:

That would not be in order until after the organization of the House.

The Clerk[2] said:

It would be a matter of unanimous consent. The gentleman from North Dakota asks unanimous consent that the name of his colleague [Mr. Marshall] be added to the roll. Is there any objection?

Mr. John S. Williams, of Mississippi, said:

At this stage of the proceedings I shall object. At the proper time that will be in order.

But after organization Mr. Marshall was permitted by the House to take the oath, on the assurance given by his colleague that the election was in no way disputed.

86. At the organization of the House a person whose name is not on the Clerk's roll may not be recognized.—On December 4, 1865,[3] at the organization of the House, and after the roll of Members-elect had been called by the Clerk, after the presence of a quorum had been announced, and after a motion had been made to proceed to the election of a Speaker, Mr. Horace Maynard, of Tennessee, whose name was not on the Clerk's roll, sought recognition.

Objection being made by Mr. Thaddeus Stevens, of Pennsylvania, the Clerk[4] held:

The Clerk rules, as a matter of order, that he can not recognize any gentleman whose name is not on the roll.

87. It has been held that the House is technically in session during the period of organization.—On January 4, 1850,[5] Mr. Speaker Cobb decided that the House was in session during the twenty days while unsuccessful votes were being taken for a Speaker. Mr. Robert C. Winthrop, of Massachusetts, had suggested that the thirty days allowed for the introduction of petitions should not be counted from the meeting of Congress, but from the date of the organization of the House.

88. On March 11, 1875,[6] the point was raised in the Senate that at a called special session it was not in order to take any action looking to the transaction of legislative business, the House not being in session. The point was debated at some length, but no determination was reached.

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[1] First session Fifty-ninth Congress, Record, pp. 40, 41.

[2] Alexander McDowell, of Pennsylvania, Clerk.

[3] First session Thirty-ninth Congress, Globe, p. 3.

[4] Edward McPherson, of Pennsylvania, Clerk.

[5] First session Thirty-first Congress, Globe, p. 101.

[6] First session Forty-fourth Congress, Record, p. 25.

89. The House may adjourn for more than one day before the election of a Speaker.—On January 13, 1860,[1] before the election of a Speaker it was ordered that when the House adjourns it adjourn until Monday next.

90. At the organization of the House in 1855 the Clerk ordered tellers.—On December 7, 1855,[2] during the protracted struggle over the election of a Speaker, Mr. Benjamin F. Leiter, of Ohio, moved that the House adjourn.

Mr. Edwin B. Morgan, of New York, asked for tellers.

The Clerk[3] ordered tellers, and appointed Mr. Morgan and Mr. John Letcher, of Virginia.

91. The yeas and nays may be ordered before the organization of the House.

In 1855 the Clerk decided questions of order at the organization.

On December 7, 1855,[2] before rules had been adopted or a Speaker elected, Mr. Benjamin F. Leiter, of Ohio, moved that the House adjourn.

Mr. Benjamin Stanton, of Ohio, demanded the yeas and nays.

Mr. John Letcher, of Virginia, made the point of order that the yeas and nays might not be demanded until after the organization of the House.

The Clerk[3] said:

> It is in order to call for the yeas and nays.

The question being taken, the yeas and nays were not ordered.

But on many other occasions during the protracted period before a Speaker was elected, the yeas and Days were ordered and taken without question.

92. In 1839 the difficulties at organization prevented the daily approval of the Journal until finally, on one day, the Journals of several days were approved.—From December 2 to 6, 1839,[4] the House was prevented from settling difficulties as to its organization by the refusal of the Clerk of the preceding House to put any question, except the motion to adjourn, because the call of the roll by States had not been completed, and the presence of a quorum ascertained. On December 5 Mr. John Quincy Adams, of Massachusetts, was chosen chairman of the meeting of Members-elect. On December 6, as soon as the meeting assembled, the Journals of the proceedings of Monday, Tuesday, Wednesday, and Thursday, the 2d, 3d, 4th, and 5th, were read and approved.

93. Instance wherein the rules were adopted immediately after the election of Speaker.—On December 21, 1839,[5] the House adopted rules before proceeding to the election of any officers except the Speaker.[6]

94. Before the election of a Speaker the House has adopted a rule regulating debate.—On December 22, 1855,[7] during the organization of the House,

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[1] First session Thirty-sixth Congress, Journal, p. 127; Globe, p. 444.

[2] First session Thirty-fourth Congress, Globe, p. 10.

[3] John W. Forney, Clerk.

[4] First session Twenty-sixth Congress, Journal, p. 7; Globe, p. 20.

[5] First session Twenty-sixth Congress, Journal, p. 95.

[6] Usually, however, rules are not adopted until the officers have been elected. See section 81 of this work.

[7] First session Thirty-fourth Congress, Journal, p. 161; Globe, p. 69.

and before the election of a Speaker or the adoption of rules, Mr. John A. Quitman, of Mississippi, submitted the following resolution, which was agreed to:

Resolved, That, until the organization of this House by the election of a Speaker, no Member shall occupy more than ten minutes in debate on any question before the House, nor shall any Member speak more than once on any question before the House, until every Member desiring to speak thereon shall have spoken; and, upon a motion to lay on the table, there shall be no debate.

95. On January 19, 1856,[1] before the election of Speaker or the adoption of rules, Mr. Schuyler Colfax, of Indiana, offered the following resolution, which was agreed to:

Resolved, That for one week, unless a Speaker is sooner elected, no debate on any subject, or under the form of personal explanation, shall be in order; but any Member attempting to speak shall be held out of order, unless the unanimous consent of the House shall have been first had, upon the question being submitted by the Clerk.

96. The House has adopted a rule relating to the privilege of the floor before the election of a Speaker.—On December 4, 1855,[2] at the time of the organization of the House, and before a Speaker had been elected or rules adopted, it was, on motion of Mr. George W. Jones, of Tennessee—

Ordered, That the Doorkeeper be directed to enforce so much of the rules of the last Congress as relates to the admission of persons within the Hall of the House.

97. On January 30, 1860,[3] before the election of the Speaker, the House adopted the following:

Ordered, That the Doorkeeper be directed to execute the seventeenth rule of the House of Representatives of the Thirty-fifth Congress, in regard to the privileges of the Hall.

98. On December 27, 1855,[4] before the election of Speaker or the adoption of rules, a proposition for the drawing of seats by Members was offered and entertained without any point of order raised, but after debate was laid on the table.

99. Before the election of officers the House has provided for opening its sessions with prayer.—On January 23, 1856,[5] before the election of a Speaker or the adoption of rules, Mr. James F. Dowdell, of Alabama, offered a preamble and resolution reciting the propriety of the House showing their reverence for God, and resolving that the daily sessions be opened with prayer, and providing that the ministers of the gospel in the city be requested to attend and perform the duty alternately.

This motion was agreed to. Later in the session, after the organization of the House, a Chaplain was elected.

100. On December 7, 1859,[6] before the election of a Speaker, Mr. Alfred Wells, of New York, by unanimous consent, offered the following resolution:

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[1] First session Thirty-fourth Congress, Journal, p. 334; Globe, pp. 269, 270.

[2] First session Thirty-fourth Congress, Journal, p. 4 , Globe, p. 18.

[3] First session Thirty-sixth Congress, Journal, p. 149; Globe, p. 629.

[4] First session Thirty-fourth Congress, Journal, p. 185; Globe, p. 89.

[5] First session Thirty-fourth Congress, Journal, pp. 354, 582; Globe, p. 282.

[6] First session Thirty-sixth Congress, Journal, p. 21; Globe, p. 42.

Resolved, That until this House shall be organized by the election of a Speaker, the clergy of this city, of the various religious denominations, be respectfully requested to open the daily session of this House with prayer; and that such of the clergy as shall accept of this invitation officiate, one each day, in alphabetical order.

Mr. William Smith, of Virginia, questioned the power of the House to transact any business until after its organization, but withdrew his objection, and the House agreed to the resolution.

101. Before the election of a Speaker the House has empowered the Clerk and Sergeant-at-Arms of the last House to preserve order.—On December 16, 1859,[1] before the election of a Speaker, Mr. William E. Niblack, of Indiana, by unanimous consent, offered the following resolutions, which were agreed to:

Resolved, That until the organization of this House by the election of a Speaker, the Clerk of the last House shall be authorized and empowered to preserve order on the floor of the House and in the galleries, and as far as possible for that purpose he may exercise the powers devolved on the Speaker, for the time being, under the rules of the last House of Representatives.

Resolved, further, That until the organization of this House as aforesaid, the Sergeant-at-Arms of the last House of Representatives is hereby authorized to exercise the ordinary powers of his office for the preservation of order, under the direction of the Clerk of the last House of Representatives as aforesaid.

A question was raised as to whether or not these resolutions were intended to allow the Clerk to decide questions of order, and Mr. Niblack responded that they were not.

102. Before the election of officers or the adoption of rules, the House has made a rule for enforcing order in the galleries.—On December 15, 1849,[2] before the House had been able to elect a Speaker and before rules had been adopted, Mr. James Thompson, of Pennsylvania, offered, and the House agreed to, the following rule:

Resolved, That the Sergeant-at-Arms and Doorkeeper are hereby authorized and directed to enforce the seventeenth rule of the last House of Representatives, and that no person be admitted to the ladies' gallery unless accompanied by ladies or introduced in person by a Member of Congress.

This resolution was agreed to without question as to the authority of the unorganized House to adopt the rule.

103. Proceedings at organization of the House in the New Jersey, or "Broad Seal," contest of 1839.

In 1839, at the organization of the House, the Members-elect did not permit five persons bearing regular credentials to participate in the organization.

In 1839 certain persons whose titles as Members-elect were contested assumed to participate in the organization; but the meeting passed on the vote of each after it had been given.

On December 5, 1839,[3] the Members-elect of the House, having been prevented from organizing the House by complications arising over a contest as to the occupants of five of the six seats of the State of New Jersey, Mr. John Quincy Adams, of

[1] First session Thirty-sixth Congress, Journal, p. 44; Globe, p. 165.

[2] First session Thirty-first Congress, Journal, p. 102; Globe, p. 36.

[3] First session Twenty-sixth Congress, Journal, pp. 6–80; Globe, pp. 20–56.

Massachusetts, was chosen chairman of the body and the rules of the last House were adopted so far as they might be applicable.

Mr. Henry A. Wise, of Virginia, then offered this resolution:

Resolved, That the acting Clerk of this House shall proceed with the call of the Members from the different States of the Union in the usual way, calling the names of such Members from New Jersey as hold the regular and legal commissions from the executive of that State.[1]

On the succeeding day Mr. R. Barnwell Rhett, of South Carolina, moved that the resolution lie on the table.

On this question tellers were called for, and the Chair appointed Messrs. George C. Dromgoole, of Virginia, and Edward Davies, of Pennsylvania, tellers to count the House.

Mr. Dromgoole inquired of the Chair who were to be counted as Members from New Jersey, and stated that he should, unless otherwise directed by the House, count every person who presented himself.

The Chairman answered, and so decided, that those must be counted who had been commissioned as Members of the House of Representatives of the United States for the Twenty-sixth Congress from the State of New Jersey by the governor of that State. The Chairman further stated that he had expressed this as his opinion before he was placed in the Chair.

From this decision Mr. Aaron Vanderpoel, of New York, took an appeal to the Members on the ground that the Chair had usurped to himself the decision of the very question that the Members were trying to decide.

Pending the appeal the House adjourned. The session of the next day, December 7, was occupied largely with proceedings for the correction of the Journal, in the course of which a vote by tellers was had, and the Chairman was asked who were to be counted as Members of the House. He replied that "the tellers will count whoever passes through; and if any pass whose title to a seat is contested, they will report the fact to the meeting, and the meeting will decide the question." But the tellers, in reporting their vote, reported no votes by gentlemen whose titles were contested.

Monday, December 9, was occupied largely with the reading of documents relating to the case, and with questions relating to the reading. It was not until December 10 that the question recurred on the appeal of Mr. Vanderpoel.

Mr. Henry A. Wise, of Virginia, moved the previous question, and on the question there were 110 ayes and 48 noes. Mr. John T. H. Worthington, of Maryland, one of the tellers, reported that three of the persons claiming to be Members from New Jersey, under the commission of the governor, voted on the previous question.

The main question was then put: "Shall the decision of the Chair stand as the judgment of the meeting?" and passed in the negative, ayes 108, noes 114.

And so the decision of the Chair was reversed.

Mr. Worthington, one of the tellers, stated that four of the Members from New Jersey, commissioned by the governor, voted on that question.

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[1] For these five seats there were ten claimants, five with credentials from the governor and five with certificates from State officials stating the vote.

The Chairman here stated that it was now for the meeting to decide who should be called as Members from New Jersey.

The question on the motion of Mr. Rhett, that the resolution of Mr. Wise do lie on the table, was called for.

The Chairman decided that that question could not be put until the preliminary question was settled as to who should vote as Members from New Jersey.

Several propositions were made, among them a motion that neither set of Members claiming seats from New Jersey should vote, until the question "Who shall vote from New Jersey?" should be decided by the House.

The Chairman decided that he was not competent to put the question on this motion, nor was it within the competency of the meeting to pass upon the motion, since in effect the motion was to decide that the people of New Jersey should not be represented on the floor.

After incidental questions had been considered, the Chairman suggested a course of procedure in the form of a ruling, but an appeal being taken, he withdrew it. Thereupon Mr. George N. Briggs, of Massachusetts, renewed the proposition in this resolution:

Resolved, That on the motion of Mr. Rhett to lay Mr. Wise's resolution on the table, or on Mr. Wise's resolution itself, the tellers shall count all the persons who may pass between them, and if any pass whose right to vote is disputed, the tellers shall report their names to the Chair, after the number of votes on both sides are reported, for the decision of the House.

This resolution was agreed to without question as to those voting.

The question then recurred on Mr. Rhett's motion, and the tellers reported that 115 had voted in the affirmative, and 114 had voted in the negative, among which latter number was one disputed vote, that of Mr. Charles Naylor, of Pennsylvania whose seat was contested by Mr. Ingersoll.

The Chairman announced to the House that he voted with the nays, whereby an equal division was produced, and the question on Mr. Rhett's motion was lost.

Mr. Francis O. J. Smith, of Maine, challenged the right of Mr. Naylor to vote, whereupon Mr. Naylor challenged Mr. Smith's right. Mr. Wise moved that Mr. Naylor's vote be counted. The question was about to be put on this motion under the operation of the previous question, when the Chairman ruled that Mr. Naylor's right to vote could not be questioned, since all controversy and proceedings had reference to the New Jersey cases and none other. Therefore the resolution moved by Mr. Briggs and adopted by the House had no relation to Mr. Naylor's right to vote.

From this decision Mr. Hopkins L. Turney, of Tennessee, appealed to the meeting.

Pending this appeal the House voted on a motion to adjourn, the tellers reporting 116 in the affirmative and 113 in the negative and that three disputed votes had been given on each side. The disputed votes being equal on each side, and therefore not affecting the result, the Chairman decided that the question was carried in the affirmative, and the meeting accordingly adjourned.

On December 11 the question was taken on the appeal by Mr. Turney, "Shall the decision of the Chair stand as the judgment of the House?" and the tellers

reported 112 votes in the affirmative, including in that number the votes of Mr. Naylor, of Pennsylvania, and Messrs. Aycrigg, Yorke, Maxwell, and Stratton, of New Jersey, commissioned by the governor of that State, 118 votes in the negative, including in that number the vote of Mr. Ingersoll, of Pennsylvania, claiming to be a Member in place of Mr. Naylor, also the votes of Messrs. Kille, Cooper, and Ryall, of New Jersey, claiming to be Members, in the room of Members commissioned by the governor of that State.

The Chairman then stated that it was for the meeting now to decide, name by name, upon the right to vote of each disputed voter whose name had been reported by the tellers.

Mr. F. O. J. Smith, of Maine, objected that the determination of the rights of the disputed voters would not affect the result; that the Chairman's decision was overruled, no matter what decisions should be given as to the challenged votes.

The Chairman held, however, that more Members were voting from Pennsylvania and New Jersey than could be permitted to vote under the Constitution and the laws; therefore the meeting must decide upon these disputed rights.

The question was first taken on Mr. Naylor's right to vote, and the tellers reported 119 votes in the affirmative, 112 votes in the negative, and no disputed votes. So it was decided that Mr. Naylor's vote should be counted.

The question was next taken on the vote of Mr. Aycrigg, of New Jersey, and on the motion that it be counted the tellers reported 117 votes in the affirmative, including in that number the votes of Messrs. Halstead, Maxwell, Stratton, and Yorke, of New Jersey, commissioned by the governor of that State; 122 votes in the negative, including in that number the votes of Messrs. Cooper, Kille, and Ryall, of New Jersey, claiming to be Members, in the room of Members commissioned by the governor of that State.

It was therefore decided that the vote of Mr. Aycrigg should not be counted.

The question was next put, "Shall the vote of Mr. Maxwell be counted?"

And the tellers reported 116 votes in the affirmative, including in that number the votes of Messrs. Halstead, Stratton, and Yorke, of New Jersey, commissioned by the governor of that State; 122 votes in the negative, including in that number the votes of Messrs. Cooper, Kille, and Ryall, of New Jersey, claiming to be Members in the room of Members commissioned by the governor of that State.

And so it was decided that the vote of Mr. Maxwell should not be counted.

It was then agreed that the question be taken by one vote on Messrs. Halstead, Stratton, and Yorke; and on the question the tellers reported 110 votes in the affirmative, 117 votes in the negative, and there was no disputed vote on either side. And so it was decided that the votes of Messrs. Halstead, Stratton, and Yorke should not be counted.

The next vote decided that the vote of Mr. Ingersoll, of Pennsylvania, should not be counted, and then it was decided that the votes of Messrs. Cooper, Kille, and Ryall, of New Jersey, should not be counted.

The Chairman then announced that from the votes thus taken and the decision thereby made the House had determined that the decision of the Chair that Mr. Naylor's vote could not be questioned, should be reversed, that Mr. Naylor's vote alstead, Stratton, and Yorke should not be counted.

The next vote decided that the vote of Mr. Ingersoll, of Pennsylvania, should not be counted, and then it was decided that the votes of Messrs. Cooper, Kille, and Ryall, of New Jersey, should not be counted.

The Chairman then announced that from the votes thus taken and the decision thereby made the House had determined that the decision of the Chair that Mr. Naylor's vote could not be questioned, should be reversed, that Mr. Naylor's vote

on the motion made by Mr. Rhett, that the resolution of Mr. Wise do lie on the table, should be counted, and that therefore the motion of Mr. Rhett had been determined in the negative.

The question then recurred on agreeing to the resolution offered by Mr. Wise.

The previous question being moved, there were in favor of it 113 votes, against it 113 votes. The Chairman thereupon voted in favor of the previous question and it was ordered.

On agreeing to the resolution there were 115 yeas and 118 nays; and so the resolution moved by Mr. Wise was rejected.

Mr. Rhett then moved the following resolution:

Resolved, That the House will proceed to call the names of gentlemen whose rights to seats are not disputed or contested; and, after the names of such Members are called, and before the Speaker is elected, they shall, provided there be a quorum of such present, then hear and adjudge upon the elections, returns, or qualifications of all claimants, Mr. Naylor and Mr. Ingersoll excepted, to the seats contested on this floor.

This resolution being divided, the portion to and including the word "contested" was agreed to without a call of the roll. The second portion was then agreed to, yeas 138, nays 92.

On December 12 the roll was called in pursuance of this order, and at the conclusion of the roll call Mr. Randolph, of New Jersey, read in his place a paper purporting to be a protest, signed by the five gentlemen commissioned by the governor of New Jersey, against the course adopted by the House in relation to their claim to be Members of the House. This paper set forth—

That the determination of the State authorities, authenticated in the manner prescribed by the State laws, is the only evidence of the election of Members of the House of Representatives which can be received prior to the organization of the House, and is final and conclusive until reversed by the House itself, duly organized.

That no one who can not produce the evidence of his election, prescribed by the laws of his State, is entitled to take a seat in the House of Representatives; and no one who does produce such evidence can be excluded before an investigation by the House, without a gross violation of the Constitution of the United States and the rights of the States themselves.

That the House of Representatives can not be constitutionally organized, nor a quorum. formed, until all the States of the Union have had an opportunity to appear by all their representatives; and that a constitutional quorum is not merely a majority of the Representatives elect after the arbitrary exclusion of other Members, on any pretext whatever, but a majority of all the Members from all the States, after each State has had an opportunity to appear by her Representatives, and to constitute a part of that quorum.

That the body here assembled, having no judicial powers, possessing no means for sending for persons and papers, not legally authorized to examine witnesses under oath, and expressly forbidden by law to go into the consideration of any business before the House is organized, and the oath to support the Constitution administered to its Members, can not exercise the highest judicial function belonging to the House of Representatives, that of reviewing and reversing the decisions of the State authorities in relation to their own elections; and that its only power is to require the persons appearing here as Members to produce the credentials prescribed by the laws of their respective States.

That, by the Constitution of the United States, each State has the power to prescribe by law the time, place, and manner of holding elections for its own Representatives in Congress, which power includes the right of prescribing the time, place, and manner of ascertaining and making known the result to Congress and the world.

Therefore the protestants held that the failure of the House to recognize their credentials was an outrage on the rights of their State and a violation of the Constitution of the United States.

Mr. Randolph moved that the protest be spread on the Journal, and on this question there appeared yeas 114, nays 117.

Mr. George C. Dromgoole, of Virginia, then submitted the following resolution:

Resolved, That a select committee, to consist of nine, be appointed, viva voce, by the Members of the House, to whom shall be referred all the papers in the possession of the Clerk relating to contests for seats on this floor from the State of New Jersey, and that they report thereon.

This resolution was agreed to, yeas 123, nays 104.

Mr. George W. Crabb, of Alabama, then moved to reconsider the vote, the point having been made that the first question was as to the returns and not as to the election. By general consent, then, the House reconsidered the vote.

Thereupon, Mr. Henry A. Wise, of Virginia, offered the following:

Resolved, That the credentials of the following Members: John B. Aycrigg, John P. B. Maxwell, William Halstead, Charles C. Stratton, and Thomas Jones Yorke, are sufficient to entitle them to take their seats in the House, leaving the question of contested election to be afterwards decided by the House.

The vote on this resolution was taken by yeas and nays, and there were yeas (the Chairman voting with the yeas) 117, nays 117. The House being equally divided, the question was lost.

A motion was then made by Mr. Smith, of Maine, that the House do come to the following resolution:

Resolved, That this House proceed at this time to the election of a Speaker.

Mr. Wise raised the question of order that it was not in order to proceed to the election of a Speaker, since by the terms of the resolution moved by Mr. Rhett the House had decided to proceed with the contested cases before the election of a Speaker.

The Chairman decided that, while the resolution moved by Mr. Rhett was in full force, the resolution proposed by Mr. Smith was still in order.

After an appeal, which was subsequently withdrawn, and several roll calls on incidental questions, the question was taken on Mr. Smith's resolution, and it was agreed to, yeas 118, nays 110.

Then followed several ineffectual attempts to settle the status of the five gentlemen having certificates from the governor of New Jersey as to the vote for Speaker. A resolution presented by Mr. John White, of Kentucky, that they were entitled to vote in the organization until excluded by a majority of uncontested votes was laid on the table, yeas 119, nays 115.

Finally, on December 14, the House proceeded viva voce to the election of a Speaker, and while the first vote was being taken Thomas Jones Yorke, John B. Aycrigg, William Halstead, John P. B. Maxwell, and Charles C. Stratton, commissioned by the governor of New Jersey as Members from that State, severally and respectively, rose in their places, exhibited their commissions, and demanded that their votes for Speaker be received; and each of them announced his vote for John Bell.

The vote was then reported by the tellers, but before the result was announced Mr. Wise inquired of the tellers if the votes of the New Jersey Members who had claimed to vote had been received.

The tellers answered the inquiry in the negative.

There was no choice on this vote, and the voting was continued until December 16, when, on the eleventh vote, Robert M. T. Hunter, of Virginia, had 119 votes, a majority, and was elected Speaker.

104. At the beginning of each session the House fixes by resolution the daily hour of meeting.—On December 6, 1859,[1] before the election of a Speaker, Mr. Sherrard Clemens, of Virginia, by unanimous consent, offered this resolution, which was agreed to:

Resolved, That the daily session of this House shall be at 12 o'clock meridian.

105. On December 4, 1855,[2] on the first day of the session, and when the House was about to adjourn after several unsuccessful trials to elect a Speaker, Mr. George W. Jones, of Tennessee, offered the following, which was agreed to:

Ordered, That the daily hour of meeting be fixed at 12 o'clock m. until otherwise ordered.

106. On December 3 1860,[3] at the beginning of a second session, the House adopted an order fixing the hour of daily meeting, as was done at the first session.

107. On December 6, 1886,[4] at the opening of the second session of the Congress, Mr. William S. Holman, of Indiana, offered and the House agreed to the resolution establishing the hour of meeting of the House at 12 o'clock noon.

108. On December 5, 1892,[5] at the beginning of the second session, the House adopted the resolution fixing the hour of daily meeting until otherwise ordered.

109. On December 1, 1902,[6] at the opening of the second session of the Congress, Mr. John Dalzell, of Pennsylvania, presented the following resolution, which was agreed to:

Resolved, That until otherwise ordered the hour of daily meeting of the House of Representatives shall be 12 o'clock meridian.[7]

110. In the early practice a motion to change the hour of daily meeting was made at any time, but as the order of business grew more rigid the motion lost its privilege.—It was the custom in the early days to agree to a resolution or order on the first day of a Congress fixing the "hour to which the House shall stand adjourned," and then on motion during the session as circumstances required the hour would be changed.[8] In those days the necessity of making certain motions privileged had not been felt, and this motion, like most other motions, was offered when a gentleman got the floor.

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[1] First session Thirty-sixth Congress, Journal, p. 14; Globe, p. 16.

[2] First session Thirty-fourth Congress, Journal, p. 18; Globe, p. 4.

[3] Second session Thirty-sixth Congress, Journal, p. 8.

[4] Second session Forty-ninth Congress, Journal, p. 10; Record, p. 14.

[5] Second session Fifty-second Congress, Journal, p. 5.

[6] Second session Fifty-seventh Congress, Journal, p. 6; Record, p. 4.

[7] A similar resolution was agreed to in the Senate. Record, p. 1.

[8] First session Sixteenth Congress, Journal, pp. 3, 364, 418 (Gales and Seaton ad.).

111. On March 28, 1834,[1] the following resolution was moved and agreed to, apparently without a motion for unanimous consent or to suspend the rules:

Resolved, That 11 o'clock a. m. shall be the hour to which this House shall stand adjourned until otherwise ordered.

112. On January 14, 1835,[2] Mr. Patrick H. Pope, of Kentucky, apparently by unanimous consent, submitted and the House agreed to a resolution changing the hour of daily meeting of the House from 12 to 11 o'clock a.m.

113. On March 15, 1836,[3] Mr. John Bell, of Tennessee, asked unanimous consent for the consideration of a resolution changing the hour of the daily meeting of the House. Objection being made, he moved the suspension of the rules,[4] and the rules being suspended for the purpose, the resolution was considered.

114. On June 9, l846,[5] Mr. Seaborn Jones, of Georgia, moved that when the House adjourns this day it adjourn to meet at 10 o'clock tomorrow morning.

Mr. Joseph R. Ingersoll, of Pennsylvania, raised the question of order that, as the hour for the meeting of the House was fixed by a standing order of the House, it was not in order to entertain a motion to change the same at any time except when resolutions were in order.[6]

The Speaker[7] stated that, although the forty-seventh rule of the House provided that "a motion to fix the day to which the House shall adjourn shall always be in order," it did not follow that a motion to change the hour already fixed by the House was always in order; and he therefore sustained the question of order raised by Mr. Ingersoll and decided that the motion of Mr. Jones was not in order.

Mr. Jones having appealed, the decision of the Chair was sustained.

115. On January 8. I845,[8] Mr. Jacob Thompson, of Mississippi, moved the following resolution:

Resolved, That from and after this day the regular hour for the meeting of this House shall be 11 o'clock a.m.

While a motion to amend this resolution was pending, Mr. Isaac E. Holmes, of South Carolina, moved that the House adjourn.

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[1] First session Twenty-third Congress, Journal, p. 459.

[2] Second session Twenty-third Congress, Journal, p. 217; Debates, p. 988.

[3] First session Twenty-fourth Congress, Journal, p. 515; Debates, p. 2779.

[4] The resolution fixing the daily hour to which the House shall stand adjourned does not seem to have been considered in the light of one of the rules of the House. Thus, on May 3,1828, a resolution to change the hour to 10 a.m. was moved and at once considered. But a motion to amend it by inserting a provision that it should not be in order to move an adjournment before 5 p.m. was ruled out, on the ground that it would be a change of rule, which could not be made except after one day's notice, the rules so providing. (First session Twentieth Congress, Journal, pp. 673, 674.) The House quite often changed the hour of its daily meeting. Thus on March 5, 1828. (First session Twentieth Congress, Journal, p. 379.)

[5] First session Twenty-ninth Congress, Journal, p. 933; Globe, p. 950.

[6] The rule providing for the introduction of resolutions has been changed since then.

[7] John W. Davis, of Indiana, Speaker,

[8] Second session Twenty-eighth Congress, Journal, p. 186; Globe, p. 113.

Mr. William J. Brown, of Indiana, moved that when the House adjourn to-day it adjourn to meet at 11 o'clock tomorrow.

Mr. John White, of Kentucky, raised the question of order that, although under the forty-eighth rule a motion to fix a different day from that to which the House would adjourn took precedence of a motion to adjourn, a motion to fix a different hour was not contemplated by the rule and did not take such precedence.

The Speaker[1] decided in favor of the question raised by Mr. White, and the House acquiesced in the decision.

116. The resolution of the House fixing the hour of daily meeting is a standing order rather than a rule.—On April 21,1880,[2] Mr. John T. Harris, of Virginia, raised a question of order as to the following resolution, which he had offered as privileged:

Resolved, That on and after Wednesday next, until otherwise ordered, the hour of daily meeting of the House be 11 o'clock a.m.

Debate arising as to the nature of the resolution, the then existing rule was quoted as follows:

No standing rule or order of the House shall be rescinded or changed without one day's notice of the motion therefor, and no rule shall be suspended except by a vote of two-thirds of the Members present, etc.

The Speaker[3] said, in relation to the resolution to change the hour of meeting:

The Chair thinks that this is an order of the House and not a rule. The latter part of the rule applies to a suspension of the rules by a two-thirds vote, but that part of the rule is not applicable as against an order in manner as provided for in first clause of the rule as read.

The Speaker therefore held that the resolution was included under the first classification, being an order of the House requiring one day's notice, and that the resolution was not before the House.

117. On April 21, 1884,[4] Mr. William R. Morrison, of Illinois, claiming the floor for a privileged report, presented the following from the Committee on Ways and Means:

Resolved, That on and after April 22, 1884, the hour of daily meeting of the House for this session be 11 o'clock a.m.

Mr. John A. Kasson, of Iowa, asked if this was privileged.

The Speaker[5] said:

The Chair will state that this is not a rule of the House which it is now proposed to change. The rules of the House do not fix the time of meeting, but the House by resolution at the beginning of the session provided that the daily session should begin at 12 o'clock until otherwise ordered.

118. The Senate having assembled and there being no presiding officer, by mutual consent one of the older Members took the chair.

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[1] John W. Jones, of Virginia, Speaker.

[2] Second session Forty-sixth Congress, Journal, p. 2612.

[3] Samuel J. Randall, of Pennsylvania, Speaker.

[4] First session Forty-eighth Congress, Record, p. 3184.

[5] John G. Carlisle, of Kentucky, Speaker.

The Senate, following the act of 1789, declined to administer the oath to Members-elect until it had chosen a President pro tempore, although a precedent for the proposed action was cited.

Argument that the law of 1789 as to organization of House and Senate by administration of the oath to Members-elect is directory merely.

On Monday, October 10, 1881,[1] the Senate assembled in special session, convened by proclamation of the President, who as vice-President had succeeded to the Presidency on the death of President Garfield, on September 19. When the Senate had met on March 4, 1881, it had been evenly divided politically, its committees having been organized by the casting vote of the Vice-President. No President pro tempore had been chosen; therefore when the Senate met this day there was no presiding officer.

Mr. Isham. G. Harris, of Tennessee, rising after the prayer of the Chaplain, stated that he had been requested by a number of Senators on both sides of the Chamber to call the Senate to order. He stated that if there was no objection he would do so, in order that they might proceed with business. There being no objection, Mr. Harris took the chair.

The proclamation of the President was then read.

Thereupon Mr. George H. Pendleton, of Ohio, offered a resolution that Thomas F. Bayard, of Delaware, be chosen President pro tempore.

Mr. George F. Edmunds, of Vermont, here presented the credentials of Messrs. Warner Miller and E. G. Lapham as Senators-elect from the State of New York, vice Messrs. Roscoe Conkling and Thomas C. Platt, resigned; and Mr. Nelson W. Aldrich, of Rhode Island, vice Ambrose E. Burnside, deceased. Mr. Edmunds declared that under the seventh rule of the Senate the presentation of credentials was always in order except during certain business such as reading of the Journal, etc.

The credentials having been presented, Mr. Edmunds moved that the oath be administered to them by Mr. Henry B. Anthony, the oldest member of the Senate in continuous service.

On motion of Mr. Pendleton, this motion was laid on the table—yeas, 36 nays 34.

Thereupon Mr. Edmunds moved as a substitute for the resolution of Mr. Pendleton a proposition that the credentials be placed on file, and that the oath be administered to the Senators-elect by Hon. Henry B. Anthony.

Mr. Edmunds said he had heard it stated that—

> the law of Congress requires that the oath of office of a Senator-elect should be administered by the President of the Senate, either the Vice-President, the Constitutional President of the Senate, or the President pro tempera acting in his absence, and that this law is an exclusive law, by implication forbidding any other administration of such an oath, and hence that it is impossible legally to admit these gentlemen until there shall be a President pro tempera who can fulfill the statute and administer the oath.

Mr. Edmunds thereupon called attention to the fact that the act of 1789 was passed by a Senate and signed by a President pro temporal not one of whom had taken the oath prescribed by the Constitution.

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[1] Special session of Senate, Forty-seventh Congress, Record, p. 505.

Therefore Mr. Edmunds argued that

this body as well as every other parliamentary body is entitled, when the just exigency of the case arises, to receive members who otherwise are a part of it, and to act, if there be no means of acting otherwise, on the very first question as well as the last one that may be presented to the body, without taking an oath at all.

Mr. Edmunds then referred to the Senate precedent of March 4, 1853, in a similar case, when it was ordered that "the oath required by the Constitution be administered" by Hon. Lewis Cass, the oldest member of the Senate. After that had been done, a President pro tempore was elected. Mr. Edmunds argued that the Senators of 1853 viewed the act of 1789 as a

directory provision for the convenient and orderly administration of the Government, which the two Houses of Congress were expected to follow, unless the absence of the convenient means of following it would put them back upon their own inherent powers. I need not tell my honorable friend from Ohio, and I need not read to him the authority to show it, that by the ancient constitution of 211 parliamentary bodies the power to administer oaths respecting their own proceedings (I limit it to that, of course) is inherent, and part of their power and existence as a body.

Mr. Augustus H. Garland, of Arkansas, admitted that by unanimous consent the course urged by Mr. Edmunds might be followed; but the law of 1789 and Rule 63 of the Senate that the oath "required by the Constitution and prescribed by the act of June 1, 1789, shall be taken in open Senate," etc., constituted a rule which the Senate should follow, and the act of 1789 required that the "President of the Senate for the time being" should administer the oath.

Mr. Edmunds's amendment was rejected—yeas 33 nays 34—and a President pro tempore was elected before the oath was administered.[1]

119. Form and history of the rule for the drawing of seats by Members (Rule XXXII, secs. 1 and 2).—The drawing of seats by the Members is provided for by the rule of the House No. 32:

1. At the commencement of each Congress, immediately after the Members and Delegates are sworn in, the Clerk shall place in a box, prepared for that purpose, a number of small balls, of marble or other material, equal to the number of Members and Delegates, which balls shall be consecutively numbered and thoroughly intermingled, and at such hour as shall be fixed by the House for that purpose, by the hands of a page, draw said balls one by one from the box and announce the number as it is drawn, upon which announcement the Member or Delegate whose name on a numbered alphabetical list shall correspond with the number on the ball shall advance and choose his seat for the term for which he is elected.

2. Before said drawing shall commence each seat shall be vacated and so remain until selected under this rule, and any seat having been selected shall be deemed forfeited if left unoccupied before the call of the roll is finished, and whenever the seats of Members and Delegates shall have been drawn no proposition for a second drawing shall be in order during that Congress.

In the early years of the House seats were evidently selected by Members in accordance with a system of mutual agreement. On February 16, 1826,[2] Mr. Robert Taylor, of Virginia, proposed a rule that the seats be numbered, and that on the first or second day of each session Members should select their seats by drawing pieces of paper bearing those numbers. This proposition was laid on the

[1] Special session Forty-seventh Congress, Record, pp. 505–509.

[2] First session Nineteenth Congress, Journal, pp. 263, 265.

table. On July 2, 1838,[1] the House agreed to a resolution that in the new arrangement of the Hall which was to be made the Members should be entitled, as nearly as possible, to the same relative positions which they then held. A proposition by Mr. Horace Everett, of Vermont, that seats be drawn by lot was not considered seriously. On June 1, 1841,[2] an effort was made to establish a permanent rule providing for drawing of seats by lot. It was urged that Members living near the seat of Government obtained an undue advantage of others by making early choices. The rule was not adopted. On December 8, 1841,[3] the House was called on to decide which of two Members was entitled to a certain seat, one Member having attempted to transfer it to another. Finally, on December 1, 1845,[4] Mr. Howell Cobb, of Georgia, proposed to remedy the unfairness of the old method of selection by having a drawing by lot. This was agreed to, and on December 4, seats were drawn for the first time.

From 1845 until 1880 seats were drawn in accordance with a resolution adopted on each occasion. At the time of the revision of 1880 the Committee on Rules reported a plan for having the names of Members written on slips of paper, which were to be drawn from a box by the Clerk. But Mr. Walter L. Steele, of North Carolina, having recited an instance in the House where such a plan had not proved satisfactory, offered as an amendment the present form of section 1.[5] The amendment was adopted.

Section 2 is in the form reported in the revision of the Forty-sixth Congress.[6] It was in form a new rule, although a portion of it comes from Rule 163 of the old rules of the House, which provided:

> Whenever the seats of Members shall have been drawn, no proposition shall be in order for a second drawing during the same Congress.

This restriction dates from February 8, 1872,[7] when it was proposed by Mr. Samuel S. Cox, of New York, to prevent obstruction of the public business by the presentation of resolutions for new drawings of seats.[8]

120. At the time of the organization of the House the motion relating to the drawing of seats is privileged.—On December 5, 1856,[9] a resolution for the drawing of seats at the beginning of a session was offered and admitted as a question of privilege.

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[1] Second session Twenty-fifth Congress, Journal, p. 1207; Globe, p. 489.

[2] First session Twenty-seventh Congress, Journal, pp. 20, 21, 34; Globe, pp. 9, 10.

[3] Second session Twenty-seventh Congress, Journal, pp. 27, 28; Globe, p. 9,

[4] First session Twenty-ninth Congress, Journal, pp. 13, 55; Globe, p. 4.

[5] See Congressional Record, second session Forty-sixth Congress, p. 1204.

[6] Congressional Record, second session Forty-sixth Congress, p. 207.

[7] Congressional Globe, second session Forty-second Congress, pp. 831, 904.

[8] Speaking in the House on March 3, 1880 (second session Forty-sixth Congress, Record, p. 1283), Mr. Alexander H. Stephens, of Georgia, indicated that the Members of the Whig party used to select seats in the portion of the Hall to the left of the Speaker, where members of the Republican party now sit, while Members of the Democratic party then as now selected seats on the side to the right of the Speaker. Members of third parties usually sit with the minority.

[9] Third session Thirty-fourth Congress, Journal, p. 59.

121. Precedents as to drawing of seats where a large portion of the majority is to be accommodated on the minority side of the main aisle.— On December 4, 1905,[1] at the organization of the House, a question arose as to the selection of seats, and Mr. James A. Tawney, of Minnesota, asked and received unanimous consent for agreement to the following:

> That in selecting seats the precedents of the Fifty-second and Fifty-fourth Congresses be followed whereby the section of seats next to the main aisle on the minority side were given to the majority side, leaving any further excess of majority Members to be accommodated in the seats on the extreme left of the minority side.

Mr. Tawney in debate referred to the precedents in the Fifty-second[2] and Fifty-fourth[3] Congresses.

122. Before an organization of the House has been effected the Senate has not usually proceeded to general legislation.

In the earlier practice of the House the Senate was notified of the election of Speaker, but not of that of other officers.

In 1839[4] the House met in the first session on December 2, but the organization was not completed until December 21. On that day, the Speaker having been elected, the rules adopted, and the Clerk and Sergeant-at-Arms elected—which steps occurred in the order enumerated—a message was sent to the Senate informing that body that a quorum of the House had assembled, that Robert M. T. Hunter, of Virginia, had been elected Speaker, and that it was now ready to proceed to business.[5] The Doorkeeper and Postmaster were not elected until the day after this message was sent.

On December 23 a message was received from the Senate informing the House that the Senate, on December 2, formed a quorum, and was ready to proceed to business. The message also communicated a resolution adopted by the Senate for appointing the customary joint committee to await upon the President and inform him that the two Houses were ready to receive any communication from him. The House at once concurred in this.

The Senate had adopted these resolutions on December 2. On the 4th Mr. Thomas H. Benton said that he understood that, as the other branch was not organized, it would not be proper to transact legislative business, yet he thought some resolutions of inquiry might be adopted in order to obtain a basis for future action. But, on the succeeding day, doubts as to the propriety of this being raised, Mr. Benton decided not to proceed.

On December 9 a resolution was adopted to inform the President that a quorum of the Senate had assembled, and that they were ready to receive any communication of an executive character which he might make.

Thereafter, until the organization of the House and the receipt of the President's message, the Senate transacted no business but executive business, not even bills

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[1] First session Fifty-ninth Congress, Record, pp. 43, 44.

[2] First session Fifty-second Congress, Record, pp. 9, 10.

[3] First session Fifty-fourth Congress, Record, p. 6.

[4] First session Twenty-sixth Congress, Journal, pp. 79, 95–101; Globe, pp. 1–78.

[5] It was not then the custom to transmit to the Senate information as to the election of other officers than the Speaker.

being introduced. Of course the election of its officers and appointment of its committees occurred.

123. In the Thirty-first Congress the organization of the House was delayed for twenty days by the failure to elect a Speaker. During this time the Senate did no general legislative business. On December 11, 1849,[1] while the House was still unorganized, Senator Joseph R. Underwood, of Kentucky, gave notice of his intention to introduce a bill.

A question being raised, and the opinion of the Vice-President[2] being asked, he said that the impression of the Chair was that no proceeding connected with legislative business could be had until both Houses were organized. As notice of the introduction of a bill was a necessary antecedent step to the introduction of a bill, and one which related to the business of legislation, in the opinion of the Chair it was not now in order to give such notice.

On December 15 the Senate adopted a resolution appointing a committee to wait on the President and inform him that the Senate was organized and ready to receive any communication he might think proper "in relation to matters which are within the sphere of their separate constitutional action." Mr. Henry Clay approved this, saying that it was in accordance to precedent, and did not seem wanting in courtesy to the other body.

124. In the session of 1855–56,[3] while the House was unable to organize because the election of a speaker was not effected until February, the Senate did not proceed to legislation, but on December 4 notified the President that it was ready for communications of an executive character; on December 31[4] received the annual message of the President of the United States; organized its committees, etc.

125. On January 18 and 19, 1860,[5] while the House was endeavoring to elect a Speaker, the Senate debated at length whether or not it might proceed to general legislative business, it being contended on the one hand that the Congress consisted of an organized Senate and an organized House, and that while one remained unorganized there was no Congress. On the other hand, it was contended that the Senate might proceed with business. A proposition declaring that the Senate might not proceed to legislative business until the House should be organized was laid on the table, and then, by a vote of 45 yeas to 7 nays, the Senate voted to allow a bill to be referred to a committee. During the discussion the constitutional questions and the precedents were examined carefully.

126. At the beginning of a second session of a Congress the House proceeded to business, although a quorum had not appeared in the Senate.

A message from one House that a quorum has appeared is not delivered in the other until a quorum has appeared there also.

On November 4, 1794,[6] at the second day's session of the second session of the

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[1] First session Thirty-first Congress, Globe, pp. 15, 35, 36.

[2] Millard Fillmore, of New York, Vice-President.

[3] First session Thirty-fourth Congress, Globe, p. 4.

[4] Globe, p. 107.

[5] First session Thirty-sixth Congress, Globe, pp. 494, 517.

[6] Second session Third Congress, Annals, p. 870.

Third Congress, a quorum appeared, and a message announcing that fact was sent to the Senate.

On November 5 Mr. Jonathan Dayton, of New Jersey, said he saw no reason for awaiting the attendance of a quorum in the Senate, and submitted a motion for the appointment of a committee to examine unfinished business.

Mr. Benjamin Goodhue, of Massachusetts, objected to the motion as improper, but the Speaker [1] put the question on Mr. Dayton's motion.

The House thereafter proceeded to business, no quorum of the Senate appearing until November 18,[1] when the joint committee was authorized and appointed to notify the President that a quorum of the two Houses had assembled.

The Journal indicates that no message was sent to the Senate until the quorum had appeared, excepting the message of November 4. That message was not delivered in the Senate until the quorum had appeared, on November 18.[2]

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[1] Annals, pp. 787, 890; Journal, pp. 232, 233 (Gales and Seaton ed.).

[2] Senate Journal, p. 120 (Gales and Seaton ed.).

Chapter V.

THE OATH.

1. **Provisions of the Constitution and statutes. Sections 127, 128.**[1]
2. **Form of at organization of First Congress. Section 129.**
3. **Administration to the Speaker. Sections 130–133.**[2]
4. **Limited discretion of the Speaker in administering. Sections 134–139.**[3]
5. **Challenging the right of a Member to be sworn. Sections 140–150.**[4]
6. **Disposal of cases of challenge. Sections 151–159.**
7. **Delays in taking the oath. Sections 160–161.**
8. **Administration before arrival of credentials. Sections 162–168.**[5]
9. **Administration to Members away from the House. Sections 169, 170.**
10. **Relations to the quorum, reading of the Journal, etc. Sections 171–181.**
11. **Status of the Member-elect before taking. Sections 183–185.**[6]

127. Senators and Representatives are bound by oath or affirmation to support the Constitution.—Article 6 of the Constitution provides:

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

128. The Member's oath, its form, and the constitutional requirement.—The Constitution, in article 6, provides that "the Senators and Representatives * * * shall be bound by oath or affirmation, to support this

[1] The iron-clad oath. (Secs. 449, 455 of this volume.) Senate declines to permit administration of the oath until after choice of a President pro tempore. (Sec. 118 of this volume.)

[2] See also sections 81, 232, and 233 of this volume. Oath administered to Speaker by Member oldest in continuous service. (Sec. 220 of this volume.)

[3] The Speaker consults the House as to administering the oath in doubtful cases. (Secs. 396, 519, 520 of this volume.) In later practice oath is administered to Delegates. (Secs. 400,401 of this volume.) Right of a contestant to be sworn is complete as soon as his case is decided favorably. (Secs. 622, 623 of this volume.)

[4] The procedure in challenging the right of Brigham H. Roberts to be sworn. (Sec. 474 of this volume.)

[5] Instance wherein a Member-elect did not present his credentials pending a contest. (Sec. 44 of this volume.)

[6] The oath as related to qualifications. (Chap. XIV, Secs. 441–463 of this volume.)

Constitution;" and the statutes direct that "at the first session of Congress after every general election of Representatives the oath of office shall be administered by any Member of the House of Representatives to the Speaker; and by the Speaker to all the Members and Delegates present, and to the Clerk, previous to entering on any other business; and to the Members and Delegates who afterwards appear, previous to their taking their seats." [1]

The oath is also prescribed by the statutes,[2] in the following form:

I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

129. At the organization of the first House an order prescribed the oath to be taken by Members until a law should be enacted.

Administration of oath to Members and Clerk in the First Congress.

On April 6, 1789,[3] it was, on motion—

Resolved, That the form of oath to be taken by the Members of this House, as required by the third clause of the sixth article of the Constitution of Government of the United States, be as followeth, to wit: "I, A B, a Representative of the United States in the Congress thereof, do solemly swear (or affirm, as the case may be), in the presence of Almighty God, that I will support the Constitution of the United States. So help me God."

On April 8, in accordance with an order adopted on the previous day, the chief justice of New York attended and administered the oath, first to Mr. Speaker in his place, and then to the Members.[4]

On April 6, previous to adopting the form of oath, leave had been granted to bring in a bill to regulate the taking the oath. This was the first bill to become a law, the President affixing his signature June 1, 1789.[5]

On June 2 the Speaker administered the oath required by the act to Members who had not taken a similar oath, and to the Clerk.[6]

130. The act of 1789 provides that at the organization of the House and previous to entering on any other business the oath shall be administered by any Member to the Speaker and by the Speaker to the other Members and the Clerk.—Section 30 of the Revised Statutes, reenacting the act of June 1, 1789, provides:

At the first session of Congress after every general election of Representatives, the oath of office shall be administered by any Member of the Home of Representatives to the Speaker; and by the Speaker

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[1] Revised Statutes, section 30.

[2] Revised Statutes, section 1757. The requirements of section 1759 of Revised Statutes in regard to the preservations of the oaths are not observed in regard to Members or Delegates or the elected officers of the House. In the Senate, however, the practice has varied, the subscribing of the oath being required at times. (First session Forty-eighth Congress, Record, p. 171.)

[3] First session First Congress, Journal, p. 7. (Gales and Seaton ed.)

[4] Journal, p. 11.

[5] Journal, p. 43.

[6] Journal, p. 44.

to all the Members and Delegates present, and to the Clerk, previous to entering on any other business; and to the Members and Delegates who afterward appear, previous to their taking their seats.[1]

131. It has long been the practice for the Member of longest continuous service to administer the oath to the Speaker.—On December 22, 1849,[2] the oath was administered to Speaker Howell Cobb by Mr. Linn Boyd, of Kentucky, the oldest Member. The Speaker descended from his seat to take the oath.[3]

132. On December 5, 1853,[4] the oath of office was administered to Mr. Speaker Boyd by Mr. Joshua R. Giddings, of Ohio, "the oldest consecutive Member of the House."

133. On February 1, 1860,[5] Mr. John S. Phelps, of Missouri, "the oldest consecutive Member of the House," administered the oath to Mr. Speaker Pennington.

134. The Speaker possesses no arbitrary power in the administration of the oath, and if there be objection the majority of the House must decide.—On January 24, 1871,[6] Mr. P. M. B. Young, of Georgia, presented the credentials of Stephen A. Corker, of the Fifth Congressional district of Georgia, and asked that the oath be administered to him.

Mr. Benjamin F. Butler, of Massachusetts, objected to the administration of the oath.

Mr. James Brooks, of New York, made the point of order that, when credentials in regular form were presented, they did not form a subject of discussion.

The Speaker[7] said:

In the organization of the House Members who have credentials from the governors of their respective States are entered upon the Clerk's list, and no man is prejudiced, of course. The House is organized upon the list so made up. But gentlemen coming subsequently are sworn in by the Chair, if there is no objection. The Chair administers the oath in cases where there is no objection; but if there be objection, of course it is a matter which must be determined by the majority of the House. The Chair possesses no arbitrary power in the matter whatever. It is a matter which must be determined by a majority of the House. If it were previous to the organization of the House, of course the gentleman's credentials would be entered on the Clerk's list and he would be sworn in with the other Members.

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[1] 1 Statutes at Large, p. 23, gives the form of oath at that time as follows: "I, A B, do solemnly swear or affirm (as the case may be), that I will support the Constitution of the United States."

On January 21, 1884, the House passed the bill (H.R. 3926) repealing the act of July 2, 1862, and such sections of the Revised Statutes of the United States as perpetuated the oath prescribed in that act. This was the repeal of the "test oath," so called. The bill became a law. (First session Forty-eighth Congress, Journal, pp. 375, 1233; Record, pp. 551, 1420.) On July 27, 1867 (first session Thirty-ninth Congress, Journal, p. 1168; Globe, pp. 4267–4273), the House laid on the table by a vote of 87 to 31 a joint resolution of the Senate for the purpose of allowing David T. Patterson, of Tennessee, to take his seat in the Senate without taking the whole of the test oath required by law.

The subject of subscribing to the oath by Senators and Representatives was discussed somewhat in the Senate on December 19, 1883, when a rule was adopted to enforce the provisions of the Statute. It was stated in the debate that Senators had not until recently subscribed to the oaths. (First session Forty-eighth Congress, Record, p. 171.)

[2] First session Thirty-first Congress, Globe, p. 67.

[3] But this is not the present practice. The Speaker stands in his place at his desk, while the Member administering the oath stands in the area in front of the Clerk's desk.

[4] First session Thirty-third Congress, Globe, p. 2.

[5] First session Thirty-sixth Congress, Journal, p. 165; Globe, p. 655.

[6] Third session Forty-first Congress, Globe, p. 703.

[7] James G. Blaine, of Maine, Speaker.

135. If a Member object the Speaker does not administer the oath to a Member-elect without the direction of the House, even though the credentials be regular in form.—On September 10, 1850,[1] Mr. Linn Boyd, of Kentucky, presented the credentials of Edward Gilbert and George W. Wright, Member-elect from the State of California. Mr. Boyd stated that the Members-elect were present and were ready to take the usual oath.

Mr. Abraham W. Venable, of North Carolina, objected to the administration of the oath, and moved that the credentials be referred to the Committee of Elections.

Mr. James Thompson, of Pennsylvania, made the point of order that it was the duty of the Speaker to administer the usual oath upon the presentation of their credentials.

The Speaker[2] decided that, inasmuch as the fifth section of the first article of the Constitution constituted "each House the judge of the elections, returns, and qualifications of its own Members," whenever objection was made it was the duty of the House, and not of the Speaker, to determine whether or not the oath should be administered. He therefore overruled the point of order.

Mr. Thompson having appealed, the appeal was laid on the table.

136. On July 3, 1867,[3] after the organization of the House, the credentials of eight Members from Kentucky were presented and the gentlemen presented themselves to be sworn.

Mr. Robert C. Schenck, of Ohio, at this point presented a protest against the administration of the oath to one of the gentlemen, Mr. John D. Young, on the ground that he had been disloyal to the Government during the war.

Mr. Charles A. Eldridge, of Wisconsin, having raised a question of order, the Speaker[4] said:

> The Chair rules, in accordance with the uniform usage of the present occupant of the chair and of every occupant of the chair, that it is for the House to determine what action it win take when a gentleman, claiming to have been elected a Representative, presents himself to be sworn. It is for the House to determine.

Later the Speaker referred, in support of his ruling, to the precedent of July 24, 1866, when Mr. William B. Stokes, of Tennessee, was challenged when he appeared to take the oath, and his credentials were referred to the Committee on Elections.

137. On March 7, 1867,[5] Mr. William E. Niblack, of Indiana, presented the credentials of A. B. Greenwood, claiming a seat as a Member from Arkansas, and moved that the same be referred to the Committee on Elections.

Mr. Thaddeus Stevens, of Pennsylvania, moved that the credentials be laid on the table, and the motion was agreed to.

A question being made as to whether or not Mr. Greenwood might not be sworn in on the presentation of the credentials, the Speaker§[4] said that the oath would not be administered if there was objection, and that objection had been indicated by the motion to lay on the table.

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[1] First session Thirty-first Congress, Journal, p. 1442; Globe, pp. 1789, 1790.

[2] Howell Cobb, of Georgia, Speaker.

[3] First session Fortieth Congress, Globe, pp. 470, 471.

[4] Schuyler Colfax, of Indiana, Speaker.

[5] First session Fortieth Congress, Journal, p. 21; Globe, p. 25.

138. On December 6, 1869,[1] at the beginning of the second session of the Congress, a question being raised as to the administration of the oath to certain Members, Mr. Speaker Blaine said:

The Chair did not propose to administer the oath to any gentleman to whose admission a single Member on the floor might make objection. The usage has always been, when there was no objection, to allow a Member to be sworn in without any further ceremony.

139. In 1866 the Speaker declined to administer the oath to persons whose credentials were regular, but who came from States declared by the two Houses not entitled to representation at the time.—On July 23, 1866,[2] Mr. Lawrence S. Trimble, of Kentucky, proposed, as a question of privilege, that the oath be administered to Messrs. N. G. Taylor, J. W. Leftwich, and Edward Cooper, Members-elect from the State of Tennessee.

The Speaker[3] said:

The Constitution does declare that each House shall be the judge of the elections, returns, and qualifications of its own Members; but the House of Representatives has decided, with the concurrence of the Senate, that certain States, not represented during the last four years in the Congress of the United States, shall not be entitled to representation again until by concurrent action of both branches they shall be declared to be entitled to representation. The House therefore declared it had no constitutional right so to judge. The Chair overrules the demand that the gentlemen claiming seats from Tennessee shall be sworn in.

Mr. Trimble having appealed, the appeal was laid on the table—yeas 119, nays 30.

140. The Members-elect having denied to certain of their number a right to participate in the organization, the Speaker declined, without instruction of the House, to administer the oath to those thus debarred, although they presented certificates in proper form.

In 1839 the House refused to direct the Speaker to administer the oath to certain persons having regular credentials as Members-elect, and as organ of the House he declined to administer the oath.

In 1839 the House declined to adopt rules until the Members had been sworn in according to the Constitution and law of 1789.

On December 9, 1839, at the organization of the House,[4] when the clerk, in calling the roll, had reached the State of New Jersey and had called the name of Mr. Joseph F. Randolph, he paused and explained that as to the other five members from that State there was conflicting evidence as to who were entitled to the seats. Messrs. John B. Aycrigg, John P. B. Maxwell, William Halstead, Charles C. Stratton, and Thomas J. Yorke had certificates from the governor of the State. On the other hand, the Clerk had in his possession certificates from the secretary of state of New Jersey showing that Messrs. Philemon Dickerson, Peter D. Vroom, Daniel B. Ryal, William R. Cooper, and Joseph Kille had received the greatest number of votes.[5] The controversy over these New Jersey seats was prolonged until December

[1] Second session Forty-first Congress, Globe, p. 9.

[2] First session Thirty-ninth Congress, Journal, pp. 1088, 1089; Globe, pp. 4055, 4056.

[3] Schuyler Colfax, of Indiana, Speaker.

[4] First session Twenty-sixth Congress, Globe, pp. 1, 30, 56, 48; Journal, p. 80.

[5] Section 31, Revised Statutes, under which the Clerk is now directed to place on the roll such Members as have credentials showing them to be regularly elected, is made up of laws passed in 1863 and 1867, dates later than the events above recorded.

16 before a Speaker was elected. In the election of Speaker the contestants on neither side voted, the other Members present having formally voted that the five holding the governor's certificate should not vote. The Speaker having delivered his address and the Journal of the previous session having been read, Mr. George C. Dromgoole, of Virginia, moved that the rules of the last House be adopted as the rules of the present House. Mr. Lewis Williams, of North Carolina, moved that this motion lie on the table until the "Members of the House shall have been sworn into office, as required by the Constitution, and by the act of June 1, 1789." [1] This motion was carried by a vote of 117 yeas to 116 nays, the Speaker voting aye. In the debate the point was made that under the law of 1789 the oaths should be administered to Members before business could begin.

The oaths having been administered to all the Members and Delegates, the Speaker [2] informed the House [3] that the five gentlemen from New Jersey holding the governor's certificate had presented themselves at the desk and demanded to be sworn into office. The Speaker further stated that, in consequence of the proceedings which had already taken place in relation to the rights of these gentlemen to seats in this House and which were to be found in the Journals, he had declined to administer to them the oath of office, although his own opinion, heretofore expressed in another situation that they were entitled to qualify, was unchanged. He therefore submitted their demand to be sworn to the House.

Various motions having been submitted and withdrawn during several days of debate, on December 20 Mr. George Evans, of Maine, finally offered the following:

Resolved, That the Representatives of the Twenty-sixth Congress of the United States now present do advise and request the Speaker to administer the oath required by law to the five gentlemen from the State of New Jersey who have presented their credentials to the Speaker and demanded to be sworn.

This resolution was defeated, yeas 112, nays 116.[4] In the course of the debate [5] the case of Mr. Landon (Lanman), in the Senate of 1825,[6] was referred to; also the case of Claiborne and Gholson in 1837,[7] in the House. The Speaker, in the course of the debate,[8] said that in regard to the duty of the Chair in swearing in the New Jersey Members he would say that he was merely the organ of the House, and whether it was a House de facto or de jure was not a question for him to decide; but being its organ, he was bound to carry out the decisions that it had made and which were staring him in the face.

Mr. John Quincy Adams, during the debate, contended [8] that it was not competent for the House to entertain the previous question or any other motion while the question of the right of the New Jersey Members to be sworn was pending.

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[1] Now section 30, Revised Statutes.

[2] Robert M. T. Hunter, of Virginia, Speaker.

[3] Journal, p. 87.

[4] Journal, p. 92.

[5] Globe, p. 59.

[6] This occurred March 4, 1825. See Contested Elections in Congress, 1789 to 1834, p. 871.

[7] First session Twenty-Fifth Congress, Journal, pp. 3, 4, 71, 91, 106, 110, 117, 137, 139. The election of these men was questioned at the organization, but they were sworn in.

[8] Globe, p. 65.

Mr. Evans's resolution having been defeated, a resolution adopting rules was agreed to,[1] and then the organization of the House was completed by the election of a Clerk and other officers. The cases of the New Jersey Members were referred to the Committee on Elections, and ultimately the delegation, headed by Mr. Dickerson, was seated.[2]

141. The fact that a Member-elect has not taken the oath does not debar him from challenging the right of another Member-elect to be sworn.—On March 4, 1871,[3] while the Speaker was administering the oath to the Members-elect at the organization of the House the name of Mr. Alfred M. Waddell, of North Carolina, was called.

Mr. Horace Maynard, of Tennessee, upon his authority as a Member of the House, charged that Mr. Waddell was disqualified, and objected to the administration of the oath to him.

Mr. Charles A. Eldridge, of Wisconsin, raised the question of order that Mr. Maynard had not been sworn, and therefore might not make the objection.

The Speaker[4] said:

He is a Member of the House. If he were not, the Chair would of course not recognize him. * * * The gentleman from Tennessee clearly has the right to raise this question.

142. On a question raised while the oath is being administered to Members the right to vote is not confined to those already sworn in.—On March 4, 1869,[5] at the organization of the House, after a Speaker had been elected and while the Members-elect were taking the oath, a question was raised as to the qualifications of Messrs. Boyd Winchester and John M. Rice, of Kentucky, and a motion was made to refer their credentials to the Committee on Elections with instructions. On this motion the previous question was ordered and the vote was about to be taken when Mr. Charles A. Eldridge, of Wisconsin, raised the question of order that none but those sworn in had the right to vote.

The Speaker[4] said:

The Chair overrules the point of order. The uniform usage of the House is otherwise.

143. It has been held, although not uniformly, that in cases where the right of a Member-elect to take the oath is challenged the Speaker may direct the Member to stand aside temporarily.—On March 4, 1869,[6] at the organization of the House and while the Speaker was administering the oath to Members-elect, objection was made to the swearing in of Mr. Patrick Hamill, of Maryland. Mr. Hamill was asked to step aside until other Members, about whom there was no question, should be sworn.

Mr. J. Proctor Knott, of Kentucky, made the point of order that the duty devolved upon the Speaker by law to swear in each Member as he presented him-

[1] Journal, p. 95.
[2] Globe, p. 256; Journal, p. 1297.
[3] First session Forty-second Congress, Globe, p. 6.
[4] James G. Blaine, of Maine, Speaker.
[5] First session, Forty-first Congress, Globe, p. 6.
[6] First session Forty-first Congress, Journal, p. 7; Globe, pp. 6, 13.

self for that purpose; it was not for the Speaker to decide whether he could properly take the oath or not. Moreover, the House could not discharge any of its functions, either legislative or quasi judicial, which were conferred on it by the Constitution, until it was organized. Therefore there was no power, either in the Speaker or the House, at present to exclude a Member-elect from taking the oath.

The Speaker[1] replied that the Chair had not assumed to exclude any Member-elect from taking the oath. But the gentleman from Maryland, in order to relieve the embarrassment of the House, voluntarily withdrew, as he had a right to do, from those who had presented themselves to take the oath.

144. On March 4, 1869,[2] at the organization of the House objection was made to the taking of the oath by Messrs. Boyd Winchester and John M. Rice, of Kentucky. When the Speaker[1] requested them to step aside until the remaining Members had taken the oath, objection was made. The Speaker thereupon stated that the question must be met at once, and a resolution, reciting the allegations against the two gentlemen and providing that they should not be sworn in until after an investigation had been made, was presented.

145. On December 5, 1881,[3] at the organization of the House the Speaker was administering the oath to Members, and the State of Alabama had been called. As Mr. Joseph Wheeler presented himself to be sworn Mr. George W. Jones, of Texas, objected, and asked that Mr. Wheeler stand aside.

The Speaker having directed Mr. Wheeler to stand aside, Mr. Samuel J. Randall, of Pennsylvania, raised the point of order that the stepping aside of a gentleman who had been thus challenged was a voluntary act, and in support of this point he cited the proceedings in the Forty-first Congress.

After debate the Speaker[4] said:

> The Chair is inclined to hold that he has the power to designate the order in which Members may be called and sworn in. Unquestionably the Chair has no right to decide upon the title of any Member. * * * If any gentleman is objected to, for mere convenience of proceeding the Chair will ask the gentleman objected to to stand aside. He having stood aside, and all others not objected to having been sworn in, the Chair will at once require the roll to be called for those persons who have been objected to and will swear them in, unless there shall be some good reason given upon which the House may act and direct the Chair otherwise. * * * This is a matter of order, wholly within the control of the Chair for the convenience of procedure.

A resolution relating to Mr. Wheeler's case having been presented and laid on the table, the Speaker said:

> The Chair will state, there being no motion before the House, in the absence of instructions he will regard it his duty to proceed to swear in the Member.

Accordingly the oath was administered to Mr. Wheeler.

146. At the organization of the House on March 4, 1871,[5] after the Speaker had been elected and while he was administering the oath to the Members, the name of Mr. Alfred M. Waddell, of North Carolina, was called. Mr. Waddell's name was on the roll and he had participated in the election of Speaker. Mr. Horace

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[1] James G. Blaine, of Maine, Speaker.

[2] First session Forty-first Congress, Journal, p. 7; Globe, p. 6.

[3] First session Forty-seventh Congress, Record, pp. 9–13.

[4] J. Warren Keifer, of Ohio, Speaker.

[5] First session Forty-second Congress, Globe, pp. 7, 11.

Maynard, of Tennessee, challenged his right to be sworn, on the ground that he was ineligible under section 3 of article 14 of the Constitution, since after taking an oath as a civil officer of North Carolina to support the Constitution of the United States he had subsequently participated in the war of secession, thereby becoming disqualified for a seat in Congress.

When this objection was made the Speaker said that he would first swear in those Members against whom there was no objection.

This was done, and later on the same day the House voted to allow Mr. Waddell to take the oath, and referred his credentials to the Committee on Elections.[1]

147. When, at the organization of the House, several Members-elect are challenged and stand aside, the question is first taken on the Member-elect first required to stand aside.—On October 15, 1877,[2] at the time of the organization of the House, objection was made to the swearing in of several Members, and they stood aside. On October 16 their cases were considered, and Mr. Eugene Hale, of Maine, called up, as a question of privilege, the case of James B. Belford, of Colorado.

Mr. Samuel S. Cox, of New York, made the point of order that the question must first be taken on the case of the Member first required to stand aside.

The Speaker[3] sustained the point of order. (Journal, p. 15; Record, p. 60.)

148. On December 6, 1875,[4] at the time of the organization of the House, objection was made to the swearing in of several Members. During the proceedings Mr. James A. Garfield made the point of order that in the consideration of these cases the question should be first taken on the one who was first called on to stand aside.

The Speaker[3] sustained the point of order.

149. When Members-elect are challenged at the time of taking the oath motions and debate are in order on the questions involved in the challenge; and in a few cases other business has intervened by unanimous consent.—On July 4, 1861,[6] the Speaker had been elected and was about to proceed to administer the oath to Members when Mr. Thaddeus Stevens, of Pennsylvania, moved that such names upon the roll as should be objected to, when called, be passed over until other Members should be sworn in. Mr. Schuyler Colfax, of Indiana, proposed an amendment by inserting the words "as may be contested" in place of "as should be objected to." Mr. Colfax explained that he did this because there was a question as to one or more of the Virginia delegation, although their seats were not contested.

Mr. Samuel R. Curtis, of Iowa, made the point of order that both the motion and the amendment were out of order, as the House was still in an unorganized condition. The first business was to perfect the organization, and until that was done such motions were not in order.

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[1] The Journal indicates that there was at this time no contest for this seat.

[2] First session Forty-fifth Congress, Journal, p. 15; Record, p. 60.

[3] Samuel J. Randall, of Pennsylvania, Speaker.

[4] First session Forty-fourth Congress, Record, pp. 167–171.

[5] Michael C. Kerr, of Indiana, Speaker.

[6] First session Thirty-seventh Congress, Journal, p. 12; Globe, p. 5.

The Speaker[1] overruled the point of order.

Mr. Stevens's motion was then amended, and as amended was agreed to.

The names of all those whose seats were not contested having been sworn in, Mr. Ellihu B. Washburne, of Illinois, moved that the rules of the last House of Representatives be adopted as the rules of this House.

The Speaker said:

> The first business to be done is the qualification of Members, and until that business is disposed of the Chair thinks it is not proper to do any other business.

150. On March 4, 1869,[2] at the organization of the House, the Speaker was administering the oath to the Members-elect, when the right of Mr. Patrick Hamill, of Maryland, to take the oath was challenged. Debate having begun upon Mr. Hamill's case, Mr. Ebon C. Ingersoll, of Illinois, made the point of order that debate was not in order on the question.

The Speaker[3] held that debate was entirely in order, as the House was considering a question of the highest privilege.

Mr. John F. Farnsworth, of Illinois, made the point of order that as the Members had not all been sworn in there was no House to vote on the question.

The Speaker overruled the point, saying that the present mode of procedure was that warranted by all the precedents. He also said in connection with a similar point of order raised later that he considered the House in its present state competent to enforce the previous question. Such was the case even in the preliminary stage of the proceedings for organization on that day before the Clerk had called the roll for the election of Speaker. The House had certainly lost none of its powers by the election of Speaker and by its proceeding so far in the business of organization.

151. By unanimous consent the House has proceeded to legislative business pending decision as to the right of a Member to be sworn in.— On October 15, 1877,[4] at the time of the organization of the House, objection was made to the swearing in of several Members, and they stood aside. Before the determination of the right of these challenged Members-elect to be sworn the organization of the House was completed and seats were drawn. On October 16 the House considered the cases of two of those challenged, and then the reading and reference of the President's message intervened before the disposal of the remaining cases. It does not appear that unanimous consent was formally asked for these interruptions.

152. On March 18, 1879,[5] at the time of the organization of the House, objection was made to the swearing in of Mr. Noble A. Hull, of Florida. The consideration of Mr. Hull's case was about to begin when Mr. William P. Frye, of Maine, requested that it be postponed until the next day.

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[1] Galusha A. Grow, of Pennsylvania, Speaker.

[2] First session Forty-first Congress, Journal, p. 7; Globe, p. 6.

[3] James G. Blaine, of Maine, Speaker.

[4] First session Forty-fifth Congress, Journal, p. 20; Record, p. 69.

[5] First session Forty-sixth Congress, Record, pp. 6, 27.

Mr. Fernando Wood, of New York, objected.

The consideration of the case thereupon proceeded, but later, by unanimous consent, the matter was postponed until the next day.[1]

153. Questions as to the credentials and qualifications of Members-elect may, by general consent, be deferred until after the election of Speaker and swearing in of Members.—On July 4, 1861,[2] at the time of the organization of the House, while the Clerk was calling the names of the Members-elect by States, several questions were raised as to the credentials and qualifications of Members-elect, but by general consent the determination of these matters was waived until after the election of a Speaker and the administration of the oath to Members.

154. In 1861 it was held that the House might direct contested names on the roll to be passed over until the other Members-elect were sworn in.—On July 4, 1861,[3] at the organization of the House, after the Speaker had taken the chair, and before administering the oath to such of the Members as were present, it was voted, on motion made by Mr. Thaddeus Stevens, of Pennsylvania, as amended on motion of Mr. Schuyler Colfax, of Indiana, that such names on the roll as might be contested should, when called, be passed over until the other Members were sworn in.

The Speaker[4] overruled a question of order that the motion was not in order prior to the completion of the organization.

155. A Member-elect challenged as he is about to take the oath is not thereby deprived of any right, and the determination of his case has priority of those of persons claiming seats but not on the Clerk's roll.—On October 15, 1877,[5] at the time of the organization of the House, while the oath was being administered to the Members-elect, several Members-elect were challenged and required to step aside.

On October 16, after the organization of the House had been perfected, the cases of these challenged Members were taken up.

Mr. Eugene Hale, of Maine, proposed to call up the case of the Representative from Colorado, from which State no name had been placed on the roll.

Mr. Samuel S. Cox, of New York, raised the question of order that those first challenged should be first considered.

After debate, the Speaker[6] said:

In the opinion of the Chair, the proposition that before taking up the case of any gentleman whose name was not upon the roll at all the House shall consider the qualifications of Members upon the roll who were asked to step aside is reasonable and right and in accord with the practice. Any other ruling would work great hardship. These gentlemen were placed upon the roll by the Clerk under the law, and upon the objection of an individual Member, which in its nature is arbitrary and might be factious, they were prevented from being sworn in. The Chair stated yesterday that such a single objection did not deprive those gentlemen of any right which they possessed, and if the occasion had presented

[1] See also the Roberts case in the Fifty-sixth Congress. (See. 474 of this work.)

[2] First session Thirty-seventh Congress, Globe, p. 3.

[3] First session Thirty-seventh Congress, Journal, p. 12; Globe, p. 5.

[4] Galusha, A. Grow, of Pennsylvania, Speaker.

[5] First session Forty-fifth Congress, Record, pp. 59, 60.

[6] Samuel J. Randall, of Pennsylvania, Speaker.

itself these gentlemen, in the opinion of the Chair, would have had the right to vote, as they did in fact vote, upon the election of Speaker, in the same manner as though they had been sworn in. For these reasons the Chair sustains the point of order of the gentleman from New York.

156. Members-elect challenged for alleged disqualifications have in several cases been sworn in at once, the question of their qualifications in some cases being referred to a committee for examination.—On July 4, 1861,[1] at the organization of the House, the Speaker[2] was administering the oath to the Members-elect. When the State of Virginia was called, Mr. Henry C. Burnett, of Kentucky, offered this resolution:

Resolved, That the question of the right of Charles H. Upton, William G. Brown, R. V. Whaley, John S. Carlile, and E. H. Pendleton, to seats upon this floor, be referred to the Committee on Elections, when formed, and that they report to this House thereon.

It appears from the debate that there was a question as to whether or not Mr. Upton was a citizen of Virginia, it being alleged that he was a citizen of Ohio and that he had voted there at the last election.

Both Mr. Upton and his associates were among those whose names were on the roll as made up by the Clerk and they had voted in the election of Speaker.

On motion of Mr. John A. McClernand, of Illinois, the resolution was laid on the table, and the Virginia Members took the oath.

157. On March 4, 1869,[3] the Speaker having been elected and having addressed the House, the swearing in of the Members was proceeding, and the name of Mr. Patrick Hamill, of Maryland, had been called, when Mr. Benjamin F. Butler, of Massachusetts, objected to Mr. Hamill on the ground that he had been disloyal during the war. Mr. Butler proposed a resolution that Mr. Hamill be not allowed to take the oath until his case should be investigated by the Committee on Elections.[4]

On March 5, when the case was again taken up, Mr. Butler stated that he had examined the case carefully and was of the opinion that the prima facie case, as made out by the certificate of the governor, ought at the present time to prevail, and that Mr. Hamill ought to be admitted to his seat.

A resolution was therefore presented and agreed to that Mr. Hamill be now sworn in and that the papers submitted in this case be sent to the Committee on Elections when appointed. Mr. Hamill therefore took the oath. Mr. Hamill had previously participated in the proceedings of organization, having answered to his name on the vote for Speaker.

158. On March 4, 1869,[5] at the organization of the House, objection was made to administering the oath to Messrs. Boyd Winchester and John M. Rice, of Kentucky, who were on the roll and had voted for Speaker. It was alleged that they were disloyal during the war. A resolution was presented reciting the allegations against them and providing that the oath should not be administered to them.

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[1] First session Thirty-seventh Congress, Journal, p. 12; Globe, pp. 6, 7, 13.

[2] Galusha A. Grow, of Pennsylvania, Speaker.

[3] First session Forty-first Congress, Journal, pp. 4, 5, 10; Globe, pp. 6, 10, 13.

[4] The Journal indicates that there was no contest for Mr. Hamill's seat (First session Forty-first Congress, p. 291). It does not appear that Mr. Hamill was afterwards disturbed in the possession of his seat.

[5] First session Forty-first Congress, Journal, pp. 4, 6, 10; Globe, pp. 10, 13.

Explanations of the charges being made, the resolution was withdrawn, and on March 5 the oath was administered to them by order of the House.[1]

159. On December 3, 1889,[2] during the organization of the House, as the Speaker was administering the oath to the Members, and as the State of Kansas was called, Mr. William M. Springer, of Illinois, asked that Mr. S.R. Peters, of Kansas, stand aside.

The Speaker[3] directed Mr. Peters to stand aside. Mr. Springer then presented a memorial from the governor and State officers of Kansas reciting that Mr. Peters, who had been elected judge for the four years ending January, 1884, was disqualified by the terms of the constitution of that State from holding any other office under the State or United States, and proposed a resolution referring the case to the Committee on Elections for examination as to whether Mr. Peters was entitled to the seat, and also to examine the claims of Mr. S. N. Wood, who contested the seat.

The Speaker suggested that the swearing in of a Member being a matter of the very highest privilege, the oath should be first administered, and then the resolution might be offered.

This was accordingly done. Mr. Peters's qualifications were afterwards examined and he was declared entitled to the seat.

160. Under exceptional circumstances the House admitted to a seat a Member-elect who failed to present himself until near the expiration of the Congress.—On February 25, 1868[4] the House voted to admit to his seat Mr. George W. Bridges, of Tennessee, who had been elected at the regular Congressional election in his State in 1861, but who had been unable to appear in his place when Congress met in December of that year because he had been captured by the Confederates and detained a prisoner. As soon as he could escape he made his way, arriving at Washington so as to appear in the House February 25, a few days before final adjournment.

161. Instance wherein a Member-elect appeared and took the oath several months after the organization of the House.—On April 19, 1906,[5] Mr. Malcolm R. Patterson, of Tennessee, appeared and took the oath. He had been regularly elected in November, 1904, as a Member of this Congress, but had not appeared at the organization of the House on the first Monday of December, 1905, nor thereafter until this date. No question was raised as to his right to qualify.

162. Although the House has emphasized the impropriety of swearing in a Member without a certificate, it has sometimes been done by unanimous consent.—On April 20, 1871,[6] Mr. Omar D. Conger, of Michigan, proposed a resolution providing that Wilder D. Foster, Member-elect from the Fourth Congressional district of Michigan, be sworn in. Mr. Conger explained

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[1] The Journal (first session Forty-first Congress, p. 291) indicates that there was a contest for Mr. Rice's seat, but not for Mr. Winchester's.

[2] First session Forty-eighth Congress, Record, p. 6. 3 John G. Carlisle, of Kentucky, Speaker.

[4] Third session Thirty-seventh Congress, Journal, pp. 489, 490; Globe, pp. 1295, 1296.

[5] First session Fifty-ninth Congress, Record, p. 5523.

[6] First session Forty-second Congress, Globe, p. 833.

that the official certificate of Mr. Foster had not been received, but it was apparent from telegraphic reports of the canvass that he had been elected by a majority of several thousand.

A question arose, and while it was generally assumed that by unanimous consent Mr. Foster might properly be admitted to take the oath, yet it was objected that admission should be as a matter of right, and that it was improper to admit without a certificate of some kind. Because of the objection Mr. Conger withdrew the resolution.

163. On December 1, 1879,[1] Mr. Waldo Hutchins, of New York, was sworn in without the presentation of the regular certificate required by law, which had not been issued because the State canvassers would not meet under the law for several days. But the county canvassers had shown his election unmistakably, and there was no contest or question. Therefore, by unanimous consent, the House allowed Mr. Hutchins to be sworn in, although distrust of the precedent was expressed.

164. On December 6, 1886[2] at the beginning of the second session Mr. Abram S. Hewitt, of New York, as a question of privilege, presented a letter from the secretary of state of New York stating that the returns officially received showed the election of Mr. Samuel S. Cox to fill the vacancy caused by the resignation of Mr. Joseph Pulitzer, of the Ninth Congressional district of New York, and that the proper certificate of election would be issued as soon as the board of canvassers should meet.

There being no objection, the Speaker administered the oath to Mr. Cox.

On the same day and under similar circumstances the oath was administered to Mr. Henry Bacon, of New York.

165. On December 1, 1890,[3] after several Members presenting regular certificates of election had been sworn in, the request was made that Mr. John S. Pindar, of the Twenty-fourth district of New York, be sworn in. The official certificate from the secretary of state of New York had not arrived, but the certificate of the county canvassers showing the result of the election was presented at the Clerk's desk. By unanimous consent the oath was administered to Mr. Pindar.

The request was then made that Mr. E. R. Hayes, of Iowa, be sworn in. It was stated by a Member of the Iowa delegation, Mr. David B. Henderson, that there was no question of Mr. Hayes's election, but by some error the certificate had not been transmitted. He presented the letter in which the certificate was supposed to have been transmitted, but in which by mistake another paper had been inclosed.

Pending the request for unanimous consent, it was suggested by Mr. Charles F. Crisp, of Georgia, "that the House sometimes accepts, in lieu of a formal certificate (as in the case of the gentleman from New York, Mr. Pindar, to which consent has just been given), the certificate of the local boards of county canvassers. But so far as I know a Member presenting himself to be sworn in must have some kind of

[1] Second session Forty-sixth Congress, Journal, p. 8; Record, p. 10.

[2] Second session Forty-ninth Congress, Journal, p. 9; Record, p. 14.

[3] Second session Fifty-first Congress, Journal, p. 5; Record, p. 11. Thom B. Reed, of Maine, Speaker.

a certificate or some authority from some source having charge of the election to warrant the granting of the request." No objection was made, however, and Mr. Hayes was sworn in.

In a similar manner the oath was administered to Mr. Robert H. Whitelaw, of the Fourteenth district of Missouri, whose certificate had not arrived. In this case a semiofficial statement from the secretary of state of Missouri, giving the figures of the election, was presented by a colleague.

On May 5, 1896,[1] at the request of Mr. Charles Daniels, of New York, and by unanimous consent, the oath was administered to Mr. Rudolph Kleberg, of Texas, who presented an informal statement to the Speaker, signed by the governor, secretary of state, and attorney-general of Texas, who stated "upon general and reliable unofficial information" that Mr. Kleberg had been elected.

On December 19, 1896,[2] on motion of Mr. Henry G. Turner, of Georgia, and by unanimous consent, the oath was administered to Mr. Charles R. Crisp, of Georgia, who presented an informal letter from the governor of Georgia to the Speaker, informing him that there was only one candidate at the election and that the commission would be forwarded as soon as the returns were received.[3]

166. On March 2, 1894,[4] Mr. William S. Holman, of Indiana, announced that Mr. Galusha A. Grow, of Pennsylvania, had been elected a Member of the House from Pennsylvania, but that his credentials had not yet arrived. After remarks on the public career of Mr. Grow in earlier years in the House, Mr. Holman asked unanimous consent that the oath be administered to him. There being no objection, it was so ordered, and Mr. Grow took the oath.

167. On January 15, 1902,[5] the House, by unanimous consent, authorized the Speaker to administer the oath to Mr. Montague Lessler, of New York, on the following statement of fact made by Mr. Lucius N. Littauer, of New York:

> Mr. Speaker, I ask unanimous consent that Mr. Montague Lessler, elected to this House at a special election held in the Seventh district of New York to fill a vacancy caused by the resignation of Mr. Muller, be sworn in. The certificate of the secretary of state of New York is not yet at hand, but there is no contest over the result of this election. The vote has been canvassed by the board of county canvassers, and Mr. Lessler is now here ready to be sworn in.

168. On December 3. 1906,[6] at the beginning of the second session of the Congress, after the roll of the Members had been called by States, and when several Members elected to fill vacancies had presented credentials and taken the oath, Mr. James Hay, of Virginia, said:

> Mr. Speaker, I ask unanimous consent that Mr. E. W. Saunders, a Member elect from the Fifth Virginia district, be sworn in. His credentials have not arrived, but there is no question of his election, and I have been in communication with the secretary of state of Virginia, who tells me that the canvass of the votes has been made and that Mr. Saunders has been declared duly elected.

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[1] First session Fifty-fourth Congress, Record, p. 4846.

[2] Second session Fifty-fourth Congress, Record, p. 301. Thomas B. Reed, of Maine, Speaker.

[3] It is a safe usage to permit the oath to be administered under such circumstances only by unanimous consent; but manifestly in a case of such high privilege the House might act by majority vote.

[4] Second session Fifty-third Congress, Record, p. 2533.

[5] First session Fifty-seventh Congress, Journal, p. 223; Record, p. 692.

[6] Second session Fifty-ninth Congress, Record, p. 13.

On this statement the House gave consent, and the oath was administered to Mr. Saunders. Under similar conditions the oath was administered to Mr. Daniel J. Riordan, of New York.

169. Instance wherein the House authorized the Speaker to administer the oath to Members away from the House.—On January 6, 1890,[1] Mr. John G. Carlisle, of Kentucky, having announced that there were three Members of the House who by reason of illness had been unable to attend and take the oath of office, offered the following resolutions, which were adopted:

Whereas Samuel J. Randall, a Representative for the State of Pennsylvania from the Third district thereof, David Wilber, a representative for the State of New York from the Twenty-fourth district thereof, and W. C. Whitthorne, a Representative for the State of Tennessee from the Seventh district thereof, have been unable from sickness to appear in person to be sworn as Members of the House, and there being no contest or question as to their election: Therefore,

Resolved, That the Speaker be authorized to administer the oath of office to said Samuel J. Randall at his residence in Washington, D. C.; and that the said David Wilber and W. C. Whitthorne be authorized to take the oath of office before an officer authorized by law to administer oaths; and that said oaths, when administered as herein authorized, shall be accepted and received by the House as the oaths of office, respectively, of Samuel J. Randall, David Wilber, and W. C. Whitthorne.

Resolved, That the oaths of office administered to the said David Wilber and W. C. Whitthorne shall be certified to the House of Representatives by the officers administering the same, authenticated by their official signatures and seals.

On the following day the Speaker announced:

The Chair desires to announce that in compliance with the resolution yesterday adopted the Speaker administered the oath of office at his residence to Hon. Samuel J. Randall, a Representative from the State of Pennsylvania, and the Clerk will make a record in the Journal.

On January 15[2] the Speaker laid before the House the oaths of Messrs. Wilber and Whitthorne, and they were ordered to be filed in the office of the Clerk.

170. By authority of the House the oath may be administered to a Member away from the House and by another than the Speaker.

As to the competency of a Speaker pro tempore to administer the oath to Members.

On January 22, 1887, Mr. Nathaniel J. Hammond, of Georgia, from the Committee on the Judiciary, submitted a report[3] on the case of Representative D. Wyatt Aiken, of South Carolina, who, by reason of illness, seemed likely not to be able to appear in the House during the Congress, and to whom it was proposed to administer the oath away from the House by a judicial officer of his State. The committee quoted the third section of Article VI of the Constitution, which requires that the Representatives "shall be bound by oath or affirmation to support the Constitution," and section 30, Revised Statutes.[4]

The committee considered two questions arising under this statute: (1) Whether any officer but the Speaker can administer that oath, and (2) whether it can be administered until the Member is "present" or "appears" in the House, or elsewhere than in the House.

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[1] First session Fifty-first Congress, Journal, pp. 89, 103; Record, pp. 399, 432.

[2] Journal, p. 124.

[3] House Report No. 3745, second session Forty-ninth Congress. (Record, p. 1157.)

[4] See section 14, this volume.

The committee say that a construction which might require that none but the Speaker can swear in a Member might prove seriously inconvenient in case of his absence. It is a rule of the House only which authorizes him temporarily to appoint a Speaker pro tempore to the chair. Such a construction would give to the Speaker the dangerous power to refuse to administer the oath and thereby exclude Members from the House. No such construction should be allowed. The committee here quote an English precedent where, out of abundant caution, such act by a deputy speaker was ratified by action of Parliament subsequently.

In regard to the second inquiry the committee cite the case of William Rufus King, elected Vice-President in 1855, and who, being detained in Habana, was allowed by special act to take the oath there. This was a precedent merely for swearing in a Member away from the House. The statute was needed to authorize the officer abroad to administer the oath.

The committee say that no provision has been made by statute for administering this oath by any but the Speaker, nor elsewhere than in the House. As to absent Members it is casus omissus. It does not require the oath to make one a Representative. Mr. Aiken was already on committees and had been granted leave of absence. The statutes [1] require that the Speaker certify the salaries and amounts of Members and approve the employment of the reporters. Yet these things may be done by a "Deputy Speaker" named by him, with the approval of the House. That Deputy Speaker [2] swears in Members also, not by statute, but only by our rule, which authorizes him to "perform the duties of the Chair."

The Constitution provides that when sitting to try impeachments Senators "shall be under oath or affirmation." No statute prescribing the form and method of taking the oath, the Senate has determined it itself. The question of how the oath of office in each House shall be taken is so near akin to the "election returns and qualifications of its own Members" and so like one of the "rules of its own proceeding," which constitutionally belong to "each House " to "judge" and "determine" for itself, that in the opinion of the committee no statute was necessary. The committee concluded by recommending the adoption of a resolution as follows:

Whereas D. Wyatt Aiken, Representative for the State of South Carolina from the Third district thereof, has been and in all probability will remain until the end of this Congress unable from sickness to appear in person to be sworn as a Member of this House, but has sworn to and subscribed the oath of office before an officer authorized by law to administer oaths, and the said oath of office has been presented in his behalf to the House,[3] and there being no contest or question as to his election: Therefore,

Resolved, That the said oath be accepted and received by the House as the oath of office of the said D. Wyatt Aiken as a Member of this House.

This resolution, after debate, was adopted by the House January 29, 1887.[4]

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[1] Sections 47 and 54, Revised Statutes.

[2] On June 15, 1898 (second session Fifty-fifth Congress), Mr. John Dalzell, of Pennsylvania, by designation of the Speaker, in writing, acting as Speaker pro tempore, administered the oath to Mr. Greene, of Massachusetts.

[3] The oath had been presented in the House on January 10 as a question of privilege (Journal, p. 200; Record, p. 493), the case of Mr. Haskell, of Kansas, being cited as a precedent.

[4] Second session Forty-ninth Congress, Record, pp. 1156–1158.

171. An adjournment taking place after the election of a Speaker, but before the Members had taken the oath, the Journal was read on the next day, but was not approved until the oath had been administered.

It has been held that the administration of the oath to a Member takes precedence of a motion to amend the Journal.

On December 22, 1849,[1] after many ballotings, Mr. Howell Cobb, of Georgia, was elected Speaker. After the oath had been administered to him the House adjourned.

On the next legislative day, December 24, the Speaker called the House to order, and the Journal of the preceding legislative day was read.

Mr. David S. Kaufman, of Texas, claimed the floor on a privileged question—a motion to amend the Journal.

The Speaker held that no question was in order until the Members of the House had been sworn in. A motion to amend the Journal or any other privileged question would then be in order.

The Speaker then proceeded to administer the oath to the Members.

172. Members have been sworn in before the reading of the Journal.— From the Journal of December 14, 1840,[2] it seems to have been the usage at that time to swear in new Members before the reading of the Journal.

173. Instance wherein, at the organization of the House, the oath was administered to a Member-elect during the call of the roll on a motion to agree to rules.—On December 4, 1905,[3] at the organization of the House, the yeas and nays were ordered on a motion for the previous question on a resolution agreeing to rules. After the roll had been called once, Mr. Albert S. Burleson, of Texas, presented himself and took the oath. The roll call was then completed, Mr. Burleson voting.

174. Members have been sworn in when a roll call had just disclosed the absence of a quorum.—On March 29, 1897[4] on a motion that the Journal be approved, the Speaker§[5] announced the result of the roll call—yeas 164, nays 2, present 2, a total of 168; not a quorum. The Speaker then announced that under the rule[6] the doors of the House would be closed preparatory to the can of the House.

At this point Mr. James D. Richardson, of Tennessee, announced that Messrs. Rudolph Kleberg, of Texas, and William A. Jones, of Virginia, were present, ready to take the oath, and asked that it be administered to them.

The Speaker said that a question arose as to whether or not, the body not being constituted to do business and the roll call having been ordered by the rule of the House, the proceedings might be interrupted. Therefore he advised that unanimous consent should be obtained.

This having been done, the oath was administered to the two Members.

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[1] First session Thirty-first Congress, Globe, p. 67.

[2] Second session Twenty-sixth Congress, Journal, p. 31.

[3] First session Fifty-ninth Congress, Record, p. 43.

[4] First session Fifty-fifth Congress, Record, p. 428.

[5] Thomas B. Reed, of Maine, Speaker.

[6] Section 4 of Rule XV. (See see. 3041 of this work.)

175. At the beginning of a second session of Congress unsworn Members-elect were taken into account in ascertaining the presence of a quorum, but in the absence of the Speaker they were not sworn until the next day.—On December 6, 1830,[1] at the beginning of the second session of the Congress, there appeared, besides those who answered the roll, several new Members. These Members-elect, as appears in the Journal, were taken into account in ascertaining the presence of a quorum, but the Speaker being absent, the oath was not administered to them.

On December 7, the Speaker being in attendance, the oath was administered to these and other new Members immediately after the reading of the Journal.

176. Instance at the beginning of a second session wherein the oath was administered to a Member-elect before the ascertainment of a quorum.

By unanimous consent the oath may be administered to Members-elect whose regular certificates have not arrived.

On December 7, 1903,[2] at the beginning of the second session of the Congress, the Speaker called the House to order, and the Chaplain offered prayer.

Thereupon Mr. John H. Stephens, of Texas, announced that Mr. J. M. Pinckney, of Texas, a Member-elect, was present and desired to be sworn. The Speaker thereupon laid before the House the following telegram:

AUSTIN TEX., *December 6, 1903.*

HON. JOSEPH G. CANNON,

Speaker House of Representatives, Washington, D.C.:

I am reliably informed that at a special election held in the Eighth Congressional district of Texas on the 17th of November last Hon. J. M. Pinckney was elected as Member of Congress to succeed Ron. Thomas Ball, resigned. I am also advised that Pinckney's election is conceded by his opponents. Under our laws, the official returns can not be opened and counted until forty days after the election.

S. W. T. LANHAM, *Governor of. Texas.*

Thereupon, by the unanimous consent of the House, the oath was administered to Mr. Pinckney.

Then the Speaker directed the call of the roll by States to ascertain the presence of a quorum.

177. On December 31, 1834,[3] as soon as the roll of Members had been called by States, several new Members appeared and were qualified and took their seats. Then the Journal announces the presence of a quorum.

178. On December 7, 1840,[4] the first day of the second session of the Congress, the Speaker called the House to order, and the Clerk called the roll by States. Then six new Members appeared and took the oath and their seats; but even with these there was no quorum present, and so the House adjourned.

179. In the absence of the Speaker a Member-elect has produced his credentials and taken his seat, but was not sworn until the oath could be administered by the Speaker.

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[1] Second session, Twenty-first Congress, Journal, p. 7; Debates, p. 350.

[2] Second session Fifty-eighth Congress, Record, pp. 15, 16.

[3] Second session Twenty-third Congress, Journal, p. 7; Debates, p. 751.

[4] Second session Twenty-sixth Congress, Journal, p. 5; Globe, p. 1.

In the earlier years of the House the absence of the Speaker caused adjournment and the postponement of the orders of the day.

On December 1, 1797,[1] the Speaker being absent, a new Member, Joseph Heister, returned to serve in the House as a Member from the State of Pennsylvania, in the room of George Egge, who had resigned his seat, "appeared, produced his credentials, and took his seat in the House."

The Speaker being indisposed (the Clerk so informed the House), the orders of the day were postponed and the House adjourned.

On the next legislative day, December 4, the oath was administered to Mr. Heister by the Speaker.

On February 22, 1798,[2] the Speaker being absent, the orders of the day were postponed and the House adjourned.

180. It was held in 1881 that the administration of the oath to Delegates was of higher privilege than the adoption of rules.—On December 5, 1881,[3] after the Members-elect had been sworn in, and after the officers of the House had been elected, but before the oath had been administered to the Delegates, Mr. Dudley C. Haskell, of Kansas, presented resolutions providing for the adoption of rules.

The House having adjourned pending action on these resolutions, Mr. Haskell, on December 6, called them up for consideration.

Mr. Samuel J. Randall, of Pennsylvania, made the point of order that under the law other business of higher privilege, viz, the swearing in of the Delegates, as provided by section 30 of the Revised Statutes, which provided for the administration of the oath, as follows:

> At the first session of Congress after every general election of Representatives, the oath of office shall be administered by any Member of the House of Representatives to the Speaker, and by the Speaker to all the Members and Delegates present, and to the Clerk, previous to entering on any other business, and to the Members and Delegates who afterward appear, previous to their taking their seats.

The Speaker[4] sustained the point of order, and directed the Clerk to call the Delegates to be sworn.

181. The presiding officer of the Senate being present, the oath of office was administered to Senators-elect, although no quorum was present.—On December 6, 1804,[5] the second day of the second session of the Congress, a quorum did not appear, but the President of the Senate administered the oath to Messrs. William B. Giles and Andrew Moore, of Virginia, who appeared with credentials showing their appointment by the governor of the State to fill vacancies.

182. On December 6, 1802,[6] in the absence of the Vice-President, a Member-elect appearing in the Senate with credentials, but there being no quorum, took his seat, but was not sworn until December 14, after a quorum had appeared and a President pro tempore had been elected.

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[1] Second session Fifth Congress, Journal, P. 95 (Gales & Seaton ed.); Annals, p. 670.

[2] Journal, p. 191; Annals, p. 1062.

[3] First session Forty-seventh Congress, Journal, pp. 16, 18; Record, p. 33.

[4] J. Warren Keifer, of Ohio, Speaker.

[5] Second session Eighth Congress, Senate Journal, p. 411. Aaron Burr, Vice-President and President of the Senate.

[6] Second session Seventh Congress, Senate Journal, pp. 241, 243.

183. Discussion of the status of a Member-elect who has not taken the oath, with a conclusion that it is distinguished from that of a Member who has qualified.—On June 13, 1864, Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, made a report [1] relating to the rights of Messrs. Robert C. Schenck, of Ohio, and Frank P. Blair, Jr., of Missouri, to seats in the House. In the course of this report the following discussion was given of the status of a Member-elect:

No one can be a "Member" against his will. He may be elected without his consent or knowledge, for he may be in a foreign land; but to become a "Member" he must not only be elected but he must take the oath of office. The Constitution says: "Each House shall be the judge of the elections, returns, and qualifications of its own Members"—that is, of those who have qualified and taken their seats. Again: "A majority of each shall constitute a quorum, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent Members." But the attendance of a Representative-elect was never yet compelled. And, again: "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." The committee are not aware of any attempt to punish a Representative-elect, and of but one instance of an attempt to expel one. A resolution was adopted by the last House, under the previous question, to expel a person who was a Representative-elect, but had never signified his acceptance of the office or qualified, or even appeared in Washington for the purpose of taking his seat. But when the Constitution uses the word "Representative," it is in this connection: "The times, places, and manner of holding elections of Senators and Representatives shall be," etc. "No person shall be a Representative who shall not have attained to the age of 25 years." In the clause now under consideration the language is: "No person holding any office under the United States shall be a Member of either House during his continuance in office." No one doubts that the object of the Constitutional inhibition was to guard the House against Executive influence. This object is attained so far as it can be by this provision, if the inhibition attaches the moment the Member enters upon the discharge of his duties as such, and nothing is gained by an earlier application of it.

184. Discussion of the status of a Member-elect in relation to the law prohibiting the holding of two offices of certain salaries, with the conclusion that it is distinguished from the status of the Member who has qualified.—On July 19, 1866 [2] Mr. Samuel Shellabarger, of Ohio, made a report from the select committee appointed April 30, 1866, to investigate certain statements and charges relating to Hon. Roscoe Conkling and Provost-Marshal-General Fry. In April, 1865, Mr. Conkling had accepted an appointment from the War Department to investigate frauds in the office of the provost-marshal for the western district of New York. He was at the same time a Member-elect of the House of Representatives. The special committee consisted of Messrs. Shellabarger, of, Ohio, William Windom, of Minnesota, B. M. Boyer, of Pennsylvania, Burton C. Cook, of Illinois, and Samuel L. Warner, of Connecticut, and they made an unanimous report, in which they found, among other things, that Mr. Conkling had not violated the law or the Constitution by accepting the appointment.

The act of 1852 [3] had provided against the holding of two offices of certain salaries under the United States; and in the course of their inquiry the committee considered the status of the Member-elect, as follows:

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[1] House Report No. 110, First session Thirty-eighth Congress, pp. 8, 9.

[2] First session Thirty-ninth Congress, Globe, pp. 3935–3942.

[3] Now section 1763, Revised Statutes.

The first of these inquiries is, in the judgment of the committee, answered, so far as is necessary in deciding upon the effect of the act of 1852, by the cases of Hammond, of Earl, of Mumford, of Schenck,[1] and others, which we have already cited. These cases, as we have seen, all determine that, prior to the time when the Constitution requires the Member-elect to commence the duties of his legislative office, and before he has assumed these duties and taken the oath of office, he may receive compensation for discharging the duties of another office. As we have already said, these cases do not determine that he may also be compensated as a Member of Congress for the same time for which he was compensated in the other office. But they do determine that being a Member-elect of Congress does not make him an "officer" in such sense as to bring him within the prohibition of the act of 1852. This question, in substance, received the careful attention of the House in the Thirty-eighth Congress upon an able report of one of its committees.[2] The committee and House came to what your committee deem a just conclusion when it determined that one merely elected to Congress, but who had not entered upon his duties nor been qualified, was not a Member of this House—that is, did not hold an office so as to prevent him from continuing to hold another office and receive compensation therefor. The committee, in concluding their argument showing that one merely elected to Congress was not a Member of the House and not, as such, amenable to its jurisdiction, says: "The committee are not aware of any attempt to punish a Representative-elect, and of but one instance of an attempt to expel one. A resolution was adopted by the last House, under the previous question, to expel a person who was a Representative-elect, but had never signified his acceptance of the office, nor qualified, nor even appeared in Washington for the purpose of taking his seat."

In that case[2] the House determined, in effect, that the act of 1852 did not prohibit General Schenck while a member-elect of Congress from receiving the pay of another office—to wit, that of Major-general of volunteers.

This is the last case in which the question came before the House. But the same question received in the Fifteenth Congress, in the case of Hammond v. Herrick (Clark and Hall, Contested Elections, pp. 293, 294), a still more elaborate and exhaustive consideration. In the report in that case (which also received the sanction of the House) this doctrine was explicitly stated, and was affirmed after a thorough review of the English and American cases touching it. The case held the rule which was stated by the committee in these words: "Neither do election and return constitute membership. * * * Our rule in this particular is different from that of the House of Commons. It is also better, for it makes our theory conform to what is fact in both countries—that the act of becoming in reality a Member of the House depends wholly upon the person elected and returned. Election does not of itself constitute membership, although the period may have arrived at which the Congressional term commences."

This House has again and again determined that men elected to it who do not appear in the body and assume the constitutional oath of office are not to be reckoned as Members of the House in determining the number required to make a majority or quorum of the body.

The committee in coming to this conclusion have not overlooked the fact that Members-elect, but not qualified, are by the laws accorded certain privileges and salary. The effect of this right to enjoy these privileges before becoming qualified as a member of the legislative body has received the fullest attention both in this House and in the English Parliament. The result attained is that these special privileges are not necessarily indicia of actual official authority or station, and may by law as well be attached to one's person before and after he is an officer as during his official tenure. The Representatives after the expiration of their terms, the President of the United States after such expiration, and the widows of certain ex-Presidents, all have the franking privilege, and these are not then officers of the Government in any sense. The assumption of office in this country, as well as its relinquishment, is voluntary, and one elected to Congress is at perfect liberty to refuse to assume the office. His exercise of the franking privilege with the knowledge that he never would enter upon the duties of the office would be an act of bad faith toward his Government; but that would not render him a Member of Congress, nor would the exercise prevent him, should failure of health or other cause render it improper to enter upon his office, from rightly refusing ever to take the office.

Other and perhaps more conclusive considerations bearing upon this important inquiry might be

[1] Report No. 110, first session Thirty-eighth Congress.

[2] House Report, No. 110, first session Thirty-eighth Congress.

given, but it is not deemed best to pursue it further. The committee are entirely satisfied that the law of this House is fully and rightly settled as to this point, and that he is not a Member of Congress, nor one who "holds any office under the Government of the United States" who has only been elected to this House, but who has never taken any oath of office nor entered upon the duties of that position.

185. In 1901, in a divided report, the Judiciary Committee discussed the status of the Member-elect, the major opinion being that he was as much an officer of the Government before taking the oath as afterwards.— On February 4, 1901,[1] Mr. George W. Ray, of New York, from the Judiciary Committee, submitted a report on a question relating to the salary of Hon. William Richardson, who had been elected to represent the district formerly represented by Hon. Joseph Wheeler. The discussion of this question involved an examination of the status of a Member-elect.

Does a person duly elected Representative in Congress hold an office prior to the meeting of Congress at the time fixed by the Constitution, or pursuant to a special call by the President and before taking the oath required by the Constitution?

It has been strenuously urged that a person so duly elected does not hold any office until Congress assembles and the oath is taken. With this contention we can not agree. Article I of the Constitution provides:

"Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

"Sec. 2. The House of Representatives shall be composed of Members chosen every second year by the people of the several States, etc. * * * The House of Representatives shall choose their Speaker and other officers, etc.

"Representatives and direct taxes shall be apportioned, etc.

"No person shall be a Representative who shall not have attained, etc.

"Sec. 4. The time, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, etc.

"Sec. 6. The Senators and Representatives shall receive a compensation for their services to be ascertained bylaw, etc. * * *

"No Senator or Representative shall during the time for which he was elected be appointed, etc. * * * And no person holding any office under the United States shall be a Member of either House during his continuance in office."

The Constitution frequently speaks of "each House." Article VI provides:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution, etc."

The Constitution does not prescribe the time when or the officer before whom such oath is to be taken. Taking the oath is not made a condition precedent to holding the office.

But section 1, chapter 1, of the first act or statute of the First Congress, which assembled at the city of New York March 4, 1789, prescribed the form of the oath to be taken pursuant to the Constitution, and section 2 of such act provided as follows:

"That at the first session of Congress after every general election of Representatives the oath or affirmation aforesaid shall be administered by any one Member of the House of Representatives to the Speaker, and by him to all the Members present, and to the Clerk, previous to entering on any other business, and to the Members who shall afterwards appear previous to taking their seats, etc."

Section 2 of Article I says:

"Each House may determine the rules of its proceedings, etc."

If we note carefully the language of this act of the First Congress, it is apparent that it was not considered that the oath was a prerequisite to becoming "a Member," for it says the oath or affirmation aforesaid shall be administered by any one Member of the House of Representa-

[1] Second session Fifty-sixth Congress, House Report No. 2656, pp. 10-13, 17, 27-29, 42-50.

tives to the Speaker, and by him to all the Members present, and to the Clerk, previous to entering on any other business, and to the Members who shall afterwards appear previous to taking their seats."

All duly elected are "Members" before taking the oath,[2] but they can not take their seats until the required oath is taken.

Then is it not true that all Representatives elected become "Members" from the very hour and minute of the commencement of the term for which elected?

The commencement of the term for which Representatives are elected was fixed and determined as follows:

After the adoption of the Constitution by the requisite number of States the Continental Congress adopted the following resolution on the 13th day of September, 1788:[1]

"Resolved, That the first Wednesday in January next be the day for appointing electors in the several States which before the said day shall have ratified the said Constitution; that the first Wednesday in February next be the day for the electors to assemble in their respective States and vote for President, and that the first Wednesday in March next be the time and the present seat of Congress the place for commencing proceedings under the said Constitution."

The several States elected Representatives in Congress for the First Congress, and it assembled March 4, 1789, the first Wednesday of that month, pursuant to the above resolution. By the Constitution Representatives are chosen every second year, thus fixing the terms of office.

In the various acts, or some of them, providing for the apportionment and election of Representatives in Congress future Congresses have been referred to as commencing on the 4th day of March.[2]

It seems clear that taking the oath is not a condition precedent to becoming a Member, although the Member can not take his seat in the House until the oath is taken. This is a rule of action prescribed by the House.

"Members" organize the House; "Members" elect the Speaker, and this is a most important function. Any Representative before taking the oath may administer the oath to the Speaker, and the Speaker administers the oath to whom? Representatives-elect? No; but to "Members." "The House of Representatives shall choose their Speaker." The House exists before a Speaker is chosen or the oath taken.

After quoting Blackstone to the effect that an office is "a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging," and other authorities,[3] in the same line, the report cites authority[4] in support of the statement that there is nothing in the Constitution or in the statutes that makes the taking of the oath a condition precedent to taking and holding the office of Representative in Congress when elected by the people for a definite term fixed by law. Even when a statute fixes the time and it is not complied with, the person elected or appointed is in and vested with the office when the term commences unless it is declined.

The report further contends:

The word "Member-elect" was never used in any of the statutes until 1873 (as we can find) and was not intended to overthrow the Constitution, which provides that Members are elected by the people, not made such by taking an oath, but was used simply to distinguish between Members who had become entitled to a seat by taking the oath and those not entitled to sit in the House after its organization. * * *

We should also call attention to the fact that we always have a Congress—always have a Senate; always have a House of Representatives and Members of the House of Representatives.

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[1] See Journal of Continental Congress.

[2] Revised Statutes, sec. 25.

[3] Blackstone's Commentaries, Book 2, chapter 3, p. 36; Kent's Commentaries, p. 454; United States v. Hartwell, 6 Wall., 385–393.

[4] Mechem's Public Offices, see. 247; Throop, Public Offices, secs. 3 and 173; Clark v. Stanley, 66 N. C., 59.

The House may not be organized, but it exists, nevertheless. Section 2, Constitution United States, says: "The House of Representatives shall choose their Speaker." The Representatives in Congress or Members of the House may not have taken the oath of office, but they are elected, and each comes into office, if eligible, the very moment the term of his predecessor ceases.

Mr. D. H. Smith, who filed individual views, held the same opinion, saying:

When it is remembered that the Clerk of the House usually makes up the roll of the House between the election and the 4th of March following, the word "Representative-elect" used in section 31 of the Revised Statutes is perhaps as aptly used as any that could have been selected and not necessarily in conflict with the above definition. Likewise when attention is called to the fact the credentials of those elected at the regular time for electing Representatives are almost universally filed before the term begins, while they are really and truly Members-elect, it is not astonishing that this language is found in section 38, though other words less liable to confuse might have been used. But whatever influence such citations might have, it is entirely safe to say the instances in which persons elected to Congress are referred to after their terms have begun as Members are much more numerous than those where the other expression is employed.

There are many statutes prohibiting Members of Congress from doing things that might be detrimental to the best interests of the Government—such as those that forbid a Member from practicing before the Court of Claims, from taking compensation for procuring public contracts or offices, from being interested in public contracts, and a great number of similar statutes. If it be true that prior to the convening of a Congress in its first session those chosen thereto are not Members, then it is a matter of serious and urgent importance that Congress address itself to the work of amending a multitude of statutes heretofore supposed and believed to apply to a Member of Congress before he is sworn, as well as afterwards. * * * But it is said that the oath of office is not taken until Congress meets, and that one can not therefore be a Member before that. Without the Constitution or the statute makes the taking of the oath a prerequisite to becoming a Member it may be taken at a subsequent time, and in the absence of such requirement one may become a Member without it.

The First Congress of the United States met on the 4th of March, 1789, and no Member of the House took the oath until April 8, and no Senator took the oath until the 3d of June, although prior to either date much business was transacted, including the count of the electoral vote for President and Vice-President of the United States. In that Congress was many of those who had been in the convention and assisted in forming the Constitution, and while all were familiar with its provisions these no doubt possessed that thorough knowledge of the instrument in detail that could only be acquired by having participated in constructing it. By their official course they gave us an interpretation of that part requiring an oath which was in effect that the oath could be taken after the session had begun, but the statute has so far modified this as to require it to be taken at the beginning of the first session. * * * Congress can not commence without Members, hence all such persons chosen to compose the Congress who have not died, resigned, or declined, and who are eligible on the 4th of March succeeding their election, if it be at the regular time, become Members of the Congress to which they have been elected. From the commencement of the Congress to which they have been elected they are Members until they in some manner vacate their positions.

Messrs. Charles E. Littlefield, of Maine, and Julius Kahn, of California, dissented from the view taken in the report of the committee, and in the views which they jointly submitted contend that until a "Member-elect" or "Representative-elect" has taken the oath of office as a "Member" he is not a "Member" of the House. A "Member-elect" is simply a person who, by reason of possessing the requisite qualifications, having been elected therefor, is capable when the constitutional time arrives of becoming a "Member." The first mention of "Member-elect" or "Representative-elect" in the statutes was in section 31, Revised Statutes, and then in section 38. The statutes relating to salary provided that the Member-elect should draw salary without the oath; the Member only after the oath. For at least seventy-seven years the laws in relation to compensation were such that the Member-

elect received no salary, payments being made only to Members who had taken the oath. Furthermore, the "Member-elect" had none of the attributes or privileges of a "Member" except as they are specially conferred by statute. Thus the Member-elect has the franking privilege; but so also does the ex-Member for a certain time after the expiration of his term. The views of the two Members are given further:

A "Member-elect" is in no sense within the constitutional inhibition, for as a "Member-elect" he has neither power nor opportunity to do any act inconsistent with the duties of any other office. He can not vote, except for Speaker. He can not discharge any of the duties or exercise any of the powers of a "Member." He can only enjoy certain privileges specifically annexed to his status as a "Member-elect" by statute. However much the elements that inhere in an inconsistent office might control for good or ill the manner in which a "Member" might discharge his duties as such, these elements can have no effect upon the action of a "Member-elect," who can not act at all. The inhibition is based upon the idea that the inconsistent office involves considerations whose probable tendencies would be to improperly affect the discharge of public duties by a Member. When considered in connection with a "Member-elect," who has no power to discharge such duties, the reason fails.

As to the contention that the provision of section 30, Revised Statutes, shows that Members are Members before they are sworn, it is urged that—

That does not follow. The election of a Speaker is but one of the steps in the organization of the House. It is clear that Members-elect necessarily have the inherent power to take this step in order that the House may be organized of which they may become Members. You can only predicate the idea of Members upon an existing body, and to hold that you can not have an organized body unless you first have members is to beg the question. The organization of a corporation created by special act illustrates the idea. The act creates certain persons, called associates or corporators, a body corporate, but this does not organize the corporation or make the corporators stockholders or members thereof. It does confer upon the corporators power to organize a corporation of which they may afterwards become members by becoming stockholders, but the fact that they can and do exercise the indispensable power of organizing does not of itself make or tend to make them "members" of the body they organize. The same result follows as to "Members-elect."

If the right of voting for Speaker demonstrates that a person is a Member, then the objection to Roberts, of Utah, was not interposed early enough. No one thought of questioning his right to vote for Speaker. The question in his case was solely one of exclusion or expulsion. Exclude him, and prevent him from becoming a Member. Therefore he was halted at the oath. But it is now contended that the oath is not an essential prerequisite to membership for the purpose of establishing the proposition that a Representative-elect becomes a "Member" on the 4th of March of a House not in existence and so continues, and the formality of an oath, though required by the Constitution, is thus dispensed with, as under such a construction it is not essential. Still, although they have thus reasoned the oath out, they must concede that this "Member" can not draw compensation without taking the oath, while a "Member-elect" can. Such an inconsistency demonstrates the fallacy of the reasoning. Roberts, of Utah, drew salary as Member-elect until November 3, 1899, exercised the franking privilege, and voted for Speaker. Was he a "Member" from March 4, 1899? If so, his exclusion from the office nearly a year later was hardly effective. Notwithstanding this new construction it was never suggested before that he was even a Member de facto.

Moreover, on the 26th day of January, 1900, by a large majority, the House held that he was not entitled to membership therein, and excluded him therefrom. It was expressly understood that majority was necessary to exclude, while it was conceded that two-thirds were necessary to expel a "Member." Did Roberts, under this new theory of the committee, become in any legal sense, de facto, de jure, or otherwise, a "Member" March 4, 1899? If so, the proceedings were had under a curious misconception of the situation. If he did not then become a "Member," could he, on the theory of the committee, be the "predecessor," within the meaning of section 51, of his successor? Yet his successor

was elected in March, 1900, and upon the proper certificate drew compensation back to January 26, 1900, which he could hardly have done had Roberts not been his "predecessor" within the meaning of that section.

In further support of this contention the two Members quote a decision of the Comptroller of the Treasury [1] in the case of Mr. Boatner, and of Attorney-General Devens [2] in the case of Delegate Romero, in both of which the Member-elect was not regarded as a Member.

There was no action by the House on the report.

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[1] Opinions of Comptroller of Treasury, Vol. 3, p. 20. See see. 28 of this work.

[2] 15 Attorneys-General Opinions, p. 280; also 14 A. G. Decisions, p. 406.

Chapter VI.

THE OFFICERS OF THE HOUSE AND THEIR ELECTION.

1. **Provisions of Constitution and rule. Sections 186, 187.**
2. **General procedure of election. Sections 188–203.**
3. **The election of Speaker. Sections 204–230.**[1]
4. **Resignation or death of Speaker. Sections 231–234.**[2]
5. **The Clerk and his election. Sections 235–245.**
6. **Absence of the Clerk. Sections 246–248.**
7. **Authority and duties of the Clerk. Sections 249–253.**[3]
8. **The Clerk custodian of the seal of the House. Sections 254–256.**
9. **The duties of the Sergeant-at-Arms. Sections 257–259.**
10. **The Doorkeeper and his duties. Sections 260–263.**
11. **Resignations and deaths of officers. Sections 264–268.**[4]
12. **The Postmaster and his duties. Sections 269–271.**
13. **The Chaplain and his duties. Sections 272–282.**
14. **Defense of officers in actions. Section 283.**

186. The Speaker and other officers are chosen by the House.—The Constitution of the United States, in Article I, section 2, provides that "the House of Representatives shall choose their Speaker and other officers."

187. The elective officers of the House, in addition to the Speaker, are the Clerk, Sergeant-at-Arms, Doorkeeper, Postmaster, and Chaplain.

A rule, which, however, is not in force at the time of organization, provides that all the elective officers except the Speaker shall be chosen by viva voce vote.

The Speaker, who was at first chosen by ballot, has been chosen by viva voce vote since 1839.

The elective officers other than the Speaker continue in office until their successors are chosen and qualified.

The elective officers of the House are sworn to support the Constitution and discharge their duties faithfully.

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[1] Clerk preserves order during. Section 64 of this volume. As to general duties of the Speaker. Chapter XLIV, sections 1307–1376 of Vol. II of this work. Contests over election of, in 1855 and 1859. Sections 6647–6650 of Vol. V.

[2] See also section 1356 of Vol. II.

[3] Presiding officer during organization. Chapter III, sections 64–80 of this volume.

[4] See also section 292 of this volume.

Origin of an obsolete requirement that the officers of the House shall be sworn to keep its secrets.

Each of the elected officers of the House appoints the employees of his department provided by law.

The attempt to establish the theory that one House might prescribe rules for its successor, and the end thereof.

The House formerly provided by special rule that the Clerk should continue in office until another should be appointed.

Rule II provides:

> There shall be elected by a viva voce vote, at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, Sergeant-at-Arms, Doorkeeper,[1] Postmaster, and Chaplain, each of whom shall take an oath to support the Constitution of the United States, and for the true and faithful discharge of the duties of his office to the best of his knowledge and ability, and to keep the secrets of the House; and each shall appoint all of the employees of his department provided for by law.

This rule is the result of many changes in the relations of the House and its elected officers. It is, of course, of advisory force only, as it has not been the custom of the House to adopt rules until it has organized by the choice of some, at least, of its officers; but at the time this rule was framed into its present form—in 1880—there existed and was continued another rule which provided: "These rules shall be the rules of the House of Representatives of the present and succeeding Congresses unless otherwise ordered." This attempt to enable one House to dictate rules to its successor was often challenged and was finally brought to an end in 1890, after having continued from 1860.[2] It is evident, then, that this rule as to the election of officers is never in existence at the time at which a large portion of it would be expected to apply.

The portion of the rule providing for election by viva voce vote is the embodiment in the form of rule of the result of a long contest in the House. The first Speaker was elected by ballot, and such continued to be the practice both as to the Speaker and other officers for many years. As early as March 1, 1826,[3] Mr. James Buchanan, of Pennsylvania, proposed a rule that the Speaker be elected by viva voce vote, but no action was taken. On January 16 and 17, 1829,[4] a proposition that the officers of the House be elected by viva voce vote was debated at length, and finally laid on the table by a vote of 97 to 92. And election by ballot continued up to and including the election of James K. Polk as Speaker in 1837, although in 1835[5] the proposition for viva voce election had been advanced again. In 1839[6] there was a long contest over the choice of Speaker, and by determination of the House all the votes were taken viva voce, although there was much opposition to the method.

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[1] An Assistant Doorkeeper was, in 1821, an elective officer of the House (first session Seventeenth Congress, Journal, p. 49); but the office was abolished many years ago.

[2] See sections 6743–6745 of Vol. V of this work.

[3] First session Nineteenth Congress, Journal, pp. 296, 305.

[4] Second session Twentieth Congress, Journal, pp. 165, 171.

[5] Second session Twenty-third Congress, Journal, p. 283; Debates, pp. 879, 1051, 1070

[6] First session Twenty-sixth Congress, Journal, pp. 59–79; Globe, pp. 69–74.

The contest of 1839[1] left the House with this rule: "In all cases of election by the House of its officers, the vote shall be taken viva voce." And this rule was continued until 1880,[2] when the Committee on Rules, in framing the present form of rule, omitted the Speaker from the list of officers who should be elected viva voce. At that time Mr. J. Warren Keifer, of Ohio, proposed that the Speaker should be included among the officers elected viva voce, as had been the practice for forty years by the old rule; but it seems to have been the intention that the House on each occasion should determine how it would elect its Speaker. The Speakers are always elected viva voce, and in recent years sometimes without even the preliminary vote to proceed to the election of a Speaker.[3] In fact, as stated above, the rule is not in existence when the Speaker and other officers are usually elected, and the House may determine for itself at the time what method shall be used. It elects the Speaker viva voce and the other officers usually by resolution.

The portion of the rule specifying the officers who shall be elected is, like the portion relating to viva voce voting, a summary of the practice of the House in the past.

On April 1, 1789,[4] a quorum appeared for the first time in the first House of Representatives, and at once the House proceeded to elect the only officer of the House specifically mentioned in the Constitution—the Speaker. And next it proceeded "to the appointment of a Clerk."

On April 2, 1789,[4] the House—

Resolved, That a Doorkeeper and Assistant Doorkeeper be appointed for the service of this House.

On April 13, 1789,[5] among the supplemental rules adopted was this:

The Clerk of the House shall take an oath for the true and faithful discharge of the duties of his office, to the best of his knowledge and abilities.

And on March 1, 1791,[6] just at the close of the First Congress, this rule was agreed to:

Resolved, That the Clerk of the House of Representatives shall be deemed to continue in office until another be appointed.

This rule was in existence in 1859,[7] but seems to have dropped out in the revision of 1860.[8] But the Clerk continues, by ancient usage, and by the implied authority from the Statutes, to act until his successor is chosen.[9] The first rule of the House specifying the Clerk as an officer of the House dates from March 16, 1860,[10] and before that it was commented on as a curious fact that there was no rule, resolution, order, or law directing the appointment of a Clerk.[11]

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[1] First session Twenty-sixth Congress, Journal, p. 1517.

[2] Second session Forty-sixth Congress, Record, pp. 199, 553, 554.

[3] First session Fifty-first Congress, Record, p. 80; first session Fifty-fifth Congress, Record, p. 15.

[4] First session First Congress, Journal, p. 6.

[5] First session First Congress, Journal, p. 13.

[6] Third session First Congress, Journal, p. 396.

[7] Second session Thirty-fifth Congress, Journal, p. 629; Rule 21.

[8] Second session Thirty-sixth Congress, Journal, pp. 492, 493.

[9] Section 31 of the Revised Statutes imposes on the Clerk of the preceding House duties as to the organization of the new House.

[10] First session Thirty-sixth Congress, Journal, p. 528.

[11] Third session Twenty-seventh Congress, Journal, p. 733.

On December 23, 1811,[1] at the time when the war with Great Britain was coming on and secret sessions were frequent, a rule was adopted providing that the Doorkeeper and Sergeant-at-Arms should keep the secrets of the House. On December 25, 1825,[2] in a Congress where there was one secret session, the Sergeant-at-Arms and Doorkeeper took that oath. In the combinations of old rules made in the revisions of 1860[3] and 1880,[4] the provision requiring the oath of secrecy was placed in such position as to apply to all the officers of the House; but inasmuch as no secret session has been held for about seventy years, the observance of this portion of the rule is naturally neglected. The portion of the rule requiring an oath to support the Constitution of the United States dates from the revision of 1880.

On March 15, 1860, a rule was adopted that the appointees of the Doorkeeper and Postmaster should be approved by the Speaker,[5] but this did not continue beyond the revision of 1880, having become obsolete.[6]

After the election of the Speaker the other elective officers are usually chosen by the adoption of resolutions.[7]

The Speaker is always a Member of the House; the other elective officers never are.

188. The House formerly proceeded to the election of an officer on a motion so to do.

Discussion as to whether or not the Clerk of the former House continues until his successor is elected.

On December 7, 1829,[8] after the Speaker had administered the oath to the Members and Delegates, Mr. William Ramsey, of Pennsylvania, offered this resolution:

Resolved, That this House do now proceed to the election of a Clerk.

Mr. Richard M. Johnson, of Kentucky, moved to amend by striking out the words "do now" and inserting "will, on Wednesday next, at 12 o'clock meridian."

A question at once arose as to whether or not the Clerk of the former House would continue in service until the election of his successor. There was a divergence of opinion, the Speaker[9] informally expressing the opinion that the Clerk of the preceding House would continue to act.

The House by a large majority decided the amendment in the negative, and the resolution was then agreed to.

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[1] First session Twelfth Congress, Report No. 38.

[2] First session Nineteenth Congress, Journal, pp. 9, 645.

[3] First session Thirty-sixth Congress, Journal, p. 492.

[4] Second session Forty-sixth Congress, Record, pp. 199, 554.

[5] First session Thirty-sixth Congress, Globe, p. 1178.

[6] Second session Forty-sixth Congress, Record, p. 199.

[7] See section 81 of this work.

[8] First Session Twenty-first Congress, Journal, p. 9; Debates, p. 471.

[9] Andrew Stevenson, of Virginia, Speaker.

189. A resolution that the House proceed to the election of an officer presents a question of privilege.—On April 5, 1878,[1] there being a vacancy in the office of Doorkeeper, which the House had provided for temporarily by ordering the Sergeant-at-Arms to perform the duties, Mr. Benjamin F. Butler, of Massachusetts, submitted as a question of privilege the following:

Resolved, That the House proceed to the election of a Doorkeeper, and that the true Union maimed soldier, Brigadier James Shields, of Missouri, be chosen to that place.

Mr. Samuel S. Cox, of New York, made the point of order that the resolution did not present a question of privilege.

The Speaker[2] said:

The Chair finds himself without an example to follow in the past. In this case, therefore, the House will establish a precedent for the future. In the judgment of the Chair, under the resolution adopted yesterday, an officer was appointed to discharge temporarily the duties of Doorkeeper. It is stated in the Manual that when a proposition is submitted which related to the privileges of the House, it is the duty of the Speaker to entertain it, at least to the extent of submitting the question to the House as to whether or not it presents a question of privilege. The Chair now proposes, in this instance, to allow the question to be determined by the House as to whether or not it presents a question of privilege.

After debate, on April 8, the House, by a vote of yeas 220, nays 4, decided that the resolution presented a question of privilege.[3]

190. The House often proceeds to the election of its officers as a matter of course, without motion to that effect.—On December 8, 1863,[4] after the election of a Speaker, and after the Senate and President had been informed of the organization of the House, we find the Speaker announcing that the business next in order was the election of Clerk, without waiting for the order of the House to proceed to the election of Clerk. The House also proceeded to the election of other officers as a matter of course, and without order.

An exception is found in the vote for Chaplain, which was taken on motion made and carried.[5]

191. An election by resolution is not a compliance with the rule requiring election of officers viva voce.—On January 9, 1850,[6] while the House was voting viva voce for Clerk in accordance with the rules of the House, Mr. Robert C. Schenck, of Ohio, offered the following resolution, contending that the resolution came within the rule:

Resolved, That———be, and he is hereby, elected Clerk of this House for the present session.

Mr. Schenck proposed to move to insert in the blank the name of Solomon Foot, holding that thus, when the yeas and nays were called on filling the blank, a viva voce vote would be obtained.

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[1] Second session Forty-fifth Congress, Journal, pp. 801, 809; Record, pp. 2310, 2341.

[2] Samuel J. Randall, of Pennsylvania, Speaker.

[3] The point that the resolution involved besides the order to proceed to the election, also the choice of a particular candidate, does not seem to have occurred to those considering the matter. The rules required the election of officers viva voce, and therefore this resolution contained a change of rule. It is now a principle that the presence of a nonprivileged provision destroys the privilege of a proposition. In this case the House declined to elect in this way, and proceeded to a choice viva voce.

[4] First session Thirty-eighth Congress, Journal, pp. 14, 15, 16, etc.; Globe, pp. 11, etc.

[5] Journal, p. 35.

[6] First session Thirty-first Congress, Journal, p. 265; Globe, p. 125.

The Speaker[1] decided the resolution out of order.

Mr. Schenck having appealed, the decision of the Speaker was affirmed.

Again, on January 16, the Speaker affirmed this decision, saying[2] that election by resolution was not a compliance with the rule requiring the election of the officers of the House viva voce. It was true that they had sometimes been elected by resolution, but he had no recollection of such an election where objection had been made.

Mr. Alexander Evans, of Maryland, having appealed, the decision of the Chair was sustained, yeas 133, nays 64.[3]

192. On December 6, 1856,[4] rules having been adopted and the organization of the House having been perfected as far as the election of the Public Printer,[5] Mr. John A. Bingham, of Ohio, offered the following resolution:

Resolved, That Oram Follett, of Columbus, Ohio, be, and he is hereby, elected Public Printer for the House of Representatives of the Thirty-fourth Congress.

Mr. Thomas L. Clingman, of North Carolina, submitted as a question of order that it was not competent, under the rules, to elect a Printer, except after a previous nomination and upon a viva voce vote, and that the resolution was out of order.

The Speaker[6] sustained the point of order.

This decision was acquiesced in by the House.

193. A resolution declaring certain persons elected officers of the House is at variance with the standing rule of the House.

Instance wherein the House failed to elect a Doorkeeper and Postmaster, the officers of the preceding House continuing to serve.

On January 19, 1850,[7] the House had not elected a Doorkeeper or Postmaster, and postponed the election of those officers until the first day of March, 1851. The Doorkeeper and Postmaster of the former House continued to discharge the duties of their positions.

On April 18, 1850,[8] Mr. Nathaniel S. Littlefield, of Maine, submitted the following resolution:

Resolved, That Robert E. Horner, of New Jersey, be, and he hereby is, declared elected Doorkeeper of this House; and John M. Johnson, of Virginia, be, and he hereby is, declared duly elected Postmaster of this House; to hold their respective offices until others are chosen in their stead.

Mr. Horner was Doorkeeper of the preceding House and Mr. Johnson the Postmaster. They were acting in those offices at this session, by the acquiescence of the House.

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[1] Howell Cobb, of Georgia, Speaker.

[2] Journal, pp. 333, 334; Globe, p. 162.

[3] It is to be noticed that the conditions under which this ruling was made differs from the conditions at the organization before the rules, including the rule prescribing viva voce voting, have been adopted.

[4] First session Thirty-fourth Congress, Journal, pp. 464, 466; Globe, p. 372.

[5] The Public Printer is no longer an officer of the House.

[6] Nathaniel P. Banks, Jr., of Massachusetts, Speaker.

[7] First session Thirty-first Congress, Journal, p. 363.

[8] Journal, p. 806; Globe, pp. 764, 765.

The Speaker[1] declared that the resolution, as a question of privilege, was out of order, on the ground that the House, on a former occasion, had so decided against the opinion of the Chair when a similar proposition was submitted, and also for the reason that it proposed a mode of election at variance with a standing rule of the House.[2]

Mr. Littlefield having appealed, the appeal was laid on the table on motion of Mr. Thaddeus Stevens, of Pennsylvania.

194. The election of officers by resolution is subject to objection, but is often permitted by unanimous consent.

In recent years all the officers have been elected before the President and Senate have been informed of the organization.

At the organization of the House on December 4, 1865, after the election of Speaker, but before the adoption of rules, Mr. James F. Wilson; of Iowa, offered a resolution for the election of the other officers of the House.

Mr. Samuel J. Randall, of Pennsylvania, objected on the ground that some Members wanted to vote for candidates not named in the resolution.

Thereupon a motion was made to suspend the rules so as to offer the resolution, and this being done the resolution was agreed to.

At that time Rule 147 provided that the rules of the preceding House should govern this until superseded.[3] But whether this could actually be so was a disputed question, and so it is doubtful whether the motion to suspend the rules applied to the rules of the last House or to the long custom of the House as to its elections.[4]

195. On December 4, 1865,[5] the subordinate officers of the House were elected by one resolution, and not by separate roll calls. So the resolution notifying the Senate and the one notifying the President were not offered and agreed to until all the officers had been elected.

196. On December 2, 1873,[6] the officers of the House, except the Speaker, were elected by resolution, the minority offering a substitute containing the names of their nominees. The officers having been elected, a message was sent to the Senate informing that body that the House had organized, and that James G. Blaine had been chosen Speaker. But no reference was made to any other of the officers.

197. Although a former rule of the House required a nomination before voting for certain officers, yet the Speaker refrained from ruling that votes might not be cast for persons not nominated.—It was a former rule of the House that where others than Members of the House were eligible to election as officers of the House, there should be a nomination. Mr. Speaker Cobb refrained, however, from deciding that under this rule Members were prohibited from voting for anyone not nominated.[7]

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[1] Howell Cobb, of Georgia, Speaker.

[2] The rule requiring viva voce election. See section 187 of this volume. It will be observed that this ruling was made not at the beginning of the Congress, but after the House had adopted rules.

[3] The theory that the rules of the preceding House controlled until the adoption of new rules prevailed at this time, but has since been abandoned. See sections 6743–6745 of Vol. V of this work.

[4] First session Thirty-ninth Congress, Globe, p. 5; Journal, p. 1217, for the rule.

[5] First session Thirty-ninth Congress, Journal, pp. 8, 10; Globe, pp. 5, 6.

[6] First session Forty-third Congress, Journal, pp. 11, 12; Record, pp. 6, 7.

[7] January 3, 1850. First session Thirty-first Congress, Globe, p. 94.

198. The Senate and President are informed of the presence of a quorum and the organization of the House.

In the earlier practice the messages announcing the organization were sent immediately after the election of Speaker, and did not refer to the election of Clerk.

On December 7, 1790,[1] after the House had appointed its committee to join with a Senate committee to wait on the President and inform him that a quorum of the two Houses had assembled, a message was received from the Senate stating that they had agreed to a resolution for the appointment of a committee, jointly with the committee to be appointed by the House, to wait on the President, etc. The House disagreed to the resolution of the Senate. Later a message from the Senate announced that they had appointed a committee to act jointly with the House committee.

199. On December 1, 1845,[2] the House informed the Senate that a quorum had assembled, and that John W. Davis had been elected Speaker, while the Clerk was not elected until the following day.

200. At the organization of the Twenty-seventh Congress, in 1841,[3] the Speaker and Clerk were elected on May 31, the first day of the session, and the usual messages were sent to the Senate and to the President, informing them that the House was organized and ready for business. But the election of Sergeant-at-Arms, Doorkeeper, Assistant Doorkeeper (not now an elective officer), Postmaster, and Chaplain were not ordered by the House until June 8, after rules had been adopted and the committees appointed. The message to the Senate announcing the presence of a quorum announced that John White had been elected Speaker, but did not mention the election of the Clerk.

201. On December 5, 1853,[4] at the organization of the House, as soon as the Speaker was elected the usual messages were sent to the Senate and President, notifying them of the organization of the House. This was in accordance with the practice of the early years of the House's existence. Then rules were adopted, and after that a motion was made and carried to proceed to the election of a Clerk. This was done viva voce. Then the Sergeant-at-Arms, Doorkeeper, and Postmaster were elected together by a resolution.

202. On December 8, 1863,[5] the Senate and President were informed of the organization of the House before the election of a Clerk and other subordinate officers of the House.

203. On December 6, 1875,[6] the usual resolution notifying the Senate that a quorum of the House was present and had elected Hon. Michael C. Kerr, Speaker, was presented by Mr. William S. Holman, of Indiana. Thereupon Mr. James A. Garfield, of Ohio, proposed an amendment to include also the name of the Clerk. Mr. Holman stated that such was not the usual form, but made no objection to the amendment, which was agreed to.

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[1] Third session First Congress, Journal, p. 4.

[2] First session Twenty-ninth Congress, Journal, pp. 9, 13.

[3] First session Twenty-seventh Congress, Journal, pp. 11, 18, 19, 52.

[4] First session Thirty-third Congress, Journal, pp. 10–14; Globe, p. 4.

[5] First session Thirty-eighth Congress, Journal, p. 14; Globe, p. 10.

[6] First session Forty-fourth Congress, Journal, p. 14; Record, p. 173.

204. Although always at liberty to choose its manner of electing a Speaker, the House has declined in later years to substitute balloting for viva voce choice.—On May 31, 1841,[1] at the first day of the first session of the Congress the roll of Members-elect was called by the Clerk of the last House, and the presence of a quorum ascertained.

Thereupon, Mr. Hiram P. Hunt, of New York, moved this resolution:

Resolved, That the Members will now proceed to the organization of the House by the election of a Speaker, viva voce.

A motion was made by Mr. Lewis Williams, of North Carolina, that the words "viva voce" be stricken out and that the words "by ballot" be inserted.

The question on the amendment being taken by yeas and nays, there were 66 yeas and 154 nays. So the amendment was disagreed to.

Mr. Henry A. Wise, of Virginia, then moved to amend the resolution by adding thereto the following:

And after the Speaker shall have sworn the Members they will proceed to the election of a Clerk in like manner.

This motion was disagreed to, and then the original resolution was agreed to.[2]

205. On December 4, 1843,[3] at the organization of the House, the Clerk (Matthew St. Clair Clarke) called the roll and announced the presence of a quorum. Thereupon he reminded the House that, as no rules had been adopted, there was no form prescribed for the election of the Speaker.

Thereupon, a motion was made and carried that the House do proceed to the election of a Speaker viva voce.

The rule at that time (i.e., the code of rules adopted by the House in this and several preceding Congresses), provided that all elections of officers of the House should be viva voce. The rule at present does not include the Speaker among those to be elected viva voce.

206. The Thirty-first Congress assembled on December 3, 1849,[4] but the House was unable to elect a Speaker until December 23. While this voting was going on a motion was generally made at the beginning of each legislative day that the House proceed viva voce to elect a Speaker. Then the votings would proceed as a matter of course through the day. As time went on motions were offered and entertained proposing election by ballot, by lot, and by resolution. These were not adopted, and the House would resume the viva voce voting by motion made and carried, or as a matter of course. Rules had not been adopted at this time, and consequently the rule providing for viva voce election was not in operation.

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[1] First session Twenty-seventh Congress, Journal, pp. 8, 9; Globe, pp. 2, 3.

[2] The rules had before this been amended to provide for the election of the Speaker by viva voce vote; but as rules had not been adopted yet in this Congress there was no rule applying. The usage of voting viva voce has become so strong in later years that the method has not been questioned for a long time.

[3] First session Twenty-eighth Congress, Journal, p. 7; Globe, p. 3.

[4] First session Thirty-first Congress, Journal, pp. 2–165; Globe, pp. 1–67.

207. On December 3, 1855,[1] at the organization of the House, after the Clerk of the preceding House had called the roll and announced the presence of a quorum, Mr. George W. Jones, of Tennessee, moved that the House proceed to the election, viva voce, of a Speaker for the Thirty-fourth Congress.

The question being put, the motion was agreed to.

Thereafter, on each day, the House proceeded to the voting without special vote, unless propositions in regard to the organization intervened. And as soon as they were disposed of the voting was resumed as a matter of course.

208. On December 19, 1855,[2] after sixty-five ineffectual attempts to elect a Speaker viva voce, a motion was made that the House proceed to election by ballot. This motion was disagreed to—yeas 214, nays 7.

209. As late as 1837 the House maintained the old usage of electing the Speaker by ballot.—On September 4, 1837,[3] the roll of Members by States having been called, and the presence of a quorum having been announced, it was, on motion of Mr. David Petrikin, of Pennsylvania,

Resolved, That the Members present now proceed to the organization of the House by the choice of a Speaker.

The House then proceeded by ballot to the election of a Speaker; and upon an examination of the first ballot it appeared that James K. Polk, one of the Representatives from the State of Tennessee, was duly elected, having received a majority of all the votes given in.

210. The House and not the hold-over Clerk decides by what method it shall proceed to elect a Speaker.

Why the House in a new Congress meets at 12 m.

Discussion as to whether or not the rules of one House remain the rules of the next House until changed.[4]

On December 7, 1835,[5] at the beginning of the first session of the Congress, the Members-elect were called to order by the Clerk of the last House, and the roll having been called, and the presence of a quorum having been ascertained and announced, the Members were about to proceed by ballot to the election of a Speaker, the Clerk having announced that the next business in order was the election of a Speaker by ballot.

At this point Mr. John M. Patton, of Virginia, raised a question as to the authority by which the Clerk announced that the House would proceed by ballot to the election of a Speaker. The House, if it was competent to elect, was also competent to prescribe the method of election. He preferred the method of election by viva voce voting They were not bound by the rules of the last House and might proceed as they pleased. Mr. Samuel Beardsley, of New York, argued that the House might proceed to the election by ballot or viva voce, as it might please. Custom alone had sanctioned the practice that the Clerk of the House should, on

[1] First session Thirty-fourth Congress, Journal, pp. 8, 18, 43, etc.; Globe, pp. 4, 6.

[2] First session Thirty-fourth Congress, Journal, p. 153; Globe, p. 53.

[3] First session Twenty-fifth Congress, Journal, p. 9; Globe, p. 3.

[4] See sections 6743–6745 of Volume V of this work.

[5] First session Twenty-fourth Congress, Journal, p. 8; Debates, pp. 1943–1945.

the first day of the session, at 12 o'clock, call over the names of the Members; and custom also had sanctioned the practice of the Clerk calling for the Members to vote and putting the question for Speaker. Mr. James Parker, of New Jersey, urged that the House should not depart from the old usage of fifty years and more, which had come to have the force of common law, and in accordance with which the Clerk called the House to order at 12 o'clock, and at no other hour, ascertained the presence of a quorum by a call of the roll; and then the House, in accordance with the same custom, proceeded to choice of a Speaker by ballot.

The Clerk read the rule of the last House providing the method of electing the Speaker by ballot,[1] and Mr. Abijah Mann, jr., of New York, contended that the rules of the last House were the laws of the present until changed, and that the Clerk did not hold his position and perform the functions at this time by mere custom.

Mr. Patton moved that the Speaker be elected viva voce.

On motion of Mr. George Evans, of Maine, this motion was laid on the table.

Then, on motion of Mr. Beardsley, it was

Resolved, That the House do now proceed to the election of a Speaker by ballot.

211. Procedure for electing the Speaker by viva voce vote.—On December 7, 1857,[2] 226 Members having answered to their names, the Clerk announced that a quorum was present. Then, on motion of Mr. John Smith Phelps, of Missouri, it was ordered that the House do now proceed viva voce to the election of a Speaker for the Thirty-fifth Congress.

The Clerk having appointed tellers, and nominations having been made, the Members then proceeded to vote viva voce for Speaker.[3]

212. At the organization of the House the motion to proceed to the election of a Speaker is of the highest privilege.—On March 4, 1869,[4] at the organization of the House, after the Clerk had called the roll of Members-elect and announced the presence of a quorum, Mr. George W. Woodward, of Pennsylvania, submitted the following resolution:

Resolved, That the roll of Members of the Forty-first Congress be amended by the addition of the name of Henry D. Foster, as the Representative of the Twenty-first Congressional district of Pennsylvania, and that said Foster be called and admitted as the sitting Member prima facie entitled to represent said district.

Mr. Ellihu B. Washburne, of Illinois, moved that the House proceed to the election of a Speaker, claiming precedence for the motion as involving a question of privilege.

Mr. John A. Logan, of Illinois, made the point of order that the law gave to the Clerk the making of the roll of members to be called prior to the organization.

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[1] See section 187 of this work for rule for election by ballot as it existed at that time. The rule was then classified among those rules relating to the Speaker.

[2] First session Thirty-fifth Congress, Journal, p. 8.

[3] In recent years the House has often proceeded at once to election viva voce without the formality of a motion.

[4] First session Forty-first Congress, Globe, p. 3.

The Clerk[1] said:

The gentleman from Illinois, Mr. Washburne, rose to a question of privilege which has precedence of that of the gentleman from Pennsylvania, and therefore the question before the House is on the motion to proceed to the election of a Speaker. * * * The duty of the House to organize itself is a duty devolved upon it by law, and any matter looking to the performance of that duty takes precedence in all parliamentary bodies of all minor questions.

213. The motion that the House proceed to elect a Speaker is debatable unless the previous question is ordered.—On March 4, 1867,[2] at the organization of the House, the Congress having assembled in accordance with the act of January 22, 1867, the Clerk had called the names of the Members-elect and bad announced that a quorum was present.

Thereupon Mr. James F. Wilson, of Iowa, moved that the House proceed to the election of a Speaker viva voce.

Mr. James Brooks, of New York, having the floor, was proceeding to debate, when Mr. John F. Farnsworth, of Illinois, made the point of order that no debate was in order until after the House had proceeded to the election of its officers.

The Clerk[1] said:

The Chair overrules the point of order, the previous question not having been called.

After further debate the previous question was moved and ordered, and under the operation thereof the motion of Mr. Wilson was agreed to.

214. A resolution to proceed to the election of a Speaker presents a question of privilege, and pending the decision another question of privilege may not be presented.—On December 4, 1876,[3] at the opening of the session, 250 Members having answered to their names, the Clerk announced that a quorum was present.

Mr. William S. Holman, of Indiana, submitted the following preamble and resolution:

Whereas the House being informed that since its last adjournment Hon. Michael C. Kerr, who at the commencement of the present Congress was elected Speaker of the House, has departed this life, creating a vacancy in the office of Speaker: Therefore,

Resolved, That the House do now proceed to the election of a Speaker viva voce.

Mr. Nathaniel P. Banks, of Massachusetts, as a question of privilege, presented the credentials of James B. Belford as Representative from the State of Colorado, and moved that the oath of office be administered to the said Belford.

Mr. Holman demanded the previous question on the adoption of the said resolution, when Mr. Banks made the point of order that the right of a Member to participate in the election of a Speaker was a question of higher privilege than the election of a Speaker.

This question of order was debated at considerable length, it being urged that the election of Speaker was secondary to the determination of what Members should be on the roll to participate in that election. The distinction was also drawn between this election and one at the beginning of a Congress when, under the law,

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[1] Edward McPherson, of Pennsylvania, Clerk.

[2] First session Fortieth Congress, Globe, p. 2.

[3] Second session Forty-fourth Congress, Journal, p. 8; Record, p. 5.

the Clerk judges what names are to go onto the roll. Not only Mr. Belford was waiting to be sworn in, but also Mr. Edwin Flye, of Maine, successor of Mr. James G. Blaine.

The Clerk [1] overruled the point of order, on the ground that the resolution submitted by Mr. Holman presented a question of privilege, and that pending the decision of such question another question of privilege could not be submitted.

From this decision of the Clerk Mr. Banks appealed. Mr. Cox moved that the appeal be laid on the table, which was done by a vote of 165 yeas to 84 nays.

215. In 1809 the House held that a Speaker should be elected by a majority of all present.—On May 27, 1809,[2] at the organization of the House, the ballot for Speaker showed the following result:

For Joseph B. Varnum	60
For Nathaniel Macon	36
For Timothy Pitkin, jr	20
For Roger Nelson	1
For C. W. Goldsborough	1
Blank ballots	2
Total	120

The tellers submitting the question as to whether Mr. Varnum was elected or not, Mr. Nathaniel Macon, of North Carolina, the rival candidate, expressed the opinion that Mr. Varnum was elected; but Mr. John Randolph, of Virginia, opposed this view strenuously, insisting that the House should elect its Speaker more majorum, after the manner of their ancestors. And on motion of Mr. Randolph the House proceeded to ballot again, which motion was carried-ayes 67, noes 43. On the next ballot Mr. Varnum was elected by 65 votes out of 119.

On the succeeding day the Journal was found to state that a majority of the votes were for Mr. Varnum, whereupon, on motion of Mr. Randolph, it was amended to read: "Sixty-five votes, being a majority of the whole number of Members present, were found in favor of Joseph B. Varnum." The call of the roll by States just preceding Mr. Varnum's election showed 126 responding. The 65 voting for Mr. Varnum were a majority of this number.

216. In 1879 it was held that a Speaker might be elected by a majority of those present, a quorum voting, a majority of all the members not being required.

Discussion as to the size of a valid vote when a quorum is present.

On March 18, 1879,[3] at the organization of the House, on the viva voce vote for Speaker, the following result was announced by the tellers:

For Samuel J. Randall	144
For James A. Garfield	125
For Hendrick B. Wright	13
For William D. Kelley	1
Total	283

[1] George M. Adams, of Kentucky, Clerk.

[2] First session Eleventh Congress, Journal, p. 5; Annals, pp. 54–56.

[3] First session Forty-sixth Congress, Record, p. 5.

The total membership of the House, however, under the existing apportionment, was 293, and the vote for Mr. Randall fell short of a majority of that number.

Mr. Omar D. Conger, of Michigan, asked if it did not require a majority of all the Members elected to the House to elect a Speaker.

The Clerk [1] replied:

It requires a majority of those voting to elect a Speaker, as it does to pass a bill. The rule requires that a quorum shall vote.[2] That is the opinion of the Clerk.

Thereupon Mr. Randall was declared elected Speaker.

217. Tellers of the vote on the election of a Speaker are appointed by the Clerk.—On December 5, 1859,[3] the House having voted to proceed viva voce to elect a Speaker, the Clerk appointed Mr. George S. Houston, of Alabama, Thomas Corwin, of Ohio, Garnett B. Adrian, of New Jersey, and George Briggs, of New York, tellers. The Clerk made the appointment of these tellers without suggestion or vote from the floor, and the Journal records the appointment.

218. The House has in one instance asked the candidates for Speaker to state their-views before proceeding to election.—On January 11, 1856,[4] before the election of a Speaker or the adoption of rules, Mr. Felix K. Zollicoffer, of Tennessee, offered the following:

Resolved, That in conformity with the principles of a great popular Government, such as that of the United States, it is the duty of all candidates for political position frankly and fully to state their opinions upon important political questions involved in their election, and especially when they are interrogated by the body of electors whose votes they are seeking.

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[1] George M. Adams, of Kentucky, Clerk.

[2] Since 1890 the requirement has been the quorum present, rather than the quorum voting. See section 2895 of Vol. IV of this work. In the decision of the Supreme Court sustaining the ruling of Mr. Speaker Reed, the court had used this language: "And here the general rule of all parliamentary bodies is that when a quorum is present, the act of a majority of the quorum is the act of the body itself." On January 10, 1896 (First session Fifty-fourth Congress, Record, pp. 579–581) a question arose on this feature of the subject, Mr. Joseph W. Bailey, of Texas, contending that for lawful action there must be the vote of a majority of a quorum. In other words, the quorum of the existing House was 179. Granted that this number should be present, yet by reason of some not voting, there might be on the passage of a bill yeas 76, nays 74. So a majority of those present would not vote affirmatively, and Mr. Bailey contended that the bill would not be lawfully passed.

The Speaker (Mr. Reed) intervened to ask: "Does the gentleman from Texas hold that it is necessary that 89 persons at least [the Speaker must have meant 90 instead of 89, since 90 is a majority of 179] should vote for every proposition that passes the House?"

Mr. Bailey contended that on a recorded vote it would be necessary.

The Speaker replied, with the concurrence of Mr. Bailey, that many bills had been passed without fulfilling the requirement, and continued:

"The Chair * * * having examined the matter somewhat carefully at various times, he finds that the court in making that decision perhaps decided that it was within the most extreme contention of the opponents, some people having contended that it is necessary to have a majority of a quorum voting. The court pointed it out in this case; but it was not necessary to discuss that question. They might have decided, had they come to the plain question of the body being constituted of the persons who participated in the presence of the rest of the body, they were controlled by their votes, because the rest of the body, being present, could have intervened and overruled them if they had so chosen; but not having chosen to do so it [they] allowed 88 [90] or any less number to pass a measure practically by their assent, because declining to participate was assent."

[3] First session Thirty-sixth Congress, Journal, p. 8; Globe, p. 2.

[4] First session Thirty-fourth Congress, Journal, p. 302; Globe, pp. 213, 222.

Although objection was made that this resolution constituted business which the House in its disorganized condition was not competent to transact, it passed in the affirmative. Later, on January 12, the candidates for Speaker answered interrogatories in accordance with the requirements of the resolution.

219. After the election of a Speaker and before he has been conducted to the chair no debate or business is in order.—On February 1, 1860,[1] the Clerk had announced the election of William Pennington, of New Jersey, as Speaker, when Mr. Thomas C. Hindman, of Arkansas, sought recognition and began to speak.

Mr. Galusha A. Grow, of Pennsylvania, made the point of order that a Speaker had just been elected by the House, and that nothing could be in order until he had been conducted to the chair.

Clerk[2] said:

> The Clerk begs leave respectfully to suggest to the gentleman from Arkansas that this House has just declared a Speaker-elect, and that the first thing in order is to conduct that Speaker to the chair. The Clerk has no power further to preserve order. Until the Speaker has been conducted to the chair, the House is without an organ or any person having authority to entertain motions or questions of order.

The Clerk then appointed a committee of two to conduct the Speaker-elect to the chair.

220. The Clerk appoints the committee to escort the newly elected Speaker to the chair.

It has long been the usage that the oldest Member in continuous service shall administer the oath to the Speaker.

After a Speaker has been elected the Clerk appoints the committee to escort him to the chair. On February 2, 1856,[3] after Mr. Speaker Banks had finally been elected after a long struggle, Mr. John Wheeler, of New York, proposed to designate the committee by resolution, but desisted because of the remonstrances of Mr. Joshua R. Giddings, of Ohio, who as "the oldest consecutive Member" was about to administer the oath to the Speaker. Mr. Giddings said that the Clerk always appointed the committee, and to arrange it otherwise would be an "innovation on the whole past practice of the House."

221. The contest over the organization of the House in 1849.[4]

The House declined to determine the choice of a Speaker by lot.

The House by special rule chose a Speaker by a plurality of votes, but confirmed the choice by a majority vote.

The question as to whether or not the House, before its organization, may adjourn over for more than one day.

On December 22, 1849,[5] the House had been in session nineteen days[5] without being able to elect a Speaker, no candidate having received a majority of the votes cast. The voting was viva voce, each Member when called naming the candidate

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[1] First session Thirty-sixth Congress, Globe, pp. 654, 655.

[2] James C. Allen, of Illinois, Clerk.

[3] First session Thirty-fourth Congress, Globe, p. 342.

[4] There had also been a prolonged contest over the organization of the House in 1840 (see sec. 103 of this work), but it was not occasioned by a difficulty over the election of Speaker.

[5] First session Thirty-first Congress, Journal pp. 156, 163, 164.

for whom he voted. After the thirteenth ballot Mr. Andrew Johnson, of Tennessee, offered a resolution providing that if, on the next ballot, no individual should receive a majority of the votes cast, the individual receiving a plurality of votes should be the Speaker for the present session. An amendment was proposed, to provide that the vote be taken by ballot. Both the resolution and amendment were laid on the table by a vote of 210 to 11.[1] A resolution proposed by Mr. Frederick P. Stanton, of Tennessee, to restrict the voting to the four highest candidates, and in the event of no choice to the two highest, was also laid on the table.[2]

On December 6, after the fourteenth ballot, Mr. John A. McClernand, of Illinois, offered a resolution to adopt the rules of the last House and appoint Mr. Linn Boyd, of Kentucky, chairman until a Speaker should be elected. After an amendment had been proposed to alternate Mr. Samuel F. Vinton, of Ohio, with Mr. Boyd, and after Mr. McClernand had modified his proposition so as to permit the proposed chairman merely to keep order during the proceedings on the election of Speaker, the whole proposition was laid on the table by a vote of 116 to 105.

After the thirtieth ballot Mr. Lewis C. Levin, of South Carolina, offered a resolution that each of the five parties, or factions, in the House should put the name of its candidate in a box and that the Clerk should draw one therefrom, thus determining the Speakership by lottery. This resolution was promptly laid upon the table. After the thirty-first ballot it was proposed that lots be drawn between Mr. Howell Cobb and Mr. Robert C. Winthrop to determine who should be Speaker. This was not approved. A motion that the vote be taken by ballot was also defeated by a vote of 162 to 62.

After the forty-first ballot Mr. George Ashmun, of Massachusetts, proposed a plan for electing by plurality of votes, but it did not meet with favor.

On motion of Mr. Milo M. Dimimick, of Pennsylvania, it was ordered that the House should proceed with the election of a Speaker and that there should be no debate until such an election should be effected.

Various solutions of the difficulty were offered as the balloting proceeded, such as modifications of the plurality plan, proposals to raise a committee to devise a plan for organization, to elect a Speaker pro tempore, etc.

Finally, after the fifty-ninth ballot, Mr. Frederick P. Stanton offered and the House adopted, after attempts to amend and protests from the minority at the prohibition of debate, the following resolution by a vote of 113 yeas to 106 nays:

> *Resolved,* That the House will proceed immediately to the election of a Speaker, viva voce; and if, after the roll shall have been called three times, no Member shall have received a majority of the whole number of votes, the roll shall again be called, and the Member who shall then receive the largest number of votes, provided it be a majority of a quorum, shall be declared to be chosen Speaker.

A strong protest[3] was made against the plurality resolution and against the resolution prohibiting debate. Mr. Robert Toombs, of Georgia, insisted on making his protest, although the Clerk began a roll call while he was on the floor, and there was great disorder and confusion. He denied the right of the unorganized House

[1] Journal, p. 32.

[2] Journal, p. 34.

[3] First session Thirty-first Congress, Globe, p. 62.

to limit debate or adopt the plurality rule, basing his opposition on the second section of the act of 1789—

That at the first session of Congress after every general election of Representatives, the oath or affirmation aforesaid shall be administered by any one Member of the House of Representatives to the Speaker, and by him to all the Members present, and to the Clerk, previous to entering on any other business.[1]

A motion having been made to adjourn over to a day beyond the next day, Mr. Alexander H. Stephens, of Georgia, arose and suggested the constitutional point that the House could not, until it was organized, do otherwise than adjourn from day to day. The House decided the motion to adjourn over in the negative.[2]

Under the operation of the plurality, resolution, the sixty-third vote resulted as follows:

For Howell Cobb	102
For Robert C. Winthrop	100
For David Wilmot	8
For Charles S. Morehead	4
For William Strong	3
For Alexander H. Stephens	1
For William F. Colcock	1
For Charles Durkee	1
For Emery D. Potter	1
For Linn Boyd	1
Whole number of votes given	222

Of which number, Mr. Howell Cobb, of Georgia, having received 102 votes, being the largest number cast for any one Member, under the resolution adopted by the House, and being a majority of a quorum of the House, Mr. Stanly thereupon offered the following resolution:

Resolved, That Howell Cobb, a Representative from the State of Georgia, be declared duly elected Speaker of the House of Representatives for the Thirty-first Congress.

This resolution having been adopted, Mr. Cobb was conducted to the chair by Mr. Robert C. Winthrop, of Massachusetts, and Mr. James McDowell, of Virginia.

222. The contest over the organization of the House in 1855 and 1856.

The House by special rule chose a Speaker by plurality of votes, but confirmed the choice by a majority vote on a resolution declarative of the result.

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[1] This now section 30, Revised Statutes. (See also sec. 128 of this work.)

[2] See also Section 89 of this volume. During the prolonged contest in the first session Thirty-fourth Congress, which resulted in the election of Speaker Banks, the House voted, on December 24, 1855, to adjourn over. (Journal, p. 172; Globe, pp. 78, 79.) Mr. Joshua R. Giddings, of Ohio, suggested that they had no power to adjourn over, and that a majority of the Members might come the next day and elect a Speaker, notwithstanding the adjournment over; but the point was not further insisted on. Mr. Alexander H. Stephens, of Georgia, who had suggested it in the Thirty-first Congress, participated in the debate, but said nothing on this point. Previous to this (Journal, p. 18) the Doorkeeper had been directed to enforce so much of the rules of the last Congress as related to the admission of persons within the hall of the House.

The House declined to permit any announcement but its own declaration in a case wherein a Speaker was chosen by plurality of votes.

Use of the motion to rescind in proceedings for organization of the House.

Instance of thanks to the Clerk for presiding during a prolonged contest over the organization.

On February 2, 1856,[1] the House was in the midst of a struggle over the election of a Speaker. One hundred and twenty-nine ballots had been taken without any candidate receiving the majority of the votes cast. Various devices, including attempts to elect Members by means of adopting resolutions declaring such a one to be Speaker, had been tried without success. On this day the proposition to elect by a plurality of votes was revived, and Mr. Samuel A. Smith, of Tennessee, submitted the following resolution, viz:

Resolved, That the House will proceed immediately to the election of a Speaker viva voce. If, after the roll shall have been called three times, no Member shall have received a majority of all the votes cast, the roll shall again be called, and the Member who shall then receive the largest number of votes, provided it be a majority of a quorum, shall be declared duly elected Speaker of the House of Representatives for the Thirty-fourth Congress.

This resolution was adopted by a vote of 113 yeas and 104 nays. After its adoption a motion was made[2] to rescind it, and was laid on the table by a vote of 117 to 110. After a motion to adjourn had been voted on, the motion to rescind was again made, but, the question being submitted to the House, the House decided that the motion to rescind was not again in order.

After the one hundred and thirty-third vote the following result was reached:

For Nathaniel P. Banks, jr	103
For William Aiken	100
For Henry M. Fuller	6
For Lewis D. Campbell	4
For Daniel Wells, jr	1
Whole number of votes	214

Of which number Nathaniel P. Banks, jr., of Massachusetts, having received 103 votes, being the largest number cast for any one Member, and a majority of a quorum of the House, was declared by the tellers to have been duly elected Speaker of the House of Representatives for the Thirty-fourth Congress.

Mr. Samuel P. Benson, of Maine, taking the roll, announced the vote, concluding with the declaration that Mr. Banks "is declared Speaker of the House of Representatives for the Thirty-fourth Congress."[3] Immediately there was a question of the right of the gentleman from Maine to make such a declaration. It was declared that only the House could make such a declaration, and the precedent of 1849 was recalled, when a resolution was adopted declaring Mr. Howell Cobb, of Georgia, duly elected Speaker. Mr. Cobb, in reply, said that he had not believed the declaratory

[1] First session Thirty-fourth Congress, Journal, pp. 429, 430, 444.

[2] Congressional Globe, first session Thirty fourth Congress, p. 336.

[3] Congressional Globe, first session Thirty-fourth Congress, p. 339.

resolution necessary in 1849 and he did not believe it necessary now. If a majority of the House adopted the plurality rule, when a plurality vote was cast for a Member he was elected by virtue of the resolution originally adopted by a majority of the House. On the other hand, it was urged by Mr. William W. Boyd, of South Carolina, that the majority could not empower a minority to designate a Speaker, because delegated power could not be delegated.

Mr. Thomas L. Clingman, of North Carolina, submitted the following resolution:

Resolved, That, by reason of the adoption of the proposition known as the plurality resolution, and the votes taken under it, the Hon. N. P. Banks, of Massachusetts, has been duly chosen Speaker, and is hereby so declared.

This resolution having been agreed to by a vote of 156 yeas to 40 nays, Mr. Banks was conducted to the chair by Mr. William Aiken, of South Carolina, Mr. Henry M. Fuller, of Pennsylvania, and Mr. Lewis D. Campbell, of Ohio, and addressed the House.

Mr. Stanton submitted the following resolution; which was unanimously agreed to, viz:

Resolved, That the thanks of this House are eminently due, and are hereby tendered, to John W. Forney, esq., for the distinguished ability, fidelity, and impartiality with which he has presided over the deliberations of the House of Representatives during the arduous and protracted contest for Speaker which has just closed.

223. In 1860 the election of a Speaker proceeded slowly, the voting being interspersed with debate which the Clerk did not prevent.—At the first session of the Thirty-sixth Congress, which began on December 5, 1859, there was a prolonged delay over the election of Speaker, a result being reached on February 1, 1860, after fifty-four ballots. On the first day of the session it was ordered that the House proceed viva voce to the election of a Speaker.

Thereupon a ballot was taken without result. Debate then began; and as the Clerk declined to decide any questions of order, the voting for Speaker proceeded very slowly. All questions of order were submitted to the House and were debated, so it became practically impossible to hasten proceedings. Sometimes only one vote would be taken during a day, the remainder of the time being consumed in debate. It was urged by Mr. Israel Washburn, jr., of Maine, and by others that the order to proceed to the election of a Speaker was a standing order and that debate and other matters were not in order.[1] He also contended that the House should each day proceed to vote without a special order so to do each time. But it was impossible to arrive at a determination of the question raised, and we find the House, at the last of the proceedings, adopting, under operation of the previous question, an order to proceed to the election of Speaker before each vote. Questions of personal privilege were raised by Members, and a resolution relating to the qualifications of the candidates for Speaker[2] was presented and debated, but no decision was reached on the point of order that it was not in order or on the reso-

[1] Thus, on January 18 (Journal, p. 130; Globe, p. 499), the Clerk declined to carry out the order, as he did not feel at liberty to arrest the remarks of a Member.

[2] On January 5, 1860, during the contest over the election of a Speaker, a proposition to elect a Speaker pro tempore was presented and discussed somewhat, but not adopted. (First session Thirty-sixth Congress, Globe, pp. 341–343.)

lution itself, the Clerk declining to decide and the House being unable to reach a decision. A resolution for a plurality rule was proposed, but was not acted on. Finally a Speaker was elected by majority vote.[1]

224. A new Speaker being elected at the beginning of a second session of Congress, Members-elect present and unsworn participated in that election.—On November 13, 1820,[2] at the beginning of the second session of the Congress, the Clerk called the House to order, and the roll of Members was called by States to ascertain the presence of a quorum.

At the conclusion of the roll call several new Members appeared, produced their credentials, and took their seats.

Then, a quorum being present (the new Members were not, however, necessary to produce this quorum, and there is no evidence as to whether or not they were counted as part of it) the Clerk laid before the House the resignation of the Speaker, and the House proceeded to elect a Speaker, a choice being effected on November 15. The new Speaker, Mr. John W. Taylor, of New York, having taken his seat and addressed the House, and a message announcing his election having been sent to the Senate, he proceeded to administer the oath to the new Members who appeared on the 13th instant.

It seems evident, from a comparison of the Journal and Annals, that the new unsworn Members voted for Speaker. They were 7 in number, and the Journal records only 131 old members as appearing on the first day. Yet the total votes in the first day's ballotings range from 132 to 138. On the second day the Journal records the appearance of enough more old Members to bring the total of old Members up to 142, yet during this day the total of votes reached as high as 148; and on the third day, with 147 old Members recorded, the totals of ballots ranged from 141 to 148. If the appearance of Members was recorded with care, as it seems to have been, it is evident that the unsworn new Members voted for Speaker.[3]

225. A Speaker elected after the organization of the House takes the oath, although he may have taken it already as a Member.

Mr. Speaker Colfax, having been elected Vice-President, resigned his Speakership on the last day of the Congress.

The Speaker called a Member to the chair and, taking the floor, tendered his resignation verbally.

On March 3, 1869,[4] the Speaker[5] called Mr. James F. Wilson, of Iowa, to the chair and, having been recognized on the floor, offered his resignation as Speaker, to take effect upon the election of his successor.

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[1] First session Thirty-sixth Congress, Journal, pp. 8, 12, 130, 151, 154, 164; Globe, pp. 187, 233, 483, 499, 637.

[2] Second session Sixteenth Congress, Journal, pp. 5–7 (Gales and Seaton ed.); Annals, pp. 434–438.

[3] At the beginning of the Fifty-fifth Congress (March 15, 1897, first session Fifty-fifth Congress, Record, p. 15) several Members present without credentials in due form, and whose names were not on the Clerk's roll, asked to be allowed to vote for Speaker. The Clerk (Alexander McDowell, of Pennsylvania) declined to permit them to do so. Had they presented credentials in due form, the situation would evidently have been different.

[4] Third session Fortieth Congress, Journal, pp. 511–513; Globe, pp. 1867, 1868.

[5] Schuyler Colfax, of Indiana, Speaker. He had been elected Vice-President, and this resignation was tendered at the beginning of the last legislative day of the Congress.

A resolution expressing regret at his retirement and a high appreciation of his services having been adopted by the House, Mr. Henry L. Dawes, of Massachusetts, moved that Hon. Theodore M. Pomeroy, of New York, "be declared duly elected Speaker in place of Hon. Schuyler Colfax, resigned, for the remaining term of this Congress."

This resolution was agreed to unanimously.

A committee was appointed to escort the Speaker-elect to the chair, and the Speaker pro tempore designated Mr. Dawes to administer the oath to the Speaker-elect.

The Speaker-elect having addressed the House briefly, the oath was administered to him.

Resolutions were then adopted directing that the Senate be informed of the election and that a committee of three be appointed to inform the President.

226. On December 4, 1876,[1] at the second session of the Congress, Mr. Samuel J. Randall, of Pennsylvania, was elected Speaker in place of Michael C. Kerr, of Indiana. The oath was administered to Mr. Randall after his election, no question being raised on the point. Of course he had already taken the oath as Member at the first session.

227. When the Speaker is absent at the beginning of a session the House may adjourn or elect a Speaker pro tempore.—On December 6, 1830, at the opening of the second session,[2] the Clerk[3] called the House to order, and the presence of a quorum having been ascertained, Mr. William S. Archer, of Virginia, arose and announced that the Speaker[4] was prevented by indisposition from attending. He had looked into the records and found that in such cases the practice had been twofold. In some cases the House adjourned from day to day; and in two other cases, occurring in 1798, the House had elected a Speaker pro tempore. Then, on motion of Mr. James K. Polk, of Tennessee, the House adjourned.

228. The Speaker pro tempore, whom the House had just elected, not being present, the Clerk held that the motion to adjourn was not business, and under the circumstances was the only motion in order.—On June 24, 1876[5] the Clerk, in the absence of the Speaker[6] and the Speaker pro tempore, called the House to order, when Mr. Samuel J. Randall, of Pennsylvania, at 12 o'clock and 5 minutes p. m., moved that the House adjourn.

This motion being disagreed to, Mr. William S. Holman, of Indiana, submitted the following resolution; which was read, considered, and agreed to:

Resolved, That Hon. Milton Sayler, a Representative from the State of Ohio, be, and he is hereby, appointed Speaker pro tempore during the present absence of the Speaker.

The Speaker pro tempore elect not being present, Mr. Holman, at 12 o'clock and 25 minutes, moved that the House adjourn.

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[1] Second session Forty-fourth Congress, Journal, p. 12; Record, p. 7.

[2] Second session Twenty-first Congress. Debates, pp. 347–350.

[3] Matthew St. Clair Clarke, of Pennsylvania.

[4] Andrew Stevenson, of Virginia.

[5] First session Forty-fourth Congress, Journal, p. 1153; Record, p. 4132.

[6] Michael C. Kerr, of Indiana.

Mr. Omar D. Conger, of Michigan, made the point of order that the House having elected a Speaker pro tempore, the functions of the Clerk as a presiding officer thereupon ceased, and that it was not competent for him to entertain or submit any motion to the House in the nature of business.

The Clerk[1] overruled the point of order, holding that a motion to adjourn was not business, and in the absence of the Speaker or Speaker pro tempore was the only motion in order.

In this decision of the Clerk the House acquiesced. And then the motion of Mr. Holman was agreed to, and the House accordingly adjourned.

229. A Speaker pro tempore elected by the House is not sworn.

Discussion of the nature and functions of the office of Speaker pro tempore.

On February 17, 1876,[2] Mr. Samuel J. Randall, of Pennsylvania, offered the following resolution, which was agreed to:

Resolved, That Hon. Samuel S. Cox, a Representative from the State of New York, be, and he is hereby, appointed Speaker pro tempore during the present temporary absence of the Speaker.

Mr. James A. Garfield, of Ohio, moved that the oath of office prescribed by the act of July, 1862, be administered to the Speaker pro tempore before he should enter upon the duties of the office to which he had just been appointed.

After debate the motion of Mr. Garfield was decided in the negative, yeas 73, nays 171.

A resolution informing the Senate of the election of Mr. Cox as Speaker pro tempore was then agreed to.

The motion of Mr. Garfield was debated at length. He urged it on the ground that the act of 1862 made it incumbent on all officers except the President to take the oath before entering on the duties of the office, and contended that the precedents cited of Speakers pro tempore who had taken no additional oath were all before 1862, while the case of Mr. Pomeroy, who took the additional oath, was after the enactment of the test oath. On the other hand, it was stated that Mr. Pomeroy, although chosen only for a day, was in fact a Speaker, since Speaker Colfax had resigned. The discussion also embraced a consideration of the relations of the offices of Speaker, Speaker pro tempore by election of the House, and Speaker pro tempore by designation of the Chair under the rules. The idea was advanced that the latter was merely a presiding officer, without the power to sign bills or do other things devolving on a Speaker. As to the distinction between an elected Speaker and an elected Speaker pro tempore there was a diversity of opinion. It was contended that the Speaker pro tempore was as different from the Speaker as a President pro tempore of the Senate from Vice-President, and the idea was opposed on the ground that the House might at any time remove its Speaker and choose one pro tempore, who would have all the attributes of his predecessor. It was also contended that when the Speaker was sworn at the organization of the House he, in fact, took two oaths at the same time, one as Member and the other as Speaker. Hence it was argued that a Speaker elected after the organization, to fill a vacancy, would take an additional oath.

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[1] George M. Adams, of Kentucky.

[2] First session Forty-fourth Congress, Journal, pp. 412–413; Record, pp. 1146–1153.

230. A Member being elected Speaker after the organization of the House, it is assumed that his committee places are thereby vacated.—On December 11, 1876,[1] Mr. Speaker Randall announced the appointment of Mr. Hiester Clymer, of Pennsylvania, on the Committee on Appropriations in place of himself, who had retired by reason of being elected Speaker. It does not appear that any request was made of the House to relieve Mr. Randall of this committee service.

231. Rising in his place, Mr. Speaker Clay addressed the House, announcing his resignation.

The Speaker having resigned, the chair remained vacant, and the Clerk presided until a successor was elected.

The Speaker having resigned in 1814, his successor, when elected, took the oath.

A Speaker being elected to fill a vacancy caused by resignation, the Senate, but not the President, was notified of the fact.

A resolution of thanks to a Speaker who had resigned was agreed to before the election of a successor.

On January 19, 1814,[2] after the business of the House had proceeded some time, the Speaker, rising in his place, addressed the House briefly, announcing his resignation as Speaker.

He then left the chair, which remained vacant.

Then, on motion of Mr. William Findley, of Pennsylvania, the Clerk putting the motion:

Resolved, That the thanks of this House be presented to Henry Clay, in testimony of their approbation of his conduct in the arduous and important duties assigned to him as Speaker of this House.

A motion to adjourn having been decided in the negative, the House proceeded by ballot to the choice of a Speaker, in place of Henry Clay, resigned; and, upon the examination of the ballots, it appeared that Langdon Cheves, one of the Representatives from the State of South Carolina, was duly elected.

Mr. Cheves, having been conducted to the chair, addressed the House. Then the oath was administered to him by Mr. Findley.

On the next day:

Resolved, That the Clerk of this House inform the Senate that, Henry Clay having yesterday resigned his seat as Speaker, the House of Representatives have made choice of Langdon Cheves, one of the Representatives from the State of South Carolina, as their Speaker.

No message seems to have been sent to the President.

232. In 1820, at the beginning of a second session, the Clerk called the House to order, and after ascertaining the presence of a quorum presented a letter of resignation from the Speaker.

The Speaker having resigned, no action of the House excusing him from service is taken.

The Speaker having resigned in 1820, it does not appear that his successor took the oath.

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[1] Second session Forty-fourth Congress, Journal, p. 56, Record, p. 129.

[2] Second session Thirteenth Congress, Journal, pp. 240–242 (Gales & Seaton, ed.); Annals, p. 1057.

A Speaker being elected to fill a vacancy caused by resignation, the Senate, but not the President, was notified of the fact.

In the earlier practice when a series of ballots were taken, the Journal recorded only the bare result of the decisive ballot.

On November 13, 1820,[1] the House was called together at the opening of the second session of the Congress by the Clerk, and the roll of Members was called by States. A quorum appearing, the Clerk stated that fact, and then announced to the House a letter[2] addressed to him by Henry Clay, Speaker of the House, in which Mr. Clay requested the Clerk to communicate to the House the fact of his inability to attend—

and to respectfully ask it to allow me to resign the office of its Speaker, which I have the honor to hold, and to consider this as the act of my resignation.

This letter being read, no motion was made to permit the Speaker to be excused from serving, but the House proceeded at once to ballot[3] to elect a Speaker. Messrs. Thomas Newton, of Virginia, and Jonathan O. Moseley, of Connecticut, were appointed a committee to count the ballots. After 7 ballots, in which no one had a majority of the votes given, as required by the rule[4] the House adjourned. On the succeeding day, also, the balloting was fruitless, but on November 15, on the twenty-second ballot, the result was announced as follows: The whole number of votes were 148, 75 necessary to a choice. The votes were: For Mr. Taylor, 76; for Mr. Lowndes, 44; for Mr. Smith, 27; scattering, 1.[5]

So John W. Taylor, a Representative from the State of New York, was elected Speaker.

Mr. Taylor addressed the House, but the Journal does not indicate that the oath was administered.

On motion of Mr. Nelson, of Virginia:

Ordered, That a message be sent to the Senate, to inform them that a quorum of this House is assembled; that they have elected John W. Taylor, one of the Representatives from the State of New York, their Speaker, in the room of Henry Clay, resigned, and are now ready to proceed to business; and that the Clerk go with the said message.

There is nothing to indicate that a notice of the election of the new Speaker was sent to the President.

233. In 1834 the Speaker, intending to resign, arose in his place and informed the House, setting a future day for the act.

The Speaker having announced his resignation, made a farewell address and left the chair.

The farewell address of the Speaker appears in full in the Journal.

The Speaker having resigned in 1834, his successor took the oath.

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[1] Second session Sixteenth Congress, Journal, pp. 5–7 (Gales & Seaton ed.); Annals, pp. 434–438.

[2] This letter appears in full in the Journal.

[3] The Journal makes no mention of a motion to proceed to the election of a Speaker; but the Annals states that such a motion was made by Mr. Thomas Newton, of Virginia.

[4] See section 6003, Volume V, of this work for the rule at that time.

[5] The Journal does not record these ballotings in detail, but announces merely that "upon an examination of the twenty-second ballot, it appeared that John W. Taylor, etc., was duly elected."

On May 30, 1834,[1] the Journal has this entry:

Mr. Speaker Stevenson rose, and informed the House that he had taken the chair this morning, though still laboring under severe and continued indisposition, for the purpose of opening the House, and preventing any delay in its business, and likewise for the purpose of announcing his determination of resigning the Speaker's chair and his seat in Congress. This he proposed doing on Monday next at 11 o'clock. He had formed this resolution under a deep sense of duty, and because his state of health rendered it impossible for him (as must be apparent to the House) to discharge, in person, the laborious duties of the Chair, and he had therefore deemed it respectful and proper to give this early notice of his intention to retire.

On Monday, June 2,[2] immediately after the reading of the Journal, the Speaker arose and addressed the House. He said he had attended for the purpose of resigning the office of Speaker, and of announcing the fact that he had communicated to the executive of Virginia his resignation as one of the Representatives of that State. Mr. Speaker then addressed farewell remarks to the House. These appear in full in the Journal.

Having completed his remarks, Mr. Stevenson then descended from the chair and withdrew.

Mr. Charles F. Mercer, of Virginia, then moved that the House proceed to the election of a Speaker.

The Clerk put this motion, which was agreed to; and then nominated 6 tellers to collect and count the ballots. Of this proceeding, however, the Journal has only this entry.

The House, on motion, proceeded by ballot to the choice of a Speaker in the place of Andrew Stevenson, resigned, and, upon an examination of the tenth ballot, it appeared that John Bell, one of the Representatives from the State of Tennessee, was duly elected; upon which, Mr. Bell was conducted to the Speaker's chair by Mr. John Quincy Adams and Mr. Richard M. Johnson, from whence he addressed the House as follows: [Address follows in full.]

The oath of office to support the Constitution of the United States was then administered to the Speaker-elect by Mr. Williams, one of the Representatives from the State of North Carolina.

234. The Speaker having died during the recess of Congress, the Clerk called the House to order, ascertained the presence of a quorum, and entertained a motion to proceed to election of a Speaker.—On December 4, 1876,[3] on the first day of the session, the Clerk of the House, having called the House to order at 12 m., announced the death of Hon. Michael C. Kerr, late Speaker; and then proceeded to call the roll of Members by States.

A quorum having been disclosed, and its presence announced by the Clerk, Mr. William S. Holman, of Indiana, presented this resolution:

Whereas the House being informed that since its last adjournment Hon. Michael C. Kerr, who at the commencement of the present Congress was elected Speaker of the House, has departed this life, creating a vacancy in the office of Speaker; therefore

Resolved, That the House do now proceed to the election of a Speaker viva voce.

This resolution, which was held to be of high privilege, was agreed to.

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[1] First session Twenty-third Congress, Journal, p. 672; Debates, p. 4335. The Speaker addressed the House immediately after the reading of the Journal.

[2] Journal, pp. 689–691; Debates, pp. 4368–4373.

[3] Second session Forty-fourth Congress, Journal, pp. 3–10; Record, pp. 3–6.

235. The House, in a rule continuing the Clerk in office until the election of his successor, assumed to perpetuate its authority beyond its own existence.—On March 1, 1791,[1] at the close of the first Congress, it was

Resolved, That the Clerk of the House of Representatives of the United States shall be deemed to continue in office until another be appointed.

Again, on March 2, 1793,[2] at the close of the Second Congress, a similar resolution was agreed to.

236. The Clerk having died in the recess of Congress, the House was informed as soon as a quorum had been ascertained and new Members sworn in.

The Clerk having died, the House at once elected a successor, declining to have the chief clerk fill the vacancy temporarily.

On December 3, 1838,[3] the Speaker laid before the House the following communication:

OFFICE HOUSE OF REPRESENTATIVES OF THE UNITED STATES,
WASHINGTON, DECEMBER 3, 1838.

SIR: The painful duty is devolved upon me of informing you, and, through you, the House of Representatives of the United States, of the death of Walter S. Franklin, esq., Clerk of the House. He died on the 20th of September last, at Lancaster, in Pennsylvania.

In making this communication, I can not omit to embrace the opportunity publicly to express the deep regret of every officer of the House at the loss the public and themselves have sustained in the death of Mr. Franklin.

With much respect, Sir, your obedient servant,

S. BURCH,
Chief Clerk of the Office, and Acting Clerk House of Representatives.

HON. J. K. POLK,
Speaker House of Representatives.

The House disagreed to a proposition that the principal assistant clerk act as Clerk until the House should fill the vacancy, and entertained and agreed to a motion that—

the House do forthwith proceed to the election of a Clerk.

Accordingly the House proceeded to the election of a Clerk.

These proceedings took place after the roll had been called by States to ascertain the presence of a quorum, and after the new Members had been sworn in, but before the Senate or the President had been informed that a quorum of the House was in attendance.

It does not appear that any message was sent to the Senate informing them that the House had elected a Clerk.

237. The election of the Clerk of the House presents a question of privilege.

The office of Clerk becoming vacant it was held that the House would not be organized for business until a Clerk should be elected.

The preparation and reading of the Journal is not prevented by the death of the officer having it in charge.

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[1] Third session First Congress, Journal, p. 396 (Gales & Seaton, ed.).

[2] Second session Second Congress, Journal, p. 731 (Gales & Seaton, ed.).

[3] Third session Twenty-fifth Congress, Journal, p. 8; Globe, p. 1.

On April 16, 1850,[1] Mr. Thomas L. Harris, of Illinois, moved that the House proceed to the election of a Clerk, to supply the vacancy occasioned by the death of Thomas J. Campbell.

Pending the consideration of this motion, Mr. Albert G. Brown, of Mississippi, submitted the following resolution:

Resolved, That the order heretofore passed by the House postponing the election of a Doorkeeper be, and the same is hereby, rescinded; and that the House of Representatives will proceed at once to the election of a Clerk and Doorkeeper for the Thirty-first Congress.

The Speaker[2] decided that the resolution was out of order, on the ground that the House could take no action upon or transact other business than the election of Clerk until such election is effected. Until a Clerk should be elected the House would not be organized.

From this decision of the Chair Mr. A. G. Brown appealed, and the question being put, "Shall the decision of the Chair stand as the judgment of the House?" it was decided in the affirmative.

The record of the debate[3] shows that the Speaker expressed the opinion that the House was not organized until a Clerk was elected.[4] In this case the Clerk had died, and the Journal on this morning was read by one of the subordinate officers of the late Clerk. Question as to this proceeding having been raised by Mr. Willard P. Hall, of Virginia, the Speaker said that the Journal had been prepared as usual under the direction of the Speaker. The Chair did not think that the death of the Clerk should prevent the reading or preparation of the Journal.[5]

238. The Clerk having resigned, the House elected his successor.

In the early days of the House two oaths were administered to the Clerk.

On December 9, 1800,[6] the Clerk having resigned, the House elected John Holt Oswald his successor. The oath to support the Constitution of the United States, together with the oath of office as prescribed by the act entitled "An act to regulate the time and manner of administering certain oaths," were then administered by Mr. Speaker to the Clerk.[7]

239. The Clerk having resigned, the House, after some intervening business, elected his successor.—On Saturday, January 28, 1815,[8] the Speaker laid before the House a letter, addressed to the Speaker by the Clerk of the House, resigning the office of Clerk.

The letter was ordered to lie on the table.

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[1] First session Thirty-first Congress, Journal, p. 789.

[2] Howell Cobb, of Georgia, Speaker.

[3] Globe, p. 741.

[4] On December 2, 1833, Walter S. Franklin, of Pennsylvania, was elected Clerk of the House. On December 3 he appeared and qualified. (First session Twenty-third Congress, Journal, pp. 9, 10.)

[5] The Journal is now prepared, not by the Clerk, but by the Journal Clerk, and is read by one of the reading clerks.

[6] Second session Sixth Congress, Journal, p. 736. (Gales & Seaton, ed.)

[7] By the act of 1789 (1 Stat. L., p. 23) two oaths were required of the Clerk. This has since been changed.

[8] Third session Thirteenth Congress, Journal, pp. 694, 697–699 (Gales & Seaton, ed.); Annals, pp. 1107, 1113.

On Monday, January 30, after business had proceeded for a time, it was

Resolved, That this House will proceed, on this day at 2 o'clock, to the appointment of a Clerk, in the room of Patrick Magruder, who has resigned that office.

Accordingly at 2 o'clock a ballot was taken, and it appears that Thomas Dougherty was duly elected.

On January 31 he gave his attendance and took the oath of office.

240. In 1860 the House decided that it might inform the Senate and President of its organization and election of a Speaker before it had elected a Clerk.—On February 1, 1860,[1] a Speaker had been elected, the oath had been administered to the Members and Delegates, and rules had been adopted. Thereupon Mr. Reuben E. Fenton, of New York, offered this resolution:

Resolved, That a message be sent to the Senate to inform that body that a quorum of the House of Representatives has assembled, and that William Pennington, one of the Representatives from the State of New Jersey, has been chosen Speaker, and that the House is now ready to proceed to business.

Mr. William Smith, of Virginia, questioned the propriety of the resolution before the election of a Clerk.

After debate, in which it was stated that it had been the custom of the House to agree to similar resolutions before the election of Clerk, the Speaker[2] held that the practice of the House had been in accordance with the proposed action, and that there was no necessity that the notice should be delayed until the election of a Clerk. The present Clerk could communicate the message.

The resolution was accordingly agreed to. Then, also, a resolution of notification to the President was agreed to before the election of Clerk. After that the House proceeded to the election of Clerk.

241. By unanimous consent, in 1867, the House elected its Clerk by resolution.

In 1867 the law of 1789 was considered as binding the House to elect a Clerk before proceeding to business.

On March 4, 1867,[3] at the organization of the House, after the Speaker had been elected, and the oath had been administered to him and by him to the Members, resolutions were adopted for notifying the President and the Senate of the organization of the House. Then rules were adopted.

After this Mr. Henry L. Dawes, of Massachusetts, presented a resolution that Edward McPherson, of Pennsylvania, be, and hereby is, elected Clerk.

The Speaker asked unanimous consent to the procedure of electing a Clerk by resolution, when Mr. Robert C. Schenck, of Ohio, objected to the election of a Clerk at this time, on the ground that it had been understood that no other officers than the Speaker were to be elected this day.

Mr. Thaddeus Stevens, of Pennsylvania, said that such had been the understanding, but a reference had shown that under the law no business could be transacted until the election of both a Speaker and Clerk.

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[1] First session Thirty-sixth Congress, Journal, pp. 167, 170; Globe, pp. 656, 661, 662.

[2] William Pennington, of New Jersey, Speaker.

[3] First session Fortieth Congress, Globe, pp. 5, 7 , Journal, pp. 9, 10.

The Speaker[1] said:

The Chair has ascertained that there are precedents on this subject. In the thirty-first Congress, when the Clerk died, the Speaker said that no business could be transacted until another Clerk was elected, because there was no officer to carry messages to the Senate.

Accordingly, there being no objection, the resolution was acted on and Mr. McPherson was elected.

On the succeeding day, and after business had intervened, the remaining officers were elected.

242. It has been decided that notwithstanding the requirements of the act of 1789, the House may proceed to business before the election of a Clerk.—On December 31, 1849,[2] after the election of Speaker, the House agreed to this resolution:

Resolved, That the House will proceed to the election of a Clerk and other officers on Thursday, the 3d day of January, 1850.

No choice of Clerk being effected on January 3, the Speaker held the order unfinished business on the 4th. On that day the further execution of the order was postponed until the 7th.

Then the House proceeded to the regular order of business provided in the rules, when Mr. Samuel W. Inge, of Alabama, rose to a question of privilege. The provisions of the act of 1789 required the Clerk of the House to be sworn before it was competent for the House to proceed to other business. He therefore moved that the House proceed to the election of a Clerk in compliance with the provisions of the said act.

The Speaker[3] decided that the House having by resolution fixed a day for the election of Clerk and other officers, the motion of Mr. Inge was out of order. The House had put its own construction on the point raised.

Mr. John L. Robinson, of Indiana, appealed, but Mr. Inge withdrew his motion, and the matter fell.

243. A question has arisen as to whether or not the House, in the face of the provision of law, may proceed to business before the election of a Clerk.—On February 1, 1860,[4] the House had elected a Speaker and adopted rules, but had not chosen a Clerk, when Mr. John S. Phelps, of Missouri, proposed to introduce a bill making appropriations to defray certain deficiencies in the appropriations for the Post-Office Department.

Mr. Thaddeus Stevens, of Pennsylvania, made the point of order that the bill could not be introduced at this time.

The Speaker[5] said:

The opinion of the Chair is that such business can not be transacted until after the election of a Clerk.[6]

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[1] Schuyler Colfax, of Indiana, Speaker.

[2] First session Thirty-first Congress, Journal, pp. 190, 228; Globe, p. 102.

[3] Howell Cobb, of Georgia, Speaker.

[4] First session Thirty-sixth Congress, Globe, p. 656.

[5] William Pennington, of New Jersey, Speaker.

[6] Mr. Phelps, who was the oldest Member of the House in the years of consecutive service, said, after the decision of the Speaker, that as the House had elected a Speaker, and under the provisions of the Constitution allowing it to make rules had adopted rules, and as among those rules was one continuing the present Clerk until another should be elected, it seemed clear to him that the House might proceed to business. He cared not what the law might be. The House might make rules overriding the law. (Globe, p. 656.)

244. A Speaker having been elected, the House has proceeded to legislative and other business before the election of a Clerk.

The Clerk of the former House continues to act as Clerk of the new House until his successor is elected.

An instance wherein certain officers of the former House continued to act through the new Congress, no successor being elected.

On December 22, 1849, the House, after a long contest, elected Mr. Howell Cobb, of Georgia, Speaker.

On the next legislative day, December 24, the oath was administered to the Members of the House. Then, before any suggestion was made as to the election of other officers, a message was sent to the Senate informing that body that a quorum of the House had assembled, that Howell Cobb had been chosen Speaker, and that the House was ready to proceed to business. Then the appointment of the usual committee to join the Senate committee in notifying the President of the United States that a quorum had assembled and that Congress was ready to receive any communication was authorized.

A proposition was then made to adopt rules, but postponed. Seats were drawn and the hour of daily meeting was fixed. Then the message of the President was received and ordered printed.

On December 27 the rules of the preceding House were adopted temporarily, the President's message was read, and the committees were appointed.

Before the appointment of committees George W. Jones, of Tennessee, urged that under the act of 1789 the committees should not be appointed until a Clerk had been elected and sworn. And soon after Mr. James Thompson, of Pennsylvania, offered this resolution:

Resolved, That the House will proceed to the election of Clerk and other officers on Thursday, the 3d of January, 1850.

On December 31 this resolution was agreed to. On this day, also, the House passed House bill No. 1, and ordered the Clerk (the Clerk of the last House, of course) to request the concurrence of the Senate.

Voting for Clerk began on January 3, and on January 4 was postponed until January 7, although a point of order was made that it was not competent for the House to proceed to other business until the Clerk had been elected. Then, on January 7, the House proceeded to vote for Clerk, and continued to do so until January 11, when Thomas J. Campbell was elected.

The House then proceeded to the election of a Sergeant-at-Arms, but on January 14 suspended the voting by postponing the further execution of the order until the next day. Thereupon the House proceeded to the consideration of the report of the Committee on Rules.

On January 15 a Sergeant-at-Arms was elected and the House next proceeded to the election of Doorkeeper. No choice resulting, after many trials, the House voted to postpone the further execution of the order for the election of officers until March 1, 1851, or until within two days of the end of the Congress. This motion was agreed to, and the Doorkeeper and Postmaster of the previous House continued in their positions by the acquiescence of the House.[1]

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[1] First session Thirty-first Congress, Journal, pp. 164, 167, 168, 184, 186, 190, 202, 225, 291, 308, 366: Globe, pp. 66, 84, 88, 89, 102, 141, 188.

On March 3, 1851,[1] the last day of the session, the election of Doorkeeper was postponed indefinitely.

245. The House has held, notwithstanding the law of 1789, that it may adopt rules before electing a Clerk.—On February 1, 1860,[2] the Speaker was elected, and after he had taken the oath and had in turn administered the oath to the Members and Delegates, Mr. Israel Washburn, jr., of Maine, submitted the following resolution:

Resolved, That the rules of the House of Representatives of the Thirty-fifth Congress shall be the rules of the House of Representatives until otherwise ordered.

Mr. William G. Whiteley, of Delaware, made the point of order that after the election of Speaker nothing was in order but the election of Clerk. He quoted that passage of the law of 1789 which provides that the oath shall be administered "to the Clerk previous to entering on any other business."

The Speaker[3] overruled the point of order, stating that it had been the custom of the House to adopt its rules previous to the election of a Clerk.

246. The Clerk desiring to be away, the House gave him leave of absence.—On April 28, 1834,[4] a Member stated that the Clerk of the House had received news of the death of a member of his family, whereupon

Ordered, That the Clerk have leave to be absent from the service of this House for four or five days.

247. On November 20, 1800,[5]

Ordered, That the Clerk of this House have leave to be absent from the service of the House for three weeks.

248. In the temporary absence of the Clerk the House has chosen a Clerk pro tempore.—On December 9, 1813,[6] Patrick Magruder, the Clerk to the House, being absent from indisposition, the House proceeded to the choice of a Clerk pro tempore, and George Magruder was unanimously chosen.

249. The House declined to interfere with the Clerk's power of removing his subordinates.—On December 31, 1833,[7] Mr. John Davis, of Massachusetts, called attention of the House to the removal from office by the Clerk of the House of Noah Fletcher, who had been an employee of the office since 1819. He presented a memorial from Fletcher, in which the latter said that he had been removed without cause, and appealed to the House to rectify the injustice. Mr. Davis offered this resolution:

Resolved, That Noah Fletcher was removed from his office of Assistant Clerk in this House without any sufficient cause, and ought to be immediately reinstated.

After debate, in the course of which it was urged that the Clerk, being responsible to the House, had the right to select his own assistants, the House, on January 13, 1834, laid the resolution on the table—yeas, 120; nays, 83.

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[1] Second session Thirty-first Congress, Journal, p. 406.

[2] First session Thirty-sixth Congress, Journal, p. 167; Globe, p. 655.

[3] William Pennington, of New Jersey, Speaker.

[4] First session Twenty-third Congress, Journal, p. 566; Debates, p. 3821.

[5] Second session Sixth Congress, Journal, p. 722 (Gales and Seaton, ad.); Annals, p. 783.

[6] Second session Thirteenth Congress, Journal, p. 169 (Gales and Seaton, ad.); Annals, p. 787.

[7] First session Twenty-third Congress, Journal, pp. 140, 183; Debates, pp. 2290, 2368.

250. There being a conflict of authority between the Clerk and another officer, the House investigated.—In 1841[1] a controversy occurred between the Clerk of the House and the Printer as to the power of the Clerk to control the binding of certain documents. The letter of the Clerk was presented to the House by the Speaker, and referred to a select committee, who investigated the subject.

251. The Clerk is required to note all questions of order and the decisions thereon, and print the record thereof as an appendix to the Journal.

It is the duty of the Clerk to print and distribute the Journal.

The Clerk attests and affixes the seal of the House to all writs, warrants, and subpoenas issued by order of the House.

The Clerk is required to certify to the passage of all bills and joint resolutions.

The Clerk makes or approves all contracts, etc., for labor, materials, etc., for the House.

The Clerk keeps account of disbursement of the contingent fund and the stationery accounts of Members.

The Clerk is required to pay the officers and employees of the House on the last secular day of each month.

Present form and history of section 3 of Rule III.

Section 3 of Rule III provides:

> He [the Clerk] shall note all questions of order, with the decisions thereon the record of which shall be printed as an appendix to the Journal of each session; and complete, as soon after the close of the session as possible, the printing and distribution to Members and Delegates of the Journal of the House, together with an accurate and complete index; retain in the library at his office, for the use of the Members and officers of the House, and not to be withdrawn therefrom, two copies of all the books and printed documents deposited there; send, at the end of each session, a printed copy of the Journal thereof to the executive and to each branch of the legislature of every State and Territory; preserve for and deliver or mail to each Member and Delegate an extra copy, in good binding, of all documents printed by order of either House of the Congress to which he belonged; attest and affix the seal[2] of the House to all writs, warrants, and subpoenas issued by order of the House; certify to the passage of all bills and joint resolutions; make or approve all contracts, bargains, or agreements relative to furnishing any matter or thing, or for the performance of any labor for the House of Representatives, in pursuance of law or order of the House; keep full and accurate accounts of the disbursements out of the contingent fund of the House; keep the stationery account of Members and Delegates, and pay them as provided by law. He shall pay to the officers and employees of the House of Representatives, the last day of each month, the amount of their salaries that shall be due them; and when the last day of the month falls on Sunday he shall pay them on the day next preceding.

This rule, except the last sentence, is as agreed on by the House at the time of the revision of 1880.[3] It was composed of seven of the former rules: Rule 14,

[1] Second session Twenty-sixth Congress, Journal, pp. 128, 193, 279.

[2] This provision relating to the seal is from former Rule 8, providing that "all writs, warrants, and subpoenas issued by order of the House shall be under his [the Speaker's] hand and seal," and which dated from November 13, 1794 (Journal Third and Fourth Congresses, p. 229), and existed until the adoption of the present form in 1880.

[3] Second session Forty-sixth Congress, Record, p. 555.

dating from November 13, 1794,[1] and providing for distributing the Journals to the States; Rule 15, dating from December 23, 1811,[2] providing for noting decisions of order; Rule 16, dating from June 18, 1832,[3] and providing for sending the Journal to Members and Delegates; Rule 17, dating from December 22, 1826,[4] and providing for retaining books and documents in the Library; Rule 18, dating from February 9, 1831,[5] providing for sending bound volumes of documents to Members; Rule 20, dated June 18, 1832 [3] providing for an index to the acts of Congress; and Rule 21, dated January 30, 1846,[6] providing for the making and approval of contracts. The last sentence, relating to payment of officers and employees, dates from January 28, 1892.[7]

252. It is the duty of the Clerk to have printed and delivered to each Member a list of the reports required to be made to Congress.

Present form and history of section 2 of Rule III.

Section 2 of Rule III provides:

> He [the Clerk] shall make and cause to be printed and delivered to each Member, or mailed to his address at the commencement of every regular session of Congress, a list of the reports which it is the duty of any officer or Department to make to Congress, referring to the act or resolution and page of the volume of the laws or Journal in which it may be contained, and placing under the name of each officer the list of reports required of him to be made.

This rule dates from March 13, 1822.[8] On April 21, 1836,[9] a provision was added requiring the Clerk to make a weekly statement of business on the Speaker's table; but this was stricken out in the revision of 1890, when the change in the order of business had prevented an accumulation of business on the Speaker's table.

253. The statutes prescribe certain duties for the Clerk as to the organization of the House and the administration of its affairs.—Before the meeting of each Congress the Clerk makes up a roll of such Members as are shown by their credentials to be regularly elected.[10] If circumstances are such that the Clerk may not perform this duty, it devolves in succession upon the Sergeant-at-Arms, and then upon the Doorkeeper.[11]

Except when Congress is in session the Clerk certifies the pay certificates of Members.[12]

Reports of committees are preserved, bound, and indexed, and distributed under direction of the Clerk.[13] The Clerk is entitled to 10 cents for each 100 words of certified extracts from the Journal, except where such transcripts are required

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[1] Third and Fourth Congresses, Journal, p. 229. (Gales & Seaton ed.)

[2] First session Twelfth Congress, Reports, No. 38.

[3] First session Twenty-second Congress, Journal, p. 899.

[4] Second session Nineteenth Congress, Journal, p. 87.

[5] Second session Twenty-first Congress, Journal, p. 284.

[6] First session Twenty-ninth Congress, Globe, p. 279.

[7] First session Fifty-second Congress, Cong. Record, p. 652.

[8] First session Seventeenth Congress, Journal, p. 351.

[9] First session Twenty-fourth Congress, Cong. Globe, p. 320.

[10] Revised Statutes, section 31.

[11] Revised Statutes, sections 32, 33.

[12] Revised Statutes, section 38; Laws, second session Forty-third Congress, p. 389; 19 Stat. L., p. 145.

[13] 24 Stat. L., p. 346; vol. 28, p. 622.

in connection with the duties of a Government office.[1] Printing and binding and the furnishing of blank books for the House are subject to the written order of the Clerk.[2] The distribution of certain documents to various homes for soldiers and sailors is made by the Clerk.[3]

On the first day of each session of Congress the Clerk submits to the House certain statements and reports the names, compensations, etc., of clerks and messengers of the House, and whether any of them may be dispensed with; an itemized statement of the expenditure of the contingent fund;[4] an exhibit of the sums drawn from the Treasury, and the balance remaining;[5] all the expenditures of the House at the end of each fiscal year;[6] a full and complete statement of his receipts and expenditures as Clerk[7] and an account of all property of the United States in his possession.[8]

The Clerk requires of the disbursing officers acting under him precise and analytical returns of the moneys expended, as a basis for an annual return to Congress.[9]

The Clerk, after advertisement for bids, contracts for the stationery for supplying the House, giving preference to domestic articles over foreign, providing such can be had on as satisfactory terms as imported articles.[10]

The Clerk may, with permission of the Joint Committee on the Library, have the use of the Library under the regulations that apply to Members.[11]

The Clerk disburses the pay of half of the Capitol Police.[12]

The Clerk is required to make contracts with the lowest bidder for packing boxes for use of the House.[13]

The Clerk gives a bond of $20,000.[14]

254. The custody and use of the seal is with the Clerk, under direction of the House.—On July 18, 1892,[15] Mr. Benton McMillin, of Tennessee, presented the following order, which was agreed to by the House:

> *Ordered,* That the Clerk of the House of Representatives be, and he is hereby, authorized and directed to affix the seal of the House of Representatives to the document entitled "The administration of the United States Government at the beginning of the four hundredth anniversary of the discovery of America."

At the same time the House passed a joint resolution allowing the Secretary of State to affix the seal of the United States to the document, and also a concurrent resolution authorizing the President to accept the document for preservation among the archives.

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[1] Revised Statutes, section 71.

[2] Revised Statutes, section 3789.

[3] Revised Statutes, section 4837; 28 Stat. L., p. 159.

[4] Revised Statutes, section 60.

[5] Revised Statutes, section 61.

[6] Revised Statutes, section 63.

[7] Revised Statutes, section 70.

[8] Revised Statutes, section 72.

[9] Revised Statutes, section 62.

[10] Revised Statutes, sections 66–49; Laws, second session Forty-third Congress, p. 316.

[11] Revised Statutes, section 94.

[12] 31 Stat. L., p. 963.

[13] 31 Stat. L., p. 967.

[14] Revised Statutes, sections 58 and 59.

[15] First session Fifty-second Congress, Record, p. 6342.

255. On January 19, 1886,[1] the Committee on Rules of the Senate reported on the subject of the seal of the Senate. They found nothing in the Journals or archives of the Senate to throw any light on the history of the seal, although from private letters recently published it had been learned when and by whom it was made. The committee found that there was no authority on the subject of its use, and recommended the adoption of the following rule:

Resolved, That the Secretary shall have the custody of the great seal, and shall use the same for the authentication of process, transcripts, copies, and certificates whenever directed by the Senate.

256. The seal of the House is in the control of the House rather than of the Speaker.—On January IT, 1901,[2] the Speaker laid before the House a letter from the Acting Secretary of State requesting that an impression of the seal of the House of Representatives be furnished for the files of the State Department for purposes of reference for authentication.

The letter having been read, the Speaker[3] said:

The Chair thinks that this is a matter which should properly be done by order of the House, and therefore submits the draft of an order to be adopted by the House, in pursuance of the request of the State Department.

The order was then submitted by unanimous consent and agreed to, as follows:

Ordered, That the Clerk be directed to furnish to the Department of State, in accordance with the request transmitted to the House from that Department, an impression of the seal of the House of Representatives.

257. The Sergeant-at-Arms attends the sittings and under direction of the Speaker or Chairman of the Committee of the Whole maintains order.

By a rule, which is not adopted usually until a Speaker is elected, the Sergeant-at-Arms is directed to preserve order under the direction of the Clerk pending the election of a Speaker or Speaker pro tempore.

The Sergeant-at-Arms executes the commands of the House and all of its processes directed to him by the Speaker.

The Sergeant-at-Arms disburses the pay and mileage of Members and Delegates.

Present form and history of section 1 of Rule IV.

Section I of Rule IV provides:

It shall be the duty of the Sergeant-at-Arms to attend the House and the Committee of the Whole, during their sittings, to maintain order under the direction of the Speaker or Chairman, and, pending the election of a Speaker or Speaker pro tempore, under the direction of the Clerk, execute the commands of the House, and all processes issued by authority thereof, directed to him by the Speaker, keep the accounts for the pay and mileage of Members and Delegates, and pay them as provided by law.

In the First Congress, on April 14, 1789,[4] this rule was adopted:

A Sergeant-at-Arms shall be appointed to hold office during the pleasure of the House, whose duty it shall be to attend the House during its sitting, to execute the commands of the House from time to

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[1] Senate Report, first session Forty-ninth Congress, No. 48.

[2] Second session Fifty-sixth Congress, Record, p. 1134.

[3] David B. Henderson, of Iowa, Speaker.[4] First session First Congress, Journal, p. 14.

time, and all such process, issued by authority thereof, as shall be directed to him by the Speaker. A proper symbol of office shall be provided for the Sergeant-at-Arms, of such form and device as the Speaker shall direct, which shall be borne by the Sergeant when in the execution of his office.

On April 4, 1838,[1] a rule was adopted providing that the Sergeant-at-Arms should keep the accounts of the pay and mileage and pay over the same to Members.

On March 3, 1877,[2] in order to meet difficulties that might occur at the organization of the House, a rule was adopted providing that the Sergeant-at-Arms should maintain order under direction of the Clerk when the latter should be presiding. There was much debate over this rule, Mr. James A. Garfield urging that the existing House might not make a rule binding on the next House; but at that time the House, by continuing an old rule of 1860, was perpetuating the theory that the rules of one House might bind the next.[3] At the time of the organization of a House this rule has not been adopted, and therefore its effect at that time is extremely doubtful.[4]

In the revision of 1880[5] the substance of the rule was retained, in somewhat different form. Only one change has' been made since 1880. In the revision of 1890[6] the new provision was added that the Sergeant-at-Arms should attend the Committee of the Whole also, and maintain order under direction of the Chairman. This was stricken out in the Fifty-second and Fifty-third Congresses, but restored in the Fifty-fourth and has continued since as part of the rule.

258. The statutes as well as the rule define the duties of the Sergeant-at-Arms, especially with reference to the disbursements made by him.

The statutes place on the Sergeants-at-Arms of the two Houses the duty of preserving the peace and security of the Capitol and the appointment and control of the Capitol police.

The act of October 1, 1890,[7] after enacting the provisions of House Rule IV in relation to the Sergeant-at-Arms, provides that the pay and mileage of Members and Delegates shall be paid at the Treasury on requisitions drawn by the Sergeant-at-Arms, and shall be disbursed by him; that he shall give bond to the United States in the sum of $50,000, no Member of Congress to be a surety on this bond; that he shall continue in office until his successor is elected and qualified; that at the commencement of each regular session he shall submit a statement of the sums drawn and disbursed by him; that there shall be employed by him in his office a deputy, a cashier, a paying teller, a bookkeeper, a messenger, a page, and a laborer, at certain fixed salaries; and that in the adjustment of his accounts the fiscal year shall extend to and include July 3.

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[1] Second session Twenty-fifth Congress, Globe, pp. 278, 281.

[2] Second session Forty-fourth Congress, Journal, pp. 635, 669; Record, pp. 2133, 2232–2235.

[3] This theory was finally abandoned in 1890. (See see. 6743–6745 of Vol. V of this work.)

[4] See section 81 of this work.

[5] Second session Forty-sixth Congress, Record, p. 204.

[6] House Report No. 23, first session Fifty-first Congress.

[7] 26 Stat. L., pp. 645, 646.

On the first day of each regular session, and at the expiration of his term, he makes out a full and complete account of the Government property in his possession.[1]

In addition to his regular salary he receives no fees[2] or other emolument.

In case of a vacancy in the office of the Clerk, or absence or disability of the Clerk, the duties of that official in connection with the organization of a new House devolve on the Sergeant-at-Arms.[3]

In conjunction with the Sergeant-at-Arms of the Senate he makes regulations to preserve the peace and security of the Capitol from defacement and to protect the public property therein, and in connection with this authority is vested the power of arrest.[4]

With the Sergeant-at-Arms of the Senate he attends to the uniforming and equipping of the Capitol police.[5]

The captain and lieutenants of the Capitol police are selected jointly by the Sergeants-at-Arms of the two Houses, and privates and watchmen are selected one-half by each of the two officials. The Clerk of the House disburses pay of one-half.[6]

259. The Sergeant-at-Arms receives no fees; and the Clerk receives them only for certified extracts of the Journal.—The statutes provide that the Sergeant-at-Arms shall receive no fees or other emoluments in addition to his regular salary.[7] The Clerk receives for certified extracts from the Journal 10 cents for each sheet containing 100 words.[8]

260. The Doorkeeper is required to enforce strictly the rules relating to the privileges of the Hall, and is responsible for the official conduct of his employees.

Present form and history of section 1 of Rule V.

Section 1 of Rule V provides:

> The Doorkeeper shall enforce strictly the rules relating to the privileges of the Hall, and be responsible to the House for the official conduct of his employees.

This is the exact form of the revision of 1880.[9] It was adopted from a portion of old rule No. 27, which was adopted at the suggestion of Mr. Abraham Rencher, of North Carolina, on March 1, 1838.[10]

261. The Doorkeeper has the custody of all the furniture, books, and public property in the committee and other rooms under his charge.

At the commencement and close of each session of Congress the Doorkeeper is required to make and submit to the House for examination by the Committee on Accounts an inventory of furniture, books, etc.

Present form and history of section 2 of Rule V.

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[1] Revised Statutes, section 72.

[2] Revised Statutes, section 53; first session Forty-third Congress, Session Laws, p. 87.

[3] Revised Statutes, section 32.

[4] Revised Statutes, section 1820.

[5] Revised Statutes, sections 1821, 1823, 1824, 1825. (As to pay of suspended members of police see 18 Stat. L., p. 345.)

[6] 31 Stat. L., p. 963.

[7] Revised Statutes, section 53.

[8] Revised Statutes, section 71.

[9] Second session Forty-sixth Congress, Record, p. 204.

[10] Second session Twenty-fifth Congress, Globe, p. 203.

Section 2 of Rule V provides:

At the commencement and close of each session of Congress he shall take an inventory of all the furniture, books, and other public property in the several committee and other rooms under his charge, and report the same to the House, which report shall be referred to the Committee on Accounts to ascertain and determine the amount for which he shall be held liable for missing articles.

This is the form of rule adopted on January 27, 1880,[1] on the suggestion of Mr. Joseph R. Hawley, of Connecticut. The Committee on Rules had presented a slightly different form, derived from former Rule 27, which dated from March 2, 1865.[2]

On December 13, 1841,[3] Mr. George N. Briggs, of Massachusetts, offered this resolution, which was agreed to by the House:

Resolved, That the office of Assistant Doorkeeper is not necessary for the service of this House, and that the same is hereby abolished.

262. The statutes impose on the Doorkeeper various duties in addition to those prescribed by the rules.

The Doorkeeper is required at stated times to return inventories of the Government property in his possession.

The Doorkeeper appoints superintendents to have charge of the folding and document rooms.

The Doorkeeper has general charge during the recess of the apartments occupied by the House.

The Doorkeeper has control of the messengers on the soldiers' roll.

On the first day of each regular session of Congress, and at the expiration of his term of service, the Doorkeeper makes out and returns to Congress a full account of all Government property in his possession.[4] During the recess he takes care, under the direction of the Clerk, of the apartments occupied by the House, and provides fuel and other accommodations for the coming session.[5] He also prevents the occupation of the rooms by unauthorized persons during the recess.[6] He sells waste paper, useless documents, and condemned furniture, covering the proceeds into the Treasury.[7]

In case of a vacancy in the offices of Clerk and Sergeant-at-Arms, or disability or absence of both of those officials,[8] the Doorkeeper performs the duties of the Clerk in relation to making up the roll of Members.[9]

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[1] Second session Forty-sixth Congress, Record, p. 557.

[2] Second session Thirty-eighth Congress, Globe, p. 1317; Journal, p. 387.

[3] Second session Twenty-seventh Congress, Journal, p. 40; Globe, p. 14.

[4] Revised Statutes, section 72.

[5] Revised Statutes, section 73.

[6] Second session Forty-second Congress, Journal, p. 1056.

[7] 22 Stat. L., p. 337.

[8] Revised Statutes, section 33.

[9] The Doorkeeper (with the aid of his appointees, viz, the superintendents of the "folding room" and "document room," messengers, pages, folders, and laborers) discharges various duties which are not enumerated in the rules or laws, viz, he announces at the door of the House all messages from the President, etc.; keeps the doors of the House; folds and distributes extra documents; furnishes Members with printed copies of bills, reports, and other documents; conveys messages from Members; keeps the Hall, galleries, and committee rooms in order, etc.

There is a folding room of the House under charge of a superintendent appointed by the Doorkeeper, and each Member is notified once in every sixty days of the number and character of publications on hand assigned to him.[1]

The Doorkeeper may assign one folder to do clerical work under the direction of the foreman of the folding room.[2]

The House document room is in charge of a superintendent appointed by the Doorkeeper, who also appoints the assistant.[3]

Janitors of committees are under direction of the Doorkeeper.[4]

The statutes provide for fourteen messengers on the soldiers' roll,[5] under the control of the Doorkeeper, at $1,200 salary each, and such soldiers are not subject to removal except for cause, with the approval of the House.[6]

On March 2, 1872, after a discussion as to disabled soldiers on the roll of the House, a resolution was adopted, on motion of Mr. Benjamin F. Butler, of Massachusetts, advising the officers of the House to retain disabled soldiers in preference to civilians.[7]

On June 29, 1870, the House instructed the Doorkeeper to retain in service during recess the crippled soldiers carried on the roll.[8]

Mr. William S. Holman, of Indiana, related the history of the soldiers' roll, it having been organized by resolution in 1867 and made permanent by law in the Forty-fourth Congress.[9]

263. The House having decided to postpone the election of a Doorkeeper, the Doorkeeper of the former House was held to continue in the office until his successor should be elected.

The House having postponed the election of an officer until a day certain, a resolution to proceed to the election was held not in order before that date.

A question as to whether or not a resolution placing the duties of one officer of the House on another involves a question of privilege.—Speaker overruled.

On January 19, 1850,[10] before a Doorkeeper had been elected, the House postponed until the 1st day of March, 1851, the further execution of the order of the House providing for the election of officers.

Thereupon Mr. John H. Savage, of Tennessee, rising to a question of privilege, made the point that Robert E. Horner, Doorkeeper of the last House, who continued to act in that capacity, was not Doorkeeper, and objected to his continuing in that capacity.

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[1] 28 Stat. L., p. 612.

[2] 31 Stat. L., p. 968.

[3] 28 Stat. L., p. 610.

[4] 34 Stat. L., p. 394.

[5] See Record, second session Forty-eighth Congress, p. 1697, for a brief debate relative to the law as to the soldiers' roll.

[6] 23 Stat. L., pp. 164, 393; second session Forty-second Congress, Journal, p. 952.

[7] First session Forty-third Congress, Journal, p. 545; Record, pp. 1905–1907.

[8] Second session Forty-first Congress, Journal, p. 1110.

[9] See Debate, second session Forty-eighth Congress, Record, p. 1698.

[10] First session Thirty-first Congress, Journal, pp. 374–377; Globe, pp. 188–194.

The Speaker[1] said:

The Chair has hitherto declined to give any opinion in relation to the effect of the motion to postpone the election of officers, and has referred the House to its own previous practice. During preceding sessions of Congress, when the elections have not been postponed to so late a day as at the present, and during the present session, the duties of Clerk, Sergeant-at-Arms, and Doorkeeper, have been performed by the old officers and the House has acquiesced. It is not for the Chair peremptorily to decide that these individuals are not officers of the House; it is a question for the decision of the House itself.

On the succeeding legislative day, January 21, Mr. Armistead Burt, of South Carolina, claiming the floor for a question of privilege, offered this resolution:

Resolved, That this House, having postponed until the 1st day of March, 1851, the election of Doorkeeper, the Sergeant-at-Arms of this House shall perform the duties of Doorkeeper until the Doorkeeper shall be elected.

Mr. George Ashmun, of Massachusetts, objected to this resolution, on the ground that the gentleman from South Carolina was not entitled to the floor to offer the resolution, and also that it contemplated a change in the rules of the House relating to the duties of the officers.

The Speaker said:

The House, by a vote on Saturday last, postponed the further execution of the order of the House in relation to the election of officers until the 1st of March, 1851. Until that time has arrived, in the opinion of the Chair, as expressed several times, it will not be in order to proceed to the election of officers; but it will be in order for the House to appoint temporary officers or persons who shall discharge the duties of those officers. The position occupied by the Doorkeeper and Postmaster is, in the opinion of the Chair, this: They were elected by the House of Representatives of the last Congress. Under the practice of former Congresses, from the First Congress down to the present time, the old officers of the previous Congress have continued to discharge the duties of the respective offices until their successors should have been elected. And the Chair thinks that the officers of the last House can continue to discharge the duties of these offices in the present House until their successors shall have been elected, holding their offices in the interval by the sufferance of the House.[2] But the House can at any time provide other persons to discharge these duties. They are not the regularly elected officers of this House and they hold their offices at the sufferance and by the will of the House. This being the state of the case, and the question being one affecting the organization of the House, the Chair decides that it is a question of privilege.

Mr. Ashmun having appealed, the appeal was debated at length, and the decision of the Chair was finally reversed, yeas 101, nays 102. So the resolution proposed by Mr. Burt was not received.

Mr. Horner continued to act as Doorkeeper.

264. An officer of the House having resigned, the House voted to proceed to the election of his successor.—On December 7, 1868,[3] the Speaker laid before the House a letter from C. E. Lippincott, resigning his position as Doorkeeper of the House, said resignation to take effect this day.

The letter having been read, Mr. William H. Kelsey, of New York, offered as a question of privilege the following:

Resolved, That this House now proceed to the election of a Doorkeeper in place of Charles E. Lippincott, resigned.

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[1] Howell Cobb, of Georgia, Speaker.

[2] Again, on January 24, 1850, the Speaker reaffirmed this ruling. (See Globe, p. 224.)

[3] Third session Fortieth Congress, Journal, p. 14; Globe, p. 12.

The resolution was agreed to, and the House proceeded to vote viva voce.

265. On December 4, 1832,[1] the House—

Resolved, That this House will, on Thursday next, at 12.30 o'clock, proceed to the election of a Sergeant-at-Arms to fill the vacancy occasioned by the resignation of John O. Dunn.

On the appointed day four ballots were taken without an election and the House adjourned to December 10. On that day the balloting was resumed without a vote so to do, and after five ballotings Thomas B. Randolph, of Virginia, was elected.

The oath was administered to him by the Speaker and he assumed the duties of the office.

266. The death of the Doorkeeper being announced, the House voted to proceed to the election of his successor at a future day.

In 1838 the House adjourned to attend the funeral of its Doorkeeper.

On March 22, 1838,[2] the Speaker laid before the House the following communication:

MARCH 22, 1838.

SIR: It becomes my duty to communicate to you, and through you to the House of Representatives, that a vacancy has occurred in the office of Doorkeeper of the House by the decease of Overton Carr, esq., which took place on Tuesday night, the 20th of March, 1838.

Your obedient servant,

J. W. HUNTER,
Assistant Doorkeeper.

Hon. JAMES K. POLK,
Speaker of the House of Representatives.

The communication having been read, on motion of Mr. Charles F. Mercer, of Virginia, it was—

Resolved, That the House will adjourn at 4 o'clock this afternoon to attend the funeral of their deceased Doorkeeper, Overton Carr; that the expenses thereof be defrayed out of the contingent fund and that his widow be paid the salary of the deceased for the present session of Congress.

On March 23, Mr. Thomas M. T. McKennan, of Pennsylvania, by leave, submitted this resolution:

Resolved, That this House will proceed, on Monday next, at 2 o'clock, to the election of a principal Doorkeeper to supply the vacancy occasioned by the death of Mr. Overton Carr.

After debate, this resolution was postponed until April 1, in order that the Committee on Accounts might have time to make a report on a subject already committed to them relating to the Doorkeeper's office.

On April 5 the resolution came up for consideration, and the House proceeded to the election of a Doorkeeper.

267. The vacancy caused by the death of the Doorkeeper was, after several days, filled by the House by election.—On March 18, 1902,[3] Mr. Joseph G. Cannon, of Illinois, offered the following resolution, which was agreed to by the House:

Resolved, That Frank B. Lyon, of the State of New York, be, and he is hereby, chosen Doorkeeper of the House of Representatives, to fill the vacancy caused by the death of the late Hon. W. J. Glenn.

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[1] Second session Twenty-second Congress, Journal, pp. 8, 25, 26; Debates, pp. 819, 821, 822.

[2] Second session Twenty-fifth Congress, Journal, pp. 645, 646, 706; Globe, p. 253.

[3] First session Fifty-seventh Congress, Journal, p. 489; Record, p. 2964.

The death of Mr. Glenn had been announced to the House on March 12.[1] No temporary appointment was made, nor was any provision made for temporary discharge of the duties in the interim.

268. The Sergeant-at-Arms having resigned, the House instructed the Doorkeeper to perform the duties of the office until the beginning of the next session of Congress.—On June 26, 1832,[2] the Speaker laid before the House a letter from J. O. Dunn, Sergeant-at-Arms, resigning the office, and surrendering his books and papers.

The letter, which appears in full in the Journal, was read and referred to the Committee on Accounts.

The House then voted that the Doorkeeper perform the duties of Sergeant-at-Arms until the beginning of the next session of Congress.

269. Creation of the office of Postmaster.—On April 5, 1838,[3] it was—

Resolved, That William J. McCormick be appointed Postmaster to this House.

270. The Postmaster superintends the post-office in the Capitol and is responsible for the prompt and safe delivery of mail.

Present form and history of Rule VI.

Rule VI provides:

The Postmaster shall superintend the post-office kept in the Capitol for the accommodation of Representatives, Delegates, and officers of the House, and be held responsible for the prompt and safe delivery of their mail.

This is the form adopted in the revision of 1880.[4] It is similar to the old rule No. 28, which dated from April 4, 1838. [5] Immediately after the organization of the Government a room was set apart in the Capitol for the reception and distribution of letters and packets, without an order for that purpose, and was called a post-office.[6] It was superintended by the Doorkeeper and his assistants. On April 9, 1814, the Doorkeeper was authorized to appoint a Postmaster, and an allowance was made to meet the expenses of the office.[7] This arrangement continued until the rule of 1838.[8]

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[1] Record, p. 2706.

[2] First session Twenty-second Congress, Journal, pp. 859, 860; Debates, p. 3783.

[3] Second session Twenty-fifth Congress, Journal, p. 704; Globe, p. 281.

[4] Second session Forty-sixth Congress, Record, p. 205.

[5] Second session Twenty-fifth Congress, Globe, pp. 278, 281.

[6] On April 30, 1802 (first session Seventh Congress, Journal, p. 229; Annals, p. 1253), the House requested the Postmaster-General to establish a post-office at or near the Capitol.

[7] Constitution, Manual, Rules, edition of 1859. Second session Thirteenth Congress, Journal, p. 398; third session Twenty-seventh Congress, Journal, p. 738.

[8] On April 4, 1838 (second session Twenty-fifth Congress, Journal, p. 703; Globe, pp. 278, 281), the House agreed to a series of resolutions reported from the Committee on Accounts. One of these resolutions related to the conduct of the post-office of the House, as follows:

"10. Resolved, That the Doorkeeper shall hire, at the lowest price for which it can be had, a suitable number of horses for the transportation and distribution of the mail of the House to and from the postoffice, and to the lodgings of the Members, and for such other necessary business as may be from time to time required; and he shall superintend the faithful performance of the duties of the messengers employed in this service, and shall report to the Clerk of the House a statement of the persons employed, and the terms of the contract, which shall be reported to the Committee of Accounts; and the Doorkeeper, or other officer of the House, shall not be directly or indirectly interested in any such contract or undertaking."

271. The Postmaster accounts for the Government property in his possession.—The statutes make it the duty of the Postmaster to make out a full and complete account of all the property of the Government in his possession on the first day of each regular session and at the expiration of his term of service.[1]

272. The Chaplain opens each day's sitting with prayer.

Present form and history of Rule VII.

Rule VII provides:

The Chaplain shall attend at the commencement of each day's sitting of the House and open the same with prayer.[2]

This rule dates from the revision of 1880,[3] although there had been a Chaplain from the very first years of Congress, and before in the Continental Congress also.[4]

273. Although in earlier years the Chaplain was not strictly an officer of the House, his election was held to constitute a question of privilege.— On March 5, 1860.[5] Mr. John S. Millson, of Virginia, having proposed to submit, as a question of privilege, the following resolution:

Resolved, That the House will proceed to-morrow, at 1 o'clock p.m., to elect a Chaplain, who shall officiate, during the present Congress, alternately with the Chaplain already elected by the Senate.

Mr. George S. Houston, of Alabama, made the point of order that the resolution did not present a question of privilege, as the Chaplain was not an officer of the House, the Thirty-fifth Congress having been organized without one, and that neither the law nor the Constitution required the election of such an officer.

The Speaker,[6] in rendering his decision, said that he had looked into the precedents, and found that they were in favor of the question being considered privileged. Therefore he overruled the point of order.

Mr. Houston having appealed, the appeal was laid on the table.[7]

274. The practice of electing a Chaplain was suspended during the Thirty-fifth Congress.—On December 10, 1857,[8] after a parliamentary struggle of considerable intensity, the following preamble and resolutions, submitted by Mr. James F. Dowdell, of Alabama, were agreed to:

Whereas the people of these United States, from their earliest history to the present time, have been led by the hand of a kind Providence and are indebted for the countless blessings of the past and the present and dependent for continued prosperity in the future upon Almighty God; and whereas the great vital and conservative element in our system is the belief of our people in the pure doctrines and divine truths of the Gospel of Jesus Christ, it eminently becomes the representatives of a people so highly favored to acknowledge in the most public manner their reverence for God: Therefore,

Be it resolved, That the daily sessions of this body be opened with prayer.

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[1] Revised Statutes, see. 72.

[2] The Chaplain sometimes invites another clergyman to officiate; sometimes one from another country. (Second session Fifty-fifth Congress, Record, p. 9.)

[3] Second session Forty-sixth Congress, Record, pp. 199, 205.

[4] Journal of Continental Congress, September 6, 1774.

[5] First session Thirty-sixth Congress, Journal, pp. 442, 443; Globe, p. 992.

[6] William Pennington, of New Jersey, Speaker.

[7] on May 26, 1876 (first session Forty-fourth Congress, Journal, p, 1521), a resolution providing for the election of a Doorkeeper was offered and received as a question of privilege.

[8] First session Thirty-fifth Congress, Journal, p. 58; Globe, pp. 25, 26.

Resolved, That the ministers of the Gospel in this city are hereby requested to attend and alternately perform this solemn duty.[1]

275. The Chaplain was not originally an officer of the House; but has been such for many years.—December 4, 1817, the House concurred in Senate resolution for appointing two chaplains of Congress, one by each House, who should interchange weekly. This was in accordance with the old custom.[2]

276. On December 10, 1845,[3] a question was raised as to the practice which had prevailed for many years of the House and Senate by concurrent action providing for the election of two different chaplains of two different denominations to officiate, one over the Senate and the other over the House. The usual resolution was agreed to, however.

277. On December 6, 1853,[4] a change was made in the practice of electing chaplains for a single session, and the House sent to the Senate a concurrent resolution providing for their election for the Congress. The nature of the office was not changed otherwise, the practice of authorizing two chaplains, of different denominations, one to be elected by the House and the other by the Senate, continuing. This authorization was by a concurrent resolution.

Resolved (the Senate concurring), That two chaplains be elected, one by the Senate and the other by the House of Representatives; and that they officiate alternately during the present Congress.

278. On February 5, 1856,[5] in accordance with the custom of Congress from very early times, the Senate passed the usual concurrent resolution providing for two chaplains of different denominations, one to be elected by each House. The House, which had not completed its organization, did not act on this resolution at this time; but on February 21 it elected a Chaplain of its own for the session. On April 24 the concurrent resolution of the Senate was laid on the table.

279. On December 22. 1856,[6] the House proceeded to the election of a Chaplain on its own account without reference to the usual concurrent resolution from the Senate.

280. At first the Chaplain did not take the oath prescribed for the officers of the House.—On July 5, 1861,[7] the House elected its Chaplain without reference to the Senate, but the Chaplain evidently did not take the oath taken by the regularly constituted officers of the House.

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[1] In this Congress a considerable number of remonstrances had been received from citizens who objected to the employment of chaplains by the Government, either in the Army, the Navy, or Congress, on the ground that such employment conflicted with the spirit of the Constitution and tended to promote a union of church and state. The debate indicates that this method, while a departure from the usage of the House from the First Congress, had probably been suggested by the way in which the Washington clergy had officiated during the prolonged struggle over the organization of the previous House. In 1854 (Report No. 124, first session, Thirty-third Congress), a committee of the House examined generally the standing of chaplains in Government positions.

[2] First session Fifteenth Congress, Annals, p. 405.

[3] First session Twenty-ninth Congress, Globe, pp. 40, 41.

[4] First session Thirty-third Congress, Journal, p. 40; Globe, pp. 8, 16, 18.

[5] First session Thirty-fourth Congress, Journal, pp. 458, 500, 582, 886; Globe, p. 410.

[6] Third session Thirty-fourth Congress, Journal, p. 143; Globe, pp. 177, 178.

[7] First session Thirty-seventh Congress, Journal, p. 22; Globe, p. 12.

281. On December 17, 1846,[1] after the election of a Chaplain on the part of the House, Mr. John Pettit, of Indiana, moved that the oath to support the Constitution of the United States be administered to the Chaplain as to all other officers of the House. This motion was decided in the negative.

282. On December 15, 1863,[2] the Chaplain appears to have been sworn for the first time. He then took the new "test oath," so called, provided for by the act of July 2, 1862.

283. The statutes provide for the defense of any person against whom an action is brought for acts done while an officer of either House in the discharge of his duty.—In cases of action brought against any person for acts done by him while an officer of either House in the discharge of his official duty the district attorney for the district within which the action is brought shall enter appearance, and the defense shall be conducted under the direction of the Attorney-General.[3]

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[1] Second session Twenty-ninth Congress, Journal, p. 66; Globe, p. 53.

[2] First session Thirty-eighth Congress, Journal, p. 39.

[3] 18 Stat. L., p. 401.

Chapter VII

REMOVAL OF OFFICERS OF THE HOUSE.

1. A proposition to remove an officer a question of privilege. Sections 284–285.[1]
2. Instances of removal, arraignment, and investigation. Sections 286–296.

284. A proposition to remove an officer of the House for misconduct is a question of privilege.—On August 3, 1854,[2] Mr. Theodore G. Hunt, of Louisiana, submitted, as a question of privilege, the following resolution:

Resolved, That John W. Forney, the Clerk of this House, by directing and causing to be made the alteration of the House bill No. 342, entitled "An act to aid the construction of a railroad to the Territory of Minnesota," and mentioned in the report of the special committee of this House, has falsified a record of this House in violation of the parliamentary law and of his sworn duty, and that the said J. W. Forney, Clerk of the House of Representatives, should be, and is hereby, removed from the office of Clerk of this House.

Mr. David T. Disney, of Ohio, made the point of order that this resolution was not privileged.

The Speaker[3] said:

The Chair overrules the question of order which has been raised by the gentleman from Ohio. In the opinion of the Chair the question of the gentleman from Louisiana is a question of privilege.

The question being taken on the resolution, it was disagreed to—yeas, 18; nays, 154.

285. On April 18, 1850,[4] Mr. Albert G. Brown, of Mississippi, presented this resolution:

Resolved, That Robert E. Homer, acting Doorkeeper of the House of Representatives, be, and he is hereby, discharged.

The Speaker[5] decided that this resolution presented the precise question which was decided by the House on a former occasion not to be a privileged question, or a question of privilege; and, in conformity with that decision, he ruled it out of order.

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[1] Charges against officers of the House are questions of privilege. (Secs. 2644–2647 of Vol. III.)

[2] First session Thirty-third Congress, Journal, pp. 1275, 1276; Globe, pp. 2101–2103.

[3] Linn Boyd, of Kentucky, Speaker.

[4] First session Thirty-first Congress, Journal p. 806: Globe, p. 765, 766.

[5] Howell Cobb, of Georgia, Speaker.

Mr. Brown having appealed, Mr. Orin Fowler, of Massachusetts, moved to lay the appeal on the table.

On this motion there were yeas 80, nays 85. So the House declined to lay the appeal on the table.

The appeal being open to debate, Mr. Robert Toombs, of Georgia, commented on the fact that the House, by declining to lay the appeal on the table, had indicated a purpose to overrule the Chair. But at the conclusion of Mr. Toombs's remarks Mr. Brown withdrew the appeal and the resolution in order to present the subject to the House in a different form.

286. It being alleged that the Clerk was guilty of official misconduct, a resolution removing him from office was presented and entertained. On January 21, 1815,[1] Mr. James Clarke, of Kentucky, offered this resolution:

Resolved, That Patrick Magruder, Clerk to the House of Representatives, be removed from office; that this House will, on Monday next, proceed to the election of a Clerk.

On January 23 the resolution was considered, the objections to the Clerk relating to his alleged neglect of proper administration of the contingent fund at the time of the destruction of the Capitol.

On a motion to postpone the further consideration of the resolution one week there were ayes 71, noes 71, whereupon the Speaker voted with the ayes.

On January 28, the Clerk resigned.

287. The House by resolution dismissed its Clerk, who had been found guilty of misappropriation of public funds.

The House has requested the executive authority to prosecute one of the officers of the House.

For misappropriation of funds the House arrested its Clerk and arraigned him at the bar.

The Clerk being arraigned to answer charges, leave was given him to address the House.

The Clerk being arraigned, and addressing the House in his defense, the Journal merely records the fact.

Pending examination of the Clerk on a charge of misappropriation of funds, he was suspended from the exercise of his functions.

The Clerk being incapacitated, the House authorized the Chief Assistant Clerk to attest a warrant and exercise the other functions of the Clerk.

The Speaker has authority to issue a warrant of arrest only by order of the House.

On January 17, 1845.[2] Mr. William Taylor, of Virginia, from the Committee on Accounts, made a report, showing a misappropriation of the funds of the House by the Clerk, and recommending the following:

Resolved, That Caleb J. McNulty be, and he is hereby, dismissed from the office of Clerk of this House.

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[1] Third session Thirteenth Congress, Journal, pp. 682, 684 (Gales and Seaton ed.); annals, pp. 1085, 1100.

[2] Second session Twenty-eighth Congress, Journal, pp. 223–227, 230–233; Globe, pp. 147–149, 152–154.

Resolved, That the Secretary of the Treasury be directed to institute forthwith the necessary legal proceedings to ascertain and secure the balance of the public moneys due from Caleb J. McNulty, as Clerk of the House of Representatives.

Resolved, That the President of the United States be requested to cause criminal prosecutions to be commenced against Caleb J. McNulty, late Clerk of this House, for an embezzlement of the public money, and all persons advising or knowingly and willingly participating in such embezzlement, according to the provisions of the act of Congress approved August 13, 1841.

It was objected that the action proposed by the committee was too summary, and Mr. Cave Johnson, of Tennessee, offered this resolution:

Resolved, That the Sergeant-at-Arms be directed forthwith to arrest Caleb J. McNulty, Clerk of this House, and bring him before the House.

Mr. John Quincy Adams, of Massachusetts, expressing doubts as to the power of the House to arrest for a criminal offense, proposed an amendment to provide for summoning the Clerk before the House.

After debate this amendment was disagreed to, and the resolution was agreed to as offered by Mr. Johnson.

Mr. Adams then made the point that a warrant was necessary, and the Speaker [1] said he considered that the Chair had no authority to issue the warrant except by the order of the House. The point was also made that the rules required a warrant to be attested by the Clerk. Accordingly, by suspension of the rules, the following was adopted:

Resolved, That the Speaker of this House issue his warrant for the arrest of Caleb J. McNulty, in accordance with the resolution of this day; and that the Chief Assistant Clerk attest the warrant under the seal of this House.

The Sergeant-at-Arms was then furnished with the Speaker's warrant in accordance with the foregoing resolution and proceeded to execute the order of the House.

On the same day the Sergeant-at-Arms came in with Caleb J. McNulty, Clerk of the House of Representatives, in his custody, when the House proceeded to the consideration of the report and resolutions from the Committee on Accounts.

On motion of Mr. George C. Dromgoole, of Virginia, leave was given Caleb J. McNulty to address the House in his own defense.

The Speaker addressed Mr. McNulty as follows:

By the order of the House I am directed to state to you that you are required to appear before the House on sundry charges contained in a report made by the Committee on Accounts this morning, and the House will now hear what you have to say in defense against these charges. In order that you may be correctly informed of the charges reported by the committee, they will now be read to you.

The report and resolutions were read accordingly.

Mr. McNulty then addressed the House.[2] denying that he had misappropriated any funds of the House as charged in the report.

Mr. Cave Johnson then proposed the following:

Resolved, That the report of the Committee on Accounts, in regard to Caleb J. McNulty, Clerk of the House, be postponed until to-morrow, at 2 o'clock p. m.; and that the Sergeant-at-Arms hold said C. J. McNulty in custody until the further order of this House.

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[1] John W. Jones, of Virginia, Speaker.

[2] The Journal gives only the statement 6f this fact and does not give his defense.

Mr. David L. Seymour, of New York, moved that the resolution be amended by striking out all thereof which directed the Sergeant-at-Arms to hold Mr. McNulty in custody.

This amendment was agreed to, yeas 99, nays 76.

Mr. Armistead Burt, of South Carolina, then moved the following amendment:

And that in the meantime the exercise of his functions as Clerk of this House be, and they hereby are, suspended, and that they be performed by B. B. French, the Chief Clerk.

This amendment having been acquiesced in by the House, the resolution as amended was agreed to.

On January 18 the consideration of the report of the Committee on Accounts was considered, and the three resolutions were severally agreed to, by the following votes: 196 to 0; affirmatively without call of the roll; 173 to 4.

Then, the rules requiring viva voce election being suspended, the following resolution was agreed to:

Resolved, That Benjamin B. French be, and he is hereby, appointed Clerk of this House.

Mr. French thereupon appeared, and the Speaker administered to him the oaths of his office.

288. Because of the misconduct of the incumbent, the office of Doorkeeper has been declared vacant, and the duties have devolved upon the Sergeant-at-Arms.

A matter affecting the character of an officer of the House involves a question of privilege.

On May 22, 1876,[1] Mr. Samuel S. Cox, of New York, from the Committee on Rules, to which was referred the resolutions of the House of the 13th and 16th instant, in relation to the Doorkeeper and the consolidation of the offices of Sergeant-at-Arms and Doorkeeper, submitted a report thereon in writing, accompanied by the following resolutions:

1. That the office of Doorkeeper be vacated by its present incumbent.
2. That the duties of Doorkeeper be, and the same are hereby, devolved upon the Sergeant-atArms until otherwise ordered.

The resolutions were severally agreed to.[2]

289. On February 1, 1878,[3] Mr. John H. Baker, of Indiana, rising to a question of privilege, made certain charges against J. W. Polk, the Doorkeeper of the House, and moved a preamble reciting the charges, which were of corruption in office, and the following resolution:

Resolved, That the Committee on Reform in the Civil Service be, and it is hereby, directed to inquire into the several matters and things so as aforesaid alleged against said Doorkeeper, and to report at any time to this House whether said Doorkeeper is guilty of any of said alleged acts; and the committee is authorized to send for persons and papers.

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[1] First session Forty-fourth Congress, Journal, p. 998; Record, pp. 3251–3253.

[2] This action was the result of a resolution presented to the House on May 13, as a question of privilege, charges against the Doorkeeper having appeared in a newspaper. The Speaker pro tempore [Mr. Cox] held that the resolution, affecting the character of an officer of the House, was a question of privilege. (Journal, p. 948; Record, p. 3066.)

[3] Second session Forty-fifth Congress, Journal, pp. 339, 358, 783, 792–796; Record, pp. 707, 744, 2209, 2285–2287.

On February 4 Mr. Charles C. Ellsworth, of Michigan, claiming the floor for a question of privilege, which seems to have been admitted as such, presented the statement of the Doorkeeper in reference to the charges, and the same was referred to the committee having the matter in charge.

On April 2 the House proceeded to consider the report of the committee, which recommended the following:

Resolved, That the position of Doorkeeper of the House of Representatives be, and hereby is, declared vacant; and

Further resolved, That until the appointment of a new Doorkeeper, the duties of the office be, and hereby are, devolved upon the Sergeant-at-Arms.

On April 4 the first resolution was agreed to—-yeas 139, nays 80. Then the second resolution was agreed to—yeas 122, nays 114.

290. A report from the Committee on Accounts having impeached the integrity of the Doorkeeper, the House removed him.

A motion to proceed to the election of an officer is privileged; but it is not so with a resolution naming a certain person to fill the office.

On May 17, 1858,[1] the House considered a report from the Committee on Accounts, charging the Doorkeeper of the House with irregularities in his office, and offering to the House the following resolution:

Resolved, That R. B. Hackney, the Doorkeeper of the present House of Representatives be, and he is hereby, dismissed forthwith from that office.

After debate, this resolution was agreed to—yeas 141, nays 34.

Mr. John B. Haskins, of New York, then proposed, as a question of privilege, the following resolution:

Resolved, That Darius Truesdell, of New York, be, and he is hereby, appointed Doorkeeper of the House of Representatives, for the Thirty-fifth Congress.

Mr. Thomas S. Babcock, of Virginia, made the point of order that it was not a question of privilege to move to appoint a particular person Doorkeeper, but that it would be in order to move to proceed to the election of Doorkeeper.

The Speaker[2] sustained the point of order.

The House thereupon voted that on the succeeding day it would proceed to the election of a Doorkeeper, and that until an election should be effected the Sergeant at-Arms should take charge of the property in the office of the Doorkeeper.

291. For permitting a Member under arrest to escape, the Doorkeeper was arraigned at the bar of the House.

An officer of the House being arraigned for neglect of duty, it was voted that he might answer orally.

The Journal recorded the substance of the oral answer of an officer of the House arraigned at the bar for neglect of duty.

On June 6, 1860,[3] during proceedings to obtain the attendance of absent Members, under a call of the House, the arrest of absent Members was ordered, and the doors were closed.

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[1] First session Thirty-fifth Congress, Journal, pp. 833, 835; Globe, pp. 2187, 2195.

[2] James L. Orr, of South Carolina, Speaker.

[3] First session Thirty-sixth Congress, Journal, p. 1025; Globe, p. 2710.

Pending these proceedings, Mr. John Hickman, of Pennsylvania, offered the following resolution:

Resolved, That the Doorkeeper be called before the bar of the House to answer for the escape of Mr. Stanton, of Ohio, from the floor of the House after he was brought before the House under its warrant.

Mr. Hickman having stated that Mr. Stanton had escaped, the resolution was agreed to.

The Doorkeeper thereupon appeared at the bar of the House, when a question was raised by Mr. Horace Maynard, of Tennessee, as to the mode of response. He held that under immemorial custom the Doorkeeper had no right to address the House, but must present his answer in writing. He was brought before the House in contempt of the House, like a witness.

The question was put to the House, and the House voted that the Doorkeeper should answer orally. The Journal has this entry:

The Doorkeeper appeared at the bar of the House, and the question having been submitted to the House, "Will the House receive a verbal answer?" and decided in the affirmative, he stated "that Mr. Stanton had passed out at one of the side doors, which was in charge of one of the messengers, in company with certain Members who had temporary leave of absence, and that he had censured the messenger for permitting Mr. Stanton to pass without leave."

292. Charges against the Postmaster being sustained, his office was declared vacant and his assistant was directed to perform the duties temporarily.

The resignation of the Postmaster was laid before the House while a resolution of dismissal was pending, and was disregarded.

On September 25, 1890,[1] the House agreed to a resolution directing the Committee on Accounts to investigate the conduct of the Postmaster of the House.

On October 1 that committee reported at length, recommending the adoption of the following resolution:

Resolved, That the office of Postmaster of the House of Representatives be, and the same is hereby, declared vacant; and that the Assistant Postmaster of the House be, and he is hereby, directed to perform the duties of Postmaster until a Postmaster shall be elected and duly qualified.

This resolution was agreed to.[2]

The report of the committee, but not the testimony, appears in full in the Journal, apparently without any special order.

293. The late Sergeant-at-Arms having announced a deficit in his office, the House authorized investigation by a select committee.—On December 9, 1889,[3] the Speaker laid before the House a letter from J. P. Leedom, late Sergeant-at-Arms, announcing that the late cashier of the office had departed without settling his accounts, and that there was a deficit in the cash.

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[1] First session Fifty-first Congress, Journal, pp. 1083, 1118; Record, p. 10786.

[2] Shortly before the action of the House on this resolution te resignation of the Postmaster was laid before the House and read. No action was taken on it. (Record, p. 10785.) A Postmaster was elected December 10, 1890 (second session Fifty-first Congress, Journal, p. 42), the election being effected by the adoption of a resolution, which was presented as privileged.

[3] First session Fifty-first Congress, Journal, p. 14; Record, p. 115.

Thereupon the House by resolution directed the appointment of a select committee to examine the accounts of the office.

294. Certain charges being made against an officer of the House, he petitioned for an investigation.—On August 26, 1789,[1] a petition was presented from Joseph Wheaton, Sergeant-at-Arms of the House, praying that an inquiry might be made into certain charges exhibited against him in an anonymous letter addressed to the Speaker.

The petition was ordered to lie on the table.[2]

295. A newspaper charge against the Clerk was, at the request of that officer, investigated by the House.

The report of an investigating committee exonerating the Clerk was printed in full in the Journal.

On May 18, 1876,[3] the Clerk of the House asked the House by a letter laid before the House by the Speaker to order an investigation into a charge made by a newspaper that he had corruptly used his power in appointing subordinates in his department. The House ordered the investigation. The report[4] exonerating the Clerk was submitted on June 27 and was printed in full in the Journal, apparently without special order of the House.

296. A candidate for the office of Secretary of the Senate was allowed to address the Senate in explanation of certain charges.

On December 19, 1831,[5] as the Senate was about to reelect its Secretary, Walter Lowrie, a charge was made that Mr. Lowrie had betrayed executive secrets of the Senate. Thereupon, by unanimous consent, Mr. Lowrie was permitted to address the Senate in his own defense.

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[1] First session First Congress, Journal, p. 90. (Gales and Seaton ed.)

[2] On March 31, 1876, the House, on application of the Chief Clerk, ordered an investigation into certain charges against that official. These charges had been made by a Member on the floor. (First session Forty-fourth Congress, Journal, p. 714; Record, p. 2136.)

[3] First session Forty-fourth Congress, Journal, pp. 975, 1168.

[4] Journal, p. 1168.

[5] First session Twenty-second Congress, Debates, pp. 8, 9.

Chapter VIII.

THE ELECTORS AND APPORTIONMENT.

1. **Constitution and laws relating to electors. Sections 297–300.**[1]
2. **Constitution and laws relating to apportionment. Sections 301–304.**
3. **Bills relating to census and apportionment, privileged. Sections 305–308.**
4. **Failure of States to apportion. Sections 309, 310.**[2]
5. **Filling of vacancies in rearranged districts. Sections 311, 312.**
6. **Right of the State to change districts. Section 313.**
7. **Claims of States to representation in excess of apportionment. Sections 314–319.**

297. The electors choosing Members of the House must have the qualifications requisite for electors of the most numerous branch of the State legislature.

The House is composed of Members chosen every second year by the people of the several States.

Section 2 of Article I of the Constitution provides:

The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

298. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.—Section 1 of Article XIV of the Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[1] Rare instances of rejection of votes of persons qualified under the suffrage laws of the State. (Sec. 451 of this volume and 865 of Vol. II.) Refusal of the House to follow this precedent. (Sec. 879 of Vol. II.)

[2] As to technical defects in establishment of a district. (Sec. 911 of Vol. II.)

299. The rights of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude.—The fifteenth amendment to the Constitution provides:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.[1]

300. The right of soldiers, sailors, and marines to exercise the privilege of suffrage is not abridged by Federal law.—Section 5532 of the Revised Statutes, dating from February 25, 1865, provides:

Every person convicted of any of the offenses specified in the five preceding sections [of the Revised Statutes] shall, in addition to the punishments therein severally prescribed, be disqualified from holding any office of honor, profit, or trust under the United States; but nothing in those sections shall be construed to prevent any officer, soldier, sailor, or marine from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote.

301. The Constitution provides that Representatives shall be apportioned among the several States according to their respective numbers, excluding Indians not taxed.

The reduction of its representation is the penalty for a denial of the right to vote by a State.

No penalty is fixed for a denial of the right of suffrage because of rebellion or other crimes.

The enumeration to fix the basis of representation is to be made once in every ten years.

The number of Representatives may not exceed one for every thirty thousand inhabitants, but each State shall have at least one Representative.

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[1] On February 24, 1881 (third session Forty-sixth Congress, Record, pp. 2020–2023), in the House Nathaniel J. Hammond, of Georgia, discussed suffrage with reference to the fourteenth and fifteenth amendments, and with references to the decisions in the cases of Minor *v.* Happersett (21 Wallace, R.) and United States *v.* Reese (92 U. S., 214) and Cole's case.

The subjects of the thirteenth, fourteenth, and fifteenth amendments to the Constitution were discussed elaborately in the Senate in 1879 on a resolution introduced by Mr. George F. Edmunds, of Vermont. (Third session Forty-fifth Congress.)

On January 30, 1879, Mr. Morgan, of Alabama, discussed with Mr. Edmunds the question of citizenship under the Constitution. (Record, p. 847.) Also question of suffrage (Record, pp. 847–957) and the power of Congress over voting at State elections (p. 848) and to punish in cases where right to vote is denied on account of race, color, etc. (p. 885); on Federal election laws to protect suffrage and the respect in which they had failed (pp. 958, 959) through rulings of the Supreme Court; as to qualifications of voters and fixing the times, places, and manner (pp. 960, 961, 997); times, places, and manner (pp. 997, 998, 999); Messrs. Edmunds and Whyte discussed the power of Congress to provide penalties for violation of laws as to time, place, and manner (p. 999). Mr. Whyte's history of Congress's interference as to time, place, and manner, beginning with 1842 (p. 999). Discussion by Messrs. Edmunds and Whyte as to the constitutionality of the act of July 14, 1870, by which supervisors of election were appointed (p. 1000). Resolutions of Messrs. Edmunds and Morgan as to voters of the States and voters of the United States (pp. 342, 567).

The Supreme Court has also discussed the fifteenth amendment in several decisions.

The first apportionment was fixed by the Constitution.
References to discussions of questions relating to apportionment.
The distribution of representation under the several apportionments.

Section 2 of Article XIV of the Constitution provides—

Representatives shall be apportioned among the several States according to their respective numbers,[1] counting the whole number of persons[2] in each State, excluding Indians not taxed.[3] 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.

[1] The various apportionments, including the first one made in the Constitution itself, have been as follows:

States.	1787.	1790.	1800.	1810.	1820.	1830.	1840.	1850.	1860.	1870.	1880.	1890.	1900.
Maine					7	8	7	6	5	5	4	4	4
New Hampshire	3	4	5	6	6	5	4	3	2	3	2	2	2
Massachusetts	8	14	17	20	13	12	10	11	10	11	12	13	14
Rhode Island	1	2	2	2	2	2	2	2	2	2	2	2	2
Connecticut	5	7	7	7	6	6	4	4	4	4	4	5	5
Vermont		2	4	6	5	5	4	3	3	3	2	2	2
New York	6	10	17	27	34	40	34	33	31	33	34	34	37
New Jersey	4	5	6	6	6	6	5	5	5	7	7	8	10
Pennsylvania	8	3	18	23	26	28	24	25	24	27	28	30	32
Delaware	1	1	1	2	1	1	1	1	1	1	1	1	1
Maryland	6	8	9	9	9	8	6	6	5	6	6	6	6
Virginia	10	19	22	23	22	21	15	13	11	9	10	10	10
North Carolina	5	10	12	13	13	13	9	8	7	8	9	9	10
South Carolina	5	6	8	9	9	9	7	6	4	5	7	7	7
Georgia	3	2	4	6	7	9	8	8	7	9	10	11	11
Kentucky		2	6	10	12	13	10	10	9	10	11	11	11
Tennessee			3	6	9	13	11	10	8	10	10	10	10
Ohio				6	14	19	21	21	19	20	21	21	21
Louisiana					3	3	4	4	5	6	6	6	7
Indiana					3	7	10	11	11	13	13	13	13
Mississippi					1	2	4	5	5	6	7	7	8
Illinois					1	3	7	9	14	19	20	22	25
Alabama					2	5	7	7	6	8	8	9	9
Missouri					1	2	5	7	9	13	14	15	16
Arkansas							1	2	3	4	5	6	7
Michigan							3	4	6	9	11	12	12
Florida								1	1	2	2	2	3
Iowa								2	6	9	11	11	11
Texas							2	4	6	11	13	16	
Wisconsin								3	6	8	9	10	11
California								2	3	4	6	7	8
Minnesota									2	3	5	7	9
Oregon									1	1	1	2	2
Kansas									1	3	7	8	8
West Virginia									3	3	4	4	5
Nevada									1	1	1	1	1
Nebraska									1	1	3	6	6
Colorado										1	1	2	3
South Dakota												2	2
North Dakota												1	2
Montana												1	1
Washington												2	3
Idaho												1	1
Wyoming												1	1
Utah												1	1
Oklahoma[a]													5
Total	63	105	141	181	212	240	223	234	241	293	325	357	391

[a] Oklahoma has since been admitted with five Representatives. (34 Stat. L., p. 271.)

[2] The Constitution also provides for ascertaining this number of persons by a census every ten years. The last census was taken in 1900.

302. The apportionment of Representatives to the several States under the act of 1901.

From March 3, 1903, the membership of the House was fixed at 386.

The representation of a newly admitted State is in addition to the total number of Representatives fixed by the act of 1901.

The act of January 16, 1901,[1] made the following provisions as to apportionment:

That after the third day of March, nineteen hundred and three, the House of Representatives shall be composed of three hundred and eighty-six members, to be apportioned among the several States as follows: Alabama, nine; Arkansas, seven; California, eight; Colorado, three; Connecticut, five; Delaware, one; Florida, three; Georgia, eleven; Idaho, one; Illinois, twenty-five; Indiana, thirteen; Iowa, eleven; Kansas, eight; Kentucky, eleven; Louisiana, seven; Maine, four; Maryland, six; Massachusetts, fourteen; Michigan, twelve; Minnesota, nine; Mississippi, eight; Missouri, sixteen; Montana, one; Nebraska, six; Nevada, one; New Hampshire, two; New Jersey, ten; New York, thirty-seven; North Carolina, ten; North Dakota, two; Ohio, twenty-one; Oregon, two; Pennsylvania, thirty-two; Rhode Island, two; South Carolina, seven; South Dakota, two; Tennessee, ten; Texas, sixteen; Utah, one; Vermont, two; Virginia, ten; Washington, three; West Virginia, five; Wisconsin, eleven; and Wyoming, one.

SEC. 2. That whenever a new State is admitted to the Union the Representative or Representatives assigned to it shall be in addition to the number three hundred and eighty-six.[2]

303. The apportionment act provides that Representatives shall be elected in districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants.

The districts in a State shall be equal to the number of its Representatives, no one district electing more than one Representative.

The act of January 16, 1901,[1] in providing for the apportionment, has the following:

SEC. 3. That in each State entitled under this apportionment, the number to which such State may be entitled in the Fifty-eighth and each subsequent Congress shall be elected by districts composed

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[3] Section 2 of Article I of the Constitution provided originally for the apportionment, but a portion of it has been superseded by section 2 of Article XIV. Section 2 of Article I is as follows, with the portion which has been superseded indicated by brackets:

[Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

On May 3, 1832 (first session Twenty-second Congress, Report No. 463), the conferees made a report of disagreement between the House and Senate as to an apportionment bill, which reviewed at length the proceedings as to prior apportionments. Later reports have also made reviews of this nature, notably House Report No. 2130, second session Fifty-sixth Congress.

[1] 31 Stat. L., pp. 733, 734.

[2] Thus, Oklahoma has been admitted by act of June 16, 1906, with five Members additional to the number provided in this act.

of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of the Representatives to which such State may be entitled in Congress, no one district electing more than one Representative.

Provisions similar, but not identical, are found in previous apportionment acts.

304. The apportionment of 1901 provided for the election of Representatives in old districts and at large until the respective States should have rearranged the districts.—The act of January 16, 1901,[1] in providing for the apportionment, has the following:

SEC. 4. That in case of an increase in the number of Representatives which may be given to any State under this apportionment such additional Representative or Representatives shall be elected by the State at large, and the other Representatives by the districts now prescribed by law until the legislature of such State, in the manner herein prescribed, shall redistrict such State; and if there be no increase in the number of Representatives from a State the Representatives thereof shall be elected from the districts now prescribed by law until such State be redistricted as herein prescribed by the legislature of said State; and if the number hereby provided for shall in any State be less than it was before the change hereby made, then the whole number to such State hereby provided for shall be elected at large, unless the legislatures of said States have provided or shall otherwise provide before the time fixed by law for the next election of Representatives therein.

Provisions similar, but not identical, are found in previous apportionment acts.

305. A legislative proposition, presented in obedience to a mandatory provision of the Constitution, was held to involve a question of privilege.— On January 3, 1901,[2] Mr. Marlin E. Olmstead, of Pennsylvania, presented, as involving a question of privilege, the following resolution:

Whereas the continued enjoyment of full representation in this House by any State which has, for reasons other than participation in rebellion or other crime, denied to any of the male inhabitants thereof being 21 years of age and citizens of the United States the right to vote for Representatives in Congress, Presidential electors, and other specified officers is in direct violation of the fourteenth amendment to the Constitution of the United States, which declares that in such case "the basis of representation therein shall be reduced in the proportion which such male citizens bear to the whole number of male citizens 21 years of age in such State," and is an invasion of the rights and dignity of this House and of its Members and an infringement upon the rights and privileges in this House of other States and their Representatives; and

Whereas since the last apportionment the States of Mississippi, South Carolina, and Louisiana have, by changes in the constitutions and statutes of said States, and for reasons other than participation in rebellion or other crime, denied the right of suffrage to male inhabitants 21 years of age, citizens of the United States, and such denial in each of said States extends to more than one-half of those who, prior thereto, were entitled to vote, as appears from the following statistics, published in the Congressional Directories of the Fifty-second and Fifty-sixth Congresses, viz:

In the seven districts of Mississippi the total vote cast for all Congressional candidates in 1890 was 62,652; in 1898, 27,045. In the seven districts of South Carolina the total vote in 1890 was 73,522, and 28,831 in 1898. In the six districts of Louisiana 74,542 in 1890, and 33,161 in 1898.

One Member of the present House, representing ten counties in Mississippi, with a population in 1890 of 184,297, received only 2,068 votes. One Member of the present House, representing six counties in South Carolina, with a population in 1890 of 158,851, received only 1,765 votes, and one Member representing thirteen counties in Louisiana, with a population of 208,802, received only 2,494 votes; and

Whereas it is a matter of common rumor that other States have, for reasons other than those specified in the Constitution of the United States, denied to some of their male inhabitants 21 years old and citizens of the United States the right to vote for Members of Congress and Presidential electors,

[1] 131 Stat. L., pp. 733, 734.

[2] Second session Fifty-sixth Congress, Journal, pp. 80, 81; Record, pp. 520–522.

as well as executive and judicial officers of said States and members of the legislature thereof, and no reduction has been made in the representation of any State in this House because of such denial; and

Whereas the President of the United States has, by message, recommended "that the Congress, at its present session, apportion the representation among the several States as provided by the Constitution:" Therefore,

Resolved, Section 1. That the Committee on Census shall be, and is, authorized and directed, either by full committee or such subcommittee or subcommittees as may be appointed by the chairman thereof, to inquire, examine, and report in what States 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 legislatures thereof is denied to any of the male inhabitants of such States 21 years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crimes, and the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in each such State.

Mr. James D. Richardson, of Tennessee, made the point of order that the resolution was not privileged.

After debate the Speaker[1] held as follows:

The matter seems to the Chair clearly settled by Article XIV, section 2, of the Constitution.

The Clerk having read the section referred to, the Speaker continued:

This is a most important section, and gravely touches the very vitals of the Republic as such, and makes mandatory upon Congress certain things that shall be done by Congress if certain conditions exist. This resolution alleges that certain things exist, expressly provided for by the section just read by the Clerk. The resolution and the preamble must be considered together. What is the object of the resolution providing for the investigation to be made by the Committee on the Census? It is to ascertain the truth of these facts and lay them before Congress so that proper action may be taken by this body.

The resolution is—

"That the Committee on Census shall be, and is, authorized and directed, either by full committee or such subcommittee or subcommittees as may be appointed by the chairman thereof, to inquire, examine, and report in what States 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 legislatures thereof is denied to any of the male inhabitants of such States 21 years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crimes, and the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in each such State."

Can any wiser course be suggested for carrying out the clear mandates of the Constitution than by the provision of this preamble and the resolution? The grave charges are made, and the resolution to carry out the proper investigation and treatment is before us. The whole matter, waiving all discussion of the rules of this House, comes under the higher rule than our rule, the constitutional rule which is here absolutely mandatory, and the Chair is unable to see why we should wander even among the precedents, which the Chair has looked over to some extent and which are all one way, when we have the plain language of the Constitution before us. The resolution is evidently carefully drawn in pursuance of the language of the Constitution. The Chair only hopes that he will never have occasion to settle a more difficult question than this, which seems to him so simple. The Chair therefore overrules the point of order.

306. A bill relating to the taking of the census was held to be privileged because of the Constitutional requirement.—On January 16. 1900,[2] Mr. Albert J. Hopkins, of Illinois, from the Select Committee on the Twelfth Census, reported as privileged the bill (S. 2179) "relating to the Twelfth and subsequent

[1] David B. Henderson, of Iowa, Speaker.

[2] First session Fifty-sixth Congress, Record, p. 884; Journal, p. 166.

censuses, and giving to the Director thereof additional power and authority in certain cases, and for other purposes."

Mr. Charles A. Russell, of Connecticut, made the point of order that the report was not privileged.

After debate the Speaker[1] held—

The question arises by the gentleman from Illinois [Mr. Hopkins], chairman of the Special Committee on the Twelfth Census, bringing in his report.

Were this an original question that had not been passed upon, the Chair might rule differently than he feels constrained to rule at this time.

The Constitution of the United States makes it mandatory upon Congress to take a census of the people every ten years. It also requires the Congress to make an apportionment of the Members of Congress for each State. The Constitution also authorizes the Congress to adopt rules for its procedure.

If this were an original question, the Chair would be inclined to hold that if the House adopts rules of procedure and leaves out any committee from the list of committees whose reports are privileged that that committee would be remitted to those rules of procedure adopted by the House for its guidance. But the Chair finds that a question which the Chair thinks is identical in every particular was ruled upon in the Fifty-first Congress. I quote:

"A bill making an apportionment of Representatives presents a privileged question. On December 16, 1890, Mr. Mark H. Dunnell, of Minnesota, as a privileged question, moved that the House proceed to the consideration of the bill of the House (H. R. 8500) making an apportionment of Representatives in Congress among the several States under the Eleventh Census. The bill having been read at length, Mr. James H. Blount, of Georgia, made the point of order that under the rule the Committee on the Eleventh Census was not included among those having the right to report at any time such business as would properly come before said committee, and that, therefore, the consideration of the bill at this time was not a privileged question."

The House will see that it could not be more fairly and squarely stated than Mr. Blount stated it:

"The Speaker, Mr. Reed, being in the Chair, overruled the point of order, on the ground that a bill making an apportionment is a, privileged question, and it being a constitutional duty imposed on Congress, the consideration of the bill was clearly a privileged question."

At that time the Fifty-first Congress had its Committee on Rules, and probably there never was one more active than the Committee on Rules of that Congress. It was equipped with all the rules of procedure, and yet the Committee on the Eleventh Census was not clothed with the power to report at any time. Now, the Chair is unable to see any distinction in principle between an apportionment bill and a bill for taking the Twelfth Census. The Chair has examined this bill. It is amendatory of the act which we passed in the last Congress for taking the Twelfth Census. It is supplemental to that act. It contains simply provisions for taking the Twelfth Census, all in the same line, and all required by the Constitution.

If the decision made in regard to the consideration of the apportionment bill was sound law, it seems to the Chair clear that it ought to be a sound ruling that this is privileged. The Chair thinks gentlemen of the House will all agree that when decisions are made it is well, unless they are clearly in abuse of the rules of the House, that these precedents should be followed. It is a guide to all Members and will aid them in their work.

Now, when the bill for the Twelfth Census was first brought up the gentleman in charge of the bill, the same gentleman as now presents this, offered it as a privileged report. The Speaker did not rule upon it. The gentleman from Texas [Mr. Bailey] reserved all rights against the bill, saying that he was not clear that it was a privileged bill at all, and with that reservation the bill was considered as introduced in the House, to be printed for the information of the House, and the chairman of the committee, the gentleman from Illinois, gave notice that he would call it up the following Monday.

That being suspension day, it was passed under suspension of the rules, and the suggested questions of the week before, or some days before, were not passed on. But the Chair is clearly of the

[1] David B. Henderson, of Iowa, Speaker.

opinion that the decision made in the Fifty-first Congress is sufficient warrant for holding this to be a privileged question.

Mr. Joseph W. Bailey, of Texas, appealed from this decision of the Chair, and during the debate the Speaker said:

The Chair desires to say * * * that the point made is clearly well made; but there is not an element in this bill but that might have properly been in the original bill. What the judgment of the House may be as to the elements of this bill is another question, but it is all germane and pertinent to the enumeration of the Twelfth Census. The Members of the House may differ as to the propriety of some of these provisions, but whether they do or not, they are all in line with the demands of the Constitution which require this body to take the census every ten years and to provide the manner for doing the same. * * *

The language of the Constitution is this:

"The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct."

Now, taking the census is the basis of apportionment, and the apportionment follows. Both are absolutely and explicitly commanded by the Constitution. If the decision about the apportionment was a correct decision, there can be no escape from the Chair's holding that the provision of law for taking the census is also within the constitutional provision.

On the succeeding day, January 17, the decision of the Chair was sustained, the appeal being laid on the table by a vote of yeas 165, nays 138.

307. A bill making an apportionment of Representatives presents a question of constitutional privilege.—On December 16, 1890,[1] Mr. Mark H. Dunnell, of Minnesota, as a privileged question, moved that the House proceed to the consideration of the bill of the House (H. R. 12500) making an apportionment of Representatives in Congress among the several States under the Eleventh Census.

The bill having been read at length, Mr. James H. Blount, of Georgia, made the point of order that under the rules the Committee on the Eleventh Census was not included among those having the right to report at any time on such business as would properly come before said committee, and that therefore the consideration of the bill at this time was not a privileged question.

The Speaker[2] overruled the point of order on the ground that a bill making an apportionment is a privileged question, and it being a constitutional duty imposed upon Congress, the consideration of the bill was clearly a privileged question.

308. On February 7, 1882,[3] Mr. Cyrus D. Prescott, of New York, as a privileged question, moved that the House proceed to the consideration of the bill (H. R. 3550) making an apportionment of Representatives in Congress among the several States under the Tenth Census.

Mr. John A. Anderson, of Kansas, made the point of order that the motion was not one of privilege.

After debate the Speaker[4] said:

The Chair will state briefly that it is of opinion that the rules of the House are always subject to any constitutional provision that may be found. It may be true that under the rules, strictly speaking,

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[1] Second session Fifty-first Congress, Journal, p. 59; Record, p. 530.

[2] Thomas B. Reed, of Maine, Speaker.

[3] First session Forty-seventh Congress, Journal, p. 519; Record, pp. 960–963.

[4] J. Warren Keifer, of Ohio, Speaker.

this bill may not be in order. The Chair is, however, of opinion that the consideration of an apportionment bill by this Congress, fixing the representation in the next Congress under the last census, is one of high constitutional privilege. The duty of Congress to make an apportionment after each census is made imperative by the first clause of the second section of the fourteenth article of the amendments to the Constitution of the United States, which 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."

It is a fact of which we must take notice, that this Congress must pass an apportionment bill, fixing the number of Representatives in the next Congress, or serious consequences must follow. The consideration of this question is analogous, perhaps, to no other question that is made imperative by the Constitution upon Congress. The state of the census; the fact that this Congress alone must act, and that apportionment under the last census can not go over to the next Congress; the necessary legislation that must take place in the different States at an early time, must all be taken into account.

In view, therefore, of the character and scope of this measure, and its constitutional character, the Chair feels bound to hold that it is a question of high constitutional privilege. The Chair desires also to state in this connection that it is informed that this has been treated as a question of privilege at various times in the past history of Congressional legislation.

309. The election cases of the New Hampshire, Georgia, Mississippi, and Missouri Members in the Twenty-eighth Congress.

The House gave prima facie effect to the credentials of certain Members, although the legality of the manner of their elections was questioned.

On December 4, 1843,[1] at the time of the organization of the House, Mr. D. D. Barnard, of New York, objected that the gentlemen presenting themselves with credentials from the States of New Hampshire, Georgia, Mississippi, and Missouri had been elected on general tickets and not by districts, as prescribed by the law of Congress. The Clerk, having declined to entertain a motion, the gentlemen in question were sworn in and participated in the election of Speaker.

On December 13[2] Mr. Garrett Davis, of Kentucky, brought the subject to the attention of the House, and on December 20,[3] by a vote of yeas 148, nays 32, it was—

Resolved, That the Committee of Elections be directed to examine and report upon the certificates of election, or the credentials of the Members returned to serve in this House; and that they inquire and report whether the several Members of this House have been elected in conformity with the Constitution and law.

310. The election cases of the New Hampshire, Georgia, Mississippi, and Missouri Members continued.

The House, in 1842, declared entitled to seats Members elected at large in several States, although the law of Congress required election by districts.

Discussion of the respective powers of Congress and the States in establishing Congressional districts.

Is the establishing of districts an exercise of the power of regulating the times, places, and manner of elections?

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[1] First session Twenty-eighth Congress, Globe, pp. 2, 10.

[2] Journal, p. 50; Globe, p. 33.

[3] Journal, p. 81; Globe, p. 54.

On March 15, 1844,[1] Mr. Stephen A. Douglas, of Illinois, from the Committee of Elections, submitted the report, recommending the following resolutions:

Resolved, That the second section of "An act for the apportionment of Representatives among the several States, according to the Sixth Census," approved June 25, 1842, is not a law made in pursuance of the Constitution of the United States, and valid, operative, and binding upon the States.

Resolved, That all the Members of this House (excepting the two contested cases from Virginia, upon which no opinion is hereby expressed) have been elected in conformity with the Constitution and laws and are entitled to their seats in this House.

The second section of the apportionment act provided as follows:

That, in each case where a State is entitled to more than one Representative, the number to which each State shall be entitled, under this apportionment, shall be elected by districts composed of contiguous territory, equal in number to the number of Representatives to which said State shall be entitled, no one district electing more than one Representative.[2]

The four States whose delegations were questioned had long had laws providing for election by general ticket, and had not changed them to conform to the law of Congress. Indeed, some of these States could not have done so without calling a special session of the legislature. There was therefore a conflict of law and sovereignty between those States and the United States, and it was important to know whether or not the law of the United States was in accordance with the provision of the Constitution—

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the place of choosing Senators.

The report, after examining the text and history of this clause, concludes—

that the convention which formed and the people who ratified that great charter of our liberties intended that the regulation of the times, places, and manner of holding the elections should be left exclusively to the legislatures of the several States, subject to the condition, only, that Congress might alter the State regulations, or make new ones, in the event that the States should refuse to act in the premises, or should legislate in such a manner as would subvert the rights of the people to a free and fair representation.

The report goes on to say that even if the power of Congress under the paragraph should be considered plenary and supreme as to prescription of time, place, and manner, yet the section of law in question did not constitute an exercise of the power in the manner prescribed by the Constitution. The law was inoperative and nugatory without State legislation. It merely presumed to dictate to the State legislatures how they should perform their duties under this clause of the Constitution. But there was no authority in the Constitution permitting Congress to compel State legislatures to change laws or make new ones. The laws of Congress might supersede or alter those of the States, but Congress might not direct the form of State legislation, or require enactments to be made in obedience to certain prescribed forms. The attempt to exercise such impracticable power was the evil of the old Confederation. Hence followed the conclusion that Congress should either designate the time, specify the places, and prescribe the manner by law, or leave it to the wisdom and discretion of the several State legislatures.

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[1] Bartlett, p. 47; House report No. 60.

[2] For debates at the enactment of this law see second session Twenty-seventh Congress, Globe, pp. 445, 446, 463, 469, 496, 555, 561, 571, 576, 583, 588, 595, 601, 608.

In debating the question, on February 14,[1] Mr. Douglas took the further position that Congress had no power to district the States, for that would be to prescribe the qualification of voters as to residence—a power expressly reserved to the States. The ward "manner" in the Constitution did not include so broad exercise of power.

The minority views, presented by Mr. Garrett Davis, of Kentucky, and concurred in by Messrs. Willoughby Newton, of Virginia, and Robert C. Schenck, of Ohio, contended that the Members whose seats were in question were not elected in pursuance of the Constitution and law, and that the seats should be declared vacant.

The minority quote that clause of the Constitution providing that "this Constitution and the laws of the United States which shall be made in pursuance thereof" shall be "the supreme law of the land," anything in the "laws of any State to the contrary," and declare that the elections in the four States must be void unless the law in question should be found unconstitutional or inoperative. The State legislatures, in providing the times, places, and manner of holding elections, acted as Federal agencies, and in testing the validity of their laws the Federal Constitution was the only guide. And the Constitution evidently, from its text and history, sanctioned the adoption of the district system by the States. The idea that the general ticket was the only constitutional method was newborn and fallacious. The States had been using the district system since the beginning of the Government.

If the clause relating to prescribing the times, places, and manner of elections did not give the power to Congress to determine whether Representatives should be chosen by general ticket in districts, then the State legislatures had not that power which they had been exercising so long. The States certainly had no implied power to conduct this or any other operation of the General Government. If the constitutional clause did not give, both to the legislatures and the Congress, the power to direct that Members of the House should be elected by districts or general ticket, then the regulation belonged to Congress exclusively as an implied power.

The minority proceeded to discuss the power of Congress to "alter" the regulations of States on this subject, holding that it gives to Congress plenary power to alter any regulations that the State may make on the subject.

Congress being able to exercise the undoubted power to provide for the whole manner of holding such elections, it could hardly be held that a partial exercise of that power was not constitutional. The objection, therefore, was not that Congress had exercised an unconstitutional power, but that it had defectively exercised a constitutional power. The question, therefore, was not whether the law was unconstitutional, but whether it could be considered a nullity. But because the regulation, standing alone, could not be executed did not prove it a nullity. The Constitution itself required legislation to make operative its provisions in respect to this subject. But the law of Congress made in pursuance of the Constitution was the supreme law of the land, and State legislatures were therefore bound to conform to it.

The minority views conclude with a paragraph deprecating an assault by the House of Representatives on a law of Congress.

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[1] Globe, p. 277.

From February 6 to February 14[1] the report was debated in the House. On February 13 in the House Mr. George C. Dromgoole, of Virginia, offered an amendment to the resolutions of the majority of the committee. This amendment, in the nature of a substitute, omitted all reference to the apportionment law, but declared all the Members of the House (except the two Virginia contested cases) from the unchallenged States elected and entitled to their seats. The amendment further declared the Members from New Hampshire, Georgia, Mississippi, and Missouri individually entitled to their seats, having been "duly elected."

On February 14 Mr. Dromgoole's amendment was agreed to—yeas 126, nays 57.

Then the question being on agreeing to the resolution as amended by the substitute, a division of the question was allowed, so that a separate vote was taken on each individual, and they were severally declared duly elected and entitled to their seats by votes not varying greatly from that by which the substitute was agreed to.

311. The New Hampshire election case of Perkins v. Morrison in the Thirty-first Congress.

The New Hampshire districts being changed after Representatives to the Thirty-first Congress were elected, an election to fill a vacancy was called in the new district, and the election was sustained.

Discussion of the powers of Congress and the States as to fixing the times, places, and manner of elections.

On December 16, 1850,[2] the Committee on Elections reported on the contested election of Perkins v. Morrison, from New Hampshire. The whole case turned on the apportionment act of the State legislature of July 11, 1850. This act, in establishing the Third district, included in it four towns which were in the Second district under the former apportionment, enacted by the law of July 2, 1846. The act of July 11, 1850, repealed all acts inconsistent with it and contained a provision that it should go into effect from its passage.

On September 9, 1850, Mr. James Wilson, who had been elected for the old Third district, resigned, and by precept of the governor a special election was held in the new Third district on October 8, 1850. At this election George W. Morrison received a majority of 63 votes over Jared Perkins. But Mr. Perkins showed that if the election had been held within the limits of the old district only he would have been elected, since Mr. Morrison's majority came entirely from the four towns included by the law of July 11, 1850.

The majority of the committee found:

By the Constitution of the United States, the right to prescribe the times, places, and manner of holding elections for Representatives in each State is declared to be in the legislature thereof, subject to the superior power of Congress to make or alter such regulations by law. That, power, however, Congress has never exercised, unless it was partially exerted by the second section of the act of June 25, 1842, to which reference has already been made. Limited only, therefore, by the provisions of that section, the legislature of New Hampshire had plenary power to prescribe by what districts the elections should be made, and to change the boundaries of those districts at its pleasure and at any time. No constitutional provision, no law of Congress, restrains this right originally to form, or subsequently to alter, the limits of

[1] Journal, pp. 353, 356, 359, 362, 365, 367, 379; Globe, pp. 236, 241, 248, 252, 255, 264, 276.

[2] Second session Thirty-first Congress, 1 Bartlett, p. 142; Rowell's Digest, p. 135; House Report No. 3.

Congressional districts, at the discretion of the State legislature. It is conceded that Congress could by law have exclusively determined the extent of each district, and enacted that it should remain unchanged under the apportionment during the entire period of ten years. But this has not been done. The act of June 25, 1842, only enacted that the elections (alike general and special) should be by districts of contiguous territory; and, under the law, the limits of each district must be as they were before its passage—such as the legislature of the State may from time to time prescribe. The act of Congress is merely commendatory. It was not possible to delegate to the State legislature the legislative power vested by the Constitution in Congress. It follows, of course, that the districting acts are the untrammeled action of the legislative assembly of New Hampshire, and consequently that the power to change the boundaries of a district remains unlimited in the same legislature. Your committee are not informed that this position has hitherto ever been seriously controverted. Such appears to have been the common understanding. The legislatures of several of the States, after having formed Congressional districts in conformity with the recommendation of the act of Congress of June 25, 1842, have subsequently redistricted the States, or made changes in the boundaries of the districts previously formed. North Carolina, Georgia, Ohio, and Pennsylvania are among the number. Representatives elected from the districts thus reorganized have been admitted to seats in the House without objection. More than twenty Representatives elected by these remodeled districts sit unchallenged in the present Congress.

But it is urged, on behalf of the contestant, that if the power be conceded to the legislature of New Hampshire to redistrict the State, the distracting act of July 11, 1850, does not extend to an election to fill vacancies in the Thirty-first Congress. In terms, however, it unquestionably does. It took effect from its passage. It repealed so much of the former act as was inconsistent with its provisions. Immediately on its passage, therefore, there were no Congressional districts in New Hampshire other than those limited by this later act. An election to fill the vacancy occasioned by the resignation of Mr. Wilson could therefore have been held in no other manner than that in which the sitting Member was elected. The Third district, by which Mr. Wilson was elected, was a creature of the act of July 2, 1846; it was sustained by it and ceased with it. When, therefore, an election was ordered to be held on the 8th of October, 1850, no political division, no Congressional district, embracing exclusively the counties of Hillsborough and Cheshire, had any legal existence. It had given place to the Third district, as limited by the Second districting act. The governor of the State could issue his precept to none other than an existing district.

The committee also found no difficulty in the fact that the legislature had extended the provisions of the act to vacancies occurring in the Thirty-first Congress. While it might be bad policy to change districts once made, yet the legislature undoubtedly had that power. Nor were the committee impressed with the argument that the voters of the four towns, having voted both in the Second and Third districts, enjoyed double representation. This they conceived to be founded on an erroneous view of the theory of constitutional representation. The division of a State into districts was a regulation of the manner of elections, not of the extent of representation. The argument that a legislature might so change districts that the governor could not tell in which to call an election in case of vacancy did not weigh with the committee, since it did not seem reasonable to argue that a power did not exist simply because it might be abused.

Therefore the majority of the committee reported a resolution declaring Mr. Morrison entitled to the seat.

The minority took the ground that the act of 1850 was not intended to apply to elections to this Congress, and that if it were so intended it was a law that the legislature had no authority to make. Therefore the minority reported a resolution declaring Mr. Perkins entitled to the seat.

The case was debated fully in the House on January 7, 8, 9, and 10, 1851.[1]

[1] Journal, pp. 119, 124, 126–130; Globe, pp. 183, 193, 204.

On a motion to substitute the minority for the majority proposition, the yeas were 84, nays 103.

On agreeing to the resolution of the committee that Mr. Morrison was entitled to the seat, there were 98 yeas and 90 nays. So the sitting Member was confirmed in his seat, Mr. Morrison having taken his seat on his credentials at the beginning of the session.

312. The North Carolina election case of Pool v. Skinner in the Fortyeighth Congress.

The North Carolina districts being changed after Representatives to the Forty-eighth Congress were elected, the House did not disturb the Member chosen in a new district to fill a vacancy in an old district.

Discussion as to the functions of a governor in calling an election to fill a vacancy in the Congressional representation.

On March 8, 1884,[1] Mr. Henry G. Turner, of Georgia, from the Committee on Elections, submitted the report of the majority of the committee in the North Carolina case of Charles C. Pool v. Thomas G. Skinner.

On November 7, 1882, at the regular election for Members of the Forty-eighth Congress, Walter F. Pool was chosen a Representative from the First district of the State.

On March 6, 1883, the State was redistricted by the legislature, and the First Congressional district was changed by taking away from it Bertie County and adding Carteret County. This act, by its terms, was in force "from and after its ratification."

On August 23, 1883, Mr. Walter F. Pool died.

The majority thus treats the question arising:

Subsequently the executive authority of the State issued a writ of election directing an election to be held on the 20th day of November, 1883, in the counties of the First district, as defined by the act of March, 1883, to fill the vacancy caused by the death of Mr. Pool. At this latter election Thomas G. Skinner and Charles C. Pool were opposing candidates, and Mr. Skinner was, by the proper authority, declared to have been elected.

It is proper here to add that Mr. Charles C. Pool has served upon Mr. Skinner notice of contest, to which Mr. Skinner has filed his answer, and from the attorneys for the parties we have obtained the facts on which the foregoing statement is founded:

The Constitution, article 1, section 4, clause 1, provides that—

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators."

Section 2, clause 4, of the same article of the Constitution provides that—

"When vacancies occur in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies."

The question is whether, after a Representative is elected by the people of a district before a change of its boundaries, a vacancy caused by his death can be filled by the people of the district after its boundaries are changed.

The Constitution seems to treat Members of the House as Representatives of the States, and not of districts merely; and the States have the right to determine what portion of their people shall choose these Representatives, subject only to the last apportionment act Of Congress. The State of North

[1] First session Forty-eighth Congress, House Report No. 727; Mobley, p. 66.

Carolina, by the act ratified on the 6th of last March, has provided "that for the purpose of selecting Representatives to the Congress of the United States, the State shall be divided into nine districts." This language might well be said to cover and include all elections, general as well as special; nor does it exclude any Congress. But this view is greatly reenforced by the second section of the act, which provides that it "shall take effect from and after its ratification." The old arrangement of the counties into eight districts was therefore abolished. The governor disregarded the old law, which had been superseded without any reservation, and followed as well as he could the law which was of force at the time of Mr. Walter F. Pool's death, and at the date of the writ of election.

There is no provision in the statutes of North Carolina which prescribes the place of the election made necessary under the special circumstances of this case, and the effort seems to have been made to approximate in the location of the election, as nearly as possible under the existing distribution of the counties into districts, to the territory the people of which chose Mr. Pool as their Representative.

The practice in the States in cases similar has been variant, the election in some cases having been ordered in the new district, in others in the old district. The practice in the House has been uniformly to acquiesce in the action of the State authority; and, following this line of consistency, if the governor of North Carolina had ordered the election to fill this vacancy in the old district, we would not have felt it our duty to recommend that the election should be vacated. By the Constitution of the United States, before cited, the governor is constituted the tribunal to determine when and where to order an election to fill a vacancy, and where the laws by which he is to be guided are doubtful his decision ought to be followed by Congress. This course is founded upon precedent, upon the respect due to State authority, and upon that public policy which requires full representation of the States.

It has been contended that the code of North Carolina (section 2722) in reference to vacancies furnishes the rule for a case like this, but, in our opinion, that section only requires that the governor shall issue his writ of election, and by proclamation require the voters in the different townships in their respective counties, at such time as he may appoint, and at the places established by law, then and there to vote for a Representative in Congress to fill the vacancy. Such is the language of the section, and it does not militate against the course which the governor pursued in this case.

Some stress has been laid upon section 3868 of the code of North Carolina, which is as follows:

"The repeal of the statutes mentioned in the preceding section shall not affect any act done, or right accruing or accrued, or established, or any suit or proceeding had or commenced in any case before the time when such appeal shall take effect; but the proceedings in every such case shall be conformed when necessary to the provisions of this code."

The previous section repeals all public and general statutes of the State with the exceptions and limitations just enumerated. But it must be borne in mind that this code containing this provision did not take effect until the 1st day of November, 1883, while the new districting act, which was also included in this code, took effect from and after March 6, 1883, and contained no such provision. Besides, we think that this section of the North Carolina code relates only to private vested rights, such as could be asserted in the courts.

Much has been said about absurd consequences which may follow under the view taken in this report; but we think that such an argument would be more fitly addressed to the legislatures of the States. And we do not hesitate to say that we would be glad to see such a regulation provided by the States as would obviate these absurd consequences. Perhaps Congress might effectuate this end in the apportionment act made necessary after every census.

As the result of this report, we submit the following resolution, and recommend its adoption:

Resolved, That Thomas G. Skinner retain his seat without prejudice to the ultimate right to the seat involved in the contested-election case of Charles C. Pool v. Thomas G. Skinner.

Mr. J. C. Cook, of Iowa, while concurring in the conclusions of the majority, dissented from the doctrine therein set forth:

Representation of the States in Congress by districts has so long been the universal rule that any doubt of the power of Congress to require the subdividing of States must be regarded as set aside. When a State has been divided and Representatives elected for a certain Congress, each district must be regarded as an existing fact for and through that entire Congress, and as the person elected from a particular district has the right to hold the office during the legal term of that Congress, so his office must

be held to exist in law and in fact for the entire term of the Congress of which he is a Member. As the State legislature can not legislate him out of office, so it can not destroy the office which he fills; no more can it destroy the district upon which the office rests.

I am clearly of the opinion that the only people who had a right to participate in the election to fill the vacancy were those of the old district, and that all votes cast outside of this district were void. The governor's duty was ministerial. He could do no more than fix the day for the election. The fact that he invited the people of Carteret County to participate in the election did not authorize them to vote, neither do I think that his failure to invite the people of Bertie deprived them of their fixed right to vote. The only material thing he was authorized to do was to fix the time for the election. Suppose he simply called the election with sufficient definiteness to indicate the officer to be voted for or the vacancy to be filled and set the time, but had not mentioned the counties in which the election should be held, would there be any question as to the validity of an election held in the old district? As he had no power to determine or change the district, what he attempted in that direction was mere surplusage in his proclamation. From this it seems to me the people of Bertie County had a right to participate in the election; certainly if they had, their votes would here be counted.

It is universally held when notice of an election is required by law and is not given that this is not fatal. This being a special election can not change the rule. The only difference is that in the one the time is fixed by law, while in the other this is fixed by the proclamation of the governor. Mr. Skinner received a majority of the votes cast in the old district. The fact that the people of Bertie County did not vote can not invalidate the act of those who did vote. It will not do to say no opportunity was given them. They could have asserted their rights given them by law. If no officers appeared to open the polls they could organize and hold the election at the places fixed by law. When we concede, as we must, that had they done this their votes would be made effective here at least, it must follow that having failed to do so they can not complain.

But if there is doubt on the foregoing proposition, there can be none on the following:

Mr. Skinner is here duly returned as a Representative from his State. No fraud is charged in his election, no misconduct on the part of any one; nothing more than a mistake on the part of the governor in calling the election. Neither the people of Bertie County nor any one of them complains. The State acquiesces, the district is satisfied, and no complaint is made by any one in Bertie County.

In view of all this, bearing in mind the fact that there was no intentional wrong, no fraud upon the ballot, or affirmative interference with the right of the citizens, considerations of "respect due to State authority, and that public policy which requires full representation of the States" would dictate that the House should not, of its own motion, declare a vacancy and require another election.

The minority views, filed by Mr. A. A. Ranney, of Massachusetts, hold—

that the right of representation for the full term of the Forty-eighth Congress inhered in the people of the old district as an accrued or an established right, and that they alone had the right to fill the existing vacancy.

The minority continue:

This right was secured to them on a fundamental principle of our representative Government and by positive law, both Federal and State. We hold these principles and these propositions to be radical and fundamental in our Government: (1) No portion of the people or territory of a State can be rightfully deprived of a representation in Congress; (2) no portion of the people or territory are rightfully entitled to a double district representation in Congress.

If the present election is sustained, both of these propositions are violated. The people and territory of Bertie County, with a population of 16,392 and 2,588 voters, are deprived entirely of all district representation in the Forty-eighth Congress, and Carteret County, with a population of 9,756 and 1,600 voters, is allowed a double representation.

It also appears that by means of calling and holding the election in the new district instead of the old the political complexion of the representation has been reversed. Bertie County casts a Republican majority of about 800, Carteret County a Democratic majority of about 400, and contestee was returned as elected by a majority of about 700.

The election was called by the lieutenant-governor in the absence of the chief executive. The essential facts are not in dispute.

A construction of the law which works such an infraction of important political rights and results in a wrong so palpable and gross will not be readily accepted as designed by the enactors thereof. We believe the true rule to be as enunciated by Judge McCrary (sec. 179), "That a district once created, and having elected a Representative in Congress, should be allowed to continue intact for the purpose of filling any vacancy which may occur until the end of the Congress in which it is represented." It will be seen, we think, that the existing legislation not only admits of the application of this rule in this case but allows of no other reasonable construction.

Having, examined the question of fact as to what the laws of Congress and the State actually provided, and having become satisfied that the state of the law was such as to require the election to have been held in the old district, the minority continue:

The majority report cites that clause of the Constitution which reads as follows (Art. I, sec. 4, clause 1):

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators."

But we can not see how this gives any support to the action of the executive.

The governor had no right, and was not empowered by law, to determine in what district the election should be held to fill a vacancy. The power is given to the legislature of the State to prescribe the time, place, and manner of holding elections, with a power reserved to Congress to alter the regulations made or to make them itself. It does not rest with the governor to do it. The general assembly has made regulations in North Carolina, giving the governor power to fix the time for holding special elections, and making his duty to issue a writ of election, and by proclamation to require the voters of the townships in the counties composing a district to fill a vacancy in case it occurs. In general elections the time is fixed by statute (Code, sec. 2721). Except as to the time everything is fixed and regulated by legislative action, and when the governor has fixed the time and issued the writ, the election is to be held in every respect as established by law (sec. 2722 of Code). An attempt seems to be made in the majority report to prove that the governor has legislative power, so he may determine what district the election shall be held in. If this were so he might have ordered an election at large, or in anyone of the old eight, or either of the nine new, districts, which would be absurd. Districts are established by law, and that law binds the governor as much as any other citizen. The governor has no authority beyond what is conferred upon him by law, and when he assumes any other he usurps it.

If it is meant to be claimed that the governor's interpretation of the law is binding, we have only to call the attention of the House to the well-recognized law that the governor is not a judicial officer, but his functions are purely executive in their character. Decisions of State courts in interpreting local statutes are heeded in the Federal courts. It is not so with the interpretations put upon the law by an executive officer.

The minority then cite the Tennessee cases of 1871, and the Iowa case in the Forty-sixth Congress, and after commenting thereon, says:

It is vain and a mistake to treat a Congressional district as a corporation, with officers and election machinery, for as such it has none. They exist in the townships and the counties exclusively. No powers were needed, therefore, to be reserved to the districts in analogy to dissolved corporations. A Congressional district has no corporate existence whatever. Defining its boundaries is only naming the counties, the voters in which are to vote for a Representative to Congress. Numbering them is purely arbitrary, and correspondence in numbers does not determine the identity of the district as to counties composing the same. In the new nine, number one may not have contained a single foot of territory which was embraced in the old number one.

We have treated the case thus far under the particular legislation of North Carolina. The distinguishing elements existing take this case out of the operation of the rule and doctrine followed in

Perkins *v.* Morrison (1 Bart., 142), and which gave rise to the conflict of precedents in this House, considered by McCrary in his work (secs. 179, 180). The doctrine of that case was reversed by case of Hunt *v.* Menard (2 Bart., 477), although the latter was complicated somewhat by another question of fraud. In both of those cases, and in the case of Mr. Taylor, of Ohio, in the Forty-sixth Congress, and of Doctor McLean, in the Forty-seventh Congress, the original election was not held under an act of Congress. The old districting acts had been absolutely repealed, and there was no State law providing for filling vacancies. Hence all the trouble in those cases. No such state of law exists in the present case.

The importance of these distinctions in two respects will be appreciated and shown by referring to the report of the committee in Hunt *v.* Menard, section 180 of the work of Judge McCrary. We quote a portion of the same:

"The act of the legislature of Louisiana of August 22, 1868, making a new division of the State into its five Congressional districts, by its terms purports to repeal all laws and parts of laws in conflict with said act, but is silent on the subject of vacancies that might occur in the districts as then existing.

"The language of the minority report in the case of Perkins, on the New Hampshire statute, is appropriate on this point as well as on this case generally, and we quote from it as follows:

"'It does not purport to provide for any method of filling vacancies that might occur in the future, and beyond all question it was understood as providing only for the election of Members to future Congresses. Such are the terms of the act, and such must also be its spirit. A vacancy in the House of Representatives is the occurrence of an event by which a portion of the people are left unrepresented and the filling of that vacancy is directed by the Constitution in such explicit language as requires no aid from State enactments to perfect the right.'

"The second section of the first article of the Constitution reads: 'When vacancies occur in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.' This is the only provision of law on the subject of vacancies, and it is ample and sufficient."

Concluding, the minority say:

We are of opinion that the election should be declared invalid. It is not a case of mere irregularity in nonessential particulars or one where no substantial injury has been done. The whole foundation of the election is illegal and the infirmity is deep and fatal. Over 16,000 people have been deprived of all district representation and some 10,000 have got a double representation, and the political complexion of the representation has been reversed. That end may have been the guiding consideration which led to the action of the executive. If not so in this case, such may be the case hereafter under like circumstances, and the other party suffer at that time. Other cases are likely to arise this term of Congress. One has already arisen, and the vacancy has been filled in the old district, and the question may come up again soon.

Assuming that the executive could have called the election either in the old or the new district, and had it legal, as found by the majority report, the conduct of the lieutenaut-governor, acting as chief in the temporary absence of the governor, in disregarding the three last precedents of this House and the doctrine approved in the standard authority in Congress, cannot easily be reconciled with the assumption of good faith.

The contention that there has been something done by which the rights of the aggrieved parties have been lost does not seem to us to be entitled to much consideration. They are before the House by the contestant, who is authorized by an act of Congress to represent them in conducting the contest. No memorial was necessary. There has been no such thing as what is called in law acquiescence. Enforced submission to executive authority is not acquiescence as known to the law. No appeal to the courts would have been of any avail, as they had no jurisdiction. An appeal here was the only means of redress allowed by law. This is a public inquiry, and not altogether personal, and the House has a duty to perform under the Constitution, which requires it to determine the validity of the election, and does not allow it to elect Representatives nor to admit to seats persons not duly elected.

The people of Bertie County had no official notice of the election, and if they had heard of it otherwise any effort to vote would have been in vain, as, presumably, no polls were opened and no

election machinery set in motion in that county. It was a special election, and the law did not fix the time.

Besides this, the question of acquiescence is a question of fact, and the committee had no authority to hear or take evidence upon it, and have not done so. We do not know but that voters in Bertie County did try to vote. Acquiescence is not nonaction alone. There must be failure to act where action would have availed.

We recommend the passage of the following resolutions:

Resolved, That the old First Congressional district of North Carolina, in which Walter F. Pool was chosen as Representative to the Forty-eighth Congress, was the only proper district in which to call and hold an election to fill the vacancy caused by his death.

Resolved, That Thomas G. Skinner is not entitled to retain longer his seat in this House as Representative from the First Congressional district of North Carolina to the Forty-eighth Congress.

This report was called up in the House both on June 12 and 27, 1884,[1] but on each occasion the House voted not to consider it. On July 5, 1884,[2] it was postponed to the second Monday of December.

Again on February 27, 1885,[3] it was again called up, but the House declined a third time to consider it. And Mr. Skinner retained the seat until the end of the Congress.

313. The Kentucky election case of Davidson *v.* Gilbert in the Fifty-sixth Congress.

The House declined to interfere with the act of a State in changing the boundaries of a Congressional district.

Discussion of the respective powers of Congress and the States in fixing the times, places, and manner of elections.

On March 1, 1901,[4] Mr. R. W. Tayler, of Ohio, from the Committee on Elections No. 1, submitted a report in the case of Davidson *v.* Gilbert, from Kentucky. This contest arose chiefly from the fact that on March 11, 1898, an act was passed by the legislature changing the boundaries of the Eighth and Eleventh Congressional districts of Kentucky, whereby the county of Jackson was taken from the Eighth district and added to the Eleventh. Jackson County having a large Republican majority, the effect of its transfer to the Eleventh was to change the Eighth from a district which had immediately previously been Republican into a Democratic district.

The claims of the contestant that the act was contrary to the State constitution, and that it had never properly passed the legislature, are dismissed by the committee without discussion as having no foundation.

The third objection was that this act contravened an act of Congress, and this the committee considered at length in the light of Article I, section 4, of the Constitution—

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

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[1] Journal, pp. 1432, 1569.

[2] Journal, p. 1701.

[3] Second session Forty-eighth Congress, Journal, p. 709.

[4] Second session Fifty-sixth Congress, House report No. 3000; Rowell's Digest, p. 603.

The report goes on to say that this is the first time that Congress has been asked to undo the work of a State which had divided itself into a proper number of Congressional districts. Reviewing the history of apportionments, the report says:

For nearly forty years the States proceeded to elect Representatives, some at large and some by districts. In 1840 the policy of electing by districts was generally approved and adopted, but several of the States continued to elect their Representatives by the vote of the entire State. The first legislation on the subject going beyond the mere apportionment of the States was enacted in 1842. In the apportionment act of that year an amendment was added in the House providing for the division of the several States into districts, composed of contiguous territory, equal in number to the number of Representatives to which the State was entitled, and each district to elect one Representative, and no more.

The amendment provoked considerable discussion, but was finally adopted.

The apportionment act, based upon the census of 1850, made no provision for the division of States into districts, nor did the act of 1862. The act of February 2, 1872, provided that Representatives should be elected by districts composed of contiguous territory, and added the provision "containing, as nearly as practicable, an equal number of inhabitants." The same provision appears in the apportionment acts of 1882 and 1891.

So far as legislative declaration is concerned, it is apparent that Congress has expressed an opinion in favor of its power to require that the States shall be divided into districts composed of contiguous territory and of as nearly equal population as practicable. Whether it has the constitutional right to enact such legislation is a very serious question, and the uniform current of opinion is that if it has such power under the Constitution that power ought never to be exercised to the extent of declaring a right to divide the State into Congressional districts or to supervise or change any districting which the State may provide.

The best opinion seems to be that the Constitution does not mean that under all circumstances Congress shall have power to divide the States into districts, but only that the constitutional provision was inserted for the purpose of giving Congress the power to provide the means whereby a State should be represented in Congress when the State itself, for some reason, has failed or refused to make such provision itself.

In support of this view the report goes on to quote the views of Justice Story, Alexander Hamilton, James Madison, Chancellor Kent, Daniel Webster (as presented in a report made in the Twenty-second Congress), and Nathan Clifford (presented in a speech in the Twenty-seventh Congress), and concludes with this opinion:

Your committee are therefore of opinion that a proper construction of the Constitution does not warrant the conclusion that by that instrument Congress is clothed with power to determine the boundaries of Congressional districts or to revise the acts of a State legislature in fixing such boundaries and your committee is further of opinion that even if such power is to be implied from the language of the Constitution it would be in the last degree unwise and intolerable that it should exercise it. To do so, would be to put into the hands of Congress the ability to disfranchise, in effect, a large body of the electors. It would give Congress the power to apply to all the States, in favor of one party, a general system of gerrymandering. It is true that the same method is to a large degree resorted to by the several States, but the division of political power is so general and diverse that, notwithstanding the inherent vice of the system of gerrymandering, some kind of equality of distribution results.

Therefore the committee reported a resolution confirming Mr. Gilbert's title to his seat.

The report was not acted on by the House, Mr. Gilbert of course retaining the seat.

314. The California election case of F. F. Lowe in the Thirty-seventh Congress.

A State having elected on a general ticket three Representatives when it was entitled to but two, the House denied a seat to the one receiving the fewest votes.

A State sending three Representatives when it was entitled to but two, the House gave prima facie effect to only two credentials.

Discussion of the census and apportionment law of 1850, which applied to succeeding censuses and apportionments.

California having in good faith elected one Member in excess of her apportionment, Congress by law provided for his admission.

On December 2, 1861,[1] at the beginning of the second or regular long session of the Congress, two Members from California, Messrs. Aaron A. Sargent and T. G. Phelps, appeared, presented their credentials, and were sworn in without objection.

On the same day Mr. Phelps presented the credentials of Mr. F. F. Lowe as a third Member from California;[2] but no motion or request was made that he be sworn in, and without debate his credentials were referred to the Committee on Elections.

On April 14, 1862,[3] the committee reported, setting forth the following state of facts:

By the apportionment under the Eighth Census [of 1860] California is entitled to three Representatives, and it is claimed by the memorialist that that apportionment applies to the present or Thirty-seventh Congress. By special provision of statute, enacted July 30, 1852, it was provided that California should have two Representatives till a new apportionment should take effect. But that State, believing that the apportionment based on the Eighth Census had already taken effect, did, at its general election held on the first Wednesday of September last, elect by general ticket three persons to represent her in the present Congress.

The Constitution provides that Representatives "shall be apportioned among the several States which shall be included within this Union according to their respective numbers;" and that "the actual enumeration shall be made within three years after the first meeting of Congress, and within every subsequent ten years in such manner as they shall by law direct." The census and apportionment thus connected together in the Constitution have been connected together in all subsequent legislation by Congress. It has been the course of legislation, up to the year 1850 and the taking of the Seventh Census, to provide for the taking of each census by special act, and, immediately upon its completion by a like special act to determine the number of Representatives, and apportion the same among the several States according to such census. But in providing for the taking of the Seventh Census in 1850 Congress undertook to establish a permanent system both for the taking of all future censuses and for all future apportionments. (Stat. L., vol. 9 p. 428.) That statute requires that the census shall be taken and returned to the Secretary of the Interior on or before the 1st day of November next ensuing the 23d day of May, 1850, the date of the act. The statute then provides, section 23, "If no other law shall be passed providing for the taking of the Eighth or any subsequent census of the United States on or before the 1st day of January of any year, when, by the Constitution of the United States, any future enumeration of the inhabitants thereof is required to be taken, such census shall in all things be taken and completed according to the provisions of this act." No other provision for the Eighth Census has been made.

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[1] Second session Thirty-seventh Congress, Journal, pp. 6, 7; Globe, pp. 2, 4.

[2] The three were elected on a general ticket, and it appears that Mr. Lowe received the smallest vote of the three.

[3] House report No. 79.

The statute then proceeds to provide, before the census is taken, for the then next apportionment to be based upon the census not yet taken, and for all further apportionments, as follows:

"SEC. 25. From and after the 3d day of March, 1853, the House of Representatives shall be composed of 233 Members, to be apportioned among the several States in the manner directed in the next section of this act.

"SEC. 26. So soon as the next and each subsequent enumeration of the inhabitants of the several States, directed by the Constitution of the United States to be taken, shall be completed and returned to the office of the Department of the Interior, it shall be the duty of the Secretary of the Interior to ascertain the aggregate representative population of the United States, by adding to the whole number of free persons in all the States, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons; which aggregate population he shall divide by the aggregate number 233, and the product of such division, rejecting any fraction of a unit, if any such happen to remain, shall be the ratio or rule of apportionment of Representatives among the several States under such enumeration; and the said Secretary of the Department of the Interior shall then proceed in the same manner to ascertain the representative population of each State, and to divide the whole number of the representative population of each State by the ratio already determined by him as above directed; and the product of this last division shall be the number of Representatives apportioned to such State under the then last enumeration."

The law further directed the Secretary of the Interior, "without delay" to make out and transmit to the executive of each State a certificate of the number of Representatives the State would be entitled to. And the Secretary of the Interior notified the governor of California that he had apportioned three Representatives to the State for the Thirty-eighth Congress. The State, however, concluded that they were entitled to them for the Thirty-seventh Congress under the law.

The majority of the committee held that the claim was based upon too strict and narrow a construction of the law of 1850. That law, as a whole, was intended to provide "that each subsequent census and apportionment should be made precisely as was provided in that statute for those then about to be made." And the law of 1850, therefore, should be held to mean that the time of future apportionments should correspond to that therein provided, the apportionment taking effect March 3, 1853. So the next apportionment should take effect March 3, 1863. The committee felt that every reasonable rule of construction suggested this conclusion. The committee say:

So far as the committee have been able to ascertain from the contemporaneous history, or the discussions in either House on its passage, or any subsequent criticism of it, till the present case has arisen, the idea never occurred to anyone that it provided, in this regard, one rule for the census of 1850 and consequent apportionment and a different one for any subsequent census and apportionment. On the other hand, there is much reason, if not constitutional obligation, that the rule should be the same for all, and that the last apportionment having been fixed to take effect "from and after the 3d day of March, 1853," the next should not take effect till ten years thereafter, or from and after the 3d day of March, 1863. The apportionment must follow and be based upon the census. The Constitution says Representatives shall be apportioned among the several States "according to their respective numbers;" and to ascertain these numbers the same section provides that "the actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct." The Constitution evidently contemplated a Census only once in ten years, and consequently a new apportionment based upon such census only once in ten years. The time when the First Census should be taken was not fixed, only it must be "within three years after the first meeting of the Congress of the United States." Now, Congress did provide for taking the First Census in 1790, the next in 1800, and in 1810, and in 1820, 1830, 1840, and 1850. So Congress has also provided by legislation, once in every ten years, that the apportionment, based upon

each one of these enumerations, respectively, shall take effect "from and after the 3d day of March, 1793," "from and after the 3d day of March, 1803," and from and after the same day in 1813, 1823, 1833, 1843, and 1853. In the absence of express enactment to the contrary, the committee can not doubt that it was likewise the intention of Congress, in providing for the Eighth Census, to provide that it shall be taken in 1860, and that the apportionment based upon it, like all that had preceded it, should take effect in the corresponding year, viz from and after the 3d of March, 1863. If it be held that apportionments of Representatives can not be made oftener than a Federal census is taken, and that the Constitution requires that that shall be taken only once in ten years, then it follows that the apportionment based upon the census of 1860 can not take effect till the 4th of March, 1863; else the period between the last two apportionments would be eight instead of ten years, while the period between all the rest would be ten years.

All construction of the constitutional obligation upon Congress to provide by law for the several "enumerations," and the apportionments based upon them, is uniform, and the course of legislation is without any conflict, all uniting in forcing upon the committee the construction they put upon this statute, that its intendment is that the apportionment based upon the census of 1860 shall take effect from and after the 3d of March, 1863.

The committee then discussed the inconveniences of any other construction were the same rule contended for by California applied to other States.

The committee say further:

But this Congress has, by positive enactment, declared when, in its opinion, the apportionment based upon the census of 1860 shall take effect, In an act passed only the last month, to modify that apportionment and give to several States therein named a greater number of Representatives than the apportionment under the statute of 1850 had given them, Congress has expressly enacted that the act shall take effect from and after the 3d day of March, 1863.

The minority of the committee, laying stress on the mandate that the Secretary of the Interior transmit "without delay" to the States certificates of the numbers of Representatives they were entitled to, and upon their inability to find any provision of the statute to prevent the apportionment taking effect immediately, contended that the apportionment applied to the Thirty-seventh Congress. Moreover, an act of July 30, 1852, provided that California should retain the number of Representatives provided by the act of admission to the Union "until a new apportionment." Congress also had apportioned a direct tax to California on the basis of the census of 1860. Could she, under the Constitution, be deprived of the Representatives allowed by that census?

Either California was entitled to three Representatives or none by virtue of the last election. All were elected on a general ticket, and the minority could not see how Messrs. Phelps or Sargent could retain their seats if Mr. Low be excluded. It was a well-settled rule of the House "that if any State return more Members than she is entitled [to], the election is void, and all must be excluded."

As to another argument of the majority, the minority urged that States, like individuals, could not be deprived of their legal rights because others failed to ask for theirs.

The report was debated on May 6,[1] and on the same day the question was taken on a substitute proposition declaring Mr. Low entitled to the seat. This was disagreed to—yeas 49, nays 69.

[1] Globe, pp. 1967–1971.

Then the resolution of the committee declaring Mr. Low not entitled to the seat was agreed to without division.[1]

On June 2, 1862, an act of Congress[2] was approved, reciting the fact that California had population sufficient for three Representatives, that three had been duly elected, as appeared by the governor's certificate, and that direct taxes had been apportioned on a basis to justify three Representatives; and therefore increasing the representation of the State to three Members for the Thirty-seventh Congress.

On June 3, in accordance with this act, Mr. Low appeared and took the oath.[3]

315. The Tennessee election case of Thomas A. Hamilton in the Fortieth Congress.

The House did not give prima facie effect to credentials regular in form but borne by a person in addition to the number of Representatives allowed the State.

Instance wherein the House denied the privileges of the floor to a claimant for a seat.

On December 7, 1868[4] Mr. Horace Maynard, of Tennessee, presented the credentials of Thomas A. Hamilton as a Member-elect from the State of Tennessee at large. It was explained that Tennessee thought herself entitled to this additional Representative because of the large number of colored people she had voluntarily admitted to citizenship. It was admitted that this Representative would be in addition to the number allowed Tennessee by the law of Congress.

No proposition was made to administer the oath to Mr. Hamilton, although his credentials were regular in form; and they were referred to the Committee of Elections without division.

Mr. Maynard moved, however, that he be allowed the privileges of the floor pending the decision of his claim. After debate as to the precedents, this motion was decided in the negative—ayes 45, noes 85.

316. The Tennessee election case of Thomas A. Hamilton, continued.

The House denied the claim of a State to representation greater than the apportionment had given to her when the reasons for such claim applied to many other States.

Discussion of the constitutional questions relating to apportionment.

Review of the acts of Congress giving increased representation in special cases.

On February 18, 1869,[5] Mr. Samuel Shellabarger, of Ohio, submitted the report of the committee, who were unanimously of the opinion that in the absence of an act of Congress increasing the representation of the State the claimant could not be admitted.

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[1] Journal, pp. 647, 648.

[2] 12 Stat. L., p. 411.

[3] Journal, p. 787; Globe, p. 2532.

[4] Third session Fortieth Congress, Journal, pp. 8, 9; Globe, pp. 8, 9.

[5] House Report No. 28 ; 2 Bartlett, p. 499; Rowell's Digest, p. 228; Globe, pp. 1329, 1330.

As to the advisability of passing an act the committee divided. The majority held that such a law should not be passed. They said:

Mr. Hamilton rests his claim to a seat, and his demand that a law shall be passed, upon substantially the following facts and considerations:

That in 1865 the people of Tennessee voluntarily emancipated their slaves, and thereby added two-fifths of these, being by the census of 1860 110,287, to the representative population of that State and making the entire representative population of the State now 1,009,801, assuming that it is the same as shown by that census; that this entitles the State to 9 Representatives, retaining the same ratio of representation (127,000) as that upon which the apportionment was made in 1861.

It is urged that this being done when it was, and voluntarily by act of the people, and being accompanied by enfranchisement of the colored race, distinguishes the claim of Tennessee for the representation of her freed people from the States where the enfranchisement was subsequent and the result of Federal coercion. It is also claimed that the second article of the fourteenth amendment, making the rights of representation to be in proportion to the numbers of the voting races, sustains this claim. It is further urged that the refusal of it would dishearten the freedmen of Tennessee, who are alleged to regard the claimant as especially their representative, and would be disastrous to their interests as a race, now in especial need of the recognition and protection of their Government.

Upon substantially these considerations, as is alleged, the general assembly of Tennessee, on the 12th of March, 1868, adopted a joint resolution requiring the governor "to issue a writ of election, to the State at large, for the purpose of electing one additional Member to the Congress;" and the claimant presents the certificate of the governor showing that on the first Tuesday of November, 1868, the claimant was elected by the people of the State at large a Representative of the State of Tennessee in the Fortieth Congress.

After citing the clause of the Constitution relating to apportionment the report says:

What, then, is the legislation of the Constitution upon this subject, and what the rule by which it has bound the powers and discretions of this House and of the Congress? These are plain, unambiguous, and complete. Those requirements of this rule which are material to be here considered are—

First. That the apportionment must be made to each of the several States. The Congress, by other provisions of the Constitution, has the power to determine when a Territory or people are such in numbers or in organization or in attachment to the Government of the United States as to be fit or entitled to be admitted as one of "the several States included in the Union." But being so admitted and recognized by Congress as such State, the Congress has no discretion as to the apportionment to such State of representation, but must accord representation to each State so admitted and recognized by Congress.

Second. This apportionment must be based on the "numbers" of the Federal populations. Whether it should be based on numbers only, and if so, who should be counted in the enumeration, was a matter of the most profound concern in the convention which framed the Constitution, and one which came near defeating its formation. It was only after such a struggle as this that "numbers" was adopted as the basis of representation, and its importance and the duty of having strict regard to it is indicated by the history of its adoption.

Third. In making the apportionment on this basis of "numbers," there must be apportioned to each one of the several States that proportion or part of the aggregate membership of the House of Representatives which that State has of the aggregate representative population of the United States.

Fourth. The enumeration upon which the apportionment is based must be the one required to be taken within every term of ten years in such manner as the Congress shall by law direct.

The committee proceed:

Having regard, then, to these controlling requirements of the Constitution, the majority of your committee finds it difficult to discover any authority by which Congress shall assign to one of the several States an increase of representation on account of its increased numbers of representative population, and yet withhold it from other States shown to the same Congress, at the same time, and by the same known and historic events, to have had a similar or greater increase of Federal numbers. Indeed, this would be so plainly a disregard of the evident requirements of the Constitution and of the rules of equality

of representation secured by it to the several States, that it need not be considered by the committee; and so plain that this was not, in terms, demanded by the claimant or by the Representative from Tennessee before the committee. And hence it is that the claim of Tennessee in this case is vindicated and pressed upon the favor of the House upon the ground, mainly, that the claim of Tennessee is distinguishable from what could be demanded by the other late slave States. This distinction is rested, as we have already stated, upon the alleged fact that in 1865, during the recent rebellion, and in aid of its suppression, the slaves of that State were, by the voluntary act of the people, emancipated, enfranchised, and added to the representative numbers within such State, while in all the other States the emancipation and enfranchisement and addition to Federal population was, on the part of the people, involuntary and by the coercions of the war. Something is also claimed by Tennessee in virtue of the fourteenth constitutional amendment, as we have above stated.

In regard to this last claim, based upon the second section of the fourteenth amendment, it is sufficient for the purposes of the present inquiry to say that it can have no possible effect upon the conclusions reached in this case unless it be the effect of leading to a reapportionment of Representatives to each of the several States in the Union.

Neither in the fourteenth amendment nor in the voluntary emancipation of the slaves does the committee find justification for special action in the case of Tennessee.

As to the precedents, the majority say:

It is, of course, not only impossible to find a precedent in former legislation for a case like this, but it is equally impossible to resist the conclusion that if this addition to the representative population of the States is to be recognized as entitling one State to increased representation now, then the magnitude of the accession to the Federal population is so great as to compel a reapportionment of the entire representation in the House if any respect is to be paid to the rule that Representatives are to be apportioned to each State according to "numbers." In dealing with this addition to representative population the Congress is not dealing with mere fractions of a representative population, but with a population entitled to elect more than one-twentieth part of the entire membership of this House. In dealing with such a large and often controlling proportion of the vote of this House, it can not be that the Constitution permits Congress to exercise any discretions such as must be by necessity exercised in disposing of a mere fraction of a representative population in a State. And this is in accordance with all legislative precedents upon this subject. These precedents involve and sustain the following propositions, namely:

1. That "the Constitution evidently contemplated a census only once in ten years, and consequently a new apportionment, based upon such census, only once in ten years." (See Low's case, 1862, Contested Elections, 421, approved by the House without division.)

2. "The census and apportionment thus connected together in the Constitution, have been connected together in all subsequent legislation of Congress."

3. "There can be no such thing as one State represented according to one apportionment and under one census, and another State according to some other apportionment based on another census. The whole number of Representatives and the number for each State are both fixed by law, and by the same law. There cannot be one law for one State and another law for another." (See same case, p. 423.)

4. All former special acts of apportionment have been passed, at least professedly, to supplement the acts of general apportionment and to complete the equality of that apportionment to and among each and every one of the several States; and no act was ever passed which contemplated or recognized any other State as being left without its just proportion of representation as contrasted with what was accorded, by the special and the general law, to every other State. On the other hand, the proposed act in favor of Tennessee does propose to accord to Tennessee alone increase of representation upon a principle and on behalf of a population which would equally entitle other States to a like or greater increase, and yet it denies the increase to the other States.

After reviewing the precedents, especially the California case, the majority conclude:

It will be seen that each of them, instead of being a precedent for allowing a State increased representation upon a claim which applied with equal force in favor of other States, and which other States the special act left unprovided for, are cases where the act assumed that all the other States were already

more fully represented than the States provided for in the special act, and that such act was required to complete the equality of representation as between each one and all of the several States.

Of course, the numerous acts admitting new States, and giving them the representation their "numbers" entitle them to, are in no sense analogous to this proposed bill, because these acts did not leave any other States not equally represented with the new State. What is deemed by the committee the fatal objection to the proposed bill is that it gives Tennessee an additional Member on the ground of the addition of 110,287 to her representative numbers by the abolition of slavery, while it passes by, neglects, and refuses to give, and thereby denies, additional Members to the other States now represented in this House, who have added nearly ten times that number to their numbers by the very same event and fact which added them in Tennessee. It can not be successfully claimed that acts admitting new States and giving them their due representation, when every other State was fully represented, and represented equally with the newly admitted State, can furnish the slightest authority or a precedent for such a wrong as this one done by the proposed bill.

The committee also refer to the fact that the applicant was elected from the State at large, and criticise it as in violation of a law of Congress.

The minority of the committee[1] contended that the law asked for might with propriety be passed. After discussing the general laws on the subject of apportionment, they enumerate the special acts:

The act of February 25, 1791, chapter 9, gave 2 Representatives each to Kentucky and Vermont, until there should be "an actual enumeration of the inhabitants of the United States." By the act of June 1, 1796, chapter 47, Tennessee was admitted to the Union, with 1 Representative "until the next general census." The act of April 30, 1802, chapter 40, enabled Ohio to form a State, and gives her 1 Representative "until the next general census."

The act of April 8, 1812, chapter 50, admitting Louisiana, gives her 1 Representative "until the next general census." The act of April 19, 1816, chapter 57, enables Indiana to form a State government, and until the next general census entitles her to 1 Representative. She was admitted to the Union by joint resolution December 11, 1816. A similar act was passed for Mississippi March 1, 1817, chapter 33, and a similar joint resolution December 10, 1817; also for Illinois, April 18, 1818, chapter 67, and December 3, 1818; and for Alabama, March 2, 1819, chapter 47, and December 14, 1819.

The act of April 7, 1820, chapter 39, reduced the number of Representatives in the Seventeenth Congress from the State of Massachusetts to 13, and gave the remaining 7 to the recently formed State of Maine.

The general apportionment act of March 7, 1822, gave to Alabama 2 Representatives. The following year a special act, January 14, 1823, chapter 2, gave her an additional Member upon fuller information as to the number of her inhabitants. The act of March 6, 1820, chapter 22, enables Missouri to form a State government, with 1 Representative until the "next general census." She was admitted to the Union by joint resolution March 2, 1821.

The act of June 15, 1836, chapter 100, admitted Arkansas to the Union, with 1 Representative "until the next general census."

The legislation by which Michigan was admitted to the Union was attended with much difficulty. It will be found in the acts of June 15, 1836, chapter 99, of June 23, 1836, chapter 121, and of January 26, 1837, chapter 6, and its difficulties are illustrated by the debates of the two Houses. In the present purpose it is deemed sufficient to refer to section 3 of the act of June 15, 1836, which provides that as soon as the people of Michigan should have complied with certain fundamental conditions the President should announce the same by proclamation; and thereupon, without further action of Congress, "the Senators and Representatives who have been elected by said State" should be entitled to take their seats without further delay, nothing appearing in the statutes to indicate the number of Representatives.

The act of March 3, 1845, chapter 48, for the admission to the Union of Iowa and Florida, provides that "until the next census and apportionment" each State be entitled to 1 Representative. Iowa

[1] Those concurring in the minority view were Messrs. David Heaton, of North Carolina, H. L. Dawes, of Massachusetts, John H. Stover, of Missouri, and S. Newton Pettis, of Pennsylvania.

was not, in fact, admitted under this act and not until near the close of the following year, act of December 28, 1846, chapter 1; but no further provision was made for her representation.

The joint resolution of December 29, 1845, chapter 1, admits Texas to the Union, with 2 Representatives until the next apportionment.

The act of August 6, 1846, chapter 89, enables the people of Wisconsin to form a State government, with 2 Representatives "until another census" and apportionment.

The act of September 9, 1850, chapter 50, admits California to the Union, with 2 Representatives until the next apportionment. Before that time the Seventh census was taken pursuant to the act of May 23, 1850, and California declares, by virtue of her ascertained numbers, to be still entitled to 2 and only 2 Representatives; and yet Congress thought proper, by act of June 2, 1862, chapter 91, for reasons appearing in the body of the act, to accord to her I additional Representative in the Thirty-seventh Congress.

The act of February 26, 1857, chapter 60, enables the people of Minnesota to form a State government, and provides for the taking of a census in the Territory with a view to ascertain the number of Representatives to which, as a State, she would be entitled. The act of May 11, 1858, chapter 31, admits her to the Union, with 2 Representatives "until the next apportionment."

The act of February 14, 1859, chapter 33, admits Oregon to the Union, with 1 Representative "until the next census and apportionment."

The act of May 4, 1858, chapter 26, providing for the admission to the Union of Kansas, under the Lecompton constitution, and that of January 29, 1861, chapter 20, admitting her under the Wyandotte constitution, both declare her entitled to 1 Representative "until the next general apportionment."

The act of December 31, 1862, chapter 6, erects a portion of the State of Virginia into the new State of West Virginia, with 3 Representatives, leaving unchanged the number to which Virginia is entitled.

The act of March 21, 1864, chapter 36, enables the people of Nevada to form a State government, with 1 Representative "until the next general census;" and, on the 19th of April, 1864, an act similar in all respects was passed by the people of Nebraska, under which acts both States have been admitted to the Union, completing the present number, 37.

These various acts have been collated at some pains, to show how completely the number of Representatives in the House has been contested, at the discretion of Congress, a discretion scarcely less absolute than that of each House over "the elections, returns, and qualifications of its own Members."

This is illustrated by the arbitrary, nay, artificial numbers, at which the ratio was successively fixed, by allowing Representatives for the fractions of the ratio, by the admission of new States with 1, 2, 3, or more Representatives according to their estimated populations, by reducing the representation of a State whose population had been reduced by the excision of part of her territory, by increasing the representation of States, as in the case of Alabama and California, when it was manifested that their population had been under estimated, and by determining the aggregate number of the House and requiring our executive officer to make the apportionment among the several States.

It is illustrated even more forcibly, if possible, by the act of March 4, 1862, chapter 36, which increases the number of Representatives from 233, the number established by the general law of May 23, 1850, to 241, giving to Pennsylvania, Ohio, Kentucky, Illinois, Iowa, Minnesota, Vermont, and Rhode Island, each I additional Member, to which they were not entitled under the general law.

In a word, these acts establish the general proposition that Congress has complete jurisdiction to adjust the representative numbers of the House, and has repeatedly and constantly exercised it at discretion, according to the varied equity of each particular case.

In conclusion the minority say:

The precedents cited as bearing upon the case are as weighty and significant as they are singularly numerous. It is believed they have not been or cannot be successfully met or explained away. These pointed examples of the unreserved exercise of legislative authority are in themselves a powerful warrant for the course which has been pursued by Tennessee. The vital point in the matter, however, is that Tennessee has not only followed "the line of safe precedent," but has conformed strictly to the true intent and meaning of the fourteenth article of the Constitution.

The fact that Tennessee happens to be the first State to claim the practical application of the inestimable rights conferred in said article should not be regarded as anomalous or involving a precedent of doubtful or "dangerous policy."

Objections founded upon any such reasoning are altogether likely to be speculative and fallacious, and lead to great injustice and wrong.

To admit the correctness of the somewhat sweeping statement that the admission of the claimant would be "a most dangerous precedent," would certainly be a most severe commentary upon many of the deliberate acts of the Congresses preceding the present.

In the present instance Tennessee claims no right or privilege she would not willingly concede to any other State having a similar record.

If, upon a fair investigation of the grounds upon which she bases her right to an additional Representative, it is found her cause rests upon merit and justice, and is sustained by unquestionable authority, her demand should receive a prompt and favorable response. To deny to her a manifest constitutional right upon the questionable and untenable objection that some other State may set up a similar claim, would surely afford abundant grounds for criticism, and come in direct antagonism with the policy heretofore maintained and pursued by Congress.

The report was not acted on by the House.

317. The Tennessee election case of John B. Rodgers in the Forty-first Congress.

The House denied the claim of a State to representation greater than the apportionment had given to her when the reasons for such claims applied to many other States.

The Clerk declined to enroll a person bearing regular credentials, but claiming to be a Representative in addition to the number apportioned to his State.

The House did not give prima facie effect to regular credentials borne by a person claiming a seat in addition to those assigned to a State by law.

On the organization of the House on March 4, 1869,[1] Mr. John B. Rodgers, of Tennessee, appeared with credentials showing him to have been elected as Representative-at-large in Tennessee. The Clerk did not put him on the roll of Members-elect, nor did the House subsequently order the oath to be administered to him, the law apportioning Members not allowing a place for him in the Tennessee delegation. His credentials, however, were referred to the Committee on Elections, and on April 7[2] Mr. David Heaton, of North Carolina, presented the report of the majority of the committee. After citing the precedents in relation to apportionment, the report says:

The case of Tennessee is this: Accord ing to the census of 1860, the inhabitants of the United States, reckoning all free persons and three-fifths of all others, numbered 29,553,273. Divide by 241, the number of Members now composing the House, it gives 122,627 as the present representative ratio. Tennessee had 834,082 free inhabitants, white and colored, and 275,719 slaves, a total of 1,109,801. Three-fifths of her slaves, however, added to her free population, on the principle of the representative enumeration, made 999,514, by virtue whereof she has now 8 Representatives.

In February, 1865, she, by voluntary act, a popular vote, manumitted and emancipated her 275,719 slaves, nearly one-fourth of her population. Two-fifths of this number, 110,288, are thereby added to those already entitled to representation. This, with a previous representative fraction, leaves 128,785 for which the State has no Representative, counting only the population as it was in 1860. This excess of popular numbers over the number of her present Representatives is not the result of growth or natural increase, in which the several parts of the country are presumed to keep pace, at least until the contrary is demonstrated by the census, but of a great political act as conspicuous and distinctive as would be

[1] First session Forty-first Congress, Journal, p. 5; Globe, pp. 38, 100.

[2] House Report No. 12; 2 Bartlett, p. 941;

the annexation of a foreign territory containing so many people. For the purpose of this inquiry it is as if the boundaries of Maine were by treaty extended to embrace Nova Scotia, with 110,288 inhabitants. Is it equitable and just that they should be denied a Representative? The undersigned think not.

Since the voluntary action of Tennessee in emancipating her slaves Congress has taken not only an important step toward settling the status of American citizenship, but also indicating a further proper basis of representation. On the 16th of June, 1866, what is known as Article XIV was submitted to the legislatures of the different States. On July 20, 1868, this article was formally proclaimed as a part of the Constitution of the United States by the Secretary of State. The second section of said article, to which particular attention is invited, reads as follows:

"SEC. 2. 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."

This section, though general in its terms, was adopted with particular reference to the recently emancipated colored population, and is a declaration to the several States in which this population is found that if they are enfranchised the State shall be represented accordingly if not, representation shall be diminished. It either means this or is a mockery and means nothing.

As soon as possible after the promulgation of the proposed amendment—on the 16th of June 1866—Tennessee convened her legislature and ratified it. She then changed her franchise laws to conform to the spirit of this amendment by removing from all colored people within her boundaries all civil and political disabilities and conferring upon them the right to elect and to be elected to every office from the highest to the lowest. Having done this, and the fourteenth article having become valid as a part of the Constitution, what was before a claim for full and complete representation, resting in the discretion of Congress, became now an absolute constitutional right. For it must be borne in mind always that this action of Tennessee has been her own, independent and in advance of executive proclamations, constitutional amendments, and reconstruction acts. She has met all the conditions of the Constitution in a spirit of the most cheerful loyalty, and has created in her favor an obligation which can not be canceled by being denied.

Her legislature, viewing the matter in this obvious light, has by appropriate action provided for the election of an additional Representative. On the 3d day of November, 1868—the day of the late Presidential election, and the day designated by law for the election of Members of Congress in Tennessee—the people of that State, fully impressed that they were fairly entitled to an additional Representative, proceeded to elect, and did elect, the Hon. John B. Rodgers to the Forty-first Congress.

It was a matter of general notoriety in Tennessee, some time before it occurred, that such an election would be held. The people of the State were duly advertised of the fact by the act of the legislature and executive proclamations. The friends of the present applicant for a seat brought him forward as a candidate at a popular convention, unusually largely attended, at the capital of the State. The popular will was fully reflected at the polls in the fact that the applicant received nearly as many votes as were cast in that State on the same day for the prevailing Presidential electoral ticket. The places for voting in this case were the same as those at which votes were given by persons of different political proclivities for different candidates for Congress and candidates for electors for President and Vice-President. Returns of the result in different counties were made in due form to the secretary of state, as appears in official documents duly certified to. On these returns credentials in due form were issued.

The report urges that Tennessee has conformed to the requirements of the fourteenth amendment, and because she was the first State so to do should not count against her.

Therefore, the majority recommended the enactment of a law to increase the representation of Tennessee by one.

The minority of the committee call attention to the fact that the additional

seat may be claimed on the authority of no existing law, and deny that the facts and precedents justify the passing of such a law:

The provision of the Constitution of the United States which regulates representation is as follows:

"Representation and direct taxes shall be apportioned among the several States which may be included within the Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative."

The second section of the fourteenth article of amendments to the Constitution relates to the same subject, and modifies, to some extent, so much of the above as relates to representation, and is as follows:

SEC. 2. 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."

While these provisions differ as to the manner in which the representative numbers in the States shall be ascertained, they agree in providing that Representatives shall be apportioned among the States according to these numbers, and we have thus a definite and absolute rule established, according to which apportionment shall be made, and which forbids any assignment of Representatives to any State for any other reason, and which requires that if representation be given to one State equal proportionate representation shall be given to any other State similarly situated in respect of its representative numbers or population.

The provision of the Constitution first above quoted also provides the means for making the apportionment so required, by requiring that once in ten years an actual enumeration shall be made; and it would follow, by fair implication, that a reapportionment should only be made after such enumeration had shown its necessity. The practice of the Government has been uniformly in accordance with this view since the adoption of the Federal Constitution.

After each decennial census, and at no other time, a new apportionment of Representatives has been made among the States, and to each State according to its Representative population as fixed by the Constitution and ascertained by the census.

The legislation of Congress admitting new States forms no exception to this rule, since under the Constitution they may be admitted at any time, and by the provision above quoted each must have at least 1 Representative; but, subject to this last provision, the number of Representatives allowed to each new State has always been the number to which it was supposed to be entitled by its representative population, upon the ratio of the last preceding apportionment. The act of March 4, 1862, by which the aggregate membership of the House was increased from 233 to 241, and 1 additional member was given to each of the States of Ohio, Pennsylvania, Kentucky, Illinois, Iowa, Minnesota, Vermont, and Rhode Island, and also the acts of January 14, 1823, and of June 2, 1862, by which Alabama and California were each allowed a member in addition to the number previously apportioned to them also, are not exceptions, since the first was passed to give representation to large fractions of representative population which would otherwise be unrepresented, and the last two were intended to correct errors arising from insufficient census returns in the apportionment previously made to those States.

We have no right, therefore, under the Constitution and the uniform practice of our legislative history, to give representation to the 110,287 slaves in Tennessee, as shown by the census of 1860, who were excluded from making a part of the representative population of that State under the Constitution as it stood in 1860, but who, as freemen, if now living in that State, would, under the same Constitution, be a part of such representative number, without at the same time providing for equal representation to the 1,469,925 persons in other States, who, slaves then, have since become free. The fact that the slaves of Tennessee became freemen by the voluntary act of the people of the State, while those

of other States were made such without the assent and against the will of the people of those States, can not affect the question, since it is the fact of their freedom, and not the manner in which they became free, which alone has any legal significance in the case.

It is no answer to this objection that no other State than Tennessee asks for this additional representation. It is the duty of Congress to apportion Representatives among the States according to their respective numbers, and this whether the States ask for it or not; and to give additional representation to Tennessee, while withholding it from States equally entitled to it, and upon facts equally within our knowledge, would be a violation of this duty.

The passage of such a general law at this time would not be proper, since the adoption of the fourteenth amendment has given a new rule for ascertaining representative numbers, and Representatives are required to be apportioned among the several States according to those numbers. No enumeration heretofore made of the people of the United States would enable us to ascertain the present representative numbers of the several States. Such an enumeration, however, must be made under the Constitution before the close of the next year. Then, and not till then, can an apportionment be made such as the Constitution now requires.

There is another consideration to which the minority deem it proper to call attention, and which seems to answer fully the equitable ground for this claim, urged on the part of the State of Tennessee.

The next census will undoubtedly show a very large increase of the population of the United States. This increase has been added, almost entirely, to the population of the States which were loyal during the war, and were not slave-holding States at its commencement. During the war the immigration to this country was excluded from the Southern States by the blockade, and by the presence of our armies, and since has been almost equally excluded by the distracted condition of those States.

The loss of life and the check to the increase of population from other causes is also believed to have been much greater in the States which were the immediate seat of hostile operations. We do not believe that anyone will seriously question that the apportionment of 1862, based upon the census of 1860, gives to each of the lately slave-holding States a larger proportionate representation than they would be entitled to upon an enumeration made at the present time, and according to the rule by which such representation must now be made. To yield the claim of Tennessee would increase this disproportion, and would be unjust to the States which were faithful to the Union through all its trials and who by their fidelity saved the Republic.

Therefore the minority recommend that the question be deferred until after the next census.

The report in this case was never acted on, but on March 1, 1871,[1] the House discharged the committee from further consideration of the subject and agreed to a resolution compensating Mr. Rodgers for his expenditures in presenting his case.

318. The Virginia election case of Joseph Segar in the Forty-first Congress.

After the division of Virginia the House recognized a division of the old representation between the two States, without specific provisions of law.

The House declined to give prima facie effect to credentials regular in form, relating to a seat, in addition to those to which the State was entitled.

After reconstruction the credentials of all the Virginia delegation were referred before the bearers were admitted.

At the second session of the Forty-first Congress the Members-elect of the Virginia delegation were not permitted to take the oath until their credentials were examined by the Committee on Elections. Then all were sworn in except Mr.

[1] Third session, Journal, p. 449; Globe, p. 1801.

Joseph Segar, who had been elected for the State at large, as was made plain by his credentials:

To all whom it may concern:

This is to certify that at an election held in and for the State of Virginia by the voters registered under the act of Congress of March 2, 1867, entitled "An act to provide for the more efficient government of the rebel States," and the act supplementary thereto and amendatory thereof, upon the question of ratifying or rejecting the constitution framed by the convention called under the authority of said laws, and at which election it was provided by the 2d section of the law of April 10, 1869, that the voters of said State may vote for and elect members of the general assembly of said State, and all the officers of said State provided for by the said constitution, and Members of Congress, Joseph Segar was duly elected at large as a Representative to the Congress of the United States.

Given under my hand, at Richmond, Virginia, this 9th day of September, 1869.

ED. R. S. CANBY,

Brevet Major-General, U. S. A., Commanding First Military District.

On March 29, 1870,[1] Mr. Halbert E. Paine, of Wisconsin, from the Committee on Elections, to whom Mr. Segar's credentials had been referred, submitted their report.

Mr. Segar, as one of his claims, had insisted that the certificate ought to be conclusive as to his right to the seat "unless in case of contest or of the allegation of fraud or of palpable clerical mistake." The report says:

This assumes, of course, that the seat itself is provided for by law. But that is the very question, and the only question in this case, and to that question the committee are constrained to give a negative answer.

Eight Representatives from Virginia had already been seated, and Mr. Segar would, if seated, make the ninth. The report of the majority of the committee thus sets forth the case:

The census act of May 23, 1850, contains the following provision:

"SEC. 24. *And be it further enacted,* That from and after the third day of March, one thousand eight hundred and fifty-three, the House of Representatives shall be composed of two hundred and thirty-three members, to be apportioned among the several States in the manner directed in the next section of this act."

And by the twenty-fifth and twenty-sixth sections of the same act it is provided that, upon the completion of each enumeration of the inhabitants of the United States, the Secretary of the Interior, after ascertaining from the census returns the representative population of the United States, and of the several States, shall apportion the Representatives among the several States, and "shall, as soon as practicable, make out and transmit, under the seal of his office, to the House of Representatives, a certificate of the number of Members apportioned to each State under the then last enumeration." Under this act the census of 1860 was taken, and the Secretary of the Interior transmitted his certificate to the House.

Under this apportionment the Secretary of the Interior allotted to Virginia 11 Representatives.

The report continues:

On the 31st day of December, 1862, an act was passed providing for the admission of the new State of West Virginia, to consist of 48 counties of Virginia, and to have, until the next general census, 3 Representatives in the House of Representatives of the United States, which act was, by its own terms, to take effect at the expiration of sixty days from the date of a proclamation of the President therein provided for.

[1] Second session Forty-first Congress, House Report No. 51; 2 Bartlett, p. 810; Rowell's Digest p. 253.

Subsequently the following joint resolution was adopted:

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress hereby recognizes the transfer of the counties of Berkeley and Jefferson from the State of Virginia to West Virginia, and consents thereto.

"Approved March 10, 1866."

The returns of the census of 1860 show that the representative population of the present State of Virginia was a little less than eight-elevenths of the entire representative population of the old State, including the counties now constituting West Virginia. While, however, the representative population of the counties constituting the present State of Virginia was not quite sufficient to entitle the State to 8 of the 11 Representatives apportioned to the old State, it was considerably more than sufficient to entitle it to 7 of them, so that the assignment of 8 to Virginia and 3 to West Virginia was the nearest practicable approach to an absolutely just distribution of the representation.

In no case have the acts providing for the readmission of the rebel States to the Union embraced any legislation changing or fixing the number of Representatives of the readmitted State. In every case the State has been readmitted with the number of Representatives fixed by the certificate of the Secretary of the Interior transmitted to the House under date of July 5, 1861.

The number of Representatives assigned to the old State of Virginia by the apportionment of 1861 was, as has been already stated, 11. The number assigned to West Virginia by the act of admission was 3. In the opinion of the committee, the present State of Virginia is by law entitled to only 8 Representatives, and the law requires that those shall be chosen by single districts.

The minority views were presented by Mr. Job E. Stevenson, of Ohio, the committee having been nearly evenly divided. The minority say—

Under the apportionment of Representatives in Congress, on the census of 1860, the State of Virginia was entitled to 11 Members. No law has been enacted affecting this apportionment, unless the reconstruction acts relative to that State can be so constructed

The acts and proceedings creating and admitting the new State of West Virginia are silent on this question. They fix the number of Representatives from the new State, but do not touch the topic of representation from Virginia.

It seems to be assumed that because the new State was formed from the side of the old, therefore the act of Congress giving West Virginia the right to 3 Representatives reduced the quota of Virginia from 11 to 8; but we respectfully submit that no such important conclusion can be properly or safely implied from laws containing neither syllable nor letter to support it; and that such latitude of construction would overthrow all rights founded upon statutes.

If the apportionment on the census of 1860 applies at all, it must be accepted in its term, and entitles the State of Virginia to her full quota of 11 Representatives, instead of 9 elected or 8 admitted.

A technical objection may be based upon the provision of the act of June 25, 1842, reenacted in subsequent acts:

"That in each State entitled in the next and any succeeding Congress to more than one Representative, the number to which such State is or may be hereafter entitled shall be elected by districts composed of contiguous territory, equal in number to the number of Representatives to which said State may be entitled in the Congress for which said election is held, no one district electing more than one Representative."

If this provision were deemed applicable, we might answer the objection by showing that it has never been observed, and is not now observed by this House.

In the Twenty-eighth Congress, the first after this provision was enacted, the House admitted 20 Members at large from the States of New Hampshire, Georgia, Mississippi, and Missouri, respectively, and voted that they had a right to their seats. (See Con. Elect. Cases, 2, p. 47.)

In the Thirty-fifth Congress, in 1858, the House decided "That the election of members by general ticket instead of by district is not a bar to admission to seats in the House." (See case of Phelps and Cavanaugh, Con. Elect. Cases, 2, p. 248.)

That case was from a newly admitted State, and therefore analogous to this of the readmission of a reconstructed State with changed boundaries. But the most striking case is that of the State of Illinois, which has been, ever since the Thirty-eighth Congress, and is now, represented in this House by

Member at large notwithstanding this provision, the proviso allowing her a Representative at large having expired with the Thirty-eighth Congress. See act of July 14, 1862, which contains the following:

"*And provided further*, That in the election of Representatives to the Thirty-eighth Congress from the State of Illinois, the additional Representative allowed to said State by an act entitled 'An act fixing the number of the House of Representatives from and after the third day of March, eighteen hundred and sixty-three,' approved March fourth, eighteen hundred and sixty-two, may be elected by the State at large, and the other thirteen Representatives to which the State is entitled by the districts, as now prescribed by law in said State, unless the legislature of said State should otherwise provide before the time fixed by law for the election of Representatives therein."

But it is not deemed necessary to dwell upon this point, because it seems obvious that the general act is not applicable to a reconstructed State when a change of circumstances calls for special action.

The claimant further urged that he was entitled to admission because of provisions of the law of Congress taken in connection with certain ordinances of the constitutional convention of Virginia. These ordinances districted the State and provided for a ninth Representative at large. Unlike the constitution itself the ordinances were not ratified by the people.

Claimant urged that the Congress by approving generally the proceedings of reconstruction in Virginia, of which the ordinances were a part, had approved the Representative at large. The majority of the committee denied this, holding that the chain of law was not perfect.

Another point was answered as follows:

3. The claimant cites the following provision of the act which took effect on the 11th day of March, 1868:

"SEC. 2. *And be further enacted*, That the constitutional convention of any of the States mentioned in the acts to which this is amendatory may provide that, at the time of voting upon the ratification of the constitution, the registered voters may vote also for Members of the House of Representatives of the United States, and for all elective officers provided for by the said constitution; and the same election officers who shall make the return of the votes cast on the ratification or rejection of the constitution shall enumerate and certify the votes cast for Members of Congress.

And he insists that the authority conferred by this act carries with it the power, first, to district the State, and, secondly, to fix the number of its Representatives; and that these two powers stand on the same footing. But the power to district a State, in accordance with the Federal apportionment, is, by section 4 of Article I of the Constitution of the United States, conferred upon the State, subject to the control of Congress, whereas the power to fix or alter the number of Members of the House of Representatives of the United States is vested exclusively in the Federal Government, and even if there is doubt whether a State can exercise the power to district its territory for the election of Representatives otherwise than through its ordinary legislature, there is no doubt that a State can not exercise the power to fix the size of the Federal House of Representatives, whether through its ordinary legislature, or its constitutional convention, or in any other way.

As to the argument that Virginia was entitled to additional representation because she had many thousands of newly enfranchised citizens, the majority of the committee denied that this fact entitled Virginia to representation at once, since the same theory would give immediately increased representation to the other reconstructed States.

The majority reported the following resolution:

Resolved, That Joseph Segar is not entitled to a seat as a Representative of the State of Virginia at large in the Forty-first Congress of the United States.

On July 11[1] the report was considered in the House. After debate a proposition was offered by the minority declaring Mr. Segar entitled to the seat. This was disagreed to—ayes 31, noes 85.

The resolution of the majority declaring Mr. Segar not entitled to the seat was then agreed to without division.

319. Reference to the claim of Nebraska for additional representation.—On February 24, 1883,[2] the House finally disposed of the claim of Nebraska for additional representation on account of alleged defects in the census on which the apportionment was based. The House found that its committee had been imposed on and took action to bring the authors of the imposition to the attention of the authorities.

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[1] Journal, p. 1216; Globe, pp. 5450–5455.

[2] Second session Forty-seventh Congress, Record, pp. 3247–3252.

Chapter IX.

ELECTORATES INCAPACITATED GENERALLY.

1. **Effect of informalities in the election. Sections 320–323.**[1]
2. **Intimidation and its effects. Sections 324–341.**[2]
3. **Principles involved in Senate decisions as to competency of legislatures. Sections 342–360**

320. The North Carolina election case of McFarland *v.* Purviance, in the Eighth Congress.

The invalidity of an election in one county out of three did not justify declaring the seat vacant.

On February 29, 1804,[3] the Committee on Elections reported on the North Carolina contested election case of McFarland *v.* Purviance. The committee found that in one county of the district the inspectors and clerks refused to take the oath prescribed by the State law that they should act with justice and impartiality. Therefore the committee conceived that for this reason the election in the county should be set aside.

The committee did not find the result in the remainder of the district successfully attacked, and therefore concluded that there was not sufficient legal testimony to vacate the seat of Samuel D. Purviance, although the result in one county had been set aside.

The House did not act on this report.

321. The North Carolina election case of McFarland *v.* Culpepper, in the Tenth Congress.

An election being found invalid in three out of five counties in the district, the House declared the seat vacant, declining to seat the contestant.

Early instance of rejection of the returns because election officers did not take the required oath.

The Committee on Elections rejects testimony taken ex parte.

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[1] See also McDuffie *v.* Davidson, section 1007 of Volume II.

[2] See also cases of Bruce *v.* Loan (section 377 of this volume), case of Hoge, Reed, and others (section 622 of this volume), and case of Switzler *v.* Anderson (section 868 of Volume II).

[3] First session Eighth Congress, contested elections in Congress, from 1789 to 1834, page 131.

In the North Carolina election case of McFarland *v.* Culpepper, in 1808,[1] the Committee of Elections, after setting forth the law of the State and the testimony, give in their report the following statement, which covers very well the principles on which the case was decided:

No full official lists of the polls, or number of votes given to the parties contesting, were laid before the committee, but both parties agree that the sitting Member had 2,750, and that Duncan McFarland had 2,701; that consequently John Culpepper had a majority of 49 votes.

From the above recited testimony, admitted by the committee, it appears that the inspectors and clerks officially employed in conducting the elections in Richmond, Anson, and Montgomery counties do not appear to have been sworn as the law of North Carolina expressly directs, and that the votes given in some of these counties, and at some elections in other counties, not being received by officers legally qualified, ought to be rejected.[2] On rejecting the returns of Richmond, Anson, and Montgomery counties, in which it appears, by the list of voters and testimony admitted, that John Culpepper had a majority of 1,578 votes, gives to Duncan McFarland a large majority of votes in these counties. Some depositions were taken before the committee respecting the elections in Moore County, taken at the instance of a friend of John Culpepper, in his absence; but though they go to prove that the elections in Moore County were not conducted agreeably to law, yet, being taken ex parte, they were not admitted.

From the testimony admitted it appears that John Culpepper is not entitled to a seat in the House, he not having a majority of votes legally taken; but though Duncan McFarland appears to have a large majority of votes taken agreeably to law, yet the committee are of opinion that the truth of this is doubtful; they are the more confirmed in this opinion from the sitting Member having expressed his opinion that if he had time allowed him to make a scrutiny he would prove the elections held in the other counties were also conducted contrary to law.

The committee, however, believing that the great object for which the power of judging the elections of Members was vested in Congress, was to secure to the people a representation of the majority of the citizens, the elections of Richmond, Anson, and Montgomery being rejected, give a majority of the votes given in Moore and Cumberland counties to Duncan McFarland, viz, a majority of two counties out of five, which comprise the Congressional district, and the votes of three counties are lost.

The committee are of opinion that, even presuming the votes in Moore and Cumberland to have been legally taken, it would be improper to deprive the other three counties of a representation for the fault of their election officers, etc., therefore think it most proper to give the citizens of that district an opportunity to have another election, and for this purpose submit the following resolution:

"Resolved, That from the testimony laid before and admitted by the committee it appears that John Culpepper is not entitled to a seat in this House."

The House having concurred in this resolution, the governor of North Carolina was notified of a vacancy in the House from that district.

322. The Kentucky election case of Blakey *v.* Golladay, in the Fortieth Congress.

Although the claimant for a seat presented unimpeachable credentials, the House declined to seat him until it had determined that the seat was actually vacant.

Instance of an election case initiated by memorial from the person claiming the seat.

In an election case not provided for by statute the House by resolution determined the conditions of its prosecution.

The House by resolution made certified transcripts of records evidence in an election case.

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[1] First session Tenth Congress, Contested Elections in Congress, from 1789 to 1834, page 221.

[2] See also Section 320 for another early instance of rejection of the returns in a case wherein the election officers did not take the required oath.

A resolution providing for the prosecution of an election case is presented as a question of privilege.

On July 5, 1867,[1] Mr. William D. Kelley, of Pennsylvania, presented the memorial of George D. Blakey, praying to be admitted as a Member from Kentucky. The memorial was referred to the Committee on Elections.

On July 11, 1867,[2] Mr. Halbert E. Paine, of Wisconsin, offered, as a question of privilege, the following:

> Whereas George D. Blakey asks for admission to this House as a Representative from the Third district of Kentucky, and his competitor, Elijah Hiss, having died before the votes were canvassed, and no other person claiming a seat in this House as a Representative of said district, this case is not provided for by any statute of the United States, but is subject to the provisions of the Constitution: Therefore,
>
> *Resolved,* That in this case transcripts of official records and files, and of extracts therefrom and abstracts thereof, duly certified under seal by the clerks of the several county courts in said district, shall be competent evidence before the Committee of Elections and before this House of the facts therein shown.

The question of order being raised that this resolution did not involve a question of privilege, the Speaker[3] said:

> Everything affecting the right of a Member to a seat is a question of privilege.

Thereupon the resolution was agreed to; yeas 92, nays 34.

On November 21, 1867,[4] papers in the case of Mr. Blakey, as contestant, were presented in the House and referred.

On November 25, 1867,[5] the Speaker laid before the House a certificate in regular form from the governor of Kentucky, setting forth that at an election held in the Third Congressional district of that State on August 5, 1867, J. S. Golladay received a majority of the votes cast and was duly elected Representative in the Fortieth Congress.

Mr. Henry L. Dawes, of Massachusetts, moved that the credentials be referred to the Committee of Elections, and that the said Golladay be not sworn in pending the investigation of the same.

It was explained that the Committee of Elections were not considering the claim of Mr. Blakey that he should be seated on the ground that he had received a majority of the legal votes, although a majority of the votes actually cast were found to be for the late Mr. Hise. The governor of Kentucky had assumed that there was a vacancy and had ordered an election; but the House was now investigating whether or not there was a vacancy. If Mr. Golladay should now be sworn in, and the House should later find that Mr. Blakey had been elected, the House would have two men in the same seat or Mr. Golladay would be unseated without having had the opportunity to present his case. On the other hand, it was urged that Mr. Golladay had the only prima facie evidence, and that he was entitled to take the seat pending the examination of final right; but the House agreed to the motion of Mr. Dawes; yeas 105, nays 38.

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[1] First session Fortieth Congress, Journal, p. 187; Globe, p. 591.

[2] First session Fortieth Congress, Journal, p. 165.

[3] Schuyler Colfax, of Indiana, Speaker.

[4] Journal, p. 255.

[5] Journal, p. 257; Globe, pp. 782–784.

323. The Kentucky election case of Blakey v. Golladay, continued.

An election invalid in 11 out of 12 counties, leaving only 737 valid votes out of 8,941, should cause the seat to be declared vacant.

The exclusion of a disloyal Member-elect would not allow a minority candidate to take the seat.

The death of the person elected creates a vacancy, although no certificate may have been awarded.

The person elected dying before credentials are issued, the minority candidate may not receive the credentials.

On December 2, 1867,[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections submitted a report, which stated the case as follows:

The right of these two claimants to the same seat depends upon the validity of elections held at different times, and it therefore becomes necessary to determine in the first instance upon the legality of the election first held, for if the one which is first in point of time be valid the other can not be.

The claim of Mr. Blakey that he was duly elected such Representative rests upon the following facts:

An election for Representatives to the present Congress was ordered by the governor of Kentucky to be held on said 4th day of May last. The claimant, Mr. Blakey, and the Hon. Elijah Hise were candidates for Representatives in the Third district, and were voted for at that election. On the 27th of the same month the governor, attorney-general, and State auditor, who constitute by law a board of canvassers for counting the votes, met in pursuance of law for that purpose and certified the result of the vote on the 4th to be, in this district: For Elijah Hise, 7,740; for G. D. Blakey, 1,201.

After the election and before this canvass, to wit, on the 8th day of said May, the said Elijah Hise died, and Mr. Blakey claimed before the board of canvassers, and renews his claim before the House, that he was entitled to the certificate of election and to retain the seat as such Representative.

First, because at the time of said canvass, he, the said Blakey, was the only person then alive for whom votes had been cast for such Representative. In this the claimant has, in the opinion of the committee, wholly mistaken the function of the board of canvassers. The sole duty of the board is to ascertain the result when the polls closed on the day of election. They can in no way or particular Change or alter that result, but only ascertain and make it known. If the claimant had not, when the polls closed, a majority of the votes legally cast, nothing transpiring subsequently could give him that majority. If Elijah Hise had that majority when the polls closed, that fact is unalterably fixed. it is sometimes quite difficult to ascertain who actually had such majority at the close of the polls, but the determining of that fact determines all else pertaining to the election. A vacancy occasioned by the death of one who has received a majority of the legal votes can not depend upon whether he had or had not received a certificate of his election before his decease. The certificate is not his title to his seat, but simply one form of evidence thereof.

Second, he further claims the seat because, "by the laws of Kentucky governing elections, the judges and other officers of the county courts in said State, in the appointment of officers to hold and conduct elections in said State, are required to appoint officers representing the two political parties in the State, and that each political party should be represented in the officers of every election precinct." This provision of law, he claims, was almost totally disregarded in 11 out of the 12 counties composing this district, thereby rendering illegal the election in those counties, and that in the other county, where this provision was complied with, he received a majority of the votes cast.

After quoting the provisions of law relating to the appointment of election officers, the report considers the evidence adduced to sustain this second objection. Contestant showed by the poll books that but 23 of the election officers voted for him, while 210 voted for Mr. Hise, and 57 did not vote at all. The committee say that obviously the poll books of this election could not have been consulted by the

[1] Second session Fortieth Congress, House Report No. 1; 2 Bartlett, p. 417; Rowell's Digest, p. 221.

county courts, for the appointments were made long before this election. No evidence was offered to show how these officers voted at the election next preceding their appointment. In fact, there was no evidence sufficient to show that the provisions of the law were disregarded. But it was really not necessary for the committee to determine this, for assuming that contestant's contention was right as to the 11 counties, yet—

In the remaining county, where it is claimed the law was complied with, and the election therefore valid, there were cast only 737 out of 8,941 votes; and of these 737, Mr. Blakey received 378, to 359 for Mr. Hise, leaving only a majority in this county for Mr. Blakey of 19. Of the whole vote in the district, as has been already stated, he received only 1,201. If, therefore, the election was invalid in 11 out of the 12 counties, rendering it impossible to count but 737 votes out of 8,941, no other alternative would be left but to set aside altogether such an election, and remand the case back again to the people, that they might have an opportunity to give expression to their choice in conformity to law. There is no precedent for fixing upon the district representation determined by 378 votes out of 8,941, and the committee see no reason for making one.

The third ground of contestant, that Mr. Hise was disloyal, was not sustained by evidence; and furthermore, the committee were not called on to consider the legal effect of the proposition had it been sustained, since the exclusion of a disloyal person did not allow a minority candidate to take the seat.

The committee therefore arrived unanimously at the following conclusion:

The only objection to the administering the oath of office and admission to the seat of Mr. Golladay, known to the committee, being the claim of the memorialist to be entitled to the seat by virtue of a prior election, this disposition of that claim removes all obstacle, and, in the opinion of the committee, Mr. Golladay should be admitted to the oath of office and to the seat.

The committee recommend the adoption of the following resolutions:

Resolved, That George D. Blakey is not entitled to a seat in this House as a Representative from the Third Congressional district in Kentucky.

Resolved, That the oath of office be now administered to J. L. Golladay, and that he be admitted to a seat in this House as a Representative from the Third Congressional district in Kentucky.

The report was debated on December 5, and on that day the resolutions of the committee were agreed to without division, a demand for the yeas and nays having been refused. A proposition to recommit with instructions to examine as to the loyalty of both Messrs. Hise and Golladay had been prevented by the previous question, which was ordered by 102 ayes to 22 noes.

324. The Maryland election case of Whyte v. Harris in the Thirty-fifth Congress.

In a report not approved by the House the Elections Committee recommended that a seat be vacated because of intimidation in five-sixths of the district.

In a case not sustained by the House a question of the degree of intimidation sufficient to justify rejection of the poll was discussed.

An early discussion as to what constituted a distinguishing mark on a ballot.

The Elections Committee having recommended a declaration that the seat be declared vacant, a question arose as to contestant's position.

On June 1, 1858,[1] the Committee on Elections reported in the case of Whyte *v.*

[1] First session Thirty-fifth Congress, H. Report No. 538; 1 Bartlett, p. 257; Rowell's Digest, p. 156.

Harris, of Maryland. The contestant had alleged frauds, intimidations, and irregularity. The majority of the committee based its conclusions chiefly on two features of the case, alleged widespread intimidation in Baltimore City, and distinguishing marks on the ballots cast for sitting Member, whereby intimidation of his opponents was rendered feasible.

The majority of the committee give in their report copious extracts of testimony showing this intimidation. The minority showed that Mr. Harris had a majority of 3,243 votes in the city wards and of 75 in the districts outside the city. They contended that the evidence in relation to intimidation was too vague. Names of persons alleged to have been intimidated were given, but it was nowhere shown that they would have voted for the sitting Member. Moreover, much of the evidence as to persons intimidated was inadmissible because hearsay in its nature.

The majority of the committee, after stating that a case of riot and intimidation was new in election cases before Congress, quotes English precedents to show that violence and tumult were sufficient reasons for declaring an election void. In the American cases of Trigg *v.* Precsott and Biddle and Richard *v.* Wing nothing like a riot or obstruction was shown at the polls. The majority of the committee say:

> Having, then, no case heretofore presented to this House involving a decision as to what extent violence, intimidation, and riot may prevail at elections to warrant a vacation of a seat, we can only refer to the numerous precedents which we find settled by other elective bodies, and to the plain teachings which we derive from our Constitution and theory of government.
>
> In the judgment of the Committee of Elections, these require the return in this case to be set aside and the seat vacated. It can not be considered the return of an election made by the legal voters of the Third Congressional district of Maryland. An election is the free choice by those who have the right to make it, and who desire and seek to make it, uncompelled, unawed, and unintimidated. The return here was based upon votes alleged to have been cast in that Congressional district. The proofs show that at the first eight wards in the city of Baltimore, and at the twelfth election district of Baltimore County (comprising about five-sixths of the returned votes), in some to a much greater extent than others, but in all to a most culpable extent, violence, tumult, riot, and general lawlessness prevailed. That, as a consequence, the reception of illegal votes and the rejection of legal votes, the acts of disturbance and assault committed on peaceable citizens, and the intimidation of voters so predominated as to destroy all confidence in the election as being the expression of the free voice of the people of that Congressional district.
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> The committee are not unmindful of the magnitude of the question they present to the consideration of the House. On the one hand it involves the vacation, temporarily, of a seat in the House of Representatives; on the other, it requires an acquiescence in, if not approval of, a wanton and unjustifiable interference with the most sacred of all political rights to a free people.

The minority did not admit that there had been serious riot or intimidation, and contended that it would be a dangerous precedent to overrule the expressed will of the people because of violence at the polls.

The majority of the committee further state that the tickets used by the party of the sitting Member (the American) were distinguished by a number of red perpendicular stripes across them. The majority conceived that this was a violation of the spirit of the law providing for a ballot system, one of the great objects of which was to allow the elector to make his choice by a secret vote. Such was the intent of the Maryland law. While it might be going too far to reject such ballots, unless so provided by law, yet their use was neither creditable nor just, since it permitted intimidation.

The minority say on this point:

The constitution of the State of Maryland, article 1, section 2, provides that "the vote shall be by ballot;" and the act of assembly regulating elections, 1805, chapter 97, section 12, provides "that upon the ballot shall be written or printed the name or names of the persons voted for, and the purpose for which the vote is given, plainly designated." It is not pretended that this was not done, and we can not for a moment admit that the marks on the ticket, or the color of the paper on which the name and office are thus plainly designated, have anything to do with the legality of the vote cast, or are to be held as infringing the law of the State.

The majority of the committee, in view of the considerations given above, recommended the following:

Resolved, That it appears to this House that there was such tumult, disorder, riot, intimidation, and injustice, in the election of a Representative to Congress from the Third Congressional district of the State of Maryland, on the 3d day of November last, in contempt of law and in violation of the freedom of elections, that the said election is void, the seat from the said district is hereby declared vacant, and the Speaker of this House be and is directed to notify the governor of said State thereof.

The minority arrived at the conclusion that the sitting member was entitled to the seat.

The case was not debated in the House on its merits. On July 11,[1] near the close of the session, the case was postponed until the next session, by a vote of 96 yeas to 80 nays,

At the next session, on December 15 and 16,[2] the report was called up.

A question arose over the request of Mr. Whyte that he have leave to occupy a seat on the floor and speak on the merits of the contest.

It was objected that he was no longer a contestant and not entitled to the privilege under the precedents; and it appeared, in fact, that he did not consider himself a contestant.

The House, by a vote of yeas 108, nays 90, laid on the table a resolution giving to Mr. Whyte the privilege asked.

Then the report of the committee was, without debate on its merits, laid on the table by a vote of 106 yeas and 97 nays.

So the sitting member retained his seat.

325. The Maryland election case of Harrison v. Davis in the Thirty-sixth Congress.

Discussion of the extent of intimidation sufficient to invalidate an election and justify declaring the seat vacant.

On January 31, 1861,[3] the Committee on Elections reported in the case of Harrison *v.* Davis, of Maryland. This case was examined, and there were reports from the majority and minority of the committee; but no action was taken by the House on the recommendation of the majority, which was in favor of the sitting Member.

The principal objection of the contestant was that there had been sufficient riot and intimidation to invalidate the whole election.

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[1] Journal, p. 1089; Globe, pp. 2961–2964.

[2] Second session Thirty-fifth Congress, Journal, pp. 72, 77; Globe, pp. 102, 120.

[3] House Report No. 60, second session Thirty-sixth Congress, 1 Bartlett, p. 341; Rowell's Digest, p. 168.

The majority of the committee found by a comparison with previous national and State elections that the aggregate vote of the district at this election of 1859 was 12,932, while in 1857 it was 14,494, and in 1855 it was 15,481. The committee did not consider the decrease sufficient to be significant; and as the majority of the sitting Member was returned as 7,272, it seemed evident that whatever voters might have been intimidated would not have been sufficient to change the result. As to the law applicable, the majority say:

> We have now to consider the question whether the election is void by reason of riot and intimidation. The specification is, that in all the wards bands of men conspired to exclude and obstruct legal voters who intended to vote for the contestant, and did, in fact, assemble at and near the voting places armed, and by threats intimidated and by violence obstructed and drove away thousands of legal voters, and deterred many from approaching the polls.
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> That statement, considered as an allegation of facts which, if proved, avoid the election in point of law, is wholly insufficient.
>
> It nowhere makes the formal allegation that the law requires: Either that the election was arrested and broken up in every ward, or that so many individuals were excluded by violence and intimidation as would, if allowed to vote, have given the contestant the majority.
>
> Either of those grounds, if stated and proved, would have been, in law, decisive of the case; but neither is stated in the specification, and neither is proved by the evidence.
>
> The case attempted to be made is one wholly different from either, and wholly unknown in the annals of election law.
>
> It assumes that an election is necessarily void at which 2,000 voters are prevented by violence or threats of violence from voting—though the election was never arrested, and though 20,000 may have been cast, and all for one candidate, which is absurd.

The minority of the committee opposed this view. From their analysis of the testimony they concluded that riot and intimidation were general throughout the district, and say:

> But the law obviates the necessity of inquiring as to the number of votes affected by riot, violence, and intimidation, holding the whole election dead when robbed of that freedom which is its soul and life. If there was "actual force or violence, or a display of numerical strength, accompanied with threats, and the conduct of the parties was such as to strike terror into the mind of a man of ordinary firmness, and to deter him from proceeding to the poll" (Cushing, sec. 183), the election must be declared a nullity. And such it unquestionably was at all the polls. * * * The election must, therefore, be declared a nullity.

Other questions relating to disqualified voters and the conduct of election officers were discussed, but they were subordinate to the main issue.

326. The Louisiana election cases of Jones v. Mann and Hunt v. Menard in the Fortieth Congress.

A Member whose seat was contested dying, the House did not admit a claimant with credentials until contestant's claim was settled.

The disqualification of a Member-elect does not entitle a minority candidate to the seat.

Instance of returns of an election made by military officers under authority of reconstruction acts.

Testimony taken before a notary public in disregard of the provisions of law was criticised by the Elections Committee, but given weight.

A contestant neglecting to prove the vote of the district, the Elections Committee had recourse to such official records as it deemed satisfactory.

On July 18, 1868,[1] Mr. James Mann, with other Members-elect from Louisiana, was sworn in and took his seat. He died about the 12th day of August. Mr. Simon Jones had served notice of contest on Mr. Mann, alleging frauds, irregularities, and intimidation in the wards of New Orleans lying within the district. While the Committee on Elections was considering this contest, on December 18, 1868, and January 5, 1869,[2] the credentials of J. Willis Menard, showing him to have been elected in place of Mr. Mann, were presented to the House and referred to the Committee on Elections. No effort was made to have Mr. Menard sworn in, Mr. Jones's title to fill the vacancy not being settled.

On February 17, 1869,[3] the committee reported both on the contest of Mr. Jones, and on the claim of Mr. Menard, whose title was contested by Caleb S. Hunt.

1. As to the contest of Mr. Jones several questions arose for the decision of the committee:

(*a*) The contestant objected that all the testimony taken in behalf of Mr. Mann was inadmissible because taken before a notary public, an officer not authorized by the act of Congress to take testimony in such cases. This objection was taken in the first instance and returned with the testimony, and the committee find that it is good under a strict construction of the law. The committee say, however, that the view the committee have taken of the case does not render it very material whether the testimony be admitted or not, and as Mr. Mann was dead and some of the testimony related to his eligibility, they had not deemed it proper to exclude it, but would submit it to the House.

(*b*) A question as to the qualifications of Mr. Mann is thus disposed of:

But the contestant and his counsel further insist that Mr. Mann was constitutionally ineligible for the reason that he was not "when elected" an inhabitant of the State of Louisiana (Constitution, Art. I, sec. 2, cl. 2), and that the contestant, if he only received the next highest number of votes, should be declared elected, and the votes cast for Mr. Mann should be disregarded. In support of this position it is suggested on his part that, in the absence of any American precedent for this course, the faithful execution of the fourteenth amendment requires the establishment of such a precedent, and that, if voters may choose disqualified members, representation may be defeated in many States.

The committee does not consider the evidence adduced by the contestant in regard to Mr. Mann's residence or domicile (Mis. Doc. No. 13, pp. 20, 29, 30) sufficiently clear and conclusive to justify it in declaring Mr. Mann constitutionally ineligible at the time of his election, even if the evidence on the part of Mr. Mann were rejected; but it is not necessary to decide upon this question of ineligibility, since, if Mr. Mann were admitted to have been ineligible at the time of holding the election, and the evidence of this held to be satisfactory and conclusive, it would not aid the contestant nor entitle him to the seat, but would only show that there was a vacancy. This is fully shown by the report of the committee in the case of Smith *v.* Brown (Report No. 11, second session Fortieth Congress) sustained by the House, which, after declaring Mr. Brown not entitled to his seat by reason of disloyalty at the time of his election, at the same time refused to Mr. Smith the seat on the ground that he had not received a majority of the votes cast for Representative at said election in said Congressional district, and directed the Speaker to notify the governor of Kentucky that a vacancy existed in the representation in this House from the said Congressional district of said State.

After quoting from the report in the case referred to, the committee go on to say that as it was made prior to the adoption of the fourteenth amendment they

[1] Second session Fortieth Congress, Journal, p. 1102; Globe, pp. 4215, 4216.

[2] Third session Fortieth Congress, Journal, pp. 93, 104; Globe, pp. 151, 182.

[3] Third session Fortieth Congress, House Report No. 27; 2 Bartlett, p. 471; Rowell's Digest, p. 226.

would, in quoting the report, intimate no opinion concerning any additional powers that might have been conferred upon Congress by the amendment. The committee also state that no statute of Louisiana provided for a minority candidate to succeed a disqualified majority candidate.

(*c*) The contestant had not proven the vote of the district, either in the aggregate or by precincts, so the committee had recourse to the certified returns of the military officers in command in the district, which showed a plurality of 1,150 votes for Mr. Mann. The contestant thereupon raised a question which went to the validity of the returns and credentials. The committee thus set forth this question:

The ex parte and unauthorized testimony of Mr. F. Leon, taken before a justice of the peace in this district January 11, 1869, since the death of Mr. Mann, is the only other evidence as to the votes cast at this election in this Congressional district, and it is insisted by the counsel for the contestant that such sworn statement of this witness is better evidence than the return of General Buchanan, who, as contestant claims, "had no jurisdiction over Congressional elections," and that "the sworn proof therefore stands upon higher ground than the voluntary statements of General Buchanan about a matter not within his jurisdiction."

He concedes, however, that by the reconstruction laws it is made the duty of the commanding general to receive and return the votes upon the ratification of the Constitution. The contestant and his counsel, in assuming this position above stated, seem to have overlooked the provisions of the supplementary reconstruction act of March 11, 1868, subsequent to which this election was held, which act makes provision for the election of Members of Congress at the same time that the vote is taken on the adoption of the Constitution, and declares that "the same election officers who shall make the return of the votes cast on the ratification or rejection of the Constitution shall enumerate and certify the votes cast for Members of Congress." It is considered, therefore, that the commanding general, in making and certifying the returns of the votes cast at this election for Members of Congress was acting under the authority conferred by the reconstruction laws aforesaid, and that his return is higher evidence than, or at least not inferior to, the brief, general, and somewhat vague and indefinite statement of Mr. Leon, sworn to as aforesaid.

The House of Representatives, also, in admitting Mr. Mann and his colleagues from Louisiana to their seats on the certificate of said commanding general, as also in admitting Members from Georgia and South Carolina on similar certificates, seems to have recognized this construction of the law and the jurisdiction of said officers in the matter of said election returns.

(*d*) Inasmuch as there was no evidence before the committee showing the returns of the various precincts, they could not proceed to apply the testimony as to frauds and intimidation—which was, moreover, not very definite—in any way to destroy Mr. Mann's plurality. They conclude:

The most favorable construction of the evidence for the contestant that could be given would not identify and count up additional votes enough in his favor to equal one-half of the majority returned for Mr. Mann, much less to give him the majority, even if all the votes assumed by witnesses to have been changed in the ballot boxes or fraudulently put in were charged to the Democratic vote, deducted from Mr. Mann's majority, and counted for the contestant. The only remedy for or correction of the evils complained of, under the state of the case as presented, would be to set aside the returns, declare a vacancy, and order a new election, as it is impossible from the evidence to purge the poll; but this the contestant does not desire or insist should be done, nor do the committee consider the evidence sufficient to justify such a course.

Therefore the committee reported a resolution declaring that Mr. Jones, the contestant, not having received a majority of the votes, was not entitled to the seat in question.

On February 27,[1] after debate, an amendment declaring Mr. Jones entitled to the seat was rejected without division, a demand for the yeas and nays being refused. Then the resolution of the committee was agreed to.

327. The Louisiana election cases of Jones v. Mann and Hunt v. Menard, continued.

The House declined to admit a claimant on the vote of three out of seven parishes, 19,078 out of 27,019 votes having been rejected.

An election to fill a vacancy being held in a newly apportioned district, the larger portion of which was new, both as to territory and people, the elections committee considered the election invalid.

A question as to whether or not the House, from historic knowledge merely, may decide that the result of an election has been invalidated by intimidation.

A seat having been adjudged vacant, the House yet declined to admit a claimant whose final right was then under examination.

Reference to historical facts in determining prima facie effect of regular credentials.

The law governing the serving of notice of contest may be departed from in a case where its observance is impracticable.

2. The examination of the contest of Hunt *v.* Menard involved several questions:

(*a*) In the first place, immediately after the decision of the House that Mr. Jones was not entitled to the vacancy caused by the death of Mr. Mann, a demand was made that, as Mr. Menard had presented credentials in due form, he should be sworn in pending the decision of the final right. The Committee on Elections, who had reported that neither Mr. Menard nor Mr. Hunt was entitled to the seat, resisted this proposition, it being stated that accompanying Mr. Menard's credentials was a certified statement of the governor and secretary of state giving reasons which induced them to throw out certain votes, which reasons were not good, tending to show that Mr. Menard was not really elected. It was also stated that in all cases from the reconstructed States the bearers of certificates had not been sworn in until the credentials had been examined by the committee. The question was brought to a vote in the shape of an amendment directing that Mr. Menard be sworn in pending the decision of his case. This amendment was disagreed to, yeas 57, nays 130.[2] In the argument it was admitted[3] that the usual rule was that a person having a certificate in proper form was entitled to be sworn in in the absence of objection; but the House had at this session in the reconstructed States taken notice of historical facts, and had not sworn in Members-elect until their certificates had been examined.

(*b*) The majority of the committee in their report discuss a preliminary question relating to notice of contest:

It is objected, however, by Mr. Menard, that no notice of contest has been served on him as required by law, and that therefore Mr. Hunt is not properly here to contest his right to the seat. In reply to this

[1] Journal, p. 470; Globe, pp. 1679–1683.

[2] Journal, pp. 473, 474; Globe, pp. 1683–1696.

[3] Globe, p. 1694.

it is urged by Mr. Hunt and his counsel that the certificate of Mr. Menard bears date November 25, 1868, and about the time when the final decision of the canvassers was made, and that as the session of Congress was to commence on the first Monday in December next succeeding, and to close on the 4th of March following, to wait the time allowed by law for giving notice and answer, and then for taking testimony, would be to permit Mr. Menard to take and hold the seat during the whole of the remaining official term, and to prevent the contest from ever being heard by this Congress, which only has jurisdiction of it. He also suggests that as no other evidence was needed by him to support his claim than the certified copy of the returns and the reasons given for their rejection, he has, by filing his protest with the House, addressed to the Speaker, stating his objections to Mr. Menard's claim to the seat, and the grounds on which he claims the same, with the evidence by which it is supported, given Mr. Menard sufficient notice, under the circumstances, and that a literal compliance with the terms of the acts of Congress was impossible without defeating him in the contest by putting off taking the evidence and the hearing of the case beyond the lifetime of the Congress to which it relates.

He also urges that the statute is directory, and has been so treated in some cases arising under it in the House, and that under the Constitution the power exists in this Congress, independent of the statute, to hear and determine this case as presented.

Were it necessary to decide this question, it is proper to say that Mr. Hunt presents some very good reasons in justification of the course he has pursued under all the circumstances of the case, but the view the committee has taken of the election itself does not, in its judgment, require that it should pass upon this objection raised by Mr. Menard, and also since it is the right of any of the legal voters of the district to petition Congress and to call in question the right of any person claiming the seat.

The minority in their views [1] thus discuss Mr. Menard's objection:

To this objection Mr. Hunt answers, that the notice of contest which he laid before the House on the 18th December, 1868 (within the thirty days required by law), was, at the time, known to him (Menard), he being present in the House at the time to present his credentials; that the grounds of contest were particularly set forth in said notice; that the contest was so limited in its range of inquiry and investigation as to require only testimony of record and construction of law; that such testimony was furnished along with the notice, and therefore Mr. Hunt submits that Mr. Menard had notice sufficient in all respects of time and particularity to put him upon his defense.

Since the passage of the act of 1851 regarding contested elections, the rulings and decisions of the Committee of Elections, sustained by the House, in respect to the construction and application of its provisions and the practice thereunder, have been most liberal in regard to the personal rights of contestants and the constitutional rights of constituencies, and the rights and powers of the House as involved more or less in every case of contested election.

After citing the cases of Wright *v.* Fuller, Daily *v.* Eastabrook, Williamson *v.* Sickles, Vallandigham *v.* Campbell, and Chapman *v.* Ferguson, the minority conclude:

In the judgment of the undersigned, in view of the facts in the premises and in the spirit of such rulings of the Committee of Elections, the notice given by Mr. Hunt as aforesaid was, for all the purposes of this contest and protection of the rights of Mr. Menard, legally and substantially sufficient.

(*c*) The committee found that Mr. Menard [2] was not elected:

From the said certified statement it will be seen that the whole number of votes cast at said election to fill such vacancy in said district was 27,019, of which votes so returned to the secretary of state 19,078 were rejected by the committee of canvassers and the returns thrown out, being a large majority of the entire vote of the district as returned, and the certificate was given to Mr. Menard on the vote of but three of the seven parishes of the district, and casting in the aggregate only a vote of 7,941. The vote of the single parish of Orleans, one of those rejected, was 11,628, being nearly four-ninths of the entire vote of the district, and 3,687 votes more than the entire vote on which the certificate was given to Mr. Menard.

The reason given in the certified statement for the rejection of the vote of the parish of Orleans, viz, "that the returns were made by the boards of supervisors of registration," shows that in this respect the returns were made as required by law, and that the objection is invalid.

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[1] Signed by Messrs. M. C. Kerr, of Indiana, and J. W. Chanler, of New York.

[2] Mr. Menard was the first colored man to present himself for a seat in the House.

By the provisions of section 25 of act No. 164, Laws of Louisiana, 1868, page 223, it is expressly made the duty of said supervisors of registration in each parish to make out and forward said returns to the secretary of state. It is unnecessary to notice further the objections stated to the returns from the other parishes rejected (although those urged against Jefferson and Terrebonne would seem to be frivolous), since, if any valid election was held there, the parish of Orleans, being properly returned, should be counted, which would give Mr. Hunt a majority over Mr. Menard so great that it would not be overcome by the vote of all or any of the other parishes, if they were counted, and in no event can Mr. Menard be shown by the returns to have received a majority vote in the district.

(*d*) Another reason for denying a seat to Mr. Menard and also to Mr. Hunt appeared in the fact that after the election of Mr. Mann, who was originally chosen to represent the district in question (the Second district), the State had been redistricted by the act of August 22, 1868, which so changed the boundaries of districts that the old Second district could not be recognized in the new Second. The largest portion of the new Second, both in territory and numbers, was made up of what was the old Third district, a district represented on the floor by a Member chosen at the time Mr. Mann was originally chosen to represent the old Second, The election at which Mr. Menard and Mr. Hunt were rival candidates was held after the apportionment, and in the new Second district. The committee say of this situation:

So far as the numbering of this new district is concerned it might with as much propriety have been called the Third district as the Second, and it would be difficult to say in which of the new districts as created and arranged by the act of August 22, 1868, the vacancy had occurred, or to which of the new districts the governor of the State should have issued his writ of election to fill the vacancy which the death of Mr. Mann had caused if the election to fill the vacancy was compelled to be holden under the law of 1868 creating the new districts. The only case to which the attention of the committee has been called as a precedent is that of Perkins *v.* Morrison (Bartlett's Election Case, p. 142), which is against this objection raised by Mr. Hunt, but in that case there was a minority report signed by four of the Committee of Elections, and the report of the majority was sustained in the House by the close vote of only 98 to 90, and, in the opinion of your committee, the soundest reasoning is contained in the report of the minority in that case, and sustains the objection raised here against the validity of this election.

The very objection which was urged in that case and which the majority in the concluding part of their report were compelled to admit, as a consequence of their position, is exemplified in the case now under consideration, and it is thus stated in their report:

"It was, that if the legislature of New Hampshire could change the boundaries of the district, they might have so divided it as to render it impossible to determine to which district the governor's precept should have been sent."

The act of the legislature of Louisiana of August 22, 1868, making a new division of the State into its five Congressional districts, by its terms, purports to repeal all laws and parts of laws in conflict with said act, but is silent on the subject of vacancies that might occur in the districts as then existing.

The committee then quotes the minority views in the case of Perkins *v.* Morrison, which dwells upon the impropriety of a decision which would allow a portion of the people to have two Representatives, while another should have none in whose choice they had participated. They then conclude:

This reasoning, which your committee consider as sound and pertinent, applied to the case under consideration seems to be conclusive against this election; and it may also be added that, whatever power a State legislature may have in the matter, it is absurd to say that a district when once established and a Representative chosen therein is not to continue for the whole Congress for which the election has once been operative. No election to fill the vacancy caused by the death of Mr. Mann appears to have been notified or held in the whole of said district as represented by him.

The returns on which Mr. Menard predicates his claim to the seat are from parishes wholly outside of said district, and comprised in the district which Hon. J. P. Newsham was chosen to represent and

is now representing in this House (act No. 54, Laws of Louisiana, 1864–65, p. 144), and which parishes, in the judgment of your committee, had no lawful right to participate in the election to fill the vacancy in another district, caused by the death of Mr. Mann.

But while the objection is thus fatal to Mr. Menard's claim to the seat, it is equally fatal to the claim of Mr. Hunt.

The minority [1] quote the New Hampshire case and says:

The reasoning of the majority of the committee in that case seems clear, forcible, and conclusive. The regulation of the districts is under the exclusive control of the States until, by act of Congress, it is taken from them. This jurisdiction has never yet been asserted by Congress. The State, therefore, had full power to create the new district. It did so, and then repealed all preexisting laws on the subject. The vacancy could not have been filled by an election held otherwise than under the provisions of the last law. It was therefore so held, in fact, and by order of the governor of the State.

But as we proceed to make it clear that if the entire vote cast in the election precincts now included in the Second district which were not in the old district be rejected, it will not materially change the result, or in any just sense sustain the decision of the majority in this case. The decision of the majority amounts to a denial of representation. This ought never to be done where it is possible to avoid it.

It is argued by the majority of the committee that the electors of the Second district who originally voted at the election of Mr. Mann, to serve during the Fortieth Congress, could alone legally elect a successor to fill his vacancy for the same Congress, and therefore that the recent election, November 3, 1868, to fill such vacancy, was invalid by reason of the participation therein of the electors of the several parishes and the ward which had been added to the district since Mann's election. If this argument be sound, it can fairly and legally apply only in such cases where the legitimate vote can not be separated nor sufficiently ascertainable from the illegitimate.

(*e*) The majority of the committee state these facts in support of a contention that there had been intimidation:

When Mr. Mann was elected, the Second district, as then constituted by the act of April 4, 1865, was wholly within the parish of Orleans, though not comprising the whole of said parish, and his aggregate vote was in April, 1868, 6,874, and the vote for Mr. Jones, as returned, was 5,634, besides 349 scattering votes given for other Republican candidates, making the aggregate vote opposed to Mr. Mann 5,983. At the late election in November, only a little over six months after, when under the act of August 22, 1868, other parishes were included in this district and a portion of the parish of Orleans, this portion of the parish of Orleans now in the district returns 11,535 votes for Mr. Hunt for both the Fortieth and Forty-first Congresses, and but 93 votes for Mr. Menard for the Fortieth Congress and 115 for Mr. Sheldon for the Forty-first Congress. The smallness and wonderful decrease of the Republican vote, the vastness and wonderful increase of the Democratic vote, and its exact coincidence for both Congresses, are all somewhat strange and not easily susceptible of satisfactory explanation on the theory of a fair and honest election.

The committee then go on to cite other things of which the House might take notice, the fact that "for some weeks immediately preceding this election civil disturbance, disorder, and crime prevailed to such extent by reason of the lawlessness of the disloyal element prevalent there that the civil authorities were unable to put it down." The committee cite the fact that the State legislature called ineffectually on the National Executive for troops, and quotes from letters of the governor. It was unsafe for loyal citizens to speak their sentiments freely, to participate in political meetings, or vote at the election. The majority therefore conclude:

[1] On this branch of the question the minority were reenforced during the debate by Mr. Luke P. Poland, of Vermont. Globe, p. 1692.

Sufficient of these matters exist of which notice may be taken in connection with the facts in evidence in the case to justify the conclusion, in the opinion of your committee, that no valid election has been held to fill the vacancy in the said Second Congressional district.

The minority assailed vigorously this position of the committee in regard to intimidation. They denied the facts by implication, if not directly, and questioned the law. It was urged [1] in the debate that there was no allegation as to intimidation before the committee and that there was no proof of it. An election case, like a suit at law, should be decided on things asserted and proven. The letter of the governor did not amount even to ex parte evidence. Further in the debate the fact that the committee had proved nothing definite as to votes prevented by the alleged intimidation was urged.

The report was debated at length on February 27,[2] the question presented being this resolution presented by the majority of the committee:

Resolved, That neither J. Willis Menard nor Caleb S. Hunt is entitled to a seat in this House as a Representative from the Second Congressional district of Louisiana, to fill the vacancy caused by the death of James Mann.

Mr. Luke P. Poland moved to amend by striking out all after the word "resolved" and inserting a provision that the report be recommitted, with instructions to take testimony in reference to "any improper or unlawful means used to prevent a free and fair election."

Mr. Halbert E. Paine, of Wisconsin, moved to amend the amendment by adding a provision that Mr. Menard be admitted on his prima facie right pending consideration of the case.

Mr. Michael C. Kerr, of Indiana, by unanimous consent, submitted a substitute declaring Mr. Hunt, the contestant, entitled to the seat.

The question being first taken on the amendment of Mr. Kerr, it was decided in the negative, yeas 41, nays 137.

On the amendment of Mr. Paine there were yeas 57, nays 130, and it was rejected.

Then, on motion of Mr. Henry L. Dawes, of Massachusetts, the whole subject was laid on the table.[3]

328. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, Kennedy and Morey v. McCranie, Newsham. v. Ryan, and Darrall v. Bailey in the Forty-first Congress.

While the Clerk may not give prima facie effect to credentials not explicitly showing the bearers to be duly elected, the House has done so after examining the returns.

The House assigned prima facie title to a claimant, although papers accompanying the credentials raised a question as to the final right.

The House declined to consider, in the assignment of prima facie title, a question of law as to rejection of votes by canvassing officers.

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[1] By Mr. Poland, Globe, p. 1692.

[2] Globe, pp. 1683–1696.

[3] Journal, pp. 473–475.

The House has examined validity of elections and qualifications of a claimant when determining prima facie title, leaving final right for later inquiry.

The House adjudged valid for prima facie title an election wherein parishes casting 14,346 out of 27,055 votes in the district were rejected.

A resolution for the investigation of the right of a claimant to a seat presents a question of privilege.

On March 4, 1869,[1] at the organization of the House, the names of the Members-elect from the State of Louisiana were not found on the Clerk's roll, particularly the name of Lionel A. Sheldon. These Members-elect bore certificates as follows in form:

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
New Orleans, November 25, 1868.

To all to whom these presents may come:

Know ye that, in accordance with the laws of the State of Louisiana, an election was held by the qualified electors of this State on the 3d day of November, A. D. 1868, for five Members of Congress, to represent the First, Second, Third, Fourth, and Fifth Congressional districts of the State of Louisiana in the Forty-first Congress of the United States, and for one Member of Congress from the Second Congressional district to the Fortieth Congress, to fill the vacancy occasioned by the death of the Hon. James Mann.

And whereas the returns of said election made to the secretary of state, as required by law, have been carefully examined, compared, and attested by the proper officers whose duty it was to examine the same;

And whereas it has been ascertained from said returns that Lionel Allen Sheldon received 5,108 votes, and Caleb S. Hunt 2,833 votes, cast at said election:

Now, therefore, I, Henry C. Warmoth, governor of the State of Louisiana, do hereby certify that Lionel Allen Sheldon received a majority of the votes cast for Representative to the Forty-first Congress from the Second Congressional district of the State of Louisiana.

In testimony whereof I have hereunto set my hand and caused the seal of the State to be affixed this 5th day of November, in the year of our Lord 1868, and of the independence of the United States the ninety third.

[SEAL.]

H. C. WARMOTH,
Governor of the State of Louisiana.

GEO. E. BOVEE, *Secretary of State.*

The Clerk had declined to put the names of the Members-elect on the roll because the words "duly elected" did not appear in the credentials.[2] The law of Louisiana had provided that the proper officials "shall proceed to ascertain from the said returns the person duly elected, a certificate of which shall be * * * signed by the governor," etc. In 1865 the credentials given by the governor, in the ancient form of the State, had certified that the bearer "was duly elected a Member of the Thirty-ninth Congress."

The Clerk having declined to place the names on the roll, the House agreed to the following resolution:

Resolved, That, inasmuch as the names of Louis St. Martin, Lionel A. Sheldon, and George W. McCranie, claiming severally to be elected Representatives from the State of Louisiana in the Forty-first Congress, have been omitted by the Clerk from the roll of Members because, as is alleged, their several credentials or certificates of election do not show that they were regularly elected in accordance with

[1] First session Forty-first Congress, Journal, p. 12; Globe, pp. 11–13.

[2] See statements of Messrs. Garfield and Stevenson in debate, Globe, pp. 11, 637, 642.

the laws of said State or of the United States, the credentials of the said severally named persons be referred to the Committee of Elections, when appointed, for inquiry and examination into the right of said persons, respectively, to be admitted on their said certificates to take the seats which they claim, with the instructions to said committee to report at as early a day as practicable.

On March 9[1] Mr. Horace Maynard, of Tennessee, as a question of privilege, presented a preamble and resolution, the former referring to an official declaration of the governor of Louisiana and a legislative report of that State as authority for statements that riot and intimidation had prevailed, and the latter providing that the committee on elections, in addition to examining the credentials,

shall inquire into the validity of the election * * * and ascertain in which of said districts, if any, a valid election was held, and shall also inquire whether the persons claiming to have been elected in such districts are qualified under the Constitution and laws to take seats as Members of this House.

A question of order being raised that this resolution did not involve a question of privilege, the Speaker[2] said:

Anything which goes to vindicate the right of a Member to a seat, whether an investigation or anything else, is within the privilege of the House.

This resolution was agreed to, yeas 117, nays 46.

On March 31,[3] Mr. Job E. Stevenson, of Ohio, submitted the report of the majority of the committee. This report, after citing the facts as to the certificates, says:

If the case rested upon the certificate alone, the right of the holder to a seat might be questioned; but upon this point, which is involved in other cases not yet considered, the committee do not deem it necessary now to pass. By the official returns, as examined and certified according to law, it appears that Lionel Allen Sheldon received 5,108 votes and Caleb S. Hunt 2,833 votes. This official statement, which was before the committee, also showed that the following votes were rejected: For Lionel A. Sheldon 3,606, for Caleb S. Hunt 15,508. The statement gave the reasons for the rejection of these votes.

The committee proceed to say:

Whatever might be the result of a contest involving the validity of these returns, and the sufficiency of the reasons assigned for rejecting the parishes which were rejected, the returns are to be received as prima facie evidence of the result of the election, and upon them Mr. Sheldon is entitled to take the seat, subject to any contest which may be lawfully made, unless he is disqualified or the election was void.

The report then states that Mr. Sheldon was not disqualified.

In the debate it was asserted[4] that the credentials were sufficient prima facie evidence for the House to seat Mr. Sheldon. The statute required that the Clerk in making up the roll should not put on the names of those not explicitly shown to be duly elected. The House was not governed by such strictness.

The minority[5] also contended that the certificate was sufficient in this respect, although not in another:

A prima facie right must be founded upon and established by prima facie evidence, and prima facie evidence is that evidence which is sufficient to establish the fact, unless rebutted. Now apply this

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[1] Journal, pp. 19, 20; Globe, p. 36.

[2] James G. Blaine, of Maine, Speaker.

[3] House Report No. 4; 2 Bartlett, p. 530; Rowell's Digest, p. 232.

[4] By Messrs. Garfield and Paine, Globe, pp. 642, 643.

[5] Minority views signed by Messrs. A. S. Burr, of Illinois, and Samuel J. Randall, of Pennsylvania.

definition to the case under consideration. Unless rebutted, the certificate which Mr. Sheldon holds is prima facie evidence: (1) That an election was held at the time, place, and for the purpose therein expressed; and (2) that he received the highest number of votes cast at the election, which necessarily constitutes his election, and thereby establishes prima facie his right, or, in other phrase, his prima facie right to be admitted to the seat. But his certificate of prima facie evidence is rebutted by a like official and authenticated statement of equal force, and showing also (1) that the election was held at the time, place, and for the purpose therein expressed; and (2) that Mr. Hunt received the highest number of votes cast at the election, and which necessarily constitutes his election, and thereby establishes prima facie his right to be admitted to the seat. Now, what becomes of Mr. Sheldon's prima facie right? It falls, of course, unsustained by prima facie evidence; and thus his claim is of no higher validity than Mr. Hunt's in a prima facie sense, and upon the form of the papers, and in substantial merits, as made manifest on the face of the certificates, it becomes utterly worthless and proves nothing to the advantage of Mr. Sheldon. The papers, taken together, establish the vital fact that Sheldon is not elected, and that Hunt is elected by a triumphant majority of 9,627 votes. Or, rejecting the parishes of Terrebonne, St. John the Baptist, and Jefferson, he is then elected by a majority of 9,135. This conclusive result is shown by the papers and the law alone, without any resort whatever to other evidence or sources of information.

The point made by the minority is elaborated more clearly in the debate.[1] The certificate of facts, which was signed by the governor and secretary of state under seal, gave the returned vote and the reasons in law for the rejection of the returns from certain parishes. The minority contended that the reference to the law brought that law within the view of the committee, and that the question whether or not the returns were properly rejected should be settled as part of the prima facie case. Comparing this certified paper with the credentials, the minority say:

This paper springs from the same fountain; is based upon and authorized by the same law; is executed by the same officers; relates to the same subject-matter, and declares certain facts in reference thereto, from which arise, by inevitable and logical implication, different legal results and conclusions from those promulgated in the certificate to Mr. Sheldon.

In all matters pertaining to the settlement or adjudication of contested elections, the House acts judicially, and not otherwise. Whenever any legal or official papers, executed in connection with such contests, and properly brought to the knowledge of the House, are based upon, or refer to, any general laws, State or Federal, for the regulation of elections, it is the imperative duty of the House to take notice of all such laws. It is the conclusive presumption of law that the House is acquainted with them. If any action in connection with an election is based upon provisions or constructions of law, and not upon facts, the law needs not to be set out in the official paper based upon it, but the House must take judicial notice of it, and must be its own exclusive judge as to its interpretation. These rules are elementary and important, and apply with great propriety and force to this case.

To this the majority replied that the tribunal in Louisiana having jurisdiction passed on the question of law, and while the House might review the decision in determining the final right, it should not do so on the prima facie question.[2]

329. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House, going outside the allegations of the parties and ascertaining by historic knowledge disturbances causing 232 deaths, declared an election invalid.

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[1] Remarks of Mr. Kerr, Globe, p. 639.

[2] Remarks of Mr. Cessna, Globe, p. 642.

The committee having also been instructed to inquire into the validity of the election, the majority of the committee arrived at the following conclusions of fact:

In the city of New Orleans and in Jefferson Parish, which adjoins and is practically part of the city, there was for about one week prior to and at the date of the election a reign of terror unsurpassed in the history of this country. The disloyal inhabitants, stimulated by the hope of reviving rebellion and regaining the lost cause, organized and armed, overcame the feeble resistance of the civil authorities, overawed the military commanders, and ran riot through the city, shooting down on sight and murdering in cold blood loyal citizens, white and colored, without offense or provocation, save those of loyalty and color.

By the official reports of the committee of the legislature of Louisiana appointed to investigate the facts, it appears that in these two parishes 232 Republicans were killed, shot, or otherwise maltreated-69 in Jefferson and 173 in Orleans.

This violence prevented nearly one-half the registered electors from voting.

Assuming that nearly all the electors thus prevented would have voted under peaceable conditions, the majority conclude that the election should be invalidated in part. They say:

It is evident, from the testimony referred to the committee, that in the parishes of Orleans and Jefferson there was no valid election, and the question arises whether this should invalidate the election in the other parishes of the district and set aside the entire returns.

In all the other parishes the election was quiet and the vote was as full as that usually cast in loyal States; and it would seem unreasonable and unjust that the peaceable electors of the district should be denied the right of representation because their violent neighbors attempted and failed to deprive them of that right.

The better rule would seem to be that indicated by the legislature of Louisiana, in the resolution referred to the committee, to exclude the disorderly and count the peaceable parishes, thereby defeating the violent and protecting the peaceable and law-abiding citizens in the right of representation.

The minority condemn the conclusion of the majority and the reasoning on which it is based, saying:

The parties to this contest do not allege invalidity in the election by reason of the existence of violence, intimidation, terror, or anarchy. They specifically and emphatically deny all such charges. But the majority of the committee assume the existence of such a state of disorder as should invalidate the election in this parish. The certificates afford no support or countenance to this assumption. There is no legal evidence before the committee to establish it. But the majority seem to have borrowed their faith on this subject from a report made to the legislature of Louisiana by a committee of that body. That report is not properly or legally before the committee; and if it were, it does not contain legal evidence to be used in this contest, and in every respect it is intrinsically and notoriously unfit to be received. It is wholly ex parte and transparently and meanly partisan, and, judged by itself, it is unworthy of respect or belief.

But the majority, by a singular disregard of the appropriate limits of an inquiry into alleged prima facie titles, attempts, by a process of argument and comparison of party votes and strength at a preceding election, to deduce the legal conclusion that if all the legal votes in the parish of Orleans that were not cast had been cast at the Congressional election in question, they would in fact have been cast for Mr. Sheldon, and that therefore he would have been elected, and ought now to be allowed to be sworm in as a Member. They appear to have no doubt but that every man who did not vote wanted to vote for Mr. Sheldon and that the House should now declare the result to be the same as if they had in fact all voted for Mr. Sheldon.

The majority reported a resolution giving the seat to Mr. Sheldon on his prima facie showing.

The report was debated in the House on April 8,[1] and a proposition of the minority that Mr. Hunt be seated was decided in the negative—yeas 44, nays 101. Then the resolution of the majority seating Mr. Sheldon was agreed to—yeas 85, nays 37.

Mr. Sheldon accordingly took the oath.

330. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

Instance wherein the House, by resolution, removed the contested cases of a State from operation of the law and prescribed a different procedure.

On the day preceding the decision to seat Mr. Sheldon, on April 7, 1869,[2] the House agreed to the following resolution:

Resolved, That each of the persons claiming seats in the Forty-first Congress as Representatives of the several Congressional districts of the State of Louisiana, excepting such as have been, or before the close of the present session shall be, reported by the Committee of Elections to this House as unable to take the oath prescribed in the act entitled "An act to prescribe an oath of office, and for other purposes," approved July 2, 1862, shall, on or before the 15th day of April, 1869, file with the Clerk of the House a statement of the grounds upon which he claims such seat, and a subcommittee shall be appointed by the Committee of Elections with power to administer oaths, take testimony, and send for persons and papers to investigate the facts connected with the late elections for Representatives in said several districts during the recess of Congress, at such time and places in the State of Louisiana as they may determine; and upon such investigation and upon the evidence heretofore lawfully taken in said respective cases the Committee of Elections shall at the next session of Congress report to the House whether the elections in the said several districts were lawful, regular, and valid, and which of said persons, if any, were lawfully elected to represent said districts, respectively, in the Forty-first Congress, and whether said claimants are able to take the oath of office prescribed in the act of July, 1862, with a full statement of facts in each case.

Under this resolution a question arose which was thus described and discussed when the committee reported on the final right to Mr. Sheldon's seat in the next session:

The sitting Member claims that as the resolution admitting him to the seat was subsequent to that of April 7, 1869, under which we are now proceeding, the latter does not apply to his case, and he insists that his case is to be further considered, if at all, solely under the act regulating contested elections, by which it is provided that notice of contest shall be given within thirty days after the result of the election shall have been declared. Under this act the notice should have been given within thirty days from November 25, 1868, but no notice was given until January 30, 1869; consequently the notice was not sufficient to sustain a contest "according to law," unless the objection was waived, which does not appear, the contestee having made and maintained the objection at every stage of the case. The committee thought proper, notwithstanding this objection, and subject to protest, to proceed in the examination of witnesses in this case; and while upon a rigid construction of the resolutions of the House under the technical rules of law it might be difficult to escape the conclusion claimed by the contestee, we submit the question without recommendation, and assume that the House in its discretion may enter into the consideration of the case upon its merits.

The minority took a more positive view:

In respect to the legal technicality urged by Mr. Sheldon and presented by the majority of the committee as one of the grounds of his right to the seat, viz, that as he was admitted to the seat subject

[1] Journal, pp. 199, 202; Globe, pp. 637–646.

[2] Journal, p. 183; Globe, p. 588.

only to a contest according to law, no person has a right to contest the seat, because he has never received any notice of contest within the time required by the law of 1851. The answer to such special pleading is, that Mr. Hunt's right to contest the seat does not now depend upon technical conformity to the law of 1851. The House resolution of 7th April not only authorizes it, but from the moment of its passage became the law and the rule under which the contest should be tried, and Mr. Hunt has complied with its requirements, and therefore is contesting according to law. The House has fallen back upon its constitutional prerogative of judging of the election and qualification of its own Members, and has taken the contest out of the hands of the parties, and commenced the case de novo. Mr. Sheldon has admitted the new status of the contest by filing his statement of the grounds of his claim, in obedience to the requirements of the resolution. Under that resolution he was admitted on prima facie right to take his seat, subject to any contest against him according to law; and Mr. Hunt, having conformed to the requirements of the House resolution, is now contesting his right to the seat in accordance with law.

331. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House has decided that widespread and organized intimidation might invalidate the polls, although the disorder ceased before the actual day of election, when the polls were quiet.

The poll of a district in a prior year has been referred to in deciding upon the effect of a widespread system of intimidation.

The report as to the final right was submitted on March 16, 1870,[1] by Mr. Stevenson. As this case was typical of the other Louisiana cases the report considers first the general principle underlying the contests in the five districts from the State. The majority of the committee found it established by official records as follows in regard to certain disturbed parishes distributed among the five districts:

The number of electors registered in those parishes under the reconstruction acts in 1867 was 74,106; 31,413 white and 42,693 colored; being a majority of 11,280 of colored electors.

The Republican vote, at the election in 1867 for the constitutional convention, was 38,335, being a majority of all the registered electors.

The Democratic vote was 2,482, the mass of that party not voting because, under the reconstruction acts, a majority of registered electors was requisite to the calling of a convention.

At the next election, held in April, 1868, there were 30,895 votes cast in favor of the Republican State, parish, legislative, and Congressional ticket, against 26,553, cast for independent candidates, adopted by the Democracy.

The next election was that in question, being the Presidential and Congressional election of 1868, when the number of Republican votes cast in these parishes was 3,359, of which number eight parishes cast 3,339. Three parishes cast two Republican votes each. Five parishes cast one Republican vote each. Seven parishes cast no Republican votes.

The majority find it established by testimony that previous to the election a condition of terrorism was inaugurated in the parishes in question. Oath-bound bands of armed men, organized in a secret fraternity, set on foot organized intimidation and riot, and the report says "it is estimated by those best informed that not less than 2,000 Republicans were killed, wounded by gunshots, or otherwise seriously injured." This caused the Republicans generally to avoid the polls on election day. The majority of the committee therefore propose the following rule:

If it be said that there might Dot have been any violence, the answer is that recent events had raised a reasonable apprehension of danger, sufficient in law to cause a man of ordinary prudence to so act as to avoid the probable danger.

[1] Second session Forty-first Congress, House Report No. 38; 2 Bartlett, p. 703; Rowell's Digest, p. 241.

It may be said that because the statutes of Louisiana provide that actual violence at the polls should void the election, therefore no election can be set aside for violence at any other time or place, however it may affect the minds or conduct of electors; and this may have been the view of the Democratic leaders in causing or permitting cessation of violence immediately, before the day of election, and in keeping the peace among themselves at the polls. They may have supposed that they could violate the spirit of the State statute without incurring the penalty of its letter. It is submitted that no such views of law should be allowed to prevail. Such a ruling would overturn established principles, and give license to lawlessness. The rule applicable is well expressed in the act of Congress known as the first reconstruction act, passed March 2, 1867, section 5, where it is provided as one of the essentials of valid election that it shall appear "that all the registered and qualified electors had an opportunity to vote freely and without restraint, fear, or the influence of fraud."

This act was passed with special reference to the circumstances surrounding the freedmen of the late rebellious States, and it is well adapted to test the fairness and validity of such elections. It is declaratory of an established rule of contested election law, and is at present our only available means of securing fair and peaceable elections in the reconstructed States. It should be strictly and impartially enforced until we shall be prepared to protect the voter in the exercise of his rights, or to punish those who violate them; and it may be that experience will demonstrate that the best permanent practicable means of securing fair and free elections in the reconstructed States will be such an application of this great principle as will teach all parties that they have nothing to gain by intimidation and violence. It is proposed to apply this rule to the several disputed parishes of the districts of the State of Louisiana, and under its operation to reject the returns from those parishes, if any, in which it shall clearly appear from the testimony that the electors generally had not an opportunity to vote "freely and without restraint, fear, or influence of fraud."

As to the remaining parishes in which it shall appear that the election was valid, it is proposed that the returns therefrom, when properly authenticated or proved, shall be counted, and the result in each district determined from such returns.

The minority[1] do not admit either the facts alleged to be shown by the testimony or the principle of law.

The anarchy, violence, and public disturbance in the city of New Orleans, set up by contestee and the majority of the committee as a proper ground for rejecting the returns of the election in the said five wards thereof, appears, by the testimony of the witnesses testifying on that point, to have occurred sometime prior to the election, and therefore could not necessarily in any manner interrupt the proceedings at the election, nor prevent the ascertainment of the result.

The rule of law is well settled upon the question of riot and disturbance of the public peace at elections, and has governed the decisions in all analogous cases in courts and legislative bodies, both in England and this country. It is laid down in all the leading authorities on the law of elections, under appropriate titles, viz, Hayward on County Elections; Wordsworth's Law and Practice of Elections; Curtis's Law and Practice of Elections; Rowe on Elections; Sheppard on Elections; 4 Selden; Cooley on Const. Limit.; I Peckwell, etc., and is in substance, that to invalidate or make void an election on the ground of riot and intimidation, it must appear that the proceedings at the election were interrupted and the ascertainment of the result prevented thereby. This rule furnishes the ground of the decisions by the Committee of Elections in the several cases of Harrison *v.* Davis, Contested Cases, vol. 2, p. 341; Preston *v.* Harris, vol. 2, p. 346; Clements, of Tennessee, vol. 2, p. 369; Bruce *v.* Loan, vol. 2, p. 519; Minority Report adopted by the House.

After quoting from some of these authorities, the minority continue—

It will be observed that these several cases were founded on allegations of riot, violence, public disorder, intimidation, and interference with voters on the day of election and at the polls; and it was sought in each case to avoid the election in whole or in part; but the committee and the House, finding that the proceedings at the election were not interrupted, and the result had been duly ascertained, declared the election in each case valid, thus sustaining the rule aforesaid; and yet, with these former

[1] This Congress the Committee of Elections worked by subcommittees. Messrs. Stephenson, Burdett, and Kerr constituted the subcommittee having the Louisiana cases.

decisions by the committee and the House before them, and directly in point of the case now under consideration, the majority of the committee reports that, because of riot and disturbance of the public peace, not on the day of election and at the polls, but several days before the election, during the political campaign in the city of New Orleans, the election in the five wards aforesaid should be considered void, and that, too, not because the proceedings at the election were interrupted, or the result not ascertainable, but because a large number of Republican electors pretended that they could not vote with personal safety, notwithstanding on the day of the election no violence, threats, nor intimidation operated to give even color to such pretense.

Another rule, equally well established, is that whenever it is sought to set aside an election, in part, on the ground of illegal votes or riot and intimidation, it must be made to appear that if such illegal votes had not been received or if such riot and intimidation had not prevailed the result of the election would have been different in the whole district; for otherwise it would be wholly immaterial whether the election was void or not, in part. On this point reference is again made to the authorities before cited. This rule is self-evident, and has always heretofore been the guide of the Committee of Elections to its conclusions, and governed the House in its decisions, and is directly in point of the contest now under consideration.

332. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House has assigned final right to a seat from a district wherein 14,346 out of 27,055 returned votes were rejected because of intimidation.

The majority of the committee, having considered the general issue, proceed to the consideration of the case of Hunt *v.* Sheldon. It appeared that in the entire district there were cast for Mr. Sheldon 8,714 votes and for Mr. Hunt 18,341, a majority of 9,627 for the latter. But the majority of the committee found that violence and intimidation had prevailed in the parishes of Orleans and Jefferson to such an extent as to bring them within the general principles set forth at the outset. The votes cast in these two parishes were for Sheldon 787 and for Hunt 13,559, a majority of 12,772 for the latter. The rejection of these two parishes would cast out 14,346 out of the 27,055 votes cast in the district, and would change the result from a majority for Mr. Hunt to a majority for Mr. Sheldon.

After reviewing the lawlessness, intimidation, and riot in these two parishes prior to election day, the majority of the committee conclude:

The number of registered electors in the parishes of Orleans and Jefferson in 1867 was 34,766, of whom 18,697, a majority, were colored. The Republican vote cast at that election in 1867, in those parishes, was 16,083—a large majority of votes cast. The regular Republican vote of those parishes in April, 1868, was 17,106. The entire Republican vote cast in those two parishes, in November, 1868, was 1,814, being a falling off, in about six months, of over 15,000 votes, upon a largely increased registration.

The comparison is equally striking if confined to the vote in Jefferson parish alone or in that part of Orleans comprised within this Congressional district. The Republican vote in Jefferson in 1867 was 3,284; in April, 1868, 3,133; in November, 1868, 672—a decrease of nearly four-fifths. The testimony relative to the elections of 1867 and April, 1868, does not show the vote of the wards of Orleans separately, but it is understood that the population of the parish was about equally divided between the First and Second Congressional districts. The registered vote of the part of the parish within the Second district in November, 1868, was 21,314, more than half the registered vote of the parish. The Republican vote cast at the November election, 1868, was 124—probably not 2 per cent of the Republican vote.

It seems clear that there was no valid election in either of these two parishes, and that the returns from each of them should be rejected, and that the result should be determined from the returns of the other parishes of the district.

The minority opposed this view, also raising a question of fact as to the actual result even were the principles of the majority to be followed.

The report was debated on April 12,[1] and on April 13[2] a vote was taken on the proposition of the minority that Mr. Sheldon was not elected and that Mr. Hunt was elected. This was defeated, yeas 49, nays 123.

Then the resolution of the majority, declaring Mr. Hunt not entitled to the seat, was agreed to, yeas 119, nays 47. The second resolution, declaring Mr. Sheldon entitled to his seat, was agreed to, yeas 114, nays 51.

333. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House concluded that when two-thirds of the returned vote of a district had been rejected for intimidation the remainder did not constitute a valid constituency.

Instance of exclusion of a Member-elect found unable to take the test oath of loyalty.

Another contested case from Louisiana was that of Sypher *v.* St. Martin. Louis St. Martin had presented credentials in the same form as those of Mr. Sheldon and had been temporarily excluded with the other Members of the delegation. Under the resolution of April 7, 1869, the Committee on Elections examined the qualifications of Mr. St. Martin, reporting[3] as follows:

> It was alleged, in writing, before the committee, by said Sypher, that said St. Martin could not take the oath prescribed in the act entitled "An act to prescribe an oath of office, and for other purposes," approved July 2, 1862. The committee thereupon, in obedience to said resolution, inquired into said charge, and have found and do report to the House that Louis St. Martin, claiming the right to represent the First Congressional district of the State of Louisiana in this House, is unable to take the oath of office prescribed in the said act of July 2, 1862.

Although the House did not act on this report, the Committee on Elections considered that it disposed of the claim of Mr. St. Martin to the seat, and did not consider him as a party except in so far as his action negatived the claim of Mr. Sypher.

The report in the case of Mr. Sypher was submitted on April 18, 1870,[4] by Mr. Stevenson. This report did not give the official returns of the district, but after reviewing the acts of violence and intimidation before the election, wherein "over 300 leading and active Republicans, white and colored, were killed, wounded, or otherwise cruelly maltreated," and after reaffirming the principles set forth in the case of Hunt *v.* Sheldon, proceeded to give the vote in the peaceable parish as 2,983 for Sypher and 2,627 for St. Martin. Therefore they proposed a resolution declaring J. H. Sypher entitled to the seat.

The minority filed no views, but in the debate[5] Mr. Michael C. Kerr, of Indiana, after taking issue with the facts and law relied on by the majority on the question of intimidation, presented returns, alleged to be official, showing that the vote of the whole district was for Sypher 2,948 and for St. Martin 12,514. Mr. Kerr also

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[1] Globe, pp. 2618, 2649.

[2] Journal, pp. 608–613.

[3] First session Forty-first Congress, Journal, p. 180; Globe, p. 562; House Report No. 11.

[4] House Report No. 60, second session Forty-first Congress; 2 Bartlett, p. 699; Rowell's Digest, p. 241.

[5] Globe, p. 2791. For the whole debate, Globe, pp. 2788–2796.

claimed that the investigation had shown the actual vote cast in the entire district to have been 3,150 for Sypher and 16,059 for St. Martin. He further alleged that the registration made under the auspices of the State administration, which was of the same party as Mr. Sypher, reached a total of 29,992. Thus he claimed that Mr. St. Martin received an actual majority of the total registered vote. Citing the case of Smith *v.* Brown and the Louisiana State case of Fish *v.* Collins, he claimed that the vote from the so-called peaceable parishes did not show a proper constituency to be represented.

In the progress of the debate Mr. James A. Garfield, of Ohio, said that in the case of Hunt *v.* Sheldon he had concluded that a very large proportion of the territory and a majority of the population had been represented in these so-called peaceable parishes. He then asked how far this principle would apply in the pending case.

There was no agreement as to the actual vote, but it was admitted that St. Martin had received as high as 12,504 of the registered vote of 29,922 and that Sypher had not received over 3,150. Mr. Kerr denied that either this case or the Sheldon case conformed to the rule stated by Mr. Garfield.

On April 20[1] the resolution declaring Mr. Sypher entitled to the seat was agreed to—yeas 78, nays 73; but very soon, after a motion to adjourn had been disagreed to, a motion was made to reconsider. A proposition to table the motion to reconsider failed—yeas 79, nays 83. Then the House decided to reconsider—yeas 86, nays 79. Thereupon the question recurred on the resolution declaring Mr. Sypher entitled to the seat, when Mr. Thomas Fitch, of Nevada, proposed the following substitute:

> That there was no valid election held in the First Congressional district of the State of Louisiana on the 3d day of November, 1868, and that neither J. H. Sypher nor L. St. Martin is entitled to a seat in the Forty-first Congress as Representative from the First Congressional district of the State of Louisiana.

The substitute was agreed to—yeas 99, nays 70. Then the resolution as amended was agreed to—yeas 96, nays 68.

334. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House declared vacant a seat in a case wherein over half of the total vote of a district had been rejected for intimidation.

Mr. George W. McCranie, of the Fifth district of Louisiana, had also presented himself with a certificate from the governor of the State of Louisiana, but had not been sworn in. Under the general rule adopted the Committee on Elections reported[2] that he was unable to take the oath, having been engaged in rebellion.

The seat being claimed by Mr. Frank Morey, the Committee on Elections reported as to the final right on April 27, 1870.[3] It appeared that the actual vote cast in the district was—for McCranie, 13,716; for Morey, 3,424, and for P. J. Kennedy, 3,076. The official returns, however, had rejected two parishes, leaving the corrected vote—for McCranie, 11,107; for Morey, 3,423, and for Kennedy, 3,076.

The grounds of contest were thus stated in the report:

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[1] Journal, pp. 643–650; Globe, pp. 2849–2852.

[2] House Report No. 10, first session Forty-first Congress.

[3] House Report No. 62, second session Forty-first Congress; 2 Bartlett, p. 719; Rowell's Digest, p. 243.

Mr. Morey claims the seat, and alleges that "a system of intimidation, threats, violence, and lawlessness prevailed in the parishes of Jackson, Franklin, Claiborne, Bienville, Union, Morehouse, Caldwell, and Catahoula prior to the election in November last; that Republicans were deterred and prevented by fear from voting at all, or were compelled by threats and intimidation to vote the Democratic ticket against their wishes, and that the election in the above-named parishes was a farce, a nullity, and an outrage of the rights of the law-abiding citizens of the Fifth Congressional district of Louisiana."

In the parishes thus impeached the vote was—for McCranie, 11,145; for Morey, 179; for Kennedy, 26. The committee show that this was a large falling off as compared with previous years, and explain it by the testimony showing intimidation, which prevented some from voting and compelled others to vote against their inclinations. The peaceful parishes showed a vote of 2,571 for McCranie, 3,438 for Morey, and 3,050 for Kennedy.

The committee, Mr. Stevenson submitting the report, conclude:

The House has heretofore, in the case of Hunt *v.* Sheldon, adopted the rule that where it appears that certain precincts and parishes (or counties) of a district have been carried by violence or intimidation the returns therefrom shall be rejected, and the result derived from the returns from the peaceable precincts and parishes (or counties).

In the subsequent case of Sypher the House refused to apply this rule to that case; and your committee, submitting to the judgment of the House, considers it a duty to reconcile these two cases if possible.

We can not advise the House to abandon the principle adopted in Hunt *v.* Sheldon, which seems of inestimable value in preventing lawless attempts upon the ballot box in the late rebellious States, where a new voting population is peculiarly exposed to violence and intimidation by the former master class, prone by habit and inclination to domineer over their former slaves; and therefore we accept the decision of the House in Sypher's case, not as a reversal but as a limitation of the rule adopted in Sheldon's case, and interpret the action of the House in Sypher's case to mean that the rule should not be so far extended as to apply to such a case where less than one-fourth of the legal electors of the district resided, and one-fifth of the registered vote was cast, within the peaceable parishes and precincts, and the claimant received but a small majority of that vote.

In the present case the five peaceable parishes comprise about one-third of the territory of the district and contain less than one-half the population and registered vote and return a minority of the vote actually polled.

The contestant received in these parishes 3,428. The registered vote of the district was 23,103. The registered vote of the five peaceable parishes was 10,400. The contestant received about one-seventh of the registered vote of the district and about one-third of the vote cast in the peaceable parishes.

Another objection to the claim of contestee is that if there had been a peaceable election in every parish and precinct of the district the contestant could not have received a majority or even a plurality of the votes cast, because the rejected parishes were Democratic at best. They gave a small Democratic majority at the spring election in 1868, and would have increased it considerably at a peaceable election in the fall. There were two Republican candidates, who divided their party vote about equally, and it seems probable that they would have divided it in every parish had the canvass and election been peaceable, so that the contestant must have been defeated. We therefore conclude that the claim of the contestant can not be sustained.

The committee also find that if they should consider the claim of Messrs. McCranie and Kennedy they would fall under the same rule. Therefore the following resolution was recommended:

Resolved, That there was no lawful election in the Fifth Congressional district of the State of Louisiana for Representative in the Forty-first Congress, and neither G. W. McCranie nor Frank Morey nor P. J. Kennedy is entitled to a seat as Representative in the Forty-first Congress from the Fifth Congressional district of the State of Louisiana.

The report was considered by the House on April 28.[1] Although there had been no minority views, Mr. Michael C. Kerr, of Indiana, opposed the report and proposed to the resolution an amendment declaring Mr. McCranie elected. This amendment was disagreed to—yeas 53, nays 104. Then the resolution recommended by the committee was agreed to without division.

335. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House considered an election valid although in five of ten parishes the vote, which was less than half the vote of the district, was rejected.

An examination of the acts necessary to justify a finding of disloyalty against a Member-elect.

A Member-elect may not take the oath until a motion to reconsider the vote determining his title is disposed of.

From the Fourth district of Louisiana the credentials were presented by Mr. Michael Ryan. He was not admitted on the prima facie showing, and on April 25, 1870,[2] Mr. Samuel S. Burdett, of Missouri, from the Subcommittee on Elections, presented a report dealing both with the qualifications of Mr. Ryan and with the claims of the contestant, J. P. Newsham.

1. As to the loyalty of Mr. Ryan, the report says:

The question of the ineligibility of Mr. Ryan put in issue by the contestant is first to be determined. It is admitted that contestee comes within the description of persons set out in the third section of the fourteenth article of amendments to the Constitution by having previously taken an oath as a member of the legislature of the State of Louisiana to support the Constitution of the United States. That he did give aid and comfort to the enemies of the United States is confidently asserted by contestant, and much evidence has been produced pro and con to meet that issue.

The substantive proofs adduced to sustain the charge of ineligibility are, that Mr. Ryan, in the early part of the year 1862, made a speech to a company of Confederate soldiers, encouraging them in their fight for secession. (See testimony of Harry Lott, vol. 1, p. 421; of Calhoun, p. 424, q. 8572; of Barlow, p. 587, q. 11539.) That after the inauguration of the rebellion he wore in public on several occasions the uniform of the Confederate military service and was an officer in a local or home company of troops.

These substantive charges are not seriously disputed, but the motive and circumstances of them are put in issue by Mr. Ryan. For him it is contended that he was, notwithstanding appearances, at heart a Union man. The proof of his allegiance, however, is only to be found in political associations and sentiments formed and uttered before actual war began, and, after the beginning of hostilities, of declarations against the policy of the secessionists, conversationally made in the hearing of known Union men and personal friends. It does appear generally from the evidence that Mr. Ryan from the first seriously doubted the ability of the rebel leaders to carry their designs to a successful issue, and that he comprehended and deprecated the inevitable waste and destruction that must follow such a failure; but it does not appear that he ever, after the beginning of actual strife, called in question the right of secession or the desirableness of success to the Southern arms, provided only they should succeed; much less is there anywhere to be found evidence of any hearty word spoken or deed performed favorable to the Union and for the Union's sake.

That the rebel military authorities were impressed with full confidence in his fealty to their cause is evidenced by the fact that he remained undisturbed at his home and unquestioned by them, while the few of his neighbors who were Union men in sentiment, on the bare announcement of that fact or

[1] Journal, pp. 693, 694; Globe, pp. 3069–3074.

[2] House Report No. 61, second session Forty-first Congress; 2 Bartlett, p. 724; Rowell's Digest, p. 244.

on the merest suspicion of its existence, were compelled to seek safety by flight, or, remaining, to endure insult, imprisonment, or death; and this, too, notwithstanding that by birth, social standing, long residence, and large wealth of lands and slaves they were as fully entitled to the regard and consideration of the rebel authorities as it was possible for Mr. Ryan to be.

The minority filed no views; but in debate Mr. Kerr denied the charges of disloyalty, contending that the evidence did not prove them.

2. As to the final right—and in the debate the majority declared that the decision as to final right left little effect to the disqualification—the majority found Mr. Newsham. entitled to the seat. The district comprised ten parishes, and the official returns showed a vote for Ryan of 10,385, and for Newsham of 5,606. In five of these parishes, where fraud and intimidation were charged, the returned vote was, for Ryan, 7,342; for Newsham, 46. The committee showed that in former elections in these five parishes there had been no such disparity of parties, and explained it by fraud and intimidation, which they considered proven. They conclude:

We assert the truth to be that in the contested parishes the result obtained was accompanied and secured by the use of unlawful means, and by the practice of oppressions and barbarities seldom equaled in any age or country, and that the several polls in all of said parishes ought to be excluded from the count.

Going back of the official returns, the report finds the whole number of votes cast in the district 20,500, the registration being 25,027. In the peaceful parishes they found a total vote of 13,112, of which Newsham had 7,210 and Ryan 5,902. The report concludes:

The committee does not cite the vote cast in the peaceable parishes as truly representing the popular will in those parishes. On the contrary, there were disorders, to the detriment of the contestant, in several of these parishes. Many of his supporters were by unlawful means kept from the polls and others compelled against their will to support his competitor.

The committee, therefore, recommends that the returns from such of the parishes of the Fourth district as are shown to have been controlled by the appliances of fraud and violence be excluded from the count.

A due regard for the rights of the faithful men of Louisiana, whose will was defeated, demands it, while every consideration of future peace for them and of safety to the State imperatively requires it.

We therefore recommend the adoption of the following resolutions:

Resolved, That Michael Ryan is not entitled to a seat as a Representative in the Forty-first Congress from the Fourth district of Louisiana.

Resolved, That J. P. Newsham is entitled to a seat as a Representative in the Forty-first Congress from the Fourth district of Louisiana.

The report was debated on May 20 and 21,[1] and on the latter day a resolution proposed by the minority and declaring Mr. Ryan entitled to the seat was disagreed to—ayes 54, noes 79. Then the resolution of the majority declaring Mr. Newsham entitled to the seat was agreed to—yeas 79, nays 71.

Mr. Charles A. Eldridge, of Wisconsin, moved to reconsider the vote.

Mr. Stevenson submitted that nothing was in order but the swearing in of Mr. Newsham.

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[1] Globe, pp. 3640, 3694–3700; Journal, p. 818.

The Speaker[1] overruled the point of order, saying—

No legislation is complete until the power to reconsider is exhausted.

On May 23[2] the motion to reconsider was laid on the table—yeas 94, nays 80.

Mr. Newsham then took the oath.

336. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

Returns of five of twelve parishes being rejected for intimidation, the House seated a contestant on the vote of the seven peaceful parishes.

On April 28, 1870,[3] Mr. Stevenson presented the report in the last Louisiana case, that of Darrall *v.* Bailey. The committee say that—

The bloodiest rioting and the darkest deeds which were done in the State were committed in these contested parishes of this district.

Fraud and violence were alleged as in the other districts. The report states the case as to the vote as follows:

Both parties affirm the validity of the election in seven parishes, while the contestee affirms and the contestant denies the validity of the election in five parishes, including St. Martin, from which there is no valid return, and which must, in any event, be rejected.

THE REGISTRY—WHITE AND COLORED.

The number of registered electors in the district was	28,486
Of colored electors	18,881
Majority of colored voters	9,276

The colored nearly double the white voters.

PEACEABLE AND VIOLENT.

The entire registry	28,486
That of the seven uncontested parishes was	15,294
That of the contested parishes	13,192
A majority in the peaceable parishes of	2,102

THE VOTE.

The vote cast (including the alleged vote of St. Martin, of which there is no return) was	26,106
The vote in the uncontested parishes was	14,627
The vote in the contested parishes (including alleged vote of St. Martin) was	11,479
Majority in the peaceable parishes	3,148

There can be no question, therefore, whether there was a valid election in the part of the district which is uncontested. It contained nearly two-thirds of the territory and a large majority of registered electors and of actual voters.

The report finds that the report from the violent parishes should be rejected, and that in the peaceable parishes Darrall had 7,436 and Bailey 7,191. The report concludes:

It may be added that the general condition of the State affected the Republican vote in these parishes, and that if peace and quiet had prevailed through the State the Republican majority would

[1] Globe, p. 3700. James G. Blaine, of Maine, Speaker.

[2] Journal, p. 830; Globe, p. 3733.

[3] House Report No. 63, second session; 2 Bartlett, p. 754; Rowell's Digest, p. 246.

have been much heavier, and in the whole district the contestant would have received a large majority. The colored registered vote of the district was nearly double the white, and many white men would, if permitted, in peace, have sustained the Republican party. We therefore feel that the result reached is not only legally correct, but that it carries out the will of a very large majority of the people of the district, while it vindicates the rights of the people we are bound to protect.

We therefore recommend the adoption of the following resolutions:

Resolved, That Adolphe Bailey is not entitled to a seat as Representative in the Forty-first Congress from the Third district of Louisiana.

Resolved, That C. B. Darrall is entitled to his seat as Representative in the Forty-first Congress from the Third district of Louisiana.

The case was debated on July 2,[1] and on that day Mr. Kerr submitted a minority proposition declaring that Mr. Bailey was entitled to the seat and should be admitted thereto. This was negatived—yeas 37, nays 97.

The question recurring on the resolution declaring Mr. Bailey not entitled to the seat, it was agreed to without division.

Then the resolution declaring Mr. Darrall entitled to the seat was agreed to—yeas 67, nays 64.

A motion to reconsider was made, and on July 6[2] was laid on the table—yeas 96, nays 77.

Mr. Darrall then took the oath.

337. The first Louisiana election case of Benoit v. Boatner in the Fifty-fourth Congress.

A notice of contest, drawn in general terms, was held to cover sufficiently the various claims made upon the testimony and in the arguments.

The service of notice of contest at the residence is sufficient compliance with the law.

On March 19, 1896,[3] the Committee on Elections No. 2, through Mr. R. W. Tayler, of Ohio, reported in the first case of Benoit *v.* Boatner, of Louisiana.

This case involved, besides the merits, the following preliminary question, thus stated by the committee:

The contestant, on the 16th day of January, 1895, caused to be served, at the place of residence of the contestee, a copy of his notice of contest. The contestee at that time was absent from the State of Louisiana, and it is admitted that under the law of that State it is sufficient notice of any suit to make service of the same at the place of residence of the defendant. The contestee moved to dismiss this proceeding on the ground that no proper notice of contest was served upon him as required by the Revised Statutes. The committee was of the opinion and held that the service of the notice in the manner stated was sufficient under the United States Statutes and was precisely the kind of notice which was held to be sufficient in the case of Manzanares *v.* Luna, in the Forty-eighth Congress. The contestee duly served upon the contestant his answer, and the parties proceeded to take testimony in all respects as if no question had been raised as to validity of contestant's service of notice. The contestant's notice of contest, while in general terms, was not seriously questioned as to form, and sufficiently covered the various claims made upon the testimony and in the arguments.

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[1] Globe, pp. 5139–5143; Journal, pp. 1141, 1142.

[2] Journal, p. 1159.

[3] House Report, first session Fifty-fourth Congress, No. 867; Rowell's Digest, p. 519.

338. The first Louisiana election case of Benoit v. Boatner, continued.

Intimidation and fraud having destroyed the integrity of an election in 10 of 15 parishes, the House declared the seat vacant.

Discussion of the extent and degree of intimidation and fraud justifying rejection rather than purging of the poll.

A case in which the committee considered historic facts in judging validity of an election wherein appeared many irregularities on the part of election officers.

As to the merits of the case, it appeared on the face of the official returns that sitting member had a majority of 9,526. The district consisted of 15 parishes. In 5 of these the fairness of the election was not questioned. The controversy was confined to the 10 parishes where the colored males over 21 years of age numbered 21,459 and the white males over 21 years numbered 7,543. These facts the committee present from the census of 1890.

After sketching the provisions of the election law of Louisiana, the majority of the committee proceed to an analysis of the testimony in regard to the 10 parishes.

First are examined the 4 "river parishes" of East Carroll, Madison, Tensas, and Concordia, where the returns gave the sitting member 7,124 votes and 81 to the contestant. The majority call attention to the fact that in these parishes the white males over 21 years of age numbered only 1,765, while the colored males of age numbered 12,454. Therefore the colored voters must have voted in large numbers for sitting member, who was a Democrat, if the returns were true. Yet the majority feel convinced that the colored voters were all Republicans. The testimony showed that it had been a custom to count the colored voters for contestant's party; that the registration list was enormously padded; that the poll books and tally sheets had disappeared in almost every precinct of the river parishes; that no election officers could be discovered who knew anything about them; that many election officers refused to obey subpoenas, and others, on examination, refused on technical grounds to answer as to the records; that very few of the returns were sworn to, although the law requiring it was mandatory; that in some precincts the election officers signed the returns in blank; that the right of suffrage in these parishes was a farce; and that the sitting member admitted in his written statement filed with the committee that of the 7,124 votes counted for him in these 4 parishes over 6,000 ought to be excluded.

In Catahoula Parish the same character of frauds prevailed, with the addition that the alphabetical mode of voting people who were dead or not at the polls was to some extent resorted to.

The committee reviewed the remaining 5 parishes, quoting testimony which satisfied the majority that intimidation was general and that the planters very generally considered themselves as having the right to determine how their colored employees should vote.

In conclusion, the majority of the committee conclude that the right of suffrage, as recognized by the Constitution and the laws, did not exist in at least 10 of the 15 parishes. After noting the remarkable state of the vote in the river parishes, the majority say:

If no question were raised as to the validity of the election outside of the river parishes, the House in justice to itself and in the interest of fair and honest elections, giving full weight to the facts apparent

in this testimony, would be compelled to declare the election void. It could not declare the contestant elected because it can not say, and the contestant did not have it in his power to determine, how many votes the contestant would have received in those 4 parishes if a free and honest election had been conducted. It would have been physically impossible to take the testimony of 6,000 or 8,000 witnesses as to the person for whom they voted or would have voted if permitted to cast their ballots, and in addition to that the very circumstances that prevented their voting would have prevented their testifying.

This case discloses as well the difficulty in obtaining testimony and inducing men to testify as it does the intimidation practiced to prevent their voting. To invoke the rule which demands that returns from the tainted precincts be thrown out would still leave the contestee elected. It seems to us that in such a case the only thing that can be done is to declare the election void. To do otherwise would be to furnish an easy, safe, and certain mode of perpetrating a stupendous fraud, and the more stupendous the more effective.

We therefore conclude as matters of fact:

First, that fraud, violence, and intimidation so permeated the election of November 6, 1894, except in the parishes of Claiborne, Franklin, Jackson, Lincoln, and West Carroll, that there was no free expression of the popular will; that fraud, violence, and intimidation were so extensive and general as to render it certain that there was no fair and free expression by the great body of the electors, more than two-thirds of the electors of the district residing in the remaining 10 parishes.

Second, that in view of the fact that the majority for the contestee in the 11 parishes outside of the river parishes was 2,483, and that in the river parishes, where there is a majority of over 10,000 negroes of voting age, fraud was universal; that while it is impossible to determine how many votes the contestant would have received if a fair and honest election had been held, justice and good morals revolt against the proposition that any valid election was held.

We therefore hold as a proposition of law, growing out of the principle laid down in Sypher *v.* St. Martin, as follows:

"If fraud, violence, and intimidation have been so extensive and general as to render it certain that there has been no free and fair expression by the great body of the electors, then the election must be set aside, notwithstanding the fact that in some of the precincts or parishes there was a peaceable and fair election."

The views of the minority, submitted by Mr. Joseph W. Bailey, of Texas, review the testimony, reaching a conclusion different from that reached by the majority, although admitting that certain precincts should be rejected, energetically protests against the conclusion of the majority, and says:

If permissible at all to declare an election void, it could, in our judgment, be legally clone only in extreme cases where, by violence, widespread and concerted intimidation and fraud, it would become impossible to eliminate the lawful and voluntary vote from the unlawful and fraudulent and that which had been cast under the influence of fear.

In this case not only do such conditions not exist, but if every poll attacked by contestant, and against which he has adduced any evidence, be excluded from the count, contestee still has a majority of 327; but giving the evidence fair consideration, and excluding only the vote which is shown to have been fraudulent and intimidated, contestee's majority is 5,188.

Therefore the minority recommended a resolution declaring sitting member entitled to the seat.

On March 20, 1896,[1] the report was debated in the House, and then a decision was obtained on the motion to substitute the minority resolution for that of the majority. That motion was disagreed to—yeas 59, nays 132. Then without division the resolution of the majority was agreed to, declaring—

That there was no valid election held in the Fifth Congressional district of the State of Louisiana on the 6th day of November, 1894, and that neither Alexis Benoit nor Charles J. Boatner is entitled to a seat in the Fifty-fourth Congress as Representative from the Fifth Congressional district of Louisiana.

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[1] Journal, p. 328; Record, pp. 3035–3051.

339. The second Louisiana election case of Benoit v. Boatner in the Fifty-fourth Congress.

Where the provisions of law are insufficient to secure a decision in an election case the House prescribes by resolution the course of procedure.

On February 5, 1897,[1] Mr. Henry U. Johnson, of Indiana, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the second case of Benoit *v.* Boatner, of Louisiana. At the first session of the Fifty-fourth Congress, as the result of a contest between the same parties,[2] the seat had been declared vacant. Thereupon, on June 10, 1896, a special election was held in the district, and Mr. Boatner was returned by 10,557 votes, against 5,989 returned for Mr. Benoit.

On December 10, 1896,[3] Mr. Boatner appeared with the credentials and was sworn in. Mr. Benoit meanwhile had contested the election, charging wholesale frauds and intimidation.

On January 14, 1897,[4] a letter from the Clerk was laid before the House announcing that if this case should take the usual course prescribed by law, allowing the full time of sixty days to be used in the preparation of briefs, it could not reach the House before final adjournment. This letter was referred, with the testimony, to the Committee on Elections No. 2, and the testimony was ordered to be printed.

On January 15[5] the committee reported the following resolution, which was agreed to:

Resolved, That the Committee on Elections No. 2, to which the contested-election case of Alexis Benoit against Charles J. Boatner, from the Fifth Congressional district of Louisiana, has been referred, be, and is hereby, instructed and authorized to proceed to the consideration of said case, and, having first afforded to said parties a fair opportunity to be heard as to the merits of the same, to report to the House their conclusions with respect to such case in time to afford to the House an opportunity to determine the same during the present session of Congress.

340. The second Louisiana election case of Benoit v. Boatner, continued.

An election in a district was not declared void on account of invalidity in one-fifth of the parishes, affecting less than a third of the vote.

Discussion of the degree of duress which may be considered intimidation justifying rejection of a poll.

Intimidation justifying rejection of a poll may fall short of physical violence against the person and need not fall within the actual time of the election.

Although a parish, in a region wherein intimidation might be expected, showed a marvelous unanimity in the vote, the committee declined to reject the poll.

An election being held without the required poll list, and there being other suspicious circumstances, the poll was rejected.

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[1] Second session Fifty-fourth Congress, House report No. 2808; Rowell's Digest, p. 526.

[2] See section 338 of this work.

[3] Journal, p. 20.

[4] Journal, p. 83.

[5] Journal, p. 86.

The conduct of the election officers of a parish being thoroughly permeated by fraud, the returns were rejected.

The report of the majority of the committee, after reviewing the conditions of population, the law of the State as to elections, and noting the fact that the contestant carried the parishes where white population predominated, while the sitting Member was strongest in the so-called "colored" parishes, proceeds to examine the testimony in detail, and to make the corrections shown to be just.

1. The votes of two parishes were rejected entirely: (a) In Tensas Parish, where the commissioners of election were all supporters of the sitting member, the returns many gave him 2,067 votes, and contestant 141. In several precincts no votes at all were returned for contestant, of itself a very suspicious circumstance, but the poll lists showed that not only were dead and absent persons recorded as voting, but in many precincts the election officers returned the registered list of voters instead of the vote as actually cast. The law required the election commissioners to write down the names of the voters in exact order as they voted, but in many cases the names are recorded alphabetically. In one precinct this peculiarity permeated the entire list of 621 names. The contestant was able to examine only one witness in the parish, the officers of the law on whom he depended for the serving of subpoenas refusing or neglecting to do their duty. Although the evidence impeached the fairness and integrity of the commissioners of election in the parish, the sitting Member produced not one of them to testify. The majority of the committee were "of the opinion that the election in this parish was a sham and a fraud and that the returns therefrom ought to be wholly rejected." The minority of the committee, whose views were presented by Mr. Joseph W. Bailey, of Texas, agree that this parish should be excluded.

(b) From Ouachita Parish the returned vote was 1,777 for Boatner and 631 for Benoit. The majority of the committee concluded that the evidence "taken as a whole, establishes the fact that there was such intimidation practiced upon the colored voters as to prevent a free and fair election there, and that for this reason the vote of Ouachita Parish should be rejected from the count." The committee continue:

> It appears that for many years, commencing in the year 1876, personal violence had been openly inflicted upon the colored electors by the white Democrats of the parish with a view of depriving them of their right of suffrage. This measure had worked the desired effect and had very largely deterred them from voting.
>
> The evidence shows that this open personal injury was not deemed by these whites to be necessary in very recent years, and therefore was only occasionally inflicted. Milder, but nevertheless lawless and coercive expedients were accordingly substituted for it by them. The colored voter, with a vivid recollection of the great wrongs to which he had been subjected, needed only to be threatened with a recurrence of there wrongs in order to deprive him of his free will, and either keep him from the polls altogether, or else compel him to vote the Democratic ticket.
>
> Accordingly, the latter-day plan and the one employed at this election by the friends and supporters of Boatner consisted in "visiting" him before the election and in threatening him with the consequences in the event he dared to vote his own sentiments.
>
> The Democratic planters claimed and exercised the right to vote their "black hands" for Boatner. These "hands" were too timid and defenseless to make any resistance and hence became the victims of this unlawful practice.

The majority of the committee also say:

In passing upon this question of intimidation the committee have had in mind certain propositions which seemed to them to be sound, and in the light of which they have reached the conclusion above announced.

They recognized the fact that coercive measures do not operate alike upon all voters. That which would have no effect whatever upon one class might, nevertheless, exert an irresistible influence upon another class.

It is therefore believed that in determining whether or not intimidation exists in any case, due regard should always be had to the mental and physical organization of the particular electors upon whom the wrong is charged to have been inflicted, their relation to the alleged wrongdoers, their condition of dependence or independence, and, indeed, to their whole environment as well as to the character and disposition of the wrongdoers themselves. Nor is it, in the opinion of the committee, either a logical or a just doctrine that the oppressive acts which will avoid an election must necessarily be of such a character as to overpower the will of voters of reasonable courage and intelligence. Such a principle as this would, in its practical operations, result in the disfranchisement of the weak and the ignorant electors, who should ever be the object of the law's solicitude, and in the arrogation of political power into the hands of the electors who are strong and well informed.

It is evident, too, that physical violence against the person of the elector is not the sole criterion by which the existence or nonexistence of intimidation is to be determined, since some electors might be beaten without being at all terrorized, while other electors might be put in great fear without the striking of a single blow. Nor do the committee believe that in passing upon the question as to whether intimidation prevailed the examination should be limited to the unlawful acts committed against the voters at the very time of the election in contest. It is often the case that preceding occurrences, although somewhat remote in point of time, give great significance and momentum to recent acts of oppression, and thus become very proper subjects for examination and consideration.

The minority of the committee do not consider that the evidence supports the conclusions of the majority as to intimidation, and do not assent to the exclusion of the vote.

2. In other parishes the majority of the committee corrected, but did not reject, the entire returns.

(*a*) In Concordia the returns gave sitting Member 1,675 votes and contestant 46. In several precincts no votes at all were returned for contestant. The testimony showed some informalities and irregularities, but there was other testimony that the election was fairly and honestly conducted. The committee, therefore, except for a slight correction in one precinct, did not interfere with the vote as returned, "although they regard the practical unanimity of the electors upon one candidate as one of the most remarkable occurrences in modern politics."

(*b*) At Madison Parish one witness testified as to intimidation and one as to bribery, but the committee determined that the returned vote should stand.

(*c*) In Catahoula Parish the majority of the committee reject the entire vote of the Jonesville precinct, which returned 497 for Boatner and none for Benoit. In this precinct the election officers were all of sitting Member's party, the registrar of the parish failed to furnish the poll list, as required to do by law, and there was evidence to show not only that the returned vote was greater than the number of voters in the precinct, but also that it was far larger than the number who actually voted. The committee say:

In the absence of the poll list it was of course impossible to hold a fair and honest election, for the reason that it could not be definitely known who was entitled to vote.

In Glade precinct, where 115 votes were returned for sitting Member and none for contestant, uncontradicted testimony showed that only 30 honest votes were polled, all for Boatner. Therefore the committee credited him only with that number.

A similar correction was made at Robertson precinct, where the election officers swore that the tally sheets had been tampered with and their names thereto forged. The testimony of these officers, who were partisans of sitting Member, indicated that 23 honest votes were probably cast for sitting Member and 2 for contestant. The committee adopt these figures instead of 135 for sitting Member and 2 for contestant as returned.

The majority of the committee, in conclusion, find that with all the deductions and rejections there still remains a majority of 802 for sitting Member. Therefore they conclude:

> While the evidence establishes the fact that flagrant frauds were perpetrated in all of Tensas Parish, and in a portion of Catahoula Parish, and that intimidation prevailed generally throughout the parish of Ouachita, still the committee do not feel justified in recommending that the election be held void and the seat declared vacant, for the reason that these three parishes constitute only one-fifth of the total parishes of the district, and their entire rejected vote does not amount to one-third of the vote cast therein at the election.
>
> The committee are not sure that the fraud and intimidation were so extensive and general throughout the district as to render it certain that there was not a free and fair expression by the great body of the electors, however strongly they may suspect this to have been the case.

The resolutions confirming sitting Member in his seat were agreed to without division on February 15.[1]

341. The Louisiana election case of Beattie v. Price, in the Fiftyfourth Congress.

An election having been peaceable in three-fourths of a district, it was not declared invalid because of violence and intimidation in the remainder.

On February 5, 1897,[2] Mr. Robert W. Tayler, of Ohio, from the Committee on Elections No. 2, submitted the report of a majority of the committee in the case of Beattie *v.* Price, of Louisiana. The official returns gave the sitting Member a plurality of 5,766 votes over the contestant, which the contestant sought to overcome, alleging fraud, violence, and intimidation.

As to a preliminary question the committee say:

> An important preliminary question arose on the motion made by the contestee to suppress a portion of the contestant's evidence on the ground that it had not been taken in compliance with the law. This objection in the main was to the effect that no proper notice had been given that the testimony of the witnesses would be taken and that there was no evidence of the official character of the persons before whom the testimony was taken.
>
> Your committee has examined all of the testimony in the case, but, in view of the conclusion at which it has arrived, it is not necessary to decide upon this preliminary motion. We have considered the testimony as if it had been regularly taken, but are not to be understood as approving or justifying the taking of testimony without serving notice on the opposite side of the names of witnesses to be examined.

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[1] Journal, p. 174.

[2] House Report No. 2812, second session Fifty-fourth Congress; Rowell's Digest, p. 527.

The majority of the committee note the fact that the population of the district consisted of 115,533 whites and 98,916 colored people; and quote documents to show that contestant was the nominee of an organization of white Republicans who discouraged the cooperation of colored Republicans. The minority, in their views (subscribed to by Messrs. Henry U. Johnson, of Indiana, Chester I. Long, of Kansas, and Jesse B. Strode, of Nebraska), deny this proposition, and claim that in many districts the organization invited the cooperation of colored voters.

Both majority and minority of the committee agreed that contestant had not made out a title to the seat; but join issue on the question as to whether or not there was a valid election. The majority of the committee say:

There is nothing in this case to justify the claim that there was "no free and fair expression by the great body of the electors."

So far as the testimony shows there was a "peaceable and fair election" in not only "some of the precincts and parishes," but in most of them.

There are 166 polling places in the district, and as to more than three-fourths of them there is not a syllable of testimony showing fraud, violence, or intimidation. If we were to admit all that the contestant claims as to the force and effect of the testimony respecting certain precincts, and then infer that like conditions existed in the 125 precincts concerning which there was no such testimony, we might be led to take a drastic course. If we did, we should be compelled to seat the contestant. No matter which way we look, or what construction we put on the testimony, we must hold that either the contestant or the contestee is entitled to a seat in this House.

There is evidence showing that in several of the parishes of this Congressional district there was some violence. This existed probably by reason of the momentum of earlier resorts to violence and intimidation. In the parish of Lafourche two colored men lost their lives and one disappeared. The supporters of the contestant insists that these deaths, which were violent, and the disappearance were due to the fact that the three colored men were supporters of the contestant. The testimony, while inconclusive, points in that direction as to Talley Whitehurst.

After describing the murder of Whitehurst, the majority say:

Atrocious as this crime was, whatever may have been its cause, it had but little if any effect on the election, and, coupled with every other circumtance of fraud, violence, or intimidation, testified about in the district, is very far from seriously affecting the plurality the contestee received.

The minority say, however:

In our opinion the record discloses widespread intimidation of the colored voters by the supporters of Price—intimidation practiced in a majority of the parishes of the district, the effect of which was to deter great numbers of them from attending the election and casting their ballots for Beattie.

For instance, the killing of Tally Whitehurst, a prominent colored Republican, and a supporter of Beattie, who resided in the parish of Lafourche, is clearly shown by the evidence to have been a cold-blooded and premeditated murder, perpetrated by some of the white friends and supporters of Price, a few days before the election, solely for political purposes, and to intimidate the colored voters.

It appears that this murder had the desired effect not only in Lafourche but also in one or two of the adjoining parishes.

We concur in the opinion of the committee that Beattie is not entitled to be seated, but disagree with their conclusion that Price is entitled to the seat.

We are convinced that fraud and intimidation prevailed so extensively and generally throughout the district as to prevent a free and fair expression by the great body of the electors, and we believe, therefore, that the election should be declared void and the seat left vacant.

The majority report and minority views were ordered printed when presented in the House on February 5,[1] but there is no record of further action.

[1] Journal, p. 143; Record, p. 1586.

342. The Senate election case of Sykes v. Spencer, from Alabama, in the Forty-third Congress.

The Senate gave immediate prima facie effect to credentials regular in form, but impeached by a memorial and historical facts relating to rival legislatures.

The question of the competency of the electing legislature as an inherent part of a prima facie showing discussed by the Senate.

On December 13, 1872,[1] in the Senate, Mr. Oliver P. Morton, of Indiana, presented the credentials of George E. Spencer, elected a Senator by the legislature of Alabama for the six years commencing March 4, 1873.

On February 28, 1873,[2] Mr. George Goldthwaite, of Alabama, presented a memorial of Francis W. Sykes, claiming the seat for which Mr. Spencer had credentials. This memorial impeached at length the title of Mr. Spencer.

On March 6, 1873,[3] during the swearing in of the new Senators, Mr. Thomas F. Bayard, of Delaware, objected to the administration of the oath to Mr. Spencer, on the ground that another claimant bore credentials for the seat.

It appeared that Mr. Spencer bore credentials in regular form—or at least in form as regular as most credentials presented—and signed by a governor whose position, both de jure and de facto was unquestioned. But the Senate had knowledge, both from the memorial of Mr. Sykes and historically, that Mr. Spencer was elected by one of two legislative bodies, each claiming to be the legislature of Alabama.

It appeared that there was presented on behalf of Mr. Sykes as credentials certificates signed by the officers of the other of the two rival bodies setting forth his election.

In the debate the cases of Goldthwaite and Ransom were referred to as recent precedents.

The prima facie affect of credentials was discussed at length, and it was urged on the one side that the competency of the legislature electing was an essential question inhering in the prima facie case.

On the other hand it was urged that Mr. Spencer was certified as elected in accordance with the law of Congress (act of 1866), and the effect of that title should not be overthrown by a mere memorialist.

On March 7[4] a motion to postpone the administration of the oath to Mr. Spencer until the next day was disagreed to—yeas 24, nays 32.

Then, after further debate, the question was taken: "Shall the oath be now administered to Mr. Spencer?" and it was decided in the affirmative without division.[5]

Thereupon Mr. Spencer appeared and took the oath.

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[1] Third session Forty-second Congress, Globe, p. 172.

[2] Globe, p. 1930. Also Senate Misc. Doc. No. 94, Third session Forty-second Congress.

[3] Special session of Senate, Forty-third Congress, Record, pp. 3–29.

[4] Record, p. 22.

[5] Record, p. 29.

On December 8, 1873,[1] Mr. John B. Gordon, of Georgia, submitted the following resolution; which was considered by unanimous consent, and agreed to:

Resolved, That the memorial of Francis W. Sykes, claiming to be a Senator-elect from the State of Alabama, with accompanying documents, be referred to the Committee on Privileges and Elections, with power to send for persons and papers.

343. The Senate election case of Sykes v. Spencer, continued.

A legislative body recognized by the State executive and having an elected but not certified quorum, was once preferred to a rival body having a certified but not elected quorum.

On April 20[2] Mr. Matt. H. Carpenter, of Wisconsin, submitted the report of the Committee on Privileges and Elections.[3] The report began with a statement of the history of the case:

Mr. Sykes claims the seat now held by Hon. George E. Spencer as Senator from the State of Alabama; and his claim is based upon the assertion that the body claiming to be the legislature of the State of Alabama which elected the said Spencer was not the rightful legislature of that State, but that another body of men was such legislature; and that the latter body, on the 10th day of December, A. D. 1872, duly elected the said Sykes to be the Senator of the United States for that State for the term of six years commencing on the 4th day of March, A. D. 1873.

It is a fact that for some time after the day fixed by law for the organization of the legislature of that State, in 1872, there were two bodies, each claiming to be the legislature of that State—one known as the statehouse legislature, which pretended to elect Mr. Sykes, and the other known as the courthouse legislature, which pretended to elect Mr. Spencer; and the question is, which of these two bodies ought to be considered the rightful legislature at that time? On the 3d day of December, 1872, the court-house legislature, so called, pretended to elect Mr. Spencer. The governor of the State certified that Mr. Spencer had been duly elected on that day by the legislature of the State; and the Senate, upon that certificate, seated Mr. Spencer as a Senator for the term in question. The first question is, therefore, whether the body of men which pretended to elect Mr. Spencer can properly be regarded as the legislature of the State at the time of such pretended election. If so, Mr. Spencer's election was valid, and, of course, if that be so, Mr. Sykes can have no right to the same seat during the same term.

After further reviewing the law of Alabama and the details of the case, the report continues:

The contest between these two legislatures depends upon this: In the statehouse legislature were eight or nine members who had received regular certificates of election, but who are conceded not to have been elected. There were of this class a sufficient number, together with unquestioned members, to make a quorum in both houses of the statehouse legislature. In the court-house legislature persons claiming the seats of this class of members of the statehouse legislature assembled with others who were undoubtedly members-elect to the senate and house of representatives, and thereby constituted in numbers a quorum of the two houses at the court-house. And the question is, whether at the time the election of Spencer took place by the court-house legislature that legislature, composed of a quorum of the persons actually elected, should be regarded as the legislature of the State; or whether the statehouse legislature, a quorum in both houses being made by this class of persons who in fact were not elected but had the regular certificates of election, should be regarded as the legal legislature. And this again depends upon another question: Whether for the time being, and until some decision by

[1] First session Forty-third Congress, Record, p. 79.

[2] Record, p. 3186; Senate Report No. 291.

[3] This committee consisted of Messrs. Oliver P. Morton, of Indiana; Matt. H. Carpenter; John A. Logan, of Illinois; J. L. Alcorn, of Mississippi; Henry B. Anthony, of Rhode Island; John H. Mitchell, of Oregon; Bainbridge Wadleigh, of New Hampshire; Wm. T. Hamilton, of Maryland, and Eli Saulsbury, of Delaware.

the two houses could be arrived at, the eight or nine persons holding certificates without the election or the eight or nine persons elected but having no certificates are to be considered as entitled to act and form part of the legislature of the State.

The report then quotes the law as to contesting elections, and concludes:

It is not pretended that the persons who were elected, but had not received certificates of election, took the steps required by this statute to contest the seats of the persons who held the certificates, but had not been elected. It is claimed, and with great force, that, until a contest, in the manner provided by law, the members who had received the certificates of election, although those certificates had been erroneously delivered and they were not in fact elected, were entitled to sit as members of the legislature. It is undoubtedly true that had all the persons claiming to be members of the legislature met in the statehouse, and the two houses had proceeded there to organize, the persons holding the certificates, without the election, would have been entitled to their seats until the persons who had been elected, but had received no certificates, should make contests for their seats and their claim should be determined by the houses themselves.

The matter, then, comes to this: The statehouse legislature was the legislature in form, and the court-house legislature was the legislature in fact. While these two pretended legislatures were in existence, each claiming to possess the legislative power of the State, Spencer was elected to the Senate by the court-house legislature, and Sykes was elected by the statehouse legislature. Spencer was first elected, and on the day of his election the court-house legislature was recognized by the governor as the legal legislature of the State. Therefore, in determining as to the right of Spencer or Sykes to this seat, the Senate is compelled to choose between the body in fact elected, organized, acting, and recognized by the executive department as the legislature, and another body, organized in form, but without the election and without a recognition on the part of the executive of the State at the time they pretended to elect Sykes. When we consider that all the forms prescribed by law for canvassing and certifying an election, and for the organization of the two houses, are designed to secure to the persons actually elected the right to act in the offices to which in fact they have been elected, it would be sacrificing the end to the means were the Senate to adhere to the mere form, and thus defeat the end which the forms were intended to secure.

The persons in the two bodies claiming to be the senate and house of representatives who voted for Spencer constituted a quorum of both houses of the members actually elected; the persons in the statehouse legislature who voted for Sykes did not constitute a quorum of the two houses duly elected, but a quorum of persons certified to have been elected to the two houses. Were the Senate to hold Sykes's election to be valid, it would follow that erroneous certificates, delivered to men conceded not to be elected, had enabled persons who in fact ought not to vote for a Senator to elect a Senator to misrepresent the State for six years. On the other hand, if we treat the court-house legislature as the legal legislature of the State, it is conceded that we give effect to the will of the people as evidenced by the election. So that, to state the proposition in other words, we are called upon to choose between the form and the substance, the fiction and the fact; and, considering the importance of the election of a Senator, in the opinion of your committee the Senate would not be justified in overriding the will of the people, as expressed at the ballot box, out of deference to certificates issued erroneously to persons who were not elected.

In the opinion of your committee it is not competent for the Senate to inquire as to the right of individual members to sit in a legislature which is conceded to have a quorum in both houses of legally elected members. But undoubtedly the Senate must always inquire whether the body which pretended to elect a Senator was the legislature of the State or not; because a Senator can only be elected by the legislature of a State. In this case, Spencer having been seated by the Senate, and being prima facie entitled to hold the seat, the Senate can not oust him without going into an inquiry in regard to the right of the individual persons who claim to constitute the quorum in these respective bodies at the courthouse and at the statehouse. We can not oust Spencer from his seat without inquiring and determining that the eight or nine individuals who were elected were not entitled to sit in the legislature of the State because they lacked the certificates. But if the Senate can inquire into this question at all, it must certainly inquire for the fact rather than the evidence of the fact. It can not be maintained that when the Senate has been compelled to enter upon such an examination it is estopped by mere prima facie evidence of the fact, and the certificate is conceded to be nothing more than prima facie evidence. But

the Senate must go back of that to the fact itself, and determine whether the persons claiming to hold seats were in fact elected. When we do this we come to the conceded fact that these persons lacking the certificate had in fact been elected, and that the persons who claimed to be the quorum of the two houses were in fact the persons who, in virtue of the election, were entitled to constitute the quorum of both houses.

So that, in any view of the matter which your committee can take, we are of opinion that Mr. Sykes makes no case entitling him to the seat now occupied by Mr. Spencer, and your committee ask to be discharged from the further consideration of the memorial of Mr. Sykes.

The minority views were subscribed by Messrs. Saulsbury and Hamilton, took issue with the majority, and argued elaborately that the statehouse legislature was the real legislature, and that it alone might decide as to the elections of its own members.

The report was debated at length on May 27 and 28,[1] and at the conclusion of the debate the question recurred on the resolution of the committee:

Resolved, That the Committee on Privileges and Elections be discharged from the further consideration of the memorial of Francis W. Sykes.

On motion by Mr. Hamilton, of Maryland, to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting—

That the Hon. George E. Spencer, not having been elected a Senator from the State of Alabama by the lawful legislature of that State, is not entitled to a seat in this body.

After debate, it was determined in the negative-yeas 11, nays 33.

On motion by Mr. Hamilton, of Maryland, to amend the resolution by striking out all after "resolved" and in lieu thereof inserting—

That Francis W. Sykes, having been duly and legally elected a Senator from the State of Alabama for the constitutional term commencing March 4, 1873, is entitled to the seat in this body now held by the Hon. George E. Spencer.

It was determined in the negative.

The question recurring on the resolution reported by the Committee on Privileges and Elections, viz:

Resolved, That the Committee on Privileges and Elections be discharged from the further consideration of the memorial of Francis W. Sykes.

On the question to agree thereto, it was determined in the affirmative.

344. The Senate election case of Sykes v. Spencer, continued.

Decision of a committee, acquiesced in by the Senate, that an election case once definitely settled might not be reopened.

On Thursday, December 16, 1875,[2] Mr. Spencer, rising to a question of privilege, referred to certain charges made in the legislature of Alabama, and proposed a resolution for an investigation of the subject so far as he was concerned personally. But on suggestion from Mr. Saulsbury, he modified it by broadening its scope, and in that form it was agreed to as follows:

Resolved, That the Committee on Privileges and Elections are hereby instructed to investigate into and inquire whether in the election of George E. Spencer as a Senator in Congress from the State of Alabama there were used, or caused to be used and employed, corrupt means or corrupt practices to secure

[1] Record, pp. 4287, 4325–4330; Appendix, p. 323.

[2] First session Forty-fourth Congress, Record, pp. 232, 233.

his election to the seat he now holds; and that said committee be empowered to administer oaths, to send for persons and papers, to take testimony, to employ stenographers and such clerical assistance as they may deem necessary, and to sit during the recess of Congress, if considered advisable, and to report the result of their investigations as soon as practicable.

Later, especially on January 24, 1876,[1] Mr. Goldthwaite presented the report of a joint committee of the general assembly of Alabama with evidence thereto relating to Mr. Spencer's election, and a memorial of the general assembly praying that the seat held by Mr. Spencer might be declared vacant.

On May 20,[2] Mr. Morton, from the Committee on Privileges and Elections, submitted a report as follows:

This testimony was ex parte in its character, very much of it hearsay, and could not be received by the committee as evidence.

The question whether Mr. Spencer was elected by the lawful legislature of Alabama, raised in the memorial referred to, and in the specifications filed before the committee by the counsel, Mr. Morgan, who represented the State of Alabama, was considered by a majority of the committee to have been fully settled in the contest for the seat occupied by Mr. Spencer, before made, in the Senate by Mr. Sykes.

The question in that contest was whether what was known as the court-house legislature, by which Mr. Spencer was elected, or the capitol legislature, by which Mr. Sykes was elected, was the lawful legislature of Alabama. After full consideration and argument of counsel, it was determined by the committee and afterwards by the Senate that the court-house legislature was the lawful one, and that Mr. Spencer and not Mr. Sykes was entitled to the seat.

The question having been definitely settled, it was considered by the committee that it was not competent for the committee or the Senate to reopen it, and that it must be treated as res adjudicata.

Upon the other branch of the inquiry, as to whether Mr. Spencer, or his friends, had been guilty of bribery, corruption, or other unlawful practices in procuring his election, the committee made faithful and diligent inquiry. Mr. Morgan, counsel for the accusers, subpoenaed and examined many witnesses, and, after the testimony was over, supported the charge against Mr. Spencer by a lengthy argument.

Those charges were not proven in any respect. No witness testified that Mr. Spencer had given, directly or indirectly, or offered to give money, or anything of value, in consideration of votes or support, in the Alabama legislature; nor was it shown that any of his friends had done so. Some hearsay testimony was offered to the effect that certain persons had said that they had received money in consideration for voting for Mr. Spencer for the Senate; but this testimony was ruled out by the committee. The persons alleged to have made these statements were competent witnesses, but were not produced, nor was it proven that any money had been paid to them for such a purpose by anybody, whether a known friend of Mr. Spencer or not.

The counsel for the accusers complain strongly of the rejection of such testimony; but its illegality and worthless character were too plain to require argument, and had it been admitted it might have contributed to make some scandal, but would have proved nothing. Attempts were made to offer the hearsay statements against Mr. Spencer of persons who were not shown to have been engaged with him in any conspiracy to procure his election by corruption or undue means, and by whose statements made in his absence he could not be bound by any known principle of law, which were also rejected by the committee.

While hearsay evidence was thus excluded, the door was thrown open widely to prove the payment of money by any person to any member of the legislature, or to be used with the legislature, to procure Mr. Spencer's election, by any person, whether such person was shown to be a friend of Mr. Spencer or not.

The committee deem it unnecessary to go into the full details of the case, and having thus given the general result, beg leave to be discharged from the further consideration of the resolution and memorial, and herewith submit copies of the testimony taken before the committee.

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[1] Record, p. 571.

[2] Record, p. 3227; Senate report No 331.

Mr. Saulsbury did not concur in all portions of the report, holding that the evidence relating to the invalidity of Mr. Spencer's election should have been presented, the case not being res adjudicata to the extent of preventing this.

345. The Senate election case of Ray and McMillen, of Louisiana, in the Forty-second Congress.

There being rival claimants bearing credentials from rival executives and chosen by rival legislatures, the Senate did not give prima facie effect to either credentials.

On January 22, 1873,[1] in the Senate, Mr. J. R. West, of Louisiana, presented the credentials of William L. McMillen, elected to the Senate to fill the unexpired term of William P. Kellogg.

State of Louisiana.

The following resolution was adopted by the senate and house of representatives of the State of Louisiana, in joint session, on Wednesday, the 15th day of January, 1873:

Whereas it appears by the journals of each house of the general assembly of the State of Louisiana that Hon. W. L. McMillen was, on the 14th day of January, 1873, elected United States Senator to fill the unexpired term of Hon. W. P. Kellogg:

Be it resolved by the senate and house in joint session, That the said election of Hon. W. L. McMillen be testified in accordance with the law.

D. B. PENN,
Lieutenant-Governor and President of the Senate.
J. C. MONCURE,
Speaker House of Representatives.

We certify the above to be a true copy of the minutes of the senate and house of representatives, adopted in joint session, January 15, 1873.

GEORGE B. SHEPHARD,
Clerk of the House of Representatives.
E. A. BURKE,
Secretary of the Senate.

STATE OF LOUISIANA,
EXECUTIVE OFFICE,
New Orleans, January 15, 1873.

I, John McEnery, governor of the State of Louisiana, do hereby certify that Davidson B. Penn, lieutenant-governor and president of the senate; J. C. Moncure, speaker of the house of representatives; E. A. Burke, secretary of the senate, and Geo. B. Shephard, chief clerk of the house of representatives, are the officers herein designated and described, and the foregoing signatures are genuine and entitled to credence as officers aforesaid.

Given under my hand and seal of the State, this 15th day of January A. D. 1873, and of the independence of the United States the ninety-seventh.

[L. S.]

JOHN MCENERY.

By the governor:
Y. A. WOODWARD,
Assistant Secretary of State.

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[1] Third session Forty-second Congress, Globe, p. 766.

Mr. West further announced that there was a contest in the case, and he presented thereupon the credentials of John Ray, as follows:

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
New Orleans, January 15, 1878.

I, William Pitt Kellogg, governor of the State of Louisiana, do hereby certify that on the 15th day of January, in the year of our Lord, 1873, John Ray was duly elected by the general assembly of this State to represent this State in the Senate of the United States, to fill the vacancy occasioned by the resignation of Hon. William Pitt Kellogg.

Given under my hand and the seal of this State, this 15th day of January, A. D. 1873, and of the independence of the United States the ninety-seventh.

[L. S.]

WILLIAM PITT KELLOGG.

By the governor.
P. G. DESLONDE,
Secretary of State.

No proposition was made to administer the oath to either claimant, and the credentials of both were referred to the Committee on Privileges and Elections.

To this committee had also been directed, on January 16, a resolution instructing it to inquire whether there was any State government in Louisiana, and to report a bill ordering an election there for the purpose of establishing a government, Republican in form.

346. The Senate election case of Ray and McMillen, continued.

Discussion of the authority of a decision of a State court over the determinations of the Senate in judging of the elections of its members.

Reference to inquiry as to existence of a Republican form of government in a State.

On February 20, 1873,[1] Mr. Matt. H. Carpenter, of Wisconsin, presented the report of the committee, Messrs. John A. Logan, of Illinois; J. L. Alcorn, of Mississippi, and H. B. Anthony, of Rhode Island, concurring therewith. He also reported a bill (S. 1621) in accordance with the instructions, and the following resolutions:

Resolved, That there is no State government at present existing in the State of Louisiana.

Resolved, That neither John Ray nor W. L. McMillen is entitled to a seat in the Senate, neither having been elected by the legislature of the State of Louisiana.

The report describes at length and in detail the political complications existing in Louisiana, involving the disputes of rival returning boards for control of the election returns; of the election of November 4, 1872; the interposition of the Federal courts and Executive; the existence of two rival legislatures and the two rival executives represented by the credentials before the Senate. The questions were largely as to facts; but the report discusses one feature which was an essential point of difference in the committee. It was claimed for the State government, represented by Governor Kellogg, that it was recognized as legal by the State supreme court, the highest judicial authority in Louisiana.

[1] Globe, p. 1520; Senate election cases, Fifty-eighth Congress, special session, Senate Document No. 11, p. 482.

The report of the committee says on this point:

The only question to be settled by this suit was whether Morgan, the relator, or Kennard, the defendant, was entitled to hold the office of associate justice of the supreme court in place of Howe, resigned; and the idea that in disposing of this single question the court had any authority or jurisdiction to determine as between Warmoth and Pinchback, neither of whom was a party to the cause, which of them was entitled to exercise the office of governor, and between 200 or 300 persons, the Kellogg legislature, and as many more, the McEnery legislature, not one of whom was a party to the suit, which of the rival bodies was authorized to exercise the legislative power of that State, is too preposterous a proposition to require serious refutation.

The utmost that can be claimed for this decision is that the court recognizes the Kellogg government as a government de facto, which may be conceded without touching the question whether it has been established by a regular election or set up and established by the usurpation of the individuals composing it, sustained by the military forces of the United States.

The question we are considering is not a judicial question and no judicial court can determine it. The question is political in its character, and, so far as the United States have to deal with it, must be determined by the political department of this Government. We must therefore investigate the facts, and no decision of any branch of a pretended State government can estop us in this inquiry.

The people of the State are about equally divided in sentiment in regard to these two pretended governments. The people of New Orleans, which is the seat of government, support the McEnery government, two to one; and it is believed that if Federal support were withdrawn from the Kellogg government it would be immediately supplanted by the McEnery government. The people of the State, as a body, neither support nor submit to either government. Neither government can collect taxes, for the people have no assurance that payment to one will prevent collection by the other government. Business is interrupted and public confidence destroyed; and should Congress adjourn without making provision for the case, one of two things must result: Either collision and bloodshed between the adherents of the two governments, or the President must continue the support of Federal authority to the Kellogg government. The alternative of civil war or the maintenance by military power of a State government not elected is exceedingly embarrassing; and in the opinion of your committee the best solution of this difficulty is for Congress to order a reelection, and provide for holding it under authority of the United States, to the end that a government may be elected by the people, to which they will submit, or which, in case of disturbance, the United States can honestly maintain.

Mr. Lyman Trumbull, of Illinois, in individual views filed by him, said on this point:

This pretended legislature, installed in power by the aid of the United States Army, in pursuance of a void order of a United States district judge, proceeded to elect John Ray to represent the State of Louisiana in the Senate of the United States; and it is said the Senate must receive him because the supreme court of Louisiana has decided the Pinchback legislature to be the rightful legislature of the State, and that the Senate is bound to follow the decision of the State court as to what constitutes its legislature.

It is true, as a rule, that the Federal courts follow the decisions of the State courts in regard to the construction of their own constitution and laws; but it is not true that the legislative department of the Government follows the decisions of the courts upon political questions. The inquiry, what is the established government in a State, belongs to the political and not the judicial power. The Senate, by the Constitution, is made the sole and only judge of the election of its members, who can only be chosen by the legislatures of the respective States. Ordinarily the body recognized in a State as its legislature would be held by the Senate to be the body authorized to elect a Senator; but when, as in the case of Louisiana, there are two bodies in a State, each claiming to be its legislature, and each of which has chosen a person to represent the State in the Senate, in deciding between the claimants the Senate must necessarily determine which body was the rightful legislature and had authority to make the election.

In view of the facts as shown to exist in Louisiana, the decisions of its courts in favor of the validity of the Pinchback legislature are entitled to no respect whatever. As has been already shown, that legislature was not elected nor brought into being by the people of the State, but owes its existence to the void proceedings of the United States court supported by military force.

Mr. Oliver P. Morton, of Indiana, in views filed by him, said:

The Constitution says that "the Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years." The manner of constituting the legislature is left absolutely to each State, and the question of its organization must be left to be decided by such tribunals or regulations as are provided by the constitution and laws of the State; and the only question about which the Senate may inquire in determining the admission of Senators is whether they have been chosen by the legislature of the State—that legislature recognized by the State or whose organization has been accepted by other departments of the State government. Under our complex system of government, all questions of the organization of State governments, under their own laws, must be left to the decision of the tribunals in such States created for that purpose; and when such decisions have been made they must be accepted by the Government of the United States in their dealings with such States. It is no answer to this to say that in a particular case such tribunals will or have decided wrongfully. The Government of the United States has no right to review their decisions so long as the State possesses a government republican in its form.

The doctrine that all questions of election arising exclusively under the constitution and laws of a State must be left to the settlement and determination of the proper tribunals created by the State for the adjustment of such matters was distinctly recognized by the Supreme Court of the United States in the celebrated case of Luther *v.* Borden, growing out of the attempt in the State of Rhode Island to overturn the old charter government and establish a new one in its stead. In that case the Supreme Court said:

"The point, then, raised here has been already decided by the courts of Rhode Island. The question relates altogether to the constitution and laws of the State; and the well-settled rule in this court is that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of a State. Upon what ground could the circuit court of the United States, which tried this case, have departed from this rule and disregarded and overruled the decision of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals."

But the reason for the rule in Luther *v.* Borden is much stronger in this case than in that. In that case there was an attempt to set up a new constitution over the old charter, under which it was claimed that a new government had been organized throughout, involving a new supreme court, as well as legislature and State officers. But in Louisiana there is but one constitution and but one supreme court, which is recognized by all parties, and no attempt made to set up another in its stead, and the only question is as to who were elected State officers and members of the legislature under the recognized constitution and laws of the State, of which the supreme court must necessarily be the final arbiter.

There is no impeachment of the supreme court of Louisiana presented to the committee or to the country. All its members but one were placed upon the bench in 1868, before the present troubles arose, and hold their office for four years longer; and although imputations have been cast upon its action, I know of no foundation for them, and it is not legitimate for Congress to make an inquiry into its motives. The power and duty conferred upon the United States by the fourth article to guarantee to every State in the Union a republican form of government is political in its character and not subject to revision by the judiciary; but when, upon inquiry, it is ascertained that a State has an existing government in active operation, which is not obstructed by violence, in which each department is mutually recognized by the other, and which is republican in its form, there is no foundation for the interference of Congress, and no condition to which its power can attach; and although its officers may have been elected by fraud or installed without election, yet all questions in relation to them must necessarily arise under the constitution and laws of the State, and, under the decision in Luther *v.* Borden, be referred for determination to the tribunal of the State.

The bill reported by the committee was debated at great length on February 27, 1873,[1] and the bill was rejected, yeas 18, nays 20.

[1] Globe, pp. 1850–1896.

The resolutions reported by the committee were not acted on, and the time for which the claimants to the seat had been chosen expired without action on their claims and without either of them taking the seat.

347. The Senate election case of Pinchback, McMillen, Marr, and Eustis from Louisiana, in the Forty-third, Forty-fourth, and Forty-fifth Congresses.

There being conflicting credentials from rival claimants to the office of governor, the Senate referred the papers before considering the question of swearing in either claimant to the seat.

Instance wherein a committee, being equally divided, reported to the Senate its inability to present a proposition for action.

The Senate tabled a motion to receive a telegram relating to credentials of a claimant to a seat.

On January 21, 1873,[1] in the Senate, Mr. J. R. West, of Louisiana, presented credentials of P. B. S. Pinchback as Senator from Louisiana for the term commencing March 4, 1873. These credentials were laid on the table.

On March 3, 1873,[2] the Vice-President laid before the Senate a telegraphic dispatch from John McEnery, "governor of Louisiana," as follows:

> I have the honor to inform you that Hon. William L. McMillen was, on the 28th instant, duly elected Senator in the Congress of the United States by the legislature of the State of Louisiana for the term commencing March 4, 1873. His credentials were mailed to him yesterday.

Mr. West having objected to the reception of the telegram, a debate arose as to its nature. It was pointed out that the credentials were often presented in the Senate in advance, but there was no validity in them until the time arrived for the person to whom they related to claim the seat. The credentials themselves from Louisiana raised no question at this time, and the dispatch was simply a notification as to them.

The question being put on the reception of the telegram, the question of reception was laid on the table.

On the same day[3] Mr. Carl Schurz, of Missouri, presented a memorial from W. L. McMillen, respectfully asking the Senate to take notice of the fact of his election. This memorial was laid on the table.

On March 7, 1873,[4] at the special session of the Senate, Mr. West presented the credentials of W. L. McMillen, which were laid on the table.

On December 4, 1873,[5] on motion of Mr. Oliver P. Morton, of Indiana, these credentials were referred to the Committee on Privileges and Elections, no proposition being made to administer the oath to either claimant.

On December 15,[6] Mr. Morton, from the Committee on Privileges and Elec-

[1] Third session Forty-second Congress; Globe, p. 728.

[2] Globe, p. 2147.

[3] Globe, p. 2165.

[4] Special session of Senate, Forty-third Congress; Record, p. 29.

[5] First session Forty-third Congress; Record, p. 57.

[6] Record, pp. 188–191.

tions, to whom were referred the credentials of P. B. S. Pinchback and W. L. McMillen, claiming seats in the Senate as Senators from Louisiana, reported that the committee were evenly divided upon the question as to whether Mr. Pinchback was, upon his credentials, entitled to be sworn in as a member, and asked to be discharged from further consideration of the subject, and to refer the whole matter to the determination of the Senate.

Mr. Morton submitted the following resolution for consideration; which was ordered to be printed:

Resolved, That the credentials of P. B. S. Pinchback for a seat in the Senate of the United States for six years, commencing on the 4th of March, 1873, being in regular form, he is entitled under the law, and in conformity with the usages of the Senate, to be sworn in as a member; and that whatever grounds of contest there may be as to his right to a seat should be made thereafter.

Mr. Morton submitted the above resolution individually as a Senator, the committee having authorized no proposition.

348. The Senate election case of Pinchback and others, continued.

In an election case the Senate considered so far as applicable testimony taken by its committee in a former Congress, in a matter to which neither contestant was a party.

Discussion in the Senate as to whether or not the competency of the electing body is a question of determining importance in considering the prima facie effect of credentials.

The credentials of Mr. Pinchback were issued by William Pitt Kellogg, as governor, and those of Mr. McMillen by John McEnery, as governor. It appeared from the debate that Mr. Pinchback's election took place on the same day and by the same legislature that had elected John Ray, whose claim to a seat for an unexpired portion of a term as Senator had not reached a decision in the preceding Congress.[1]

At the outset of the discussion, on December 15,[2] Mr. Orris S. Ferry, of Connecticut, moved to take from the files of the Senate for consideration in connection with this case the reports and evidence taken in the last Congress in the Louisiana case by the Committee on Privileges and Elections.

At once there arose objection to this course, it being pointed out by Mr. Roscoe Conkling, of New York, that the document in question recorded the result of an investigation in another case.

Speaking, on December 16,[3] Mr. Oliver P. Morton, of Indiana, said:

This question has never been before the committee, nor has it ever been before the Senate; and so far as that volume of testimony is concerned, while I have no sort of objection to anybody referring to it for any purpose, it is no part of the res gestae. It is not a part of this case. It was taken before a different committee. The committee has been twice reorganized since that time. It was taken at a former session of Congress in a proceeding to which Mr. Pinchback was not a party and for which he is nowise responsible; and while it is here for reference, as every document in the document room is, and every book in the Library is, it is no part of this case.

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[1] See section 345 of this work.

[2] Record, pp. 189, 191.

[3] Record, p. 222.

Replying on January 30,[1] Mr. Matt. H. Carpenter, of Wisconsin, said on this point, speaking as to Mr. Pinchback's status:

His prima facie case is overturned. The presumption that might spring from reading these papers is rebutted by the full proof of the fact that a committee of this body unanimously, except one of its members, has reported to you, and that report lies upon your table today, or in your document rooms, that there was no State legislature and there was no State government in Louisiana on the 15th day of January last, when it is pretended Pinchback was elected. Again, the Senator says this testimony was not taken in Mr. Pinchback's case; it was taken in Mr. Ray's case, and therefore Mr. Pinchback is not to be affected by it. Why, sir, in a judicial court, for reasons that pertain to such tribunals alone, the testimony taken in a case between Smith and Jones can not be used in a case between Brown and Gray, for the reason that each is entitled to cross-examine witnesses whose testimony is to affect him.

At this point Mr. Morton interposed to say that the resolution instructing the committee to inquire whether there was any State government in Louisiana was offered on the 16th of January, 1873, and the credentials were not presented to the Senate until some time afterwards. That investigation was already ordered before the credentials were presented to the Senate.[2]

To this Mr. Carpenter replied:

If the investigation had no reference to Mr. Ray's case; if it was an independent proceeding ordered by the Senate to ascertain an important fact upon which we might be called to legislate, then it binds all the world; all mankind were parties to that investigation. * * * It was not a proceeding in Ray's case, and Mr. Pinchback was as much a party to the proceeding as any other citizen of the United States.[3]

Mr. Carpenter then proceeded to read from Lewis's Reasonings and Methods in Politics to show that the process of ascertaining facts for legislative purposes was not so formal or subject to such strict rules of evidence as in judicial departments.

So I say [he continued] that the information which is furnished to the Senate by the report and testimony of this committee not only comes within the rules of evidence upon which legislative bodies must act, but that it was obtained in a proceeding instituted by its own authority, conducted by its own members, exercising its own powers to send for persons and papers, and conducted, too, under the supervision of the Senator from Indiana himself; and I say that it is before us, as evidence in this case, and in all cases, and for all purposes. The Senator says it is before us like any other volume in the document room, or any book in the library. I am willing to accept that expression, because every book in the library which gives us a fact of history applicable to this case, every law book which discusses the questions involved in this case, and every document in any room of this Capitol which furnishes information bearing upon this subject is legitimately and properly before us this morning.

Thereafter during the debate the report in question was referred to and quoted from freely.[4]

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[1] Record, p. 1037.

[2] The record of the case of Ray and McMillen in the Forty-second Congress shows that this statement is accurate; but the credentials were referred to the committee in season to be taken into consideration in its report.

[3] This is not wholly accurate. On January 16, 1873, the committee were directed to require and report as to the existence of a legal State government. On January 22, the credentials of Ray and McMillen were presented and referred to the committee. On February 20 the committee reported both as to the existence of a legal State government and as to the rights of Ray and McMillen.

[4] On March 3, 1876, while this question was still pending, Mr. George F. Edmunds, of Vermont, took the same view as Mr. Carpenter took. First session Forty-fourth Congress, Record, p. 1437.

Proceeding to the merits of the case, Mr. Morton asserted[1] the proposition that if William Pitt Kellogg, who as governor issued the credentials of Mr. Pinchback, was the lawful governor, then Mr. Pinchback was entitled to take the seat without delay, and any contest to be made must be made thereafter. While he would discuss in this connection the status of the legislature, he did not consider it necessarily involved in the argument. He referred in support of this view to the precedents in the cases of Senator Goldthwaite, of Alabama, and of Potter v. Robbins, from Rhode Island.[2]

Mr. Carpenter did not admit that these precedents sustained Mr. Morton's argument,[3] and said:

> When a gentleman comes to this body with credentials in due form, showing that he has been elected by a body authorized to elect a Senator, then he has a prima facie case. The case then before the Senate (Goldthwaite case), * * * was such a case. There was a question made here as to individuals sitting in the legislature of Alabama, but there was no question that the body itself was the legislature of the State; and the better opinion is that the Senate has no authority to inquire into the right of individual members of a State legislature to sit therein, that being a question to be settled by the legislature, if there be a legislature to settle it; but the Senate has authority to inquire whether the body which has pretended to elect a Senator was the legislature of the State. The legislature alone can elect a Senator, and therefore to make a prima facie case it must be shown that the legislature has made an election.

Mr. Morton called attention to the fact that a certificate by the governor was a proper form of making known the election by the legislature, to which Mr. Carpenter replied:

> A prima facie case is that which appears before an examination of the merits; but when there has been a full investigation and trial, and it is ascertained that what appeared prima facie to be the case is not the true case then the prima facie case is gone. In Robbins's case there had been no investigation, and therefore the Senate properly acted upon the prima facie case. But here a full investigation had been made before Pinchback presented his prima facie case. Whenever the Senate acts, it must act upon all the facts before it; and, in this instance, we have not only the prima facie case made by the credentials, but also the full investigation showing that Pinchback's prima facie case is false.

349. The Senate election case of Pinchback and others, continued.

Reference to principles governing recognition of a State government by the President of the United States.

The discussion, from the above points of departure, naturally divides itself into two main branches:

(1) Was Governor Kellogg the governor of the State of Louisiana when the credentials were issued?

Mr. Morton contended[4] that he was. He had been in complete possession of the office for nearly twelve months, acting as governor in every respect; he had been recognized as such by the other State officers, by the legislature in various ways, by the State courts from the lowest to the highest; he had been recognized by the United States House of Representatives, which had seated a Member-elect bearing credentials signed by him; and, finally, he had been recognized by the

[1] Record, p. 224.
[2] Record, p. 222.
[3] Record, pp. 1037, 1038.
[4] Record, p. 223.

President of the United States. On this last point Mr. Morton quoted at length the decision of the United States Supreme Court in the Rhode Island case arising out of the so-called "Dorr rebellion," the case of Luther *v.* Borden (7 Howard).

Mr. Carpenter dissented [1] from this claim that Kellogg was the lawful governor. As to the point that he had held the office for a period of time and was still holding it, it was sufficient to say that he was holding it not by the voluntary consent and assent of the people of Louisiana; but by reason of support from the strong arm of the military power of the Federal Government. Under such circumstances the duration of his power was not material. If it was not rightful in the beginning, it was not rightful now. As to its recognition by the President and by the courts of Louisiana, Mr. Carpenter denied the effectiveness of both these arguments.

(*a*) As to the force of the decisions of the State courts in limiting the inquiry of the Senate, Mr. Morton contended [2] that it was obligatory to accept the decisions of State tribunals on all questions arising upon State laws. He quoted the cases of Luther *v.* Borden, and also Webster *v.* Cooper (14 Howard). Mr. Morton contended that the Senate, in accordance with this principle, should take a legislature as the State gave it. But it was objected in this connection, notably by Messrs. Eli Saulsbury, of Delaware, and John P. Stockton, of New Jersey, that the question of the existence of a legislature was directly before the Senate, and that it alone was the judge.

Mr. Carpenter discussed [3] more fully the effect of the decisions of the Louisiana court, taking the ground that the courts had acted in cases not properly within their jurisdiction, and that their decisions were conflicting and therefore not within the rule making them the highest evidence of what the local law was. He cited on this point the cases of the Ohio Life and Trust Company *v.* De Bolt (16 Howard, 432), Gelpecke *v.* Dubuque (1 Wallace, 175), and Havemeyer *v.* Iowa County (3 Wallace, 294). Mr. Thomas C. McCreery, of Kentucky, also argued in the same line.[4]

(*b*) As to the alleged recognition of the Kellogg government by the President, the facts and law were discussed at length [5] on December 16 and January 26 and 30, and February 2.

(2) As to the question of the legality of the legislature there was elaborate discussion and exploration of fact, the report already discussed being the basis of consideration, it being contended on the one side that the legislature was the legal body, and on the other that it was not.

On January 26 [6] Mr. Morton modified his resolution to read as follows:

> *Resolved,* That the credentials of the Hon. P. B. S. Pinchback be referred to the Committee on Privileges and Elections; that the committee have power to send for persons and papers, and be instructed to inquire into the conduct of said Pinchback in connection with said election.

In making this change Mr. Morton announced that he had learned that there were charges of improper conduct made against Mr. Pinchback in connection with

[1] Record, p. 1053.
[2] Record, pp. 225, 226.
[3] Record, p. 1054.
[4] Record, p. 916.
[5] Record, pp. 223, 1050, 1109; Appendix, p. 41.
[6] Record, p. 915.

the election, and this was the reason for the modification. Mr. Carpenter commented[1] on this as a virtual abandonment of the prima facie claim, but Mr. Morton declined to admit that this was the significance of his action.

On January 27[2] the credentials of Mr. McMillen were recommitted to the Committee on Privileges and Elections.

But it does not appear that any action was taken at this session on the modified resolution presented by Mr. Morton.[3]

350. The Senate election case of Pinchback and others, continued.

Discussion of the form of credentials and the competency of the electing and certifying authorities behind them as elements in their efficacy.

Discussion of the status of a governor de facto as distinguished from an usurper.

On December 16, 1874[4] the Vice-President laid before the Senate a letter of W. L. McMillen requesting the speedy action of the Senate upon his credentials as Senator elect from the State of Louisiana; which was referred to the Committee on Privileges and Elections.

On December 23[5] Mr. Morton submitted the following resolution for consideration; which was ordered to be printed:

Resolved, That the Senate recognize the validity of the credentials of P. B. S. Pinchback as certified to by Governor William P. Kellogg, of Louisiana, under the seal of said State; and the Committee on Privileges and Elections are instructed to examine and report if said Pinchback is entitled to be admitted on the prima facie case thus made, or if such admission should be postponed until investigation is made as to the charges of corruption in his election alleged against him.

On January 22,[6] 1875 Mr. West presented new credentials, in due form but in somewhat different form from the preceding credentials, dated January 13, 1875, and signed by "Wm. P. Kellogg" as governor, certifying that on January 12, 1875, Pinckney B. S. Pinchback had been elected to the United States Senate for the term expiring March 4, 1879—i. e., the term beginning March 4, 1873, as expressed in the credentials issued to Mr. Pinchback by William P. Kellogg on January 15, 1873.

These credentials, together with the former credentials and other papers relating to the case, were referred to the Committee on Privileges and Elections.

On February 8, 1875,[7] Mr. Morton submitted the report of the committee, as follows:

That the certificate of William Pitt Kellogg, then and now the governor of the State of Louisiana, which certificate is verified by the great seal of the State, shows that on the 17th day of January, 1873, the Hon. P. B. S. Pinchback was elected to a seat in the Senate of the United States for the term of six years, beginning on the 4th of March, 1873, by the legislature of Louisiana, in manner and form as pre-

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[1] Record, p. 1053.

[2] Record, p. 941.

[3] It was stated in debate on January 22, 1875, that no action was taken. Record, second session Forty-third Congress, p. 647.

[4] Record, p. 94.

[5] Record, p. 227.

[6] Record, p. 647.

[7] Record, p. 1063. This report was concurred in by 4 of the 7 members present at the meeting, the whole membership of the committee being 9.

scribed by the act of Congress regulating the elections of Senators of the United States. Upon this certificate the committee are of opinion that Mr. Pinchback has a *prima facie* title to admission as a member of the Senate, and that whatever objections may exist, if any, as to the manner of his election or as to the legal character of the body by which he was elected, should be inquired into afterwards.

The committee, therefore, recommend the adoption of the following resolution:

"Resolved, That P. B. S. Pinchback be admitted as a Senator from the State of Louisiana for the term of six years, beginning on the 4th of March, 1873."

In support of this report, on February 15 [1] Mr. Morton cited the cases of Robbins, Shields, and Goldthwaite. At a later date he also cited the case of Spencer.

Minority views [2] were filed by Messrs. William T. Hamilton, of Maryland, and Eli Saulsbury, of Delaware. The minority begin with a discussion of the force and effect of the Kellogg credentials:

The power of the Senate, under section 5, article 1, of the Constitution, to "judge of the election, returns, and qualifications of its own members" is absolute and unlimited.

The object in this case is to seat P. B. S. Pinchback upon this certificate alone, irrespective of his election, and which in effect for the present excludes any consideration of the election itself.

It may be admitted that the general practice has been to admit the person chosen as a Senator to his seat upon credentials sufficiently authenticated either by the legislature or the governor of the State, subject, of course, to any contest that might be thereafter prosecuted in respect to his right to the seat. The credentials in themselves, it will be conceded, have no substantial value. It is the election, and the election alone, that gives to the person chosen the right to be a Senator.

The certificate of the governor of a State directed to be given by the act of Congress approved July 25, 1866, upon the election of a Senator, is but the certificate of a fact upon which the official existence of the person chosen depends. It gives to it no force whatever, and without it the election is just as good. It is merely one of the evidences of the election in a solemn form, and to which due respect should always be paid. In the act referred to there is nothing said as to what effect should be given to such a certificate. It has, however, been generally regarded as sufficient in itself to presume a lawful election of the person represented by it to be chosen. It is most certainly appropriate that this act did not define the force of such a certificate. It prescribes a duty that the governor might or might not observe. The Constitution of the United States provides for the election of Senators by the legislatures of the States. This is their absolute right. Congress may regulate the time and manner of choosing Senators, and the power of Congress over the subject is limited to this only. The right of choosing Senators belongs to the legislatures alone, and such election is alone in all cases of inquiry to be determined by its records. The governor is not known in the election; no duty is imposed upon him by the Constitution in respect to it, or in respect to its authentication. The legislature, to which is alone confided the high trust of choosing Senators, can speak through its own organization, its own officers, and its own acts, as its official record will show.

The right of election is sacred; the right of having this election determined by its own record is equally sacred; for it might be that if other independent departments of the Government, as the executive, for example, possessed the right or power of authentication in the election of a Senator, you might impinge upon the full enjoyment of the power of the legislature in the due choosing of Senators. This absolute right to choose we hold should not and does not depend for its efficiency upon the action of the executive or any other officer of the State or Federal Government.

It will be observed that the certificate such as we now have under consideration necessarily involves these elements of belief before it can have the force which is now attempted to be given to it by the report of the committee in this case: First, that the facts stated in regard to the election are true; and second, that the person certifying as governor is in fact what he represents himself to be. The efficacy sought to be impressed upon this certificate, in at once admitting the person represented to be chosen to a seat, alone depends upon the latter fact. With this in dispute the efficient power is gone. Investigation is at once inaugurated to settle the disputed point. Inquiry leads to inquiry, and the real life of

[1] Record, p. 1277.

[2] Senate Report No. 626.

the certificate is lost in the strife, for it can be readily seen that in a contest as to whether the certificate has any validity, either by reason of the allegation that the person certifying was not in fact the governor, or from any other reason, the State might be left without a Senator, when by reference to the acts of the legislature the records would show a lawful election by a lawful body, and who could deny that a person so chosen and with such a record could not be admitted without regarding at all the contest about the certificate of the governor, or whether he was in fact governor?

We advert to this to show that a contest upon the subject of certificates at all for any legitimate cause destroys their force. It was intended that by their force alone there should be immediate unobstructed admission to a seat. It must be conceded, in order to give this effect to the certificate before us, that William Pitt Kellogg was at the time the governor of Louisiana. If he were not the governor, then it is no more than waste paper. All will admit, we presume, that this has been a subject of dispute at least since the State election which took place on the 4th day of November, A. D. 1872. A constant, earnest, and at times an aggressive protest has been made against Kellogg, as not only not entitled to be the constitutional and rightful governor of Louisiana, but as a notorious usurper, held in the position he has seized without color of right by means of the armed forces of the United States. Events occurring at the time, and continually since, and some of the most painful character, prove that he does not hold this place practically by any other tenure or power. Whatever else may be said of this notable prominent fact, all are well advised that the right of Kellogg to be governor of Louisiana is in good faith denied and resisted in every way possible to a peaceful resistance.

This at once, most naturally, opens up the inquiry as to the certificate itself, and no efficacy is to be ascribed to it until this is satisfactorily settled, for without this it is worthless for any purpose. We apprehend there is no diversity in the committee on this point. The report of the committee insists that Kellogg is the governor of Louisiana, and would proceed to show it by a course of argument and a system of evidence satisfactory to gentlemen uniting in that report. On the contrary, another course of argument, and other evidence equally satisfactory, have brought the undersigned to a very different conclusion. The broad field of inquiry and investigation is therefore opened up, for it must be manifest to an unprejudiced mind that an examination into the fact whether Kellogg was the rightful governor of Louisiana at the time he signed this certificate must bring us to his pretended election, and, with it, to the election of the body which chose Pinchback. The whole subject relating to the affairs of this State, in connection with the election held on the 4th of November, 1872, for the election of governor and other State officers and members of the legislature, becomes involved in the very first branch of the inquiry which it is conceded by all must be made and settled before any force can be imparted to the certificate.

Before entering upon this inquiry we submit most respectfully, putting it in the mildest form, whether this is not an exceptional case from the ordinary one, where it is conceded that there was a rightful governor to sign certificates and where there was a legislature to elect. It must be admitted that no such case was ever before presented to the consideration of the Senate. Notwithstanding it has been the usual practice to admit, in the first instance, persons to a seat upon such certificates, leaving the contest, if any, to be proceeded with thereafter in the usual way, yet the very first question as to the official character of the person pretending to be governor impairs, as we have before said, the wonted efficacy of such certificate; so that when in the examination of this primary question is involved the body that chose Pinchback, and in fact the whole State government of Louisiana, would it be fair, rational, and just to stop short of the substantial merits of the case when all can be settled at once?

It will be admitted, we think, that in such a controversy, opening up both the official character of the governor and the legal validity of the legislature choosing the Senator, we could determine against the validity of the certificate and at the same time determine the validity of the election upon the record of the legislature and upon its official power of election. Suppose that such certificates should be attacked for fraud, as they could be, could anyone say that such attack would involve alone the fraudulent character of the certificate, and not the rightful issue—the election itself? The attack would involve both, and, involving both, common reason would dictate that we should decide the substantial question. While we could, in such an inquiry, set aside the certificate, we would give to the person rightfully chosen his seat, and all done in the same proceeding. For if our inquiry should be alone confined to the certificate, for whatever cause, we would be exposed to the fallacy of setting it aside and then remitting the case to the governor for other or further certificate of a fact simply, when we could, and it would be our duty, ascertain the fact ourselves to end the matter.

Therefore we conceive that even in a technical sense, upon a question submitted as this is, an examination of the whole subject is necessary to come to right conclusions; but when we view it in its broad sense, and as we have it in the light of history and events daily transpiring, many of which we must or are presumed to know, as legislators and members of this body, we would consider it a gross dereliction of public duty did we confine ourselves to a technical consideration of matter not substantial when in it are involved questions of the greatest moment, and which in their proper solution demand our earnest efforts and soundest judgment.

The facts present the broadest grounds for interposition in the broadest sense to ascertain the real right and settle a question that has already given, and, until rightly settled, will give to the country the greatest concern. The facts can not be denied that imperatively call for such an interposition; mere parchment titles, mere certificates, sink into insignificance before the patent and undeniable facts which environ this case. Never before has such a case been made, and it is to be hoped that no such one will ever be made again.

A brief reference to the prominent facts will show how entirely and neecessarily the whole case is before us.

The views then go on to review the facts of the State election of November 4, 1872, in Louisiana, to discuss the rival returning boards, the fraudulent returns, the rival governors and rival legislatures, and then proceed to discuss the status of Kellogg as governor:

But to recur to the question. If, in the course of the investigation, from all the facts drawn from all the sources to which we have referred, we conclude that the pretended governor is a mere usurper, then his acts are void and avail nothing. Persons hold office or place under three different tenures—first, de jure; second, de facto; and, third, as a usurper—the only three modes, we believe, known to the law; and by one or the other of these tenures does the person exercise the office or place that he holds.

The first is clothed with all the powers that right, combined with possession, can give, The second is only clothed with the powers possession can give, that possession being obtained under a color of right; and these powers are limited to certain well-defined acts. The third refers to a person undertaking to hold office without any color of right; he is a mere usurper, whose acts are void.

The distinguishing differences between officers de jure and de facto and a mere usurper are well laid down in the books in the earlier days, and the same are observed to this day. In a leading case, decided so far back as 1738, the general principles relating to officers de jure and de facto were well defined. In this case one Goldwire, "under pretense and color of being elected mayor of Christ Church, in the county of Southampton," was presented unto William Willis, steward of the court leet, and was there sworn into the office of mayor, and, in fact, exercised the office till —— day of ——, 1736, and that being in the exercise of said office, and under "pretense of being elected, and sworn into the same, he issued a summons to the several burgesses of the corporation to meet," etc., and at such meeting he nominated the defendant Lisle as one of the burgesses, and the question was whether, when he made such nomination, he was mayor de facto, for it was found that he had never been elected, and, if mayor de facto, whether he had the power to make the appointment. It was held by the court that Goldwire was not so much as a mayor de facto; for in order to constitute a mayor de facto it is necessary that there be some form or color of an election; but without this, the taking the title and regalia of the office, and the acting and being sworn in as mayor are not sufficient. Now, here it appears that Goldwire was never elected in fact; and though it be stated that he was sworn at the leet, it does not appear (as it ought) that this was agreeable to the constitution of the borough. And it is not material that he acted as mayor, as it is found that a quo warranto was recently prosecuted against him, pending which the present election was made, and that he was thereupon adjudged to be a usurper." (Andrews's Reports, Henry *v.* Lisle, 173.) The distinctions then made are continued to this day, and are as clearly defined:

"An officer de facto is one who exercises the duties of an office under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right, and on the other from an officer de jure, who is in all respects legally appointed and qualified to exercise the office. These distinctions are very obvious, and have always been recognized."—(17 Connecticut, Plymouth *v.* Painter, 588; 7 Johnson, People *v.* Collins, 549; 2 Kent.)

It is claimed by some that though it be a question whether Kellogg be a governor de jure, yet he is a governor de facto, and as such his certificate of the election of Pinchback is to be recognized as equally binding upon us as if he were governor de jure.

Holding, as we do, that he is neither the governor de jure nor de facto, but a mere usurper, and a usurper not keeping himself in position by his own unaided local power, but by the aid of armed forces of a foreign power—in its true relations to this case as much a foreign power as that of Great Britain could be—we desire, briefly, to examine this phase of the subject.

Keeping in view the rulings we have cited, is Kellogg so much as a governor de facto? In disposing of this we dispose of his character as governor de jure.

As we have already noticed, the constitution of Louisiana provides that the governor shall be elected by the people. To be such de facto he must be in by color of an election. If he has no color of an election, he is nothing but a usurper, "who is one undertaking to act without a color of right." Two propositions are to be here considered in order to arrive at correct conclusions—

1. Was Kellogg elected by a majority of the votes of the people at the election held on the 4th day of November, 1872?

2. If he was not, then had he such a color of an election as to constitute him governor de facto?

This brings us to the wider domain of fact which at every step has marked this controversy from its inception, in 1872, to the present period. In the direct examination of the matter all the facts that may tend to a correct result should be considered. We have a great variety of facts and circumstances, some historical in their character, some which we are obliged to know or are assumed to know from our constitutional relations to the State, her people, her government, her officials, whether judicial, ministerial, executive, or political, and those which we have gathered ourselves through committees of this body in the investigation had by resolution of this body passed on 16th January, 1873, and which is as follows: *"Resolved,* That the Committee on Privileges and Elections be instructed to inquire and report to the Senate whether there is any existing State government in Louisiana, and how and by whom it is constituted;" and to which committee were also referred the certificates of John Ray and W. L. McMillen, both claiming the seat in this body supposed to have been made vacant by the resignation of William Pitt Kellogg.

This committee, composed of Messrs. Morton, Carpenter, Logan, Anthony, Trumbull, Alcorn, and Hill, made a diligent and laborious investigation of all the matters connected with both questions, and made an elaborate report to the Senate, accompanied by a large amount of testimony. It is Senate Report No. 457, Forty-second Congress, third session. From all the evidence, then, and which covers and exhausts the whole subject, was Kellogg in fact elected by the people of Louisiana the governor of that State?

After examining the facts the minority conclude—

Then, so far as Kellogg is concerned, there is nothing to show that he had the slightest right, either by an election or the color of an election, to hold this office. He must therefore be regarded as a usurper; for in no other character could he hold the place, if not in that of governor de jure or de facto.

The principles are well and plainly defined in the case of Plymouth *v.* Painter, 17 Conn., already quoted, in respect to the acts of persons holding place under one or the other of these modes. The following is from page 593:

"The acts of a mere usurper of an office, without any color of title, are undoubtedly wholly void, both as to individuals and the public. But where there is a color of a lawful title, the doings of an officer, as it respects third persons and the public, must be respected until he is ousted on a quo warranto, which is the appropriate proceeding to try the validity of a title to an office, and in which it would be necessary for him to show a complete title in all respects; although in a suit against a person for acts which he would have an authority to do only as an officer, he must, in order to make out a justification, show that he is an officer de jure; because the title to the office being directly drawn in question, in a suit to which he is a party, may be regularly decided. So where he sues for fees, or sets up a title to property by virtue of his office, he must show himself to be an officer de jure."

It is here laid down—

First. That the acts of a usurper are void.

Secondly. That the acts of an officer in by a color of title—that is, an officer de facto, where the rights of third persons or the public are concerned—are to be respected.

Thirdly. That where he is directly concerned he must show himself to be an officer de jure whenever the direct issue is made, either as to title, or fees, or as a trespasser, or otherwise.

If Kellogg, then, be a usurper, the certificate relied upon in this case has no value for any purpose. But let us assume, for the sake of the argument, that Kellogg was governor de facto; that he was in by color of an election, and by color of an election only, and not by an election itself; with such knowledge upon our part, with the known fact, besides, that his right to the place is denied and contested, that there is a rival governor, in fact a rival government, we should proceed with great caution in giving such efficacy to his simple certificate. True, the third section of the act of Congress of 1866, making provision for the election of Senators, makes it the duty of the governor to certify the election to the President of the Senate; it still stops short of prescribing the force of such a certificate. No doubt Congress intended that ordinarily it should be regarded as sufficient for admission to a seat, but it must be manifest that this certificate is not the real credentials of a Senator-elect, but intended originally, we may presume, as a substitute for it. The real credentials of the election is a copy of the record of the election itself, properly certified by the officers of the body electing; for Congress has no right to impose this duty upon the governor, and that neither it nor the person elected can compel the governor to issue any such certificate.

There must be design in not presenting a certified copy of the record of election by the legislature instead of depending alone upon this certificate of the governor, when it was well known that every step in the progress of this case would be contested. The declaration in the report submitted by the committee, that Kellogg was then and now the governor of Louisiana, defines the spirit of the whole proceeding; and that is that it is more of an object to get Kellogg recognized in some way as governor by this body than the admission of Pinchback to a seat in it.

Therefore should we be more careful still how we undertake, in giving ostensible credence alone to a certificate, to pass upon a higher matter—the legal character of the person giving it. Why not, in such an acknowledged condition of things, recur to his credentials, which the record of the election or a copy of it can make? But, that produced, it is too apparent that the contest would be transferred from the governor to the legislature; the legislature is out of being, and therefore the fact of an election by it can only be inquired into; but the governor is still living in the place in which he was put, and still kept by an armed force, and to be kept there if his acts are to be respected or sanctioned by us. How shall we close our eyes to the facts staring us in the face? We again beg leave to repeat that with the assumption that Kellogg is at best but a governor de facto, with a rival governor claiming the right, and with the acknowledged power to exercise it in the absence of the troops of the United States, should we not be careful, if we can in any way abstain from determining questions of the present, which concern alone the present, and which should be determined in a different way and by all branches of the Government, if to be determined at all by it? The election of Pinchback does not concern the present; the body electing him is functus officio. He must stand or fall by the action of that body. Let us go back to that, and upon the acts and legal validity of that body determine the right to a seat. We say again that the passage of the resolution decides only one thing, the right of membership, and binds no one to anything besides; but the fact that in doing this we have acknowledged the legal validity of Kellogg's official character may influence others or justify others in doing things to the infinite injustice of the people of Louisiana, and to the persons there claiming to be officers by virtue of a rightful election.

Again, we well understand the principles which limit and qualify the powers of an officer de facto. His acts are scanned and judged; he can do only those that are to be considered as necessary to be done; indeed, so confined in this respect that it was held, in the case of King *v.* Lisle, that the proper question in a case would be "whether the person be an officer de facto as to the particular purpose under consideration;" he can do nothing for himself; he can not set up title by virtue of his office; he can not sue for his fees or salary; he can not justify in a trespass; he can do nothing that may bring in issue his right to hold the office without showing that de jure right for the exercise of it. As a judge de facto his judgment in a litigation between third parties would be good; a sale of property under such a judgment would be good to pass title; and for the reason that third parties are not supposed to be able to inquire into the rights of one holding and exercising the duties of the office, and must therefore act upon what appears to be the right. But a sheriff de facto seizing and selling the property under that or any other judgment in a suit against him for the seizure by the owner or possessor of the property, he must for his defense show that he held his office de jure, for this concerns himself only, and he should know whether he was in right an officer.

Shorn of the general and enlarged powers of an officer de jure by the plainest principles of law, limited and circumscribed by rules founded in reason and having the sanction of ages, shall we be disposed to give to the act of such an officer—governor de facto, if even he be such—that full and unqualified effect in this case, with the extraordinary circumstances surrounding it, as if he were an officer de jure, when that act, too, bears directly upon the constitution of this body, which we are bound to guard, and upon the right of a State to have its true representatives upon this floor? In regard to the constitution of this body the direct issue is made; this pretended governor represents himself to be the governor of Louisiana, and upon this alone does the committee rest the case. It is admitted that he must be the governor to give the certificate any power whatever. In raising the question it is shown that he is only governor de facto, if governor at all, and not de jure—that is, governor for a purpose only, and that purpose to be judged of, whether proper or not, when the exigency arises. It is upon us, and it is whether we shall constitute members of this body upon the certificates of such a governor, or shall we not rather recur, as we have before inquired, into the election itself or the record of it?

Upon this body rests the duty of preserving its own organization, and of admitting its own members. Here its power is supreme, and for its independence it must depend upon this power, and its proper and legal and rational exercise; and it is to judge of the fact whether a certificate (not of a governor, as contemplated by the law, a rightful governor in all respects—but of such a governor) shall have the efficacy now asked for it.

Indeed, in this very case, in the complications in Louisiana, the troubles and disorders there, the very soul of the objection that we now urge against the recognition of this certificate is made to appear. There is trouble about the State government in that State. There is trouble as to who is the constitutionally elected governor, both claiming it, and as to which body of the two claiming to be the legislature is the real one. In this contest, where so much right is involved, and where right should be done, might it not be that, if we should admit Pinchback upon the certificate of Kellogg, we would to that extent recognize him as the rightful governor of Louisiana, and possibly direct additional power against the other side? Would this be wise, and just, and expedient; and when we know, too, that so far as the certificate in itself is concerned it adds nothing to title, but that the election constitutes this? If it is the policy to settle these disturbances in Louisiana, to recognize either governor or none, do it in the usual manner known to the laws, and that is by legislation upon the part of Congress, when the whole subject can be considered, and the remedy, if any, be applied.

351. The Senate election case of Pinchback and others continued.

The Senate in election cases investigates the legality of the legislature as organized, but refrains from questioning the titles of the component parts of an undoubted legislature.

Having thus disposed of the question of the competency of Kellogg as governor, the minority continue:

Having come to the conclusion that Kellogg was a mere usurper and the certificate not entitled to respect, or if it should be considered by some that he was the governor de facto, that even in this view no force ought to be given to his certificate, we are brought to the consideration of the main fact itself—the election of Pinchback by a legislature. While this is not technically before us, it is substantially. While the report of the committee bases its action entirely upon the force of the certificate, the resolution submits the question of admission generally. It can not be denied that the inquiry upon one branch opens up the whole subject, and one can not be well considered without considering both.

This brings us to the examination of the body organized under the returns made by the Lynch board, to which we have referred in the other branch of the case. In looking into the organization that elected Pinchback, the surreptitious inauguration of Kellogg into the gubernatorial office pales into insignificance before the fraudulent creation of this body into a legislature and of its shameless pretension to power.

Even admit that Kellogg was the rightful governor of Louisiana and that his certificate should have all the force which could properly under ordinary circumstances attach to it, still all the facts are before us, and they are of the gravest character. The question is not who are members of the legislature of Louisiana—for that body is the judge of this, and of their elections and qualifications; with these we have nothing to do; but the question is as to the legislature as organized, whether there is one in being

to elect, and whether such an one elected Pinchback. The existence of a legislature competent to elect a Senator is not only a historical fact to be known to us as any other patent fact, but it is one which is susceptible of proof.

It will be necessary again to give a brief résumé of the facts known to exist in Louisiana respecting the organization of the body claiming to be the legislature of that State, and which elected Pinchback.

After reviewing the facts, especially the mandate of Judge Durell, of the Federal court, and its enforcement by Federal troops, the minority say:

The whole proceeding from its inception down to its final consummation was a gross usurpation, accompanied with every species of fraud and tyranny. The body that was organized under this mandate and its military enforcement is not entitled to any legal existence that any American should acknowledge. The whole is a product of fraud, conspiracy, and of armed force, and is entitled to no consideration.

We wish it to be remembered that we are not inquiring into the component parts of a legislative body. Each house of the legislature must do that for itself. We are inquiring into the aggregate character of the body as organized and as it represents itself to be—a legislature; how it was brought into being; how supported; and under what authority. We find no single element in it to constitute it a legislature representing the free people of Louisiana under their constitution and laws; but, on the contrary, simply a body organized under the mandate of a Federal judge supported by the armed force of the United States, based upon a pretended election found by a returning board without a single official return, and not having a title of authority, and acting in violation and in defiance of all law. We find that body, pretending to be the legislature of Louisiana, the mere creature of a conspiracy as bold, as reckless, and as wicked as any that has ever disgraced the annals of history. We speak thus strongly because our instincts as American citizens prompt us to the reprobation it so signally deserves. This body thus organized chose P. B. S. Pinchback a Senator in Congress for the period he claims.

The large mass of the members of it were never elected in fact; the returning board declaring them to be elected had not a single power to do so; it never had an official return before it.

After reviewing the histories of the rival legislatures, the minority continue:

Can the Senate hesitate to determine between such governments? The interposition of mere force without cause and without right, by which one for the present may be put up and the other down, should not deter us in determining which is the rightful one. The soldiers of the United States should not be allowed to step in between our judgment and our duty. The day is not yet upon us, we trust, when the sword is to settle questions alone for us to determine. Taking all the facts as they appear in the case before us, from the inception of each rival body to the final consummation in their respective organizations, we can determine between them. It is our duty to do so; and we have facts sufficiently numerous and authentic to determine fairly and intelligently between them. Each has chosen Senators, and both are here with certificates.

There can be no doubt that where there are rival bodies, each claiming to be the rightful legislature of a State, and each presenting a Senator for admission upon this floor, we must judge between them, for the reason that we are to judge of the elections, the qualifications, and returns of our own members; and in this we are to know whether the body choosing a Senator is the legislature having the constitutional right to do so, and that such an one did choose a Senator.

This was clearly submitted in the case of Robbins and Potter, contesting Senators from Rhode Island. Mr. Poindexter, who submitted the majority report in that case, says:

"There was but one governor and but one senate in the State claiming to be a part of the general assembly. If there had existed another body of men, however chosen, contending for the offices of the governor and senators in the State, it will not be denied that their respective rights might be the subject of inquiry in deciding a contested election in the Senate of the United States."

The right of the Senate is undoubted to judge in this respect. Its power is not limited, for the sound reason that its independence can only be absolutely preserved in possessing such a right. In exercising it here we should not be capricious, but governed in our conduct by rules that good sense, honest intention, and a desire for truth and justice should naturally inspire. No other department of the Government ought to control it; no other department of the Government should be allowed, under any pretext or in the exercise of any power, to trench upon it. It is a primary right, for in its free and absolute exercise the very life, existence, and organization of free legislative bodies depend.

Coming to the main point again, should the Senate hesitate between the rival governments? How can the Senate recognize the Kellogg government, stamped, as it is, all over with fraud, conspiracy, and force? There is not an element of free constitutional government in it. Mere intruders and usurpers in all departments of it, how shall the Senate, in respect for constitutional government, admit that such a body as that organized under the order of Durell shall impose upon us a Senator? We might receive with just as much plausibility and complacency a Senator from the soldiery who guarded that body when it went through the forms of choosing one. The bayonet organized it, kept it in being, protected it by day and by night, and without it no one would be here pressing a claim to a seat by virtue of any authority from it.

Speaking for ourselves, we can not in any manner acknowledge any such election. We can not give any respect or efficacy to the certificate under consideration as that of a rightful governor, and must therefore declare that in our opinion P. B. S. Pinchback is not entitled to a seat as a Senator from the State of Louisiana.

In conclusion the minority say:

It is said that the Senate is bound, or ought to be bound, by decisions of the judicial tribunals of the State when inquiring into the existence of a government or of its officers; also by the action of other departments of the State government; also by the late act of the President and by reason of the possession of the office for a length of time. We shall only briefly remark that this body is bound by nothing in the exercise of its undoubted power. But admitting that any or all of these combined should have more or less influence upon the judgment of the Senate in coming to conclusions, we may be permitted to say that, in regard to the judicial action of the courts of Louisiana in relation to this subject, the question in issue never was fairly presented, and with the further remark that it is painfully evident that a majority of the court deciding cases having relevancy at all to the subject was in complicity with the Kellogg government to maintain its power; and so with the other departments of the State government, for all depended for their very existence upon the official being of Kellogg. As to the action of the President having any binding force upon the Senate, we say that his power to act relates alone to one thing, and that is the suppression of violence when legally called upon for aid in suppressing such violence. His action can not bind beyond the simple fact and its real dependents; it decides no right for us or for Congress. One word as to the continuous possession of Kellogg and which it is claimed gives him some standing to be considered in this body. His possession is that of fraud and force, and this possession is to-day only held by this force. It is the possession of might against right, and the weakness of the title will at once be witnessed upon the withdrawal of the force which keeps him in place. In our opinion, there is nothing in the matters that would be set up to secure a recognition of the Kellogg government. The whole is a crime against our civilization and a blot upon our free institutions.

The resolution proposed by the majority of the committee was debated on February 15, 16, and 17, 1875,[1] and on the latter day, by a vote of yeas 39, nays 22, it was laid on the table. Mr. Lot M. Morrill, of Maine, who made the motion to lay on the table, explained that he did so from no spirit of hostility to the resolution, but simply because the Senate needed to proceed to other business.[2] And thereafter during the Forty-third Congress the resolution remained on the table.

On March 5, 1875,[3] when the Senate met in special session, at the beginning of the Forty-fourth Congress, Mr. Morton offered this resolution:

Resolved, That P. B. S. Pinchback be admitted as a Senator from the State of Louisiana for the term of six years beginning on the 4th of March, 1873.

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[1] Record, pp. 1277–1289, 1306–1310, 1327–1353, 1358–1382.

[2] Record, p. 1382.

[3] Special session Senate, Forty-fourth Congress, Record, p. 2.

This resolution was debated at length on March 8, 9, 10, 12, and 13,[1] and on the latter day a motion was submitted by Mr. George F. Edmunds, of Vermont, to amend the resolution by inserting the word "not" before the word "admitted."

This amendment was debated on March 15 and 16,[2] and on the latter day further consideration was postponed until the second Monday in December next, the vote being yeas 33, nays 30.

352. The Senate election case of Pinchback and others, continued.

The Senate declined to seat the bearer of credentials signed by a person exercising the authority of a governor, it being objected that the signer was an usurper and that there was no election by a valid legislature.

Discussion as to how far the Senate, in considering an election case, should follow a decision of a State court as to the competency of the legislature.

Discussion of the powers of the Senate under the constitutional authority to judge the elections and returns of its members.

Instance wherein an unsuccessful contestant for a seat in the Senate was permitted to withdraw his credentials.

Discussion as to the required form for Senate credentials under the law.

Discussion of the judicial knowledge which must exist to justify giving prima facie effect to credentials.

On Thursday, December 9, 1875,[3] at the first or regular session of the Forty-fourth Congress, Mr. West presented the following letter:

WASHINGTON, D.C., *December 8, 1875.*

To the Honorable the President and members of the Senate of the United States:

The undersigned would respectfully ask permission to withdraw his credentials as Senator-elect by the McEnery legislature from the State of Louisiana.

Respectfully,

W. L. MCMILLEN.

At the same time Mr. West presented and had read an open letter from Mr. McMillen to John McEnery, claimant to the governorship of Louisiana. In this letter he explained how he had contested with John Ray for the remainder of the term ending March 4, 1873, and with Pinckney B. S. Pinchback for the full term beginning at that date, and how a question as to the respective bodies represented by himself and his opponents had prevented an award of the seat. He then continues—

In November, 1874, the successors to the general assembly electing me were chosen, and after continued effort the difficulties in the way of organization of the assembly were composed.

Under the auspices of a committee of Congressmen, a plan of adjustment was agreed upon, the parties thereto embracing many of the gentlemen who honored me with their support in 1872–3, and the settlement resulted in the formation of a general assembly largely Democratic and conservative in the lower house, and generally accepted as legitimate by both of the political parties of the State; and said assembly so constituted, at their extra session in April last, did formally recognize W. P.

[1] Record, pp. 3–7, 9–17, 17–25, 32–41, 41–53.

[2] Record, pp. 55–62, 62–91.

[3] First session Forty-fourth Congress, Record, p. 190.

Kellogg as the executive of Louisiana. Further, the House of Representatives of the Congress of the United States, with a large Democratic majority, following the action of the preceding Republican House, did, on the 6th instant, recognize the final and determining action of the present legislature of the State of Louisiana relative to the State government thereof by seating, prima facie, the six members of Congress-elect from said State bearing the credentials of W. P. Kellogg, and refusing at the same time to recognize your competency to exercise executive functions for Louisiana.

The letter then goes on to state that as the issues are determined a further contest by him could have no beneficial effect. and he considers it his duty to withdraw his credentials.

The letter having been read, Mr. West offered the following—

Ordered, That the request of William L. McMillen, heretofore claiming a seat in the Senate from the State of Louisiana, for the return of his credentials be granted.

On December 14[1] the order was debated at length, it being objected that the credentials were transmitted to the Senate in pursuance of law, and that they belonged to its archives and should not be withdrawn. But by a vote of yeas 30, nays 28, the order was agreed to.

On December 20[2] Mr. Thomas F. Bayard, of Delaware, by consent of the Senate, presented and had laid on the table a paper purporting to be the credentials issued by John McEnery as governor, showing the appointment of Robert H. Marr as Senator from Louisiana to fill the vacancy caused by the resignation of William L. McMillen.

On January 18, 1876,[3] Mr. Allen G. Thurman, of Ohio, presented the credentials of James B. Eustis, of Louisiana, for the term beginning March 4, 1873. These credentials were not from the governor of the State, but consisted simply of duly certified transcripts of the proceedings of the legislature of Louisiana resulting in the election of Mr. Eustis. At once a question was raised by Mr. Roscoe Conkling, of New York, who called attention to the fact that the laws of the United States required that the credentials of a Senator should be certified by the governor of the State.[4] Mr. Thurman replied that there was no method of coercing a governor who should refuse to sign the certificate, and the requisition of the statutes could not be understood as constituting the certificate of the governor the only evidence of the election of a Senator by a State legislature. In return Mr. Conkling called attention to the fact that the papers nowhere alleged that the governor had refused to give the ordinary credentials, and the papers themselves were not those on which the Senate should rely as prima facie evidence.

Mr. Thurman cited the case of Mr. Sykes, of Alabama wherein, the governor having refused to sign credentials, a transcript of proceedings had been accepted as title papers of the party.

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[1] Record, pp. 200–204.

[2] Record, p. 248.

[3] Record, pp. 451–455.

[4] Sections 18 and 19 of the Revised Statutes provide:

"It shall be the duty of the executive of the State from which any Senator has been chosen to certify his election, under the seal of the State, to the President of the Senate of the United States.

"The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State."

On January 24,[1] on motion of Mr. Morton, the papers purporting to be the credentials of Mr. Eustis were referred to the Committee on Privileges and Elections.

On January 26[2] Mr. West presented a memorial of certain State senators of Louisiana in relation to the election of Mr. Eustis, and was referred to the Committee on Privileges and Elections.

On January 28[3] Mr. Morton, from that committee, presented the following report:

That in their opinion there is no vacancy in the office of Senator from the State of Louisiana, P. B. S. Pinchback having been elected in January, 1873, to the term beginning on the 4th of March, 1873. They therefore recommend that the papers relating to Mr. Eustis be laid upon the table.

Three members of the committee announced their dissent from the report.

On February 3,[4] on motion of Mr. Morton, the Senate proceeded to the consideration of the resolution submitted by him on March 5, 1875, the pending question being the motion of Mr. Edmunds to insert "not" before the word "admitted."

The debate on this proposition went on during February 4, 7, March 1, 3, 7, and 8.[5]

Mr. James L. Alcorn, of Mississippi, who had originally concurred in the report which found that there was no legal State government in Louisiana in 1873, sketched briefly the developments in the situation.[6]

McEnery's legislature was finally dispersed, and he was driven from the field, and Kellogg was left in possession. Congress refused to do anything. Kellogg, in spite of all local opposition, maintained his government. His official position was recognized in the State of Louisiana. It became an accepted authority throughout the United States, so far as it could be emanating from the governor of a State. Finally the House of Representatives, at the last session of Congress, passed a formal resolution recognizing the Kellogg government. The Senate of the United States, subsequent to that time, passed a resolution to the same effect.

Therefore Mr. Alcorn urged that the certificate of Governor Kellogg should be good, and should be honored.

While it was denied,[7] especially by Mr. George F. Edmunds, of Vermont, that the Senate had in express terms recognized Kellogg as governor, and while a reference to the resolution showed that it was merely an approval of the action of the President "in protecting the government in Louisiana, of which W. P. Kellogg is the executive," yet Mr. Edmunds admitted that Kellogg was the executive.

But Mr. Edmunds denied[8] that the question was narrowed merely to the credentials. He showed that the pending resolution covered final as well as prima facie right. But even narrowing the case down to the credentials, he denied the effect of the Kellogg certificate:

What is this paper? It bears the great seal of the State of Louisiana. How do we know that to be the great seal of the State of Louisiana? We know it upon precisely the same ground that we know

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[1] Record, p. 574.

[2] Record, p. 637. The memorial is found in Senate Miscel. Doc. No. 41, Forty-fourth Congress, first session.

[3] Record, p. 706.

[4] Record, p. 866.

[5] Record, pp. 886–889, 907–913, 1382–1392, 1436–1444, 1511–1516, 1545–1558.

[6] Record, p. 1383.

[7] Record, p. 1389.

[8] Record, pp. 1436, 1437.

that there is a legislature of the State of Louisiana, or that there is not a legislature of the State of Louisiana, or that in the year 1863 there was no legislature of the State of North Carolina—I mean no constitutional legislature under the Constitution of the United States. How, then, do we get at the first knowledge, the first step, on the subject of this prima facie? We get it by the judicial knowledge—to borrow a phrase of art which we are supposed to possess, whether, in fact, we do or not—that this seal is the seal of the State of Louisiana. We do not get it by proof; we do not get it by attempting to hear, try, or determine the question; but we get it, as I say, by that judicial knowledge which the laws of the land impute to everybody called upon to administer, as we are here, either legislative or judicial functions. Therefore * * * this paper, on the face of it, is an official paper, emanating from some executive authority or person acting in executive capacity in the State of Louisiana. Does our judicial knowledge stop there? * * * No, sir. That is not the law; it is not common sense. This body, in my opinion—and the law is all one way upon the subject—was in a constitutional and legal sense just as well advised of the state of legality or the want of the state of legality of the legislature that elected this man before the inquiry made by the Committee on Privileges and Elections as afterwards. That inquiry, in the judicial sense, was an inquiry to inform the conscience of the Senate just as we refer to a lexicon or to a law book or to a precedent in our statutes. We are bound to know, in short, what are the legislatures of the various States, which bodies, if there are two, or whether a particular body, if there be only one, is the government of that State or is the chief officer of any department of it. * * * If that be true, then this paper is not a prima facie case, as it is called, unless we also have the judicial knowledge that the body of men who purport to have elected him was the legislature of the State of Louisiana.

Mr. Morton, on the other hand, urged that in the recent case of Senator Spencer, of Alabama,[1] the Senate, under conditions the same, had honored the credentials.

Proceeding to discuss the status of the legislature, Mr. Edmunds referred[2] to the fact that the decision of the supreme court of Louisiana was the ground on which the validity of the legislature was affirmed. While denying that the supreme court had actually declared the legislature legal, he would, for purpose of argument, admit the contention. He then said:

The Constitution, which is the supreme law of the land, says that not the supreme court of Louisiana, not the supreme court of any State, but we, here, under a personal oath, each one of us to do justice according to the law, shall be the judge for this purpose of what the law of the State of Louisiana is. Sir, I am not ready to abdicate; I have no right to abdicate. This provision of the Constitution making us the judge, first, last, and always, of the election of a Senator, was inserted from the gravest considerations, not only of public convenience, but of public safety. The fathers of the country in their wisdom did not intend that this Government should be broken down as so many of its predecessors had been by the factions and storms of localities in States, but to compose this National Government there should be this perpetual and supreme tribunal, which was itself to be the judge of the election of its members, and nobody else was. It was not a concurrent jurisdiction; it was an exclusive one.

On this question also, Mr. Allen G. Thurman, of Ohio, who concurred in the view that the competency of the legislature was vital in the case, said:[3]

There is one conclusive answer to all that has been said about the decisions of the supreme court of Louisiana, and that is that the question before us is to be decided by this Senate, and by this Senate alone, and that the decision of no court, not even if it were the Supreme Court of the United States, has even the force of a precedent on a question like this. The Constitution makes the Senate the sole judge of the elections, returns, and qualifications of its members. It can not, therefore, be bound by the decision of any other tribunal or any other body of men.

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[1] Record, p. 1441.

[2] Record, p. 1439.

[3] Record, p. 910.

On March 8, 1876,[1] the amendment proposed by Mr. Edmunds was agreed to, yeas 32, nays 29. Then the resolution as amended was agreed to, yeas 32, nays 29. So it was—

Resolved, That P. B. S. Pinchback be not admitted as a Senator from the State of Louisiana for the term of six years beginning on the 4th of March, 1873.

353. The Senate election case of Pinchback and others, continued.

The Senate has admitted a person elected while the case of another claimant to the seat was yet pending.

In determining an election case the Senate has taken notice of the journals of a State legislature.

In a case wherein a governor declined to sign the credentials of a Senator-elect the Senate admitted the claimant after examination of final right.

On March 8, 1877,[2] at the beginning of the Forty-fifth Congress, Mr. Thurman called attention to the fact that the decision in the Pinchback case had settled that there was a vacancy, and therefore removed the ground on which the committee had reported against the claim of Mr. Eustis in the preceding Congress. Therefore he proposed, and the Senate on the next day agreed to, a resolution taking the credentials of Mr. Eustis from the files and referring them to the Committee on Privileges and Elections.

On December 1, 1877,[3] Mr. Bainbridge Wadleigh, of New Hampshire, from the Committee on Privileges and Elections, submitted a report as follows:

Mr. Eustis claims to have been elected on the 12th of January, 1876. The body which elected him was that formed by what is known as the Wheeler compromise, and there is no doubt that it was the lawful legislature of Louisiana.

Two questions arise in this case: First, whether Mr. Eustis was lawfully elected; second, whether at the time of his election a vacancy existed which the legislature of Louisiana had the right to fill.

The legislature of Louisiana on the 12th day of January, 1876, consisted of a house containing 111 members and a senate with 36 senators. On the 11th day of January, 1876, the house voted to go into an election for United States Senator, and the senate on the same day refused to do so. On the 12th day of January, it appearing that there had been no election on the day before, 64 members of the house and 12 members of the senate, being a majority of all entitled to seats in both houses, met in joint convention and elected Mr. Eustis.

Your committee find that although the senate refused to take part as such in said election, and although a minority of the senate only did take part in it, yet there was a substantial compliance with the act of Congress of 1866. Upon the constitutionality of that act your committee express no opinion. The Senate has repeatedly, however, by its action affirmed its constitutionality; and your committee feel bound by the precedents which the Senate has established.

The second question, whether or not a vacancy existed at the time of Mr. Eustis's election which the legislature of Louisiana had the right to fill, is one of some difficulty. At the time of said election Mr. P. B. S. Pinchback was the claimant for the same seat under two elections—one in 1873, the other in 1875. His credentials and claims under said elections had been presented to the Senate and by it referred to the Committee on Privileges and Elections. Said committee, on the 5th day of March, 1875, reported a resolution to the Senate that Mr. Pinchback be admitted thereto. On the 8th day of March, 1876, that resolution was amended so as to change it to a resolution that he be not admitted. The resolution was passed as thus amended on the same day.

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[1] Record, pp. 1557, 1558.

[2] Special session Senate, Forty-fifth Congress, Record, p. 39.

[3] First session Forty-fifth Congress, Record, p. 800.

Your committee feel bound to regard that vote of the Senate as a final adjudication of the claims of Mr. Pinchback and a decision that he had no right to a seat. Mr. Eustis's election took place while Mr. Pinchback's case was pending in the Senate, and it may be contended with much force that until the final adjudication by the Senate of Mr. Pinchback's claims there was no vacancy which the legislature was authorized to fill.

This question arose at the first session of the Twenty-third Congress, in the case of Potter *v.* Robbins, where a majority of the special committee of the Senate held that the legislature of Rhode Island had no authority to proceed to the election of another Senator until the seat of the Senator-elect had been vacated by a solemn decision of the Senate of the United States. Silas Wright, of New York, made a report in behalf of the minority of said committee, in which it was contended that if the election of Mr. Robbins was not made by the lawful legislature of the State it was absolutely void, and that therefore Mr. Potter's election while Mr. Robbins's claim to a seat in the Senate was still pending was valid.

Your committee do not question the soundness of the rule laid down in that case, but are not disposed to apply it to this case, where the circumstances are very different. In the case of Potter *v.* Robbins Mr. Robbins had been admitted to the Senate, the committee had before it both his credentials and those of Mr. Potter; but here there is no contest. The Senate never admitted Mr. Pinchback to his seat, but decided that he had no right thereto.

This seat has long been vacant. Mr. Eustis is the only person who appears to claim it. The lawful character of the legislature which elected him is admitted. His election was substantially in compliance with the law of Congress. No one appears to contest his right to a seat. Under these circumstances your committee believe that Mr. Eustis should be admitted to the Senate, and report a resolution to that effect and recommend its passage.

Therefore the committee recommended the following:

Resolved, That James B. Eustis is lawfully entitled to a seat in the Senate of the United States from the State of Louisiana, from the 12th day of January, 1876, for the term ending March 3, 1879, and that he be admitted thereto upon taking the proper oath.

On December 10,[1] when the report came before the Senate, Mr. John J. Ingalls, of Kansas, announced that, with two of his associates on the committee, he dissented from the report.

Mr. Ingalls urged in the first place that the report did not touch the question of the credentials, which were irregular and not in the form required by law. It had not been made to appear why the executive of Louisiana had declined to issue credentials. In opposition to this it was replied that a witness before the committee had testified to the committee that the governor had declined to issue the certificate on the ground that Mr. Pinchback had been elected to the seat. Moreover, the question before committee was not one as to the prima facie title only, but also referred to the case on its merits.

Taking up the first point touched by the report of the committee, Mr. Ingalls contended that there was nothing before the Senate to show how many senators and how many representatives constituted the legislature of Louisiana under the constitution of Louisiana, since the papers of Mr. Eustis did not show this. It was replied that the journals of the house and senate were before the committee; but Mr. Ingalls insisted that the pamphlets purporting to be such journals were not properly authenticated. To this Mr. Allen G. Thurman, of Ohio, replied, in effect, that the Senate were bound to take notice of the laws and journals of a legislature. The journals were put in evidence before the committee and were not denied, It was also stated in this connection that the Senate should take official notice of the constitution of the State.

[1] Second session Forty-fifth Congress, Record, pp. 82–87.

Mr. Ingalls also contended that the election of a Senator being by the legislature, a quorum of both houses were necessary to constitute the joint convention referred to in the law of 1866, and that the law might not constitutionally provide that a Senator could be elected in a joint convention wherein less than a quorum of one body was present. To this Mr. Thurman replied that in electing a Senator in joint convention the legislature did not act in its organized capacity as a legislature. Otherwise one branch might veto the election of a Senator. It was in view of a condition of this sort which had arisen in Indiana that the law of 1866 was passed.

As to the second point treated in the report, Mr. Ingalls urged that there was no vacancy. The election was held before the Senate had acted on Mr. Pinchback's claim. When the Senate did act it simply declared that Mr. Pinchback be "not admitted to a seat in the Senate." In the case in the Twenty-third Congress, to which the report of the majority referred, it was held that a vacancy did not occur until it was officially ascertained and declared by the Senate. In reply, it was stated that the case in the Twenty-third Congress was one wherein there was a contestant. But in this case no one appeared to oppose.

The question being taken on the resolution reported by the committee, it was agreed to—yeas, 49; nays, 8.

Thereupon Mr. Eustis appeared and took the oath.

354. The Senate election case relating to Kellogg, Spofford, and Manning, of Louisiana, in the Forty-fifth and Forty-sixth Congresses.

The Senate declined to give immediate prima facie effect to credentials regular in form, but from a State where there were rival claimants to the governorship and rival legislatures.

On January 20, 1877,[1] in the Senate, Mr. Oliver P. Morton, of Indiana, presented the credentials of William Pitt Kellogg, as Senator-elect from Louisiana, for the term of six years commencing March 4, 1877.

On March 5, 1877,[2] at the time of the organization of the Senate in the Forty-fifth Congress, Mr. Kellogg advanced to the Secretary's desk to take the oath, when Mr. Lewis V. Bogy, of Missouri, objected to the administration of the oath on the ground that there were two legislatures in Louisiana, and that there would be a contest. On March 6, Mr. James G. Blaine, of Maine, offered the following:

Resolved, That the oaths prescribed by law be now administered by the Vice President to William Pitt Kellogg, whose credentials as a Senator from the State of Louisiana were presented on the 20th of January, 1877.

To this Mr. Thomas F. Bayard, of Delaware, proposed on March 7:

Strike out all after the word "resolved," and in lieu thereof insert "the credentials of William Pitt Kellogg, claiming to be a Senator from the State of Louisiana, do now lie upon the table until the appointment of a Committee on Privileges and Elections, to whom they shall be referred."

The resolution was debated on March 6 and 7. It was urged that while ordinarily a certificate in regular form was sufficient for a prima facie case, yet in this case there were two persons claiming to be governor and two bodies claiming to be the legislature. This fact was well known. Mr. Kellogg's credentials were

[1] Second session Forty-fourth Congress, Record, p. 762.

[2] Special session of Senate, Forty-fifth Congress, Record, pp. 1, 2, 15, 16, 17–23.

signed by Stephen B. Packard, as governor, but it was alleged by Mr. Bayard that there was no proof that Mr. Packard was either de jure or de facto governor, and in reality he was neither. There was the same uncertainty as to the legislature.

On March 7,[1] Mr. Bayard's amendment was agreed to—yeas 35, nays 29. Then the resolution as amended was agreed to—yeas 43, nays 21.

355. The Senate election case relating to Kellogg and others, continued.

There being two conflicting credentials, the Senate declined to give immediate prima facie effect to either, although the electing and certifying government behind one had been swept away by force.

On October 17, 1877,[2] Mr. Allen G. Thurman, of Ohio, presented the credentials of Henry M. Spofford, as Senator-elect from Louisiana, for the term of six years commencing March 4, 1877. These credentials were signed by Francis T. Nichols, as governor of Louisiana, bore date of June 20, 1877, and stated that the election of Mr. Spofford had been accomplished on April 24, 1877.

On October 18,[3] the Senate resumed consideration of the resolution presented the day before by Mr. Thurman:

Resolved, That Henry M. Spofford, whose credentials as Senator from the State of Louisiana have this day been read, be now sworn and admitted as such Senator.

Mr. George F. Edmunds, of Vermont, objected that while the Spofford credentials might be prima facie correct, yet there were on the files of the Senate other credentials in favor of Mr. Kellogg. So the records of the Senate antagonized the prima facie standing of the Spofford credentials.

In support of Mr. Thurman's motion it was urged that the Senate might take judicial notice of the history of the country, which showed that the legislature electing Mr. Kellogg had ceased to exist, and that Mr. Packard had ceased to be de facto governor.

Finally, after debate, the resolution proposed by Mr. Thurman was amended and agreed to as follows:

Resolved, That the credentials of Henry M. Spofford, claiming to be a Senator from the State of Louisiana, be referred to the Committee on Privileges and Elections; and the said committee shall also consider and report upon the credentials of William Pitt Kellogg.

On October 25[4] the Senate gave the Committee on Privileges and Elections authority to take testimony in the case.

356. The Senate election case, relating to Kellogg and others, continued.

A person ascertained by a majority of the committee to be legally elected and certified was seated by the Senate, although both executive and legislature were displaced by force before the Senate acted.

There being rival legislatures, the Senate, in deciding an election case, investigated the titles of the legislators, even to the circumstances of their elections.

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[1] Record, p. 23.

[2] First session Forty-fifth Congress, Record, p. 78.

[3] Record, pp. 99–106.

[4] Record, p. 150.

In a Senate election case, by consent of the parties, testimony taken by Senate and House committees in proceedings to which neither contestant was a party, was admitted for what it was worth.

An instance wherein the Senate indorsed the principle that a legislator whose presence was forcibly obtained and who refused to vote might be counted as part of the quorum.

On November 26, 1877,[1] Mr. Bainbridge Wadleigh, of New Hampshire, submitted the report of the committee, accompanied by the following resolutions:

Resolved, That William Pitt Kellogg is, upon the merits of the case, lawfully entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th day of March, 1877, and that he be admitted thereto upon taking the proper oath.

Resolved, That Henry M. Spofford is not entitled to a seat in the Senate of the United States.

In their report the committee say:

Mr. Kellogg claims to have been elected on the 10th day of January, 1877. Aft. Spofford claims to have been elected on the 24th of April, 1877. In an inquiry into these cases upon their merits, the first question which arises is, whether the body which elected Mr. Kellogg was the lawful legislature of Louisiana at the time of such election.

There was in said State on the 6th of November, 1876, an election for governor, lieutenant-governor, and members of the general assembly. The statements of the votes cast at such election were required by law to be sent to a board of returning officers for all elections in the State. Said returning officers were by law authorized and required to ascertain, return, and certify the election of members of the general assembly. No other tribunal was clothed with that power or duty. They were required to report their decisions to the secretary of state, and it was by law provided that the secretary of state should transmit to the clerk of the house of representatives and secretary of the senate of the last general assembly a list of the names of such persons as, according to the decisions of the returning officers, were elected to either branch of the general assembly.

It was the duty of the said clerk and secretary to place the names of such persons so furnished upon the roll of the house and senate, respectively, and those representatives and senators whose names were so placed by the clerk and secretary, and none others, were competent to organize the house of representatives or senate.

The secretary of state, in obedience to the statute, transmitted to the clerk of the former house and secretary of the senate a list of the names of persons by the said returning officers decided to have been elected to either branch of the general assembly, and from the list thus furnished the clerk and secretary organized each house of the State legislature on the 1st day of January, 1877.

By the constitution of Louisiana the house of representatives is composed of 120 members and the senate of 36 members. There is no doubt that 61 members of the house constitute a quorum of that body, and that 19 members constitute a quorum of the senate. There were present at the organization, and took part in the proceedings, 8 senators holding over, and 11 newly elected—19 in all—having the certificates of said returning officers, which was a quorum, and 68 representatives, thus declared to have been elected, being 7 over a quorum. After such organization the members of the two houses assembled in joint convention on the 10th day of January, 1877, to elect a Senator of the United States.

Upon reading the journal of each house it was found that no election of Senator had been made the day before. The roll of each house was called, and it was found there were present in the joint convention 17 senators and 66 representatives, they composing a majority of all the members of the general assembly of the State. Nominations were then made for Senator, and a viva voce vote was had, and William Pitt Kellogg received the votes of 17 senators and 66 representatives, and was declared by the president of the senate (the presiding officer of the joint convention) to have received a majority of all the votes of the general assembly, and to have been duly elected a Senator of the United States for the term of six years beginning on the 4th day of March, 1877.

[1] Senate Report No. 16, first session Forty-fifth Congress.

Your committee find that said election was held strictly in accordance with the act of Congress of 1866 to regulate the times and manner of holding elections for Senators. The credentials of Mr. Kellogg are signed by Stephen B. Packard as governor of the State of Louisiana, and bear date the l1th day of January, 1877.

It appears to your committee that Mr. Packard was on that day the lawful governor of the State of Louisiana.

The report goes on to show that by returns duly transmitted by the returning officers and duly counted by the legislature it was ascertained that Mr. Packard was elected governor. The report then continues:

Upon the facts herein before stated your committee are of the opinion—

First, that the returning officers of Louisiana were a lawful tribunal, solely authorized and required to ascertain, return, and certify to the election of members of the general assembly.

Second, that those, and only those, who held certificates of election from said returning officers were entitled to seats in the general assembly at the organization thereof.

Third, that the body which first organized with a quorum of the members in each branch thereof, having such certificates, and which was duly recognized by the lawful governor of said State, was the lawful legislature.

The proof before your committee seems conclusive that at the time the legislature which elected Kellogg was organized there were present a quorum of each house thereof then lawfully entitled to seats therein; that at the time of his election there were present a quorum of the general assembly then lawfully entitled to seats therein, all of whom voted for said Kellogg, and that said legislature was recognized by the lawful governor of said State. It was, however, contended by Mr. Spofford that it was the duty of your committee to go behind the certificates of the returning officers and investigate the elections of individual members of the general assembly. At his request your committee did investigate such elections and find the following facts:

Of the lawful election of 57 members of the house of representatives which aided in electing Mr. Kellogg there is no dispute whatever, and they now sit in the Nicholls house, which took part in the election of Mr. Spofford. Three more of the members of the Packard house, from the parish of Orleans, were until recently admitted on all hands to have had a majority of the votes cast, and your committee find that they were lawfully elected. Besides these 60 members of the house, there were 11 more whose election is disputed by Mr. Spofford upon the ground that they did not receive a majority of the votes cast. Of the 21 members of the senate which participated in the election of Mr. Kellogg, there were 16 whose right to hold their seats is admitted.

The election of 3 more from the twelfth, eighteenth, and twenty-second senatorial districts is disputed upon the ground that they did not receive a majority of the votes cast. Two more, Baker and Kelso, were not declared elected by the returning board, but were seated by a vote of the senate acting under its constitutional right to judge of the election of its own members.

Complaint is made by Mr. Spofford that one Steven, a lawful senator, was taken against his will into the senate and detained there against his will for the purpose of making a quorum. Your committee believe there is no good reason for such complaint. If the senate had organized with a quorum of members lawfully entitled to seats therein, as was the case, it had the undoubted right to compel the attendance of absent members.

The senators and members whose title to seats is disputed on the ground that they did not receive a majority of the votes cast were those declared elected by the returning board on account of the rejection of the votes cast at certain polls in the parishes of East Baton Rouge, De Soto, West Feliciana, Lafayette, Morehouse, Ouachita, and Webster; in the twelfth senatorial district, composed of the parishes of East Feliciana, West Feliciana, and Pointe Coupée; the eighteenth senatorial district, composed of the parishes of Ouachita and Caldwell; and the twenty-second senatorial district, composed of the parishes of Natchitoches, De Soto, Red River, and Sabine.

There were no votes rejected in the parishes of Sabine, Pointe Coupée, and Red River. A comparatively small number of the votes were rejected on account of the obvious illegalities, informalities, and misconduct of the election officers, and there is little complaint on account of the rejection of such votes. The rest were rejected on account of violence and intimidation which prevented a fair election. The

evidence of such intimidation is overwhelming and irrefutable. Many of the Republican leaders were killed, others were tortured, others driven into exile. Companies of armed men paraded the parishes by night, carrying terror wherever they went.

After citing facts as to these intimidations the committee proceed to a complaint of Mr. Spofford that the returning officers were guilty of fraud in rejecting the returns of the parishes before mentioned, and also in having committed forgery in altering the statement of votes from the parish of Vernon. "But the law is clear," says the report, "that, even had the returning officers been guilty of fraud, or had mistakenly exceeded their authority, it was the right and duty of the persons returned by them as elected to take their seats in the general assembly."

The report, after citing section 141 of Cushing's Law and Practice of Legislative Assemblies and a New Hampshire case occurring in 1875 (56 N. H. Reports), continues:

When your committee decided to go behind the certificates of the returning officers and to seek the real merits of the case in the thousands of pages of printed testimony taken for the use of the Senate and House, Mr. Spofford contended that your committee should simply ascertain the number of votes deposited in the ballot boxes at the election. Your committee believe, however, that if their inquiry is to extend beyond the question as to who were the lawful governor of Louisiana and the lawful members of the general assembly, it should go far enough to ascertain how far the freedom of election was impaired by intimidation, violence, and crime. The law on this subject is thus stated by Cushing in his Law and Practice of Legislative Assemblies, pages 67, 68, section 181:

"The great principle which lies at the foundation of all elective governments and is essential, indeed, to the very idea of election is that the electors shall be free in the giving of their suffrages. This principle was declared by the English Parliament, with regard to elections in general, in a statute of Edward I, and, with regard to elections of members of Parliament, in the Declaration of Rights. The same principle is asserted or implied in the constitutions of all the States of the Union. Freedom of election is violated by external violence, by which the electors are constrained, or by bribery, by which their will is corrupted; and in all cases where the electors are prevented, in either of these ways, from the free exercise of their right, the election will be void without reference to the number of votes thereby affected."

The evidence clearly proves, and your committee believe, that by intimidation, violence, and crime freedom of election was utterly destroyed at those polls in the ten parishes heretofore referred to, whose votes were rejected by the returning officers; that in throwing out such polls and declaring the Republican candidates elected the returning officers did that which they believed to be legal, and which was really equitable and just and what the two houses of the general assembly would have been bound in law to do with the facts before them. They believe, therefore, that the members by whose votes the general assembly was organized, and a sufficient number of the members by whose votes Mr. Kellogg was elected, were not only lawfully but equitably entitled to their seats.

It is contended by Mr. Spofford that the legislature which elected Mr. Kellogg and the governor who signed his credentials have vanished from political existence and ceased to have any authority in the State of Louisiana, and that therefore, if for no other reason, his own election is valid. Your committee find that at and after the organization of the legislature which elected Mr. Kellogg an overwhelming array of armed and organized military force was used to destroy and crush out the lawful State government of Louisiana. By it the courts were overthrown and annihilated, and under its constantly impending menace the lawful legislature gradually melted away and its terrorized members sought safety in the so-called Nicholls legislature or abdicated their rights.

By such and perhaps other equally illegal means the so-called Nicholls legislature at length came to contain an undisputed majority of the members lawfully elected to the general assembly; and on the 24th day of April that legislature chose Mr. Spofford, the contestant, a Senator of the United States. Your committee are of the opinion that his claim is not well founded. Until and after the election of Mr. Kellogg, Governor Packard and what is known as his legislature were de facto and de jure the government of Louisiana. Upon that legislature devolved the duty of electing a Senator of the United

States. That duty was performed by them in the election of Mr. Kellogg. No subsequent events, especially successful revolution through treasonable force, could undo what had been lawfully done. The doctrine contended for by Mr. Spofford, if established, would render insecure all political vested rights. It would offer a premium to overthrow by force the result of every sharply contested election, and at no distant day reduce this country to the unhappy condition of those wretched communities which are continually a prey to disorder and civil war.

The minority views, signed by Messrs. Eli Saulsbury, of Delaware, A. S. Merrimon, of North Carolina, and Benjamin H. Hill, of Georgia, found that the Nicholls legislature had a quorum in both houses, and declared that had it not been for the unlawful action of the returning board there would have been no pretense for the Packard legislature, which assembled under protection of United States troops.

The minority deny that at any time the Packard senate had a quorum, since it had secured the required number by force.

Then Mr. Steven, a "holding over" senator, sitting in "the Nicholls legislature," happened to be in the State house on business, and the sergeant-at-arms of the Packard legislature seized and took him into the senate chamber to try and restore their nominal quorum. He was taken by force, and against his will and protest, and he did not participate in anything done. The seizure of Mr. Steven was a disgraceful proceeding, and the object had in view was to make a nominal quorum in order to admit as senators, upon a feigned contest, Baker and Kelso, two candidates who were defeated at the polls, and who did not even hold certificates of election from the returning board. Steven did not vote, refused to participate, and without him there was no quorum present when Kelso and Baker were admitted.

As to the Packard legislature the minority say:

Treachery and fraud mark every lineament of the so-called "Packard legislature" from its incipiency, and the Senate can not escape seeing this. But apart from fraud, where there are two rival bodies of men in a State, each claiming in good faith to be the lawful legislature, and each contests the right of the other from the beginning of their existence, and such contest is continued without intermission until one prevails and absorbs the other, so that the latter completely disappears, and all the coordinate branches, and all the authorities, and the great mass of the people of the State, and the President and courts of the United States, recognize the prevailing body as the lawful legislature, and all its acts passed from its beginning as laws of the State, and recognize no single act of the body so absorbed and totally disappearing, can the Senate of the United States, many months after it has so completely disappeared, recognize the body thus disappearing as the legislature of the State by admitting to the Senate as a Senator a person who claims to have been elected by such a body of men?

The statement of the proposition irresistibly suggests the answer—it can not. The Senate may have the physical power to do so—it has not the right to do so—it can only do so by the arbitrary exercise of lawless despotic power. Such an act on the part of the Senate could only be regarded as a defiance of the authority, right, and will of the State and an insult to its dignity; it would shock the moral sense of the American people, and afford cause for profound distrust and alarm for the safety of our system of government.

An important question arose as to the evidence admitted in this case. The majority report frequently cites the reports of the Field and Morrison committees of the House of Representatives, and the Howe and Sherman committees of the Senate. The minority views explain this:

The contestants were each requested to indicate what testimony he desired to produce, and after debate they were requested to confer and see what state of facts they could agree upon touching controverted material points at issue. Statements were submitted to Mr. Kellogg touching the result of the election in parishes indicated, and Mr. Kellogg made a statement in that respect in reply. These statements were received as evidence, and it was further agreed to receive the testimony, or so much thereof as may be pertinent, taken by Congressional committees commonly known as the "Howe com-

mittee," the "Morrison committee," the "Sherman committee," and the "Field committee," touching Louisiana affairs. Mr. Spofford did not object to the reception of this testimony, but he strenuously insisted on being allowed to take testimony in support of the several allegations specified by him.

In the debate, on November 28,[1] Mr. Hill, who signed the minority views, explained that—

The committee well knew that much testimony had been taken both by the Senate and House on a former occasion involving some, but only some, of the issues between these contestants; but knowing that that testimony was not taken in this case, and therefore was not legal testimony without their admission, the committee called first upon these contestants to make statements before the committee as to what points they desired evidence taken upon.

Mr. Hill went on to say that Mr. Kellogg insisted on the evidence in the Howe and Sherman reports, which had been taken by the Senate, and Mr. Spofford that he would agree to that if the evidence of the Field and Morrison committees of the House of Representatives could be referred to as evidence in precisely the same manner for what they were worth. All the testimony in these reports was taken before the election for Senator was had, and was not taken with reference to the rights of the parties to this contest; but it did bring out many facts concerning the election of the governor and legislature in Louisiana which it was material for the Senate to understand in considering this question.

In addition, Mr. Spofford had asked to be permitted to take certain testimony which he specified in addition. The minority held that he should have this right.

We are of opinion that the testimony so proposed by Mr. Spofford is material, and ought, in justice to him and the Senate, to have been received. Besides, it can not be truly said that the respective claims of the contestants have been decided upon their "substantial merits" when one of them is not allowed to produce material testimony which he offers and is anxious to produce. And it may be that a decision made by the Senate now, without fair opportunity to produce such testimony, may be reviewed and reversed at some future time. It is well to put an end to controversy now by allowing both the contestants the fullest and fairest opportunity to produce all material testimony. We think, therefore, that the whole matter ought to be recommitted to the committee, to the end the proposed testimony may be taken.

The resolutions proposed by the majority were debated on November 28, 29, and 30,[2] the principal question being as to the request of Mr. Spofford. In his request he had specified certain testimony intended to show wrongdoing by Mr. Kellogg in connection with the proceedings of the returning board; but on behalf of the majority it was asserted that in this point the testimony of the reports accepted as evidence was full and conclusive.

On November 30[3] Mr. Saulsbury moved to recommit the subject, with instructions to take the testimony referred to. This motion was disagreed to—yeas 29, nays 29.

Mr. Hill then moved the following substitute amendment to the first resolution proposed by the committee:

That Henry M. Spofford be admitted as a Senator from the State of Louisiana on a prima facie title, and subject to the right of William Pitt Kellogg to contest his seat.

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[1] Record, pp. 740, 741.

[2] Record, pp. 730, 749, 767.

[3] Record, p. 778.

This motion was disagreed to—yeas 27, nays 29.[1]

The resolutions of the committee were then agreed to—yeas 30, nays 28.

And on the same day Mr. Kellogg appeared and took the oath.

357. The Senate election case relating to Kellogg and others, continued.

A Senate election case having been once decided, an attempt to reopen it failed after a favorable report from a committee and elaborate discussion.

Discussion in the Senate of the doctrine of res adjudicata as applied to an election case.

At the beginning of the next Congress, on March 21, 1879,[2] Mr. Benjamin F. Jonas, of Louisiana, presented in the Senate the petition of Henry M. Spofford praying for the reopening of his case. The petition was referred to the Committee on Privileges and Elections.

On April 16[3] Mr. Hill of Georgia, reported from that committee the following:

Resolved, That the Committee on Privileges and Elections be authorized to have printed for its use the arguments before it in the case of Spofford against Kellogg relative to a seat in the Senate from the State of Louisiana, with such evidence, papers, and documents relative to the case as it may deem proper.

Mr. Edmunds, of Vermont, made objection to the resolution if it contemplated the taking of evidence in order to reopen a case which he considered settled; but on a suggestion of Mr. George F. Hoar, of Massachusetts, the resolution was modified and agreed to as follows:

Resolved, That the Committee on Privileges and Elections be authorized to have printed for its use the arguments before it in the case of Spofford against Kellogg relative to a seat in the Senate from the State of Louisiana, with such other proceedings in relation to the case as it may deem proper.

On May 1[4] Mr. Saulsbury, from the Committee on Privileges and Elections, reported a resolution as follows:

Resolved, That the Committee on Privileges and Elections, to which was referred the memorial of Henry M. Spofford, praying permission to produce evidence relating to the right of Hon. William Pitt Kellogg to the seat in the Senate held by him from the State of Louisiana, and in support of the claim of said petitioner thereto, be, and said committee is hereby, instructed to inquire into the matters alleged in said petition, and for that purpose said committee is authorized and empowered to send for persons and papers, administer oaths, and do all such other acts as are necessary and proper for a full and fair investigation in the premises. Said committee may, in its discretion, appoint a subcommittee of its own members to make such investigation in whole or in part, which subcommittee shall have authority to employ a clerk, stenographer, and sergeant-at-arms, and shall have all the powers of the general committee to administer oaths and send for persons and papers, and may make such investigation either in Washington or in the State of Louisiana, and said committee or its subcommittee may sit in vacation.

On May 2[5] the resolution came up for consideration, when Mr. George F. Hoar, of Massachusetts, proposed the following amendment in the nature of a substitute:

Whereas on the 25th day of October, 1877, the Senate unanimously adopted the following resolution:

"*Resolved,* That the Committee on Privileges and Elections on the contested cases of William Pitt Kellogg and Henry M. Spofford, claiming seats as Senators from the State of Louisiana, and whose cre-

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[1] Record, p. 797.

[2] First session Forty-sixth Congress, Record, p. 33.

[3] Record, p. 469.

[4] Record, p. 1011.

[5] Record, p. 1022.

dentials have been referred to such committee, be authorized to send for persons and papers, and administer oaths, with a view of enabling said committee to determine and report upon the title, respectively, on the merits of each of said contestants to a seat in the Senate."

And whereas on the 26th day of November, 1877, said committee reported the following resolutions:

"*Resolved,* That William Pitt Kellogg is, upon the merits of the case, entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th day of March, 1877, and that he be admitted thereto upon taking the proper oath;

"*Resolved,* That Henry M. Spofford is not entitled to a seat in the Senate of the United States;"

And on the 30th day of November, 1877, the Senate adopted said resolution, and thereafter on the same day said Kellogg was duly admitted to take the oath and took his seat as a Senator from said State for said term:

Resolved, That said proceedings are final and conclusive upon the right of said Kellogg and the claim of said Spofford to said seat for said term.

As the grounds on which it was proposed to reopen the case became of importance, the text of the petition [1] was often referred to. After the purely formal portions, Mr. Spofford went on as to the claims of himself and Mr. Kellogg:

That a partial or imperfect investigation of their respective claims to the above-mentioned seat in the Senate was had before the said committee, but the case made by your petitioner against the claim of the said Kellogg was not fully heard by the committee, because they came to a sudden determination to close the same without giving him opportunity to adduce proof, which he had constantly offered to adduce if leave were granted, having a material bearing upon the contest for said seat against Kellogg's claim; that the pendency of a controversy in the Senate relative to the disposition to be made of another contest between other parties over another seat led to the hurried closing of the evidence in the case between said Kellogg and petitioner by the committee, a majority of whom speedily made a report in favor of said Kellogg's claim; that this abrupt closing of the case and refusal of petitioner's request for leave to take evidence was against the remonstrance of petitioner, who desired to make a formal protest, but was told that no precedent was known for such a practice; that the report of the committee, made while the other controversy just referred to was under debate in the Senate, led to confusion in considering, discussing, and disposing of the two cases; that for the reasons aforesaid petitioner's case against the said Kellogg never had a full examination and hearing upon its merits, either in the committee or in the Senate, and should therefore, petitioner most respectfully submits, be reexamined, to the end that justice may be done.

Petitioner further represents that the State of Louisiana, through its legislature (as will fully appear by a joint resolution of the two houses of the general assembly, approved February 1, 1878, to which reference is here made), has protested against the admission and retention of said Kellogg in said seat and the exclusion of your petitioner therefrom as leaving unfulfilled that provision of the Constitution of the United States which declares "that the Senate of the United States shall be composed of two Senators from each State, to be chosen by the legislature thereof, for six years."

Petitioner further represents that he ever has been and still is ready to furnish evidence to establish the five specifications upon which he was not permitted to take proof heretofore, and particularly evidence of the direct and active interference of said Kellogg in the preparation of illegal complaints or protests against polls of which he had no knowledge.

Petitioner further represents that since the contest aforesaid and very recently he has discovered new and material evidence to prove that the election of said Kellogg was null and void, by reason of improper, illegal, and corrupt influences exerted by him in person to bring about his own election as Senator; to prove that he obtained and held the title of governor by corrupt bargain, not by election, and then used the power, patronage, and resources of the governor's office to procure the return and organization of a general assembly for the purpose of electing him Senator, and afterwards employed both menace and bribery among those whom he had assisted to have returned as members to induce them to vote for him as Senator; and that but for such illegal and corrupt interference personally exerted by the said Kellogg he would not have secured the nominal election under which he claims his seat. All of which petitioner now offers to prove upon a review of the case.

[1] Second session Forty-sixth Congress, Senate Report No. 388, p. 5.

The resolution reported from the committee and the amendment proposed by Mr. Hoar formed an issue which was debated at length on May 2, 6, and 7.[1] It was urged in opposition to the resolution of the committee that the case was one falling under the doctrine of res adjudicata. In support of this position Mr. Angus Cameron, of Wisconsin, cited[2] as precedents the Fitch and Bright case, the Spencer case, and the Butler and Corbin case, and also the cases of Bogy and Cameron, all Senate cases.

The doctrine of res adjudicata was debated at great length, both abstractly and in reference to the constitutional functions of the Senate in judging the elections of its own Members.[3]

On behalf of the committee it was urged that the petition set forth a new ground not touched on in the original case, viz, the alleged corruption of the legislature by Mr. Kellogg, and that this justified the reopening of the case.

On May 7,[4] Mr. Edmunds proposed to the resolution of the committee an amendment so that the inquiry as to the matters alleged in the petition should go "so far only as relates to any charge in said petition of personal misconduct on the part of said Kellogg which may render him liable to expulsion or censure."

This amendment was disagreed to—yeas 20, nays 27.

Thereupon Mr. Roscoe Conkling, of New York, moved to amend the committee's resolution by adding:

> Providing that the inquiry hereby authorized shall be confined to the matters alleged in the memorial of Mr. Spofford to be new and different from those covered by,the previous inquiry.

This amendment was disagreed to—yeas 20, nays 27.

Mr. Edmunds proposed as an amendment the lines "recognizing the validity and finality of the previous action of the Senate in the premises," which was disagreed to—yeas 20, nays 27.

Mr. Conkling then proposed the following:

> *Provided,* That such questions in said case as were fully considered and adjudged in the former investigation shall not be opened under this resolution.

Which was disagreed to—yeas 20, nays 27.

Mr. John A. Logan, of Illinois, proposed the following amendment, which was disagreed to—yeas 19, nays 28:

> *Provided,* That said committee be further empowered and directed to make inquiry and take testimony upon the matter as to whether any unlawful or corrupt means were employed to disorganize the body by which William Pitt Kellogg claims to have been elected to the Senate, or to organize that by which the memorialist claims to have been elected or to secure the alleged election of the memorialist.

One amendment proposed by Mr. George F. Hoar to the committee resolution was agreed to without debate. It added thereto the words:

> And said committee are further instructed to inquire and report whether bribery or other corrupt or unlawful means were resorted to to secure the alleged election of the memorialist.

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[1] First session Forty-sixth Congress, Record, pp. 1022–1024, 1071–1087, 1099–1123.

[2] Record, pp. 1077–1079.

[3] Note particularly the speech of Mr. Matt. H. Carpenter, of Wisconsin, Record, p. 1100.

[4] Record, pp. 1112–1123.

The question was then taken on the amendment in the nature of a substitute already pending, and it was disagreed to—yeas 17, nays 26.

The original resolution of the committee, as amended, was then agreed to—yeas 26, nays 17.

On June 21 the Committee on Privileges and Elections, or one of its subcommittees, was authorized to sit during the recess of Congress.

On February 9, 1880,[1] the Vice-President laid before the Senate resolutions of the Louisiana legislature denying the validity of Mr. Kellogg's election and protesting against his continuance as Representative of the State. These resolutions were referred to the Committee on Privileges and Elections. Also, on February 12[2] a memorial of certain members of that legislature, affirming the legality of Mr. Kellogg's election, was presented and referred. Also, on February 17, a memorial from certain citizens was presented and referred.

On March 22[3] the report of the committee and the minority views were presented. The report was submitted by Mr. Hill, of Georgia, and was accompanied by the following resolutions:

Resolved, That, according to the evidence now known to the Senate, William P. Kellogg was not chosen by the legislature of Louisiana to the seat in the Senate for the term beginning on the 4th day of March, 1877, and is not entitled to sit in the same.

Resolved, That Henry M. Spofford was chosen by the legislature of Louisiana to the seat in the Senate for the term beginning on the 4th of March, 1877, and that he be admitted to the same on taking the oath prescribed by law.

In the report, which was concurred in by Messrs. Saulsbury; Hill; Frances Kernan, of New York; James E. Bailey, of Tennessee; Luke Prior, of Alabama, and Zebulon B. Vance, of North Carolina, the facts as to the election by the legislature were briefly stated, and then the committee go on to state that they have investigated the subject as directed to do by the Senate.

The memorialist and the sitting Member appeared before the committee in person and by counsel. On the 5th of June, 1879, the full committee commenced the examination of witnesses in this city. The examination was continued in November and December by a subcommittee in the city of New Orleans, and was again resumed by the full committee in this city, and was continued until both parties announced they had no further testimony to offer. Nearly 150 witnesses have been examined, and over 1,200 printed pages of testimony have been taken and are herewith reported to the Senate, with the conclusions of law and fact at which the committee have arrived.

In the opinion of your committee, the evidence, now for the first time fully taken, clearly and abundantly establishes the following facts:

I. That said William Pitt Kellogg, then holding the office of governor of the State of Louisiana, and pending the canvass in said election of 1876, did conspire with divers persons, and in aid of such conspiracy did fraudulently use the influence and power of his office of governor, to prevent a fair, free, and legal election in said State, to the end that he might procure from the commisioners of election the return of a legislature a majority of whose members should be of the Republican party and presumed to be favorable to his election to the Senate.

II. That, having failed in this, the said William Pitt Kellogg, still holding the office of governor, did conspire with divers persons, and in aid of such conspiracy did fraudulently use the influence and power of his office of governor, to change the result as returned by the commissioners of election, to

[1] Second session Forty-sixth Congress, Record, p. 749.

[2] Record, p. 833.

[3] Record, p. 1758; Senate Report No. 388; Record, p. 1758.

the end that he might procure, through false certificates of election, the organization of a pretended legislature a majority of whose members should be of the Republican party, and supposed to be favorable to his election to the Senate.

III. That said William Pitt Kellogg did conspire with divers others to prevent, and by force, through the metropolitan police, aided by the Army of the United States, did prevent the lawfully elected members of the legislature, and especially those of the Democratic party, from assembling in the halls of the senate and house of representatives in the Statehouse of the said State of Louisiana; and did, by threats, by the use of money, by the promise of offices, and by other corrupt practices, compel and induce to assemble in said halls, respectively, a mob of his coconspirators, against the will of the people of Louisiana, many of whom had not been elected, and some of whom had been neither elected or certified, to the end that he might procure a pretended legislature for the inauguration of Stephen B. Packard as governor, who, he well knew, had not been elected, and from which mob he might procure the form of his own election to the Senate, and which pretended election he knew such pretended governor would certify.

IV. That said William Pitt Kellogg having thus corruptly procured the assembling of a body of persons pretending to be a legislature, in which were included persons not elected, and from which had been forcibly excluded persons who had been elected and certified as members, did, by bribery, by the use of money and the promise of offices, and by other corrupt practices, induce said body of persons to go through the form of choosing him to a seat in the Senate of the United States.

V. That said William Pitt Kellogg, well knowing that the facts now proven to exist did exist, did falsely represent that no such facts existed or could be proven, seeking thereby to induce a majority of the committee, without taking the evidence which has now been taken, to make a report declaring his title to the seat, and with intent to induce a majority of the Senate to admit him to the seat so fraudulently claimed.

VI. That, to prevent the discovery of the briberies, frauds, and corruptions now proven to exist, the said William Pitt Kellogg did procure a large number of the persons composing said pretended legislature to be appointed to public offices of profit in the custom-house at New Orleans and elsewhere, as inducement not to disclose the truth. That, after other persons, officers, and members of said pretended legislature had freely and voluntarily admitted, under oath, their knowledge of said briberies and corruptions, and had been summoned to appear as witnesses before your committee, and were under the protection of the Senate, said William Pitt Kellogg did, by bribery and corrupt practices, induce such witnesses to testify falsely that they had not made such admissions, or that, if they had made them, they were not true.

The report then goes on to review the testimony by which they considered their conclusions justified and then go on to discuss the question as to the reopening of the case:

Your committee are unable to see how an impartial legal mind can read the evidence taken and doubt the guilt of the sitting member upon every charge which has been made against him, notwithstanding so many of the witnesses must be admitted to be disreputable.

But the sitting member, through his very able counsel, also insisted, with great earnestness and skill before your committee, that the Senate at a former session having, "after and upon evidence going to the merits of the case," declared that Kellogg was "upon the merits of the case entitled to the seat," this decision is final and conclusive, and cannot now be reexamined and reversed. This was the first and chief position on which the title of the sitting member was made to rest. Your committee have fully considered the question thus presented, and can not doubt the correctness of the conclusions at which they have arrived.

Stated in the light of the facts now known and herewith reported to the Senate, this position would read thus: That though the sitting member was not, in fact, chosen by the legislature of Louisiana, and though the body of men alleged to have elected him was assembled through fraud, was held together by force, and was controlled by bribery and corruption, and all this was accomplished by a conspiracy to defraud the State and people of Louisiana, of which conspiracy the sitting member was himself the chief, yet, the Senate having decided in ignorance and by the suppression of these facts that the sitting member was entitled on the merits to the seat, the Senate is compelled to allow him to retain the seat after full

knowledge that every fact which was assumed to exist when be was admitted is and was false and untrue. The reply to such a position is sufficiently furnished in the statement of the position itself. But your committee will not rest the argument here, and will consider it in the light of precedent and law. Counsel for the sitting member says:

"If, therefore, this committee and the Senate shall set aside this judgement on the merits it will present to the country and the world a spectacle not seen before in the century of our national existence just closed."

We might justly reply to this that this case, in the facts now proven, already presents to the country and the world a spectacle not before seen in this century or any previous century of this or any other nation. We trust such a spectacle will never again be presented, and that it may not be it ought to be now condemned by all men, and especially by this Senate. If it shall be understood that seats once procured in this body by any means, however false and fraudulent, which bad men may employ cannot be taken away, this Senate may soon be largely composed of members not chosen by the legislatures of the States. Successful frauds will displace the positive requisition of the Constitution in the elections of Senators. A case without precedent can not be decided by precedent. Fraud has certainly become a powerful agent in our politics, but we are not willing to admit it has yet become the supreme law above review and beyond remedy.

But while no case like this was ever before presented for decision, yet principles have been announced in other cases which will furnish some guide to a proper determination of this question.

In the case of Bright and Fitch, in the Thirty-fifth Congress, the rehearing asked was refused because "all the facts and questions of law involved were as fully known and presented to the Senate on the former hearing as they were then presented in the memorial of the legislature asking a rehearing." It was held that in such a case the judgment first rendered by the Senate "was final, and precluded further inquiry into the subject."

In the Butler and Corbin case, in the Forty-fifth Congress, the report of the minority of the Committee on Privileges and Elections correctly stated that no allegation was made "that testimony was before excluded which ought to have been admitted, or that testimony was admitted which ought to have been excluded; no request by either party to produce testimony had been denied, and no pretense that testimony then offered and excluded can now be produced. The jurisdiction is the same; the parties are the same; the subject-matter of contest is the same, the facts are the same, and the questions of law are the same." The report further said: "If, on the former hearing, Mr. Corbin had been denied the privilege of introducing material facts which he offered to produce; if he presented material facts now which were then unknown; if all the facts and questions of law now known and presented were not then as fully known and presented, the undersigned will not undertake to say his petition for a rehearing ought not, in justice and right, to be gravely heard and considered on the merits." The Senate adopted these views, though it is a significant fact that a large and intelligent minority of the Senate voted to unseat Mr. Butler and to admit Mr. Corbin, when not a single new fact or question of law had been presented or offered.

Your committee freely admit that a decision rendered on the merits ought not to be afterwards reviewed and reversed on light or even doubtful grounds. In the courts the familiar rule is that new evidence to authorize a reversal "ought to be material and such as would probably produce a different result." In this case your committee are willing to apply a much stronger test, though there is no reason why a stronger should be required. Let us adopt and apply the rule so strongly and forcibly expounded by a distinguished member of this Senate in the following language:

"The Senate would do manifest injustice were it hastily and without the most plain and most manifest reason to reverse a decision that had been made seating a Senator on this floor. The case must be extremely strong that would justify such a proceeding. All that I am free to admit, but to say that the technical rule of res adjudicata that applies to courts of justice applies in this Chamber on a question of this kind is to confound all distinctions and to disregard all the laws of this body." (Congressional Record of May 7, p. 24.)

Let us now apply this rigid rule to the present case:

1. On the former hearing not a single witness was examined. Some admissions were made by the parties, and some reports of investigations by Congressional committees not on the issues involved in this contest "were agreed to be considered in evidence as far as they were pertinent." This was done only to narrow the field of investigation.

On this hearing nearly 150 witnesses have been examined, making over 1,200 printed pages of testimony of the most material and controlling character.

2. On the former hearing the memorialist begged and pleaded for the privilege of having witnesses called and examined on five points not covered by the admissions and reports above referred to, and by which witnesses he alleged he could prove, among other things, the direct personal complicity of the sitting member in glaring frauds in the pretended legislature which elected him. All these appeals were refused by the majority of the committee, although an investigation had been previously ordered by the Senate and resolved upon by the committee, and the investigation was suddenly closed against the protest of the memorialist and a minority of the committee.

On the present hearing the witnesses have been examined, and the complicity of the sitting member in the frauds alleged has been most convincingly established.

3. On the former hearing there was no evidence and no opportunity to produce evidence showing conspiracies, briberies, and other corruptions by the sitting member to procure a fraudulent legislature, and to control the members thereof in his own election to the Senate.

On the present hearing such conspiracies, briberies, and corruptions of the most startling, unblushing, and unparalleled character have been positively testified to by numerous witnesses, and these briberies and corruptions have been shown to extend to the witnesses in the case in the very face of the Senate.

Your committee could multiply the features of contrast between the former and the present hearing in this case, but we forbear. Under the most technical rule of res adjudicata there is not a court in civilized Christendom which would hesitate to review and reverse a judgment so utterly unauthorized and unjust; and surely it can not be contended that the Senate can have less power than a court to annul such a decision.

Conceding then, for the argument, that the Senate in passing upon contests for seats in this body acts as a court, and that the technical rule of res adjudicata applies to decisions rendered in such cases, do courts not reexamine, review, and reverse their decisions? Are not appeals, writs of error, motions for new trials, and bills of review familiar to us all? The Senate, in considering such cases in the first instance, is not bound by the forms of proceedings in the courts. We have no declarations, no complaints, no bills in chancery, nor pleas, demurrers, answers, and joinders of issue in the Senate. If the Senate proceeds to original judgment without the pleading known to the courts, may not the Senate also proceed to review, reexamine, and reverse such judgments when good cause is shown, without resorting to the processes which in such cases are known to the courts? If the Senate is a court, then if the facts in a given case are such as would require the vacation of a judgment if rendered by a court, surely the Senate would also be authorized to vacate such judgment. The exclusion by the court of material testimony on the first hearing, the discovery of new and material evidence since the hearing, the existence of frauds, forgeries, briberies, and perjuries in procuring the first judgment are all well-known grounds on either one of which courts, by some of the methods of proceeding, will review and reverse such judgments. All these grounds are shown by the evidence and the records of this Senate to exist in extraordinary clearness, force, and repeated abundance in the case we are now considering. Is the Senate, by being likened to a court, to be bound by decisions which a court would rigorously vacate and annul?

But the attempt to apply to the Senate the technical rule of res adjudicata as it obtains in the courts is a palpable sophistry and not an argument. In the correct and forcible language of Senator Thurman, before quoted, "it confounds all distinctions and disregards all the rules of this body."

In cases where the contestants claim to represent the same State government, and the issue between them is one of informality or irregularity, or noncompliance with statutory provisions, there would be some show of reason for the application of this doctrine. In such cases there ought to be an end of litigation in the Senate as well as in the courts. A wise policy would certainly require in such cases the principle if not the rule of res adjudicata. It is to such cases the authorities cited by the eminent counsel for the sitting member were intended to apply.

But the questions involved in the present case rise immeasurably above such issues. They are not questions of regularity, but of authority. They are not questions of discretion, but of duty. They exist more between the State of Louisiana and this Senate than between the contestants. In their nature these questions are not merely judicial, but political in the highest sense.

The Constitution says:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof."

Can a man sit as a member of this Senate who was not chosen by the legislature of his State? But suppose, in ignorance of the fact that he was not so chosen, the Senate is induced to declare him entitled to the seat "on the merits," after investigation; does such erroneous decision supplant the Constitution and give him a title after the mistake becomes known?

Let us suppose an impossible case: Suppose a majority of this Senate should for any purpose, partisan or otherwise, seat a man in this body who they knew was not chosen by the legislature of his State, would any future Senate be compelled to continue such person in the seat? Would not such continuance be as criminal as the original admission? Will any man pretend that a plain constitutional provision can be superseded by a mistaken decision of this Senate? If the sitting member was not chosen by the legislature of Louisiana, every hour he sits on this floor after that fact is known is a violation of the Constitution. It is a question of obedience to the Constitution. Can any person estop this Senate, can the Senate estop itself, from obeying the Constitution? Can the Senate estop itself from inquiring toties quoties whether he was chosen by the legislature? Can it be so estopped by its own erroneous decision on a former hearing?

In cases like the one now before us your committee do not hesitate to adopt the language employed by those eminent constitutional lawyers—Mr. Collamer, of Vermont, and Mr. Trumbull, of Illinois—in the Fitch and Bright case in 1859. They said:

"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 correction of error and 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 or falsehood, or even by papers forged or fabricated."

In the light of the evidence now before the Senate the sitting member was admitted by a wrongly procured decision of the Senate in his favor by means quite as criminal as those stated in the last paragraph quoted, since the means employed by him to secure his pretended election included conspiracies, briberies, and perjuries often repeated, and the knowledge of which was vigorously suppressed on the former hearing. He was not chosen by the legislature of Louisiana. He was chosen by a body of men who conspired with him to defeat the will of the State, and who excluded by force the members elected by the people in order that the conspirators might be enabled to accomplish their work.

The primary authority to determine what is the legislature of a State is and must be the State herself. When the State determines that question for herself, it is determined for all the world. In case there are two governments, or two bodies each claiming to be the true government or the true legislature of the State, and the State has not determined the controversy, the duty may devolve upon others, and in this case upon this Senate to adjudge that question pro hac vice.

In January, 1877, a portion of the members elected by the people united with others not elected and seized the Statehouse by cooperation with the sitting member, who was then acting as governor, were barricaded in the building, which was surrounded with troops, and refused to permit other elected members to be admitted into the building. The barricaded persons called themselves the legislature, and the excluded members met in St. Patrick's Hall and called themselves the legislature. This was the condition of things when the sitting member presented his credentials to this Senate and asked to be admitted to his seat on this floor. He was not admitted, but his credentials were referred to the Committee on Privileges and Elections. Before the committee took any action whatever the issue thus raised between these two rival bodies was settled by the State. It was decided that the body which assembled and organized in St. Patrick's Hall was the true legislature of the State. This decision was accepted by all the people of Louisiana and by all the departments of her government, by the President and House of Representatives, and by the circuit and district courts of the United States, and finally by all the persons who composed the body which seized the Statehouse. The latter, which had been known as the Packard legislature, disbanded, leaving not a resolution, or act, or other thing which has ever been recognized as authoritative, or which has been claimed to be valid, save only the pretended election of the sitting member to this Senate; and this single act has been recognized only by this Senate. The former body, which had been known as the Nicholls legislature, performed all the functions of a legislature from the beginning, passed laws which are obeyed by all the people and enforced by all the courts. All the persons who had been elected left the pretended Packard legislature and took their seats in the Nicholls

legislature, and those who had not been elected admitted they were not elected, without even a contest, and went home or into the custom-house or some other Federal office.

The regular legislature thus organized, composed of all the members elected by the people, chose the memorialist to the seat he is now claiming. The election was free, regular, legal, and without taint of corruption of any kind, and his credentials are in due form. Of a legislature which was composed, when full, senate and house, of 156 members, the memorialist received over 140 votes.

Since the former hearing in this case the supreme court of Louisiana has also decided that the officers of the Packard government had, in January, 1877, no official status, and that no acts performed by them at that time, though purporting to be performed virtute officii, could have the force and effect of official acts. (State ex rel. Lipo *v.* Peck, 30 Annual Reports, 280.)

And in addition to all this, the evidence now taken shows that the Packard legislature, which pretended to elect the sitting member, was, in fact as well as in law, not a legislature, but was a body of men assembled by fraud, held together by force and controlled by bribery, with the aid and in the interest of the sitting member.

Mr. George F. Hoar, of Massachusetts, submitted the minority views, which were concurred in by Messrs. Angus Cameron, of Wisconsin, and John A. Logan, of Illinois:

The party majority in the Senate has changed since Mr. Kellogg took the oath of office in pursuance of the above resolution. Nothing else has changed. The facts which the Senate considered and determined were in existence then as now. It is sought, by mere superiority of numbers, for the first time to thrust a Senator from the seat which he holds by virtue of the express and deliberate final judgment of the Senate.

The act which is demanded of this party majority would be, in our judgment, a great public crime. It will be, if consummated, one of the great political crimes in American history, to be classed with the rebellion, with the attempt to take possession by fraud of the State government in Maine, and with the overthrow of State governments in the South, of which it is the fitting sequence. Political parties have too often been led by partisan zeal into measures which a sober judgment might disapprove, but they have ever respected the constitution of the Senate.

The men whose professions of returning loyalty to the Constitution have been trusted by the generous confidence of the American people are now to give evidence of the sincerity of their vows. The people will thoroughly understand this matter, and will not be likely to be deceived again.

We do not think proper to enter here upon a discussion of the evidence by which the claimant of Mr. Kellogg's seat seeks to establish charges affecting the integrity of that Senator. Such evidence can be found in abundance in the slum of great cities. It is not fit to be trusted in cases affecting the smallest amount of property, much less the honor of an eminent citizen, or the title to an object of so much desire as a seat in the Senate. This evidence is not only unworthy of respect or credit, but it is in many instances wholly irreconcilable with undisputed facts, and Mr. Kellogg has met and overthrown it at every point.

The report was taken up for consideration on April 22, and thereafter was debated at length on April 23, 26, 27, and 30, May 3, 4, 7, 10, 14, 20, and June 5, 7, and 11.[1] On May 7[2] Mr. George F. Hoar proposed the following amendment:

Strike out all after the word "resolved" where it first appears, and insert the following:

"That in the judgment of the Senate the matters reported by the Committee on Privileges and Elections at the present session respecting the right to the seat in this body now held by William Pitt Kellogg and claimed by Henry M. Spofford are not sufficient to justify the reopening of the decision of the Senate, pronounced in its resolution adopted on the 30th day of November, A. D. 1877, that said Kellogg was, upon the merits of the case, lawfully entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th day of March, A. D. 1877, and that said Spofford was not entitled to a seat in the Senate of the United States."

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[1] Record, pp. 2676, 2735, 2909, 2952, 2972, 3108, 3161, 3232, 3270, 3313, 3362, 3456, 3511, 3551, 4238, 4414.

[2] Record, pp. 3108–3116.

The debate was elaborate, but it appeared that a portion of the majority party in the Chamber did not subscribe to the conclusions of the committee.

The minority having set up the doctrine of res adjudicata, the question as to the exact functions of the Senate under the constitutional provision making it the judge of the elections of its Members became one of importance. On behalf of the majority Mr. Bailey declared [1] that the Senate was not a court in the strict sense, but that its duties in judging elections were in the broadest sense political. Mr. Pryor made [2] an elaborate constitutional argument to show that the word "judge" did not convert the Senate into a judicial body. Mr. Hill insisted again that the Senate was a political body, not a court.[3] On the other hand, Mr. Hoar argued,[4] from the history of the Constitution that in cases of this sort the Senate acted as a judicial body. Also Senators Wade Hampton and Marion Butler, of South Carolina, differing from their party associates, held [5] that the Senate in such cases acted as a court.

As to the doctrine of res adjudicata itself, Mr. Hill set forth [3] the doctrine that the Senate could constitutionally judge only as to who were elected its members and could not judge as to what was the rightful legislature of a State. That decision belonged to the courts, the executive, and the people of the State itself. In this case the Senate had presumed to judge what was the legislature. That decision was void, beyond jurisdiction, attackable collaterally. Mr. George G. Vest, of Missouri, considered [6] the decision of the supreme court of Louisiana conclusive that the Nichols legislature was the only lawful one. The Senate, in his opinion, was a "creature of the Constitution and has absolute power, irrespective of all technical rules of proceeding, to determine its own constitutional membership." The theory of Mr. Hill was combated by Mr. Matt H. Carpenter, of Wisconsin, who declared "Where a court has jurisdiction at all it has jurisdiction to decide every question necessary to the decision of the question that it must settle." Therefore the Senate could decide as to the competency of the legislature, and its conclusion was not void.

On the doctrine of res adjudicata Mr. Carpenter declared [7] that the peace of society required that some things should be presumed even against notorious facts, and cited the Supreme Court case of Fletcher *v.* Peck (6 Cranch, 130). A wise rule for the courts must be a wise one for the Senate acting in its judicial capacity. Mr. Hampton, while believing that Mr. Kellogg was wrongly seated, said: [8] "I believe we have not the power, the rightful power, to rectify the wrong." And his colleague, Mr. Butler, also declared [9] that a Member seated on the merits of his case could be unseated only by expulsion, for he believed that the Senate expended its power when once it judged. The Throckmorton case (98 U. S., 61) was cited by Mr. Carpenter on this point.

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[1] Record, p. 2677.
[2] Record, p. 3110.
[3] Record, p. 3236.
[4] Record, p. 3162.
[5] Record, pp. 3314, 3511, 3512.
[6] Record, p. 2973.
[7] Record, pp. 3319, 3320.
[8] Record, p. 3315.
[9] Record, pp. 3511, 3512.

Messrs. Kernan, of New York, and Pendleton, of Ohio, held[1] that material or relevant facts ascertained after the decision might justify a review, but the latter considered the new evidence was not such as to justify the reopening.

As to precedents, the Gholson and Claiborne case in the House of Representatives in 1837 was cited[2] and its applicability as a precedent was also denied.[3] The Reeder and Whitfield case in the House of Representatives in 1856 was also cited.[3] It was claimed for each of these cases that the House reviewed a decision, but this was denied.

No decision on the question was reached at this session of Congress.

By the time the Third session of the Congress began, Mr. Spofford had died, and on December 7[4] Mr. Jonas presented the credentials of Thomas Courtland Manning, appointed a Senator by the governor of Louisiana to fill the vacancy occasioned by the death of Henry M. Spofford, who claimed to be elected Senator from that State; which were referred to the Committee on Privileges and Elections.

No further action was had, Mr. Kellogg retaining the seat.

358. The Senate election case of Sanders, Power, Clark, and Maginnis, from Montana, in the Fifty-first Congress.

There being conflicting credentials resulting from elections by rival legislative bodies, the Senate declined to give prima facie effect to the papers and examined the final right.

A Senate discussion favoring recognition of a legislative body having a legally certified but not legally elected quorum in preference to one having an elected but not certified quorum.

A legislature in electing a Senator may act under the law as an assemblage of legislators rather than as two organized legislative bodies.

On January 16, 1890,[5] in the Senate, Mr. Henry M. Teller, of Colorado, presented a paper purporting to be the credentials of Wilbur F. Sanders, chosen a Senator by the legislature of Montana, and also a paper purporting to be the credentials of Thomas C. Power, chosen a Senator by the legislature of the same State, which were read and referred to the Committee on Privileges and Elections.

These credentials were alike in form. Each recited that the senate and house of representatives had duly organized and elected as United States Senator, the bearer, whose name was given. Then the credentials[6] proceeded as follows:

Whereas Hon. Joseph K. Toole, the governor of said State, upon the 10th day of January, A. D. 1890, did refuse to certify such election of said Wilbur F. Sanders for said Senator:

Now, therefore, I, Louis Rotwitt, secretary of the State of Montana, do hereby certify that the said Wilbur F. Sanders has been duly elected by said joint assembly Senator in Congress from said State of Montana.

In testimony whereof I have set my hand and caused the great seal of the State of Montana to

[1] Record, pp, 3363, 3364, 4239.

[2] Record, pp. 2678, 3162.

[3] Record, p. 3112.

[4] Third session Forty-sixth Congress, Record, p. 15.

[5] First session Fifty-first Congress, Record, p. 633.

[6] For forms of the credentials in this case, see Record, p. 3419.

be affixed at my office in Helena, the capital of said State, in the year of our Lord, 1890, and of the independence of the United States of America the one hundred and fourteenth.

[SEAL.] L. ROTWITT,
Secretary of State of the State of Montana.

On January 23[1] Mr. George G. Vest, of Missouri, presented a paper purporting to be the credentials of William A. Clark, and also a paper purporting to be the credentials of Martin Maginnis, elected Senators by the legislature of the State of Montana, which were read and referred to the Committee on Privileges and Elections.

On motion by Mr. Vest, and by unanimous consent,

Ordered, That, pending the settlement of the contested election cases of Senators from the State of Montana, Messrs. Wilbur F. Sanders, Thomas E. Power, William A. Clark, and Martin Maginnis be admitted to the privileges of the floor of the Senate.

These credentials were dated "The State of Montana, Executive Office," recorded the election of the bearers by the legislature, and concluded:

Now, therefore, I, Joseph K. Toole, governor of the State of Montana, do hereby certify that the said William A. Clark has been duly elected by such joint assembly to serve as Senator in Congress from the State of Montana.

In testimony whereof I have hereunto set my hand and caused the great seal of the State of Montana to be affixed. Done at my office, in Helena, in the year of our Lord, 1890, and the year of American Independence the one hundred and fourteenth.

JOS. K. TOOLE, *Governor of Montana.*

In fact, the "great seal of the State" was not affixed to the credentials. The signature of the governor was attested only by a notary public.

The credentials were referred, neither of the claimants being permitted to take the oath.

On March 24[2] Mr. George F. Hoar, of Massachusetts, chairman of the committee, submitted a report concurred in by himself and by Messrs. William P. Frye, of Maine; Henry M. Teller, of Colorado; William M. Evarts, of New York; and John C. Spooner, of Wisconsin. Dissenting minority views were presented by Messrs. Z. B. Vance, of North Carolina; J. L. Pugh, of Alabama; George Gray, of Delaware; and David Turpie, of Indiana.

The report first states the facts:

No distinction exists between the cases of Messrs. Sanders and Power, and no distinction exists between the cases of Messrs. Clark and Maginnis. The cases on each side have been presented and argued upon the merits of the title, and not merely upon the question presented by the certificate of the governor or of the secretary of state. The committee, therefore, have considered and report upon the whole case upon its merits.

The claimants on both sides seem to be agreed that a lawful joint convention was held in Montana by the members of the two houses of the legislature, and elected Senators by due proceedings. The dispute is which of two bodies claiming to be the lawfully organized house of representatives of Montana was entitled to that character.

There was no election of Senator by concurrent vote on the Tuesday appointed for that purpose by the statute of the United States (Rev. Stat., secs. 14, 15). On the following day one-half the members of the senate met in joint assembly with a body which had assembled and organized in a room called the Iron Hall, which body was known as the Iron Hall or Republican house, whereupon, a ballot for

[1] Record, pp. 795, 3419.

[2] Senate Report No. 538.

Senator being had, Mr. Sanders had a majority of all the votes cast, and was declared duly elected. No other person having such majority, the convention was adjourned until the day following, when, a ballot for Senator being held, Mr. Power had a majority of all the votes cast and was declared duly elected. If this body were the lawful house of representatives of Montana, these two gentlemen were duly chosen Senators.

On the same day the other half of the members of the senate met in joint assembly with a body which had assembled and organized in the court-house, which body was known as the Court House or Democratic house, voted for Senators by separate ballotings, adjourned from day to day, and continued balloting until Messrs. Clark and Maginnis had a majority of all the votes cast and were declared duly elected. If this body were the lawful house of representatives of Montana, these two gentlemen were duly chosen Senators.

These two bodies were composed as follows: By the constitution of Montana the house of representatives consists of fifty-five members, of whom twenty-eight are a quorum. Twenty-five persons of whose title to sit in the house of representatives and take part in its proceedings no question is made, together with five persons claiming to be entitled to sit and take part as representatives from the county of Silver Bow, met, as above stated, at the Iron Hall, at the time fixed by the constitution for the meeting of the legislature, and organized there. The auditor, who is required by the constitution to preside at the organization of the house, called them to order and presided till a speaker was chosen. Twenty-four other persons of whose title to sit in the house of representatives and take part in its proceedings no question is made, together with five other persons claiming to be entitled so to sit and take part as representatives from the county of Silver Bow, met, as above stated, at the court-house, at the time fixed by the constitution for the meeting of the legislature, and organized there.

The whole case, therefore, turns upon the question which of these two sets of five persons was entitled to sit in the house of representatives from the county of Silver Bow, take part in the organization and other proceedings down to and including the time of the election of Senators. It is not claimed that there was any adjudication of the house itself affirming or denying such title.

In determining the question as to the rights of the respective claimants to the five contested seats the committee discuss three questions:

First. Which of the two sets or groups of five members claiming to sit for the county of Silver Bow had credentials from the officer or board entitled to canvass the vote and declare the result?

On this question a sharp difference arose between the majority and minority, arising from different constructions of the laws of Montana. The majority held that the credentials issued by the State canvassing boards were the only lawful credentials. The minority sustained the credentials issued by the county clerks. The case largely turned on this issue, which was discussed at length in the reports and in the debate on the floor.

Second. If one group of five had the lawful credentials, but the other group were in fact elected, which was legally entitled to sit in the house at its original organization and remain and take part in all subsequent proceedings until the house itself had adjudicated their title, there being in existence two bodies each claiming to be the true house?

The majority report says:

It will hereafter appear that it is unnecessary to decide this question for the purposes of the present case. We believe, for reasons hereafter stated, that the certificates of the State board declared the true will and choice of the people as expressed by a majority of the votes actually and lawfully cast. But, as the matter has been discussed, it is proper to say that we are unable to see any distinction in principle between the case of a person claiming title to a seat in an assembly whose character is disputed by some other body, and in an assembly whose character is undisputed. The majority of persons having a right to seats in the house of representatives have a right to organize that house and to transact all its lawful business, including the enactment of laws and the election of Senators. Persons who have the certificates of election have such right to seats. Every act of the assembly in which they take part, and to which their consent is necessary, has as absolute validity as if their title had been affirmed by

an adjudication of the house itself. Their title is not, as is sometimes carelessly said, a prima facie title. It is an absolute title, continuing until the house itself has adjudicated that some other person be admitted to their place. This adjudication is only operative for the future, and has no retroactive effect whatever. When the house makes the inquiry on the merits, it may treat the credentials as prima facie evidence upon that question. But until the house tries the case, the credential is conclusive as to all the world.

If this be true, how can an attempted usurpation by another body of the functions of the house, to which they belong, in the least affect their right? If four certified members had come over from the court-house to the Iron Hall, according to this argument, these men, who had no title to their seats before, would at once become entitled to them. If the men who went to the court-house had never gone there or made any claim to the seats, in that case, according to this theory, the five certified members from Silver Bow would have been all right. It seems to us impossible to believe that the right of these gentlemen to sit and vote, the validity of any laws they might have helped to enact, or of the choice of any officer they might help to elect, should depend on the acts of other persons.

This question may be raised at the beginning of any session of Congress. If the certificate of the proper officer of the State give no title, surely the act of the clerk in placing the claimant's name on a roll can give none. It would be competent, if the claim we are dealing with be sound, to organize the House of Representatives of the United States with a quorum partly made up of persons having credentials and partly of persons having none, and thereby put upon the Senate, when called upon to determine whether it will recognize such a body, the necessity of going into evidence of what occurred at the popular elections and of trying the right of the Members of the House to their seats. The President must make for himself a like inquiry, and perhaps the courts a third. It might be that these bodies would come to different conclusions upon the voluminous and conflicting evidence in a contested-election case, and thus the whole Government would be thrown into confusion. We suppose that there has been more than one occasion in recent years when a majority of the Senate firmly believed that enough of the Members of the House who held credentials were not duly elected to change the political majority. I this doctrine be accepted, the party in the minority in the House may at any time associate with themselves persons enough claiming to have been chosen to make a quorum, and disregard the certificates of the executives of the States and the Clerk's roll. The Senate may then take evidence of what occurred at the polls, thereby determine who were lawfully elected, recognize the body so organized, and thereby give the persons it finds so elected the seats to which neither credentials nor judgment of the House have ever given a title.

The report in Sykes *v.* Spencer, decided by the Senate in 1873, is relied upon as supporting an opinion contrary to that which we have stated. If so, we dissent from it. But it is to be remarked that in that case, which was upon an election held less than seven years after the close of the war, the doctrine of the report is not relied upon in the debate. It is further to be observed that that case is to be distinguished from this by the fact that there it was conceded that the persons who had not certificates were duly elected. The distinction from the general rule is expressly put by Mr. Carpenter, in his report, upon this concession. When the fact there conceded is, as in the present case, disputed, and to be proved, we think there are but two ways in which it can be proved to the Senate. One is the possession of lawful credentials. The other is the judgment of the House itself, not only the final, but the sole judge of the elections, qualifications, and returns of its Members.

Mr. Gray, speaking for the minority, said they did not dissent from the proposition laid down by the majority, and did not found their case on the principles enunciated in the case of Sykes *v.* Spencer, which he declined to indorse. The ruling was considerably discussed during this debate.[1]

Third. Is there evidence which warrants the Senate in finding that the persons who had the credentials were not, in fact, duly elected?

The majority and minority disagreed sharply as to which set of contestants were actually elected, and this question was discussed at length in the report and on

[1] Record, pp. 2910, 2918, 3188.

the floor. The majority found that the persons bearing the State canvassing-board credentials had in fact been elected.

On another point the majority concluded:

The suggestion has been made that, to elect a Senator, there must be in existence a legislature exercising, or at least capable of exercising, the law-making function; and that when this function is interrupted or abdicated, or has never been set in motion because either house refuses to recognize and act in concert with the other, or because the governor refuses to treat either as possessed of legislative authority, there is, in fact, no legislature in the constitutional sense, and therefore no body competent to appoint a Senator. In Montana the governor declined to recognize the Iron Hall house, and the senate, which was evenly divided politically, did not recognize either Iron Hall or Court-House.

The suggestion is ingenious, but we do not think it will bear examination. The governor is no part of the law-making power. The legislature may pass laws, if he do not assent to them. He has only the power to require the legislature to reconsider a bill or resolve they have once passed. On such reconsideration a two-thirds vote, instead of a bare majority, is essential to the enactment. (Constitution of Montana, art. 5, sec. 29.)

It would be a strange condition of things if the governor of a State, or the President of the United States, could, by a simple refusal of recognition, suspend all legislative functions, so that bills presented to him should not become laws through his inaction, or be passed over his veto. Such a theory, which rests wholly on implication, would, if adopted, neutralize plain provisions of the Constitution.

Neither house of the legislature, when once lawfully constituted, can abandon its own authority. Much less can it take away the authority of the other. Neither House of Congress can even adjourn for more than three days without the consent of the other. A like provision is in the constitution of Montana. This theory enables one house, or the executive, to overthrow at once all the constitutional securities for the preservation of the legislative power. It is utterly opposed to the act of Congress prescribing the manner of the election of Senators (Revised Statutes, secs. 14 to 19.) If no concurrent election be had, "the members of the two houses shall convene in joint assembly."

This is intended to put it out of the power of a majority of either house to prevent a choice of Senator. This provision we think clearly constitutional. It is in accordance with the legislative usage in the matter of electing officers whose choice may be prevented altogether if two distinct bodies must concur to produce a valid result.

In conclusion, the majority recommended these resolutions:

Resolved, That William A. Clark is not entitled to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Martin Maginnis is not entitled to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Wilbur F. Sanders is entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Thomas C. Power is entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

The report was debated at length on April 2, 3, 7–11, 15, and 16.[1] On the latter day[2] a motion to recommit was disagreed to—yeas 26, nays 32.

Then the question recurring on agreeing to the first two resolutions reported by the committee, Mr. Gray moved a substitute declaring Messrs. Sanders and Power not elected. This amendment was disagreed to—yeas 26, nays 32.

The two first resolutions of the committee were then agreed to—yeas 38, nays 19.

Then the question recurred on the two last resolutions of the committee, declar-

[1] Record, pp. 2906, 2968, 3101, 3136, 3188, 3228, 3279, 3378, 3419.

[2] Record, pp. 3433–3435.

ing Messrs. Sanders and Power entitled to the seats. A substitute amendment declaring that in the judgment of the Senate there had been no choice was disagreed to—yeas 23, nays 30.

Then the resolutions were agreed to—yeas 32, nays 26.

Messrs. Sanders and Power thereupon appeared and were sworn.

359. The Senate election cases of John T. Morgan, of Alabama, and L. Q. C. Lamar, of Mississippi, in the Forty-fifth Congress.

The Senate gave immediate prima facie effect to perfect credentials certifying election by a legally organized legislature, although it was objected that popular will had been subverted in electing the legislators.

On March 5, 1877,[1] at the time of swearing in Senators-elect, Mr. George E. Spencer, of Alabama, objected to the administration of the oath to Mr. John T. Morgan, of Alabama.

On March 7[2] Mr. Thomas F. Bayard, of Delaware, offered this resolution:

Resolved, That the credentials of John T. Morgan, Senator-elect from the State of Alabama, be taken from the table and that he be sworn.

On March 8[3] Mr. Spencer proposed an amendment providing that the credentials be referred to a committee before the swearing in of Mr. Morgan.

It did not appear that there was any question as to the credentials, as to the title of the governor who signed them, or as to the fact that the legislature which elected him was the only legislature of the State. But it was urged that in the election of the State government the will of the people had been subverted by violence, and therefore that the action of the legislature was void.

After debate Mr. Spencer's amendment was rejected, the resolution was agreed to, and Mr. Morgan took the oath.

360. On March 3, 1877,[4] in the Senate, the credentials of L. Q. C. Lamar, of Mississippi, for the six years commencing March 4, 1877, were presented.

On March 5,[1] at the time of swearing in Senators-elect, Mr. George E. Spencer, of Alabama, objected to the administration of the oath to Mr. Lamar because of conditions set forth in the report of the Committee on Privileges and Elections, who had investigated the recent election in Mississippi.

On March 6,[5] Mr. William A. Wallace, of Pennsylvania, offered the following:

Resolved, That the credentials of L. Q. C. Lamar, Senator-elect from the State of Mississippi, be taken from the table and that he be sworn.

Mr. Spencer moved to amend the resolution by a substitute referring the credentials to the Committee on Privileges and Elections.

In the debate Mr. Spencer urged that the State government of Mississippi, as shown by the report of the Senate's committee, was a fraud and an usurpation. The legislature had been chosen in an election wherein violence and intimidation pre-

[1] Special session of Senate, Forty-fifth Congress, Record, p. 2.

[2] Record, p. 24.

[3] Record, pp. 24–31.

[4] Second session Forty-fourth Congress, Record, p. 2147.

[5] Record, pp. 5–15.

vailed. In his view a mob could not organize a State government sufficient to make out a prima facie case.

It appeared that Mr. Lamar's credentials were issued by a governor whose title was not disputed by any other claimant and by a legislature that was unquestioned as the only legislature of the State. It was urged that the objections raised went to the fact of election, and should not prevent the swearing in of Mr. Lamar on his undisputed prima facie showing.

There was little objection to this claim; but Mr. Oliver P. Morton, of Indiana, called attention to the Pinchback case of Louisiana, and declared that it was inconsistent to seat Mr. Lamar and deny a seat to Mr. Pinchback, who bore credentials from the only recognized governor of Louisiana of an election by the recognized and existing legislature of the State. In opposition to this view it was urged, especially by Mr. Henry L. Dawes, of Massachusetts, that a rival claimant also presented credentials from a rival governor of Louisiana, and that Mr. Pinchback's case was thus so complicated that both claimants should wait until their claims could be examined.

Mr. Bainbridge Wadleigh declared that the question which arose was whether the voice which came here was really the voice of Mississippi. An usurpation should not have a voice on the floor of the Senate. He favored an examination before admitting Mr. Lamar.

The question recurring on the amendment proposed by Mr. Spencer, there appeared 1 yea (Mr. Wadleigh) and 58 nays.

Then the resolution proposed by Mr. Wallace was agreed to—yeas 57, nays 1 (Mr. Wadleigh).

Mr. Lamar then appeared and took the oath.

Chapter X.

ELECTORATES DISTRACTED BY CIVIL WAR.

1. Joint rule excluding persons elected in insurrectionary States. Section 361.
2. Informal elections in districts under military duress. Sections 362–381.
3. Principles deduced from Senate decisions as to States under military duress. Sections 382–385.

361. Persons bearing credentials regular in form, but coming from communities disorganized by civil war, have been excluded until Congress should determine the status of the constituencies.

In the days of reconstruction the two Houses, by joint rule, excluded Members-elect with credentials in due form, some entirely, others until the States were declared by law entitled to representation.

An instance wherein credentials of persons claiming to be Members-elect were referred to a joint committee of the two Houses.

Credentials regular in form have been presented as a matter of privilege, although the status of the constituency was, by reason of civil war, in doubt.

On December 12, 1865,[1] Mr. Henry J. Raymond, of New York, as a question of privilege, presented the credentials of the Representatives from the State of Tennessee, signed by the governor, sealed with the seal of the State, and otherwise regular in form.

Mr. Thaddeus Stevens, of Pennsylvania, raised the question that, as the State of Tennessee was not known to the House or to Congress, no question of privilege was presented.

The Speaker[2] overruled the point of order, saying that the usages of the House since the rebellion began showed that a claimant to a seat, with papers prima facie indicating his election, was entitled, as a question of privilege, to have them presented.

A question then arose as to the reference of the credentials, it not being proposed that the oath should be administered on the prima facie showing.

Finally, after debate, the credentials were referred to the newly constituted

[1] First session Thirty-ninth Congress, Journal, pp. 51, 52; Globe, pp. 31–33.

[2] Schuyler Colfax, of Indiana, Speaker.

Joint Committee on Reconstruction, by a vote of yeas 125, nays 42. This committee had been constituted by resolution of the two Houses, which provided that until the committee should have investigated and reported on the condition of the so-called Confederate States, no Member should be received into either House from any of these States, and that all papers relating to such representation should be referred to the joint committee.[1] On December 14[2] the House reenforced the provisions of the concurrent resolution by agreeing to the following, by a vote of yeas 107, nays 56:

Resolved, That all papers which may be offered relative to the representation of the so-called Confederate States of America, or either of them, shall be referred to the joint committee of fifteen without debate, and no Members shall be admitted from either of said so-called States until Congress shall declare such States, or either of them, entitled to representation.

During consideration of the resolution it was objected that under the Constitution and laws the Speaker was required to administer the oath to Representatives of States as they should appear.

Later, on February 20, 1866,[3] the House passed a concurrent resolution declaring that "no Senator or Representative shall be admitted into either branch of Congress from any of said [insurrectionary] States until Congress shall have declared such State entitled to such representation."

This resolution was later agreed to by the Senate.[4]

At various times between the adoption of these resolutions and June 4, 1866,[5] the credentials of various gentlemen from the insurrectionary States were presented and referred under the rule.

The report of the Joint Committee on Reconstruction[6] showed that Tennessee had a republican form of government, and an act of Congress was passed at this session and approved July 24, 1866, "restoring Tennessee to her relations to the Union" and declaring her "again entitled to be represented by Senators and Representatives in Congress."[7] Accordingly, on the day of the approval of the act, and later, the Members-elect from Tennessee appeared and were sworn.[8]

Gentlemen bringing credentials from other insurrectionary States were not admitted during this Congress.

The report of the Joint Committee on Reconstruction,[9] made at this session of Congress, took the ground that Congress could not "be expected to recognize as valid the election of Representatives from disorganized communities" without first providing constitutional or other guarantees.

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[1] Journal, p. 10.
[2] Journal, pp. 71, 72; Globe, p. 61.
[3] Journal, pp. 300–315; Globe, pp. 943–950.
[4] Journal, p. 353; Globe, p. 1132.
[5] Journal, pp. 88, 96, 98, 111, 135, 145, 245, 332, 792, 838.
[6] First session Thirty-ninth Congress, Report No. 30.
[7] 14 Stat. L., p. 364.
[8] Journal, p. 1110.
[9] House Report No. 30, p. xviii.

362. The North Carolina election case of Charles Henry Foster in the Thirty-seventh Congress.

The House declined to seat a claimant chosen by a few people at an election wholly informal because of civil war.

The House declined to honor credentials regular in form, but referring to a constituency notoriously incapacitated by civil war.

Instance of a claim for a seat brought before the House by petition.

On July 13, 1861,[1] the petition of Charles Henry Foster, claiming to have been elected Representative from the First Congressional district of North Carolina, was presented and referred to the Committee on Elections. Mr. Foster apparently did not seek at this time to establish a prima facie right to the seat.

On December 2, 1861,[2] at the beginning of the next session (the regular long session), credentials in regular form were presented in behalf of Mr. Foster. These credentials referred to another election and had no reference to the petition of the preceding session. It was urged in behalf of Mr. Foster that a provisional government had been formed in North Carolina, that proclamation of the governor had been made calling an election, which had been duly held, and that Mr. Foster now presented the certificate of the governor under the broad seal of the State entitling him to the seat from the Second district.

Objection was made to the admission of Mr. Foster to the seat, and the papers were referred to the Committee on Elections, who had not reported on the memorial presented at the first session.

On December 18[3] the committee reported that Mr. Foster was not entitled to a seat either from the First or Second districts of North Carolina, his claim being founded upon imposition. The House agreed to this report without debate or division.

On March 6, 1862,[4] a memorial of 68 loyal electors of the Second district was presented asking the admission of Mr. Foster to the House. This memorial was referred to the Committee on Elections, who reported on June 16.[5]

In this report the committee say:

This is the fourth time that Mr. Foster has claimed to have been elected a Representative to the Thirty-seventh Congress from the State of North Carolina—twice from the First and twice from the Second district. On the 18th day of December last the House adopted without division the following resolution:

"Resolved, That Charles Henry Foster is not entitled to a seat in this House as a Representative in the Thirty-seventh Congress, either from the First or from the Second district of North Carolina."

The present claim is based entirely upon proceedings which have transpired since that date. Those proceedings consist of what purports to be a poll list of 81 votes cast for Mr. Foster at Chickamacomico precinct on the 16th February last, supported by a copy of a paper purporting to be signed by 30 citizens of Carteret County, "ratifying and approving" said election, and a copy of a resolution of like purport, supposed to have been adopted by some citizens—how many it is not known—of Craven County. The other voting presented to the committee were proceedings upon which a former election was claimed, which claim was unanimously rejected by the House.

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[1] First session Thirty-seventh Congress, Journal, p. 74; Globe, p. 115.

[2] Second session Thirty-seventh Congress, Journal, p. 7; Globe, p. 3.

[3] Journal, p. 88; Globe, p. 132.

[4] Journal, p. 413; Globe, p. 1103.

[5] House Report, No. 118.

The Second district of North Carolina is composed of the counties of Wayne, Edgecomb, Green, Pitt, Lenoir, Jones, Onslow, Carteret, Craven, Beaufort, and Hyde, and usually casts about 9,000 votes. The regular day of election was the first Thursday in August, 1861. There was no election for Members of Congress held on that day, because the whole State was at that time in the armed occupation of rebels.

The committee further say that since then some portions have been reclaimed and the authority of the Government asserted. But the claimant admitted that voting in any other precinct than that where the election occurred was impossible. The voting that did occur was without the slightest authority of law. No election was called, no writ of election issued. There was no governor of the State, provisional, military, or of any other character, except the Confederate governor.

The committee also found that the memorial of citizens of Carteret County was of an anomalous character, unworthy of effect as a legal document.

Therefore the committee recommended that Mr. Foster be considered not entitled to the seat. The House concurred in this report without division.[1]

363. The Virginia election cases of Joseph Segar, in the Thirty-seventh Congress.

The House refused to seat a claimant chosen by a mere fraction of the people, at an election informally called and held, in a district under duress of armed enemies.

The House declined to give prima facie title to the bearer of informal credentials referring to a constituency notoriously paralyzed by civil war.

A legislature being in existence, a constitutional convention may not fix the times, etc., of elections of Representatives.

On December 2, 1861,[2] Mr. Joseph Segar appeared with credentials in the form of a certificate of the vote cast, attested by a certificate from the provost marshal of the Federal camp, Hamilton, purporting to give him title to the seat from the First Congressional district of Virginia.

The House had admitted to seats Members elected under authority of the provisional government of Virginia, but in the case of Mr. Segar there arose a question as to what portion of the voters of the district had participated in that election. After debate the House declined to allow Mr. Segar the prima facie title to the seat, and referred his credentials to the Committee on Elections.

On January 20, 1862,[3] the committee made its report, recommending that Mr. Segar be not admitted to the seat. In this case, as in the case of Mr. Beach, the election was held under authority of a proclamation of Governor Pierpont. The committee state the facts as follows:

A convention assembled at Wheeling, in the State of Virginia, on the l1th of June last, in which were represented, it is believed, thirty-nine counties of the State, situate in what is known as Western Virginia. This convention adopted on the 19th of June "an ordinance for the reorganization of the State government," after having declared that, because of the treasonable practices and purposes of the State convention lately held in Richmond, and of the executive of the State in connection therewith, "the offices of all who adhere to the said convention and executive, whether legislative, executive, or judicial, are vacated." By the same ordinance a legislature, or general assembly, for the State of Virginia was created, and required to "assemble in the city of Wheeling on the 1st day of July, and

[1] Journal, p. 912; Globe, pp. 2879, 2880.

[2] Second session Thirty-seventh Congress, Journal, p. 7; Globe, p. 3.

[3] House Report No. 12; 1 Bartlett, pp. 415, 426; Rowell's Digest, pp. 179, 181.

proceed to organize themselves as prescribed by existing laws in their respective branches." Said convention subsequently elected a governor for the State of Virginia, who still holds the office thus conferred upon him.

The legislature thus created assembled as required and passed many enactments for the whole State of Virginia, elected two United States Senators, who were admitted to seats in the Senate, and assumed all the functions of the general assembly of Virginia under its preexisting constitution and laws. The convention which created and set in motion this new government did not, however, dissolve itself upon the assumption of the several functions of government by the executive officers and general assembly which, in the exercise of provisional powers, it had itself brought into being, but continued to hold its meeting after the assembling of the legislature and to share with it in ordinary legislation for the whole State. The legislature was in session till the 24th of July, and how much longer the committee are not informed. The convention was in session on the 20th of August, and on that day passed an ordinance providing for the election of Representatives in Congress in each district where from any cause such election was not held on the fourth Thursday in May last, the day provided by law for such election, and also "in the Eleventh district, where a vacancy now exists, an election for such Representative shall be held on the fourth Tuesday in October next, which shall be conducted and the result ascertained, declared and certified in the manner directed in the second edition of the Code of Virginia"

In accordance with the proclamation of Governor Pierpont, an election was held at Hampton, in Elizabeth County, on October 24, 1861, at which 25 votes were cast for Mr. Segar. A certificate of these votes, signed by the election officers and certified by the provost-marshal of Camp Hamilton, were the only credentials presented by Mr. Segar on December 2. On a subsequent day of the session he presented credentials signed by the governor and attested under seal of the Commonwealth.

There was also presented the proceedings of a meeting on Chincoteague Island, at which 136 citizens expressed, on December 10, a preference for Mr. Segar, but Mr. Segar did not rely on this. He based his claim on the 25 votes cast at Hampton, claiming that his claim was strictly legal.

The committee say:

The committee have been led to investigate this claim of legality. The whole authority for this election is the ordinance of the Wheeling convention passed August 20. Assuming that the proceedings of that convention, and of the legislature and executive created by it, have ripened into a State government, legal in all respects, still the question arises, Was it one of the functions of that convention to provide for the time, place, and manner of electing Representatives in Congress, especially after the legislature had assembled? The purpose of that convention was the creation of a new State government. The only basis upon which it rests is necessity.

A new government must begin somewhere, and there must be somebody to make it. As necessity was the foundation, so also it was the limit of the power called into being for the sole purpose of inaugurating a new government. It could do anything necessary to carry out that purpose, and when that was done it could do no more. Its functions ceased the moment the new government took on form and life. The two can not, in the nature of things, exist and move pari passu. Now, long before this ordinance had passed the convention there was in existence a governor and a legislature, having all the powers that a governor and legislature could have in Virginia—that is, all the powers which the constitution of Virginia clothes a governor and legislature with not in conflict with the Constitution of the United States. Now, this latter instrument provides (art. 1, sec. 4) that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof." It is a legislative act. It is a law. * * * But this time and manner were not fixed in the organic act nor by the legislature, but by the convention assuming legislative functions in the presence of the legislature itself.

Again, the ordinance itself proposes to conform this election to the Code of Virginia. It "shall

be conducted and the result ascertained, declared, and certified in the manner directed in the second edition of the Code of Virginia." Has the election under consideration been conducted in all respects according to the requirements of the Virginia Code? Title 3, chapter 7, section 11, of that code provides for elections to fill vacancies in Congress and enacts that they "shall be superintended and held by the same officers, under the same penalties, and subject to the same regulations as are prescribed for the general elections." Section 12 of the same chapter provides that "a writ of election shall be directed to the sheriff or sergeant of the county or corporation for which the election is to be held; or if the election is to be held for an election district, or to fill a vacancy in the Senate or in Congress, to the several sheriffs and sergeants of the counties and corporations which, or any parts of which, are included in the district. It shall prescribe the day of election (to be the same throughout the district), and may fix a day on which the officers conducting the election are to meet to make returns, not later than that fixed by law in the case of a regular election."

The committee further go on to show that in this case there was nothing which answered to a writ of election; but that the governor in his proclamation simply "entreats the loyal voters," and addressed it not to the sheriffs, but "to the people of Virginia."

In this case it was admitted that there was no election in any other place than Hampton, as notice could not pass beyond the enemy's lines to other parts of the district. Moreover, the notice was apparently brought to Hampton through the medium of a newspaper publication and a private letter.

The committee concluded that the claim of Mr. Segar could not be maintained if it rested on the plea of a strict conformity with all the provisions of law.

But the committee do not rest their conclusions on so narrow a basis. They say:

If the Union voters of the district had had an opportunity to chose a Representative—if there had been no armed occupation of the district by rebels so that polls could have been opened at the various voting places in the district, and all who desired could have deposited their ballots, and had done so in conformity with the provisions of law, so far as the disturbed and abnormal condition of things would permit, the committee would have sought some way to give effect to such election. But enough of the facts surrounding this election have already been stated to show that such is not the case. There was but one single poll in the whole district opened, and but 25 votes cast. The reason why there were no other polls opened or more votes cast can not be better expressed than by the three freeholders themselves who certify to this election. This is their language:

"And we do further certify that there was no poll opened at any other precinct in said county; and that so far as we can learn and confidently believe there was no poll opened or election held for Member of Congress in any other county or city or town of said First Congressional district, owing to the fact that all the other counties and election precincts of said Congressional district were, on the 24th day of October last, within the lines and under the influence and control of the seceding and rebel States."

This state of things is no fault of the memorialist or the Union voters of the district, but it did exist on the day of this election. How can it be made to appear, then, that the memorialist is the choice of the district, or that if an opportunity had existed an overwhelming majority of votes would not have been cast against him? In what sense can it be said that those who did not vote are to be presumed to acquiesce, when they neither had the opportunity to vote nor the knowledge that voting was going on? Acquiescence presumes liberty to protest. In this instance that liberty did not exist.

On February 10 and 11,[1] the report was debated at length in the House.

On February 11[2] a motion was made to substitute for the proposition of the

[1] Globe, pp. 727, 751.

[2] Journal, pp. 295, 296; Globe, pp. 759, 760.

committee a declaration that Mr. Segar was entitled to the seat. This was decided in the negative—yeas 40, nays 85.

Then the resolution of the committee declaring Mr. Segar not entitled to the seat was agreed to without division.

364. The Virginia election case of Joseph Segar, continued.

An instance wherein the House recognized an election legal in form, but participated in by a small fraction of the voters, the district being disturbed by civil war.

The House declined to give prima facie effect to regular credentials, having historic knowledge that the district was incapacitated by civil war from holding a regular election.

Instance wherein a committee unable to agree reported this fact to the House, and it became a basis for action.

On March 24, 1862,[1] the credentials of Mr. Segar were presented again, he claiming to have been elected at another election held March 15, 1862.

It was claimed and not disputed that the certificate presented was in the form required by law, but it was objected that the House knew from the report of the committee on the state of affairs in Virginia that no election could have been held in that State on March 15, 1862.

Then, without division, the credentials were referred to the Committee on Elections.

On April 14[2] the committee reported the following facts:

That those credentials, a copy of which is annexed, consist of a certificate signed by "William Mears, conductor at the court-house at Northampton," "Michael H. Higgins, conductor at the court-house of Accomac," and "John O. Evans, conductor at the court-house of Elizabeth City," dated the 22d day of March last, certifying that at an election held on the 15th day of said March in the several counties composing said district the claimant was duly elected to represent the same in the Congress of the United States. Mr. Segar also presented to the committee during the hearing a proclamation by Governor Pierpoint to the same effect, of date the 26th day of March last, a copy of which is also annexed. The First Congressional district is composed of seventeen counties, viz, Middlesex, Westmoreland, Richmond, Essex, Northumberland, King and Queen, Lancaster, Gloucester, James City, the City of Williamsburg, New Kent, York, Warwick, Northampton, Accomac, and Elizabeth City. Governor Pierpoint. issued writs of election in due form of law on the 24th day of February, 1862, directed to the sheriffs of the several counties composing this district, requiring them to hold an election for Representative to this Congress on said 15th day of March. The claimant stated to the committee that he himself took these writs of election to the sheriffs of the counties of Accomac, Northampton, and Elizabeth City, and that in one of these counties he saw the sheriff post up notice of the election at the several election precincts more than ten days before the day of the election, and in the others he saw the notices after they were put up, but whether they were up the time required by law he does not know. But no writs of election reached the sheriffs in the other fourteen counties, nor was any notice of election given, or any election held, at any precinct in any of the other fourteen counties in the district, for the reason that all the other counties were at the time of the election, and had been for a long time, in possession of the rebel army, and the rebel authorities had proclaimed martial law over them. For the same reason no election was held in Elizabeth City County, except at one precinct, Hampton. Notice to the sheriffs of these counties, to the people thereof, the opening of a poll or the casting of a vote at any precinct in any one of them, were all impossibilities.

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[1] Journal, p. 472; Globe, p. 1339.

[2] House Report, No. 70; 1 Bartlett, p. 415.

There were cast at this election in the several voting precincts of Accomac and Northampton counties, and at Hampton, in Elizabeth City County, as appears by the several annexed certificates from commissioners in said counties, in all 1,018 votes.

The committee further found that Mr. Segar had 559 of the total, Arthur Watson 438, and all others 21.

The vote of the whole district for governor at the May election of 1859 was 7,986, and the population of the whole district in 1860 was 122,017.

In all the counties where the election in question was held there were 32,216 inhabitants. This included the county of Elizabeth City, in which only one poll was opened.

The counties occupied by the hostile army at the time the election was held and under martial law had 89,001 population. The committee say:

The committee have no means of knowing, other than may be inferred from the foregoing figures, what portion of the 7,986 electors, who cast their votes in that district for governor, reside in the three counties where this election was held, or bow many of them resided at the time in the fourteen counties where it was impossible to hold any election.

Upon these facts the committee were unable to agree upon any recommendation to the House. They therefore ask to be discharged from further consideration of the subject, and report the following resolution:

Resolved, That the Committee of Elections, to whom were referred the credentials of Toseph Segar, claimin a seat in this House as a Representative from the First district in Virginia, be discharged from the further consideration of the subject.

On May 6[1] the question came before the House, and Mr. Henry L. Dawes, of Massachusetts, chairman of the committee, in presenting the case, said:

The difficulty which the Committee on Elections encountered was this: They have laid down a principle heretofore, and the House has acted upon it in several cases which have been brought before the House, that if the voters of a district had an opportunity to vote, if there was no restraint upon them so that they could vote, he who had the highest number of votes is entitled to a seat, whether the votes be few or whether they be many; and the question is whether this case came within that rule.

Here were only three counties out of seventeen, and although they are large counties, they contain a little over 30,000 out of the 122,000 of all the inhabitants, and there were polled only one-eighth of all the votes. Whether it could be said that in the other fourteen counties, which were in the occupation of the rebel armies, the voters could not go to the polls and express their opinion at all, or not, or whether it could be said that the voters of these three counties, numbering about 1,000, expressed the wish or desire of the voters in the other counties so nearly and so fairly that, under the present state of things in Virginia, it is right or proper to admit this man to a seat, is a question which the committee felt disposed to bring before the House to let them pass upon it.

* * * All that the committee desire is that the House shall say when that state of things [the restoration of order in Virginia], all things considered, shall have been so nearly approached as that it shall be safe and proper to admit as a Representative upon this floor, from the First district of Virginia, or from any other district situated as that district is, a man who has received but little more than one-half of one-eighth of the votes of the whole district, and that, too, under circumstances such that the committee was not clear to say that the others could be said, in law or in fact, to have been free, or had the opportunity to vote if they had seen fit.

In the course of the debate the point was made, with effect, that all the provisions of law were followed in holding the election, although after the elections it had been impossible wholly to comply with the required forms. And after the subject had been referred to the Committee on Elections Mr. Segar had presented credentials

[1] Globe, pp. 1971, 1972.

from Governor Pierpont, of Virginia. It was urged that as all the departments of the National Government had recognized the government of Governor Pierpont, that certificate had exactly the same force as that of any other Representative on the floor from any State. It constituted prima facie evidence, and the House was not called on to investigate critically the merits of the case.

The House, by a vote of yeas 71, nays 47, substituted for the resolution of the committee a resolution that Mr. Segar be admitted to a seat as a Representative from the First district of Virginia.[1]

Mr. Segar then appeared and qualified.

365. The Tennessee election case of Andrew J. Clements in the Thirty-seventh Congress.

The House seated a loyal claimant voted for at an election called on the legal day, but by the governor of a State in secession.

Instance of an election proven by testimony of participants, the returning officers serving a secession government and making no return.

The House seated a claimant who had received a third of the votes of a district, the remainder being cast for candidates for a secessionist Congress.

The House declined to give prima facie effect to informal papers referring to an election in a district known to be under duress of civil war.

On January 13, 1862,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee of Elections, reported in the case of Andrew J. Clements, who claimed to have been elected in the Fourth district of Tennessee. Mr. Clements had first appeared in the House on December 3, 1861,[3] and a motion had been made to allow him to take a seat on his prima facie right; but the House decided that his papers should be referred to the Committee of Elections before he should be allowed to take his seat.

The report states sufficiently the facts. Previous to the day for the election of Congressmen, the first Thursday of August, 1861, the State of Tennessee had perfected its acts of secession, and the governor of the State had ordered an election for the choice of delegates to the provisional congress of the Confederacy. The day was the same as that fixed by the constitution and laws of the State for the election of Representatives to the Congress of the United States, the first Thursday of August.

In four of the ten districts of the State the Union men disregarded the acts of secession and cast their ballots for Representatives to the Congress of the United States. One of the districts was that which Mr. Clements sought to represent. The report says further of him:

> He brings no certificate from the governor of Tennessee; but the refusal of the governor of Tennessee to grant a certificate of election to one entitled to it can not prejudice his right to it. (Richards's case, Hall & Clark, 95.) It may and has put him to the trouble of substantiating the fact of his election by

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[1] Journal, p. 649; Globe, p. 1872.

[2] Second session Thirty-seventh Congress, House Report No. 9; 1 Bartlett, p. 366; Rowell's Digest, p. 174.

[3] Globe, p. 6. Mr. Horace Maynard, of Tennessee, on December 2, 1861, had been sworn in on the presentation of the certificates of the several counties in his district. Mr. Clements did not have the same prima facie evidence.

other evidence before he can take his seat. The memorialist has presented the proper certificate of the sheriff of one county (Macon County) that he received in that county 433 votes. The sheriffs of the other counties in the district failed or refused to make returns of the votes cast for him in their respective counties, being themselves either open rebels or in sympathy with the rebellion. But the statutes of Tennessee themselves, as well as the precedents of Congress, have provided for this emergency by enacting that "if the judges fail to return the poll books or list of votes, or copies of them certified as aforesaid, the same may be proved by other creditable testimony, and received as evidence in any case arising out of said election." (Code of Tenn., sec. 870.) In accordance with this provision the memorialist presented evidence before the committee to satisfy them that he had received, in addition to the 433 returned by the sheriff of Macon County, votes in each of the other counties comprising the district, except Warren, amounting in the aggregate to more than 1,500 votes; making in all about 2,000 votes. The proof of this has been exceedingly difficult, because of the fact that the indignation of the secessionists against the memorialist for permitting himself to be a candidate rose to such a pitch immediately after the election that he was obliged to flee from the State to escape assassination, and has not been able to return to it since. But he has furnished from the volunteers, now in the service of their country in Kentucky, who were his constituents and voted for him in Tennessee before leaving their State for the war, and from other testimony, evidence which has satisfied the committee of the fact. The committee are also satisfied that on the day of election there was an armed rebel force present in the district preventing or restraining the voters from the exercise of the elective franchise, and that though a violent and bitter public sentiment existed, calculated to overawe and intimidate, yet the rebel forces had not up to that time so taken possession of the district as to prevent such voters as chose so to do to deposit their votes for a Representative in this Congress. The ordinary vote of the district is about 6,000; and then there were at the same time two candidates running for the Confederate congress, but no other candidate except the memorialist for the Congress of the United States.

In conclusion, the committee, upon the whole evidence, find that on the day of election no armed force prevented any considerable number of voters in any part of the district from going to the polls, and that on that day, in conformity with the forms of law, 2,000 votes at least were cast for the memorialist as a Representative to this Congress, and none, so far as the committee know, for any other person. They therefore report the following resolution, and recommend its adoption:

Resolved, That Andrew J. Clements is entitled to a seat in this House as a Representative in the Thirty-seventh Congress from the Fourth district in Tennessee.

The House, on the same day the report was presented, agreed to it without division.[1]

Mr. Clements thereupon appeared and took the oath.

366. The Virginia election case of Charles H. Upton, in the Thirty-seventh Congress.

The House unseated a person chosen by a few votes, at an election wholly informal, in a district almost entirely under duress of civil war.

Instance wherein, by majority vote, the House unseated a person whose title was not contested but whose election was invalid.

The presumption that those who do not go to the polls acquiesce does not apply where a condition of civil war prevents due notice of election.

An exceptional case wherein the Clerk, without sufficient evidence, enrolled a person who participated for a time as a Member.

An examination of qualifications of a Member-elect as to inhabitancy.

On January 30, 1862,[2] the Committee of Elections, in accordance with the direction of the House, reported on the eligibility of and the circumstances attending the election of Charles H. Upton, who at the preceding session had, on his prima

[1] Globe, p. 297; Journal, p. 166.

[2] Second session Thirty-seventh Congress, House Report No. 17; 1 Bartlett, p. 368; Rowell's Digest, p. 174.

facie right, been admitted to a seat as a Representative of the Seventh Congressional district of Virginia.[1] The election at which he claimed to have been elected was held on May 23, 1861. As to whether or not he was eligible the committee say:

It appears from the facts admitted in the case and the testimony submitted to the committee that the incumbent for the last twenty-five years has been a freeholder in the State of Virginia, having himself for the most of that time been a resident and inhabitant of the county of Fairfax, where he and his family were domiciled. For sometime prior to the month of November, 1860, the incumbent himself had lived at Zanesville, in the State of Ohio, where he owned an interest in and had been engaged in conducting a daily newspaper, and it was shown that he voted at that place at the annual State election in October, and again at the Presidential election in November of the same year. Under the law of Ohio in force at that time the legal right to vote at either of those elections would necessarily imply a previous residence in that State of one year at least. But the evidence adduced upon this point satisfied the committee that in the month of November, soon after the Presidential election, he returned to his previous residence in the county of Fairfax, where his family had remained and then was. From that time to the month of June last he continued to be a resident and inhabitant of the State of Virginia, and consequently not ineligible, on account of the objection in question, as a candidate for Congress from that State at the date above referred to.

As to the conditions prevailing in the district the committee show at the outset that on May 14, 1861, the secession of Virginia from the Union had been perfected, so far as it could be perfected, by the formal admission of the State to the Southern Confederacy. On the 24th of the preceding April the State convention which framed the ordinance of secession had passed the following ordinance:

The election for Members of Congress for this State to the House of Representatives of the Congress of the United States, required by law to be held on the fourth Thursday of May next, is hereby suspended and prohibited until otherwise ordained by this convention.

The committee held that although the acts of secession and the above ordinance "were usurpations upon the rights" of the people of Virginia, and in nature revolutionary, yet it appeared "that they were generally acquiesced in by a very large majority of the people in the whole of the eastern part of the State." The memorial of the incumbent showed to the committee that this was the fact throughout his district. The committee then say:

The law of the State providing for the election of Members of Congress on the 23d of May was regarded and treated by the governor, sheriffs, commissioners, and other officers charged with the duty of seeing it carried into effect, with the exception at most of those of a single election precinct, as suspended and for the time being as practically repealed. This course of the election officers appears to have been adopted and pursued without remonstrance or objection from any considerable number of the people of the Seventh Congressional district. The great body of the people in the district seem to have acted upon the belief that on the 23d of May there was no law in force in the State which would enable them, if so disposed, to elect a Member of Congress, nor was there any evidence before the committee that any very considerable number, if they have had the power, would have had the inclination to exercise it. Such being the state of the district, it is a question well worthy of grave consideration whether its political condition was such that any election for a Member of Congress at that time should be held legally valid either under the law of Virginia or of the United States, even were the evidence of such election clothed with all the ordinary forms of law.

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[1] On February 26, 1862, in debate Mr. Henry L. Dawes, of Massachusetts, said that Mr. Upton came without certificate of any man touching his right to the seat, and by personal influence only induced the Clerk of the last House to put his name on the roll of Members elect, "without the slightest evidence in the world."

Mr. Upton had advertised himself as a candidate, and had called on the Union men to open "side polls" on election day and vote for him for Congress. It was claimed that such "side polls" were opened at five different voting precincts, at which he received 95 votes. Certain documents were presented containing lists of persons who subscribed to statements reciting that they had been deterred by threats or deprived of the opportunity of voting, and "therefore voted" for Mr. Upton. The committee found that "the votes claimed to have been cast at these 'side polls' were not cast in conformity with any law at that time or heretofore in force in Virginia for the election of candidates for Congress; they were not given at the place of voting in the precinct, nor received by any election officer, nor certified or authenticated by any magistrate or commissioner or conductor of an election, nor proved by the oath of any witness." The committee therefore took no account of these votes.

But from a precinct called Ball's Cross Roads a copy of a so-called poll book was certified, and this showed 10 votes cast for Mr. Upton for Congress. The committee found that this poll book was not authenticated "in due form, or in such manner as to make its contents evidence for any purpose" as would appear by reference to the election laws of Virginia. The State being in rebellion, the returns could not be delivered to the county sheriff, and the return officers could not make out the certificate required by law to be transmitted to the Governor. Armed men had been at the polls at the Cross Roads, and had evidently intimidated voters who might have wished to vote for Mr. Upton.

The committee say further—

> In the view the committee have taken of this case, they have not deemed it necessary for them to express any opinion upon the question whether, in a Congressional district containing from 6,000 to 8,000 legal voters, the votes of so few as 10 electors, even if properly authenticated and clothed with all the forms of law, would furnish that evidence of a claim to a seat in this House that ought to be regarded as conclusive of the title. The proper time to determine this question will be when a case shall arise that makes a decision of it more indispensable than the one now submitted to the committee.
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> It was very apparent, from the evidence before the committee, that but a very small portion of the voters in this Congressional district could have been in any way apprised that the incumbent was, on the 23d day of May, a candidate for Congress. It is probable, from the testimony, that not one voter in ten, of the whole number, could have known at the time that the incumbent, or any other candidate, was seeking an election to that office.
>
> What the legal effect of this general ignorance and want of notice to the voters would be in itself, considered independently of all forms of law, is a matter of very great doubt and well worth grave consideration. Election implies choice, and choice a state of mind in reference to the object of it the reverse of ignorance. With what propriety a person may be said to be elected or chosen as a Representative to Congress in a district in which nine-tenths of those interested in the election had no knowledge that he or anyone else was a candidate, we do not readily or clearly see. If it should be suggested that those who do not go to the polls are presumed to acquiesce in the action of those who do, would not that presumption be sufficiently rebutted by the proof that those who did not go were not only ignorant of the election, but acted under the belief that no election at the time could be legally held?

Accordingly, the committee reported a resolution that Mr. Upton was not entitled to the seat.

When the report came up in the House on February 26 and 27,[1] there was a long debate on the question suggested by the committee as to the size of the elect-

[1] Globe, pp. 975, 1001.

orate. It was urged that there was no law of Virginia requiring for the election of a Member of Congress the votes of any specified proportion of the voters, and that any number of voters attempting under form or color of law to give expression to the will of the people might be sufficient to exercise the power.

On the other hand, it was argued that while the forms of law might be put aside when necessary to allow the voices of the voters to be heard, in this case it was proposed to waive all the requirements of law to give effect to the voices of ten men.

On February 27,[1] a motion was made to amend the resolution proposed by the committee so as to declare Mr. Upton entitled to the seat. This amendment was defeated, yeas 50, nays 73. Then the resolutions declaring Mr. Upton not entitled to the seat was agreed to.

In the debate the point was made that the unseating of Mr. Upton, in a case where there was no contestant to be seated, was virtually expulsion; but this point did not figure largely, as there was no serious questioning of the right of the House to investigate the titles of its Members to their seats.

367. The Virginia election case of Samuel F. Beach, in the Thirty-seventh Congress.

The House decided against the validity of an election informally held and participated in by only a few voters, most of the district being occupied by an armed enemy.

The presumption that those who do not go to the polls acquiesce does not apply where a condition of civil war prevents due notice of election.

A legislature being in existence, a constitutional convention may not fix the times, etc., of elections of Representatives.

On March 3, 1862,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, reported on the memorial of Mr. Samuel Ferguson Beach, who claimed to represent the Seventh district of Virginia. Mr. Beach's certificate showed that on October 24, 1861, at an election held at the court-house at Alexandria, he received 138 votes, and that Charles B. Shirley, his opponent, received 11 votes; that no other polls of election were opened in the district, as all other portions than the vicinity of Alexandria were within the lines of a hostile force. The credentials were signed by the conductor and two commissioners who were officers of the election, and were addressed to "His Excellency Francis H. Pierpont, Governor of the State of Virginia."

The conditions under which the election had been held were thus described by the committee:

A convention assembled at Wheeling, in the State of Virginia, on the 11th of June last, in which were represented, it is believed, thirty-nine counties of the State, situate in what is known as Western Virginia. This convention adopted on the 19th of June "an ordinance for the reorganization of the State government," after having declared that, because of the treasonable practices and purposes of the State convention lately held in Richmond, and of the executive of the State in connection therewith, "the offices of all who adhere to the said convention and executive, whether legislative, executive, or judicial, are vacated." By the same ordinance a legislature, or general assembly, for the State of Virginia was

[1] Journal, p. 369.

[2] Second session Thirty-seventh Congress, Report No. 42; 1 Bartlett, p. 391; Rowell's Digest, p. 176.

created, and required to "assemble in the city of Wheeling on the 1st day of July, and proceed to organize themselves as prescribed by existing laws in their respective branches." Said convention subsequently elected a governor for the State of Virginia, who still holds the office thus conferred upon him.

The legislature thus created assembled as required, and passed many enactments for the whole State of Virginia, elected two United States Senators, who were admitted to seats in the Senate, and assumed all the functions of the general assembly of Virginia under its preexisting constitution and laws. The convention which created and set in motion this new government did not, however, dissolve itself upon the assumption of the several functions of government by the executive officers and general assembly which, in the exercise of provisional powers, it had itself brought into being, but continued to hold its meetings after the assembling of the legislature, and to share with it in ordinary legislation for the whole State. The legislature was in session till the 24th of July, and how much longer the committee are not informed. The convention was in session on the 20th of August, and on that day passed an ordinance providing for the election of Representatives in Congress in each district where, from any cause, such election was not held on the fourth Thursday in May last, the day provided by law for such election, and also "in the Eleventh district, where a vacancy now exists, an election for such Representative shall be held on the fourth Tuesday in October next, which shall be conducted, and the result ascertained, declared, and certified in the manner directed in the second edition of the Code of Virginia."

Thereupon, on October 12, Governor Pierpont issued a proclamation, to carry out the ordinance of the convention, and closed with the statement that he did "hereby entreat the loyal voters of this State to hold elections in their several districts," etc.

Such was the authority under which the election was held. Mr. Beach claimed "that the ballot box knows no quorum, and that the number of votes cast is not a legitimate inquiry beyond the necessity of ascertaining for whom a majority was given."

The committee examined two questions on which the determination of the case depended: *(a)* The legality of the election in a technical sense; and *(b)* the acquiescence of the constituency.

As to the legality of the election, the committee examined first the authority under which the election was called. They say in their report:

The whole authority for this election is the ordinance of the Wheeling convention passed August 20. Assuming that the proceedings of that convention, and of the legislature and executive created by it, have ripened into a State government, legal in all respects, still the question arises, was it one of the functions of that convention to provide for the time, place, and manner of electing Representatives in Congress, especially after the legislature had assembled? The purpose of that convention was the creation of a new State government. The only basis upon which it rests is necessity.

A new government must begin somewhere, and there must be somebody to make it. As necessity was the foundation, so also it was the limit of the power called into being for the sole purpose of inaugurating a new government. It could do anything necessary to carry out that purpose, and when that was done it could do no more. Its functions ceased the moment the new government took on form and life. The two can not, in the nature of things, exist and move pari passu. Now, long before this ordinance had passed the convention there was in existence a governor and a legislature, having all the powers that a governor and legislature could have in Virginia—that is, all the powers which the constitution of Virginia clothes a governor and legislature with, not in conflict with the Constitution of the United States.

Now, this latter instrument provides (art. 1, sec. 4) that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislatures thereof." It is a legislative act. It is a law. If the time had been fixed in the constitution of the State, recognized and acquiesced in by the legislature, it may be said to be the act of the lawmaking power—a legislative act. But this time and manner were not fixed in the organic act, nor by the legislature, but by the convention assuming legislative functions in the presence of the legislature itself.

Further discussing the legality of the election, the committee point out numerous particulars in which the election failed to be carried out in conformity with the Code of Virginia, which the convention prescribed as the guide. The governor had directed no writ of election to the sheriffs, but had simply entreated the loyal voters, the election had not been advertised over the district, the vote had not been canvassed and proclaimed.

Therefore the committee concluded that if the claim of the memorialist rested exclusively on a strict conformity with all the provisions of law, it could not be maintained.

The committee, however, continue:

But the committee do not desire to rest their conclusions upon so narrow a basis. If the Union voters of the district had had an opportunity to choose a Representative, if there had been no armed occupation of the district by rebels, so that polls could have been opened at the various voting places in the district, and all who desired could have deposited their ballots, and had done so in conformity with the provisions of law, so far as the disturbed and abnormal condition of things would permit, the committee would have sought some way to give effect to such election. But enough of the facts surrounding this election have already been stated to show that such is not the case. There was but one single poll in the whole district opened, and but 149 votes cast. The reason why there were no other polls opened or more votes cast can not be better expressed than by the three freeholders themselves who certify to this election. This is their language:

"And we further certify that there were no other polls of election held at any other precinct in said county of Alexandria, nor in any other of the counties of this Congressional district, as far as we can learn and believe; and that all the other counties of this Congressional district are, and were at the time of said election, included within the lines of the rebel army."

This state of things is no fault of the memorialist or the Union voters of the district; but it did exist on the day of this election. How can it be made to appear, then, that the memorialist is the choice of the district, or that if an opportunity had existed an overwhelming majority of votes would not have been cast against him? In what sense can it be said that those who did not vote are to be presumed to acquiesce, when they neither had the opportunity to vote nor the knowledge that voting was going on? Acquiescence presumes liberty to protest. In this instance that liberty did not exist.

Therefore the committee recommended the adoption of a resolution declaring that Mr. Beach was not entitled to the seat claimed by him.

On March 31, 1862,[1] the report of the committee was agreed to by the House, without debate or division.

368. The Virginia election case of Wing v. McCloud in the Thirty-seventh Congress.

The House declared invalid an election informally held and participated in by a small fraction only of the voters, the district being largely occupied by an armed enemy.

The House declined to seat on prima facie showing a claimant declared elected by the governor's proclamation, the district referred to being notoriously under duress of civil war.

On January 8, 1863[2] the credentials of Mr. John B. McCloud, as Representative-elect from the Second Congressional district of Virginia, were presented to the House, and a motion was made that he be permitted to take the oath. This certificate was in the form of a proclamation of Governor Pierpont, of Virginia, declaring Mr. McCloud duly elected.

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[1] Journal, p. 490; Globe, p. 1452.

[2] Third session Thirty-seventh Congress, Journal, p. 165; Globe, p. 237.

Objection being made, the credentials were referred to the Committee on Elections, and the oath was not administered. The House, however, allowed the privilege of the floor to Mr. McCloud, as was customary in the cases of contestants and claimants for seats.

On February 4[1] the committee reported both on the claim of Mr. McCloud and also the claim of Mr. W. W. Wing, who contested the election on the ground that certain ballots had been improperly counted for Mr. McCloud, thereby violating the Virginia law requiring viva voce voting.

The committee found it unnecessary to go into this controversy, since the validity of the entire proceeding was in doubt.

The Second district of Virginia was composed of ten counties and Norfolk city. The election occurred December 22, 1862, and in all 1,402 votes were cast, 645 for Mr. McCloud, 621 for Mr. Wing, and 136 for other candidates.

The election was called by proclamation of "John A. Dix, Major-General," and was held in precincts in four counties by election officers appointed by "Egbert L. Viele, Brigadier-General and Military Governor." In addition there were writs of Governor Pierpont directed "To the sheriff, or any constable, or to any freeholder" in the county, and requiring them to hold an election. The committee say in regard to the proceeding:

It is difficult to imagine a proceeding so entirely in disregard of the requirements of the law of this State as this election. Whether authority for it be sought in the proclamation of Major-General Dix, "commanding the department of Virginia," or in that of Brigadier-General Viele, "military governor of Norfolk," or in the writs of election issued by Francis H. Pierpoint, governor of the Commonwealth of Virginia, or in all three combined, it is equally in conflict with the plainest provisions of the law of the State. What territory in Virginia the "department of Virginia" embraces the committee are not informed; so that they are unable to say that it did or did not embrace the Second Congressional district. The committee are also ignorant of the source from whence General Dix obtained authority to call an election at all. He does not purport to call it as military governor, who is clothed to some extent with civil as well as military powers. The committee are not aware that General Dix assumes to discharge any other civil functions whatever. But the proclamation itself undertakes to prescribe the qualifications which alone would entitle a man to vote at this election, when the Constitution of the United States and of Virginia have fixed the qualification of voters for Representative to Congress, and these qualifications can not be added to or taken from.

Article 1, section 2, of the Constitution of the United States is as follows:

"The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

And the constitution of Virginia provides, article 3, section 1:

"Every white male citizen of the Commonwealth, of the age of 21 years, who has been a resident of the State for two years, and of the county, city, or town where he offers to vote for twelve months next preceding an election, and no other person, shall be qualified to vote for members of the general assembly."

And section 4 provides, as already cited, that "in all elections votes shall be given openly, or viva voce, and not by ballot."

A comparison of these several provisions with the proclamation of General Dix will show the departure and conflict without any comment or inquiry into the authority for issuing it.

The proclamation of General Viele seems to have been in aid of that of General Dix. It is issued by him as "military governor of Norfolk." The committee have failed to obtain the instructions to General Dix in this matter, and are equally ignorant of the extent of jurisdiction of the military gov-

[1] Report No. 23; 1 Bartlett, p. 455; Rowell's Digest, p. 182.

ernor of Norfolk. If anything can be learned from his title, it is confined either to the city or county of Norfolk. If that be so, he could hardly interfere in this election with the counties of Princess Ann, Nansemond, or Isle of Wight. But he not only appointed commissioners of election in the county of Norfolk, but also in the other counties already named, and required all from all these counties to make returns to "these headquarters within three days subsequent to the election." The statutes of Virginia require these commissioners to be appointed by the court of each county, and require them to make returns to the clerks of the county courts of their respective counties, and they to the clerk of the county of Isle of Wight, and he declares the result. But it seems that this proclamation, like that of General Dix, was confined to four out of the eleven counties of this district. There is no authority of law for this selection, and it is supposed to have been induced by necessity, the remainder of the district being within the rebel lines. But whatever the reason, the House can at once see the danger if it were permitted. If certain counties may be selected in a district, and others omitted in the issue of writs of elections, then the control of the representation must rest with the power of selection. It should be sufficient, however, that the law does not sanction any such selection, and requires the issue of writs to the proper officers of all the counties.

But the writs of Francis H. Pierpoint, governor of the Commonwealth of Virginia, were also issued in this case, as has been already said. There were none of them sent to any county in the district except the four already named, and therefore all that has been said touching the same proceeding under the proclamations of General Dix and General Viele has equal force here. But these writs, although bearing date the 12th of December and calling originally for an election upon Saturday, the 27th day of December, were first brought into the district on Saturday, the 20th, and delivered on Sunday, the 21st, to one of the candidates for distribution, and then by erasions and insertions made at some time—the committee do not know when—they became writs for an election on the next day that is, on Monday, the 22d day of December, and they were so distributed that day. Now, it is expressly enacted by the statutes of Virginia that "every officer to whom a writ of election is directed shall, at least ten days before such election, give notice thereof, and of the time of the election, by advertisement at each place of voting in his county or corporation." With this plain and express provision of law before them the committee are at a loss for any explanation of the reason of delivering these writs on Sunday for an election the next day, except that given to the candidate at the time of their delivery by General Samuels, the messenger who brought them, as stated to the committee by Mr. Wing himself, viz, "to give a semblance of legality to the election," Whatever may have been the reason for this proceeding, the proceeding itself will have a tendency to invoke the closest scrutiny on the part of the House into the regularity of each successive step in all elections held under the circumstances which attend this.

But turning from an examination of the conformity to legal requirements in this election to the question whether the voters of this district, conforming as nearly to law as possible, have, unrestrained and unawed by the presence of any considerable rebel force, had full and fair opportunity to express their choice of a Representative, the committee find that but 1,402 votes in all were cast in a district usually polling about 10,000 votes; that of the eleven counties composing this district polls were opened in only four of them, and not in every precinct in these four, for the reason that they were in the armed occupation of the rebels. No polls could, therefore, be opened, and not a single voter—be the number what it may in this much the greater portion of the district—could cast a vote, or in any way have a voice in the selection of a Representative. According to the uniform rule adopted by the committee and sustained by the House this has failed, in any just sense, to be the election of a Representative from the Second district in Virginia. The committee, therefore, report adversely upon the right of either claimant to the seat.

Therefore the committee concluded that neither Mr. Wing nor Mr. McCloud was entitled to the seat.

On February 14,[1] in the debate, it was stated that the testimony of Governor Pierpont had been taken since the report was written, and it appeared that the alteration in the writs had been made by military officers.

The House, without division, agreed to the report of the committee.[2]

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[1] Globe, p. 963.

[2] Journal, p. 400.

369. The North Carolina election case of Jennings Pigott in the Thirty-seventh Congress.

In time of civil war an election participated in by a small number of loyal voters was held invalid, more than two-thirds of the district being unable to participate.

The House declined to give prima facie effect to irregular credentials referring to a district notoriously under duress of civil war.

A mere sojourner in a State was held not to be qualified as an inhabitant to represent a district in Congress.

On January 15, 1863,[1] the credentials of Jennings Pigott, claiming to have been elected to the House from the Second district of North Carolina, were presented and the suggestion was made that Mr. Pigott be sworn in. But the House referred the credentials to the Committee on Elections, and the oath was not administered.

On February 14,[2] the committee reported, finding that Mr. Pigott claimed to have been elected January 1, 1863, by virtue of a proclamation issued by Edward Stanley, military governor of North Carolina. The committee do not consider the legality of that action, or, in fact, of any of the steps taken in pursuance of that proclamation. They consider only (*a*) the numbers of loyal voters participating in the election, and (*b*) the qualifications of the claimant.

As to the election, the committee find that the whole number of votes cast was 864, of which Mr. Pigott received 595. There was voting in only three of the eleven counties composing the district, and in one of the three there was voting in only one precinct. And there were many voting places in the three counties where no polls were opened or notice taken of the election. Generally, the presence of armed enemies prevented the opening of these polls, and the remaining eight counties were almost entirely in the armed occupation of the enemy. Therefore the committee concluded that Mr. Pigott could

> in no just sense be deemed the choice of the loyal voters of a district in which more than half of them had no opportunity to express that choice. Voters may voluntarily stay away from the polls, and they are thereby taken and deemed to have acquiesced in what was done by those who are present. But no such presumption rests upon those who are under duress; and it can never be known that they would not have made choice of another if the iron grasp of the rebellion had been unloosed.

As to the second point, whether Mr. Pigott was at the time of the election an "inhabitant" of North Carolina, within the meaning of the Constitution, the committee say:

> Mr. Pigott, although a native of North Carolina, had resided in the city of Washington for the last ten or eleven years, owned real estate here, dwelt with his family in his own house here, and had on more than one occasion voted here for municipal officers. After Mr. Stanly was appointed military governor of North Carolina, Mr. Pigott was appointed his private secretary, and, renting his house in Washington, went to North Carolina in that capacity, and had remained there as such private secretary two or three months when this election took place. He had done nothing since his return to the State to indicate a permanency of abode there beyond what is here stated. The committee are of opinion that to be an inhabitant within the meaning of this section of the Constitution, if it does not mean resident or citizen, certainly means more than sojourner, which is all that can be claimed for Mr. Pigott.

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[1] Third session Thirty-seventh Congress, Journal, p. 194; Globe, p. 334.

[2] House Report No. 41; 1 Bartlett, p. 463; Rowell's Digest, p. 184.

In the case of John Bailey (Contested election cases, 411), who was elected a Representative from Massachusetts while a clerk in one of the Departments in Washington, where he had been for six years, although a native of Massachusetts, it was decided that he had ceased to be an inhabitant of Massachusetts within the meaning of the Constitution. And the able report of the committee in that case, adopted by the House, defines the word inhabitant in this connection to be "a bona fide member of the State, subject to all the requisitions of its laws and entitled to all the privileges and advantages which they confer." In the opinion of the committee the sojourn of Mr. Pigott in North Carolina, for the temporary and transient purpose of being private secretary to a military governor, was not an inhabitancy within this definition.

Therefore the committee reported that Mr. Pigott was not entitled to the seat.

On February 23[1] the report was considered in the House. A proposition was made to amend by adopting a substitute, reciting that the loyal people of the district, having done their best to secure representation, should not be deprived of their rights because of the act of disloyal persons; that the acts of the disloyal had devolved the responsibilities of citizenship on the loyal; that the Constitution guaranteed to every State a republican form of government and equal representation in Congress; that the payment of taxes was reciprocal with the right of representation; that protection of citizens in their right of voting was the duty of the Government; and therefore that the loss of that right by loyal citizens because of invasion of the disloyal was a misfortune and not a fault; that laws prescribing the time, mode, and manner of holding elections were merely directory; and finally that, in accordance with these principles, Mr. Pigott was entitled to the seat.

This amendment was disagreed to[2] without division; and then the report of the committee was agreed to. So Mr. Pigott was not admitted to the seat.

370. The Tennessee election case of John B. Rodgers in the Thirty-seventh Congress.

The House declined to seat a claimant voted for in a district established by an insurgent authority and at an election called by that authority.

Instance of a claim for a seat presented by a memorial.

On January 19, 1863,[3] the memorial of John B. Rodgers, claiming a seat in the House from Tennessee, was presented and referred to the Committee of Elections, no suggestion being made that Mr. Rodgers should be sworn in.

On February 9[4] the committee reported as follows:

That Mr. Rodgers claims to have been elected to this House in November, 1861, from a district in Tennessee, made up in part of the counties embraced in the district now represented by Mr. Maynard (the Second) and in part of counties embraced in the district now represented by Mr. Clements (the Fourth). These gentlemen were elected in August, 1861, and subsequently to their election, the committee are informed by Mr. Rodgers that the State was redistricted by the rebel legislature for the so-called Confederate congress, and an election in these new districts was held for the Confederate congress in November following. It is claimed by Mr. Rodgers that at this election votes were cast for him as a Representative to this Congress; and it is by virtue of these votes, that he now claims a seat. All the evidence submitted by Mr. Rodgers in support of his claim accompanies this report. The com-

[1] Journal, p. 460; Globe, pp. 1208–1212.

[2] The Journal, by the evident use of the word "agreed" for "disagreed," states that this amendment was agreed to. The context of the Journal, as well as the Globe, shows that it was disagreed to.

[3] Third session Thirty-seventh Congress, Journal, p. 206; Globe, p. 382.

[4] House Report No. 32; 1 Bartlett, p. 462; Rowell's Digest, p. 184.

mittee have found no foundation for the claim, and, referring the House to the accompanying papers, do not deem further comment necessary. They accordingly report the following resolution:

Resolved, That John B. Rodgers is not entitled to a seat in this House as a Representative from the State of Tennessee.

The House, on February 14,[1] agreed to the resolution without division.

371. The Virginia election case of Christopher L. Grafflin in the Thirty-seventh Congress.

The House considered invalid an election informally held wherein all but a fraction of the voters were prevented by civil war from participating.

The House declined to give prima facie effect to credentials regular in form but referring to a district notoriously under duress of civil war.

On January 23, 1863,[2] the credentials of Christopher L. Grafflin, claiming to be elected as Representative from the Eighth Congressional district of Virginia, were presented to the House and the motion was made that he be permitted to take the oath. The credentials were signed by Governor Pierpont and under the seal of the State.

The House did not permit Mr. Grafflin to take the oath, but referred the credentials to the Committee of Elections.

On February 23[3] the committee reported as follows:

Writs of election were issued by the governor of the Commonwealth, bearing date the 13th of December, 1862, ordering an election of Representative in this district on the 31st of said December. These writs were placed in the hands of Mr. O. D. Downey, who was instructed to visit the district and determine, from actual observation, whether the district was in a condition to hold an election at the time fixed in the writ; and if, from the presence of rebels or other causes connected with the war, he should deem an election at that time impracticable or unsafe, to appoint such other day as, in his judgment, would be, under all the circumstances, most suitable and proper. On the arrival of Mr. Downey in the district he found the condition of the people so unsettled (a strong force of the enemy occupying several of the counties, and in the immediate neighborhood of others, threatening those desirous of exercising the elective franchise) that he deemed an election upon the day fixed in the writ wholly impracticable. He accordingly fixed upon the 5th of January, 1863, as the time for holding this election. At that time there were cast in the county of Morgan 158 votes for Mr. Grafflin and 58 for Joseph S. Wheat; in the county of Berkeley 115 votes for Mr. Grafflin; and in the county of Hampshire 69 votes for Mr. Grafflin and 2 votes for Mr. Wheat; 342 votes in all for Mr. Grafflin and 60 votes for Mr. Wheat—total of 402 votes. No votes were cast in any other county, and in but two precincts in Hampshire and one in Berkeley. In the counties of Frederick, Page, Warren, Clarke, Loudoun, and Jefferson, six out of the nine composing the district, there were no votes cast. Of some of these counties the rebels had armed occupation, and into others guerrilla bands were constantly making incursions, filling the people with terror, and threatening with imprisonment all who should participate in this election. To open the polls under such circumstances in these counties would have been worse than a farce; it would have been an invitation to the rebels to visit with violence the peaceful and loyal citizens so situated that our forces could not protect them.

This case comes within the precedent established in the recent case of Lewis McKenzie,[4] claiming a seat as a Representative from the Seventh district in Virginia by virtue of an election precisely similar to this. The laws of Virginia require the governor to fix in his writ the time for holding an election to fill a vacancy, and nowhere authorize him to delegate that power to another.

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[1] Journal, p. 401; Globe, p. 963.

[2] Third session Thirty-seventh Congress, Journal, pp. 226, 227; Globe, pp. 489, 491.

[3] House Report No. 43; 1 Bartlett, p. 464; Rowell's Digest, p. 184.

[4] See Section 372.

The election itself, had the day upon which it was held been authorized by law, like that in the case of McKenzie, already alluded to, was not a general election in the whole district, but only a partial and imperfect one, in which much the largest portion of the voters of the district took no part and had no opportunity to take part. No notices were served and no polls opened; and, if there had been, no voter could, with safety to his property, his liberty, or his life, have voted in much the largest portion of the district. The committee regret that they can not find any ground for pronouncing this an election in any just sense of that term. After a careful revision of the decision to which they arrived in the case of McKenzie, already stated, which was sustained by the House, they see no occasion to question its correctness, and they therefore report the accompanying resolution and recommend its adoption:

Resolved, That Christopher L. Grafflin is not entitled to a seat in this House as a Representative from the Eighth Congressional district of Virginia.

On March 3[1] the resolution proposed by the committee was agreed to without division.

372. The Virginia election case of Lewis McKenzie, in the Thirty-seventh Congress.

The House declined to hold valid an election informally held and, because of civil war, participated in by only a small fraction of the voters of the district.

On January 29, 1863,[2] the credentials of Lewis McKenzie as Representative-elect from the Seventh Congressional district of Virginia, were presented to the House and referred to the Committee of Elections, no motion being made that the oath be administered to Mr. McKenzie. The credentials were in the form of a statement of the votes cast in two counties, no returns, being received from eight counties, and were signed by "Jefferson Tacey, Clerk."

On February 9[3] the committee reported, showing the following facts and conclusions:

TO THOMAS J. EDLEN,

Special Commissioner for Alexandria County:

Whereas the voters of the Seventh (7th) Congressional district of Virginia, composed of the counties of Alexandria, Spottsylvania, Fairfax, Fauquier, Prince William, Rappahannock, Culpeper, Stafford, Orange, and King George, failed to elect a Representative to the Thirty-seventh (37th) Congress of the United States on the 23d of May, 1861, you are hereby required, having first taken the oath or affirmation prescribed by existing laws, to hold an election to supply the vacancy aforesaid, at the several places of voting in Alexandria County, on Wednesday, the 31st day of December, 1862, or such other day as you may appoint, and of which you shall give due notice; and full authority is hereby conferred on you to do and provide whatever may be necessary for the purpose.

Given under my hand and the less seal of the Commonwealth, at the city of Wheeling, this thirteenth day of December, 1862, and in the eighty-seventh year of the Commonwealth.

[L.S.]

F. H. PIERPOINT.

By the Governor:

L. A. HAGANS, *Secretary of the Commonwealth.*

These writs ordered an election upon the 31st day of December, 1862, "or such other day as you may appoint." They were not delivered in the district till the evening of the 21st of December. The statutes of Virginia (Code, ch. 7, sec. 17) require "each officer to whom a writ of election is directed shall, at least ten days before such election, give notice thereof, and of the time of the election, by advertisement, at each place of voting in his county or corporation." It became an impossibility to give the required notice for the 31st after the receipt of these writs, on the night of the 21st. Accordingly,

[1] Journal, p. 580; Globe, p. 1540.

[2] Third session Thirty-seventh Congress, Journal, p. 297; Globe, p. 602.

[3] House Report, No. 33; 1 Bartlett, p. 460; Rowell's Digest, p. 183.

the person to whom the writ for Alexandria County was directed, and the person to whom that for Fairfax County was directed, met on a subsequent day and fixed upon the 15th of January for the election, and gave the notices in their respective counties accordingly. The only authority for this alteration of the time is in the writ itself, as follows: "or such other day as you may appoint." No authority of law for giving any such power to the commissioners was shown or claimed before the committee; on the contrary, the statutes of Virginia (Code, ch. 7, sec. 16) expressly declares that the writ "shall prescribe the day of election to be the same throughout the district." The committee are of opinion that this power, thus fixed by law in the governor, can not be by him delegated to anyone else, and for this reason the election held on the 15th of January was without any sanction of law. If it were possible that this power could be delegated, still the committee find that the day was agreed upon by the commissioner of Alexandria and of Fairfax counties alone, without regard to those in the seven other counties composing the district. The law is imperative that the day shall be the same throughout the district; yet if the commissioners in any two of the counties can fix upon a day, the same may be done by any other two, and the utmost confusion would be certain to ensue. The committee were unable to sanction any such proceeding.

The committee further show that eight days after the election the legislature of Virginia passed an act providing:

An Act providing for the return of the special election for a Representative in the Seventh Congressional district, held on the 15th day of January, 1863. Passed January 23, 1863.

Be it enacted by the general assembly, That the clerk of the county court, authorized by law to make returns of the elections held on the 15th day of January, 1863, for a Representative in Congress for the Seventh district, be, and is hereby, authorized and required to ascertain the result and grant certificates therefor at any time within the thirty days allowed therefor.

2. This act shall be in force from its passage.

The claimant contended that this legislation ratified and confirmed the action of the two commissioners in fixing the day of the election. But the committee concluded that the act referred wholly to the making of the return, and that it was beyond the power of the legislature to ratify or confirm an election held without authority of law.

The committee also went further and inquired into the character of the election itself. It appeared that there was no election in seven out of nine counties; that in the seven counties an election would have been impossible because of the presence of the armed belligerents; and that the total vote cast was only 554, as compared with 9,273 cast in the Congressional election of 1857. However loyal the people of the district might be, they had had no opportunity to testify that loyalty.

The committee therefore reported that Mr. McKenzie was not entitled to the seat.

On February 17,[1] when the report was considered, a motion was made to amend the resolution of the committee so it should declare Mr. McKenzie entitled to the seat. This amendment was disagreed to without division.

The report of the committee was then agreed to.

373. The Tennessee election case of Alvin Hawkins, in the Thirty-seventh Congress.

The House declined to hold valid an election which was entirely broken up by contending armies, so that only fragmentary and informal returns could be obtained.

[1] Journal, pp. 413, 414; Globe, p. 1036.

On February 11, 1863,[1] the credentials of Mr. Alvin Hawkins, claiming a seat from the Ninth Congressional district of Tennessee, were presented to the House and referred. No suggestion was made that Mr. Hawkins should be sworn in on his prima facie showing. The credentials were dated at "Headquarters, District of Jackson, Eighteenth Army Corps, Department of Tennessee," distinguished as "Special Orders, No. 29," and was signed by "Jere C. Sullivan, Brigadier-General Commanding in District of Jackson." The credentials gave the vote cast, and further stated that "forces of the so-called 'Confederate States' were at various places within said district on said day of said election preventing the people from voting."

On February 28,[2] the Committee on Elections reported the following state of facts: The election was held on December 29, 1862, pursuant to writs of election issued by Andrew Johnson, military governor of Tennessee. It appears that a convention of the people of the district had appointed December 13, 1862, as a time for election; but the appearance of the proclamation and writs of Governor Johnson ordering the election on the 29th so interfered with this election that claimant made it no part of his reliance in his claim to the seat. The election on the 29th was almost entirely broken up by the presence of contending armies in the district. Indeed, General Hurlbut, commanding the Government forces, issued a military order postponing the election. One sheriff was seized by the enemy and his writs of election were destroyed. Mr. Hawkins was himself driven from the district. On his return he gathered up such returns as he could, and procured the general order referred to as his credentials to accompany them.

In relation to this condition of affairs, the committee conclude:

The committee have struggled to find some way to give effect to this effort to secure representation; but they have not been able to bring it within any of the rules adopted by the House in determining the election cases which are analogous to this. How far the election was conducted at the polls in conformity to the law of Tennessee it has been impossible to ascertain. No one would expect to find or should require rigid conformity under the peculiarly trying circumstances under which this attempt was made. But the evidence of any votes at all will be seen, by a reference to the accompanying papers, to be of the most vague, uncertain, and unsatisfactory character. The committee have but to call attention to one or two of these papers. An unofficial person, A. G. Shrewsbury, certifies that he has seen the return of votes in Henderson County, and that "there were over 700 votes polled in that county, over 700 of which were for Alvin Hawkins, and the balance, numbering some 20 or 30, were scattering, and for other persons." This comes, so far as appears, from a private citizen, and has not even the sanction of an affidavit. In no sense can it be taken as evidence. Of a similar character is what purports to be a return from Chestnut Bluff, a precinct in Dyer County, to which the committee call attention. These papers are the bases of the certificate of General Sullivan. The law requires all the returns to be made to the governor, and he is to make the certificate. It was impossible for this to be done, and Governor Johnson has furnished nothing. The committee are of opinion that it would be a very unsafe precedent, sure to be fruitful of mischief, to take, as evidence of an election, the papers here presented. Mr. Hawkins himself was driven from the district and has no personal knowledge of the facts. He has letters from highly respectable citizens corroborating, to some extent, these papers; and while, as a matter of fact, the House may not doubt that these transactions have taken place, yet it would be most dangerous to take, as legal proof of an election, the papers here presented.

Although the evidence, as far as it goes, tends to show that 1,900 votes were cast, nearly all for Mr. Hawkins, yet it also appears that a very small part of the district participated in this election.

[1] Third session Thirty-seventh Congress, Journal, p. 373; Globe, pp. 887, 888.

[2] House report No. 46; 1 Bartlett, p. 466; Rowell's Digest, p. 184.

Some parts had already voted on the 13th; some had postponed still further the day of election, under the military order of General Hurlburt, but more was at the very moment under the control and occupation of contending armies in battle array, in which an election was an impossibility. Under these circumstances, if it be taken as satisfactorily shown that 1,900 votes were polled, that fact must be taken along with the other that they were polled in a very small part of the district, and that much the greater portion of it, for the reasons stated, had no part or lot in the matter. The district at the last election for representative cast 18,000 votes.

The committee are again compelled to come to the same conclusion they have reluctantly arrived at in other cases, adverse to the right of Mr. Hawkins to a seat in this House, upon the state of facts presented to them and which they herewith report. They accordingly recommend the adoption of the accompanying resolution:

Resolved, That Alvin Hawkins is not entitled to a seat in this House as a Representative from the Ninth district in Tennessee.

On March 3[1] the House, without division, agreed to the report of the committee, adopting the resolution.

374. The Virginia election case of McKenzie v. Kitchen, in the Thirty-eighth Congress.

The House declined to hold valid an election participated in by a little less than half the voters of a district divided between contending armies.

The House declined to give prima facie effect to credentials in the form prescribed by a government already suspended and referring to a district distracted by war.

The Clerk declined to enroll persons bearing credentials in form prescribed by a State government already suspended.

On December 7, 1863,[2] at the time of the organization of the House, after the roll of Members-elect had been called by the Clerk, the following resolution was offered:

Resolved, That the names of L. M. Chandler, Joseph Segar, and B. M. Kitchen be placed on the roll as Representatives from the State of Virginia.

These claimants presented credentials made out in form prescribed by an act of "the general assembly of Virginia, held December 2, 1861, at the city of Wheeling." That legislature, it was urged, had been recognized by the National Government; but since that date the State of West Virginia had been formed. The Clerk had not put on the roll the names of the three gentlemen, not deeming the credentials sufficient.

The House, by a vote of yeas 100, nays 73, laid on the table the resolution.

On December 9,[3] Mr. Henry L. Dawes, of Massachusetts, presented the credentials of Messrs. Segar and Kitchen, which were referred to the Committee on Elections without any motion that the gentlemen be sworn in.

On February 8, 1864,[4] the Committee on Elections reported both on the right of Mr. Kitchen and on a contest which had been made against his claim to the seat by Lewis McKenzie.

As between Mr. Kitchen and Mr. McKenzie the election was determined by the vote of Berkeley County, which the contestant claimed should be included in the

[1] Journal, p. 580; Globe, p. 1540.

[2] First session Thirty-eighth Congress, Journal, p. 8; Globe, p. 6.

[3] Journal, p. 20; Globe, p. 12.

[4] Report No. 14; 1 Bartlett, p. 468.

State of West Virginia, and therefore formed no part of the district as constituted under the laws of the United States and Virginia. The committee found, as a matter of fact under the law, that, as Congress had never assented to the transfer, Berkeley County belonged to Virginia and that its vote was properly counted.

The contestant further alleged that the commissioners of election in Berkeley County certified the result directly to the clerk of Alexandria County, instead of certifying to the clerk of Berkeley County, who was required by the law to record it in a book and send a certified copy of it to the clerk of Alexandria County. The committee unanimously agreed on the following conclusion:

It was not contended that any fraud was committed or that the true result in Berkeley was not here certified, and therefore the committee were of opinion that the votes should be counted. This determines the result as to Mr. McKenzie. If these votes were counted, he did not receive a plurality and would not, in any event, be entitled to the seat.

On February 26 [1] a resolution declaring Mr. McKenzie, the contestant, not entitled to the seat was, after debate, agreed to without division.

The Committee on Elections did not, however, allow the case to rest with the determination of the rights of the contestant. They go into the consideration of the State of the district and its capability for electing a Representative.

The committee found some difficulty in coming to a decision upon this question; but the conclusion to which they have arrived, after a careful consideration, they now submit to the House.

The case comes so near to what seems to be the dividing line, as established by the precedents of the last House in similar cases, and the judgment of this committee in the case of Joseph Segar, heretofore reported to the House, that the difficulty lies in determining upon which side of that line it falls.

It will be seen that between that part of the district where polls could be and were opened, and the part held by the enemy, there is very nearly an equal division, whether it be divided by territorial limits, by the aggregate of population, the entire free population, or the white male population. In each division the part within the occupation and control of the enemy is a trifle the greatest, but it may be treated practically as about an equal division of the district between the rebels and the Union forces. But it should not be overlooked that, while that portion under rebel control is held so by force of arms and the presence of rebel bayonets, it is equally true that the remainder of the district is, as yet, within our lines and under our sway only by a like force of arms and presence of loyal troops. If the Union forces were withdrawn from any portion of the district, it would be immediately overrun by rebel armies. Practically, the Seventh Congressional district of Virginia, the scene of some of the fiercest and bloodiest conflicts of arms in the whole war, is still a battle ground.

The present condition of that portion of it within the Union lines little fits it for the free exercise of the elective franchise. Martial law and military discipline, if not incompatible with, are certainly, at best, poor instrumentalities for ascertaining the choice of freemen. Off against this portion of the district thus selected, and thus held, must be set quite as large if not a larger portion in territory, in population, or in voters, which all the time has been held bound in the chains of an armed enemy, overrun with a hostile army, and ground into the dust by the heel of a usurped power.

The committee have, in this state of the facts, come to the conclusion that this case comes within the precedents of the last Congress, which have been adopted by the committee in the case from the First district of Virginia, already reported to the House. They cannot satisfy themselves that there has been such a freedom of election in this district as to warrant the conclusion that Mr. Kitchen is the choice of the loyal voters of the whole district. However near to a majority of such voters those came who participated in this election, yet it appears to the committee that a greater portion failed to participate in it for the reason that they were held under the power of the rebel army, and therefore by no method can it be shown that the claimant is the choice of the Union voters of the whole district. It may not be improper to call attention to the fact that while the whole number of votes cast was 2,059,

[1] Globe, pp. 847–850; Journal, p. 309.

only 962 of these were cast for Mr. Kitchen; and that of those, 730 were cast in the county of Berkeley, where Mr. Kitchen now resides, a county which, on the same day that these votes were cast, voted also unanimously to attach itself to West Virginia, and which has, so far as the legislature of both States can effect it, been made a part of the new State, and separated from this district altogether. Although, for reasons already stated, this can have no legal effect upon the vote to its exclusion, yet it is a circumstance which, if it can have any effect, certainly will not lead to the conclusion that Mr. Kitchen would have been the choice of the other counties whose voters were not permitted to participate at all in the election.

Therefore the committee found that Mr. Kitchen was not entitled to the seat. One of the committee filed minority views.

This report was debated on February 26[1] and on April 16,[2] the length of the debate as well as the nature showing that the case was considered of great importance.

A motion to amend the resolution proposed by the committee so as to declare Mr. Kitchen entitled to the seat was disagreed to without division. Then, also without division, the resolution was agreed to As reported by the committee.

375. The Virginia election cases of Chandler and Segar, in the Thirty-eighth Congress.

An election by one-third of the voters of a district was held invalid when the presence of an armed enemy prevented the remainder from expressing their wishes.

The holder of credentials in due form, whose prima facie title is not contested, may not take the seat if a question exists as to the competency of the constituency.

On December 7, 1863,[3] at the organization of the House, after the Clerk had called the roll of Members-elect, the credentials of L. M. Chandler, claiming a seat as a Member from Virginia, were presented, and a resolution was offered to provide for putting the name of Mr. Chandler, with the names of two other gentlemen, B. M. Kitchen and Joseph Segar, also claiming seats from Virginia, on the roll of Members-elect. This resolution was laid on the table—yeas 100, nays 73.[4]

The cases having been referred to the Committee on Elections, that committee reported on Mr. Chandler's case on April 25, 1864,[5] and on Mr. Segar's case on January 25, 1864.[6] The report shows that in the Second district of Virginia, which was composed of eleven counties, polls were opened in nine places in Norfolk County, Portsmouth, and Norfolk, and the whole number of votes cast was 779, of which Mr. Chandler received 778. No polls were opened in any other places in the district, because the other counties except Norfolk were so under control of hostile forces that no man could go to the polls in safety. By the census of 1860 Norfolk County (including Norfolk city and Portsmouth) had 36,227 population out of 156,626 in the whole district. The committee conceived that this case was governed by the same principles as were set forth in the report on

[1] Globe, p. 850.

[2] Globe, pp. 1673–1678.

[3] First session Thirty-eighth Congress, Journal, p. 8; Globe, p. 6.

[4] See case of B. M. Kitchen, Section 374.

[5] House Report No. 59; 1 Bartlett, p. 520; Rowell's Digest, p. 190.

[6] House Report No. 9; 1 Bartlett, p. 577; Rowell's Digest, p. 197.

Mr. Segar's claim, and therefore reported a resolution that Mr. Chandler was not entitled to the seat.

Mr. Segar claimed to have been elected in the First district of Virginia, composed of twenty counties, receiving about 1,300 votes out of 1,667 cast in four counties. The remainder of the district was so occupied by hostile forces that polls could not be opened. The committee estimated that while 1,667 votes were cast, there were about 5,100 loyal men in the district who did not vote. The committee therefore conclude:

It is true that the legality of an election does not necessarily depend upon the relative number of loyal voters who attend the polls and of those who stay away. If all are at liberty to vote, those who stay away must always be considered as acquiescing in the action of those who do not. But acquiescence implies liberty to protest. If one stays away because he could not go, it is absurd to say that he stays away because he acquiesces. When a man is forcibly silent because his mouth is stopped, nothing can be taken against him for not speaking. If, then, 5,000 Union men have been kept from the polls by the arms of the rebels, it can not be said that they acquiesce in the choice made by 1,700 who were at liberty to go. It can not be known, therefore, by the proceedings on election day, that Mr. Segar was the choice of the legal voters of the district. He might have been, and he might not have been. The committee have no evidence that, had all been permitted to vote, he would not have been such choice, nor have they that he would. Upon this point it is impossible to know, for less than one-fourth of the voters were permitted to speak.

The question is, upon this state of facts presented, whether, upon any known principle or precedent, Mr. Segar can be admitted to this seat as the legally chosen representative of this district. All principle seems against it. By no process of reasoning can the committee infer from what was done that Mr. Segar is the choice of the district; and it is upon no other base that a right to, a seat here can at any time rest. And precedent is equally against it. In the reported cases during the last Congress the Committee of Elections and the House had occasion frequently to pass upon this very question. And the principles there laid down by the committee, and sustained in every instance by the House, both when reporting in favor of a right to the seat, as in the cases of Clements, from Tennessee, and Flanders and Hahn, from Louisiana, and when reporting adversely, as in the cases of Upton, Segar, and McKenzie, from Virginia, and Hawkins, from Tennessee, govern this case. Each of these cases was determined upon the facts peculiar to the case. But in them all it was recognized as a rule that where the vote actually polled was such a minority of the whole vote that it could not be determined that the person selected by that minority was the choice of the whole district, and the absent majority were not voluntarily staying away from the polls, but were kept away by force, then no such selection thus made could be treated as an election.

Therefore the committee concluded that Mr. Segar was not entitled to the seat.

They also, in their report, settled a preliminary question, which they state as follows:

The election was held on the fourth Thursday of May, 1863, and a certificate of election, in substantial conformity with the laws of Virginia as amended by the act of January 31, 1862 (Session Laws, 1861, chap. 44, p. 40), was furnished Mr. Segar by the officer required by that statute to certify an election of Representative in Congress. This certificate accompanies this report. Mr. Segar claimed that having presented a certificate in conformity to the laws of Virginia, he is now entitled to be sworn in, and to occupy the seat as a Representative till some one else appears showing a better title to it. But the committee were of opinion that they should inquire into and report the facts concerning this election and their conclusion thereon.

In debate Mr. Segar stated[1] that the Clerk originally put his name on the list of Members-elect, but erased it before the Congress assembled.

[1] Globe, p. 2312.

On May 17 the cases of Messrs. Chandler and Segar were, by unanimous consent, debated together,[1] as they involved the same principles.

The question was first taken on the resolution declaring Mr. Segar not entitled to the seat, and the House agreed to it, yeas 94, nays 23. The resolution declaring Mr. Chandler not entitled to the seat was then agreed to without division.[2]

376. The Louisiana election case of A. P. Field, in the Thirty-eighth Congress.

The House declined to recognize an informal election, participated in by a mere fraction of the voters, in a district entirely under military domination.

The House denied prima facie title to a person enrolled by the Clerk on credentials signed by a mere claimant to the governorship in a State disrupted by civil war.

On December 7, 1863,[3] at the time of the organization of the House, the name of Mr. A. P. Field was called among those on the Clerk's roll of Members-elect, and Mr. Field voted for Speaker. When the Members were sworn, Mr. Thaddeus Stevens, of Pennsylvania, objected to the administration of the oath to Mr. Field, and on his motion the credentials were referred to the Committee on Elections, and the administering of the oath was deferred until after the report of the committee.

The credentials of Mr. Field are thus described by the committee in their report[4] on the final right to the seat:

> That no undue weight may be given to the credentials of Mr. Field, purporting to come from the government of the State, being signed "J. L. Riddell, governor of the State of Louisiana," it is proper that the facts elicited before the committee bearing upon the authenticity of this certificate should be laid before the House.
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> Mr. Riddell claims to have been elected governor at the same time with the alleged election of Mr. Field. There were but few votes cast for him, 500 or 600, in the parishes about New Orleans which are joined with that city in the First and Second Congressional districts under the old apportionment.
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> The whole election, like that of Mr. Field, was under the auspices of a committee, to whom the votes were returned, and he has himself no personal knowledge of the number of votes cast for himself or for Mr. Field. That he received in all the number of votes already stated is only the best opinion he could form upon the subject. All voting for governor, as well as Representative in Congress, in New Orleans, was forbidden by the military governor. The committee express no further opinion here upon the propriety of such conduct on his part, but only state the fact. Mr. Riddell claims to have been elected, and qualified as governor by taking the oath of office before a justice of the peace in New Orleans. The term of office to which Mr. Riddell claims to have been elected did not, according to the laws of the State, commence till the 1st of January, 1864. It is impossible to understand by what process of reasoning this Mr. Riddell has come to the conclusion that he was governor of the State of Louisiana on the 20th day of November, 1863, the day this certificate bears date.
>
> It was also stated by him that the certificate in question was made out in this city upon information received by him from others, which he believed to be true, but of the truth of which he had no personal knowledge.

On the question as to the final right of Mr. Field to the seat, the Committee on Elections found that the alleged election had been held without authority of law, and that there was, moreover, no constituency.[5]

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[1] Globe, pp. 2311–2323.

[2] Journal, p. 670; Globe, p. 2323.

[3] First session Thirty-eighth Congress, Journal, pp. 6, 11; Globe, pp. 6, 7, 8.

[4] House Report No. 8.

[5] 1 Barlett, p. 580; Rowell's Digest, p. 197.

Mr. Field claimed to have been elected November 2, 1863, the day prescribed, from the law of the State, in the "First Congressional district" under an apportionment next preceding the then existing one. The existing apportionment required five districts instead of the four required by the preceding apportionment; and the law of Congress of July 14, 1862, required the five Members to be elected from "districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled in the Congress for which said election is held." Thus it was necessary for the State to be divided into five instead of four districts before an election could be held. But such division of the State had not been made, and therefore the election of Mr. Field from one of the old four districts was not in accordance with law.

As to the constituency on which Mr. Field relied, the committee say:

> The election purports to have been held in the First Congressional district of Louisiana under the old apportionment. That district is composed of the two parishes of Plaquemines and St. Bernard, containing, in 1860, only 12,566 inhabitants, of whom only 2,563 were male whites, and a large portion of the city of New Orleans, containing, in 1862, when this district was formed, about the balance of the then apportionment of 93,000, and in 1860, of course, a much larger number.
>
> But no election was held on the 2d day of November in any part of this district but the two parishes of Plaquemines and St. Bernard.
>
> The precise number of votes actually cast for Mr. Field in these two parishes the committee have not been able to ascertain. Mr. Field had before the committee returns from two or three precincts in St. Bernard, which were made to a committee appointed to aid in conducting the election, and amounting to 156 votes, and he believed, though he had no personal knowledge of the fact, that as many more votes were cast for him in Plaquemines. But in all that part of the district made up of the city of New Orleans, comprising almost the entire district—certainly more than nineteen-twentieths of the inhabitants—there was no election held and no opportunity given for an elector to express his choice. The election, so far as the city of New Orleans was concerned, was suppressed by orders emanating directly from the military governor of the State, Brigadier-General Shepley. This suppression was effectual, so that not a vote was cast in the city, and the only constituency Mr. Field has was the small number of votes already stated from the very small fraction of the district situated outside the city limits.

Therefore the committee were unanimous in finding no grounds for treating this as an election and reported a resolution declaring Mr. Field not entitled to the seat.

The report was debated in the House on January 29 and February 9,[1] and on the latter date the resolution of the committee was agreed to—ayes 85, noes 48.[2]

377. The Missouri election cases of Bruce v. Loan, Birch v. King, and Price v. McClurg in the Thirty-eighth Congress.

The House, overruling its committee, declined to declare invalid an election because of intimidation in certain counties by State troops on duty by order of the governor.

The House declined, on proof of intimidation at 8 precincts out of 150, to find general intimidation sufficient to render invalid an election.

On April 8, 1864,[3] the Committee on Elections reported in the case of Bruce *v.* Loan, of Missouri.

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[1] Globe, pp. 411, 543–547.

[2] Journal, p. 242; Globe, p. 547.

[3] First session Thirty-eighth Congress, Report No. 44.

The question involved in this election was whether or not there had been a valid election in the district.

The election in question, held on November 4, 1862, was the first attempted to be held in the State since the commencement of the civil war. From August, 1861, until the summer of 1862 the affairs of the State had been conducted by a provisional government. On June 10, 1862, a convention of the people of the State adopted an ordinance defining the qualification of voters and civil officers in the State and specifying a form of oath of loyalty, which was the new qualification provided, in addition to the old qualifications of the State constitution.

The civil commotion had been so great in the State that there were serious apprehensions of disturbances on the day of election. Therefore the adjutant-general of the State, on October 23, issued a general order stating that the test oath of loyalty was a sufficient safeguard against the participation of disloyal persons in the election, and therefore warning the enrolled militia, who as citizens would generally be at the voting places, that they should keep order at the polls, prevent intimidation of qualified voters, themselves abstain from interference, and, finally, that in case of disturbance beyond the power of the civil authorities to quell any commissioned officer present should, "at the request of any judge, sheriff, or justice of the peace," use the necessary military force to suppress it.

On November I another general order cautioned the enrolled militia against constituting themselves judges of election and warned them to "carefully abstain from all acts calculated to interfere with the freedom of election."

The Seventh Congressional district consisted of fifteen counties. It was admitted that the election was fair in seven counties, but the contestant, in his grounds of contest, asserted the following:

First. For interference by portions of the armed militia of the State of Missouri with the polls, and the tearing up of poll books, and the interference with voters at the polls by your friends, whereby persons desiring to vote for me were prevented and intimidated from voting and rudely driven from the polls; and by thus preventing persons who would have voted for me I lost, in the counties named below, the number of votes set opposite each county:

Buchanan County	800
Andrew County	400
Holt County	400
Atchison County	400
Nodaway County	300
Dekalb County	100
Daviess County	200
Livingston County	600
Making a total of	3,200

which would have elected me over you, and made my entire vote 7,754.

Second. Improper interference and improper conduct of officers of the election in excluding qualified voters from voting for me in the counties named in reason first.

Third. Intimidation on the part of portions of the militia of the State of Missouri and other armed soldiery, by threats intimidating voters from attending the election, who would have voted for me had they attended.

Fourth. Interference of portions of the militia of Missouri by forcibly driving voters from the polls who had tickets in their hands ready to vote for me.

Fifth. Interference of portions of the militia of Missouri, in standing at voting places, with muskets

in their hands, and demanding the tickets of voters; and when shown with my name on them, the tickets were torn up by your friends, and the parties told that they could not vote that ticket; and persons who were legal voters were thus prevented from voting for me.

The whole number of votes returned as cast at the election was 13,803, of which Mr. Loan, the sitting Member, was credited with 6,582; Mr. Bruce with 4,554; Mr. H. B. Brand with 2,665, and 2 scattering. Thus the sitting Member's majority over contestant was 2,028 votes.

It appeared that at the time of the election the sitting Member was a brigadier-general, and had shortly before the election ceased to be in command of the enrolled militia in the Seventh Congressional district, although he still held such official position elsewhere. Many of the candidates for State offices associated with him on the ticket were militia officers then in command. Neither the contestant nor any of the persons associated with him on the ticket were connected officially with the militia.

After examining the case the Committee on Elections divided, a bare majority concluding that neither contestant nor sitting Member were entitled to the seat, since military interference had invalidated the election; while the minority concluded that the evidence did not show sufficient effects of whatever disturbance there may have been to overcome the plurality of the sitting Member.

The decision of the case, both in the Committee and the House, turned on the examination of the evidence as to the alleged intimidation and violence in the several counties.

Buchanan County: The only testimony was as to the election in St. Joseph, in the township of Washington. The sheriff of the county, who favored the sitting Member, found the polls guarded by militia at one precinct, and saw the ticket of a citizen torn up by a soldier and the citizen driven away. Those not favoring certain candidates seemed afraid to vote. What he saw at two other precincts convinced him that there could not be a free and fair election because of the actions of the militia. In one of the three precincts, as shown by other witnesses, bands of armed militiamen broke up the election and tore up the poll book. The majority of the Committee became convinced from the testimony and from comparison with the vote of other years that as many as 900 votes were lost to the contestant in the township because of the disturbance and intimidation. The minority, while not denying that there had been violence and intimidation, thought a deduction of 300 votes about what the testimony indicated, and urged that this, with the deductions in other counties, would not destroy the sitting Member's plurality. It appeared also that the military guard at the polls was asked for by contestant.

Andrew County: The testimony related only to the election precinct of Savannah. Here there was no militia guard at the polls, the local commanding officer having declined to furnish a guard unless called on by the civil officers. The witnesses testified to disturbance and intimidation, but had only estimates as to those deterred from voting for contestant. The minority of the committee did not consider that any considerable number of persons were intimidated at Savannah, although one witness had estimated the number as high as 200. The militia were present as citizens only. The majority of the committee considered the decrease in the total vote of the county as compared with the election of 1860 as of significance.

Livingston County: The testimony related only to Chillicothe precinct. There an officer with a squad of soldiers marched to the polls in the morning and arrested several voters against whose loyalty charges were made. Later the troops were ordered away by a telegram from the governor. The majority of the committee presented the comparison with the vote in the precinct and county two years previous, showing a considerable falling off. The minority of the committee found no evidence to show that any voters were kept from the polls by the military, the voting having gone on after the soldiers had been withdrawn. In the whole county the contestant received more than twice the number of votes received by the sitting Member.

Atchison County: In this county the testimony related to the precinct of Rockport only, where it was shown that the polls were guarded by armed militia, and where a witness testified that he heard of people who tried to vote being thrust from the polls. Witness also testified that he heard of interference at most of the other precincts of the county. Witness also testified that attempts to take depositions in this county for the purposes of the contest were prevented by intimidation, and that by such depositions a loss of about 300 votes for contestant was expected to be proved.

The majority of the committee make the comparison, showing a falling off in the vote of the county. The minority of the committee assail this witness for giving merely hearsay testimony, and call attention to the fact that he had been employed as counsel by contestant.

Dekalb County: The testimony related only to the precinct of Stewartsville. Several witnesses, including a constable who was on duty at the polls all day, testified to specific acts of intimidation by the enrolled militia, and certain witnesses testified that they were deterred from voting. The minority assailed this testimony as inadmissible because ex parte, and also from the fact that the testimony showed only estimates and opinions as to the number of votes kept from the poll by intimidation.

Holt and Nodaway counties: Contestant took no testimony in these counties, as sworn testimony was produced to show that it would not have been safe for contestant or his representatives to go into these counties.

Daviess County: Contestant included this county in his notice as one where there had been illegal interference with the freedom of election; but the majority of the committee, in their report, concede that this was one of the eight counties where the election was fair.

From their review of the conditions in the above named counties and from a comparison of the votes for the respective candidates in these counties and those where no interference was alleged, as well as from a comparison with the vote of two years previous, the majority concluded that the enrolled militia had "by threats, violence, and by various modes of intimidation so far interfered with the election as, in the opinion of the committee, to render the election a nullity." Therefore the majority reported resolutions declaring neither contestant nor sitting Member entitled to the seat.

The minority criticise the nature of the testimony as to a large extent hearsay, call attention to the fact that contestant offered testimony as to only eight precincts,

while there must have been one hundred and fifty in the whole district. The presumption, in the absence of proof, must be that the election in the precincts not attacked by testimony were fair.

The minority also call attention to the fact that the aggregate vote of the district for Congressman was larger than that of any other Congressional district in the State at this election.

The minority cited the cases of Trigg v. Preston and Clements to show that the acts of "a few loyal State troops, acting under the orders of the State authorities in guarding the polls," should not be considered such acts as to invalidate the election. Therefore it was recommended that the House declare the sitting Member entitled to the seat.

The report was debated in the House at length on May 6, 9, and 10,[1] those sustaining the majority of the committee setting forth the general state of alarm and intimidation which the testimony tended to disclose.

The minority contended that when riotous interference or violence were set up, the law required rigorous proof that the result of the election had been affected by riotous interruption or obstruction; and also when restraint or intimidation were set up, proof was required that an organized system of unlawful restraint or intimidation existed or was acted upon to prevent the freedom of election and to secure the defeat of the contestant. And it was contended that such a state of things was not shown in this case.

On May 10[2] the House took a test vote on the resolution—

Resolved, That Benjamin F. Loan (the sitting Member) is not entitled to a seat in this House, etc.—

And there were yeas 59, nays 71.

The resolution declaring contestant not entitled to the seat was agreed to without division.

So the contention of the minority was sustained.[3]

378. The Kentucky election case of McHenry v. Yeaman in the Thirty-eighth Congress.

The House sustained an election generally participated in by the voters, although the district was under martial law and the military power enforced the State requirements as to qualifications of voters.

On May 13, 1864,[4] the Committee on Elections reported on the case of McHenry *v.* Yeaman of Kentucky. The only question was whether there was a legal election in the Second Congressional district of that State, the contestant asking that the House would vacate the seat "and refer this election back to the people, or take such other action in the matter as may be deemed right and proper."

The main grounds of the contest were the issuance of certain military orders by officers commanding in the district; and the claim that the election was carried by fraud and force, and that test oaths were applied unknown to the laws of Kentucky.

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[1] Globe, pp. 2155, 2185, 2207–2214.

[2] Journal, pp. 640, 641.

[3] The case of Birch *v.* King, also from Missouri, involved the same principles, and the committee asked that it be discharged. This was done after debate. (Globe, pp. 2639–2650.) The action was also taken in the Missouri case of Price *v.* McClurg. (Journal, p. 787.)

[4] First session Thirty-eighth Congress, House Report No. 70; 1 Bartlett, p. 550; Rowell's Digest, p. 193.

By an act of March 11, 1862, the legislature of Kentucky had passed a law providing in its first section that any citizen of the State who had adhered to the cause of the so-called Confederate States "shall be deemed to have expatriated himself, and shall no longer be a citizen of Kentucky, nor shall he again be a citizen, except by permission of the legislature, by a general or special statute." Then the act further provided:

SEC. 2. That whenever a person attempts or is called on to exercise any of the constitutional or legal rights and privileges belonging only to citizens of Kentucky, he may be required to negative on oath the expatriation provided in the first section of this act, and upon his failure or refusal to do so shall not be permitted to exercise any such right or privilege.

On July 20, 1863, in view of the approaching election (in August, 1863, the election in question) the governor of the State issued a proclamation, enjoining "the strict observance and enforcement" of the above act, in order to preserve the purity of the elective franchise.

On July 28, 1863, Col. John W. Foster, commanding at Henderson, Ky., issued the following general order:

In order that the proclamation of the governor and the laws of the State of Kentucky may be observed and enforced, post commandants and officers of this command will see that the following regulations are strictly complied with at the approaching State election:

None but loyal citizens will act as officers of the election.

No one will be allowed to offer himself as a candidate for office, or be voted for at said election, who is not in all things loyal to the State and Federal governments and in favor of a vigorous prosecution of the war for the suppression of the rebellion.

The judges of election will allow no one to vote at said election unless he is known to them to be an undoubtedly loyal citizen, or unless he shall first take the oath required by the laws of the State of Kentucky.

No disloyal man will offer himself as a candidate, or attempt to vote, except for treasonable purposes; and all such efforts will be summarily suppressed by the military authorities.

All necessary protection will be supplied and guaranteed at the polls to Union men by all the military force within this command.

Appended to this order was the following form of oath:

OATH TO BE TAKEN AT THE ELECTION.

I do solemnly swear that I have not been in the service of the so-called Confederate States in either a civil or military capacity, or in the service of the so-called provisional government of Kentucky; that I have not given any aid, assistance, or comfort to any person in arms against the United States; and that I have, in all things, demeaned myself as a loyal citizen since the beginning of the present rebellion. So help me God.

On July 30 a duplicate of this order was issued by Brigadier-General Shackelford, commanding at Russellville, Ky.

On July 31 Major-General Burnside, commanding the Department of the Ohio, issued a general order reciting that the State of Kentucky was invaded by a hostile force with the avowed purpose of keeping loyal voters from the polls and forcing the election of disloyal candidates on August 3, and declaring the State under martial law. The order disclaimed any intention of interfering with the proper expression of public opinion, and declared that all discretion in the conduct of the election would be, as usual, in the hands of the legally appointed judges at the polls, who

would "be held strictly responsible that no disloyal person be allowed to vote, and to this end the military power is ordered to give them its utmost support."

As part of the record was included a dispatch from General Burnside to General Halleck, dated August 3, 1863 (the day of the election), announcing that a hostile force, which had crossed the Kentucky River to assist the command of Morgan, was in full retreat.

The majority of the committee (which included all but one Member) declined to enter into a consideration of the question whether the military orders were or were not proper; but declared that they "were designed to carry out the law of Kentucky, and in no wise to interfere with the freedom of the elective franchise."

The majority go on to say that the only question was whether there was an election or not, there being no pretense of title on the part of the contestant. As a conclusive answer to the question whether Mr. Yeaman was the choice of the legal voters of the district, the committee give the official votes at preceding elections: In Presidential election of 1860 it was 15,236; in May, 1861, for delegates to border State convention, 13,328; in June, 1861, for Representative in Congress, 14,665; in August, 1863, for governor, 10,652. In August, 1863, Mr. Yeaman received 8,311 votes and Mr. McHenry 3,087. It was evident, therefore, that Mr. Yeaman received a majority of the whole voting population of the district, measured even by the standard of 1860. And it was in evidence that the district had contributed 5,714 men to the Army of the United States alone.

Therefore the majority of the committee recommended a resolution declaring Mr. Yeaman entitled to the seat.

The minority views, filed by Mr. D. W. Voorhees, of Indiana, on May 12, did not deny that the sitting Member received a large majority over the contestant, but denied that the election was "a free and equal election," such as the constitution of Kentucky guaranteed:

> Any election for a civil officer held under martial law, where the qualifications of voters are prescribed by military officers, is not such an election as the founders of this Government intended should be held under the Constitution which they framed, and should be declared void in all cases by the Congress of the Nation.

The minority views further present an analysis of the testimony to show intimidation of voters, the administering of various oaths as tests of loyalty, etc.

On May 27 and 30[1] the report was debated at length in the House. The supporters of the majority report argued that the sitting Member was manifestly the choice of the district. A few, while supporting the sitting Member on these grounds, condemned the act of the military authorities in proclaiming martial law.

On May 30[2] the resolution of the majority was agreed to by the House—yeas 95, nays 26; so Mr. Yeaman was confirmed in his seat.

379. The Louisiana election cases of Flanders and Hahn in the Thirty-seventh Congress.

The House seated a person elected according to the essential requirements of law, except that the time of the election was fixed by proclamation of a military governor.

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[1] Globe, pp. 2527, 2579.

[2] Journal, p. 719; Globe, p. 2585.

Discussion of the powers of a military governor, and his status as a de facto executive.

The House declined to give prima facie effect to credentials signed by the military governor of a State lately in secession.

On December 19, 1862,[1] Mr. Benjamin F. Flanders appeared and presented credentials purporting to show his election to fill a vacancy in the office of Representative of the First Congressional district of Louisiana. These credentials were under the seal of the State and signed by "G. F. Shepley, military governor of Louisiana," and countersigned by "James F. Miller, acting secretary of state."

The request was made that the oath be administered to Mr. Flanders at once, but objection being made to the nature of the credentials they were referred to the Committee of Elections.

On December 22[2] Mr. Michael Hahn appeared with similar credentials for the Second district of Louisiana. The same objection being made, the credentials were referred to the Committee on Elections.

On February 3, 1863,[3] the committee reported on the two cases, as they involved the same principles. The regular elections for Members of the Thirty-seventh Congress should have been held in Louisiana, under the State law, on the first Monday of November, 1861. But the State was then in rebellion, and the governor neglected and refused to order the election. The reoccupation by the national armies of the portions of the State comprising the First and Second districts had been followed by the resumption of allegiance on the part of many citizens, the total number being over 60,000 up to October 21, 1862.

On November 14, 1862, the military governor of the State, George F. Shepley, issued a proclamation ordering an election for Members of Congress in the First and Second districts. This proclamation, over which the principal issue in this case forms, was as follows:

A PROCLAMATION.

BY BRIGADIER-GENERAL GEORGE F. SHEPLEY, MILITARY GOVERNOR OF THE STATE OF LOUISIANA.

Whereas the State of Louisiana is now and has been without any Representatives in the Thirty-seventh Congress of the United States of America; and whereas a very large majority of the citizens of the First and Second Congressional districts in this State, by taking the oath of allegiance, have given evidence of their loyalty and obedience to the Constitution and laws of the United States:

Now, therefore, I, George F. Shepley, military governor of the State of Louisiana, for the purpose of securing to the loyal electors in the parishes composing these two Congressional districts their appropriate and lawful representation in the House of Representatives of the United States of America, and of enabling them to avail themselves of the benefits secured by the proclamation of the President of the United States to the people of any State, or part of a State, who shall on the first day of February next be in good faith represented in the Congress of the United States by Members chosen thereto at elections wherein a majority of the qualified voters of such State have participated, have seen fit to issue this my proclamation, appointing an election to be held on Wednesday, the third day of December next, to fill said vacancies in the Thirty-seventh Congress of the United States of America, in the following districts, namely:

The First Congressional district, composed of that part of the city of New Orleans heretofore known as municipality number one and municipality number three, and now designated as districts

[1] Third session Thirty-seventh Congress, Journal, p. 101; Globe, p. 144.

[2] Journal, p. 106; Globe, p. 164.

[3] House Report No. 22; 1 Bartlett, p. 438; Rowell's Digest, p. 181.

numbered two and three, and Suburb Treme, that portion of the parish of Orleans lying on the right bank of the Mississippi, and the parishes of St. Bernard and Plaquemines.

The Second Congressional district in the State of Louisiana, composed of that part of the city of New Orleans above Canal street, known as the First district, and district number four, formerly the city of Lafayette, and of the parishes of Jefferson, St. Charles, St. John the Baptist, St. James, Ascension, Assumption, Lafourche, Terrebonne, St. Mary, and St. Martin.

Writs of election will be issued, as required, and the election held at the places designated by law.

The proceedings will be conducted and returns thereof made in accordance with law.

No person will be considered as an elector qualified to vote who, in addition to the other qualifications of an elector, does not exhibit to the register of voters, if his residence be in the city of New Orleans, or to the commissioners of election, if his residence be in any other place in said districts, the evidence of his having taken the oath of allegiance to the United States.

Given under my hand and the seal of the State of Louisiana, at the city of New Orleans, this fourteenth day of November, A. D. 1862, and of the independence of the United States of America the eighty-seventh.

GEORGE F. SHEPLEY,
Military Governor of Louisiana.

By the Governor:

JAMES F. MILLER, *Acting Secretary of State.*

In accordance with this proclamation the election was held. It was claimed by the Committee of Elections, and not disputed, that in essential respects the election was conducted according to the forms prescribed by the laws of Louisiana, excepting a law of the disloyal legislature prescribing an oath to support the Confederacy as a qualification of voters. The registration required by law was not wholly completed however, and persons not registered were in some precincts allowed to vote after proving that they had the requisite qualifications. The Committee of Elections held that the spirit of the law was not in this respect violated, and they further say:

And had its provisions been ignored in this particular it would clearly have been only a disregard of a mere directory provision of the law. The principal and only aim of the law is to secure fair elections, and the nonobservance of directory provisions can not annul an election carried on with all the essentials of an election and with perfect fairness.

This principle of law, with regard to directory provisions, has been repeatedly and clearly laid down by the supreme court of Louisiana and the supreme courts of other States, as well as by the Supreme Court of the United States, and is too well understood by every legal mind to need any elucidation here. And it is expressly enacted that no elector shall be deprived of his vote by any omission to give him a certificate of his election.

But this phase of the question was little in issue, and there was in the controversy little insistence that the election had not been conducted in accordance with the requirements of law.

The main issue of the case is thus stated by the committee:

The committee have found little difficulty in coming to a conclusion that the claimants should be admitted to their seats, except in doubts as to the power of the military governor to fix the day of this election. In all things else there has been strict conformity to law. The districts were entirely free from a rebel force to restrain or overawe the loyal votes. The old voting precincts and voting places were all restored, and votes polled at every one of them, except in one inconsiderable parish, and part of another in one district into which guerrillas sometimes made incursions. There was a very full vote given a remarkably full one when compared with the vote at former Congressional elections, if allowance be made for the usual proportion of voters among the soldiers absent in the Union and rebel armies. Two thousand men had been recruited by General Butler into his own regiments, and two full regiments of Louisiana troops had been organized by him from these two Congressional districts, while more had

gone into the rebel army, though many of these had returned to the city and their allegiance. Deducting the proper proportion of voters from these, and there can be no doubt of a full vote when the result is compared with that in former years. At the last election for representative in the First District, in 1859, the whole number of votes was 4,970; at the present election, 2,643; difference, 2,327. In the Second district, in 1859, the whole number was 10,367; at the present election the whole number was 5,117; difference 5,250.

* * * * * * *

It remains to be considered, finally, whether this election, thus conducted, in which all the loyal voters in such numbers participated in conformity with all the provisions of law, shall be set aside by this House and the representation denied, because the time for holding it was fixed by the military governor in the absence of any other governor. The exact powers of a military governor can not be easily defined. They have their origin in, and are probably limited by, necessity. They are to some extent civil as well as military, and the authority for his civil functions is no less clear than for his military. The Supreme Court and Congress have recognized both. The former, in the case of Cross *v.* Harrison (16 Howard, 164), recognized as valid the imposition and collection of duties by a military governor, even after the port at which they were imposed and collected had been by statute included in a collection district and a collector appointed, but who had not entered upon the duties of his office. And Congress admitted California into the Union, with a State government formed and set in motion, even to the election of Senators and Representatives in Congress, exclusively under the auspices of a military governor. The constitutionally elected governor of Louisiana had turned traitor and refused to discharge his constitutional obligations in this regard. What were the loyal voters to do? Were they to turn traitors also or be disfranchised? The Constitution imposes upon the United States this obligation (Art. IV, sec. 4):

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them from invasion; and on application of the legislature or of the executive (when the legislature can not be convened), against domestic violence."

Representation is one of the very essentials of a republican form of government, and no one doubts that the United States can not fulfill this obligation without guaranteeing that representation here. It was in fulfillment of this obligation that the Army of the Union entered New Orleans, drove out the rebel usurpation, and restored to the discharge of its appropriate functions the civil authority there. Its work is not ended till there is representation here. It can not secure that representation through the aid of a rebel governor. Hence the necessity for a military governor to discharge such functions, both military and civil, which necessity imposes in the interim between the absolute reign of rebellion and the complete restoration of law. Suppose Governor Moore to be the only traitor in Louisiana. One of two things must take place. The people must remain unrepresented, or some one must assume to fix a time to hold these elections. Which alternative approaches nearest to republicanism-nearest to the fulfillment of our obligations—to guarantee a republican form of government to that people, closing the door of representation, or recognizing as valid the time fixed by the military governor? Are this people to wait for representation here till their rebel governor returns to his loyalty and appoints a day for an election, or is the Government to guarantee that representation as best it may? The committee cannot distinguish between this act of the military governor and the many civil functions he is performing every day, acquiesced in by everybody. To pronounce this illegal, and refuse to recognize it, is to pronounce his whole administration void and a usurpation. But necessity put him there and keeps him there.

Again, this George F. Shepley assumes to act as governor of Louisiana, discharging the civil functions of such governor. This is one of them. All loyal men in the State acquiesce in these acts. There is no other man discharging them or seeking to discharge them. This act of fixing the time of an election comes in conflict with no time fixed by any other man. This is to be governor de facto. This House has no jurisdiction to determine who is rightfully in the office of governor of Louisiana. Thus if this act be taken as the act of a governor de facto it must be recognized as valid.

The committee cited in support of its position the case of Clements, of Tennessee, and concluded by recommending resolutions declaring both Mr. Flanders and Mr. Hahn entitled to seats in the House.

The debate began on February 9 and continued through February 10 and 17,[1] the issue being joined almost entirely on the question of the constitutionality of the proclamation of the military governor. It was objected that the Constitution had fixed the method by which Members should be elected to the House, and that the time, place, and manner were to be determined by the legislative power only. This provision was derived from the English constitution, where it had been needed to curb the authority of the sovereign. So in this country the fixing of the time

of election by a military governor, appointed by the President, was an invasion by executive power. "No Representative can be elected to the Congress of the United States," it was argued,[2] "except in pursuance of the legislation of a State, or of the legislation of the Federal Government. * * * A State election law, which by its terms requires State officers duly qualified to execute it, can not be executed by a military governor appointed by the President." No State law and no law of Congress authorized the calling of the election in question. Hence it was contended that the two gentlemen were not entitled to admission.

On February 17 the following substitute was proposed for the resolutions of the committee:

> That the proclamation issued by George F. Shepley, styling himself military governor of Louisiana, at New Orleans, on the 14th day of November, 1862, etc. * * * was null and void, without the authority of law, and imparts no validity to the election of Benjamin F. Flanders and Michael Hahn.
>
> *Resolved,* That the election of said Flanders and Hahn appearing to have been free and unrestrained, and in accordance with the laws of Louisiana, except that being on a day other than a day of general election, had not been directed to be held by the governor of Louisiana, the action of the electors in the premises is ratified and confirmed, and said Flanders and Hahn are declared entitled to their seats as Members of this House.

This amendment was disagreed to—yeas 11, nays 115.

Then, by a vote of yeas 92, nays 44, the House agreed to the resolutions declaring Messrs. Flanders and Hahn entitled to their seats.[3]

380. The Arkansas election cases of Johnson, Jacks, and Rogers in the Thirty-eighth Congress.

The House as a matter of course declined to give prima facie effect to credentials emanating from the loyal provisional government of a State lately in secession.

In 1864 the Elections Committee favored the seating of claimants coming from districts almost free from armed foes, but elected in an election called by a loyal convention and by a fraction of a normal vote.

On February 10, 1864,[4] Mr. Henry L. Dawes, of Massachusetts, presented the credentials of James M. Johnson, from the Third Congressional district of Arkansas.

The credentials[5] were in the form of a proclamation issued by the provisional governor of Arkansas, reciting that in accordance with the schedule appended to the constitution adopted by the late convention of the State of Arkansas (held in January, 1864) an election had been held on March 14, 15, and 16, 1864, at which

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[1] Globe, pp. 831, 855, 1030.

[2] By Mr. John A. Bingham, of Ohio.

[3] Journal, pp. 411, 412; Globe, pp. 1035, 1036.

[4] First session Thirty-eighth Congress, Journal, p. 244; Globe, p. 574.

[5] Second session Thirty-eighth Congress, House Report No. 18.

the constitution had been adopted, various State officers elected, and three Congressmen, one of whom was Mr. Johnson, from the Third district.

Mr. Dawes asked that the credentials be referred to the Committee on Elections. No request was made that the oath be administered.

Mr. Henry Winter Davis, of Maryland, moved that the credentials be laid on the table.

On February 16,[1] the motion to lay on the table being withdrawn to permit debate, Mr. Davis said he had moved to lay the credentials on the table because other action on them might lead to the recognition by the House of the State of Arkansas.

After debate at length, Mr. Robert C. Schenck, of Ohio, moved to amend the the motion to refer by adding instructions that the committee investigate whether or not there was such government existing in Arkansas as to entitle the State and people to representation in Congress.

On the question of agreeing to the instructions there were yeas 53, nays 104.

A motion by Mr. Davis to lay the whole subject on the table was disagreed to; and then the motion of Mr. Dawes that the credentials be referred to the Committee on Elections was agreed to.[2]

On May 12[3] the credentials of Mr. T. M. Jacks, from the First Congressional district of Arkansas, were presented to the House and referred to the Committee on Elections; and on May 16[4] those of Mr. A. A. C. Rogers were similarly presented and referred.

On February 17, 1865,[5] the committee reported resolutions declaring that Messrs. Johnson and Jacks were entitled to seats as Representatives from Arkansas. The committee say:

> There seems in Arkansas at all times to have been a large number of unconditional Union men. It is evident that the so-called secession ordinance was not passed in accordance with the wishes of the people of the State. The convention elected in 1861 was largely Union, but, without instructions from the people, passed the ordinance of secession.
>
> After three years of war and desolation, the loyal people of Arkansas assembled in convention at Little Rock in January, 1864. The result of the convention's deliberations was the amending of the State constitution, the appointment of a provisional governor, lieutenant-governor, and secretary of state, and the designation of the 14th, 15th, and 16th days of March as the time for holding a general election throughout the State.
>
> The acts of this convention, judging from the statements of its members, were rather suggestive than obligatory. Indeed, it did not claim its acts as binding until they were ratified by the people, which was done with a unanimity seldom met with. At the election on the 14th, 15th, and 16th of March, the acts of the convention were approved by 12,177 voters, while they were disapproved by only 226. At that election the people of more than 40 counties elected State and county officers necessary to set to work again the machinery of a loyal State government, which had been overthrown by the rebellion in the month of May, 1861.
>
> On the 18th of April, 1864, the State government was formally inaugurated, since which time it has been struggling for an existence under difficulties which those who are strangers to its trials can not properly appreciate.

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[1] Globe, pp. 680–687.

[2] Journal, pp. 268, 269; Globe, p. 687.

[3] Journal, p. 650; Globe, p. 2253.

[4] Journal, p. 660; Globe, p. 2289.

[5] Second session Thirty-eighth Congress, House Report No. 18; 1 Bartlett, p. 597; Rowell's Digest, p. 199.

The committee go on to describe the amended constitution, showing that it abolished slavery, and to show that a State government under this constitution was in operation, and the legislature had shown by its legislation that the disloyal elements of the State were not to participate in its government. It was also noted that Arkansas had furnished at least 10,000 Union volunteers.

The First district was composed of twenty counties, which at the Presidential election of 1860 cast 16,841 votes. Fourteen of these counties participated "pretty fully" in the March election in question, casting the aggregate vote of 3,000. These fourteen counties in 1860 cast a total of 14,005 votes. Of the 3,000 votes cast for Member of Congress at the March election Mr. Jacks received all but 15.

In the Third district all but one of the nineteen counties participated pretty fully, the total vote being nearly 5,000, of which Mr. Johnson received over 4,000. These counties gave in 1860 an aggregate vote of 16,932.

The committee then go on to quote the position taken in the case of Mr. Bonzano, of Louisiana, as to the course to be taken when the people had reorganized State governments.

The report of the committee in these Arkansas cases was presented near the end of the Congress, and was not acted on by the House.

381. The Louisiana election cases of Bonzano, Field, Mann, Wells, and Taliaferro, in the Thirty-eighth Congress.

In 1864 the Elections Committee were divided as to seating persons chosen under authority of a constitutional convention in a State recently in insurrection.

The House did not permit prima facie effect to credentials coming from a State lately in insurrection and from a government of doubtful standing.

On December 5, 1864,[1] the Speaker laid before the House the credentials of M. F. Bonzano, A. P. Field, W. D. Mann, T. M. Wells, and Robert W. Taliaferro, as Representatives from the State of Louisiana. No motion was made to administer the oath, and the credentials were referred to the Committee on Elections. The claimants were allowed the privileges of the floor.

On February 11, 1865,[2] the Committee reported on the case of Mr. Bonzano, who had been returned by 1,609 votes out of a total of 3,065. The committee say:

> This election derives its authority from the constitutional convention which commenced its session in New Orleans April 6, 1864, which amended essentially and adopted anew the constitution of Louisiana, and, among other things, did, on the 22d of July, 1864, divide the State into five Congressional districts, in accordance with the number of Representatives assigned to that State in the apportionment under the census of 1860, and ordered an election to be held on the first Monday of September, 1864, to fill the vacancies caused by the failure of the State hitherto to elect Representatives to the present Congress.

Previous to this constitutional convention there had been a State government, elected in pursuance of a proclamation of the major-general commanding the department. The State convention, which met April 6, 1864, and adjourned July 25,

[1] Second session Thirty-eighth Congress, Journal, p. 7; Globe, p. 2.

[2] Journal, p. 242; 1 Bartlett, p. 583; Rowell's Digest, p. 198; House Report No. 13.

adopted a provision abolishing slavery as part of the new constitution, and the proceedings were, by proclamation of the governor, submitted to the people on September 5, and were ratified without material opposition. The whole number of votes was over 9,000.

The constitutional convention, by ordinance, divided the State into five Congressional districts, and directed elections to be held on September 5, 1864. In accordance with this ordinance the governor issued his proclamation directing the elections to be held. Mr. Bonzano was elected in accordance with these proceedings, and received his certificate of election from the governor.

The committee say in regard to this election:

This election depends for its validity upon the effect which the House is disposed to give to the efforts to reorganize a State government in Louisiana, which have here been briefly recited. The districting of the State for Representatives, and the fixing of the time for holding the election, were the acts of the convention. Indeed, the election of governor and other State officers, as well as the existence of the convention itself, as well as its acts, are all parts of the same movements.

It is objected to their validity that they neither originated in nor followed any preexisting law of the State or Nation. But the answer to this objection lies in the fact that, in the nature of the case, neither a law of the State nor Nation to meet the case was a possibility. The State was attempting to rise out of the ruin caused by an armed overthrow of its laws. They had been trampled in the dust, and there existed no body in the State to make an enabling act. Congress can not pass an enabling act for a State. It is neither one of the powers granted by the several States to the General Government, nor necessary to the carrying out of any of those powers, and all "the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people." It is preposterous to have expected at the hands of the rebel authorities in Louisiana that, previous to the overthrow of the State government, they should prepare a legal form of proceeding for its restoration. In the absence of any such legal form prepared beforehand in the State, and like absence of power on the part of the General Government, under the delegated powers of the Constitution, it follows that the power to restore a lost State government in Louisiana existed nowhere, or in "the people," the original source of all political power in this country. The people, in the exercise of that power, can not be required to conform to any particular mode, for that presupposes a power to prescribe outside of themselves, which it has been seen does not exist. The result must be republican, for the people and the States have surrendered to the United States, to that extent, the power over their form of government in this, that "the United States shall guarantee to every State a republican form of government."

It follows, therefore, that if this work of reorganizing and reestablishing a State government was the work of the people, it was the legitimate exercise of an inalienable and inherent right, and, if republican in form, is entitled not only to recognition, but to the "guaranty" of the Constitution.

The attention of the committee has, therefore, been directed to the inquiry how far this effort to restore constitutional government in Louisiana has been the work of the people. Those engaged in the traitorous attempt to destroy the government form no part of that people engaged in the patriotic effort to restore it. The government is to be made, if at all, for and by patriots and not by traitors. In answering another and essential question, whether a government once erected in that State will be able to maintain itself against domestic violence, traitors must be counted, but not for their voice in making the government itself. As well might the inmates of a State prison be enumerated and consulted upon determining the character of a code of laws designed for their government.

The evidence before the committee, and all the information they could obtain, satisfied them that the movement which resulted in the election of State officers, the calling of a convention to revise and amend the constitution, the ratification of such revisal and amendment by a popular vote, and the subsequent election of Representatives in Congress, was not only participated in by a large majority, almost approaching to unanimity, of the loyal people of the State, but that that loyal people constituted a majority of all the people of the State.

The committee go on to say that they entertain no doubt of the ability of this government to maintain itself against domestic violence if protected from enemies without.

Therefore, the committee recommended a resolution declaring Mr. Bonzano entitled to a seat as Representative from the First district of Louisiana.

A minority of the committee dissented from this conclusion. They say:

Has evidence been presented which authorizes this House to declare that the people of Louisiana, by any proper mode of expression, have changed the status in which they were placed by their own acts and established a republican government? Such only is the form contemplated by the Constitution; such only has any title to representation on this floor; such only is the United States bound to guarantee or authorized to recognize.

The indispensable quality of such government is that it shall emanate from the people; and not only must it be derived from the great body, but their agency in its organization must have been voluntary. The idea of restraint is incompatible with volition. The government must not only rest on the consent of the governed but that consent must not be procured by force or intimidation.

It is not sufficient that the result may show that a government apparently republican has been created, but the creation must be the exercise of a will unaffected by the presence of an overawing power.

The erection of a State government is a purely civil act. It has no affinity or connection with martial law. The civil power is alone capable to distinguish or declare the fact of its establishment or the essential conditions of its existence. The Congress of the United States is the only body having authority, primarily, to recognize the government of a State. Neither the Executive nor any subordinate military commander has capacity to incept or consummate its creation. The undersigned do not insist that an act of Congress is necessary as a prerequisite to enable the people of Louisiana to form a government, but the judgment of Congress must be passed on the result of the action of the people in the recognition of their act before Representatives can be entitled to admission on this floor. This House must be satisfied that their constitution is ordained in accordance with their deliberate and unforced will before it can lend its sanction to the act or recognize its validity. Two questions, therefore, are presented for consideration:

1. Did the great body of the loyal people of Louisiana, in fact, participate or clearly concur in the establishment of the government offered for recognition?

2. Was their act the result of their deliberate will and voluntary choice, unprocured by military interference?

The minority answer the first question by showing that only nineteen of forty-eight parishes in the State sent delegates to the constitutional convention, and that the votes on the ratification of the constitution were not representative of the vote of the State.

The minority answer the second question by citing testimony and documents tending to show that the military power was all-powerful, and that civil government did not in fact exist except in a weak condition.

The report in this case of Mr. Bonzano was not acted on by the House.

Reports similar in nature were made on the cases of Messrs. Field and Mann, but were not acted on by the House.[1]

382. The Senate election cases of Fishback and Baxter, from Arkansas, in the Thirty-eighth Congress.

The Senate declined to give prima facie effect to credentials regular in form but from a State known to be kept from the duress of an armed foe only by a partial military protection.

[1] House Reports Nos. 16, 17; 1 Bartlett, pp. 596, 597.

The Senate declined to admit persons elected under the auspices of a State government representing a portion only of the people in a State menaced by hostile armies.

On May 21, 1864,[1] the credentials of Hon. William Fishback, claiming a seat as a Senator from Arkansas, were presented in the Senate, and a motion was made that the oath be administered to Mr. Fishback. The credentials were in regular form, but a question was raised as to the status of the State of Arkansas.

On June 13,[2] after long debate, the Senate referred the credentials of Mr. Fishback, and also of Hon. Elisha Baxter, also claiming a seat from Arkansas, to the Committee on the Judiciary.

On June 27, 1864,[3] the report was submitted to the Senate. It begins:

> That the credentials presented are in due form, purporting to be under the seal of the State of Arkansas, and to be signed by Isaac Murphy, governor thereof; and if the right to seats were to be determined by an inspection of the credentials, Messrs. Fishback and Baxter would be entitled to be sworn as members of this body. It is, however, admitted by the persons claiming seats, and known to the country, that, in the spring of 1861, the State of Arkansas, through its constituted authorities, undertook to secede from the Union, set up a government in hostility to the United States, and maintain the same by force of arms.

The report then goes on to recite the history of secession, and then the later reorganization of the State government by loyal citizens, citing the cases of Robbins and Potter in the Senate, and the decision of the United States Supreme Court in the case of Luther *v.* Borden as to the rule of recognition of State governments. The committee conclude:

> The number of persons in Arkansas who voted for President in 1860 was 54,053, less than one-fourth of whom, as appears from the statement of the claimants, took part in the reorganization of the State government. This, however, would not be fatal to the reorganization, if all who were loyal to the Union had an opportunity to participate, and the State was free from military control. Such, however, is understood not to have been the case. The President had not then, nor has he up to this time, recalled his proclamation, which declared the inhabitants of Arkansas in a state of insurrection against the United States, nor was there any evidence before the committee that said insurrection had ceased or been suppressed. At the time when the body which chose the claimants was elected, when it assembled, and at this time, the State of Arkansas is occupied by hostile armies, which exercises supreme authority within the districts subject to their control. While a portion of Arkansas is at this very time, as the committee are informed, in the actual possession and subject to the control of the enemies of the United States, other parts of the State are only held in subordination to the laws of the Union by the strong arm of military power. While this state of things continues, and the right to exercise armed authority over a large part of the State is claimed and exerted by the military power, it can not be said that a civil government, set up and continued only by the sufferance of the military, is that republican form of government which the Constitution requires the United States to guarantee to every State in the Union.
>
> When the rebellion in Arkansas shall have been so far suppressed that the loyal inhabitants thereof shall be free to reestablish their State government upon a republican foundation, or to recognize the one already set up, and by the aid and not in subordination to the military to maintain the same, they will then, and not before, in the opinion of your committee, be entitled to a representation in Congress and to participate in the administration of the Federal Government. Believing that such a state of things

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[1] First session Thirty-eighth Congress, Globe, pp. 2392, 2458.

[2] Globe, pp. 2895–2906; Senate Journal, p. 552.

[3] 1 Bartlett, p. 641.

did not at the time the claimants were elected, and does not now, exist in the State of Arkansas, the committee recommend for adoption the following resolution:

"Resolved, That William M. Fishback and Elisha Baxter are not entitled to seats as Senators from the State of Arkansas."

On June 29,[1] after full debate, the resolution was agreed to, yeas 27, nays 8.

383. The Senate election case of Willey and Carlile, from Virginia, in the Thirty-seventh Congress.

From a State distracted by civil war the Senate admitted Senators chosen by a legislature representing no more than a third or fourth of the people.

The withdrawal of a Senator to join the foes of the Government was held to create a vacancy which a legislature could recognize, although the Senate had not expelled him.

Instance wherein the Senate gave immediate prima facie effect to credentials from a de facto government in a State disturbed by civil war.

On July 13, 1861,[2] in the Senate, Mr. Andrew Johnson, of Tennessee, presented the following credentials:

VIRGINIA, *to wit:*

The legislature of this State having, on the 9th day of July, 1861, in pursuance of the Constitution of the United States, chosen Waitman T. Willey, esq., a Senator of this State, to fill the vacancy which has happened by the withdrawal and abdication of James M. Mason, esq., I, Francis H. Pierpont, being governor of the Commonwealth, do hereby certify the same to the Senate of the United States.

Given under my hand and the seal of the Commonwealth this 11th day of July, 1861.

[L.S.]

FRANCIS H. PIERPONT.

Mr. Johnson also presented similar credentials certifying the election of John S. Carlile, esq., as the other Senator from Virginia, to fill the vacancy caused by the "withdrawal and abdication of Robert M. T. Hunter, esq."

Mr. Johnson proposed that Messrs. Willey and Carlile take the oath at once, but Mr. James A. Bayard, of Delaware, objected, and moved that the credentials be referred to the Committee on the Judiciary for examination before the administration of the oath.

It appeared from the ensuing debate that the Senate had recently, on July 11, expelled Messrs. Mason and Hunter. But the election of Messrs. Willey and Carlile had occurred on July 9, two days before the expulsion. Mr. Bayard made the point that the legislature of Virginia, even if a valid legislature, might not create or assume a vacancy. The Senate itself could expel, but the legislature could not. Neither could the legislature determine that the charge of crime vacated the seats. Mr. Bayard further objected that if, as he believed, Virginia was out of the Union, she certainly should not have representation in the Senate. If she was in the Union then the Senate must take cognizance of her laws and constitution, and under those John Letcher, and not Francis H. Pierpont, was governor. The legislature which had elected Messrs. Willey and Carlile was only a portion of the real legislature of Virginia. Mr. Lazarus W. Powell, Senator from Kentucky, stated that they represented not more than a fourth, or at most a third, of the people of Virginia. Only

[1] Globe, pp. 3360–3368; Senate Journal, p. 677.

[2] First session Thirty-seventh Congress, Globe, pp. 103–109.

thirty or forty counties out of over one hundred and fifty were represented in the legislature. This statement was not denied.

In opposition to these objections it was urged by Mr. Johnson that in fact the vacancies did exist on July 9. Both Mason and Hunter had withdrawn from the Senate, had abdicated before July 9. That fact was notorious, and the Senate's resolution of expulsion on July 11 did not change that fact. Messrs. Jacob Collamer, of Vermont, and Lyman Trumbull, of Illinois, urged that the resolution of expulsion had relation to the time when Messrs. Mason and Hunter committed the criminal act of withdrawing and joining the foes of the Government. And the legislature of Virginia might take cognizance of that act as well as they might of the death of a Senator or a resignation. In the case of John F. Mercer the House of Representatives had settled that the executive of a State might take cognizance of the resignation of a Representative and order a new election.

As to the second objection it was urged that the loyal portion of the people of Virginia had a government which was at least the de facto government of the State; and Messrs. Willey and Carlile bore uncontested prima facie evidence of election from that government. There was no evidence from any quarter that these gentlemen were not the Senators-elect as their credentials purported to show.

Mr. Bayard's motion was disagreed to—yeas 5, nays 35.

Thereupon Messrs. Willey and Carlile appeared and took the oath.

384. The Senate election cases of Segar and Underwood, from Virginia, in the Thirty-eighth Congress.

The Senate declined to admit to a seat a person bearing uncontested credentials of election by a legislature representing a small fraction of the people in a seceding State.

On February 17, 1865,[1] in the Senate, Mr. Waitman T. Willey, of West Virginia, presented the credentials of Mr. Joseph Segar, as Senator-elect from the State of Virginia, to fill the vacancy caused by the death of Lemuel J. Bowden, who had been admitted to a seat as Senator from Virginia in 1863, at the time that certain counties of old Virginia had been organized and admitted to the Union as the new State of West Virginia. The condition of affairs was briefly set forth at a later day in a Senate report[2] submitted by Mr. George F. Hoar, of Massachusetts, in relation to a claim by Mr. Segar for compensation:

On the 23d of February, 1863, Mr. Bowden was elected Senator for Virginia by the legislature assembled at Wheeling, the great portion of Virginia, including Richmond, its former seat of government, being then in rebellion. He was admitted to his seat, the Senate thereby recognizing the legal existence of the State he represented. West Virginia was then erected into a separate State. The legislature of Virginia assembled at Alexandria and continued the functions of a State legislature of Virginia. Mr. Bowden continued to represent Virginia in the Senate until his death, on the 2d of January, 1864. December 8, 1864, the petitioner was elected to succeed Mr. Bowden, and prosecuted his claim with diligence. The Alexandria government was recognized as a valid State organization by President Lincoln in his amnesty proclamation of December 8, 1863. It gave its constitutional assent to the adoption of the thirteenth amendment of the Constitution of the United States, and its assent is treated by Mr. Seward in his proclamation announcing the adoption of the amendment as necessary thereto.

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[1] Second session Thirty-eighth Congress, Globe, pp. 845–849, 1433, 1434.

[2] Second session Forty-fifth Congress, Senate Report No. 509.

Mr. Charles Sumner, of Massachusetts, immediately upon the presentation of the credentials, objected to the immediate administration of the oath and moved that they be referred to the Committee on the Judiciary. Mr. Sumner urged that the so-called legislature of Virginia was little more than a common council of the city of Alexandria, while the greater part of Virginia was in armed resistance to the Government, and the President of the United States had declared the people of the State generally to be in insurrection. Certain counties, however, had been excepted, as stated in the debate by Mr. Jonathan Doolittle, of Wisconsin:

> The Presidential proclamation declaring the population of certain States to be in insurrection excepted from its operation the counties of Alexandria city and county, Berkeley, Accomac, Northampton, Princess Anne, Norfolk, Norfolk city, Portsmouth city, and Elizabeth city and county, in the State of Virginia, containing a population of over 175,000; and these counties are now represented in the legislature at Alexandria.

In favor of the admission of Mr. Segar it was urged that the credentials were sufficient on their face, and that the right of Virginia to representation had been settled when Mr. Bowden was admitted to a seat.

Mr. John Sherman, of Ohio, pointed out that the term for which Mr. Segar had been elected would expire on March 4 next, and that it was hardly worth while to delay the pressing public business to determine this question. He therefore moved that the credentials lie on the table. This motion was agreed to—yeas 29, nays 13.

On March 9, 1865,[1] on the first day of the special session of the Senate, Mr. Jonathan Doolittle, of Wisconsin, presented the credentials of John C. Underwood as Senator-elect from the State of Virginia for the term beginning March 4 instant.

Mr. Charles Sumner, of Massachusetts, moved that the credentials be referred to the Committee on the Judiciary.

At this time the question of admission of Senators elected in Louisiana and Arkansas was before the Senate, and in view of the doubt as to the future treatment of the seceding States a motion to postpone the consideration of the credentials to the next session of Congress was agreed to without division.

Neither Mr. Underwood nor Mr. Segar were ever admitted to a seat.

385. The Senate election case of Cutler and Smith, from Louisiana, in the Thirty-eighth Congress.

The two Houses of Congress having by law declared the State of Louisiana in a state of insurrection, the Senate in 1864 did not admit persons bearing credentials therefrom.

On December 6, 1864,[2] the credentials of R. King Cutler and Charles Smith, as Senators from Louisiana, were presented in the Senate. At the same time memorials were presented containing the protests of citizens of Louisiana against their admission to the Senate. No proposition was made to administer the oath to the claimants, but on December 8 the credentials were referred to the Committee on the Judiciary.

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[1] Second session Thirty-eighth Congress, Globe, pp. 1433, 1434.

[2] Ibid., pp. 5, 8.

On February 18, 1865,[1] the committee reported, reviewing at length the condition of affairs in Louisiana and concluding:

The persons in possession of the local authorities of Louisiana having rebelled against the authority of the United States, and her inhabitants having been declared to be in a state of insurrection in pursuance of a law passed by the two Houses of Congress, your committee deem it improper for this body to admit to seats Senators from Louisiana, till by some joint action of both Houses there shall be some recognition of an existing State government, acting in harmony with the Government of the United States, and recognizing its authority.

Your committee therefore recommend for adoption, before taking definite action upon the right of the claimants to seats, the accompanying joint resolution:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States do hereby recognize the government of the State of Louisiana, inaugurated under and by the convention which assembled on the 6th day of April, A. D. 1864, at the city of New Orleans, as the legitimate government of said State, entitled to the guarantee and all other rights of a State government under the Constitution of the United States."

The report was debated on February 23, 24, and 25,[2] but was not finally acted on.

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[1] 1 Bartlett, p. 643.

[2] Globe, pp. 1011, 1061, 1091, 1101.

Chapter XI.

ELECTORATES IN RECONSTRUCTION.[1]

1. **Members-elect from insurrectionary States not admitted on prima facie title. Sections 386–388.[2]**
2. **Case of the Georgia Members in 1869. Section 388.**
3. **Principles deduced from Senate decisions. Sections 389–395.**

386. In the Fortieth Congress Members-elect from States lately in secession were not admitted until a committee had examined their credentials, qualifications, and the status of their constituencies.—

In 1868, at the time of the reconstruction of the State governments of a number of the States recently in secession, persons claiming to be elected Members of the House appeared from the States of Arkansas, Florida, North and South Carolina, Alabama, Louisiana, and Georgia.[3] These persons bore credentials signed, some by military authorities in command of the districts comprising the State,[4] others signed by the president of a constitutional convention.[5] The House decided in these cases to refer the credentials to the Committee on Elections before the Members-elect were sworn in,[6] in accordance with the precedent in the preceding Congress.

The Committee on Elections reported in these cases as to whether or not the credentials were "in due form of law" and whether or not the States had conformed to the laws of Congress.[7] Also, they reported as to the qualifications of the Member-elect, especially as to whether or not his disabilities had been removed so that he might take the oath.[8]

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[1] See also cases of Houston *v.* Broocks (sec. 644 of this volume and Jacobs *v.* Lever, Myers *v.* Patterson, and Prioleau *v.* Legare (sec. 1135 of Vol. II).

[2] See also cases of Segar (sec. 318 of this volume) and Jones *v.* Mann and Hunt *v.* Menard (sec. 326 of this volume).

[3] For references to these cases see p. cccxvi of the Index to the Congressional Globe, second session Fortieth Congress.

[4] Members of the House protested against Members "sent here by military force acting under a brigadier-general," second session Fortieth Congress, Journal, p. 922; Giobe, p. 3441.

[5] So Members from Alabama, Globe, p. 4294.

[6] Journal, p. 917; Globe, p. 3396.

[7] Globe, p. 4215.

[8] Globe, p. 4254.

387. In 1869 the House provided by resolution that the credentials of persons claiming seats from certain States should be examined by a committee before the oath should be administered.

The credentials of Members-elect who appear after the organization are presented but are not examined by a committee before the oath is administered, unless there be objection.

In 1870 the House declined to exclude a Member-elect for alleged disloyalty in giving utterance to words indicating contempt for the Government.

On December 6, 1869,[1] at the beginning of the second session, after the roll of Members-elect had been called by States and the presence of a quorum had been announced, the Speaker invited Members-elect with credentials, whose right to seats were unchallenged, to come forward and take the oath.

Mr. Halbert E. Paine, of Wisconsin, said that, as there was no law authorizing the Speaker, Clerk, or other officer to inspect credentials presented after the House was once organized, it seemed most proper that all credentials be referred to the Committee on Elections for examination before the bearers should be sworn in.

The Speaker[2] said the usage had always been, when there was no objection, to allow a Member to be sworn in without any further ceremony. The Chair did not propose to administer the oath to any to whom objection might be made.

Members-elect to whom there was no objection were then sworn in.

Later in the day Mr. Paine presented the credentials of William Milnes, Jr., claiming a seat as a Member from the Sixth district of Virginia, and at the same time offered the following resolution, which was agreed to by the House:

> *Resolved,* That all credentials of persons claiming the right to represent the people of Virginia and Mississippi in this House be referred, when presented, to the Committee of Elections.

In accordance with this resolution credentials were presented and referred, the oath not being administered pending the investigation.

On January 27, 1870,[3] Mr. Paine submitted from the committee a report finding that six of the nine persons who presented certificates from Virginia, were entitled to be sworn in, and submitted a motion that the oath be administered to them. Objection being made to one of the six, Mr. Charles H. Porter, he stepped aside until the oath was administered to the others. The question recurring as to administering the oath to Mr. Porter, Mr. Fernando Wood, of New York, presented the record of a trial by a military commission whereby Mr. Porter had been punished, after conviction, for declaring that—

> This Government is all a———humbug from beginning to end, etc.

After debate the motion to administer the oath to Mr. Porter was agreed to, but immediately Mr. William S. Holman, of Indiana, moved to reconsider. Thereupon a debate arose, partisan in nature, which reviewed the exclusion of the Kentucky Members on charges of disloyalty. Finally the motion to reconsider

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[1] Second session Forty-first Congress, Journal, pp. 22, 23; Globe, pp. 9, 15.

[2] Schuyler Colfax, of Indiana, Speaker.

[3] Globe, pp. 822–828.

was laid on the table-yeas, 167; nays, 4. Thereupon Mr. Porter appeared and took the oath.

The three other claimants to seats presented cases requiring further examination, involving questions as to prima facie and final right that are considered on other pages.

388. The election case of the Georgia Members in the Forty-first Congress.

The House decided in 1869 that a person might not, by virtue of one election, sit as a Member of the House in two Congresses.

The Clerk declined to enroll claimants bearing credentials referring to an election by virtue of which the said claimants had already held seats in the preceding Congress.

Instance wherein a constitutional convention in a State undergoing reconstruction authorized the election of Members of Congress in anticipation of the sanction of Federal law.

Instance wherein, during the reconstruction period, credentials were issued to Members-elect by a military commander.

On March 5, 1869,[1] when the House of Representatives organized the names of no persons as Members-elect from the State of Georgia were included in the roll called by the Clerk.

It appeared that certain persons had appeared bearing credentials of the governor of Georgia, under seal of the State, and in due form setting forth:

Whereas the convention of the people of this State, held under the reconstruction acts of Congress, passed an ordinance dated 10th of March, 1868, which ordained that an election be held, beginning on the 20th day of April, 1868, for Representatives to the Congress of the United States; and whereas the returns made agreeably to said ordinance show that you received the highest number of votes for Representative from the Second Congressional district of this State; and whereas it is my duty under the laws of Georgia to commission the persons legally elected.

These are therefore to commission you, the said Nelson Tift, to take session in the House of Representatives of the United States in accordance with said election under said ordinance, a copy of which is hereunto annexed, and to use and exercise all and every the privileges and powers which by right you may or can do, under and by virtue of the Constitution, in behalf of this State.

This credential was dated November 24, 1868.

The ordinance, which was annexed to the credentials, provided that the persons elected at the election of April 20, 1868 (at which the constitution was voted on, and which was conducted under direction of the commanding general of the military district including Georgia)—

shall enter upon the duties of the several offices to which they have been respectively elected when authorized so to do by acts of Congress or by the order of the general commanding, and shall continue in office till the regular session provided for after the year 1868 and until successors are elected and qualified, so that said officers shall each of them hold their offices as though they were elected on the Tuesday after the first Monday in November, 1868, or elected or appointed by the general assembly next thereafter.

In the debate it was stated that while the Clerk was technically right in not putting the names of the persons on the roll, the House was not bound by so strict

[1] First session Forty-first Congress, Journal, pp. 5, 14; Globe, pp. 16–18.

technical rule. It appeared from the debate that the same persons, by virtue of the election in question, had taken seats in the preceding Congress, the Fortieth.

The House, in the perplexities caused by this state of facts abandoned a resolution providing for the swearing in of the persons named, and agreed to this resolution:

Resolved, That the credentials and papers of J. W. Clift, Nelson Tift [mentioning others], claiming seats as Members of the House of Representatives from the State of Georgia, be referred to the Committee of Elections, when appointed, with directions to report to the House whether their papers present a prima facie right to their seats.

On January 28, 1870,[1] Mr. John C. Churchill, of New York, from the Committee on Elections, submitted the report. The report first states fully the facts in connection with the case:

In November, 1867, under the reconstruction acts of Congress, members of a convention to form a constitution of the State of Georgia were elected. This convention convened on the 9th day of December, 1867, and proceeded with the only duty which, under those acts, they had to perform, and on the 11th of March, 1868, they adopted a constitution to be submitted to the people under the acts above referred to.

On the 11th of March, 1868, Congress passed an act, the second section of which reads as follows:

"SEC. 2. *And be it further enacted,* That the constitutional convention of any of the States mentioned in the acts to which this is amendatory may provide that at the time of voting upon the ratification of the constitution, the registered voters may vote also for Members of the House of Representatives of the United States, and for all elective officers provided for by the said constitution; and the same election officers who shall make the return of the votes cast on the ratification or rejection of the constitution shall enumerate and certify the votes cast for Members of Congress."

Under the authority of this section, although anticipating its passage, the convention on the 10th of March, 1868, adopted an ordinance which provided that an election should be held, beginning on the 20th of April, 1868, "for voting on the ratification of the constitution, and for governor, members of the general assembly, Representatives to the Congress of the United States, and all other officers to be elected as provided in the constitution." It was further provided "that the persons so elected shall enter upon the duties of the several offices to which they have been respectively elected, when authorized so to do by acts of Congress or by the order of the general commanding; and shall continue in office till the regular succession provided for after the year 1868, and until successors are elected and qualified; so that said officers shall each of them hold their offices as though they were elected on the Tuesday after the first Monday of November, 1868, or elected or appointed by the general assembly next thereafter."

General Meade was further requested by the same ordinance to cause due returns to be made, and certificates of election to be issued by the proper officers. Under this ordinance an election was held, beginning on the 20th April, 1868, at which Representatives in Congress were voted for in the several congressional districts, each voter so voting depositing but a single ballot, on which was inscribed "for Representative in Congress," with the name of the person for whom he voted. At this time there was no act of Congress in existence giving representation in Congress to Georgia, and therefore no time when, by the terms of the above ordinance, the terms of the persons so voted for could commence.

On the 25th of June, 1868, Congress passed a law which declared that Georgia should be entitled and admitted to representation in Congress when the legislature of the State should have duly ratified article fourteen of the amendments to the Constitution, and should also have given the assent of the State to certain fundamental conditions specified in the act; and the President was required, within ten days after the receipt of official intelligence of the fact, to issue a proclamation announcing the ratification by the legislature of the fourteenth amendment.

On the 1st of July, 1868, General Meade issued certificates of election to the several persons who had received a majority of votes for Representative in Congress in their respective districts, which certificate, for the First Congressional district, was in the following form:

[1] Second session Forty-first Congress, House Report No. 16; 2 Bartlett, p. 596.

"HEADQUARTERS THIRD MILITARY DISTRICT,
"(GEORGIA, FLORIDA, AND ALABAMA.)

"From the return made to these headquarters by the boards of registration of the election held in the State of Georgia for civil officers of said State, and for Members of Congress, under the provisions of General Order, No. 40, issued from these headquarters, which election commenced on the 20th day of April and continued four days, *it is hereby certified* that it appears that in said election J. W. Clift received a majority of the votes cast for a Representative to the Congress of the United States from the *First Congressional district* in said State of Georgia.

"GEORGE G. MEADE,
"MAJOR-GENERAL, U. S. A., COMMANDING.

"ATLANTA, GA., *July 1, 1868.*"

The certificates were similar in form, with changes only of the name of the person certified to be elected.

The convention adjourned on the 11th March, 1868, the constitution providing that the general assembly should meet within ninety days of the adjournment of the convention, and annually thereafter on the second Wednesday in January, or on such other day as the general assembly might provide. This last fact is important, since it has been claimed before the committee that, under the constitution of Georgia, no election for Members of Congress could be held until the year 1870. The clause of the constitution so referred to is as follows—article 2, section 11:

The election of governor, Members of Congress, and the general assembly, after the year 1868, shall commence on the Tuesday after the first Monday in November, unless otherwise provided by law.

But this puts no limitation whatever upon the powers of the general assembly to regulate the time and frequency of elections, and, taken in connection with the general grant of power to the general assembly (article 3, section 5, 1) to pass any law consistent with the constitution they might deem necessary to the welfare of the State, gave them full control of the subject; and the convention having required the general assembly to meet within ninety days of their own adjournment, and also on the second Wednesday of the following January, the fullest opportunity was given to the latter to provide by further legislation, if necessary, for the proper representation of the State in Congress.

On the 8th of July, 1868, the general assembly of Georgia organized, and soon after ratified the fourteenth amendment and assented to the fundamental conditions mentioned in the amendatory reconstruction act of June 25, 1868; and the President thereupon, on the 27th day of July, 1868, issued his proclamation of the fact of such ratification. The Members-elect from Georgia thereupon, in July, 1868, presented their certificates of election received from General Meade, and, so far as eligible, were thereon admitted to seats in the Fortieth Congress.

Afterwards, in November, 1868, the governor of the State issued commissions to each of these parties, based upon the same election.

The report goes on to say that the commission of the governor as evidence of the election is unauthorized, General Meade having been the only person authorized by the ordinance to issue certificates of election. The commission issued by the governor of Georgia referred to the same election as did the certificate issued by General Meade and conferred no additional powers. By the election of April 20, 1868, Georgia became entitled to representation immediately upon compliance with certain conditions. Those conditions were complied with in time for the Representatives to be admitted to the Fortieth Congress. It was absurd to say that the right to immediate representation would be satisfied by admission to the Forty-first Congress. The committee concludes:

The action of the persons elected, as well as of the House, was in entire harmony with this view. Immediately upon the compliance of Georgia with the required conditions, their members presented themselves and the House received them as Representatives from that State.

It is too late for these claimants to deny that their election entitles them to sit in the Fortieth Congress. Their own action has estopped them from such denial, and unless they can show themselves entitled by the election of April 20, 1868, to hold for two terms the force of their election is exhausted.

The action of the people in voting for them as Representatives in Congress, and their certificates of election as such Representatives, have been fully answered by admitting them as such Representatives to the Fortieth Congress. Nor was it a matter of choice with these men whether they should present themselves for admission to the Fortieth or to the Forty-first Congress. By the ordinance of the convention under which this election was held, and the law of Congress of June 25, 1868, they were to enter upon the duties of their office whenever the State of Georgia had complied with the conditions mentioned in the last-mentioned act. These conditions were complied with during the following month of July, 1868, and therefore it became the duty of these men to enter upon the duties of the office to which they had been chosen. This they did, and became Members of the House of Representatives of the Fortieth Congress, and acted as such during the closing days of the second session of that Congress and for the remainder of the term of its existence.

Having taken their seats as Members of the Fortieth Congress, it was not in the power of the convention of Georgia to extend their term so as to include the Forty-first Congress. The office of Representative to the Fortieth Congress is entirely distinct from that of Representative in the Forty-first Congress, and made so by the Constitution of the United States.

It is not pretended that there was anything in the conduct of the election of April 20, 1868, or in the action of the voters, which indicated a purpose to choose for more than a single Congress, and the ordinance of the convention can not affect the result. Indeed an examination of the ordinance will show that it was the State officers, and not Members of Congress, the duration of whose offices was attempted to be regulated by that act.

The conclusion of the committee, therefore, is that the force of the election of April 20, 1868, Was exhausted when these gentlemen were admitted Members of the Fortieth Congress, and they therefore recommend the adoption of the following resolution:

"*Resolved*, That the claimants to seats in the Forty-first Congress of the United States from the State of Georgia, under the election held in that State on the 20th day of April, 1868, are not entitled to such seats."

On January 28, 1870,[1] the report was explained, but not opposed, and the resolution was agreed to without division.

389. The Senate election case of Jones and Garland v. McDonald and Rice, from Arkansas, in the Fortieth Congress.

A State having been in secession, the Senate admitted as Senator the person chosen after the State had conformed to conditions prescribed by law, and refused to admit one chosen prior to such conformity.

Instance wherein the Senate gave immediate prima facie effect to informal credentials, although other claimants presented credentials technically conforming to law.

Instance wherein the Senate admitted persons chosen before Congress had admitted a reconstructed State to representation.

From the outbreak of the civil war until 1868 the State of Arkansas was without representation in the Senate of the United States. On November 24, 1866, the legislature of Arkansas elected as Senators John T. Jones for the vacancy in the term beginning March 4, 1865, and Augustus H. Garland for the term commencing March 4, 1867. Neither of these Senators-elect were admitted; but by the act of July 19, 1867,[2] Congress declared the governments then existing in several Southern States, including Arkansas, illegal. Previously, by the law of March 2, 1867,[3] Congress had prescribed the conditions on which the States lately in secession might be read-

[1] Journal, p. 222; Globe, pp. 853, 854.

[2] 15 Stat. L., p. 14.

[3] 14 Stat. L., p. 428.

mitted to representation, but leaving it for a future law to effect such readmission. Arkansas proceeded, under the law of March 2, 1867, to form a new State government, and the legislature of that new government on April 15, 1868, chose two Senators, Alexander McDonald for the term beginning March 4, 1865 (that for which Mr. Jones had been elected), and Benjamin F. Rice for the term beginning March 4, 1867 (that for which Mr. Garland had been elected). But it was not until June 22, 1868,[1] that Congress by law formally admitted Arkansas "to representation in Congress as one of the States of the Union." So Messrs. McDonald and Rice were chosen before Arkansas was actually admitted.

On June 23, 1868,[2] the day after the act of admission had become a law, Mr. John M. Thayer, of Nebraska, presented the credentials of Messrs. McDonald and Rice in the Senate. They were in form as follows:

STATE OF ARKANSAS, *to wit:*

The general assembly of the State, assembled under the provisions of section 2 of Article V of the constitution as adopted by the convention on the 11th day of February, A. D. 1868, a copy of which is hereto annexed, having, on the 15th day of April, A. D. 1868, in pursuance of an act of Congress entitled "An act to regulate the times and manner of holding elections for Senators in Congress," approved July 25, 1866, chosen Benjamin F. Rice a Senator of the United States for the term ending on the 4th day of March, A. D. 1873.

Therefore we, John N. Sarber, president pro tempore of the senate, and John G. Price, speaker of the house of representatives, do hereby certify the same to the Senate of the United States.

Given under our hands, this 15th day of April, A. D. 1868.

JOHN N. SARBER,
President Senate pro tempore.
JOHN G. PRICE,
Speaker House of Representatives.

As soon as these credentials had been read, Mr. Garrett Davis, of Kentucky, offered the credentials of Messrs. Jones and Garland, which were in regular form, signed by "Isaac Murphy, governor," attested by the seal of the State, and countersigned by the secretary of state.

Mr. Davis claimed that this title was the older and, from the standpoint of prima facie authority, the better. He also contended that constitutionally Messrs. Jones and Garland had the better title; and proposed a reference of all the credentials to the Judiciary Committee for investigation.

Mr. Davis's proposition was not taken seriously by the majority of the Senate, who considered the reconstruction legislation as conclusive on this point.

But Mr. Lyman Trumbull, of Illinois, suggested two questions on which there was extended debate:

(1) That the credentials of Messrs. Rice and McDonald were signed only by the president pro tempore of the senate and speaker of the house, whereas the law of July 25, 1866[3] provided:

That it shall be the duty of the governor of the State from which any Senator shall have been chosen as aforesaid to certify his election, under the seal of the State, to the President of the Senate of the United States, which certificate shall be countersigned by the secretary of state of the State.

[1] 15 Stat. L., p. 72.

[2] Second session Fortieth Congress, Globe, pp. 3384–3389.

[3] 14 Stat. L., p. 244.

(2) That Messrs. Rice and McDonald had been chosen before Congress had admitted Arkansas to representation.

As to the first point, it was explained that the governor had not given credentials because the legislature did not recognize the old governor and the new governor was not in possession of the office and was simply a governor-elect. While admitting the informality of the credentials, the general opinion of the Senate seemed to concur in the views expressed by Messrs. Oliver P. Morton, of Indiana, and Reverdy Johnson, of Maryland, that the law was merely directory as to the governor and that the authentication of the credentials in this case was sufficient. Mr. Johnson, however, thought it well that the credentials should be referred to a committee, that a general rule might be established for the future.

As to the second point, Mr. Trumbull recalled that it had been an established practice for new States to organize and elect Senators before their admission to the Union. And when Congress subsequently recognized the State government it had been construed to have relation back to the time when the organization took place and the Senators had been admitted to their seats. Mr. Johnson, in support of this view, recalled the case of California.

Mr. Davis, insisting on his view that Messrs. Jones and Garland were the only constitutionally elected Senators, moved that the credentials be referred to the Judiciary Committee; but the motion was negatived without division.

Then the motion that Messrs. Rice and McDonald be sworn was agreed to; and they appeared and took the oath.

390. The Senate election case of Marvin v. Osborn, from Florida, in the Fortieth Congress.

A State having been in secession, the Senate admitted as Senator the person chosen after the State had conformed to conditions prescribed by law and refused to admit one chosen prior to such conformity.

Instance wherein immediate prima facie effect was given to credentials of a Senator-elect from a reconstructed State.

On June 30, 1868,[1] in the Senate, Mr. Timothy O. Howe, of Wisconsin, presented the credentials of Thomas W. Osborn, as Senator from Florida to fill the term expiring on March 3, 1873. Florida had been without representation since the secession of the State; but Congress, by the act of July 25, 1868, had provided that Florida and certain other secession States should be admitted to representation when they should have complied with certain conditions.

Mr. Howe also presented, as evidence that the State had complied with the conditions, her ordinances ratifying the thirteenth and fourteenth amendments to the Constitution of the United States.

The credentials of Mr. Osborn showed his election on June 18, 1866, and that it was in accordance with the act of July 25, 1866. The State had completed the ratification of the amendments on June 11, 1868, seven days prior to Mr. Osborn's election.

While Mr. Osborn's credentials were under consideration Mr. Jonathan Doolittle, of Wisconsin, offered credentials signed by David S. Walker as governor of Florida,

[1] Second session Fortieth Congress, Globe, pp. 3598–3607.

dated November 30, 1866, and showing the election of William Marvin as Senator on November 28, 1866, a considerable time before the ratification of the amendments.

Mr. Doolittle contended that Florida had never been out of the Union; that as soon as the power of the secession armies vanished she became entitled to representation again, and that as Mr. Marvin had always been a loyal man he should be seated. For this reason Mr. Doolittle opposed the pending motion, which was that the oath be administered to Mr. Osborn.

A considerable diversity of opinion arose as to whether the case should not be referred to the Judiciary Committee for examination before the administration of the oath. This appears not to have been because Mr. Marvin's claim was generally treated as serious, but because of doubts as to whether the act of the legislature of Florida in ratifying the amendments had been properly conducted and authenticated.

Finally, by a vote of yeas 34, nays 6, the motion that Mr. Osborn be permitted to take the oath was agreed to.

391. The Senate election case of Whiteley and Farrow v. Hill and Miller, from Georgia, in the Fortieth and Forty-first Congresses.

The Senate declined to give prima facie effect to credentials impeached by charges that a State was not fulfilling in good faith the conditions of reconstruction.

The Senate finally seated persons elected by a legislature in a reconstructed State, although after the intervention of Congress other persons had been elected.

Instance wherein a special law was passed prescribing the form of oath to be taken by a Senator-elect.

On December 7, 1868,[1] in the Senate, Mr. John Sherman, of Ohio, presented the credentials of Joshua Hill, Senator-elect from the State of Georgia, to serve the unexpired term ending March 4, 1873.

At this time Georgia was without representation in the Senate. By the act of Congress of June 25, 1868, the provisional governor of Georgia, Rufus B. Bullock, appointed as such on July 4, 1868, by General Meade, military commander of the district, called a provisional legislature, which convened on July 20. Mr. Hill was elected on July 28.

As soon as Mr. Hill's credentials were read to the Senate, Mr. Charles D. Drake, of Missouri, objected to the administration of the oath of office, and moved that the credentials be referred to the Committee on the Judiciary. The reason for the objection appeared in two papers presented to the Senate at this time the first, a letter from Governor Bullock, alleged that certain persons lacking the qualifications of loyalty had been permitted to take seats in the legislature, contrary to the letter and spirit of the law of Congress; and second, a memorial of colored citizens of Georgia, reciting that the white members of the legislature had expelled from that body 29 duly elected members because they were persons of color and, as was claimed, ineligible to office under the constitution and laws of Georgia. It appeared that this act of expulsion occurred after Mr. Hill had been elected Senator, and Mr. Sherman urged that it should not be charged against him.

[1] Third session Fortieth Congress, Globe, pp. 1–5.

But Mr. John M. Thayer, of Nebraska, and others urged that the neglect of the legislature to purge itself of disloyal men cast suspicion on the effectiveness of the reconstruction of the State, and that Senators should not be admitted while this doubt existed, in spite of the fact urged by Mr. Sherman that Georgia had been recognized by the Senate and House of Representatives as a State in the Union.

On December 10,[1] on motion of Mr. Sherman, the credentials were referred to the Committee on the Judiciary, no attempt being made to have the oath administered to Mr. Hill at this time.

On January 11, 1869,[2] Mr. Lyman Trumbull, of Illinois, presented the credentials of H. V. M. Miller, Senator-elect from Georgia, to fill the unexpired term commencing March 4, 1865. These credentials were referred to the Judiciary Committee without question, no proposition to administer the oath being made.

On January 25[3] Mr. William M. Stewart, of Nevada, presented the report of the committee on the case of Mr. Hill. Apparently Messrs. George F. Edmunds, of Vermont, and Benjamin F. Rice, of Arkansas, concurred with Mr. Stewart in the report, while Messrs. Roscoe Conkling, of New York, and Frederick T. Frelinghuysen, of New Jersey, concurred in the conclusion of the report, that Mr. Hill should not be seated. Mr. Lyman Trumbull, of Illinois, submitted minority views favorable to the seating of Mr. Hill, and the remaining member of the committee, Mr. Thomas A. Hendricks, of Indiana, dissented from the majority conclusion, but did not present views.

In the report of the majority the condition of affairs in Georgia is thus set forth:

On the 21st of May, 1868, the President transmitted to Congress a proposed constitution for the State of Georgia, which had been framed by a convention assembled under the reconstruction acts of Congress and ratified by the people. On the 25th June following Congress passed an act which, among other things, provided for the admission of Georgia to representation upon compliance with certain conditions therein named, the most important of which was that the legislature of Georgia should duly ratify the amendment to the Constitution of the United States known as the fourteenth amendment. The act further provides that after compliance with the required conditions "the officers of said State duly elected and qualified under the constitution hereof shall be inaugurated without delay; but no person prohibited from holding office under the United States or any State by section 3 of the proposed amendment to the Constitution of the United States known as article 14 shall be deemed eligible to any office in said State unless relieved from disability as provided in said amendment."

The obvious design of this provision was to prevent the new organization from falling under the control of enemies of the United States, so as to defeat the reconstruction of the State.

The right of Mr. Hill (if regularly elected) to a seat in the Senate depends upon three important considerations:

First. Did the legislature of Georgia, regularly organized in accordance with the Constitution of the United States, the laws of Congress, and the constitution of Georgia, duly ratify the fourteenth amendment and comply with the various conditions imposed by the act of June 25, 1868?

Second. Have the legislature and people of Georgia, subsequent to such compliance with said acts of Congress, committed such acts of usurpation and outrage as to place the State in a condition unfit to be represented in Congress?

Third. Whether, on the whole case, taking the action of Georgia both before and since the pretended ratification of the fourteenth amendment, a civil government has been established in that State which Congress ought to recognize?

These questions must be answered by the law and the facts.

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[1] Globe, p. 43.

[2] Globe, p. 273.

[3] Globe, p. 568, Senate Report No. 192, third session Fortieth Congress.

After reviewing the failure of the legislature to purge itself of disloyal members, the report continues:

Your committee are of opinion that the act of June 25, 1868, which required that the constitutional amendment should be duly ratified, must be held to mean that it must be ratified by a legislature which has in good faith substantially complied with all the requirements of law providing for its organization. It is true that, after this pretended investigation by the two houses of the eligibility of their members, the district commander recognized the validity of their proceedings and permitted the State officers to be inaugurated and the State government to go into operation. On the 21st day of July the legislature passed a resolution of ratification of the fourteenth amendment and the other resolution required by the act of June 25, 1868.

On the 28th of July, 1868, the legislature went into joint convention for the election of United States Senators. Joshua Hill received 110 votes; Joseph E. Brown, 94 votes, and A. H. Stevens, 3 votes, whereupon Mr. Hill was declared elected United States Senator for the term ending March 3, 1873.

It is quite probable that Mr. Hill received votes of persons who were not qualified to hold seats in the legislature more than sufficient to constitute his majority and secure his election, but your committee do not propose to investigate that question. The election and qualification of members of the legislature, where the existence of any legislature authorized to act as such is not involved, can not be inquired into by the Senate in determining the right of a Senator to his seat. Your committee holds that the question involved in this case is not whether persons not entitled to seats in the legislature were received by that body and allowed to vote upon the election of a Senator, but whether the body assuming to be the legislature violated the conditions upon which it was allowed to organize by permitting disloyal persons to participate in its proceedings. It may be contended that although the matters hereinbefore set forth constitute a failure on the part of the State of Georgia to comply in every respect with the reconstruction acts, yet Congress ought to waive these slight departures and admit their representatives. But an examination into the subsequent proceedings of the legislature of Georgia, and the disorganized condition of society in that State, leads your committee to the conclusion that all these violations of law were in pursuance of a common purpose to evade the law and resist the authority of the United States.

The report next recites the expulsion of the colored members of the legislature, and says:

Your committee are of opinion that under the constitution of Georgia there is no distinction in the right to hold office on account of race or color, and they are quite confident that such was the opinion of Congress at the time it approved that constitution.

This act of injustice and oppression denied the right of representation of a whole race, constituting nearly one-half of the people of Georgia. It will not be contended that there is no power in this Government to restrain in some form an outrage of this character. It certainly furnishes a strong reason why Congress should not at this time overlook the irregularities in the organization of the legislature of Georgia and admit her Senators to representation. And this is not all. Your committee have examined the official reports of the various officers connected with the Freedmen's Bureau in Georgia, and find reported 336 cases of murders and assaults with intent to murder upon colored persons by the whites, from January 1, 1868, to November 15 of same year. For all of which there has been no legal redress and scarcely any effort whatever on the part of the authorities to punish the criminals. And it is stated by these officers that they are unable to report fully as to the number and character of these outrages on account of intimidation of witnesses, which is practiced by the perpetrators of crime. Your committee have no source of official information as to outrages committed upon loyal whites, but it is represented by various and numerously signed petitions and memorials from the loyal people of Georgia that they are constantly exposed to violence, and are without protection of law. It is a matter of public notoriety that loyal white men are persecuted, murdered, and driven from their homes. Several members of the legislature have been compelled to take refuge at the capital of the State where the national troops are stationed to avoid the violence of the enemies of the United States. The unlawful and vindictive conduct of the legislature tend to confirm these statements and reports, and exclude all hope that the new civil government will afford adequate protection to life and property. Since the withdrawal of the military, crime has greatly increased while punishment for crime has diminished.

And the report concludes:

Wherefore your committee feel called upon to recommend that Mr. Hill be not allowed to take a seat in the Senate for the reason that Georgia is not entitled to representation in Congress, and submit the accompanying resolution.

"Resolved, That Joshua Hill, claiming to be Senator-elect from Georgia, ought not now to be permitted to take a seat in this body."

Mr. Trumbull favored the seating of Mr. Hill, saying in minority views:

The undersigned, being unable to agree with the majority of the committee in their report upon the credentials of Joshua Hill, claiming to have been duly elected and entitled to a seat in the Senate from the State of Georgia, begs leave to present the reasons for his dissent. That Hill possesses all the qualifications for a Member of the Senate of the United States required by the Constitution; that he is one of the few prominent men residing in a rebel State who remained true to the Union during the war; that he is now and has been at all times thoroughly loyal to the Union; that he is in every respect personally unobjectionable; that he was duly elected by the legislature of Georgia, and that his credentials are in due form is not questioned by anyone. If he is not entitled to his seat, it must be either because the State of Georgia was not in a condition to entitle her to representation at the time of his election or because the body which elected him was not the legislature of that State.

The former of these propositions, whether Georgia was or is in a condition to entitle her to representation, is not a question for the Senate to decide. The unfortunate disagreement which has existed for some years between the President and Congress has, in part, been owing to a disagreement upon this very point, the President insisting that it was for each House of Congress to determine for itself in the admission of Members whether a State was entitled to representation, and Congress insisting that it was for Congress to determine in the first instance whether a State was entitled to representation, and that question being affirmatively settled it was then for each House to judge for itself of the election, returns, and qualifications of its own Members. This controverted point was settled by Congress in March, 1866, by the passage through both Houses of the following concurrent resolution:

"Resolved by the House of Representatives (*the Senate concurring*), That, in order to close agitation upon a question which seems likely to disturb the action of the Government, as well as to quiet the uncertainty which is agitating the minds of the people of the eleven States which have been declared to be in insurrection, no Senator or Representative shall be admitted into either branch of Congress from any of said States until Congress shall have declared such State entitled to such representation."

The reconstruction acts, since indorsed by the people at a popular election, declare that "until the people of said rebel States shall be by law—not by the action of each House—admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only;" which is equivalent to a declaration that when admitted to representation by law they shall be no longer provisional.

The supplementary act of March 23, 1867, declares that when the requirements of the reconstruction acts shall have been complied with by any of the rebel States in the formation of a constitution, and "said constitution shall be approved by Congress, the State shall be declared entitled to representation, and Senators and Representatives shall be admitted therefrom, as therein provided." This action of Congress, indorsed by the people, determined that neither House of Congress was authorized by itself to admit Senators or Representatives from any of the rebel States till Congress should determine by law that such State was entitled to representation. The converse of the proposition was also equally determined—that it would be the duty of each House to admit duly elected and qualified Senators and Representatives from each of said States whenever Congress shall have determined by law that such State was entitled to representation.

After quoting the act of June 25, 1868, and other documents, Mr. Trumbull continues:

The foregoing extract, together with copies of official correspondence between Major-General Meade and General Grant, hereto attached, establish the fact that the legislature of Georgia fully complied with the requisitions of the act of June 25, 1868, and the fact of her ratification of the fourteenth amendment was duly proclaimed by the President, as also appears by a copy of the proclamation, hereto attached.

Congress having decided that Georgia was entitled to representation through the State government organized under the reconstruction acts, on complying with the conditions therein named, it is not competent for either House, now that the conditions have been complied with, to refuse admission to Members on the ground that the State is not entitled to representation. For either House to do so would be for such House to set aside a solemn act of Congress, passed by both Houses, and to repudiate the principle on which it differed with the President and went before the people in the popular elections. The House of Representatives, conforming to the law of Congress, has admitted to seats the Representatives from Georgia against whom no personal objection was made, without any further inquiry than whether Georgia had complied with the conditions of the act of June 25, 1868. No attempt was made in that body to revise the decision of Congress.

The assumption that the constitutional amendment was not adopted in good faith is not sustained by a particle of evidence before the committee, and is contradicted by the official report of Governor Bullock to General Meade, by the orders of General Meade, and those emanating from the General in Chief, by the proclamation of the President, made in pursuance of law, by the action of the House of Representatives in passing upon the admission of Members to that body, and by the acquiescence of all the departments of Government from July until now. If one branch of Congress is at liberty to deny a State representation on the ground that it did not act in good faith in agreeing to the conditions prescribed by Congress, what is to prevent either House of any other Congress, acting on a like assumption, from denying admission to Members from any other of the reconstructed States? It is well known that a large political party in the country believe the reconstruction acts unconstitutional. Should that party hereafter obtain ascendency in either House of Congress, is it to be at liberty to overturn the State governments which have been established in pursuance of law and to quote as a precedent the action of the Senate in this case? When are we to have peace and civil governments established in the late rebel States under such a policy? The question has been asked, If one person disqualified by the fourteenth amendment could be permitted to act as a member of the Georgia legislature, why not all; and if all, would it be pretended that it was a legislature organized in accordance with the reconstruction acts? Probably not; and the same question, with the same force, may be asked in reference to Congress or any other legislative body in the land. If a disqualified person or several such were permitted to act as Members of Congress or a State legislature, does anybody pretend that the action of the body would be vitiated thereby; and yet who would not admit that if a body of men were to assemble and undertake to act as the Congress or the legislature of a State, all of whom were disqualified from acting as such, that their action would have any validity? No such case is to be presumed, and no legislative body is justified or safe in basing its action on supposititious cases which never have and are not likely ever to occur. No such state of facts is presented in the case of Georgia. Not one in ten of the members of the senate, after deducting those from whom the disabilities had been removed by Congress, and not one in fifty of the members of the house were found disqualified by even the minority of the committee who investigated this subject, and each house decided all its members to be qualified. The constitution of Georgia, which was accepted by Congress, like that in all the other States, and like the Constitution of the United States, in regard to Congress, leaves to each house the exclusive right to judge for itself of the election and returns of its own members, and that judgment, when pronounced, is conclusive everywhere. There was not a shadow of anything deserving the name of evidence before the committee to show that either house of the legislature of Georgia acted corruptly or fraudulently in passing upon the right of members to their seats under the fourteenth amendment.

The Senate has no right, in the opinion of the undersigned, to revise the action of Congress, disregard its laws, and refuse Hill his seat, because in its opinion Georgia is not entitled to representation, when Congress has decided otherwise, and the Executive and the General in Chief have acted on that decision. It being admitted that Hill is entitled to his seat if Georgia is entitled to be represented in the Senate, and it being shown that Georgia has been declared by law to be entitled to representation on certain conditions, which are shown to have been complied with, the conclusion would seem to be irresistible that Hill was entitled to take his seat. That it is competent for the Senate, in passing upon the elections, returns, and qualifications of its Members, to inquire whether the body by which a Senator was elected was the legislature of the State is not disputed; but it is not pretended that Georgia had any other legislative assembly than the one which elected Mr. Hill claiming to be a legislature. The legislative body

which elected him was the one which was convened by the governor in pursuance of an act of Congress; the one which ratified the fourteenth amendment to the Constitution as proclaimed both by the President and Secretary of State, in accordance with the requirements of law; and the one, and the only one, which has been elected and assembled in said State under the constitution formed in pursuance of the reconstruction acts and approved by Congress. The legislature of Georgia, under its constitution, consists of 44 senators and 175 representatives, and the complaint is, not that the persons properly chosen and qualified would not and did not constitute the legislature, but that "there were a number of persons holding seats in both branches of the legislature that were and are not eligible under the fourteenth constitutional amendment."

Each house appointed committees, who investigated the question of the eligibility of the members of their respective houses under that amendment; and, on their report, each house decided that all its sitting members were entitled to seats. Whether these decisions were correct or not is not material to Hill's right to a seat, as it is not pretended, even by the minority of the committees appointed to investigate, that more than 4 senators out of 44, omitting those whose disabilities had been removed by act of Congress, and 3 representatives out of 175, were disqualified by the fourteenth amendment.

No evidence was taken by the Judiciary Committee to ascertain how many or whether any of the members of either house were ineligible.

The statements of letter writers and memorialists can not surely be treated as evidence upon which to overthrow a State government. The only reliable information the committee had on that subject is contained in the official report of Major-General Meade and the journal of the legislature, as published in a newspaper. From these it appears that only 4 senators and 3 representatives were complained against by any one in the legislature as disqualified by the fourteenth amendment.

If it were admitted that the decision of each house was wrong in regard to the eligibility of the members complained against it would not vitiate the proceedings of the legislature.

As to the expulsion of the colored members, Mr. Trumbull said:

Another objection urged against Mr. Hill's right to a seat is the fact that the legislature of Georgia unjustly denied the right of certain colored members to seats. However unjust this denial may have been, it did not take place till more than a month after Hill's election. He was elected July 28, and the colored members participated in all legislation till September 3.

It is difficult to perceive how an act subsequent to the election could affect its validity. If the legislature was properly organized when it elected Hill, the fact that it subsequently became disorganized ought not to affect his election.

On February 17 Mr. Stewart, from the Judiciary Committee, submitted a report against the admission of Mr. Miller, whose case was similar to that of Mr. Hill.

The Senate did not decide either of these cases at this session.

On March 9, 1869,[1] at the beginning of the next Congress, the credentials of Messrs. Hill and Miller were again referred to the Judiciary Committee, and on March 17, 1869, Mr. Trumbull reported from that committee the credentials, with the recommendation that they lie on the table until action should be taken on a bill to enforce the fourteenth amendment and the laws of the United States in the State of Georgia and to restore to that State the republican government elected under its new constitution.[2] Mr. Trumbull said he was opposed to the recommendation of the committee, and thought the credentials should be acted on at once. But no further action was taken at this session of Congress.

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[1] First session Forty-first Congress, Globe, pp. 31, 102.

[2] Such a law was passed and approved December 22, 1869 (16 Stat. L., p. 59), and provided for summoning the legislature and testing their loyalty by oath, and also forbade the exclusion of members because of color.

At the next session, on February 14, 1870,[1] the credentials of Messrs. Miller and Hill were again taken from the files and referred to the Judiciary Committee.

On July 15, 1870,[2] Mr. Stewart presented the credentials of Richard H. Whiteley, elected to fill the term for which Mr. Miller was a claimant, and of Henry P. Farrow, elected to fill the term for which Mr. Hill was a claimant. These credentials were laid on the table.

On December 13, 1870, at the next session, the credentials of Messrs. Whiteley and Farrow were referred to the Committee on the Judiciary, and on January 23, 1871,[3] Mr. Trumbull submitted a report from that committee. Five members, Messrs. Trumbull, Edmunds, Conking, Matt H. Carpenter, of Wisconsin, and Allan G. Thurman, of Ohio, concurred in the report. Two, Messrs. Stewart and Rice, signed minority views.

Messrs. Farrow and Whiteley had been elected in 1870 by the same legislature that had elected Messrs. Hill and Miller in 1868. But between the two acts the legislature had been purged in accordance with the terms of the act of Congress of December 22, 1869, disloyal members being excluded and the wrongfully excluded colored members being restored. The question before the Judiciary Committee in this instance was whether Messrs. Hill and Miller were to be seated, or Messrs. Farrow and Whiteley. The majority of the committee decided in favor of seating Mr. Hill, and found that Mr. Miller would be entitled to a seat when his disabilities should be removed.

The report of the committee recites the history of reconstruction in Georgia, and gives the details as to the purging of the legislature, quoting from a report of the Senate Judiciary Committee to show that steps unwarranted by law were taken in the course of that process. The history of the elections of the two sets of Senators is also given, with conclusion as follows:

The general assembly was organized in July, 1868, in prima facie accordance with the constitution of the State, the reconstruction acts of Congress, and the orders of the military department. It complied in form with all the requirements necessary to entitle the State to representation in Congress, and Members were accordingly admitted into the House of Representatives of the United States in 1868. Whether either or both houses of the general assembly of Georgia admitted persons to sit as members in their respective bodies who were disqualified by the third section of the fourteenth article of the Constitution was at the time a disputed question; but each house appointed a committee to consider that question, after whose report it was voted by each house that all its members were qualified. These reports and the action upon the same appear in the appendix to the report made to the Senate by this committee, by Mr. Stewart, at the third session of the Fortieth Congress, and are hereto annexed, marked "Exhibit G." The general assembly thus organized not only elected Senators of the United States, but it also elected, as required by the State constitution, State officers, to wit, a secretary of state, a comptroller-general, and a State treasurer, all of whom have since been discharging the duties of their respective offices without question. At the same session judges of the various courts throughout the State were appointed by the governor, by and with the advice and consent of the senate, who have since been and are now presiding in the various courts of the State. The legislature thus organized passed laws authorizing the borrowing of money and affecting the general interests of the State, none of which have ever been held or supposed to be invalid for the reason that the legislature which enacted them was not properly organized. The reason for the passage of the act of Congress of December 22, 1869, requiring a reorganization of the general assembly is to be found in the wrongful expulsion by the general assembly in September,

[1] Second session Forty-first Congress, Globe, p. 1247.

[2] Globe, p. 5634.

[3] Senate Report No. 308, third session Forty-first Congress.

1868, of its colored members, in the seating of the minority candidates in their places, and in continuing in their seats members believed to be disqualified, and in the general disorder and violence which prevailed in the State. That act did not declare the general assembly as organized in July, 1868, to have been illegal, or its acts, other than those referred to in the act itself, invalid; but it provided for correcting the wrongful and revolutionary acts which had been done by it as organized in July, 1868. It is not believed that the act of December 22, 1869, would ever have been passed had the colored members been permitted to retain their seats and the peace of the State been preserved.

The body of the general assembly as organized in July, 1868, and as reorganized in January, 1870, is not essentially different. Of the 44 senators and 173 members declared elected by General Meade, only 5 senators and 19 representatives who participated in the organization of July, 1868, were excluded or failed to participate in the reorganization in January, 1870, and 21 minority candidates were improperly admitted to seats in the general assembly, as reorganized, in their places. The general assembly as organized in July, 1868, and at the time of the election of Hill and Miller, contained in each house a constitutional quorum of legal members. All the contestants maintained the position before the committee that the ineligibility or disqualification of individual members of either house, not sufficiently numerous to affect its constitutional quorum, was an immaterial issue. Your committee have not, therefore, deemed it necessary to discuss that question further than to state the facts in regard to it. Three of the claimants—Joshua Hill, W. P. Farrow, and R. H. Whiteley—have had their political disabilities removed by act of Congress of June 25 and July 20, 1868. H. V. M. Miller never labored under ally of the political disabilities imposed by the third section of the fourteenth amendment to the Constitution of the United States; but it is admitted that he acted as a surgeon in the rebel army under an appointment from a colonel of a rebel regiment, and having thus given aid to persons in hostility to the United States, can not take the oath required by the act of July 2, 1862.

The act of July 11, 1868, prescribes a qualified oath to be taken by persons elected or appointed to office from whom political disabilities have been removed. Your committee are of opinion that Joshua Hill was duly elected by a legislature having authority to elect Senators, and is entitled to take his seat on taking the oaths required by the Constitution and laws. Miller, however, is not relieved from taking the oath prescribed by the act of July 2, 1862, and in the opinion of your committee is not entitled to take his seat; and it follows from the conclusion of the committee as to the proceedings in the election of Hill and Miller that neither Farrow nor Whitely is entitled to a seat.

The committee recommend for adoption the following resolution:

Resolved, That Joshua Hill has been duly elected Senator of the United States by the legislature of the State of Georgia, and is entitled to take his seat on taking the oaths required by the Constitution and laws.

In the minority views, which favored the seating of Messrs. Farrow and Whiteley, Mr. Stewart argued that the act of June 25, 1868, provided that Georgia, with certain other States, should be admitted to representation in Congress, when they had complied with certain conditions. And he held that the conduct of the Georgia legislature had been violative of those conditions. He says in the minority views:

We have been able to find no case in the history of the Government where Senators have been admitted from a State not entitled to representation in Congress at the time of their election.

There are many cases in which this legislative declaration was not made until after the election of Senators. This has occurred in the admission of new States where the organization of the State and the election of Senators had occurred previous to the admission. But in those cases the act of admission was an approval of the organization that had preceded it, and amounted to a legislative declaration that the State at the time of the election of Senators was entitled to representation. In each of these cases the loyal status of the State was unquestioned, and the act of Congress admitting such State was construed to relate back to the election of Senators and to amount to a legislative declaration that the State at the time of the election was entitled to representation. This principle can not help the case of Hill and Miller, for at the time the declaration was made by the act of July 15, 1870, that the State of Georgia was entitled to representation, the status of things had been changed in Georgia by the reorganization of the legislature. This declaration related to the then existing condition of the State.

Congress has already in effect decided that the necessary legislative declaration that Georgia was entitled to representation was not made prior to the election of Hill and Miller. The act of December 22, 1869, "to promote the reconstruction of Georgia," can be justified upon no other theory than that reconstruction in that State was not then an accomplished fact. After a compliance with this act, and not before, we have the declaration in the act of July 15, 1870, that "it is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States." If this act relates back to the date of the election of Hill and Miller, their exclusion from seats in this body from July, 1868, until now is wholly without justification, and the act of December 22, 1869, was an exercise of power over a State entitled to representation for which there is no precedent and which, if exercised in the case of Massachusetts or Ohio, would, to say the least, be open to grave constitutional doubts. It directs the governor to convene the persons originally elected to the legislature, and requires those persons, as a qualification for seats in that body, to take and subscribe to an oath hitherto unknown to the laws of the State of Georgia or of the United States; and it also required them to reorganize the legislature by electing officers, who shall also be required to take the same oath. It requires the legislature to ratify the fifteenth amendment before Senators and Representatives shall be admitted to seats in Congress, and prescribes various other matters, all pertaining to the reconstruction of a rebel State, and never applied to a loyal State whose practical relations to the Union were not disturbed. We venture to affirm that the Senate and House of Representatives in voting for that act did so upon the theory that they were reconstructing a rebel State, and not upon the theory that they were dealing with a State whose practical relations with the United States had never been disturbed, or which, having been disturbed, were then fully restored. It seems clear that the requirement alone that the legislature should ratify the fifteenth amendment before Senators and Representatives should be admitted from Georgia was in itself a declaration that Georgia was not, on the 22d of December, 1869, entitled to representation. But after the reorganization of the legislature under this act, the whole matter was again submitted to Congress, and Congress accepted the State as then organized. The act of July 15, 1870, was a legislative declaration that the State was then entitled to representation under the organization of the legislature as then existing, and related back to the commencement of the then existing state of things, namely, the reorganization of the legislature in January, 1870. This was a declaration that Georgia was entitled to representation at the time of the election of Farrow and Whiteley.

The language of the act of July, 1870, is "that the State of Georgia, having complied with the reconstruction acts, and the fourteenth and fifteenth articles of amendments to the Constitution of the United States having been ratified in good faith by a legal legislature of said State, it is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States."

How can it be claimed that this language refers to the organization in 1868, in view of the facts in this case? Had the State of Georgia complied with the reconstruction acts at that date?

If this be so, Congress stultified itself in passing the act of the 22d of December, 1869, to promote the reconstruction of Georgia, eighteen months after she had fully complied with the reconstruction acts under which the other States were admitted.

It seems clear that this language embraced all the reconstruction laws with which Georgia was required to comply, including the act of December, 1869. It is evident that Congress intended to declare, and did declare, that after the compliance with the last-named act, and not before, Georgia was entitled to representation.

It is too late to question the propriety of these acts by either House, acting separately, upon the credentials of its Members, for it is too well established that Congress must determine when a State is entitled to representation. After that determination has been made, neither House, acting alone, can question its validity, but each House is confined, in passing upon the credentials of its Members, to matters of election and qualification.

We have shown that Hill and Miller were not elected from a State which at the time was entitled to representation by any act of Congress, from which it follows that they are not entitled to seats in the Senate.

We have also shown that Farrow and Whiteley were elected by a legislature of a State which Congress recognized as duly organized by declaring the State entitled to representation.

The election of these gentlemen seems to have been regular and a substantial compliance with law, and we therefore conclude that they are entitled to their seats.

* * * * * * *

It is suggested that there is some doubt about the regularity of the election of Mr. Farrow, for the reason that there was no quorum present in the house of representatives at the time of his election. The records show that the house, when reorganized, and disloyal members excluded, consisted of 154 members, and Mr. Farrow alleges that 1 member, Robert Lumpkin, who had been sworn in, died before the Senatorial election, leaving the number 153. A quorum of this number would be 77. The number of persons present and voting was 82, of which Mr. Farrow received 80. But it is said that minority men were improperly admitted. We might answer this by saying they were admitted by the legislature, and that the Senate will not ordinarily review the action of that body in deciding upon the qualification of its own members.

But if the Senate would enter upon such an investigation under any circumstances (which on mature reflection we now think may be open to some doubt) it can not be called upon to do so in this case. The question of the proper organization of the legislature in January, 1870, was, at the last session, under investigation in both Houses, on the passage of the act of July 15, 1870. The report of the Judiciary Committee of the 2d of March last, printed as a part of the majority report, recommends that no further legislation be had to perfect the organization of the legislature of Georgia as it then existed, and Congress, acting on that report, decided it to be a legal legislature.

But admitting that the minority men were improperly received, the result would be the same.

The number of members declared elected in General Meade's order, who were allowed to qualify and retain their seats, leaving out of the calculation those who are known as "minority men," was 141.

Deducting Mr. Lumpkin, who is alleged to have died before the Senatorial election, and we have 140. Necessary to a quorum, 71. Number of persons present and voting on the election of Mr. Farrow, 71. Of this number Mr. Farrow received 69. Thus it appears in either case a quorum was present, and Mr. Farrow had a majority of that quorum.

All other matters in regard to the election of Messrs. Farrow and Whiteley we believe, are admitted to have been regular.

We therefore recommend for adoption a resolution declaring Henry P. Farrow and Richard H. Whiteley elected, and entitled to seats in the Senate on taking the oaths required by law.

The report was debated at length on January 30 and 31 and February 1.[1] On January 30[2] an amendment offered by Mr. Stewart declaring Messrs. Farrow and Whiteley entitled to take seats upon taking the oath, was disagreed to—yeas 19, nays 36. On February 1[3] an amendment striking out the name of Joshua Hill in the resolution of the majority and inserting the name of Henry P. Farrow was disagreed to—yeas 19, nays 36. Then the resolution seating Mr. Hill was agreed to without division, and he appeared and took the oath.

On February 24,[4] after a bill prescribing the form of oath to be taken by him had been passed by the House and signed by the President[5] Mr. Miller appeared and took the oath.

392. The Senate election case of Hart v. Gilbert, from Florida, in the Forty-first Congress.

Instance wherein the Senate admitted a person chosen before Congress had admitted a reconstructed State to representation.

Construction of the law specifying the time when a legislature shall proceed to the election of a Senator.

The Senate has declined to permit a contestant to be heard on the floor of the Senate in his own case.

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[1] Globe, pp. 816–830, 848–851, 871–874.

[2] Globe, p. 822.

[3] Globe, p. 871.

[4] Globe, p. 1632.

[5] 16 Stat. L., p. 703.

On April 1, 1870,[1] in the Senate, Mr. Thomas W. Osborn, of Florida, presented the credentials of Ossian B. Hart as Senator-elect from Florida for the term for which Mr. Abijah Gilbert was already occupying a seat. Accompanying the certificate was a memorial of Mr. Hart, setting forth the reasons on which he based his claim to Mr. Gilbert's seat. On motion of Mr. Osborn the papers were referred to the Judiciary Committee.

On April 13, 1870,[2] Mr. Lyman Trumbull, of Illinois, submitted the report of the committee, as follows:

In consequence of the rebellion the State of Florida was without representation in the Senate of the United States from 1861 till 1868. In pursuance of a constitution framed and adopted under what are known as the reconstruction acts, a legislature convened in Florida, Monday, June 8, 1868, the members of the assembly and half of the senate having been elected for two years and the other half of the senate for four years.

This legislature, on the 16th day of June, 1868, being the second Tuesday after its meeting and organization, proceeded, in accordance with the act of Congress of July 25, 1866, "regulating the times and manner of holding elections for Senators in Congress," to take action for the election of two United States Senators to fill the then existing vacancies for the terms expiring on the 3d of March, 1869, and the 3d of March, 1873. On Wednesday, the day following that on which each house had separately, but without result, voted for Senators to fill the two existing vacancies, the members of the two houses, convened in joint assembly, elected a Senator to fill the vacancy expiring March 3, 1869, and adjourned till the next day, when they again assembled and elected a Senator for the term expiring March 3, 1873, and adjourned without date.

The next day (Friday) the members of the two houses, each house having previously concurred in a resolution to that effect, assembled again in joint convention for the election of a Senator to succeed the one whose term would expire on the 3d of March, 1869, when Abijah Gilbert, the present sitting Member was elected.

The petitioner was chosen by the same legislature in January, 1870, to represent the State in the Senate for the term commencing March 4, 1869, and now claims the seat occupied by Mr. Gilbert.

The elections of 1868 all took place before the passage of the act of June 25, 1868, which declared Florida entitled to representation in Congress.

Two objections are taken to the election of the sitting Member:

1. That he was chosen by the legislature of a State not at the time recognized as entitled to representation in Congress.

2. That he was not elected in conformity with the act of July 25, 1866.

The first objection is answered by the fact that the subsequent recognition of the State as entitled to representation under the Constitution, in pursuance of which the legislature was elected and organized, related back to and made valid its acts from the time of its organization. Senators and Representatives from several of the reconstructed States have been chosen before the States were declared entitled to representation, and no one has ever questioned their right to seats when Congress subsequently recognized the government under which they were chosen as entitled to representation.

The only ground for the other objection arises from the fact that the legislature failed to take action on the "second Tuesday after its organization" in regard to the third Senator who was to be elected, but it took action on the subject of electing Senators and actually voted, though unsuccessfully, on that day for persons to fill the two existing vacancies.

The object of the act of Congress was to insure the election of Senators by the proper legislature, and to fix a time when proceedings for that purpose should be commenced and continued till the elections were effected.

The legislature by which the sitting Member was elected was the one chosen next preceding the term which would commence on the 4th of March, 1869, and was therefore the proper legislature to elect. "The second Tuesday after the meeting and organization of the legislature" was the time pre-

[1] Second session Forty-first Congress, Globe, pp. 2330, 2331.

[2] Senate Report No. 101, Globe, p. 2639.

scribed by the act of Congress for initiating the election of Senators, and that was the time when the legislature proceeded to that business. There being three Senators to elect, it took action on that day only in reference to two of them. Did its failure to take action on that day and the two subsequent days (which were occupied in electing the first two Senators) in reference to the third Senator render his election, in all other respects regular, invalid? The committee think not.

The language of the law is: "In case no person shall receive such majority on the first day, the joint assembly shall meet at 12 o'clock meridian of each succeeding day during the session of the legislature and take at least one vote till a Senator shall be elected." No formal adjournment from day to day by vote of the joint assembly was necessary, but it was the duty of the members of each house to meet in joint assembly at noon of each day and vote at least once till all the Senators whom the legislature had the right to elect were chosen. This is exactly what the legislature did.

In no view which the committee can take would the petitioner be entitled to a seat in the Senate, for if the election of the sitting Senator was irregular, that of the petitioner, by the same legislature at a subsequent session, was equally so.

The committee recommend for adoption the following resolution:

Resolved, That Abijah Gilbert was duly elected a Senator from the State of Florida for the term commencing March 4, 1869, and is entitled to hold his seat as such.

On April 15, 1870,[1] Mr. Trumbull presented the memorial of Mr. Hart, who prayed that he might be permitted to address the Senate on the subject of his claim, as he conceived that the report did not take what he considered the correct view of the case. The application was debated briefly, and it was stated that in the other House contestants were frequently heard, and that in a previous case from Florida the Senate itself had set such a precedent. But the general opinion of the Senate concurred in the view expressed by Mr. Roscoe Conkling, of New York, that the merits of the case could not fail to be tried searchingly without the introduction of new talent. Therefore Mr. Hart's petition was laid on the table.

On April 28,[2] the report came up, but was not debated except for the reading of a brief written argument, written by Mr. Hart, but presented by Mr. Timothy O. Howe, of Wisconsin, and read in his time.

The resolution confirming Mr. Gilbert's title to the seat was then agreed to without division.

393. The Senate election cases relating to Goldthwaite, Blodgett, and Norwood, from Alabama and Georgia, in the Forty-second Congress.

The Senate declined to give immediate prima facie effect to regular credentials impeached by a memorial alleging irregularities in constitution of the State legislature and suggesting personal disqualifications of the bearer.

On February 8, 1871,[3] in the Senate, Mr. George E. Spencer, of Alabama, presented the credentials of George Goldthwaite, elected a Senator by the legislature of Alabama, for the term of six years commencing March 4, 1871.

On March 4, 1871,[4] at the time of swearing in Senators-elect, Mr. Goldthwaite appeared to take the oath, when Mr. John Sherman, of Ohio, presented the following protest, signed by 45 members of the legislature of Alabama:

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[1] Globe, pp. 2705, 2706.

[2] Globe, pp. 3053, 3054.

[3] Third session Forty-first Congress, Globe, p. 975.

[4] First session Forty-second Congress, Globe, pp. 1–4.

MONTGOMERY, ALA., *January 26, 1871.*

To the Senate of the United States:

The subscribers, members of the senate and house of representatives of the State of Alabama, respectfully represent:

That they protest against the admission of Hon. George Goldthwaite to the Senate of the United States as a Senator from Alabama, on the grounds that he was not elected by a majority of the legal votes of the joint meeting of the legislature. He was declared elected by the following vote: For George Goldthwaite, 65 votes; for Willard Warner, 50; for William J. Haralson, 14 votes. It will be seen that 65 votes constitute a majority of the votes cast, and that number of legal votes are necessary to an election.

We represent that Hon. George Goldthwaite did not receive that number of legal votes, as B. M. Henry, claiming to be a representative from Russell County, in said State, who voted for Hon. George Goldthwaite, was not elected by the people of said county, did not have a certificate of his election, as is required by our laws, but was defeated at the polls by several hundred, and was not legally entitled to vote for a United States Senator in said joint meeting of the legislature, which, if said illegal votes had been rejected, would have been sufficient to prevent the announcement of the election of Hon. George Goldthwaite to a seat in your honorable body.

Saul Bradford, of Talladega County, who had been rejected by the people at the ballot box, was permitted to vote for said Hon. George Goldthwaite, when in our opinion his vote should have been rejected, as he had never been legally elected a member of the legislature.

In the counties of Greene, Sumter, Lee, and other counties, the representatives of which all voted for Hon. George Goldthwaite, we have every reason to believe that the elections of said representatives were procured by intimidating the voters, and in several instances fraud added thereto, and that the gentlemen claiming to be representatives of these counties were not legally elected by the people of said counties, are not their legal representatives, and were not entitled to vote for United States Senator at the joint meeting of the general assembly.

We are informed that some of the members of the legislature who voted for Hon. George Goldthwaite are laboring under political disabilities imposed by the fourteenth amendment of the Constitution of the United States, and it is an inquiry worthy the consideration of the Senate of the United States whether Hon. George Goldthwaite is not laboring under the same disabilities for his actions during the recent rebellion of the Southern States.

Believing, therefore, that Hon. George Goldthwaite is not legally elected Senator from Alabama, we respectfully pray that the Senate of the United States may so decide, and declare his seat vacant.

It appeared that Mr. Goldthwaite's credentials were in regular form, signed by the acknowledged governor, under the seal of the State, and that there was no question that the legislature which had elected was the rightful legislature.

In the debate Mr. Allen G. Thurman, of Ohio, urged that the memorial made no case against the Senator-elect. The Senate had never undertaken to canvass the question of the eligibility of the members of a legislature.

Mr. Sherman replied that the memorial related to much more than an inquiry whether one person or another was elected to the legislature. It showed that an intruder had cast a deciding vote, and also that in several counties of the State the right of the electors had been denied by force and fraud. In large portions of the State a quasi war had existed. There was a question also as to whether or not the claimant was qualified.

The matter was debated at considerable length on this day, and then the credentials and protest were temporarily tabled. During the debate the Rhode Island case of Asher Robbins was frequently referred to.

On the same day, March 4,[1] the Vice-President laid before the Senate the credentials of Foster Blodgett, Senator elect from Georgia. These credentials were in

[1] Globe, p. 4.

due form, but there had been filed a memorial of certain members of the late general assembly of the State of Georgia protesting against the admission of Mr. Blodgett to a seat for the following reasons:

That the election was not held in accordance with the law of Congress approved July 26, 1866, in that the legislature was not the body chosen "next preceding the expiration of the time for which" said Blodgett was elected to represent said State in Congress. The legislature which elected him was elected in April, 1868, and another legislature was chosen in December last, previous to the occurrence of the vacancy, upon whom, under the law, devolves the duty of electing the Senator.

That at the time said Blodgett was elected the constitution of said State required that the legislature to be elected in the fall of 1870 should assemble on the second Wednesday in January, 1871, prior to the occurrence of the vacancy; but that the day of meeting was wrongfully changed to November, 1871, with a view, as we believe, of creating a pretended necessity for an election of Senator by the old legislature. This change was not made until after the election of said Blodgett, thereby by a mere trick defeating an expression of the voice of the people in accordance with the laws of the United States.

That the election is, furthermore, illegal in this, that at the time said Blodgett was elected a quorum of the house of representatives of said general assembly was not present, as is shown by the journals of that body.

For which reasons we pray that said election be not recognized by your honorable body, and that the legislature elected next preceding the occurrence of said vacancy, which will assemble in November next, be allowed to elect a Senator to represent this State in your honorable body, as provided by the law of Congress, etc.

The credentials and memorial were temporarily laid on the table.

On March 13, 1871,[1] the papers in the cases of Messrs. Goldthwaite and Blodgett were referred to the Committee on Privileges and Elections.

394. The Senate election case relating to Goldthwaite and others, continued.

The Senate failed to follow its committee in giving prima facie effect to regular credentials impeached by allegations that the legislature had been elected in violation of the provisions of Federal law.

Senate decision as to the time when a legislature should fill a vacancy in the United States Senate.

An instance wherein a Senate committee reported in a single resolution their conclusions as to the election cases of claimants from different States.

A Senate ruling that the division of a question depends on grammatical structure rather than on the substance involved.

On March 20[2] Mr. William M. Stewart, of Nevada, submitted the following report:

That said credentials are in due form and *prima facie* entitle said Goldthwaite and Blodgett to their seats upon taking the oath prescribed by the Constitution and laws, neither of them being under any disability.

The grounds on which their right to seats are contested have not been fully considered by the committee for want of time, nor will there be sufficient time at this session to consider them. In the opinion of your committee it would be unjust to those States and gentlemen to keep the latter out of their seats until such investigation can be had.

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[1] Globe, p. 74.

[2] Senate Report No. 3.

The committee therefore report the following resolution:

Resolved, That George Goldthwaite and Foster Blodgett be permitted to take seats in this body upon taking the proper oath; and that the Committee on Privileges and Elections proceed hereafter to consider the grounds on which their rights to seats, respectively, are contested, and hereafter make reports to the Senate thereon.

WM. M. STEWART.
O. P. MORTON.
H. HAMLIN.
B. F. RICE.

We concur in the foregoing as to Goldthwaite, but not as to Blodgett.

JOSHUA HILL.
A. G. THURMAN.

On March 22[1] the resolution was taken up for consideration, and at once Mr. Joshua Hill, of Georgia, raised a question that the cases of the two claimants should be passed on separately, and proposed a division of the question.

The Vice-President[2] held, however, that the resolution was not divisible, as it did not conform to the rule which required that after the division each portion should present a substantive proposition.

Mr. Thurman dissented from this decision, holding that it was the subject and not the grammar which should control. But the Vice-President adhered to his decision, and in the subsequent proceedings the Senate separated the two propositions by amendment.

Mr. Joshua Hill, of Georgia, in order to separate the two propositions, moved to strike out the words "and Foster Blodgett."

The questions involved in the resolution and amendment were debated on March 25 and April 6 and 10.[3] It was objected that the case of Mr. Blodgett differed materially from the case of Mr. Goldthwaite. It does not appear that there was opposition to the swearing in of the latter. But there was opposition to the administration of the oath to Mr. Blodgett on the ground that there was a question as to the competency of the legislature. Mr. Thurman insisted that this question was essentially part of the prima facie case. The Senate sitting in a case like this was bound like every court to take notice of the laws and constitution of a State in regard to its legislature.

On behalf of the majority it was urged that the Senate was accustomed to seat persons bearing credentials regular in form except in cases where there was a question as to the right of a State to representation or as to the qualifications of the person bearing the credentials. The question as to the legislature of Georgia was a law question, and one that might well be examined and decided after the bearer of the credentials had been sworn in on his prima facie title.

On April 11[4] the subject was tabled to make way for other business, by a vote of 19 yeas to 17 nays.

At the next session of the Congress, on December 4, 1871,[5] Mr. Thurman presented the credentials of Thomas M. Norwood as Senator from Georgia for the six

[1] Globe, pp. 218, 219.
[2] Schuyler Colfax, of Indiana, Vice-President.
[3] Globe, pp. 272, 494, 540.
[4] Globe, p. 566.
[5] Second session Forty-second Congress, p. 1.

years commencing March 4, 1871. On December 11[1] the credentials were referred to the Committee on Privileges and Elections.

On December 182 Mr. Matt. H. Carpenter, of Wisconsin, submitted a report as follows:

The Committee on Privileges and Elections, to whom were referred the credentials of Foster Blodgett and Thomas M. Norwood, each claiming a seat as Senator from the State of Georgia for the term which commenced March 4, 1871, respectfully submit the following report:

The Senate being a branch of the Government of the United States, the right to elect a Senator is conferred and its exercise regulated by the Constitution of the United States, and no law or regulation of a State touching such election has any validity beyond the authority conferred upon the State by the Constitution of the United States.

The Constitution, Article 1, section 3, provides that Senators shall be chosen by the legislatures of the respective States. Section 4 of the same article provides:

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

The first clause of this section commits to the legislatures of the States primarily the whole subject of electing Senators and Representatives, and authorizes them to make such regulations upon the subject as they may deem 'proper. The phrase "the times, places, and manner of holding such elections for Senators and Representatives "embraces the whole subject of election of Senator except that the election must be made by the legislature of the State, as provided in the third section. The legislature may therefore provide that a Senator shall be elected by the legislature to be chosen next before the expiration of a term or next after its commencement. The second clause, quoted from the fourth section, confers upon Congress the same power and absolute control over the subject, to be exercised in the discretion of Congress, except that Congress can not fix a place for holding the election different from that fixed by the State legislature.

In the exercise of this undoubted constitutional power Congress passed an act regulating the election of Senators, approved July 25, 1866 (14 Stat. L., p. 243), which provides:

"The legislature of each State which shall be chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress in place of such Senator so going out of office."

Foster Blodgett claims to have been elected on the 15th day of February, A. D. 1870, by the legislature then existing and in session. He received the requisite number of votes, and his credentials are in due form. The question, therefore, is whether it was competent for that legislature to elect a Senator to serve during the term before mentioned. If this question can be answered in the affirmative, Mr. Blodgett is entitled to the seat; if not, his pretended election was an absolute nullity. The answer to this question depends upon the true construction of the act of Congress before quoted. It is claimed by Mr. Blodgett that chosen and elected mean different thin,"; that legislators are elected by the people, but that legislators are not the legislature, and that the legislature is not chosen until the members elected assemble as provided by law and organize as a legislature by determining what persons elected or claiming to be elected are entitled to seats. That is, the people elect the legislators, and the legislators after their election choose the legislature, and hence the legislature which was in fact organized next preceding the expiration of the term of office is the one authorized to elect a successor without regard to the time when the members of such legislature were elected by the people.

This refinement of reasoning does not meet the approbation of your committee. The question is, What was the intention of Congress in passing this act? The legislature designated by the act is the one "which shall be chosen next preceding the expiration of the time," etc. There is no such thing as choosing a legislature except by choosing its members. The Constitution declares that Senators shall be elected by the legislature of each State. Hence the act of Congress employs the same phrase. But your committee can not doubt that it was the intention of Congress to provide that the legislature whose members

[1] Globe, p. 55.

[2] Globe, p. 171; Senate Report No. 10.

should be elected next preceding the expiration of the Senatorial term should elect the successor. The distinction sought to be established between the words elected and chosen derives no support from popular or legal lexicography. Elected is defined chosen and chosen is defined elected, and the words are used as synonymous in the Constitution of the United States, the constitution of every State, in all our statutes, and in all popular literature. It is a universal rule of construction, applicable to constitutions and statutes, that words are to be understood in their popular, commonly received meaning, and to force upon this statute so unnatural a construction would defeat the intention of Congress, manifest in the act itself, and violate the fundamental principle of free government which doubtless inspired the passage of the act.

The legislature which was in session on the 15th day of February, 1870, when Mr. Blodgett claims to have been elected, was chosen in April, 1868. By the constitution and laws of Georgia then in force it was provided that another legislature should be elected on Tuesday after the first Monday in November, 1870, and that the legislature so to be elected should meet and organize on the second Wednesday in January, 1871. Thus it will be seen that at the time Mr. Blodgett claims to have been elected there was to be another legislature elected and organized prior to the expiration of the term for which Mr. Blodgett claims to have been elected to serve. Therefore, as the case then stood, the action of that legislature in the premises was without authority and directly in contravention of the act of Congress upon that subject. It is not claimed that Mr. Blodgett was elected at any other time or by any other legislature. The validity of his election must depend upon the state of case then existing. If the legislature had no authority to elect him at that time, their pretending to do so conferred upon him no right to claim this seat. If he has any rights they vested by that election, and were perfect as soon as the election was completed. His election was either valid or void; if valid, no subsequent action of the legislature could impair his rights; if void, no subsequent action of the legislature, short of another election, could entitle him to this seat.

Subsequently to Mr. Blodgett's pretended election the legislature provided by law, as it was authorized to do by the constitution of the State, that the legislature which was to be elected in November, 1870, and organized in January, 1871, as required by law at the time of Blodgett's pretended election, should not be elected until December, 1870, and should not convene and organize until November, 1871. But if your committee are right in their construction of the act of Congress, the legislature which convened in November, 1871, was the legislature chosen next preceding the expiration of the Senatorial term, and, consequently, that legislature was the one which was authorized to elect the successor; and this legislature did, in fact, elect Mr. Norwood. The fact that the State for months after the expiration of the former term, March 4, 1871, was without full representation in the Senate is not the fault of the act of Congress. The legislature authorized under the act of Congress to make this election would have been elected in November, 1870, and convened in January, 1871, and might have elected a Senator prior to the expiration of the former term but for the action of the State in postponing the election and organization of the legislature authorized to elect the successor. The State can not complain of its own act, nor ask the Senate to disregard the act of Congress, because the State has intentionally omitted to comply with the act of Congress, and avail itself of its provisions.

Therefore, Mr. Norwood having been duly elected at the first session of the legislature which was chosen prior to the expiration of the former term, your committee respectfully recommend the adoption of the following resolution:

Resolved, That Thomas M. Norwood is entitled to a seat in the Senate as a Senator from the State of Georgia for the term commencing March 4, 1871, and that he be admitted to the same.

On December 19[1] the Senate agreed to the resolution and Mr. Norwood appeared and took the oath.

On December 21[2] Mr. Thurman submitted the following resolution for consideration:

Resolved, That George Goldthwaite be permitted to take a seat in this body as a Senator from the State of Alabama, upon taking the oath, and that the Committee on Privileges and Elections proceed hereafter to consider the grounds on which his right to a seat is contested, and hereafter make report to the Senate thereon.

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[1] Globe, p. 211

[2] Second session Forty-second Congress, Globe, p. 261.

Mr. Thurman urged that, as Mr. Goldthwaite had credentials regular in form, he was entitled to the seat by prima facie title. He had examined all the precedents from the beginning of the Government, and had not found a single case where a Member-elect with such a title had been denied the seat. Had it not been for the complication with the case of Mr. Blodgett, Mr. Goldthwaite would have been seated long since.

Mr. Oliver P. Morton, of Indiana, said that so far as the alleged election of members of the legislature by fraud was concerned, and the alleged participation of an intruder were concerned, those were questions to be determined by the legislature. The question as to whether or not members of the legislature were under disabilities imposed by the Constitution of the United States was one which the Senate had a right to inquire into.

On January 9[1] Mr. Thurman called up the report of the committee on Mr. Goldthwaite's case, and proposed this substitute for the resolution therein presented:

amend the resolution by. striking out all after the word "resolved," and in lieu thereof inserting:

"That George Goldthwaite be permitted to take a seat in this body as a Senator from the State of Alabama upon taking the proper oath; and that the Committee on Privileges and Elections proceed hereafter to consider the grounds on which his right to a seat is contested, and hereafter make report to the Senate thereon."

It was determined in the affirmative; and on the question to agree to the resolution as amended, it was determined in the affirmative. So the resolution as amended was agreed to.

On January 15 Mr. Goldthwaite appeared and took the oath.

395. The Senate election case of Reynolds v. Hamilton, of Texas, in the Forty-second Congress.

Conflicting credentials being presented, and a question of law appearing, the Senate swore in neither contestant until after examination by a committee.

Decision by the Senate as to authority of a legislature to elect Senators before the date when the State became entitled to representation.

On July 13, 1870,[2] in the Senate, the credentials of Morgan C. Hamilton, as Senator from Texas for the term of six years, commencing on March 4, 1871, were presented.

On March 3, 1871,[3] the credentials of Joseph J. Reynolds, as Senator for the same State and the same term, were also presented.

On March 4, 1871,[4] at the time of swearing in Senators-elect, Mr. Oliver P. Morton, of Indiana, presented a joint resolution of the legislature of Texas relating to the cases affected by the credentials. Mr. Morton also stated that the credentials of Mr. Reynolds did not bear the signature of the governor, it having been omitted by inadvertence, evidently. The seal of the State had been placed thereon and they were certified in proper form by the secretary of state.

The papers were laid on the table for inquiry.

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[1] Globe, pp. 319, 376.

[2] Second session Forty-first Congress, Globe, p. 5527.

[3] Third session Forty-first Congress, Globe, p. 1979.

[4] First session Forty-second Congress, Globe, p. 4.

On March 13, 1871,[1] on motion of Mr. Henry B. Anthony of Rhode Island:

Ordered, That the credentials of Joseph J. Reynolds and the credentials of Morgan C. Hamilton, with the resolution of the legislature of Texas, declaring the election of said Hamilton on the 22d of February, 1870, as Senator from that State for six years from March 4, 1871, illegal, be referred to the Committee on Privileges and Elections.

On March 15,[2] the Vice-President laid before the Senate the credentials of J.J. Reynolds, elected a Senator in Congress by the legislature of the State of Texas for the term of six years, commencing on the 4th day of March, 1871.

The credentials were read.

The letter accompanying the credentials states that inadvertently the governor had not signed the credentials presented March 3.

On March 18[3] Mr. William M. Stewart, of Nevada, submitted the report of the Committee on Privileges and Elections, as follows:

That in pursuance of the several acts of Congress for the reconstruction of the State of Texas the legislature convened on the 8th and completed its organization on the 10th of February, 1870. On the 22d of February, 1870, second Tuesday after its organization, the legislature elected the Hon. Morgan C. Hamilton a Senator of the United States for the term commencing on the 4th of March, 1871.

The same legislature on the same day elected the Hon. J. W. Flanagan a Senator of the United States for the term ending March 3, 1875, and the Hon. Morgan C. Hamilton for the term ending March 3, 1871. These last two elections were to fill vacancies then existing, and both of these Senators were admitted to their seats.

By the constitution of Texas there was another session of the same legislature held in Texas after the election of Mr. Hamilton and before the expiration of his term. This session commenced on the 10th of January, 1871, and on the second Tuesday after its organization proceeded to the election of a Senator for the term commencing on the 4th of March, 1871, the same term for which Mr. Hamilton had been elected at the preceding session.

Gen. J.J. Reynolds is represented to have been elected, although the certificate referred to the committee is not signed by the governor.

The reasons assigned for the election of General Reynolds are that the legislature had no authority to elect Mr. Hamilton at the time of his election, first, because the State had not at that time been recognized as entitled to representation in Congress; and, secondly, because there was another session of the legislature after the election of Mr. Hamilton and before the commencement of the term for which he was elected.

The case of Hon. Abijah Gilbert, Senator from Florida, is precisely in point upon both of these questions.

The act of Congress of July 25, 1866, declares "that the legislature of each State which shall be chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress in the place of such Senator so going out of office, in the following manner."

The fact that the State was not admitted to representation until after the election of Mr. Hamilton is immaterial. The act admitting Texas to representation related back to the organization, and ratified the proceedings of the legislature.

The committee therefore recommend that Mr. Hamilton be permitted to take his seat on taking the oath prescribed by the Constitution and the laws.

Therefore the committee recommended this resolution:

"Resolved, That Morgan C. Hamilton was duly elected a Senator from the State of Texas for the term commencing March 4, 1871, and is entitled to take his seat as such upon taking the required oaths."

This resolution was agreed to without division.[4]

On March 20[5] Mr. Hamilton appeared and took the oath.

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[1] Globe, p. 74.

[2] Globe, p. 109.

[3] Senate Report No. 2.

[4] Globe, p. 168.

[5] Globe, p. 169.

Chapter XII.

ELECTORATES IN NEW STATES AND TERRITORIES.

1. Admission of Members after passage of act admitting State. Sections 396–399.
2. Delegates from portions of the Northwest Territory. Sections 400–401.
3. Delegates admitted after portion of Territory becomes a State. Sections 402–404.
4. Territory must be organized to justify admission of Delegates. Sections 405–412.

396. The House declined to admit the Member-elect from Illinois until the State had been formally admitted to the "Union.

The Speaker asked the decision of the House when a Member-elect from a State not yet admitted to the Union presented himself to be sworn.

On November 19, 1818,[1] Mr. John McLean, Representative from Illinois, being in attendance, the Speaker stated to the House a difficulty which he felt in deciding whether or not to administer the oath to Mr. McLean, in the absence of action by Congress on the admission of the State.

Objection was made, especially by Mr. Timothy Pitkin, of Connecticut, who thought that before admitting a Representative to a seat, the question whether the people who elected him were a State ought to be decided.

The question being put, it was decided that the Speaker should not administer the oath. Then the House ordered the constitution of Illinois referred to a select committee.

On the following day that committee reported a joint resolution declaring the admission of the State of Illinois into the Union, on an equal footing with the original States. This was passed by the Senate, and on December 4 a message was received from the President announcing his signature.

Thereupon Mr. McLean produced his credentials, and the oath was administered to him.

397. The House declined to admit the Member-elect from Michigan except as a spectator—until the act admitting Michigan to the Union had become a law.

It is not necessary that a State be admitted to the Union before it may elect a Representative to Congress.

[1] Second session, Fifteenth Congress, Journal, pp. 22, 25, 61, Annals, pp. 296, 297, 306–311, 342.

On December 16, 1835,[1] the Speaker submitted to the House the following communication:

WASHINGTON, *December 15, 1885.*

SIR: Inclosed is a certificate of my election as a Representative of the State of Michigan in the Congress of the United States. It is my desire that the same may be presented to the consideration of the body over which you have the honor to preside.

I am, with great respect, your obedient servant,

ISAAC E. CRARY.

Hon. JAMES K. POLK,
Speaker of the House of Representatives.

As the question of the admission of Michigan into the Union was still pending, a question was raised and the consideration of the subject went over until December 28, when Mr. Samuel Beardsley, of New York, under suspension of the rules, offered this resolution:

Resolved, That Isaac E. Crary, who claims to have been duly elected a member of this House, be admitted as a spectator, within the hall, during the sittings of the House.

Mr. Beardsley stated that this resolution was in accordance with the precedent at the time when the admission of the State of Tennessee was pending.

The resolution was agreed to by the House.

On January 27, 1837,[2] the bill entitled "An act to admit the State of Michigan into the Union on an equal footing with the original States," passed by the two Houses of Congress, having been approved and signed by the President of the United States, and the certificate of the election of Isaac E. Crary as Representative from the State of Michigan in this House having been communicated to the House at the last session of Congress, to wit, on the 17th of December, 1835, and the said Isaac E. Crary being in attendance. A motion was made by Mr. Francis Thomas, of Maryland, that the oath appointed by law to be taken by Members of the House of Representatives be administered to the said Isaac E. Crary; and that he thereupon take his seat as a Representative of the State of Michigan in this House.

A motion was made by Mr. John Robertson, of Virginia, that this motion, together with the whole subject of the legality of the election of a Member of the House from the State of Michigan, be referred to the Committee of Elections.

Mr. Robertson said that the election by which Mr. Crary claimed his seat took place in October, 1835. At that time Michigan was a Territory, and she continued to be such until yesterday, when she was admitted into the Union. In this matter subsequent recognition of Michigan as a State could not stand in the place of previous consent, because the boundaries of Michigan were uncertain until fixed by Congress. That was a preliminary act, necessary before Michigan could lawfully frame a State government. Under the ordinance of 1787, Michigan must of necessity remain a Territory until admitted as a State, therefore, remaining a Territory until admission as a State, there was no right to representation at the time of the election of Mr. Crary, and his election could not be valid.

[1] First session, Twenty-fourth Congress, Journal, pp. 71, 120, 121; Debates, pp. 1964, 2102, 2103

[2] Second session Twenty-fourth Congress, Journal, pp. 290, 291; Debates, pp. 1504–1509.

The previous question being ordered, the amendment of Mr. Robertson fell,[1] and Mr. Thomas's motion was agreed to, yeas 150, nays 32.

Mr. Crary was thereupon sworn, and took his seat.

398. The Senate declined to admit the persons bearing credentials as Senators-elect from Tennessee until that State had been admitted to the Union.—On June 1, 1796[2] the Senate declined to admit William Blount and William Cocke, who produced credentials as Senators from the State of Tennessee. That State had not yet been admitted to the Union.

399. The Senate election case of James Shields, of Minnesota, in the Thirty-fifth Congress.

The Senate declined to admit a Senator-elect from Minnesota until a formal act of admission had been passed by Congress.

On February 25, 1858,[3] in the Senate, Mr. John J. Crittenden, of Kentucky, presented the following letter:

WASHINGTON, *February 24, 1858.*

SIR: I beg leave to offer a few reasons to show that Minnesota is one of the sovereign States of this Union. My first proposition is that there are only two forms of political organization under which a community of American citizens can legitimately exist within the jurisdiction and under the Constitution of the United States. The one is the organization of a Territory of the Union; the other that of a State of the Union. These are the only determinate shapes into which political communities can be molded under our Constitution. Each has its appropriate place in our federal system. A community of American citizens living under a Territorial organization is in direct and legitimate connection with the Federal Government. That same community, transformed into a State, is also in direct legitimate connection with the Federal Government. In the transition from a Territory to a State, there is no point of time at which this connection can by any possibility be broken. The Territorial government continues in full force until it is superseded by a State government; and whenever the people constitute themselves lawfully into a State, it is, Io instanti, a State of the Union. There is no such political anomaly as a State out of the Union, or not yet in the Union. These erroneous terms have been applied so vaguely to communities whose condition is not easily determined that the public begin to think there must be some intermediate provisional, probationary state, in which communities are sometimes kept on their passage from the condition of Territories to that of sovereign States of the Union. California was denominated not many years ago a State out of the Union. Minnesota is, I suppose, at present considered by some a State not yet in the Union, or, perhaps, a provisional State. Certainly the Representatives of Minnesota are at present in a provisional dilemma, not knowing whether they represent a State in the Union or out of the Union.

I now beg leave to refer you to the law of 1857[4] authorizing the people of Minnesota to form a State government. The first section contains the following language: "The inhabitants of Minnesota are hereby authorized to form for themselves a constitution and State government by the name of Minnesota, and to come into the Union on an equal footing with the original States, according to the Federal Constitution." Here the authority is absolute and unconditional, first, to form a constitution and State government; secondly, to come into the Union on an equal footing with the original States—authority to make a State and authority to come into the Union. No language could be more positive; no authority could be more plenary; no act could be more determinate. The people have performed their engagements in good faith, and they have a right to expect a like compliance on the part of Congress. These engagements, too, affect the most sacred of all political rights—the constitutional rights of a sovereign State. The third section of the Minnesota enabling act strengthens and corroborates this position. It provides that a convention of delegates shall assemble at the capital of said Territory on the second Monday of July next (1857), and first determine by a vote whether it is the wish of the people of the proposed State

[1] This was the effect of the previous question on a pending amendment at that time.

[2] First session Fourth Congress, Contested Elections in Congress, from 1789 to 1834, p. 868.

[3] First session Thirty-fifth Congress, Globe, pp. 861–867.

[4] Act approved February 26, 1857, 11 Stat. L., p. 166.

to be admitted into the Union "at that time." Mark the language—not thereafter; not upon the happening of any future contingency, but "at that time," to wit, on the second Monday in July, 1857; "and if so,"—that is, if they shall so determine—"shall proceed to form a constitution and to take all necessary steps for the establishment of a State government in conformity with the Federal Constitution, subject to the approval and ratification of the people of the proposed State."

Here two things are to be specially observed: First, the determination to become a State at that time; not the determination at that time to become a State, but a State at that time. Second, the submission to the approval and ratification of the people. When was Minnesota to become a State? At that time. How was her constitution to be ratified? By submission to the people. She has complied with every requirement. She entered the Union at the time prescribed; her constitution is ratified in the manner prescribed; and yet she is now as completely postponed and ignored as if she had disregarded all her obligations. Permit me to cite two precedents, which I hope will prove conclusive in this case. In 1802 an enabling act was passed for Ohio somewhat similar to, but not so decisive as, the Minnesota act. The authority given was to form a constitution and State government, and then follows this language: "The State, when formed, shall be admitted into the Union on the same footing with the original States." This was then considered an authorized admission of the State, and the only act of admission that ever took place in the case of Ohio, and that State is now in the Union under and by virtue of the authority of that enabling act.

The enabling act in the case of Indiana contains the following language: "The State, when formed, shall be admitted into the Union." Mark the difference in the two acts. In the case of Minnesota authority is given to come in at the present time. In the case of Indiana a promise is given for her admission at some future time; under the law Indiana adopted a constitution and elected Representatives, as Minnesota has done.

On the 2d December, 1816, Mr. Hendricks, Representative from the new State, presented his credentials in the House of Representatives, was sworn in, was appointed on a committee, and was allowed to vote and act as a Member of that body; and yet it was not until ten days afterwards (on the 12th of the same month) that a joint resolution was passed by both branches of Congress formally admitting Indiana. This kind of resolution was then considered form—nothing but mere form—something which Congress has the power to observe or omit at pleasure, but something with which the State has no concern, and which can not affect its right. This was then the opinion of John C. Calhoun, at that time a Member of the other House; and this, we may fairly presume, would be his opinion if he were a Member of the Senate now. When the precedent was established Daniel Webster was also a Member of the House, and gave it the weight of his authority. But Minnesota stands upon far stronger grounds than Ohio or Indiana the ground of Congressional authority. If this authority is good, Minnesota can not fail. This is a great question—a question of constitutional right, of national faith. Congressional faith, I sincerely hope, will be held sacred and inviolate in the case of Minnesota by the prompt admission of her Representatives. My sense of duty to my constituents compels me, through you, to make this appeal to the Senate.

I have the honor to be, your obedient servant,

JAMES SHIELDS,
Senator from Minnesota.

HON. JOHN J. CRITTENDEN.

Mr. Crittenden also presented credentials in due form, showing the election of Mr. Shields by the legislature of Minnesota on December 19, 1857.

A discussion arose as to whether or not Minnesota was a State in the Union by virtue of the enabling act, or whether an act of admission would be necessary. Mr. Crittenden, in arguing that there had been no act of admission, cited the case of Louisiana in addition to those of Ohio and Indiana quoted by Mr. Shields.

A motion that the subject lie on the table was disagreed to—yeas 22, nays 26.

Then, after lengthy debate, the Senate, on motion of Mr. Robert Toombs, of Georgia, agreed to the following:

Resolved, That the question of the admission of James Shields to a seat in this body, as a Senator from the State of Minnesota, be referred to the Judiciary Committee, with instructions to inquire whether or not Minnesota is a State of the Union under the Constitution and laws.

The Judiciary Committee consisted of Messrs. James A. Bayard, of Delaware; Robert Toombs, of Georgia; George E. Pugh, of Ohio; Judah P. Benjamin, of Louisiana; James S. Green, of Missouri; Jacob Collamer, of Vermont; and Lyman Trumbull, of Illinois. On March 4, 1858,[1] Mr. Bayard submitted the following report:

Having considered the question as to which they were by the the foregoing resolution instructed to inquire, the committee have unanimously adopted the following resolution:

Resolved, That Minnesota is not a State of the Union under the Constitution and laws.

Minnesota was admitted into the Union by the act approved May 11, 1858,[2] and thereupon her Senators-elect were admitted.

400. The election case of James White, Delegate from the Territory south of the Ohio, in the Third Congress.

In 1794 the House admitted a Delegate on the theory that it might admit to the floor for debate merely anybody whom it might choose.

The office of Delegate was established by an ordinance of the Continental Congress, confirmed by a law of Congress.

The House decided in 1794 that the oath should not be administered to a Delegate.

The legislation as to the privileges of the Delegate was enacted after the House had recognized the office.

In 1794 the Delegate seated by the House was elected by the legislature of the Territory and not by the people.

On November 11, 1794,[3] the credentials of James White as a Representative of the Territory of the United States south of the river Ohio, were laid before the House and referred to a select committee, who, on November 14, made the following report:

That, by the ordinance for the government of the Territory of the United States northwest of the river Ohio, section 9, it is provided "that, so soon as there shall be five thousand free male inhabitants of full age in the district, upon giving proof thereof to the governor, they shall receive authority to elect representatives to represent them in a general assembly," and by the twelfth section of the ordinance, "as soon as a legislature shall be formed in the district, the council and house, assembled in one room, shall have authority, by joint ballot, to elect a Delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government." Full effect is given to this ordinance by act of Congress August 7, 1789.

That, by the deed of cession of the Territory south of the river Ohio to the United States, in the fourth article, it is also provided "that the inhabitants of the said Territory shall enjoy all the privileges, benefits, and advantages set forth in the ordinance of the late Congress for the government of the Western Territory—that is to say, Congress shall assume the government of the said Territory, which they shall execute in a manner similar to that which they support in the Territory west of the Ohio, and shall never bar or deprive them of any privilege which the people in the Territory west of the Ohio enjoy."

The cession, on these conditions, was accepted by act of Congress on the 2d of April, 1790.

By an act passed the 26th of May, 1790, for the government of the Territory of the United States south of the river Ohio, it is enacted "that the inhabitants shall enjoy all the privileges, benefits, and advantages set forth in the ordinance of the late Congress for the government of the Territory of the United States northwest of the river Ohio. And the government of the said Territory south of the Ohio shall be

[1] Globe, p. 957, Senate Report No. 104.

[2] 11 Stat. L., p. 285.

[3] Second session Third Congress, contested elections in Congress from 1789 to 1834, p. 85.

similar to that which is now exercised in the Territory northwest of the river Ohio, except so far as is otherwise provided in the conditions expressed in an act of Congress of the present session, entitled 'An act to accept a cession of the claim of the State of North Carolina to a certain district of western territory.'"

The committee are of opinion that James White has been duly elected as Delegate from the Territory of the United States south of the Ohio, on the terms of the foregoing acts. They therefore submit the following resolution:

Resolved, That James White be admitted to a seat in this House as a Delegate from the Territory of the United States south of the river Ohio, with a right of debating, but not of voting.

This resolution gave rise to considerable debate, it being urged in opposition that the Constitution provided for no such admission to the House, and that it would be more proper to admit him to the Senate. It was said, also, that he should be admitted only in accordance with a law of Congress. In opposition it was maintained that the House might admit and give the right of debating to whomsoever it might please, as it might admit an advocate to plead in any particular case, and that a law was not necessary, since they need not and ought not to consult the Senate in such a matter.

On November 18 the House agreed to the report of the committee.

A question then arose as to whether or not the oath should be administered to Mr. Smith.

The question being taken, it was decided—yeas 32, noes 42—that the Delegate should not take the oath, the argument that his inability to vote rendered the oath unnecessary.[1]

During this session a bill was passed allowing the Delegate pay and the privilege of franking letters.[2] This legislation was in the form of a bill extending the franking privilege specifically to James White and providing for the same compensation received by a Member.

401. The election case of Narsworthy Hunter, Delegate for Mississippi Territory, in the Seventh Congress.

In 1801 the oath was administered as a matter of course to a Delegate from a Territory.

On December 21, 1801,[3] the House, on report of the Committee on Elections, to whom had been referred the credentials of Narsworthy Hunter as Delegate from Mississippi Territory, decided that the Territory was entitled to a Delegate, with a right to debate, but not to vote, and that Mr. Hunter was elected such Delegate. As in the case of James White, the title of the territory to a Delegate was referred back to the ordinance of 1787, certain provisions of which were by acts of April 7, 1798, and May 10, 1800, applied to Mississippi Territory.

Mr. Hunter had appeared on December 7, at the time of the organization of the House, and had taken the oath with the Members.[4]

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[1] The compiler of the election cases has inserted a footnote explaining that in practice it was usual (in 1834, when the work was published) for the Delegates to be sworn. See also Section 401.

[2] 1 Stat. L., p. 403.

[3] First session Seventh Congress, Contested Elections in Congress from 1789 to 1834, p. 120

[4] Journal, p. 5.

402. The election case of Paul Fearing, Delegate from the territory northwest of the river Ohio, in the Seventh Congress.

A Delegate was not dispossessed of his seat because a portion, but not all, of his territory had been erected into a State.

On January 31, 1803,[1] the Committee on Elections reported on the following proposition, which had been referred to them previously:

That inasmuch as the late territory of the United States northwest of the river Ohio have, by virtue of an act of Congress passed on the 1st day of May, 1802,[2] formed a constitution and State government, and have thereby and by virtue of an act of Congress aforesaid become a separate and independent State, by the name of "Ohio," that Paul Fearing, a Member of this House, who was elected by the late territorial government of the territory northwest of the river Ohio, is no longer entitled to a seat in this House.

The committee reported the following:

Resolved, That Paul Fearing, the Delegate from the territory northwest of the river Ohio, is still entitled to a seat in this House.

The report was laid on the table.

Mr. Fearing has taken his seat on the first day of the Congress.[3] The Member from the State of Ohio did not appear until the next Congress.[4]

403. The election case of Doty v. Jones, from Wisconsin Territory, in the Twenty-fifth Congress.

The term of a Delegate need not necessarily begin and end with the term of Congress.[5]

In 1839 the Committee on Elections held that the office of Delegate ceased when the Territory ceased to exist as a corporation by becoming a State.

At the session of 1838–39[6] the Committee on Elections reported on the case of Doty v. Jones, from Wisconsin Territory. This case involved merely a question as to when Mr. Doty should take the seat.

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[1] Second session Seventh Congress Contested Elections in Congress, from 1789 to 1834, p. 127; Journal, pp. 297, 313, 314; Annals, pp. 413, 448.

[2] This act, actually approved April 30, 1802 (2 Stat. L., p. 174), did not include in the new State of Ohio all the territory of the "late territory of the United State northwest of the river Ohio," but provided "that all that part of the territory of the United States northwest of the river Ohio heretofore included in the eastern division of said territory and not included within the boundary herein prescribed for the said State is hereby attached to and made a part of the Indiana Territory from and after the formation of the said State." Indiana had been organized by act of May 7, 1800 (2 Stat. L., p. 58). Indiana was not allowed a Delegate until the act of February 27, 1809 (second session Tenth Congress, 2 Stat. L., p. 525). So it is evident that Mr. Fearing would remain as the Delegate for an increment of population left out by the new boundaries of Ohio. The act of May 1, 1802, provided that "the said State, when formed, shall be admitted into the Union upon the same footing with the original States in all respects whatsoever."

[3] Journal, p. 5.

[4] First session Eighth Congress, Journal, p. 403 (Gales and Seaton ed.).

[5] But since 1848 (9 Stat. L., p. 349) the acts admitting States have required that the term of the delegate should begin and end with a single Congress.

[6] Third session Twenty-fifth Congress, 1 Bartlett, p. 6; Rowell's Digest, p. 107; Report No. 7, Journal, p. 191.

In October, 1835, Mr. George W. Jones had been elected Delegate from the Territory of Michigan for a term extending, under the existing law for Michigan, for two years from the date of his certificate. He took his seat in December, 1835, and would naturally have served until about that time in 1837. But by act of June 15, 1836, Michigan was admitted to the Union on condition that she should by convention ratify certain boundaries, which was done December 15, 1836. The committee therefore considered that the Territory of Michigan ceased to be on June 15, 1836, and that Mr. Jones ceased to be her Delegate on that day, which was about a year and a half before his term would naturally have expired.[1]

In October, 1836, Mr. Jones was elected Delegate from the adjacent Territory of Wisconsin, which had just been organized. The act of organization provided that he should serve "for a term of two years." Mr. Jones took his seat December 5, 1836, and the term of two years would, if computed from the time of election or qualification, expire in October or the 1st of December, 1838.

And so, naturally, Mr. James D. Doty, elected on September 10, 1838, would take his seat at the December session of 1838, which was the last and not the first or long session of the Congress, and consequently would finish out the current Congress and sit for the first half of the next Congress.

The natural objection then arose that this should not be, because the term of the Delegate, like the term of the Member from a State, should be for the term of the Congress, and should not comprise a portion of two Congresses. In support of this contention a clause of the act of March 3, 1817, was cited, wherein it was provided that Delegates "shall be elected every second year for the same term of two years for which Members of the House of Representatives of the United States are elected." Furthermore, there was a question as to when Mr. Jones's term as Delegate from Michigan expired, and so that term might work out the time of beginning for the term of Mr. Doty.

The committee did not consider that the law of 1817, even supposing it not to have been modified by the subsequent act organizing Wisconsin and providing simply that the Delegate should "serve for a term of two years," necessarily meant that Delegates should serve the same two years for which Members of the House were elected. The committee would construe it to mean that the duration of service should be the same, but not necessarily contemporaneous. Although not entirely confident of this construction, the committee found it fortified by the fact that previous to that law Delegates were elected annually. The Constitution was silent as to Delegates, which were mere creatures of law, whose terms of service might be long or short and commence and terminate at such periods as Congress might dictate. The law organizing Wisconsin, unlike the Michigan law, did not specify when the term should begin; but in cases where no time is specified for the performance of a duty it is common to construe that it is to be performed forthwith. Any other construction would, when Mr. Jones was elected Delegate from Wisconsin, have left the Territory unrepresented for part of a Congress, while he

[1] Congress actually passed (on January 26, 1837) another act for admission of Michigan as a State, and Isaac E. Crary, elected Representative from the State, was not permitted to take his seat until January 27, 1837 (2d sess. 24th Cong., Journal, pp. 288, 290; Globe, p. 134.)

would have been awaiting the beginning of the term of the new Congress on March 4, 1837. So the committee decided that Mr. Jones's term did not last until March 4, 1839, and therefore reported the following resolution, which was agreed to by the House—yeas 165, nays 25:

Resolved, That James Duane Doty is entitled to a seat in this House as a Delegate from Wisconsin Territory, and that George W. Jones is not so entitled.

404. The election case of Henry H. Sibley, claiming a seat as Delegate from Wisconsin, in the Thirtieth Congress.

The House admitted a Delegate from a county left under the old Territorial laws after the remainder of Wisconsin Territory had become a State.

By the act of May 29,1848,[1] Wisconsin, which had been a Territory, with a Territorial Delegate, was admitted to the Union as a State. But the boundaries of the new State left out a portion of the old Territory of Wisconsin lying beyond the St. Croix River, comprising a population of about 4,000 and constituting what had been a judicial district of the old Territory, organized as an entire county. The Delegate who had represented Wisconsin Territory had resigned when the State was formed. So the people in the portion left without the State boundaries had no representation in Congress.

The governor of the Territory having become an United States Senator from the new State, the secretary of the Territory, upon whom under the law of the Territory the duties devolved, removed to the region beyond the St. Croix and assumed the duties of governor. He issued his proclamation as acting governor, ordering a special election to fill the vacancy caused by the resignation of the Delegate who had represented the whole Territory of Wisconsin. And in pursuance of that proclamation the people beyond the St. Croix elected Henry H. Sibley, who in due time presented his certificate of election, under the hand of the acting governor and with the seal of the "Territory of Wisconsin" attached.

On December 4, 1848,[2] at the beginning of the second session of the Congress, Mr. Sibley's credentials were presented to the House, but objection was made to swearing him in on his prima facie showing, and the credentials were referred to the Committee of Elections.

The majority of the committee reported a resolution that Mr. Sibley be admitted to a seat as Delegate of the Territory of Wisconsin. They argued that these people as part of the old Territory of Wisconsin had once enjoyed the right of representation and that they were still entitled to it by natural right as well as by the usages of the Government. The act of Congress admitting the State of Wisconsin had left them outside its benefits, but had not abrogated any of the old law organizing the Territory, and they were therefore entitled to all their rights under the terms of the law organizing the original Territory of Wisconsin. Those rights had, moreover, been guaranteed by the ordinance of 1787, which had been reaffirmed by Congress. The omission of Congress to repeal the law organizing the Territory of Wisconsin, as well as the failure to make any other law for the government of

[1] Second session Thirtieth Congress, House Report No. 10; 1 Bartlett, p. 102; Rowell's Digest, p. 127.

[2] Globe, p. 2.

the people beyond the St. Croix, were proof conclusive that the old Territorial law was intended to operate in the residuum of the Territory. Moreover, acting on the authority of the State Department, the officers of the present Territory were holding the offices under the original appointments made before the State of Wisconsin was formed. The committee cited the case of Delegate Paul Fearing, from the Territory of Ohio.

The minority of the committee contended that the formation of the State of Wisconsin annulled by implication the whole political organization of the Territory of Wisconsin. A special repealing clause was not necessary and had not been inserted in the laws organizing other States. Neither had it been usual to grant Delegates to Territories in the first stages of their existence. When the people had become numerous enough to entitle them to legislative assemblies it had been usual to allow them Delegates in Congress. The authority of the precedent of Paul Fearing was denied. The fact that the people of the residuum county would be left without laws might be a matter to be remedied by law, but was not such as to require the interposition of the House in the manner proposed.

On January 15, by a vote of 124 to 62, the House agreed to the resolution admitting Mr. Sibley as the Delegate of the Territory of Wisconsin.[1]

405. The election cases of Hugh N. Smith and William S. Meservey, claiming seats as Delegates from New Mexico in the Thirty-first Congress.

The House declined to admit a Delegate from New Mexico before the organization of the Territory had been authorized by law.

The House declined to give prima facie effect to the credentials of a Delegate elected by a convention in an unorganized Territory.

The House held that there should be prior legislation by Congress before the admission of a Delegate.

On February 4, 1850,[2] the credentials of Hugh N. Smith, as Delegate from the Territory of New Mexico, were presented to the House. The credentials were in the following form:

> Be it remembered that in the convention of delegates chosen from the seven different counties of New Mexico to assemble in the city of Santa Fe on the 24th day of September, A.D. 1849, for the purpose of forming and proposing the basis of a government which the people of New Mexico desire should be granted to them by the Congress of the United States, and for the purpose of choosing a Delegate to represent New Mexico in the House of Representatives of the Thirty-first Congress of the United States, Hugh N. Smith was chosen by a majority of all the convention, and declared duly elected said Delegate.
>
> Given under our hands, at Santa Fe, this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and forty-nine.
>
> ANTONIO JOSÉ MARTINEZ,
> *Presidente de la Convensione.*
>
> JAMES H. QUINN, *Secretary.*

The House did not swear in the Delegate on this prima facie showing, but referred the credentials to the Committee on Elections.

This committee reported on April 4. It was ascertained that New Mexico was acquired by the treaty of GuadaloupeHidalgo; that previously it had been a

[1] Globe, p. 260.

[2] First session Thirty-first Congress, Journal, p. 463; Globe, pp. 279, 412; 1 Bartlett, p. 109.

department of Mexico, governed by its own legislature and having representation in the National Congress. But when acquired by the United States it came as territory only, not retaining its old political organization. An army officer was stationed there as military commander, but there was no political organization known to the laws. The convention which chose Mr. Smith Delegate was summoned by proclamation of the army officer in command.

The further fact appeared that the larger portion of the Territory was claimed by the State of Texas and had been so claimed since 1836. This claim still existed although not admitted by the Executive of the United States. Mr. Smith, the Delegate-elect, was himself a resident of the portion claimed by Texas, as were the larger portion of his constituents.

Without considering the claim of Texas, for the time being, the majority of the committee came to the conclusion that Delegates admitted by the House had in every case been chosen in accordance with laws enacted by Congress. The case of Mr. Sibley, of Wisconsin, was not an exception, since he was admitted on the theory that a Territory of Wisconsin still existed. The admission of Mr. Smith would be construed as a quasi recognition of New Mexico as an organized government, a proceeding not within the constitutional power of the House. To admit Mr. Smith simply as the representative of the inhabitants would be anomalous and unwise.

The minority of the committee contended that the privilege of citizens of a Territory or portion of the Union not organized into a State to have a Delegate depended neither on the Constitution nor law, but on the pleasure of the House alone. The discretion of the House should be exercised in favor of the right of representation. New Mexico was a populous region, whose people had enjoyed an organized political existence under the former sovereignty. While her former condition could not be considered as establishing her claim to representation, yet it showed her capacity for self-government and constituted a strong argument to control the discretion of the House, so that she might not be kept in a worse situation than she was in before.

As to the justness of the claim of Texas the majority passed no opinion. If it was just certainly the people were already represented, and might not be further represented. Whether just or not the claim existed, and it was not the part of the House to express judgment on it by admitting Mr. Smith. The minority held that the claim of Texas might be admitted as just, and yet Mr. Smith might be admitted properly as representing a residuum of people without the boundaries claimed by Texas. Furthermore, Texas had not enforced her claim and exercised no authority over the disputed territory; and New Mexico should not be neglected because of the mere claim of Texas.

The majority of the committee recommended the following:

Resolved, That it is inexpedient to admit Hugh N. Smith, esq., to a seat in this House as a Delegate from New Mexico.

The minority proposed the following:

Resolved, That the said Hugh N. Smith be admitted to a seat in the House of Representatives of the United States as a Delegate from New Mexico.

The report was debated at length on May 22 and July 15–18.[1] Besides the merits of the case, there seems to have developed some considerations relating to the question of slavery and a disposition to resort to dilatory tactics. Finally, on July 19, the whole subject was laid on the table, by a vote of 105 yeas, 94 nays.

406. On December 10, 1850,[2] the credentials of William S. Meservey as Delegate from the Territory of New Mexico were presented and referred to the Committee on Territories, no motion being made to swear in Mr. Meservey. Later the reference was changed to the Committee on Elections, which reported on February 6, 1851.[3] On May 25, 1850, before a decision had been reached by the House in the case of Mr. Smith, another convention had assembled at Santa Fe and established a constitution for a State government. On June 20, 1850, the voters of the Territory ratified the constitution and elected officers, including a Representative in Congress. Mr. Meservey was chosen to this office. The State officers issued a credential to Mr. Meservey as a "Representative," but he claimed a seat as a "Delegate." The committee, after commenting on this fact, went on to argue that it would be a dangerous precedent to admit a Delegate not provided for by law of Congress and would overrule the usages of sixty years. Moreover, there was now in force an act of Congress providing for a Territorial Delegate from New Mexico. This act became a law on September 9, 1850, after the decision in Mr. Smith's case. So the committee reported against the admission of Mr. Meservey. The report was not acted on by the House.

407. The election case of Almon W. Babbitt, claiming a seat as a Delegate from the so-called State of Deseret, in the Thirty-first Congress.

The House decided it inexpedient to admit a Delegate chosen by a community not yet made a Territory by law.

On April 4, 1850,[4] the Committee on Elections reported on these credentials:

PROVISIONAL STATE OF DESERET, *ss:*

I hereby certify that, pursuant to a joint resolution passed by both houses of the general assembly of this State, Almon W. Babbitt, esq., was on the 5th day of July, 1849, elected by both branches of the general assembly a Delegate to the Congress of the United States, to present the memorial of said general assembly and otherwise represent the interests of the inhabitants of this State in Congress.

Given under my hand and the great Seal of the State of Deseret, at the city of the Great Salt Lake, this twenty-fifth day of July, 1849.

[SEAL.]

WILLARD RICHARDS,
Secretary of State.

Mr. Babbitt had not attempted to take a seat on these credentials in the first instance, and after examination the committee found that the memorial presented did not ask the admission of the Delegate until "some form of government" had been adopted. Moreover, the so-called State of Deseret had been formed by an irregularly called convention of citizens representing a region not yet organized by law of Congress. To admit Mr. Babbitt would be for the House to give a quasi recognition of the legal existence of the State of Deseret and an implied ratification

[1] Journal, pp. 1142, 1150; Globe, pp. 1038, 1375, 1383, 1386, 1392, 1399, 1411.

[2] Second session Thirty-first Congress, Globe, p. 22.

[3] 1 Bartlett, p. 148; Rowell's Digest, p. 135.

[4] First session Thirty-first Congress, 1 Bartlett, p. 116; Rowell's Digest, p. 130.

of its constitution. Such recognition and ratification were within the power of Congress alone.

So the committee recommended this resolution:

Resolved, That it is inexpedient to admit Almon W. Babbitt, esq., to a seat in this body as a Delegate from the alleged State of Deseret.

On July 18, 19, and 20[1] the resolution was debated in Committee of the Whole. There were arguments in favor of admitting a representative of the people of Deseret and the position of the committee as to the matter of recognition was combatted. The slavery question also had some bearing on the result.

Finally, by a vote of yeas 104, nays 78, the resolution was laid on the table.

408. The election case of Fuller v. Kingsbury, from the Dakota portion of the old Territory of Minnesota, in the Thirty-fifth Congress.

Duty of the Speaker as to recognition of a Delegate after the Territory has been admitted as a State.

On May 27, 1858,[2] several days after the Representatives from the State of Minnesota had been qualified, one of them, Mr. James M. Cavanaugh, rising to a question of privilege, offered this resolution:

Resolved, That the Committee on Elections be authorized to inquire into and report upon the right of W. W. Kingsbury to a seat upon this floor as Delegate from that part of the Territory of Minnesota outside the State limits.

In the debate a question was raised as to recognition of Mr. Kingsbury, and the Speaker[3] said he had continued to recognize him as Delegate in accordance with past precedents.

Thereupon an amendment was adopted providing:

And in the meantime no person shall be entitled to occupy a seat as a Delegate from said Territory.

This amendment was adopted, and the resolution as amended was agreed to.

On June 3,[4] when the committee had reported in favor of allowing Mr. Kingsbury to retain his seat, a motion was proposed to lay the report on the table, and a question arose as to the effect of agreeing to the motion.

The Speaker said:

The resolution referring the subject to the Committee of Elections provided that the committee be authorized to inquire into and report upon the right of W. W. Kingsbury to his seat upon this floor as Delegate from that portion of the Territory of Minnesota outside of the State limits, and that in the meantime no person should be entitled to occupy a seat as Delegate from the said Territory. The Chair is of opinion that when the committee submitted a report to the House the proviso ceased to operate, and the Chair, following the precedents, without intimating whether the Chair thinks the precedents right or wrong, would recognize the Delegate from Minnesota.

409. The election case of Fuller v. Kingsbury, continued.

After the admission of Minnesota as a State, the House declared portions of the old Territory outside the limits of the State not entitled to a Delegate.

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[1] Journal, pp. 1153, 1155; Globe, pp. 1413, 1418, 1423.

[2] First session Thirty-fifth Congress, Journal, p. 932; Globe, p. 2428.

[3] James L. Orr, of South Carolina, Speaker.

[4] Globe, pp. 2677, 2678.

The State of Minnesota being admitted, the House suspended the functions of the Delegate from the old Territory.

On May 29, 1858,[1] the Committee on Elections reported in the case of Fuller *v.* Kingsbury, of the portion of the former Territory of Minnesota not included within the limits of the new State. The committee, after quoting from the law establishing the Territory, and citing the fact that the Territory of Minnesota had been represented without interruption, by a Delegate elected in conformity with law, say:

It further appears that William W. Kingsbury was regularly elected on the 13th day of October, 1857, as such Delegate, and, in that capacity, was, at the opening of the present session of Congress, admitted to, and has held, a seat in the House of Representatives until the passage of the act of May, 1858, for the admission of the State of Minnesota into the Union, when his right to retain it was brought in question. Of the legality of the election of Mr. Kingsbury as the Delegate from the Territory of Minnesota there seems to be no doubt. * * * The number of inhabitants in the Territory not included in the bounds of the State is not very clearly settled, but, as far as can be learned, it amounts to several thousands, and is said to be rapidly increasing. There were five counties established by law, and two of them fully organized, with the proper officers for regular municipal government. * * *

Does the admission into the Union of a State formed out of a part of the original Territory of Minnesota annul the election of the Delegate, repeal or set aside the law creating the Territory, and all other laws; deprive the people inhabiting that part of the Territory not included in the limits of the new State of the right or privilege of being heard in the House of Representatives by an agent or Delegate; substitute anarchy for a government of law, and resolve society into its original elements? Such is not the opinion of your committee. There is nothing in the act authorizing the people of Minnesota to form a constitution and State government, nor in the act for the admission of the State of Minnesota into the Union, which repeals in anywise the law creating the Territory, or deprives the people inhabiting that part not included in the new State of any rights or privileges to which they were entitled under any laws existing at the time of the admission of that State. It matters not whether one State or half a dozen have been carved out of an organized Territory; if a portion remains, and, more especially, if inhabited, and counties and towns, with their corporate governments, exist, created by law, it would seem to be a most violent presumption to hold that they became eo instante upon the admission of the State a disfranchised people—a mere mob or rabble. The fact that the admitted State bears the same name as the Territory may lead to some confusion of ideas, but it does not alter the fact. The existence of the State of Minnesota does not destroy the existence of the Territory of Minnesota, nor deprive the inhabitants of such Territory of any of their rights. No such result can be by implication. The Territorial law must be repealed before such consequences could follow, and even then a grave question would arise here how far such repeal could operate upon the rights of the people.

The committee then cite the cases of Delegates Fearing and Sibley in support of their view.

As to the memorial of A. G. Fuller and his certificate of election under the hands of the county officers of Midway County, in the Territory of Dakota, the majority say that there is no Territory of Dakota authorized to elect a Delegate. The region named as Dakota is admitted to be the residue of the Territory of Minnesota, already represented by Mr. Kingsbury.

Therefore the majority of the committee reported resolutions that Mr. Kingsbury be allowed to retain his seat "as a Delegate from the Territory of Minnesota."

The minority of the committee base their argument on a question of fact which is disputed. The majority of the committee had said:

The committee are informed, on what they consider good authority, that * * * at the election for Delegate to Congress, the people of this so-called Territory of Dakota, or a part of them, did vote for Mr. Kingsbury for their Delegate, and they so claim him to be, notwithstanding the admission of the State of Minnesota into the Union.

[1] First session Thirty-fifth Congress, 1 Bartlett, p. 251; Rowell's Digest, p. 155.

The minority take issue on this point, saying:

On the said 13th day of October, 1857, the people resident in the limits of the State voted entirely to themselves. They elected a Delegate (Mr. Kingsbury), who had opposition; also elected Representatives. On the same day the inhabitants outside said State limits held a separate election for themselves and elected A. G. Fuller their Delegate, said Fuller also having an opponent. The people outside the State limits acted and voted separately and independently; so did the inhabitants within the State.

Section 14 of the act organizing the Territory of Minnesota, approved March 3, 1849, provides that a Delegate to the House of Representatives of the United States may be elected by the voters qualified to elect members of the legislative assembly. The election for governor, State officers, members of assembly, and Representatives, as well as Delegates, was confined to the voters within the limits of the proposed State. No polls were opened for these elections to the people outside the limits of the proposed State.

When the reports were debated, on June 2 and 3,[1] there was controversy over the point, and letters were presented from Territorial officers showing that votes were cast for Mr. Kingsbury in the portion of the Territory outside the limits of the proposed State. But this fact was not settled so conclusively that it could be said to be established.

The minority alleged that Mr. Kingsbury was not a resident of the portion of Minnesota or Dakota which he sought to represent, but that he lived within the limits of the new State. In reply to this it was declared that there was no provision of law requiring a Delegate to be a resident of the Territory he represented.

The minority further urged:

We further find and report that the people residing out of the limits of the proposed State, after being separated, in anticipation of a separate Territorial organization for the remaining Territory, under the new name of Dakota, held an election for a Delegate on the 13th of October, A. D. 1857, as stated in the memorial of A. G. Fuller, when the said A. G. Fuller received a large majority of the legal voters resident in the said Territory, and he holds the best evidence thereof which the present imperfect legal provisions in the Territory will admit of; and, according to the precedent in the case of H. H. Sibley, from Wisconsin, would be entitled to his seat as a Delegate representing the resident citizens on the remaining Territory, who voted for him, and who were not by law allowed to vote for or against W. W. Kingsbury

Therefore the minority recommended that Mr. Fuller be admitted in place of Mr. Kingsbury.

On June 2 and 3[2] the question was debated at length, the doubt as to whether Mr. Kingsbury had been voted for by the people outside the limits assigned for the new State figuring prominently.

Finally, by a vote of yeas 120, nays 80, the House amended the proposition of the majority of the committee by substituting the following:[3]

Resolved, That the admission of the State of Minnesota into the Union with the boundaries prescribed in the act of admission operates as a dissolution of the Territorial organization of Minnesota; and that so much of the late Territory of Minnesota as lies without the limits of the present State of Minnesota is without any distinct legally organized government, and the people thereof are not entitled to a Delegate in Congress until that right is conferred on them by statute.

The resolution as amended was then agreed to.

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[1] Globe, pp. 2660, 2679.

[2] Globe, pp. 2660, 2677–2679.

[3] Journal, p. 1007.

410. The election case of J. S. Casement, claiming a seat as Delegate from Wyoming, in the Fortieth Congress.

The House declined to give prima facie effect to credentials from a Territory not yet organized.

After the passage of the act organizing the Territory of Wyoming, but before the actual organization, the House declined to admit a Delegate elected before the passage of the act.

On January 12, 1869,[1] Mr. Henry L. Dawes, of Massachusetts, claiming the floor for a question of privilege, presented the credentials of Mr. J. S. Casement, claiming to be Delegate-elect from the Territory of Wyoming, and asked that he be sworn in.

A question being raised, it was admitted that the Territory had not been organized, and that Mr. Casement had not been regularly elected. Thereupon, after debate, the credentials were referred to the Committee on Elections, and Mr. Casement was not sworn in.

On February 23[2] Mr. Burton C. Cook, of Illinois, presented the report of the committee, as follows:

The Territory is not yet organized. Section 17 of the act to provide for the temporary government for the Territory of Wyoming, approved July 25, 1868, is as follows:

"This act shall take effect from and after the time when the executive and judicial officers herein provided for shall have been duly appointed and qualified: Provided, That all general Territorial laws of the Territory of Dakota in force in any portion of said Territory of Wyoming at the time this act shall take effect shall be and continue in force throughout the said Territory until repealed by the legislative authority of said Territory, except such laws as relate to the possession or occupation of mines or mining claims."

Section 13 of the same act provides as follows:

"A Delegate to the House of Representatives of the United States, to serve during each Congress of the United States, may be elected by the voters qualified to elect members of the legislative assembly. The first election shall be held at such times and places and be conducted in such manner as the governor shall appoint and direct, and at all subsequent elections the times, place, and manner of holding elections shall be prescribed by law. The person having the greatest number of votes of the qualified voters, as hereinbefore provided, shall be declared by the governor elected, and a certificate thereof shall be accordingly given."

The election at which J. S. Casement claims to have been elected was held on the 8th clay of October, A. D. 1867. The bill above referred to was passed July 25, 1868, and has not yet taken effect, for the reason that the executive and judicial officers provided for in said act have not been duly appointed and qualified. The election laws of Dakota are still in force in that Territory.

The election held on the 8th day of October, A. D. 1867, was not held in pursuance of any law, but was held in pursuance of a call made by a mass meeting, at which certain commissioners were appointed to make arrangements for holding a general election. It is apparent that this election had none of the safeguards provided by law to secure the purity of elections; no one could be punished for illegal voting, or for receiving illegal votes, or for excluding legal votes, or for making false returns; no qualifications of voters had been prescribed by law; not even a residence in the Territory was required; no voting precincts had been established by law. Three persons, who sign their names as commissioners of elections, have made a certificate that the election was held, and that J. S. Casement was elected Delegate to Congress. A copy of this certificate is hereto annexed, marked "A."

The only other evidence adduced before the committee in support of the claim was an affidavit of J. H. Hayfer, a copy of which is hereto annexed, marked "B."

It is not contended that there is any law entitling the claimant to a seat as a Member of this House,

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[1] Third session Fortieth Congress, Journal, p. 142; Globe, pp. 310, 311.

[2] House Report No. 30; 2 Bartlett, p. 516. Rowell's Digest, p. 229; Globe, p. 1460.

and it is apparent that, according to law, the first election must be holden in a very different manner and the certificate be given by the governor; but it is insisted that it is a matter within the discretion of the House, and that there are precedents which would justify the admission of the claimant to a seat; and the admission of Members of Congress from Arkansas who were elected before the State constitution was approved by Congress or the State admitted as one of the States, is cited.

This precedent is not in point for the reason that Arkansas was a State in the Union at the time when the first Representatives from that State were admitted to seats in Congress, and the committee find no precedent for the admission of a Member from a State or a Delegate from a Territory which was not organized at the time the Member or Delegate was sworn and admitted to his seat. The Territory of Wyoming is not now organized, and no reason can be given for the admission of the claimant in this case which would not be equally good to sustain the claim of a Delegate from Alaska should a mass meeting be convened at Sitka and a Delegate be elected by such meeting.

Therefore the committee recommended the adoption of a resolution declaring that Mr. Casement was not entitled to a seat.

This report was not acted on by the House.

411. The election case of Mottrom D. Ball, claiming a seat as Delegate from Alaska, in the Forty-seventh Congress.

The House declined to admit a Delegate from an unorganized Territory, although by treaty the people were entitled to the rights of citizens.

A proposition relating to the admission of a Delegate from an unorganized Territory was held not to be a question of privilege.

On December 21, 1881,[1] Mr. Horace F. Page, of California, by unanimous consent, presented the memorial of certain citizens of Alaska, together with a certificate of the election of Mottrom D. Ball as Delegate to the House of Representatives from the Territory of Alaska. These were referred to the Committee on Elections.

On February 28,1882,[2] Mr. William H. Calkins, of Indiana, reported[3] from the committee this resolution, which was referred to the Committee on Territories:

Resolved, That M. D. Ball be not admitted to a seat in the Forty-seventh Congress as a Delegate from the Territory of Alaska until the Committee on Territories shall report thereon, and that the matter be continued until that time for further action.

The minority of the committee proposed with their views this resolution:

Resolved, That M. D. Ball be admitted to a seat in the Forty-seventh Congress as a duly elected Delegate from the Territory of Alaska, with all the rights and privileges of Delegates from other Territories of the United States.

The majority did not make an argument, but the minority went at length into reasons for seating Mr. Ball. They recited that under the treaty by which Alaska had been ceded it had been stipulated that the inhabitants, except the uncivilized natives, should be "admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States."

As Congress had passed no act in fulfillment of this obligation, the people of the district had met in election and chosen delegates, who in convention adopted a memorial and elected a Delegate. Reference was made to the case of James White, in 1794, who was seated as a Delegate from the territory south of the Ohio River. The minority summarized as follows the reasons for admitting Mr. Ball: (1) Representation is one of certain rights and advantages to which this people are

[1] First session Forty-seventh Congress, Journal, p. 193; Record, p. 243.

[2] Journal, p. 685.

[3] House Report No. 560.

entitled and were entitled at the time of their action; (2) having the vested title to the present enjoyment of this right, they were debarred from its possession through the failure of the party obligated to its accordance to furnish the means whereby they might attain it; (3) being so wrongfully debarred of an essential, a guaranteed, and an inherent right, by the fault of the authority that should have extended it, they set about its acquisition through the exercise of means recognized as authoritative under similar circumstances; (4) under such a condition of fact it is the duty of this House to ratify their act and make it legal and valid to the end desired; (5) not only is this duty plain, but the honor and good faith of our Government is involved in this recognition. And it is further shown to be advisable on the mere ground of expediency.

On March 28, 1882,[1] Mr. William H. Calkins, of Indiana, as a question of privilege, proposed to call up the report of the Committee on Elections in the case of the claim of M. D. Ball to a seat in this House as a Delegate from the Territory of Alaska.

Mr. J. Proctor Knott, of Kentucky, made the point of order that the said report and subject was not a question of privilege, there being no law authorizing Alaska to send a Delegate to Congress or authorizing an election for that purpose to be held in said Territory.

After debate on the point of order, the Speaker[2] sustained the same, on the ground that said report, with an accompanying resolution, providing that M. D. Ball be not admitted to a seat in the Forty-seventh Congress as a Delegate from the Territory of Alaska until the Committee on the Territories shall report thereon, was referred to the Committee on the Territories, which committee had not reported thereon.

At the second session of this Congress an attempt was made, on February 19, 1883,[3] to set a time for considering this report and also the bill and reports of the Committee on Territories, but it failed. The matter ended thus.

412. The election case of Owen G. Chase, claiming a seat as Delegate from the Territory of Cimmaron, in the Fiftieth Congress.

The House declined to admit a Delegate from a Territory not organized by law.

On December 12, 1887,[4] Mr. William M. Springer, of Illinois, presented the petition of Owen G. Chase, claiming to be elected a Delegate from the Territory of Cimmaron, and also a resolution referring the petition and certificate of election to the Committee on Territories and allowing Mr. Chase the privileges of the floor pending the consideration of the organization of a Territorial government.

Mr. Springer urged, in behalf of his resolution, the precedent of California. On the other hand, it was urged that the more recent action of the House in the case of the proposed Delegate from Alaska was the better precedent.

On motion of Mr. S. S. Cox, of New York, the resolution and petition were laid on the table, ayes 157, noes 53.

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[1] First session Forty-seventh Congress, Journal, pp. 923, 924; Record, pp. 2343–2345.

[2] J. Warren Keifer, of Ohio, Speaker.

[3] Second session Forty-seventh Congress, Journal, p. 444; Record, p. 2954.

[4] First session Fiftieth Congress, Journal, p. 42; Record, pp. 38–40.

Chapter XIII.

THE QUALIFICATIONS OF THE MEMBER.

1. **Provision of the Constitution. Section 413.**[1]
2. **State may not prescribe. Sections 415–417.**[2]
3. **Age. Section 418.**
4. **Citizenship in the United States. Sections 419–427.**
5. **Principles deduced from Senate decisions as to citizenship. Sections 428–430.**
6. **Citizenship of Delegates. Section 431.**
7. **Inhabitancy. Sections 432–436.**[3]
8. **Principles deduced from Senate decisions as to inhabitancy. Sections 437–440.**

413. The Constitution provides that a Member shall fulfill certain conditions as to age, citizenship, and inhabitancy.—Section 2 of Article I of the Constitution provides:

> No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

414. The election case of William McCreery, of Maryland, in the Tenth Congress.

A question arising in 1807 as to the right of a State to prescribe qualifications for Representatives, the House, while inclining manifestly to the view that the States did not have the right, avoided an explicit declaration.

Discussion of the three constitutional qualifications as exclusive of others.

On October 30, 1807,[4] Joshua Barney presented a memorial contesting the election of William McCreery, of Maryland. On November 9 the Committee of Elections made a report showing the following facts:

The law of Maryland (act of 1790) required the Member to be an inhabitant of his district at the time of his election, and to have resided therein twelve calendar months immediately before.

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[1] Many decisions that disqualification of the majority candidate does not give title to the minority candidate. (See secs. 323, 326, 424, 435, 450, 459, 460, 467, 469, 473, 621, 807.) Also an elaborate Senate discussion. (Sec. 463 of this volume.)

[2] Senate case of Lucas *v.* Faulkner. (Sec. 632 of this volume.)

[3] See also cases of Upton (sec. 366 of this volume) and Pigott (sec. 369 of this volume).

[4] First session Tenth Congress, Contested Elections in Congress, 1789 to 1834, p. 167. Reports, No. 1; Annals, p. 870; Journal, p. 44. Mr. McCreery had already taken the oath without question; Journal, p. 6.

The law of Maryland (act of 1802) provided that Baltimore town and county should be a district entitled to send two Representatives in Congress, one to be a resident of Baltimore City and the other a resident of Baltimore County.

At the election the poll resulted, 6,164 votes for Nicholas P. Moore, indisputably a resident of Baltimore County; 3,559 votes for William McCreery, whose claim to the required residence in Baltimore City is questioned; 2,063 votes for Joshua Barney, indisputably a resident in Baltimore City, and who contests the seat of Mr. McCreery; 353 votes for John Seat, a resident of Baltimore City.

The committee reported the conclusion that the law of Maryland prescribing the qualifications of Members was unconstitutional, and therefore reported a resolution that William McCreery, who unquestionably had a majority of votes for the Baltimore City seat, was entitled to the seat. The committee did not attempt to ascertain whether or not Mr. McCreery had the residence requirements of the law of Maryland.

This report was the subject of exhaustive debate in the House, lasting from November 12 to 19.[1]

It was urged, in behalf of the report, that the qualifications of the National Legislature were of a national character and should be uniform throughout the nation and be prescribed exclusively by the national authority. The people had delegated no authority either to the States or to Congress to add to or diminish the qualifications prescribed by the Constitution. In denying the right of the States to add qualifications, the Congress was only protecting the rights of their citizens against encroachments on their liberties by their own State legislatures, which were corporate bodies not acting by natural right, but restrained by both Federal and State constitutions. The reserved power of the States could operate only when, from the nature of the case, there could be no conflict with national power. Congress had the power under the Constitution to collect taxes. From the nature of the case the same power was reserved to the States. Congress had power to "establish post-offices and post-roads." From the nature of the case the States would not reserve this power. In the same way the States could not reserve a power to add to the qualifications of Representatives. If they could do this, any sort of dangerous qualification might be established—of property, color, creed, or political professions. The Constitution prescribed the qualifications of President, as it did of Representatives. Did anyone suppose that a State could add to the qualifications of the President? In the case of Spaulding *v.* Mead, the House had decided that a State law could not render void returns made after a certain time. Qualifications for Representatives should be firm, steady, and unalterable. The National Legislature must have the power to preserve from encroachment the national sovereignty. A part of the Union could not have power to fix the qualifications for the Members of the Assembly of the Union. It is presumed that written documents say all they mean. Had the makers of the Constitution meant that there might be other qualifications, they would have said so. The people had a natural right to make choice of their Representatives, and that right should be limited only by a convention of the people, not by a legislature. The

[1] Annals, pp. 870–950.

powers of the House were derived from the people, not from the States. The power to prescribe qualifications had been given neither to Congress nor the States. The States might establish districts, but they might not prescribe that Representatives should be confined to the districts. The Constitution had carefully prescribed in what ways the States might interfere in the elections of Congressmen. They might prescribe the "times, places, and manner" of holding elections, reserving to Congress the right to "make or alter" such regulations. This was all the Constitution gave to the States. It had been urged that the language of the clause prescribing the qualifications was negative, but so also was the language of the clause prescribing the qualifications of the President. The qualifications of Representatives did not come within the range of powers granted, but rather were the means of exercising those powers. The powers reserved to the States were reserved to them as sovereignties, but the qualifications of the Members of the House of Representatives of the nation never belonged to those sovereignties, but flowed from the people of the United States.

It was urged against the report that the positive qualifications assumed by the Constitution did not contain a negative prohibition of the right of the States to impose other qualifications. The State by annexing the provision for a residence in a district did not interfere with the constitutional requirement of residence in the State. Whatever rights were not expressly delegated to the United States were reserved to the States themselves or to the people. A right could not be delegated absolutely which could be exercised conjointly. For the House to declare a long-existing State law unconstitutional would be a dangerous act. In prescribing the qualifications of the voters the Constitution was positive, but in prescribing the qualifications of the Representatives in Congress the language was significantly negative. The Constitution did not fix the qualifications; it simply enumerated some disqualifications within which the States were left to act. The power contended for by Maryland must be included in the common and usual powers of legislation, and not being delegated to the General Government must reside in the States. Because the House was constituted the judge of the qualifications of its Members, it did not follow that it could constitute or enact qualifications. The functions were distinct. No harm could come from the exercise by the States of the power to prescribe qualifications, since the power would be used with discretion.

In the course of the debate a resolution that "William McCreery is duly elected according to the laws of Maryland and is entitled to his seat in this House" was negatived by a large vote.

Then a resolution was offered declaring that neither Congress nor the State legislatures could add to or take away from the qualifications prescribed by the Constitution, that the law of Maryland was void, and that William McCreery was entitled to his seat. This resolution did not come to a vote, as the committee rose after it was offered, and on the next day, November 19, the House discharged the Committee of the Whole from the subject and recommitted it to the Committee on Elections.[1]

On December 7[2] the committee reported, presenting evidence at length on the

[1] Journal, p. 36.
[2] Annals, p. 1059.

subject of Mr. McCreery's residence, but expressing no opinion on that subject, and recommending the adoption of the following resolution:

Resolved, That William McCreery, having the greatest number of votes, and being duly qualified agreeably to the Constitution of the United States, is entitled to his seat in this House.

On December 23 this resolution was debated in Committee of the Whole, where a disinclination to come to a decision on the rights of the States was manifest. This finally took form in the adoption of the following amendment, offered by Mr. Robert Marion, of South Carolina:

Strike out all the portion relating to votes and qualifications, so that the resolution reads as follows:

Resolved, That William McCreery is entitled to his seat in this House.

The Committee of the Whole agreed to this amendment, which, being reported to the House, was agreed to by a vote of yeas 70, nays 37. Both Mr. William Findley, of Pennsylvania, who had supported the original report, and Mr. John Randolph, of Virginia, who had made the main argument in opposition, voted against the amendment.[1]

The amendment of the Committee of the Whole having been agreed to, Mr. John Randolph, of Virginia, moved a further amendment by inserting after the word McCreery the following:

By having the qualifications prescribed by the laws of Maryland.

Mr. Randolph explained that he wished to bring the constitutionality of the law of Maryland before the House. On December 24 the question was taken on Mr. Randolph's amendment, and it was decided in the negative—yeas 8, nays 92.

The question then being taken on the adoption of the resolution:

Resolved, That William McCreery is entitled to his seat in this House.

And it was agreed to—yeas 89, nays 18.

Mr. Randolph was one of those voting nay.[2]

415. The Illinois cases of Turney v. Marshall and Fouke v. Trumbull in the Thirty-fourth Congress.

In 1856 the House decided that a State might not add to the qualifications prescribed by the Constitution for a Member.

The governor of a State having declined to issue credentials to rival claimants, the House seated the one shown prima facie by official statement to have a majority of votes. (Footnote.)

An instance wherein a contest was maintained against a Member-elect who had not and did not take the seat.

Discussion of the three constitutional qualifications as exclusive of others.

In 1856 the House considered and decided a question as to the qualifications of a Member who had already been seated on his prima facie showing.

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[1] Journal, p. 91; Annals, p. 1231.

[2] Journal, pp. 93–95; Annals, p. 1238.

On June 24, 1856,[1] Mr. John A. Bingham, of Ohio, from the Committee on Elections, reported in the two Illinois contested election cases of Turney *v.* Marshall and Fouke *v.* Trumbull. Each of these cases arose out of the following clause in the constitution of Illinois:

The judges of the supreme and circuit courts shall not be eligible to any other office or public trust of profit in this State, or the United States, during the term for which they are elected, nor for one year thereafter. All votes for either of them, for any elective office (except that of judge of the supreme or circuit court), given by the general assembly or the people, shall be void.

Both Messrs. Marshall and Trumbull were indisputably under this disqualification, and the contestants claimed the seats on the ground that the votes cast for them "were null and void."

Thus was presented the question whether a State might superadd to the qualifications prescribed by the Constitution of the United States for a Representative in Congress.

After quoting Chancellor Kent's saying "the objections to the existence of any such power appear to me too palpable and weighty to admit of any discussion," the report proceeds:

And Mr. Justice Story, upon the same question, says that "the States can exercise no powers whatsoever, which exclusively spring out of the existence of the National Government, which the Constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a Representative as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by the States. It is no original prerogative of State power to appoint a Representative, or Senator, or President for the Union. (Story's Commentaries, vol. ii, page 101.)

The second section of the first article of the Constitution of the United States provides that the people of the several States shall choose their Representatives in Congress every second year, and prescribes the qualifications both of the electors and the Representatives.

The qualification of electors is as follows:

"The electors in each State" (who shall choose Representatives in Congress) "shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

The qualifications of a Representative, under the Constitution, are that he shall have attained the age of 25 years, shall have been seven years a citizen of the United States, and, when elected, an inhabitant of the State in which he shall be chosen. It is a fair presumption that, when the Constitution prescribes these qualifications as necessary to a Representative in Congress, it was meant to exclude all others. And to your committee it is equally clear that a State of the Union has not the power to superadd qualifications to those prescribed by the Constitution for Representatives, to take away from "the people of the several States" the right given them by the Constitution to choose, "every second year," as their Representative in Congress, any person who has the required age, citizenship, and residence. To admit such a power in any State is to admit the power of the States, by a legislative enactment, or a constitutional provision, to prevent altogether the choice of a Representative by the people. The assertion of such a power by a State is inconsistent with the supremacy of the Constitution of the United States, and makes void the provision that that Constitution "shall be the supreme law of the land," anything in the constitution or laws of any State to the contrary notwithstanding.

Your committee submit that the position assumed by those who claim for the States this power, that its exercise in nowise conflicts with the Constitution, or the right of the people under it to choose any person having the qualifications therein prescribed, has no foundation in fact.

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[1] First session Thirty-fourth Congress, 1 Bartlett, p. 166; Rowell's Digest, p. 141; House Report No. 194.

By the Constitution the people have a right to choose as Representative any person having only the qualifications therein mentioned, without superadding thereto any additional qualifications whatever. A power to add new qualifications is certainly equivalent to a power to vary or change them. An additional qualification imposed by State authority would necessarily disqualify any person who had only the qualifications prescribed by the Federal Constitution.

Your committee can not assent to the averment of the memorialist, Mr. Fouke, that "the question presented is not one of qualification of a Member of Congress arising under the Constitution of the United States, but a question of election arising under the constitution and laws of the State of Illinois."

It is not intimated either by the memorialist, or any one else, that the persons who voted at said election in said several districts were not qualified electors and legally entitled to vote, nor is it intimated that said election was not conducted in all respects as required by law. In short, the only point made by the memorialist is that Mr. Marshall, who received a large majority of all the votes cast in said Ninth district, and Mr. Trumbull, who received a large majority of all the votes cast in the said Eighth district, were each of them ineligible to a seat in Congress, not because either of them lacked any qualification prescribed by the Constitution of the United States, but because each of them was disqualified by operation of the provisions of the constitution of the State of Illinois. If the respective terms for which those two gentlemen had been elected judges of the said State had expired more than one year before the 7th of November, 1854, we would have had no intimation that the votes cast for each of them were in contemplation of law no votes; their election would, under these circumstances, have been conceded, because they would have been acknowledged as not disqualified to hold the office under and by virtue of the constitution of the State of Illinois. If the State of Illinois may thus disqualify any class of persons possessing all the qualifications required by the Federal Constitution for a Representative in Congress for a period of ten years, and another class for a period of five years, what is there to restrain that State from imposing like disabilities upon all citizens of the United States residing within her territory, and thus take away from the people the right to choose Representatives in Congress every second year, declaring, in effect, that only every fifth or tenth year shall the people choose their Representatives? It is no answer to say that these disabilities are self-imposed by the majority of the people of the State. The majority of the people within the several States have not the power to impair the rights of the minority guaranteed by the Constitution of the United States and exercised under its authority'

By the plain letter of the Constitution Congress may prescribe the time, place, and manner of holding elections for Representatives, and at such time and place, and in the manner thus prescribed—every second year—the people of each State may choose as Representative in Congress any person having the qualifications enumerated in that Constitution. The power attempted to be asserted by the State of Illinois in the cases before us is in direct contravention of the letter, as also of the spirit, true intent, and meaning of these provisions of the Federal Constitution, and absolutely subversive of the rights of the people under that Constitution. Your committee, therefore, conclude that the said tenth section of the fifth article of the constitution of the State of Illinois is inoperative in the premises; that the said Trumbull and Marshall were each eligible to the office of Representative in Congress at the time of said election, it being conceded that on that day they possessed all the qualifications for that office required under the Constitution of the United States; and that the votes given to each of them were not void, as alleged, because they were given by electors having the qualifications prescribed by the Constitution of the United States, and at the time and place and in the manner prescribed by law.

On April 7 and April 10 [1] the report was debated in the House. Mr. Trumbull had never taken his seat in the House, having been elected to the Senate. So in the contest in his case, the committee tested the question before the House with the following resolution:

Resolved, That the Hon. P. B. Fouke, who has presented to this House his memorial claiming to represent the Eighth district of Illinois in the Thirty-fourth Congress, was not duly elected as claimed by him, and is not entitled to a seat in this House, and that said seat is vacant.

This resolution was agreed to—yeas 135, nays 5.

[1] Journal, pp. 805–808; Globe, pp. 829, 864.

Then a resolution declaring that Mr. Turney was not elected and that Samuel S. Marshall,[1] the sitting Member, was entitled to the seat, was agreed to without division.

416. In 1856 the Senate decided that a State might not add to the qualifications prescribed by the Constitution for a Senator.

In the Senate in 1856 a Senator-elect was sworn on his prima facie right, although his qualifications were questioned.

In 1856 the Senate considered and decided a question as to the qualifications of a Member who had already been seated on his prima facie showing.

On February 27, 1856,[2] the Senate Judiciary Committee reported on the right of Mr. Lyman Trumbull, of Illinois, to a seat in the Senate. A provision of the constitution of Illinois provided that certain judges of that State should not be eligible to any other office of the State or United States during the term for which they were elected nor for one year thereafter. Mr. Trumbull had been a judge and came within the prohibitions of the constitution. Hence a question arose as to the effect of qualifications imposed by a State in addition to the qualifications imposed by the Constitution.

On December 3, 1855,[3] when Mr. Trumbull appeared to take the oath, a protest reciting the facts was filed, but no objection was offered to his taking the oath, which he accordingly did.

On February 20 and 27,[4] and March 3 and 5,[5] 1856, the question was debated at length, and on the latter day, by a vote of yeas 35, nays 8, Mr. Trumbull was declared entitled to the seat.

417. The Kansas election case of Wood v. Peters in the Forty-eighth Congress.

In 1884 the House reaffirmed its position that a State may not add to the qualifications prescribed by the Constitution for a Member.

Discussion as to whether or not a Member is an officer of the Government.

On March 18, 1884,[6] Mr. Mortimer F. Elliott, of Pennsylvania, from the Committee on Elections, presented the report of the majority of the committee in the Kansas case of Wood *v.* Peters.

The sitting Member had received, on the general ticket, 99,866 votes, and contestant 83,364. The contestant claimed the seat on the sole ground that Mr. Peters was ineligible at the time he was voted for.

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[1] The Journal and Globe show that Mr. Marshall's name was on the roll when the House first met, and that on February 4, after the Speaker was finally chosen, he was sworn in without objection. (Journal, pp. 7, 448; Globe, pp. 2, 353.) But from the debate (Mr. Orr's speech, Globe, p. 831) it appears that the governor of Illinois had declined to issue credentials to any of the four, but sent them all with a statement of facts. Mr. Marshall was seated on his prima facie showing of a majority of votes. For a copy of governor's statement, which was really a duly authenticated certificate, see Globe, page 865.

[2] First session Thirty-fourth Congress, 1 Bartlett, p. 618.

[3] Globe, p. 1.

[4] Globe, pp. 466, 514.

[5] Globe, pp. 547–552, 579–584.

[6] First session Forty-eighth Congress, House Report No. 794; Mobley, p. 79.

The constitution of Kansas provided that judges of the supreme and district courts of the State should not "hold any office of profit or trust under the authority of the State or the United States during the term of office for which said justices or judges shall be elected."

It was conceded that Mr. Peters came within this prohibition, and the majority say:

It is clear that Peters falls within the inhibition of the constitution of Kansas, and if a State possesses the power to add to the qualifications prescribed by the Constitution of the United States for Representatives in Congress, then he was ineligible at the time he was voted for, and is not entitled to a seat in this House.

Article I, section 2, of the Constitution of the United States provides that—

"No person shall be a Representative who shall not have attained the age of 25 years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen."

The Constitution, by prescribing certain qualifications enumerated in the section just quoted, according to a well-settled rule of construction, excludes all others.

The States have no power to superadd other qualifications, for the reason that such power can not, in the nature of things, be found among the reserved rights of the States, and no such power is delegated to them by the Federal Constitution.

Congress is the creature of the Constitution of the United States, and the right of the people of the several States to representation therein is derived wholly from that instrument, and the States could not have reserved the right to prescribe qualifications of Members of Congress, when the right to elect them at all grew out of the formation of the National Government.

The question involved in this contest is not a new one. It has been too well settled to require further elaboration, and the committee will content themselves with a reference to a few of the authorities on the subject:

"Now, it may properly be asked, where did the State get the power to appoint Representatives in the National Government? Was it a power that existed at all before the Constitution was adopted? If derived from the Constitution, must it not be derived exactly under the qualifications established by the Constitution, and none others? If the Constitution has delegated no power to the States to add new qualifications, how can they claim. any such power by the mere adoption of that instrument, which they did not before possess?

"The truth is that the States can exercise no powers whatsoever, which exclusively spring out of the existence of the National Government, which the Constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a Representative as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by the States. It is no original prerogative of State power to appoint a Representative, a Senator, or President for the Union. (Story on the Constitution, vol. 1, secs. 626 and 627.)

"The question whether the individual States can superadd to or vary the qualifications prescribed to the Representative by the Constitution of the United States is examined in Mr. Justice Story's Commentaries on the Constitution, volume 1, pages 99 to 103, but the objections to the existence of any such power appears to me to be too palpable and weighty to admit of any discussion. (1 Kent's Commentaries, p. 228, note F.)"

To same effect, Paschal's Annotated Constitution, page 305.

The precise question presented in this case was determined by this House in the cases of Turney *v.* Marshall, and Fouke *v.* Trumbull, of Illinois. (Bartlett's Contested Election Cases from 1834 to 1865, p. 167.)

The tenth section of the fifth article of the constitution of the State of Illinois, which was adopted on the 6th day of March, 1848, is in the words following:

"The judges of the supreme and circuit courts shall not be eligible to any other office or public trust of profit in this State or the United States during the term for which they were elected, nor for one year thereafter. All votes for either of them for any elective office (except that of judge of the supreme or circuit courts), given by the general assembly or the people, shall be void."

Marshall and Trumbull had been judges of Illinois, and at the time they were elected Members of Congress were clearly within the prohibitory provisions of the constitution of that State.

The Committee on Elections, in their report to the House on these cases, state the questions to be determined as follows:

"This presents the question whether a State may superadd to the qualifications prescribed to the Representative in Congress by the Constitution of the United States."

The committee reached the conclusion that a State could not add to the qualifications prescribed by the Constitution of the United States, and reported that Trumbull and Marshall were entitled to their seats. The report of the committee was sustained by the House by a decisive vote.

Trumbull's case, determined by the United States Senate in 1856, is also directly in point. (Election Cases from 1834 to 1865, p. 618.)

The authorities cited place the question involved in this case beyond the realm of doubt. It is very clear that S. R. Peters was duly elected a Member of the Forty-eighth Congress from the State of Kansas at large, and that he possessed all the qualifications requisite to entitle him to take his seat.

The committee, therefore, submit the following resolution and recommend its adoption:

Resolved, That S. R. Peters was duly elected a Member of Congress from the State of Kansas, and is entitled to his seat.

Mr. R. T. Bennett, of North Carolina, filed minority views in which he argued at length, with an abundant citation of precedents, and an elaborate review of the Constitution, that the State had the right to prescribe the additional qualification. He also argued that Senators and Representatives were not "officers" of the General Government.

Assuming that Mr. Peters was disqualified, he next argued elaborately, with a review of precedents, that the minority candidate was entitled to be seated. This argument was replied to by Mr. Elliott in the course of the debate.[1]

The minority proposed resolutions declaring Mr. Peters ineligible, and seating Mr. Wood.

The report was debated April 23,[2] and on that day the minority proposition declaring Mr. Peters ineligible was disagreed to; ayes 20; noes 106. The next proposition declaring Mr. Wood entitled to the seat was disagreed to.

Then the majority resolution confirming the title of Mr. Peters was agreed to without division.

418. A Member-elect whose credentials were in due form, but whose age was not sufficient to meet the constitutional requirement, was not enrolled by the Clerk.

A Member-elect not being of the required age, the taking of the oath was deferred until he was qualified.

On December 5, 1859,[3] among the Members-elect appearing with credentials was Mr. John Young Brown, of Kentucky. His name appears in the list of Members-elect in the Congressional Globe of that date, but does not appear in the Journal on the roll of Members-elect called by the Clerk.

In this Congress there was a contest for Speaker lasting from December 5, 1859, until February 1, 1860, when, on the forty-fourth vote, a Speaker was elected. Mr. Brown does not appear among those voting in this contest, nor was he sworn in on

[1] Record, p. 3298.

[2] Record, pp. 3296–3303; Appendix, p. 75; Journal, pp. 1115–1117.

[3] First session Thirty-sixth Congress, Journal, p. 7; Globe, p. 2.

February 1,[1] when the oath was administered to the Members of the House by the Speaker.

At the beginning of the next session, on December 3, 1860,[2] Mr. Brown was sworn in.

No explanation was given on any of the above dates of the delay of Mr. Brown in taking the oath.

The reason for the delay appears incidentally in a debate on June 18, 1860,[3] when Mr. John W. Stevenson, of Kentucky, explained that Mr. Brown was under the constitutional age, and had not been sworn in, although the State authorities of Kentucky had issued a certificate to him.[4]

419. The Constitution defines what shall constitute citizenship of the United States and of the several States.—Section 1 of Article XIV of the Constitution provides:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[5]

420. The South Carolina case of William Smith, the first election case in the First Congress.

A native of South Carolina, who had been abroad during the Revolution and on his return had not resided in the country seven years, was held to be qualified as a citizen.

The House decided a Member-elect entitled to a seat on his prima facie right, although knowing that his qualifications were under examination.

In the first election case the Committee on Elections were directed to take proofs, but not to present any opinion thereon.

A Member whose qualifications were questioned was permitted to be present before the committee, cross-examine, and offer counter proofs.

Instance of an inquiry as to a Member-elect's qualifications instituted by petition.

As to whether or not a disqualified Member who has taken the oath may be excluded by a majority vote.

As to the effect of absence from the country on the question of citizenship.

The First Congress assembled on March 4, 1789, and a quorum not being present the House met and adjourned daily until April 1, when a quorum appeared

[1] Journal, p. 166; Globe, p. 655.

[2] Second session Thirty-sixth Congress, Journal, p. 7; Globe, p. 2.

[3] First session, Thirty-sixth Congress, Globe, p. 3125.

[4] William C. C. Claiborne, of Tennessee, said to have been born in 1775, took his seat in the House on November 23, 1797, without question, although if the date of his birth is correct he was only 22 years of age. (Second session Fifth Congress, Journal, p. 84; Vol. IV, New International Encyclopaedia.)

[5] This portion of the Constitution was declared ratified July 21, 1868.

and a Speaker was elected. On April 13[1] Mr. William Smith, of South Carolina, appeared and took his seat. On April 15[2] a petition of David Ramsay, of the State of South Carolina, was presented to the House and read, setting forth that Mr. Smith was at the time of his election ineligible and came within the disqualification of the third paragraph of the Constitution, which declared that no person should be a Representative who should not have been seven years a citizen of the United States.[3] This petition was referred to the Committee on Elections with instructions to report "a proper mode of investigating and deciding thereupon." This Elections Committee, which had already been chosen, consisted of Messrs. George Clymer, of Pennsylvania; Fisher Ames, of Massachusetts; Egbert Benson, of New York; Daniel Carroll, of Maryland; Alexander White, of Virginia; Benjamin Huntington, of Connecticut; and Nicholas Gilman, of New Hampshire.

On April 18,[4] in accordance with a usage then established and continued in several Congresses, the Committee on Elections reported a list of the Members whose credentials were "sufficient to entitle them to take seats in this House," and the House agreed to the report. The name of William Smith, of South Carolina, was on this list.

On the same day, and very soon thereafter, the Committee on Elections reported as to the case of Mr. Smith, the report, after amendment by the House, being as follows:

> That in this case it will be sufficient, in the first instance, that a committee take such proofs as can be obtained in this city respecting the facts stated in the petition, and report the same to the House; that Mr. Smith be permitted to be present from time to time when such proofs are taken to examine the witnesses, and to offer counter proofs, which shall also be received by the committee and reported to the House; that if the proofs, so to be reported, shall be declared by the House insufficient to verify the material facts stated in the petition, or such other facts as the House shall deem proper to be inquired into, it will then be necessary for the House to direct a further inquiry, especially the procuring whatever additional testimony may be supposed to be in South Carolina, as the case may require; that all questions arising on the proofs be decided by this House, without any previous opinion thereon reported by a committee.

The report having been considered on April 29, and amended by the House to read as above shown,[5] it was—

> *Resolved,* That this House doth agree to the said report, and that it be an instruction to the Committee of Elections to proceed accordingly.

On May 16[6] a yea-and-nay vote occurred in the House and Mr. Smith is recorded as voting, showing conclusively that he had taken the oath while the question as to his qualifications was pending.

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[1] First session First Congress, Journal, p. 12. It is a fair presumption that, Mr. Smith took the oath when he took his seat, as on April 6 the House had agreed on a form of oath which was on April 8 administered to those present. Other Members came in and took seats after that, and undoubtedly took the oath. The record of Mr. Smith's appearance is the same as that of others.

[2] Journal, p. 14.

[3] See section 413 of this chapter.

[4] Journal, pp. 16, 17, 23.

[5] Journal, p. 23; Annals, p. 232; American State Papers (miscellaneous), p. 1. The amendments made by the House are not specified.

[6] Journal, p. 37.

On May 12[1] the committee submitted their report, which was taken up for consideration on May 21. The report[2] stated:

That Mr. Smith appeared before them, and admitted that he had subscribed, and had caused to be printed in the State Gazette of South Carolina, of the 24th of November last, the publication which accompanies this report, and to which the petitioner doth refer as proof of the facts stated in his petition; that Mr. Smith also admitted that his father departed this life in the year 1770, about five months after he sent him to Great Britain; that his mother departed this life about the year 1760, and that he was admitted to the bar of the supreme court in South Carolina in the month of January, 1784.

The committee also submitted certain counter proofs, mostly copies of acts of South Carolina.

On May 21 and 22[3] the House considered the report, and in the debate the following facts were stated and admitted:

That Mr. Smith was born in South Carolina, of parents whose ancestors were the first settlers of the colony, and was sent to England for his education when about 12 years of age. In 1774 he was sent to Geneva to pursue his studies, where he resided until 1778. In the beginning of that year he went to Paris, and resided two months as an American gentleman; was received in that character by Doctor Franklin, Mr. Adams, and Mr. Arthur Lee, the American commissioners to the Court of France. In January, 1779, he left Paris for London, to procure from the guardian appointed by his father the means of his return to America. He was disappointed, however, of the expected aid, and was obliged to remain in England till he could get remittances from Charleston. In the interval the State of South Carolina fell into the hands of the enemy, and this rendered it impossible at that time to return. He remained in England, and embraced the opportunity to acquire a knowledge of the English law, but could not be admitted to the practice of it because he had not taken the oath of allegiance to Great Britain, which is a necessary qualification. Having obtained the necessary funds, he left London in October or November, 1782, with a view of returning to America, but avoided taking passage for Charleston, because it was then in possession of the British, but traveled over to Ostend, and there embarked in a neutral vessel for St. Kitts, with the intention of receiving the first opportunity of reaching the American camp. In January he sailed from Ostend, but was shipwrecked on the coast of England and obliged to return to London in order to procure another passage, and was thus prevented from reaching the United States till 1783. That on his arrival in Charleston he was received by his countrymen as a citizen of the State of South Carolina, and elected by their free suffrages a member of the legislature, and was subsequently elected to several honorable posts, and finally, in 1788, to the seat in Congress, which is the subject of this contest.

The constitution of South Carolina was silent as to citizenship; but certain laws had from time to time been passed, both with regard to those absent from the country for purposes of education and with regard to aliens. The constitution also prescribed certain qualifications of residence for those holding certain offices.

It was shown that in Mr. Smith's public career in his own State it had uniformly been assumed that he was a citizen of the State during the time he resided abroad; and no questions were raised, although he was disqualified for some of those positions under the law, if it was to be assumed that he was not a citizen while abroad.

After debate, the House, on May 22, 1789,[4] agreed to the following resolution by a vote of 36 yeas to 1 nay:

Resolved, That it appears to this House, upon mature consideration, that William Smith had been seven years a citizen of the United States at the time cf his election.

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[1] Journal, pp. 33, 39.

[2] Journal, p. 33; American State Papers (miscellaneous), p. 8.

[3] Journal, pp. 39, 40; Annals, pp. 397–408.

[4] Journal, p. 39.

It does not appear that any question was raised in the debate as to the right of the House to decide by majority vote on the title of a Member to his seat should he be found disqualified.

421. The Michigan election case of Biddle v. Richard in the Eighteenth Congress.

An alien naturalized by a State court not expressly empowered by the United States Statutes so to do was yet held to be qualified as a citizen.

A person who had resided in a Territory one year as a person, but not as a citizen, was held to be qualified as a Delegate under the law requiring a residence of one year.

A discussion as to whether or not a Delegate should have the same qualifications as a Member.

The office of Delegate was created by ordinance of the Continental Congress.

On January 13, 1824,[1] the Committee on Elections reported on the contested election case of Biddle *v.* Richard, from Michigan Territory. Mr. Richard was objected to on the ground that he was an alien, his naturalization before a Michigan court being alleged to be invalid; and on the ground, should the naturalization be held valid, he was still disqualified, as the naturalization had not taken place a year previous to the election.

The committee in this case first noticed the subject of the qualifications of a Delegate, and called attention to the fact that the office was not one provided for by the Constitution, but grew out of the ordinance of Congress for the government of the Northwest Territory, passed before the adoption of the Constitution. Neither by the terms of that ordinance nor by the laws of the United States were qualifications required of a person elected Delegate. Unless a rule could be deduced from the principles of the Constitution there was nothing to prevent an alien from holding a seat in Congress as Delegate from a Territory. But the committee expressly disclaim any intention of pronouncing a decision on this point, since the case did not render it absolutely necessary.

The sitting Member had been naturalized in a county court in Michigan, and while the naturalization law of the United States did not in terms include such court among those authorized to naturalize aliens, yet the committee concluded that by implication the intention to authorize such a court was plainly shown.

As to the second objection, it was shown that the law prescribed a residence of one year "next preceding the election" as a qualification needed to make a person eligible to any office in said Territory. Even admitting the office of Delegate to be included in this prescription, it was to be observed that it was not the citizen but the person who was required to reside in the Territory one year. Therefore the committee overruled the objection that the naturalization had not taken place a year before the election.

The committee concluded that Gabriel Richard was entitled to the seat.

On February 2, 1824, the House practically concurred in this conclusion by ordering that John Biddle have leave to withdraw his petition and documents.

[1] First session Eighteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 407.

422. The Florida election case of David Levy in the Twenty-seventh Congress.

An instance of citizenship conferred by treaty stipulations.

In determining citizenship a committee ruled that the domicile of the father is considered the domicile of the son during the minority of the son if he be under the control and direction of the father.

In 1841–42,[1] the Committee on Elections twice examined the qualifications of David Levy, sitting as Delegate from Florida.

By the treaty ceding Florida to the United States, it was provided:

> The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States.

This treaty was signed February 22, 1819, and ratified February 22, 1821. The majority of the Committee of Elections found that the formal transfer began at St. Augustine on July 10, 1821, and was completed at Pensacola July 17, and that on the latter day Governor Jackson issued his proclamation of American sovereignty, in accordance with the directions of the Government at Washington. The minority of the committee found that East Florida (there being two provinces) was transferred July 10, and preferred that date to July 17.

David Levy was not an inhabitant of Florida on either the 10th or 17th of July 1821. He had been born on the island of St. Thomas (then a possession of Denmark) on June 2, 1810, his father being a subject of the King of Denmark. David Levy came to Norfolk, Va., in 1819, and attended school and worked there until 1827. He did not go to Florida to reside until 1827. It is evident, therefore, that he was not an inhabitant of Florida, in his own right, at the time of the transfer of the Territory.

The committee, in the course of the investigation, adopted the principle "that the domicil of the father is the domicil of the son during the minority of the son, if the son be under the control and direction of the father."

Therefore the question turned on whether or not Moses Levy, father of David Levy, was an "inhabitant" of Florida at the time of the transfer of sovereignty. Moses Levy was born in Morocco, but at the time of the birth of his son was a subject of the King of Denmark. In the early part of 1821 he came to Philadelphia and took out his declaration to become an American citizen. He then went to Florida, and the question turns principally on whether he was there at the time of the transfer, although the minority contended that, not being a subject of the King of Spain, the treaty did not operate on him. In their first report the committee found that Moses Levy was not an inhabitant of Florida at the time of the transfer, and that, had he been, the King of Spain might not have transferred his allegiance to the United States, since he was a Danish subject.

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[1] First session Twenty-seventh Congress, House Report No. 10; Second session, Report No. 450; 1 Bartlett, p. 41; Rowell's Digest, p. 114.

423. The Florida election case of David Levy, continued.

A Delegate who, though an alien by birth, had lived in the United States from an early age, and whose father had been a resident for twenty years, was not disturbed on technical objections as to his citizenship.

The House has the same authority to determine the right of a Delegate to his seat that it has in the case of a Member.

A committee held that the strongest reasons of public policy require a Delegate to possess qualifications similar to those required of a Member.

A committee held that under the principles of the common law an alien might not hold a seat as a Delegate.

A committee denied the binding effect of a decision of a Territorial court on a question of fact concerning the qualifications of a Delegate.

An instance of the admission of ex parte testimony in an election case.

Later additional evidence was presented, and, although objected to by the minority of the committee as inadmissible because taken ex parte, was admitted. This testimony shows, among other things, that Moses Levy was recorded as an inhabitant in a registry established by General Jackson. This proceeding appeared undoubtedly to have been ultra vires; but there was other evidence as to the time of the arrival of Moses Levy in Florida, and the majority of the committee finally concluded that as the Delegate had lived in the United States from an early age, as his father had been a resident of the United States for more than twenty years and had twice taken the oaths of abjuration and allegiance, the "spirit of the naturalization policy of the country" had been fully satisfied. This idea seems to have been of considerable weight in determining the committee to reverse its first report, and decide that Mr. Levy was entitled to the seat. This reversal of conclusion was barely made, four of the nine members of the committee dissenting and a fifth giving only a qualified assent.

The House did not act on the report; but Mr. Levy retained the seat without confirmation of the report by the House, since he had originally been admitted to the seat.

In the course of the consideration of this case the committee came to certain conclusions bearing vitally on the case.

1. It was urged that the House of Representatives had no jurisdiction to try or determine the eligibility of a Territorial Delegate. The committee concluded that the House had plenary authority to investigate and decide upon all questions touching the right of a Delegate to hold a seat in that body. Such authority seemed absolutely essential to the existence of a well-regulated legislative body, which must have the power to prevent the intrusion of improper persons, or guard its own rights from violation. And the House had so determined in many cases from 1794 to 1838.

2. That citizenship was not one of the qualifications of a Delegate in the acts of Congress under which he was appointed; and that, therefore, the House of Representatives could not make it a test of eligibility. The committee agreed that while the original ordinance of 1787 for the government of the Northwest Territory was silent in reference to the qualifications of a Delegate, yet must have assumed certain

ones. While not strictly or technically a Representative, yet, considering the dignity and importance of the office, the strongest reasons of public policy would require that he should possess qualifications similar to those required by a Representative. Even if the letter and spirit of the Constitution might not give light, yet the well-settled principles of common law would prevent an alien from holding a seat in the House of Representatives. Chancellor Kent had enunciated the proposition that an alien might not hold any civil office, or take any active share in the administration of the Government. The committee therefore were confident that an alien might not exercise the office of a Delegate to Congress.

3. That the rights of David Levy under the treaty had been the subject of recent adjudication by the highest judicial tribunal of Florida, constituted of judges appointed and commissioned by the United States Government, and that such adjudication, if not conclusive, was persuasive evidence, and that the committee ought not to look behind it. The committee denied that the court in question was one of concurrent jurisdiction, or that the decision in question was directly upon the point. Furthermore, it was not between the same parties.

424. The Indiana election case of Lowry v. White in the Fiftieth Congress.

A Member who had long been a resident of the country, but who could produce neither the record of the court nor his final naturalization paper, was nevertheless retained in his seat by the House.

The House, overruling its committee, admitted parol evidence to prove the naturalization of a Member who could produce neither the record of the court nor his certificate of naturalization.

Determination by a divided Elections Committee that the disqualification of a sitting Member does not entitle the contestant, who had received the next highest number of votes, to the seat.[1]

On January 30, 1888,[2] Mr. F. G. Barry, of Mississippi, from the Committee on Elections, submitted the report of the majority of the committee in the Indiana case of Lowry *v.* White. The sitting Member had been returned by a majority of 2,484 votes over contestant, and also a clear majority of all the votes polled at the election.

The questions of importance in this case all arose out of the alleged disqualification of the sitting Member, it being alleged that he had not been on the 4th of March, 1887, a citizen of the United States for a period of seven years prior thereto, as required by the Constitution.

(1) The majority state the first question:

(1) Was the contestee a naturalized citizen of the United States, and.had he been for seven years previous to the 4th of March, 1887, and if he was, can he prove that fact by parol?

The majority report thus answers this question:

The second paragraph of section 2, Article I, of the Constitution of.the United States says:

"No person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

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[1] See also Section 417 of this volume for reference to an elaborate discussion of this point.

[2] First session Fiftieth Congress, House Report No. 163; Mobly, p. 623.

In the eighth section of the Constitution of the United States power is conferred on Congress "to establish an uniform rule of naturalization." This power is exclusively in Congress. (2 Wheaton, 269.) The existing legislation of Congress on that subject is contained in the thirty-third chapter of the Revised Statutes, 1878.

It is admitted that contestee is a native of Scotland, and that he arrived in the United States on the 8th of August, 1854. Your committee believe that in claiming to be a naturalized citizen of this country he fails to bring himself within the provision of said statute. His original status is presumed to continue until the contrary be shown. (Hauenstein *v.* Lynhom, 100 U.S., 483.) In the opinion of your committee contestee has failed to remove this presumption.

It is proven and not disputed that contestee went through the final forms of naturalization and admission to citizenship at Warsaw, Kosciusko County, Ind., on Monday, November 1, 1886, in a court of record, on the ground that the doctrine of relation might apply to his declaration of intention which is duly entered of record on the 24th day of July, 1858, in the circuit court of Allen County, Ind.

To say the least of it, this is an unfavorable admission on the part of the contestee. It is not contended by the learned counsel that the doctrine of relation will apply in this case. Contestee, however, claims to have been admitted to citizenship in the court of common pleas of Allen County, Ind., on February 28, 1865, which is the vital point of contention in this case.

It is admitted that there is no record of such proceedings, nor a trace of such a record in any court; but contestee now claims that a certificate of naturalization was then issued to him which he can not now produce, nor does he or any one know what became of it.

If contestee were naturalized in February, 1865, can he prove it by parol? A thorough examination of the authorities convince your committee that he can not. Contestee, in his brief, holds that parol evidence may be received to prove the fact of naturalization; that it is the oath of fidelity to the Government which makes an alien a citizen, and that fact can be proven by parol in the absence of the record of the court.

There are set forth in the printed record of this case contemporaneous entries of naturalization in said Allen County, which are claimed by contestee to be in duplicate of the certificate issued to naturalized persons about the period he claims to have been naturalized, and from this it is assumed by contestee he held such a certificate.

Whatever weight might be given to this alleged missing certificate, even if produced in evidence, it is unnecessary to discuss, and we forbear an opinion on that. It is sufficient to say that such an attempt to prove it or its contents is a species of evidence too speculative and inferential to be entertained, especially when it is sought to establish the solemn proceedings of a court of record. No authority in support of such a rule of evidence has been furnished this committee, and we do not think there is one in existence.

As the able counsel for the contestee tersely stated the proposition in their brief, "Can parol evidence be received to prove the fact of naturalization?" We answer, it can not; certainly not in the absence of any record whatever, or even a certificate of naturalization, as is admitted in this case. The authorities therein cited to the effect that the contents of a lost record may be proven by parol, is a principle too familiar to discuss. But we have not found a single adjudicated case in which oral evidence is admitted to prove a record which never existed.

Not one witness testifies to having read the alleged certificate, and none but contestee says he ever saw it, and he does not attempt to state its contents. There are only two witnesses, Isaac Jenkinson and William T. Pratt, who profess to have been present at the alleged naturalization of contestee in February, 1858, besides the contestee himself. Pratt says nothing of seeing such certificate, and Isaac Jenkinson says:

"I have no recollection of any papers being drawn up or signed or sworn to on that occasion." (Record, p. 190, question 41.)

In Shaeffer *v.* Kreutzer (6 Binn., 430), which is relied on by contestee, Justice Yates says:

"It [the verdict] is no evidence of the fact having been legally decided, for the judgment may have been arrested and a new trial granted. Here a former action of ejectment was brought for the same land by persons to whom the present parties are privies, and the verdict given therein was offered to introduce the collateral fact of payment of the cost of that suit, and to account for the defendant in this action coming into possession, and of the plaintiff's acquiescence in the adverse title."

Contestee also relies on Campbell *v.* Gordon. (6 Cranch, 176.) This was a bill to rescind contract for sale of land. There was a memorandum on the minutes of the court as follows:

"At a district court held at Suffolk, William Currie, native of Scotland, migrated into the Commonwealth, took the oath, etc."

There was also a certificate of naturalization of appellee's father. Judge Spears, in discussing that case, said not only the certificate of the clerk but the minutes of the court were produced; besides, the certificate had appended to it these words: "A copy: test, Jno. C. Littlepage," who it appeared in evidence was clerk. (See Green's Son, Federal Reporter, July, 1887, vol. 31, p. 110.)

In Dryden *v.* Swinburne the court discusses the case of Campbell *v.* Gordon at length, and says:

"When the court say, 'The oath when taken confers upon him the right of citizenship' it is obvious that they meant when the record showed the oath was taken it would suffice, and it would be presumed that it was not administered, or at least an entry was not made of it, till all the other requisites of the statutes were complied with. It would be an utter distortion of this language and decision to hold that the taking of the oath by parol testimony, when the record was produced, and it failed to show any naturalization or attempt at naturalization." (Dryden *v.* Swinburne, 20 W. Va., 125. See also 18 Ga., 239.)

Any other construction would be in direct violation of the Revised Statutes of the United States upon the subject of naturalization. Section 2165 says:

"An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:"

It subsequently says, "which proceedings shall be recorded by the clerk of the court." It distinctly provides that the naturalization proceedings must be in a court of record. Hence Justice Marshall says:

They [the courts of record] are to receive testimony, to compare it with the law, and to judge of both law and fact. The judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and like every other judgment, to be the complete evidence of its own validity."

In this extract that great jurist was discussing the proceedings in naturalization.

Contestee relies also on Stark *v.* Insurance Company (7 Cranch, 420). This was an action of covenant upon a policy of insurance. The goods insured were warranted to be American property. The record entries are complete, with a formal judgment of admission to citizenship, but fail to show that Stark, the naturalized alien, had filed a previous declaration of intention. It was held that the judgment was conclusive as to antecedent matters in the cause.

Contestee also cites 91 United States Reports, page 245 (Insurance Co. *v.* Tesdale). Suit was brought by plaintiff, who was administratrix of her deceased husband, in her individual character, against defendant, upon a policy of insurance on the life of her husband. The sole question was, could letters of administration be admitted to prove the death of a third person where the right of action depends upon the death of such person; and the court held that it could not be done.

The question of naturalization was in no way involved, but the court says, incidentally, that a certificate of naturalization is good against all the world as a judgment of citizenship, from which may follow the right to vote and hold property; but it can not be introduced as evidence of residence, age, or character. (91 U.S.R., 245.)

Mr. Calkins, in his very able and ingenious argument before the committee, relied with great emphasis on the case of Coleman on habeas corpus (15 Blatchford, 406), in which the court says, speaking of the Revised Statutes concerning naturalization proceedings:

"The provisions for recording proceedings at the close of the second condition and the provisions for recording the renunciation mentioned in the fourth condition are introduced in such form that they may very well be regarded as merely directory."

This was a criminal proceeding, highly penal in its nature, the offense with which Coleman was charged being a felony, under Revised Statutes of the United States, section 5426.

Coleman held a certificate of naturalization, and the only question presented was: (1) Had the certificate been unlawfully issued or made; and (2) did Coleman know that when he so issued it?

Coleman was arraigned for having so used said certificate for the purpose of registering himself as a voter, knowing it was unlawfully issued. There were papers on file in the clerk's office, from whence the certificate issued, setting forth the necessary proceedings of Coleman's naturalization. His name was also entered in the naturalization index. The certificate was signed by the clerk of the superior court, attested by the seal of the court, certifying that the copy, before set forth, of the entry in regard

to Coleman in such naturalization index, "is a true extract from the record of naturalizations of this court, remaining in my office to date."

Judge Blatchford held that Coleman was duly and legally admitted to citizenship, and that he should be discharged.

It can not be contended that in a matter so highly penal any evidence that would go toward acquittal would be sufficient to establish citizenship and clothe an alien with all the political powers and privileges of a citizen. What would be sufficient in one case might be wholly insufficient in the other.

In such a prosecution the criminal intent or the guilty knowledge of using an unlawful certificate would be the governing question. In such a case even a reasonable doubt would discharge the defendant. A naturalized citizen is a mere creature of the law. He derives his existence as such from the law, and if he fail to follow its essential provisions he can not be clothed with those high privileges such a law confers.

But the court says in the Coleman case that propositions are announced the accuracy of which can not be questioned—such as the admission of an alien to citizenship is a judicial act (15 Blatchford, p. 420)—and at furthest the partial committal of the court in the Coleman case, that the statute requiring the record or proceedings may very well be regarded as directory, can only be considered as a dictum, as it was held in that case there was complete and sufficient record of naturalization.

Contestee also relies on 7 Hill, N. Y., 137–141, but in that case, it will be observed, the court says:

"The proceedings of naturalization are strictly judicial (p. 138). The right of citizenship is finally conferred by the judgment of the court (p. 141)."

He also cites McCarty *v.* Marsh (5 N. Y., 263) as liberal to the naturalization of foreigners.

In that case Justice Foot says:

"The simple question, then, is whether the record is conclusive evidence of the fact that a prior declaration of intention was made in due form of law. The weight of authority is decidedly in the affirmative. (Citing 6 and 7 Cranch, supra, Spratt *v.* Spratt, 4 Peters, and a large number of cases.)"

Contestee also relies on the case of *The Acorn* (2 Abbott, U.S. Reports, p. 434) as liberal concerning the naturalization of foreigners. This was a libel of information and seizure for forfeiture for alleged violation of registry laws. One of the causes alleged is, that when David Muir took the oath he was not a citizen of the United States, as his oath alleged.

Muir introduced in evidence an exemplified copy of the record of his naturalization. So far as the question of naturalization is concerned in that case, Judge Longyear decided that the judgment naturalizing Muir was conclusive as to the preliminary proceedings necessary to give the naturalizing court jurisdiction—a familiar principle that runs through all adjudicated cases on that point. This judge also says in his opinion:

"The proceeding to obtain naturalization is clearly a judicial one. (Ibid., p. 444.)

"A hearing is required to be had in open court, and the right can be conferred only by the judgment of the court, and upon satisfactory proof. (Ibid., p. 444.)"

Contestee relies in his brief on the following extract from Morse on Citizenship, page 84:

"In case of an individual claiming to be a citizen by naturalization, the certificate or letter of naturalization is the usual and orderly proof which is offered, but is not exclusive. If the letter or certificate is lost and the record can not be discovered, secondary evidence to establish citizenship would be admissible. (Citing Field's International Code, p. 136, note, and the opinion of Attorney-General Black, vol. 9, p. 64.)"

The last-named author, under the subject of allegiance, cites Attorney-General Black, who simply says:

"The fact of renunciation is to be established like any other facts for which there is no prescribed form of proof by evidence which will convince the judgment."

This was a case of a Bavarian, once naturalized here, claiming renunciation of his citizenship as a citizen of this country; and how and where the author of the above quotation got his law your committee are at a loss to determine. In international affairs such a principle might apply, when the question of citizenship is a matter of dispute and the liberty or property of a subject are involved. But there are no authorities holding such a doctrine in this country when an alien, claiming to be naturalized, seeks to establish that fact by parol proof.

The case of Dryden *v.* Swinburne (22 W. Va.) is a remarkable parallel case to this in all of its salient features. Judge Green in that case, in an elaborate opinion, discusses the subject in the most learned manner.

The following extracts from the syllabus in that case is a clear statement of the decision on this point:

"The law requires that an alien should be naturalized in a court of record, and his admission to citizenship must be a judgment of such court; and therefore if it is claimed in any case that an alien has been naturalized in a certain court, and it be shown, that if naturalized at all, he was naturalized in that court, and the records of such court are produced, and an examination of them shows that no entry was made on the records of such court naturalizing such alien, it can not be proven by parol evidence that he was admitted to citizenship in such court, but that by inadvertence, or any other reason, there was no entry made of it; nor can the citizenship of an alien, under such circumstances, be presumed by proof of his having held real estate or of his having voted or held office or by other circumstances."

The same doctrine is announced in the case of Chas. Green's Son and others *v.* Salas (3 Federal Law Reporter, July 26, 1887); also in Rutherford *v.* Crawford (53 Ga., 138).

In these last two cases a certificate was presented by the persons claiming to have been naturalized, which was held insufficient in each.

In Andrews *v.* Inhabitants of Boylston (110 Mass., 214) it is held, if the records of a town meeting fail to show a two-thirds vote to reestablish a school-district system, parol evidence is inadmissible to show it, even though the record shows that the town voted to reestablish the school-district system.

The omission in a record can not be supplied by parol proof. (2 Pickering, 397.)

The court says "it would be dangerous to admit of such.proof." (2 Pickering, 397. See also 125 Mass., 553; 117 Mass. 469; 58 Iowa, 503; Wharton's Evidence, 987; 18 Maine, 344; 3 Blackford, 125; 23 Maine, 123.) '

In Slade *v.* Minor (2 Cranch, Circuit Court Reports, D. C., 139), the point was distinctly presented, and the case was decided upon it, in which the court held that the naturalization of Charles Slade could not be proved by parol.

Certificates of naturalization issued by the clerk of a court, without any hearing before the judge in open court, are void, and confer no right of citizenship upon the holder. (McCrary on Elections, see. 56.)

Starkie in his work on evidence, page 648, says:

"In the first place, parol evidence is never admissible to supersede the use of written evidence where written proof is required by law. Where the law, for reasons of policy, requires written evidence, to admit oral evidence in its place would be to subvert the rule itself.

"To admit oral evidence as a substitute for instruments to which, by reason of their superior authority and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact, and presumption for the highest degree of legal authority; loose recollections and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt; to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices."

And he thus lays down the rule:

"In the first place, written evidence has an exclusive operation in many instances, by virtue of peremptory legislative enactments. So it has in all cases of written contracts. So also in all cases where the acts of a court of justice are the subject of evidence. Courts of record speak by means of their record only, and even where the transactions of courts which are not, technically speaking, of record, are to be proved, if such courts preserve written memorials, are the only authentic means of proof which the law recognizes."

Wharton, in his Law of Evidence, section 1302, says:

"A court of record is required to act exactly and minutely, and to have record proof of all its important acts. If it does not, these acts can not be put in evidence."

The proceedings of a court of record can be shown only by the records, unless they are lost or destroyed. (Rutherford v. Crawford, 53 Ga.)

The minority views, signed by Mr. J. H. Rowell, of Indiana, and five other members of the committee, held:

It is contended by contestant, and held by the majority of the committee, that no matter what the fact is, unless there is a record remaining in the court, or unless there was a record made and retained

from which a transcript could be made, parol proof is not admissible to establish the fact of naturalization and of the issue of a certificate thereof.

It is claimed that no naturalization is complete so as to invest the applicant with citizenship until a record of the proceeding is made in the court where the judgment was rendered and the oath administered.

We hold the law to be that parol testimony is admissible to prove naturalization under circumstances such as are shown to exist in this case.

We hold further that the making out of a certificate of naturalization, reciting all the requisite facts, under the seal of the court, is an entry of record of the proceedings, even though that certificate is carried away from the court, instead of being left with the clerk.

We hold that, having done all that the statute requires of him, and having obtained his certificate of naturalization in due form, with all proper recitals from a competent court, the person is, from that time invested with citizenship without reference to any further act to be performed by the clerk of the court.

We hold that the certificate so obtained is original evidence and conclusive of citizenship in all collateral proceedings, without proof of any record remaining in court and whether such a record exists or not.

The minority quote Morse on Citizenship, the case of Acorn (2 Abb. U. S. Reports, 434–437), Wharton's International Law Digests (sec. 174), Campbell *v.* Gurden (6 Cranch, 179), Stark *v.* Insurance Co. (7 Cranch, 420), Insurance Co. *v.* Tesdall (91 U. S. Reports, 245), In re Coleman (15 Black, 406), and after discussing these cases say:

There can be no doubt that parol proof is admissible to establish the contents of lost deeds and papers and records. (Greenleaf on Ev., vol. 1, sec. 509; Whalen's Ev., vol. 1, sec. 136; Wood's Prac. Ev., see. 7 et seq.; Ashly *v.* Johnson, 74 Ill., 392.)

Had contestee been able to produce this certificate, would anyone venture to question his citizenship? And yet the case stands in proof precisely the game as if he had done so. Everything necessary to admit parol proof of existence and loss of certificate was given in evidence. (Record, p. 256.) The book of blank certificates in use in the court at the time is in evidence. (Record, pp. 214, 272–273, 383.)

Contestee proved that he was in fact naturalized; that no other record of the proceedings was made so far as could be ascertained than the certificate issued to him; that he received his final certificate; that it is lost; that he is the identical person who was naturalized, and the contents of certificates universally in use at that time. By just such proof the courts of the country are constantly ascertaining the contents of lost papers involving the title to property; the contents of most solemn records are so proven.

Life and liberty are put into the scales upon the same kind of proof. If every other right of the citizen may be thus established, we are at a loss to know why this contestee is to be deprived of like rights and like application of unquestioned rules of law.

He was chosen to the Congress by the very emphatic voice of the legal voters of his district. He has for more than thirty years been an inhabitant of the country, deporting himself in such a way as to meet the approval of his fellowmen.

For more than twenty years he has been recognized as a citizen of the United States, and as such was chosen a Representative to the Fiftieth Congress from the Twelfth Congressional district of Indiana.

If the report of the majority of the committee is to be sustained, an unparalleled injustice will be done to those who elected him and to contestee himself; not because of any fault or neglect on his part, but because of the neglect of a clerk who is proven to have been negligent of duty and careless of the rights of others.

Courts will invoke the aid of technical rules to prevent gross injustice, but it is the boast of all modem courts that mere technical rules of law are not permitted to stand in the way of doing equal and exact justice, unless of such rigid character and so firmly embedded in the law as to compel adhesion to them. Doubts on such questions are always resolved in favor of justice and against wrong.

The majority of the committee have adopted a rule which, while some authority may be found in favor of it, is rejected by other and weightier authority—a rule opposed to sound reason and the best canons of construction.

They have invoked this bare technicality not to prevent wrong, but to enable the House to commit an outrage upon the rights of contestee and the people of his district.

(2) The second question:

(2) If he can prove it by oral evidence, does the testimony disclose sufficient proof to establish that fact?

The majority review the parol proof and give arguments to show its fragile character.

The minority consider it sufficient, and thus review it:

Contestee is a native of Scotland. He came to this country in 1854, and has been a resident of the State of Indiana almost continuously since 1857, most of that time in the city of Fort Wayne, his present home. He was a captain in the Thirtieth Regiment of Indiana Infantry Volunteers and was dangerously wounded at the battle of Shiloh.

In 1858 he declared his intention to become a citizen of the United States, as appears of record in the clerk's office of Alien County, Ind., the certificate issued to him having been lost.

In February, 1865, about the 28th of that month, he appeared in the court of common pleas of Allen County, Ind. (a court having common-law jurisdiction, a clerk and a seal), and produced two credible witnesses in open court, viz, John Brown and Isaac Jenkson, who were also sworn in open court as his witnesses to complete his naturalization. He took the oath of allegiance to the United States and of renunciation, which was administered to him by the judge of the court.

The clerk then and there issued to him a final certificate of naturalization, under the seal of the court, the contents of which certificate is shown by the proof of the only form of final certificates used in that court. This certificate with other important papers of contestee has been lost, as conclusively shown by the evidence.

The clerk of the court negligently omitted to receive the oath of allegiance and its recitals, but gave to Mr. White the record of the proceedings then made in the form of a certificate of naturalization, such as is usually issued to foreigners on being naturalized, and almost universally accepted as conclusive evidence of citizenship.

On pages 286, 287, and 288 of the record will be found a list of about one hundred and fifty persons naturalized during the years between 1860 and 1870 in Allen County, of which naturalization the only record remaining is a duplicate of the certificate issued to the person naturalized, from which it appears that the common way of recording naturalization proceedings in those courts was to make duplicate certificates, reciting all the facts necessary to complete naturalization, signed by the clerk and sealed with the seal of the court, retaining one in the clerk's office and giving the other to the person naturalized.

In some cases the clerk neglected to fill up the duplicate blank kept in the office, only filling out one blank and giving that to the person so naturalized, such certificate being the only record made by the clerk.

As showing the negligent manner of keeping the records by the clerk of that court, the evidence discloses several instances of making a record of naturalization years after the fact.

This same clerk was in the habit of writing up judgments in divorce cases when the minutes of the judge did not show that any divorce had been granted, and in four or five cases records were found written up in which the several cases had not been even docketed, in which there was nothing to show that such divorces had ever been granted by the court.

In addition, it is proper to state that many other persons are similarly situated. Persons who claim to have been in fact naturalized in Allen County, who have moved away, have frequently written and in some cases returned to get proof of citizenship and found no trace of a record.

The fact of Mr. White's naturalization in the courts and at the time claimed is established to a moral certainty. See testimony of Isaac Jenkins (R., pp. 187–195), of James B. White (R., p. 229), and of William T. Pratt, Democratic sheriff at the time (R., p. 196). The testimony is positive,

specific, uncontradicted, and unimpeached. Its conclusiveness will hardly be questioned by any fair-minded man. The absence of a record remaining in the clerk's office in no way casts a doubt upon it, taken in connection with the evidence of the unreliability of these records as kept by the clerk, or rather by the deputy.

Mr. White has passed all the years of his manhood in this country. He has made the greatest sacrifice that one can make for his country—the offer of his life in its defense. He has held office in the city where he resides, and has established such a character that his fellow-citizens elected him to Congress by nearly 2,500 plurality in a district where the party with which he affiliates is in the minority by some 3,000.

Thousands of foreign-born citizens are in like situation with him, the evidence of their citizenship resting upon duly authenticated certificates issued by competent courts and without complete records thereof remaining.

Many of them hold responsible positions in public life; all of them exercise the right of suffrage at every recurring election. Large property interests depend upon their citizenship.

It may safely be said that the right to seats in the House of many Members depends upon the validity of citizenship Testing upon just such evidence.

In the debate the majority laid stress on the fact that neither the record of the court nor the naturalization papers could be produced.

(3) The conclusion which the majority proposed raised another question:

(3) If contestee is ineligible, is contestant, having received the next highest number of votes, entitled to the seat?

We answer the first in the negative.

The majority say:

Now, with regard to the last proposition, of seating contestant.

The universal weight of authority in the United States and the numerous decisions in both branches of the Congress thereof render an extended discussion on this point quite unnecessary. With the exception of the State of Indiana, where the rule is established by the supreme court, holding that, where a candidate who receives the highest number of votes is ineligible, the candidate receiving the next highest number of votes is entitled to the office, there is perhaps not another State in the Union where such a doctrine prevails.

The authorities cited by contestant which discuss the control of suffrage as residing in the States, subject to the limitation imposed in the fifteenth amendment of the Federal Constitution, in our opinion, wholly fail to establish his position, that the issue on this point stands and appends wholly upon Indiana law.

To suffer a Member to be seated from one State in pursuance of this view and forbid the same right on the part of a Member from another State would destroy that equality and harmony in the membership of our National Legislature which the founders of our Government obviously intended to establish.

The Federal Constitution says the Members of the House shall be chosen every second year by the people of the several States, and that the electors of each State shall have the qualifications requisite for electors in the most numerous branch of the State legislature.

It is a cardinal idea in our political system that this is a people's government and that the majority rule. In the convention which framed our common Constitution, when it was proposed to strike out people in the clause above referred to, and insert legislatures, thus giving the legislatures the power to elect Representatives, there were only three votes in the affirmative and eight in the negative. On the final vote only one State voted in the affirmative, one was divided, and nine in the negative.

Mr. Jefferson considered that a wholesome provision in our organic law on the ground that the people should be taxed only by Representatives chosen by themselves. It is true that article 4, section 1, of the Constitution of the United States says, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and that Congress may enact the necessary laws thereunder.

This was chiefly intended to give the same conclusive effect to judgments of all the States and

equal verity to the public acts, records, and judicial proceedings of one State in another, so as to promote uniformity, as well as certainty, among them. (See Story on the Constitution, sec. 1307.)

This author adds:

"It is, therefore [a foreign judgment], put upon the same footing as a domestic judgment; but this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it or the right of the State itself to exercise authority over the persons or the subject matter. We think it can not be assumed under this clause of the Constitution, to hold full faith must be given to the opinion of every State judge on mere matters of law; but to the record the judicial proceedings of a State court, whether made as the result of right rulings or wrong, that, where properly authenticated, such record would be held conclusive as to its own identity."

Judge Cooley announces the law to be in this country, that if the person receiving the highest number of votes is ineligible, the opposing candidate is not elected and the election fails.

The report then cites the Congressional cases supporting this view.

The view taken of the case by Mr. Rowell and his minority associates did not render a decision of the question necessary; but Mr. J. H. O'Neill, of Massachusetts, filed individual views:

That the qualification of a Member of Congress—his eligibility—depends upon the Federal Constitution and the laws of Congress passed in pursuance thereof.

That the election of a Member depends upon the voters of the district he represents, expressing themselves in the way prescribed by the constitution and laws of the State from which he comes. To ascertain whether eligible or not, we look to the Constitution and laws of the United States; to ascertain whether elected or not, we look to the constitution and laws of the State whose electors send him to Congress.

Recognizing the first proposition, the majority of the committee have found and report that the contestee does not possess the qualifications prescribed. Disregarding, however, the second proposition, the committee report adversely to the right of contestant to the place to which, under the laws of Indiana, and by the voice of the electors of the Twelfth Congressional district of said State, legally expressed, he was duly elected. In that State the rule of law, as held by a long and unbroken line of authority, by the courts of last resort and in the halls of the legislature, the principle is well settled that every vote given by an elector to an ineligible candidate counts for naught; that such vote is ineffectual to elect or to defeat. In one of the early cases in that State, the supreme court of the State say:

"While it is true that the votes of the majority should rule, the tenable ground appears to be that if the majority should vote for one wholly incapable of taking the office, having notice of such incapacity, or should perversely refuse or negligently fail to express their choice, those, although in a minority, who should legitimately choose one eligible to the position should be heeded. * * *

"True, by the constitution and laws of the State, the voice of the majority controls our elections, but that voice must be constitutionally and legally expressed. Even a majority should not nullify a provision of the constitution or be permitted at will to disregard the law. In this is the strength and beauty of our institutions. (Gulick *v.* New, 14 Indiana, p. 93.)"

In the case Gulick *v.* New, supra, the court places the impotency of the votes upon the question of notice to the voter of the ineligibility of the candidate for whom the voter casts his ballot. Later cases refer to want of force in the vote without referring to the question of notice. But without referring to those cases, it is here asserted that—

"The legal presumption in favor of the nationality of birth, or domicile of origin, continues until proof of change; that in the absence of proof that an alien has become a citizen of the United States his original status is presumed to continue. (Howenstine *v.* Lynham, 100 U. S. Reports, p. 483.)

"A disqualification patent or notorious at once causes the votes given for the candidate laboring under the disqualification to be thrown away. The same would probably be held to be the case where the electors had the means of knowledge or might have ascertained the facts had they desired. (Grant on Corporations, p. 208.)"

That contestee was of foreign birth, like most foreigners professed of himself, would conclusively show. Then, if alienage is presumed to continue until citizenship is proven, those who voted for him must be presumed to have known. Everyone is bound to know that seven years' citizenship is required of a Member of Congress.

425. The case of Lowry v. White, continued.

In the record of an election case allegations and testimony relating to nominations are out of order.

Personalities and, generally, also digressions on local politics are irrelevant to the record of an election case.

Motions to suppress testimony in an election case already printed under the law were disregarded by the Elections Committee.

An Elections Committee has ruled that the determination of result contemplated by the law governing notice of contest is not reached until returns have been compared or certified as required by law.

The Committee on Elections has apparently acquiesced in the view that a contestant, while bringing into issue no ground that could possibly give him the seat, is yet to be treated as a memorialist, entitled to have the question determined.

Form of resolutions for unseating a Member for disqualifications.

The majority report determines certain preliminary questions, incidental in nature:

(*a*) All of the allegations and testimony relating to the nomination of contestant are foreign to the merits of the case, and are not considered by the committee.

(*b*) A large portion of the printed record in the case is needlessly encumbered with such testimony, ramifying and shaping itself into a multitude of phases with reference to State, county, and Congressional politics. The record is also disfigured with acrimonious personalities between contestant and contestee, that were brought into the testimony and were developed by way of objections to evidence in taking the same—all of which your committee dismiss from consideration as irrelevant to the legitimate issues involved.

(*c*) Motions were filed during the consideration of the case by the committee, by both contestant and contestee, to suppress certain portions of the testimony, but your committee could see no practical purpose in entertaining the same otherwise than is involved in the general consideration of the case, in view of the act of Congress of March 2, 1887, under which the record has been printed and distributed, as required by law, prior to the hearing of the case.

Under the provisions of that statute both parties could have appeared within twenty days, on the notice of the Clerk of the House, and have agreed upon portions of the record to be printed, or should they have failed to agree, it was the duty of the Clerk of the House to decide what portions should be printed.

It is to be hoped this provision of the law will be observed in future, as it will greatly expedite a consideration of contested cases, and relieve both the committee and the House of a great deal of needless labor in investigating the same.

(*d*) The Revised Statutes of the United States, 1878, section 105, require notice of contest to be given within thirty days after the result of an election shall have been determined.

Service was had on the contestee on the 20th day of December, 1886. The contestant swears that he visited the office of the secretary of state of Indiana as late as the 23d or 24th of November, 1886, and that he was informed by that official that the election returns of the district in question had not then been compared or certified as required by law. (See Lowry's testimony, Record, 409.) This is not denied; consequently, in legal contemplation, the result had not been determined, and the contestant was clearly within the statute requiring him to give thirty days' notice.

The minority views also discuss a question which by implication the majority of the committee may also have approved, since they in fact did not favor dismissing the contest:

(*e*) It is urged by contestee that inasmuch as contestant abandoned the only ground of contest which could give him any standing as a contestant for the seat occupied by contestee, the whole pro-

ceeding ought to be dismissed. That even admitting the ineligibility of contestee as charged, contestant has no standing in the case, because, having been beaten at the polls, he can not under any proper view of the case succeed to the seat from which he seeks to oust the sitting Member.

That this would be the rule in judicial proceedings will not be denied. But inasmuch as all the papers in the case were before the committee for their consideration, we are inclined to treat the contestant as a memorialist, and to examine the questions presented for the purpose of reporting our conclusions to the House.

In accordance with their conclusions, the majority proposed two resolutions:

Resolved, first, That James R. White, not having been a citizen of the United States for seven years previous to the 4th of March, 1887, is not entitled to retain his seat in the Fiftieth Congress of the United States from the Twelfth Congressional district of Indiana.

Resolved, second, That Robert Lowry, not having received a majority of the votes cast for Representative in the Fiftieth Congress from the Twelfth Congressional district of Indiana, is not entitled to a seat therein as such Representative.

The minority proposed this resolution:

Resolved, That James B. White was duly elected a Representative to the Fiftieth Congress from the Twelfth Congressional district of Indiana, and is entitled to retain his seat.

The report was debated at length on February 2, 4, and 6,[1] and on the latter day the resolution of the minority was substituted for that of the majority by a vote of yeas 186, nays 105. Then the resolutions of the majority were agreed to as amended.[2] So the recommendations of the majority of the committee were reversed, and sitting Member retained his seat.

426. The case relating to the qualifications of Anthony Michalek, of Illinois, in the Fifty-ninth Congress.

The House considered a protest as to the qualifications of a Member after he had taken the oath without objection.

Form of protest as to the qualifications of a Member.

The House referred a question as to the qualifications of a Member to an elections committee instead of to a select committee.

On December 4, 1905,[3] at the time of the organization of the House, the name of Anthony Michalek appeared on the Clerk's roll among the Members-elect from Illinois. He voted for Speaker and was sworn in without objection.

On December 5,[4] Mr. Henry T. Rainey, of Illinois, claiming the floor for a question of privilege, and being recognized, presented the following protest:

To the honorable the House of Representatives of the fifty-ninth Congress of the United States of America:

The undersigned citizens and legal voters of the Fifth Congressional district of Illinois respectfully represent unto your honorable body that at the last Congressional election held in said district one Anthony Michalek was elected as a Member of the Fifty-ninth Congress; that since said election it has come to the notice of the undersigned that said Anthony Michalek was not at the time he was elected nor is he now a citizen of the United States.

Wherefore we protest against being represented in your honorable body by one who has not deemed it worth while to become a citizen of the United States, and respectfully petition your honorable body

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[1] Record, pp. 915, 947, 988–1001; Journal, pp. 684–686.

[2] The Journal omits to notice that the resolutions as amended were agreed to, but the Record (p. 1001) and subsequent proceedings show that the question was in fact put and agreed to.

[3] First session Fifty-ninth Congress, Journal, p. 3; Record, p. 39.

[4] Journal, p. 68; Record, p. 108.

to cause an investigation to be made, and if it is found that said Michalek is not a citizen of the United States to take such action in the premises as to your honorable body shall seem fit and proper.

And in support of this petition we herewith submit the affidavits of Julius M. Kahn, Enoch P. Morgan, and Joseph Pejsar, which affidavits are made part of this petition, and we offer to produce other and additional testimony on any hearing ordered by your honorable body.

And we will ever pray.

STATE OF ILLINOIS, *County of Cook, ss:*

Julius M. Kahn, being first duly sworn, on oath deposes and says that he is an attorney at law, and resides at 729 East Fiftieth place, in the city of Chicago; that he is a native-born citizen of the United States, and that he is thoroughly familiar with the records of the courts of Cook County, in the State of Illinois, and a competent person to examine the records of the courts; that in said county there are four courts which have the power to naturalize citizens, namely: The circuit court, superior court, county court, and criminal court, and no other court in said Cook County has such power, and that no other court had such power for more than thirty years last past; that he has carefully examined the records of each and every one of said four courts for the purpose of ascertaining whether one Vaclav Michalek ever became a citizen of the United States; that he carefully examined the records beginning with the year 1879 and ending with the year 1890, both inclusive, and that there is no record in any of said courts showing that one Vaclav Michalek became a naturalized citizen during said period of time, and that during all of said period of time no one by the name of Michalek became a citizen in said Cook County, except one Michael Michalek, who became a citizen on March 26, 1888, by naturalization and judgment of the superior court of Cook County; that said Michael Michalek, as appears from said records, was a native of Germany, and not a native of Bohemia, Austria, and that he took the oath renouncing allegiance to the Emperor of Germany.

And this affiant says that after a thorough investigation of the records he finds that Vaclav Michalek was never naturalized in the county of Cook during said period of time.

Affiant further says that under the election laws of the State of Illinois each voter must register and answer under oath certain questions in regard to his qualifications as a voter, and that the record of each voter's answers is kept; that this affiant examined the records so kept in the election commissioners' office in the city of Chicago, County of Cook, and State of Illinois, and finds that Anthony Michalek, Congressman-elect from the Fifth Illinois district, registered in the Eighth precinct of the Eleventh ward in said city in the year 1905, and that his sworn answers to questions propounded were that he, Anthony Michalek, was born in Bohemia, and that he became a citizen of the United States by act of Congress.

And further affiant saith not.

JULIUS M. KAHN.

Subscribed and sworn to before me this 18th day of November, A. D. 1905.

[SEAL.]

EDW. R. NEWMANN,
Notary Public.

STATE OF ILLINOIS, *County of Cook, ss:*

Josef Pejsar, being first duly sworn, on oath deposes and says that he is, and for about thirty-five years last past has been, a citizen of the United States; that he has resided in the city of Chicago for about thirty-nine years last past; that he is a householder and resides, and has resided for more than ten years last past, at No. 3437 Lowe avenue, in the city of Chicago; that he is acquainted with Anthony Michalek, Congressman-elect from the Fifth Congressional district; that the name of the father of said Congressman-elect was Vaclav Michalek; that said Vaclav Michalek was by occupation a brewer; that this affiant was also by occupation a brewer; that both of them were natives of Bohemia, Austria, and that both of them were employed by the Seipp Brewing Company, in the city of Chicago, and that this affiant was well acquainted with said Vaclav Michalek, father of said Congressman-elect; that said Vaclav Michalek arrived in this country in 1879 as an immigrant from Bohemia, and brought said Anthony Michalek-, his son, with him; that he came direct to Chicago, and remained here until the time of his death; that he died in the year 1883, and that he had not been fully five years in this country at the time of his death, and that at the time of his death the said Vaclav Michalek was at least 40 years of age; and that the said Vaclav Michalek had never been in the United States prior to the year 1879. That at an election held in the city of Chicago a few months preceeding the death

of said Vaclav Michalek this affiant had a conversation with said Vaclav Michalek in the Bohemian language, in which conversation this affiant desired said Michalek to become interested in the coming election, and asked him to become a citizen of the United States and make application for his first papers; but that said Vaclav Michalek answered that elections could get along without him, and that he was not and did not care to become a citizen of the United States for some time to come.

And further affiant saith not.

JOSEF PEJSAR.

Subscribed and sworn to before me this 21st day of November, A. D. 1905.

[SEAL.]

ALFAR M. EBERHARDT, *Notary Public.*

STATE OF ILLINOIS, *County of Cook, ss:*

Matous Sedlacek, being fast duly sworn, on oath deposes and says that he is by occupation a brewer; that he is a citizen of the United States, and resides at 630 West Eighteenth Street, in the city of Chicago, Cook County, Ill., and that he has been a resident of the city of Chicago for a period of not less than thirty-four years; that he was born in Bohemia, and speaks the Bohemian language.

Affiant further says that he became acquainted with one Vaclav Michalek about the time and during the same year that said Vaclav Michalek arrived in this country as an immigrant from Bohemia; that said Vaclav Michalek came here with his family, and was the father of Anthony Michalek, Congressman-elect from the Fifth Illinois district; that said Vaclav Michalek worked during his lifetime at Seipp Brewing Company and at Hauck's malt house; that for a period of about three years the said Vaclav Michalek and this affiant worked together and often conversed with each other in the Bohemian language.

Affiant further says that he well remembers the time of the death of said Vaclav Michalek, and that between the time of the arrival of said Vaclav Michalek as an immigrant in this country and the time of his death less than five (5) years elapsed.

And further affiant saith not.

MATOUS SEDLACEK.

Subscribed and sworn to before me this 21st day of November, A. D. 1905.

[SEAL.]

ALFAR M. EBERHARDT, *Notary Public.*

STATE OF ILLINOIS, *County of Cook, ss:*

Enoch P. Morgan, being first duly sworn, on oath deposes and says that he resides at 495 South Hermitage Avenue, in the city of Chicago, Ill.; that he is, and for the past seventeen years has been, a citizen of the United States, and for more than thirteen years last past has been a resident of the city of Chicago; that he is a resident of the Fifth Congressional district and is well acquainted with Anthony Michalek, Congressman-elect from said district; that during the last Presidential campaign this affiant was one of the Republican campaign speakers in the employ of the national committee; that said Anthony Michalek informed this affiant that he, Michalek, was born in Bohemia, and that his father emigrated to this country and brought said Anthony with him when said Anthony was a boy of tender years; that he, said Anthony Michalek, was not a citizen of the United States; that the said conversation took place at the time when said Anthony Michalek was a candidate for Congress at the last national election; that this affiant advised him that it was his duty to at once apply to become a citizen of the United States, and told him that he could obtain his papers easily, because he came to this country when he was under the age of 18 years; and that this affiant informed him that he should not under any circumstances omit to perform that duty at once, or that he would surely get himself in trouble if he voted without being a citizen; that said Anthony Michalek replied that nobody would know anyway, and that it would not make any difference; that one of his relations, who was also not a citizen, had held office, and that he saw no reason why he could not hold office without going to the trouble of taking out his papers, and that nobody would know the difference.

And further affiant saith not.

ENOCH P. MORGAN.

Subscribed and sworn to before me this 18th day of November, A. D. 1905.

[SEAL.]

JULIUS M. KAHN, *Notary Public.*

The memorial having been read, Mr. Rainey offered the following:

Resolved, That the protest of citizens of the Fifth Congressional district of Illinois against being represented in Congress by Anthony Michalek, declared by them to be an alien, be referred to a special committee of five Members of this House, to be appointed by the Speaker, for immediate investigation.

To this Mr. James R. Mann, of Illinois, offered an amendment as follows:

Strike out of the resolution the words "a special committee of five Members of this House, to be appointed by the Speaker, for immediate investigation" and insert "be referred by the Speaker to the appropriate committee of this House when appointed."

Debate followed as to the propriety of the consideration of the subject by an elections committee instead of a special committee, during which Mr. Marlin E. Olmsted, of Pennsylvania, cited the provisions of Rule XI giving the Elections Committees the right to report at any time on the right of a Member to a seat, and Mr. Mann recalled the fact that in the First Congress a question as to qualifications was passed on by the Elections Committee.

After debate the amendment was agreed to, yeas 178, nays 93. Then the resolution as amended was agreed to.

427. The case of Anthony Michalek, continued.

The House authorized its committee to take testimony in a case wherein the qualifications of a Member were impeached.

As to the degree of testimony required to put the burden of proof on a Member whose status as a citizen was impeached.

On January 29, 1906,[1] Mr. H. Olin Young, of Michigan, from the Committee on Elections No. 1, submitted the following report:

The Committee on Elections No. 1, to whom was referred the protest of citizens of the Fifth Congressional district of Illinois, against the right of Hon. Anthony Michalek, elected as a Member of the House of Representatives from that district to the Fifty-ninth Congress, to a seat in the House, on the ground that he was not at the time he was elected a citizen of the United States, beg leave to report and recommend the passage of the following resolution:

"*Whereas*, there is now pending before the House of Representatives a protest alleging that the Hon. Anthony Michalek was not at the time of his election as a Member of this House, and is not now, a citizen of the United States, and therefore is disqualified to be or remain a Member of this House, which protest has been referred to the Committee on Elections No. 1 for investigation: Therefore

"Resolved by the House of Representatives, That said committee be empowered to take such testimony as it deems necessary to a determination of said matter, either before said committee or before a subcommittee thereof or a member of said Committee on Elections No. 1 appointed therefor, or any other person selected by said committee for such purpose, and that the time, place, and manner of taking, certifying, and returning said testimony be determined by said committee, and that the expenses incurred in taking said testimony be paid from the contingent fund of the House upon the order of said Committee on Elections No. 1."

The resolution was agreed to by the House.

On March 6,[2] Mr. James R. Mann, of Illinois, submitted the unanimous report of the committee, which recited the petition protesting against the seating of Mr. Michalek, and said:

The petition purported to be signed by John F. Joyce, 696 West Taylor Street, Chicago, and 124 other persons.

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[1] Journal, p. 356; Record, p. 1698.

[2] House Report No. 2117.

The petition having been referred to this committee, the House, on the 29th day of January, A. D. 1906, passed a resolution authorizing this committee to take testimony in order to determine the right of Mr. Michalek to his seat.

The original petition was supported by the affidavits of Julius M. Kahn, Joseph Pejsar, Matous Sedlacek, and Enoch P. Morgan, which were attached to the petition and formed a part thereof, as presented to the House. The affidavit of Julius M. Kahn did not, on its face, make any case against Mr. Michalek, because it showed that while affiant stated he had made search of the records of certain courts in Chicago, Cook County, Ill., to ascertain whether the father of Mr. Michalek had been naturalized, it also showed that he had made no search for such naturalization in either the United States district or circuit court in Chicago, of which courts this committee necessarily takes notice.

The affidavit of Enoch P. Morgan did not make out a prima facie case against Mr. Michalek, because affiant simply stated what, at the best, would be a conclusion as to citizenship.

The two affidavits of Joseph Pejsar and Matous Sedlacek, however, were to the effect that Mr. Anthony Michalek, the sitting Member, came to this country when he was a minor, with his father, and that the father, Vaclav Michalek, died before he had been in this country a period of five years.

The statements in the affidavits of Sedlacek and Pejsar seem to justify the committee in permitting the protestants to offer evidence in support of their protest, and accordingly such evidence was taken by a member of the committee and by direction of the committee in Chicago.

At the taking of this testimony neither Joseph Pejsar nor Matous Sedlacek was called upon to testify, and it was then, and is now, admitted that the affidavits of these two men were false.

At the taking of the testimony in Chicago not one of the protestants appeared and not one of them testified.

NECESSITY FOR CARE WHEN CHARGES ARE MADE AGAINST THE RIGHT OF A MEMBER OF CONGRESS TO HIS SEAT.

The necessity for care in considering and examining a protest of this character is well exemplified by this particular case. Here are 125 names signed to a protest and on the hearing not one of the persons signing the protest appears to give his reasons for making the protest. The two persons who are principally relied upon by their affidavits to sustain the protest do not appear, and it is admitted that their affidavits are falsehoods. By what right do these 125 men make a statement that a Member of this House is not entitled to his seat and then offer no proof in support of it? Were Mr. John F. Joyce and the other signers of the protest simply dummies who were being used by somebody else? Were they the cat's-paw to pull the chestnuts out of the fire in the interest of someone else?

These persons have trifled with the dignity of this House. They have not even had the manliness to come before the committee at the hearing and state that they were deceived by the false affidavits of Pejsar and Sedlacek. We do not wish to be understood as criticising counsel who appeared for or in support of the position of the protestants. Counsel in behalf of the protestants were engaged as and appeared as lawyers. They presented their case with the utmost fairness and in a manner to maintain their high position as leaders among the great bar at Chicago.

ANTHONY MICHALEK IS FOREIGN BORN.

It appears from the evidence in the case that Anthony Michalek, the sitting Member, came to this country with his father, Vaclav Michalek, and his mother, Therese Michalek, in 1878, when only a few months old.

There are five ways, in any one of which Anthony Michalek might have become a citizen of the United States.

First. By the naturalization of his father, Vaclav Michalek, during the minority of the son.

Second. By the naturalization of his mother, Therese Michalek, after the death of his father, during the minority of the son.

Third. By the marriage of Therese Michalek after the death of Vaclav Michalek to a citizen of the United States during the minority of the son.

Fourth. By the naturalization of Anthony Michalek himself as a person who came here under the age of 18, he having the right under the statute to receive his final papers without taking out first papers.

Fifth. In case his father, Vaclav Michalek, took out his first papers and then died, by compliance on

the part of Anthony Michalek with section 2168 of the Revised Statutes, providing that where a person takes out his first papers and dies his widow and minor children shall be considered as citizens and be entitled to all the rights and privileges as such upon taking the oaths required by law.

It will be seen, therefore, that the sitting Member might have become a citizen by reason of the naturalization of his father or of his mother or of himself. In order to make a prima facie case against him by an examination of the records, it would seem to require an examination as to all three of these persons. There are at least six courts in the city of Chicago, where these persons lived from the time they came into the country, which are authorized by law to issue naturalization papers. These are four State courts and two Federal courts.

To make a prima facie case against the sitting Member it would be necessary to examine the records in each of these six courts for naturalization of Vaclav Michalek, Therese Michalek, and Anthony Michalek. This would make at least eighteen separate examinations of records. As a matter of fact, counsel for protestants offered testimony concerning the naturalization of Vaclav Michalek, the father, in the four State courts. No testimony was offered concerning the naturalization of Vaclav Michalek in the two Federal courts and no testimony was offered as to the naturalization of Therese Michalek or Anthony Michalek in any of the six courts.

The purpose of offering testimony at all concerning records of the courts was to shift the burden of proof from the protestants to the sitting Member. If any testimony be necessary concerning the records in any courts, in order to shift the burden of proof, then it would seem that testimony ought to be offered as to all of the courts, and if it be necessary to offer testimony concerning the naturalization of the father, Vaclav Michalek, it would seem to be also necessary to offer testimony concerning the records as to Anthony Michalek, the sitting Member himself, as well as his mother, Therese Michalek, if it be desired to shift the burden of proof.

While there are six courts in Chicago having the power to naturalize, the law also provides that any person living in Chicago may apply to any court within the State for naturalization.

We think it might be fairly well contended that proof that neither Vaclav Michalek, the father, Therese Michalek, the mother, or Anthony Michalek, the son, was naturalized in any court in Cook County would shift the burden of proof to the sitting Member without requiring the protestants to offer proof as to the many courts in Illinois outside of Cook County, though we do not wish to be considered as expressing any decided opinion upon that question, it being wholly unnecessary for the decision of this case.

It is perfectly manifest in our opinion that if evidence concerning the records of any of the courts as to the naturalization of either the father, the mother, or the son be necessary to effect the shifting of the burden of proof, then it is necessary to offer evidence concerning all of these local courts.

The evidence which was produced relating to the naturalization of Vaclav Michalek in the State courts of Cook County was mainly evidence relating to an examination of the indexes of naturalization and not to an examination of either the actual records or the original applications. Counsel for protestants seemed to admit that an examination of the indexes (not required by law to be kept) might be insufficient to prove the contents of the records, and offered upon the argument of this case in committee, and after the hearing and testimony had been completed, affidavits of various persons connected with the offices of the clerks of the State courts in Chicago concerning the records themselves.

Without expressing any opinion as to the right of the protestants to have these affidavits admitted in evidence without an opportunity on the part of the sitting Member to a cross-examination of the witnesses, we have considered the affidavits as evidence in the case, inasmuch as giving them the weight of testimony has not resulted in detriment to the sitting Member, who was deprived of the opportunity of cross-examination.

The evidence in this case shows that the condition of the naturalization papers and records in Cook County is not very satisfactory; that the indexes have many mistakes in them; that all the original applications for naturalization have not been entered of record as required by the statute, and that the naturalization papers and records have not been kept with that degree of care and accuracy which is presumed to be used in the keeping of ordinary court records and documents. It is not likely that the condition of the naturalization records in Cook County is different from the naturalization records in other large cities. It is well known, and the evidence in this case disclosed the fact, that naturalization of foreign-born persons is often carried on at night, when applicants appear in large numbers and at the suggestion and expense of political committees. The names of the applicants are writ-

ten in the body of the application blanks by the clerks of the courts either from the signature of the applicants or from the pronunciation of their names by themselves. It is perfectly manifest to everyone that under such circumstances many errors creep into the names as written in the body of the applications and afterwards into the records.

In the affidavits filed with the protest in this case the name of Pejsar is not written, where he signs the affidavit, in the same manner as it is written in the body of the affidavit, nor would it be possible for the writer of this report to definitely state from his signature what his name is. The same is true also of the adaffivit and name of Sedlacek. There are a number of signatures attached to the protest presented to the House which it is not possible for a stranger to accurately read.

The Bohemian, Polish, and Russian names are usually not familiar to the average clerk of the court. He does not quickly read the name correctly when written by the applicant in his foreign handwriting.

NO PRIMA FACIE CASE MADE BY PROTESTANTS.

We are of the opinion that the protestants have not made a prima facie case against Anthony Michalek, the sitting Member, by the evidence offered in reference to the naturalization records in Cook County. We are further of the opinion that the evidence of Enoch P. Morgan does not tend to make a prima facie case against Mr. Michalek. The testimony of Mr. Morgan bears upon its face so many evidences of self-contradiction that it is to be looked at with some careful scrutiny before it is accepted as correct. But, reduced to a few words, the evidence of Mr. Morgan, Mrs. Morgan, and their son is to the effect that Mr. Morgan, prior to the election, believed the sitting Member ought to take out naturalization papers himself, on the theory that he could not take a seat in Congress unless he had received a naturalization paper declaring him to be a citizen. It seems evident to us that, even if the conversations as narrated by the Morgans took place, there was a misunderstanding of the meaning of the words "citizen" and "native born." When, according to Morgan, he asked Mr. Michalek if he was a citizen, and Michalek said he was born in Bohemia, and Morgan told Michalek that he must take out his papers and become a citizen and Michalek "laughed," Morgan thought Michalek must take out citizenship papers in person before he could be elected to Congress, and Michalek thought that Morgan believed a man could not be elected to Congress who was foreign born and not native born, and that was not worth discussing.

MICHALEK IS A CITIZEN AND ELIGIBLE FOR MEMBERSHIP IN THE HOUSE.

We find from the evidence in the case, however, that the sitting Member, Anthony Michalek, is and has been for more years than required by the Constitution a citizen of the United States; that the Michalek family came to this country in 1878; that while in this country the father was known as by his Bohemian friends as Waclav or Vaclav Michalek, and by his German friends as Wenzel or Wencl Michalek; that on the 29th day of October, 1884, he applied for and received his first citizenship papers in the county court of Cook County under the name of Wenzl Michalek, as written in the body of the declaration, or Wenel Michalek, as written in the signature; that on August 12, 1885, he made a contract for the purchase of a lot in Chicago, in which contract he was described in the body of the contract as Wenzel Michalek, and which contract he signed as Waclav Michalek; that on March 12, 1887, he made his application for final naturalization in the superior court of Cook County, and by judgment of that court became a naturalized citizen of the United States under the name of Vaclav Michal; that shortly after the issuance of the naturalization papers on March 12, 1887, to Vaclav Michal, the father of the sitting Member, while living on De Koven street in Chicago, voted at the Chicago city election in April, 1887, and that he also voted at the fall election of 1887 while living at 79 Liberty street, to which place he had meanwhile moved with his family.

The mother of the sitting Member, after the death of his father, in February, 1898, was married in Chicago to a man who was presumably then a citizen.

CONCLUSION REACHED FROM PROTESTANTS' TESTIMONY.

The foregoing statements in reference to the naturalization of Anthony Michalek, the sitting Member, by reason of the naturalization of his father and his mother, are based upon the testimony of witnesses called in behalf of protestants.

ADDITIONAL TESTIMONY.

The chief witness for the protestants was Mr. Enoch P. Morgan. Mr. Morgan testified that during the national campaign of 1904 he was in the employ of the Republican national campaign committee as a speaker, and that during the campaign he had several conversations with Hon. James A. Tawney, now chairman of the Committee on Appropriations of the House of Representatives, who was in charge of the speakers' bureau of the Republican national committee, and that he informed Mr. Tawney that Mr. Michalek was not a citizen of the United States.

Mr. Tawney has stated to the committee that no such statement was made to him by Mr. Morgan and Mr. Tawney contradicts Mr. Morgan as to various other statements which Mr. Morgan claims he made to Mr. Tawney.

Your committee is forced to the conclusion that Mr. Morgan in his testimony is somewhat mistaken in his statement of facts.

TESTIMONY OF ANTHONY MICHALEK, THE SITTING MEMBER.

Mr. Michalek requested that he might appear before the committee and make a brief statement as to his position and his claims. Mr. Michalek stated to your committee, under oath, that he was born in Bohemia; that he came to this country with his parents, Vaclav Michalek and Therese Michalek, while an infant in arms that his father died when he was 9 years of age; that he had been informed by his mother and older brothers that his father had become a naturalized citizen and that he grew up in that belief, and immediately upon attaining the age of 21 he registered as a voter in the city of Chicago and has since then always maintained and exercised his right to register and vote; that he has believed for many years and still believes himself to be a citizen of the United States by reason of the naturalization of his father.

CONCLUSIONS.

There never was any proper justification for the protest and charges filed against Mr. Michalek. The persons making the protest did so without knowledge and without evidence. The charges were recklessly made and untruthfully made. They were based upon false affidavits. Proof in the case offered by the protestants makes out a case for the sitting Member instead of the protestants.

SITTING MEMBER NOT CALLED UPON TO ANSWER THE CHARGES.

While the committee, at the request of Mr. Michalek, permitted him to make a brief statement to the committee, yet the committee has not been of the opinion that any prima facie case was made against Mr. Michalek, and hence has been of the opinion that he should not be put to the trouble or expense of proving by witnesses introduced in his behalf his title to citizenship. Your committee is of the opinion that when charges affecting the eligibility of a Member of Congress to his seat are made, some proof should be offered in their support before putting the sitting Member to the expense and the burden of making a defense.

The committee accordingly reported the following resolution, which was, on March 6,[1] agreed to by the House without division:

Resolved, That Anthony Michalek, at the time of his election as a Member of Congress from the Fifth Congressional district of Illinois had attained the age of 25 years, and had then been for more than seven years a citizen of the United States, and was then an inhabitant of the State of Illinois, in which he was elected, and that he was elected a Member of the Fifty-ninth Congress from the Fifth Congressional district of the State of Illinois, and is entitled to retain his seat therein.

428. In 1794 the Senate decided that Albert Gallatin was disqualified, not having been a citizen nine years, although he had served in the war of independence and was a resident of the country when the Constitution was formed.

The Senate by majority vote unseated Albert Gallatin for disqualification after he had taken the oath.

[1] Journal, p. 600; Record, p. 3399.

On February 28, 1794,[1] the Senate, by a vote of yeas 14, nays 12, voted that the election of Albert Gallatin (who had already been sworn in and was acting as a Senator)[2] to be a Senator of the United States was void, he not having been a citizen of the United States the term of years (nine years) required as a qualification.

It appeared that Mr. Gallatin, who was born at Geneva, January 29, 1761, arrived in Boston July 14, 1780. In October, 1780, he settled at Machias, Me., and resided there a year, furnishing funds for and several times acting as a volunteer with the troops there. In the spring of 1782 he was chosen an instructor at Harvard College, remaining there a year. In July, 1783, he removed to Pennsylvania, and in November of the same year proceeded to Virginia, where he purchased considerable land at two different periods. In October, 1785, he took an oath of allegiance to Virginia. In December, 1785, he purchased a plantation in Pennsylvania, where he resided up to the date of these proceedings. In October, 1789, he was elected a member of the Pennsylvania constitutional convention, and in October of the years 1790, 1791, and 1792 was elected member of the State legislature. On February 28, 1793, he was chosen Senator of the United States.

Mr. Gallatin contended that every man who took part in the Revolution was a citizen according to the great law of reason and nature, and when afterwards positive laws were made they were retrospective in regard to persons in this predicament. He was one of the people who formed the Constitution, being of the body of people who were citizens mutually before the Constitution was ratified.

In opposition it was denied that he was one of the mass of citizens at the time of the adoption of the Constitution; and it was argued that the oath taken in Virginia did not make him a citizen of that State because the Virginia law prescribed other formalities and qualifications which Mr. Gallatin had not satisfied. In Massachusetts, also, certain requirements existed which he had not conformed to. These provisions of the laws of Virginia and Massachusetts were cited as insurmountable barriers in the way of Mr. Gallatin's occupation of the seat.

429. The Senate decided in 1849 that James Shields was disqualified to retain his seat, not having been a citizen of the United States for the required time.

Charges that a Senator-elect was disqualified did not avail to prevent his being sworn in by virtue of his prima facie right.

A Senator was unseated for disqualification after he had been seated on his prima facie right.

On March 5, 1849,[3] at the special session of the Senate, Mr. James Shields, of Illinois, appeared for the purpose of being qualified.

Thereupon a resolution was proposed that his credentials be referred to the Committee on the Judiciary, with instructions to inquire into the eligibility of Mr. Shields to a seat in the Senate.

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[1] First session Third Congress, Contested Elections in Congress from 1789 to 1834, p.851. Journal of Senate, pp. 18, 29, 34, 37, 39, 40.

[2] Journal, pp. 3, 20.

[3] Second session Thirtieth Congress, Journal of the Senate, pp. 353, 357; Globe, Appendix, pp.327–329.

Mr. Stephen A. Douglas, of Illinois, asked that the oath be administered to Mr. Shields, leaving the question as to his qualifications to be decided later. Mr. Douglas contended that Mr. Shields had a prima facie right to the seat, and that in similar cases the oath had been administered, as in the case of Mr. Gallatin, of Pennsylvania, Mr. Smith of South Carolina, and Mr. Rich of Michigan. In a case where the governor of Connecticut had appointed to a vacancy which he had no authority to fill, this fact appeared on the face of the credentials, and the appointee was not sworn in. But in the pending case the certificate showed the election, and Mr. Shields was entitled to the seat until his qualifications were determined.

Mr. John MacP. Berrien, of Georgia, made the argument that the credentials were prima facie evidence of the election, but not of the qualification.

The Senate, without division, agreed to a motion submitted by Mr. Douglas that Mr. Shields be sworn in, and the oath was administered to him.

The Senate then referred to a select committee the subject of the eligibility of Mr. Shields.

On March 13 [1] the committee reported, and the Senate agreed on March 15, after long debate, to a resolution declaring that the election of Mr. Shields "was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States at the commencement of the term for which he was elected."

This resolution was adopted without division, it being considered evidently that a majority vote only was required for the passage of the resolution.

430. In 1870 a question was raised as to the citizenship of Senator elect H. R. Revels, but he was seated, the Senate declining to postpone the administration of the oath in order to investigate the case.

In reconstruction days the Senate deemed valid credentials signed by a provisional military governor.

On February 23, 1870,[2] Mr. Henry Wilson, of Massachusetts, presented in the Senate the credentials of H. R. Revels, Senator-elect from Mississippi. These credentials were signed by "Adelbert Ames, brevet major-general, United States Army, provisional governor of Mississippi," attested by "James Lynch, secretary of state" and under the great seal of the State. Moreover—

Mr. Wilson presented a certified extract from the proceedings of the house of representatives of the State of Mississippi; also a certified extract from the proceedings of the senate and house of representatives of the State of Mississippi relative to the election of H. R. Revels as a Senator in Congress.

Mr. Willard Saulsbury, of Delaware, objected that the credentials were irregular, that a "provisional governor" was unknown to the Constitution, and that the interference of an officer in the Army showed that a republican form of government was not existing in Mississippi.

It was urged in support of the credential that it was otherwise proper in form under the seal of the State, and that it had been frequent when new States were admitted for Senators to bear certificates technically irregular as to signature, since

[1] Senate Journal, pp. 361, 365, 366; Globe, Appendix, pp. 332–351; 1 Bartlett, p. 606.

[2] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 370; second session Forty-first Congress, Globe, p. 1503–1506.

the certificates were frequently signed by a governor-elect, as was the case with the first Nebraska credentials.

The Senate voted, without division, to receive the certificate.

Thereupon Mr. John P. Stockton, of New Jersey, offered the following:

Resolved, That the credentials of Hiram R. Revels, who is now claiming a seat in this body as a Senator-elect from the State of Mississippi, be referred to the Committee on the Judiciary, who are hereby requested to inquire and report whether he has been a citizen of the United States for the period of nine years, and was an inhabitant of the said State at the time of his alleged election in the sense intended by the third section of the first article of the Constitution of the United States, and whether Adelbert Ames, brevet major-general and provisional governor of Mississippi, as appears by the credentials, was the governor of the State of Mississippi at the time, and whether he was an inhabitant of the said State."

This resolution was debated long and learnedly on February 23, 24, and 25.[1] It appeared that Mr. Revels was partially of negro descent, but was born free and a native of the United States. It was asserted that he had voted in Ohio twenty years before this date. It was urged, however, that the States might not naturalize, and that under the Dred Scott decision a person of his descent could not have been a citizen nine years before this date. Mr. George Vickers, of Maryland, thus summarized the argument, speaking of the Dred Scott case:

What were some of the propositions of law decided by that tribunal?

1. That when the Constitution was adopted persons of African descent were not regarded in any of the States as members of the community which constituted the States, and were not numbered among its people or citizens; consequently the special rights and immunities guaranteed to citizens did not apply to them.

2. That no State could by any subsequent law make a foreigner or any other description of persons citizens of the United States.

3. That a State might by its laws put a foreigner, or any other description of persons, upon a footing with its own citizens; but that would not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State.

The disqualification of the African race was as radical, fundamental, and perfect as language could make it. This is by a coordinate department of the Government, existing by the same Constitution as Congress; in its origin, design, and objects as thoroughly constitutional; in its powers and jurisdiction superior, because State and national legislation is measured and limited by the Constitution according to its judgment. Its decisions and decrees are as binding as the Constitution itself.

In opposition it was urged that Mr. Revels was born in the United States; that he never had been a slave, and did not conform to the description of negro in the Dred Scott case; that that decision was not authoritative. Mr. John Scott, off Pennsylvania, said:[2]

The history of the litigation that had occurred in various States, and that finally got into the Supreme Court of the United States in the Dred Scott case, is enough to show that a question was made as to whether a colored man was or was not a citizen of the United States. The decisions in Kentucky, the decisions in Connecticut, the decisions in my own State, the discussion which took place upon the admission of Missouri into the Union, the Dred Scott case, the universal discussion of this question at one period in our history—these are enough to show that the public mind was not settled upon the question. But if it was not settled then, could it be more effectively settled than it has been, first by the passage of the civil rights bill, and then, if that was not sufficient as a mere act of Congress to determine the status of citizenship in the face of a decision of the Supreme Court, surely it will not be con-

[1] Globe, pp. 1506–1514, 1542–1544, 1557–1568.

[2] Globe, p. 1565.

tended that the fourteenth constitutional amendment, declaring that all persons born within the United States are citizens, is not sufficient to settle it.

The civil rights bill, if its text be turned to, and the fourteenth amendment, if its text be turned to, will be found to be both declaratory. They do not enact that "from henceforth all persons born within the United States shall be citizens," but the present tense is used in both: "all persons" "are citizens of the United States." If that be sufficient to settle the question, if that be enough as a declaratory law to declare that all persons born within the limits of the United States are citizens of the United States, where does this man stand who now presents himself as Senator-elect from Mississippi?

It is urged by gentlemen on the other side that he became a citizen only by virtue of one or the other of these enactments; but if they turn to the history of that clause of the Constitution of the United States on which they rely they will find that it was inserted both in reference to Senators and to Representatives in the other House of Congress, and also in reference to the President, because of the apprehension that was felt of foreign influences in our Government. In the discussion which occurred in the convention—I have it here, but will not take the time of the Senate to read it—on fixing the qualifications of Senators it was especially dwelt upon that the Senate being the body which was to pass upon treaties with foreign governments, it was particularly necessary that the period of citizenship should be extended and made longer for a Senator than for a Member of the House of Representatives. The discussion of Mr. Madison in the Federalist of this clause shows that the purpose, the reason, the intention of this clause in the Constitution of the United States was that persons who had been born abroad should not be permitted to become Senators until after they bad been citizens a certain length of time. That is the reason, that is the spirit of the law; and it is a maxim which I need not quote, that the reason ceasing the law ceases with it.

Here, then, is a man born in the United States, not an alien, not a foreigner, who comes here elected by a State legislature. No question is raised as to his qualification as to age; no question is raised as to his qualification in any other respect than as to whether he has been a citizen of the United States for nine years. Now, even if the doctrine contended for by the gentlemen on the other side were true, that he was not a citizen until the time of the passage of the civil rights bill or until the adoption of the fourteenth constitutional amendment, still he is not within the meaning of that clause of the Constitution which requires a man to be a citizen for nine years. The meaning, the spirit of that was, that no man should occupy this place who had been naturalized as a foreigner until nine years had elapsed after his naturalization.

On February 25 [1] the resolution of Mr. Stockton was disagreed to—yeas 8, nays 48.

Then on the question of administering the oath to Mr. Revels there were yeas 48, nays, 8.

Accordingly, he appeared and took the oath.

431. Congress has by law prescribed that the Delegates from certain Territories must be citizens of the United States.—The act of May 9, 1872 (sec. 1906, Rev. Stat.), provided—

The Delegate to the House of Representatives from each of the Territories of Washington, Idaho, and Montana must be a citizen of the United States.[2]

432. The Maryland case of Philip B. Key in the Tenth Congress.

Philip B. Key, who had inhabited a home in Maryland a brief period before his election, but had never been a citizen of any other State, was held to be qualified.

Instance wherein the question of qualification was passed on after a Member-elect had been sworn in on his prima facie showing.

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[1] Globe, p. 1568.

[2] See also sections 421, 422 of this chapter.

On October 26, 1807,[1] at the beginning of the Congress, Philip B. Key appeared as a Representative from the State of Maryland and took the oath without question. On November 4 and December 7[2] memorials were presented relating to Mx. Key's qualifications as a resident of his district, and as an inhabitant of Maryland,[3] and on December 7[4] the report found that as to residence in the district there was no law of Maryland requiring such residence. As to his inhabitancy in the State, the committee report facts showing that Mr. Key was a native of Maryland and a citizen and resident of that State at the time of the adoption of the Constitution of 1787; that he was never a citizen or resident of any other of the United States; that in 1801 he removed from Maryland to his house in Georgetown, about 2 miles without the boundaries of Maryland, where he continued to reside until 1806, when, on September 18, he removed with his family and household to a partially completed summer home (intended for himself and not for an overseer), which he was building on an estate in Maryland bought by him in November, 1805, and which was part of an estate owned many years by Mrs. Key's family. Here he was residing October 6, 1806, the date of his election. On October 20, 1806, he removed with his family and household to his house near Georgetown, which he lived in until July, 1807, when they returned to the Maryland house and lived in and inhabited it until October 23, 1807. On that date they returned to the house near Georgetown, that he might attend to his duties in Congress. It further appeared that he had continued the practice of law in Maryland and had declined practice in the District of Columbia; and that in January, February, and March, 1806, he had declared that he intended to reside in Maryland, and that he bought the land with that intention. It was urged and admitted that the Maryland house was fitted only for a summer residence, and was much inferior to the house near Georgetown; and that the latter was left practically with its furnishings complete whenever the family went to Maryland.

On January 21 and 22, 1808,[5] the report was discussed, but was recommitted because of allegations relating to a matter not referred to in the report and not related to the question of inhabitancy.[6]

On March 17 and 18,[7] the report made by the committee after reexamination, and which was favorable to Mr. Key, was discussed, the form of the question being a resolution as follows:

> *Resolved,* That Philip B. Key, having the greatest number of votes, and being qualified agreeably to the Constitution of the United States, is entitled to his seat in this House.

A motion was made to strike out the words "having the greatest number of votes, and being qualified agreeably to the Constitution of the United States," and a division being demanded, the words "having the greatest number of votes, and" were stricken out.

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[1] First session Tenth Congress, Journal, pp. 2, 6.

[2] Journal, pp. 16, 68.

[3] Another feature of this case is considered in section 441 of this volume.

[4] Journal, p. 68; House Report No. 3; Annals, p. 1490.

[5] Annals, pp. 1490, 1496.

[6] See section 441 of this volume.

[7] Annals, pp. 1845, 1848, 1849.

The question then recurred on striking out "being qualified agreeably to the Constitution of the United States."

It is inferable, although the records of debate are scanty, that the question as to whether or not Mr. Key was a pensioner of the British Government figured largely in this question. The House voted—yeas 79, nays 28—to strike the words out.

• Then, on the question on agreeing to the simple amended resolution that Mr. Key was entitled to his seat, a debate occurred, which, as the Annals state, "appeared to be reduced to the plain fact of residence." The House finally agreed to the resolution7—yeas 57, nays 52.

433. The election case of John Forsyth, of Georgia, in the Eighteenth Congress.

Residence abroad in the service of the Government does not constitute a disqualification of a Member.

On March 3, 1824,[1] the Committee on Elections reported on the case of John Forsyth, of Georgia, that Mr. Forsyth was elected a Member of the present Congress during his residence near the court of Spain, as minister plenipotentiary of the United States. The committee were of the opinion that there was nothing in Mr. Forsyth's case which disqualified him from holding a seat in the House. The capacity in which he acted excluded the idea that, by performing his duty abroad, he ceased to be an inhabitant of the United States. And, if so, inasmuch as he had no inhabitancy in any other part of the Union than Georgia, he must be considered in the same situation as before the acceptance of the appointment.

Therefore the committee asked leave to be discharged from the further consideration of the subject.

This report was pending in Committee of the Whole at the time of the consideration of Mr. Bailey's case, and on March 18, after the decision in that case, the House discharged the Committee of the Whole from consideration of the report, and laid it on the table.

Thus Mr. Forsyth was allowed to retain his seat.

434. The election case of John Bailey, elected from Massachusetts to the Eighteenth Congress.

One holding an office and residing with his family for a series of years in the District of Columbia exclusively was held disqualified to sit as a Member from the State of his citizenship.

Discussion of meaning of word "inhabitant" and its relation to citizenship.

In the earlier years of the House contested election cases were presented by petition.

On February 20, 1824,[2] the Committee on Elections reported on the petition of Sundry Electors *v.* John Bailey, of Massachusetts. This case arose under section 2, Article 1, of the Constitution of the United States, which provides "that no person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

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[1] First session Eighteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 497.

[2] Ibid., p. 411.

The facts were ascertained to be as follows: On October 1, 1817, Mr. Bailey, who was then a resident of Massachusetts, was appointed a clerk in the Department of State. He immediately repaired to Washington and entered on the duties of his position, and continued to hold the position and reside in Washington until October 21, 1823, when he resigned the appointment. It did not appear that he exercised any of the rights of citizenship in the District, and there was evidence to show that he considered Massachusetts as his home and his residence in Washington only temporary. It was shown that Mr. Bailey had resided in Washington in a public hotel, with occasional absences on visits to Massachusetts, until his marriage in Washington, at which time he took up his residence with his wife's mother. The election at which Mr. Bailey was chosen a Representative was held September 8, 1823, at which time he was actually residing in Washington in his capacity as clerk in the State Department.

The conclusions of the committee was embodied in the following:

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

In support of this conclusion the committee made an elaborate report, centering entirely around the meaning of the word "inhabitant."

After reviewing the circumstances attending the adoption of this clause of the Constitution, the committee comment upon the fact that the word "resident" had first been proposed, but had been put aside for "inhabitant," as being a "stronger term, intended to express more clearly their intention that the persons to be elected should be completely identified with the State in which they were to be chosen."

The word "inhabitant" comprehended a simple fact, locality of existence; that of "citizen" a combination of civil privileges, some of which may be enjoyed in any of the States of the Union. The word "citizen" might properly be construed to mean a member of a political society, and although he might be absent for years, and cease to be an inhabitant of its territory, his rights of citizenship might not be thereby forfeited. The committee quote Vattel and Jacob's Law Dictionary to show that the character of inhabitant is derived from habitation and abode, and not from political privileges. The committee further fortified their position by an examination of the State constitutions and the laws of the United States.

The committee denied that the expressed intention of Mr. Bailey to return to Massachusetts had any bearing on his status as an inhabitant. It was true that ambassadors and other agents did not suffer impairment of their rights as citizens by residing abroad at the government of a foreign country. That which appertained to ministers of the Government residing abroad could not be supposed to attach to those in subordinate employments at home. The relations which the States bore to each other was very different from that which the Union bore to foreign governments. The several States by their own constitutions prescribed the conditions by which citizens of one State should become citizens of another, and over this subject the Government of the Union had no control. It would, therefore, be altogether fallacious to pretend that the bare holding of an appointment under the General Government, and residing for years in one of the States, should preclude the holder from being a citizen and inhabitant of such State when by its constitution and laws

he was recognized as such. Therefore, as a formal renunciation of allegiance to the State from which he came was not necessary to being admitted to the rights of citizenship in the State to which he went, so the expression of an intention to return would be of no importance. At the time of his election, and for nearly six years before, Mr. Bailey was an inhabitant of the District of Columbia. It had been urged that as the District belonged to the General Government, each State possessed a part, and therefore a resident of the District was not out of the jurisdiction of his State. But this argument would apply equally to inhabitants of all the Territories of the United States, and was plainly more ingenious than conclusive. Moreover, Mr. Bailey had married a wife and established a family of his own, thereby leaving his natural or original domicile in his father's house.

From March 18 to 26 the report was debated at length in Committee of the Whole. In support of the committee's view the suggestion was made that Mr. Bailey, had held another Government office before and after his election to the House, and therefore was ineligible. But in view of the decision in the Herrick case this point was not pressed. In continuation of the reasoning of the report the point was made that Mr. Bailey had no domestic establishment or estate in Massachusetts, unless exception be made of certain books called a "library." The construction put on the word "inhabitant" by the various States was not particularly pertinent, as it might import a different, sense in different States. The construction in the case under consideration called for common sense merely. Mr. Bailey's residence was in the District. He was eligible for office there. If the District were entitled to a Delegate in the House whose qualifications should be that he should be an inhabitant of the District, he would certainly be eligible for that place. Therefore, he must have lost his inhabitancy in Massachusetts. So far as inhabitancy was concerned the District stood on the same basis as the other Territories of the United States. If in this case the inhabitancy in Massachusetts could be maintained, so could all the emigrants to the Territories retain inhabitancy in the States from which they came. A man in one of the States appointed to an office in one of the Territories would be eligible to be chosen Delegate from that Territory. Would he still retain his inhabitancy in the State from which he came? An inhabitant of one State was deprived of the right of being elected in all the other States. Was there any reason why the inhabitants of the District should be more highly favored than the inhabitants of the States? It was inevitable that in moving from State to State political and even personal rights must suffer modification or extinction with the changed condition of law. So in moving to the District certain rights enjoyed in the States were lost. If the residence of Mr. Bailey here had been transient and not uniform; had he left a dwelling house in Massachusetts in which his family resided a part of the year; had he left there any of the insignia of a household establishment; there would be indication that his domicile in Massachusetts had not been abandoned. It had been urged that the expressed intention to return to Massachusetts should govern. But the law ascertained intention in such a case by deducing from facts. The danger of allowing the Executive to furnish Members of Congress from the public service was discussed at length. The committee did not contend that a Member must be actually residing in a State at the time of his election. Foreign ministers going abroad, but from the nature of the case precluded from becoming citizens of a

foreign power or obtaining the rights of inhabitancy, did not lose their inhabitancy at home by absence.

In support of the sitting Member the arguments were urged that the expressed will of the people should be set aside only for conclusive reasons; that a liberal construction had always been given in behalf of the rights of the people in such cases; that the proceedings in the constitutional convention changing the word "resident" for "inhabitant" showed that the framers of the instrument considered that a person might be an inhabitant without actually being a resident. The usages of Massachusetts showed that the word "inhabitant" referred to a person as a member of the political community, and not as a resident. It was probable that the Constitution meant that the meaning of the word "inhabitant" should be settled by the State usage. What decision could be of more force than that of the electors themselves? A person coming from a State to the District, left the direct jurisdiction of his State, but not its participant jurisdiction. An ambassador most certainly became the inhabitant of the foreign country if "local existence" was the test. If "locality of existence" were the test, persons on journeys would be constantly transferring their inhabitancy. The real meaning of "inhabitant" was one who had a "permanent home" or domicile in a place. The intention to return constituted the pivot on which the decision must turn. A man, citizen in one State, going into another to transact business, did not cease to be an inhabitant in the first State. There must be an intention to permanently settle to establish inhabitancy in the second State. No one denied that Mr. Bailey was a citizen of Massachusetts. If a citizen he must be an inhabitant. A citizen was always an inhabitant, but an inhabitant was not always a citizen. No one could be compelled to renounce his native State, yet to deny Mr. Bailey his seat would be in the direction of compelling him to do it against his own will and the will of his constituents. The sitting Member declared himself an inhabitant of Massachusetts, his constituents recognized him as such, and the governor of the State, in effect, had certified him as such. Mr. Bailey had left an extensive and valuable library in Massachusetts, constituting the greater portion of his visible property. Why were they not sold or brought to the District if he intended to settle permanently here? If "locality of existence" were the test, the members of the House might all be ineligible, as they were inhabitants of Washington. Foreign ministers did not lose their inhabitancy because they never intended to settle in the foreign country.

In Committee of the Whole, a motion to strike the word "not" from the resolution was decided in the negative by a vote of 105 to 55.

In the House the resolution of the committee was agreed to, yeas 125, nays 55.

So Mr. Bailey was declared not entitled to the seat.

435. The Virginia election case of Bayley v. Barbour, in the Forty-seventh Congress.

A Member who had resided a portion of the year in the District of Columbia, but who had a home in the State of his citizenship and was actually living there at the time of the election, was held to be qualified.

The Elections Committee held that a contestant could have no claim to a seat declared vacant because of the constitutional disqualifications of the sitting Member.

A suggestion that questions relating solely to qualifications of members should be brought in by memorial rather than by proceedings in contest.

On April 12, 1882,[1] Mr. John T. Wait, of Connecticut, from the Committee of Elections, submitted the report of the committee in the case of Bayley v. Barbour, from Virginia.

As to all of the grounds of contest but one the committee found no evidence to sustain them. The report says:

In disposing of these grounds of contest it is only necessary to state that there was no evidence whatever offered in support of them, and that there was no contention before the committee that they were in point of fact true. Having been abandoned, it appears from the record that of the 27,441 legal votes cast at said election the said Bayley, contestant, received only 9,177. This leaves for the committee's consideration the sole question raised by the first ground set out in the notice of contestant, to wit:

That the said John S. Barbour, at the time of said election for such Representative, was ineligible and disqualified to be the Representative of said district and State.

The said ineligibility and disqualification consists in this, that the said John S. Barbour was not at the time aforesaid either a bona fide resident or inhabitant of said State of Virginia.

When the contestant abandoned the grounds of contest above set forth he at the same time relinquished all right or claim to the seat of the sitting Member, even in the event that the same should be declared vacant on the ground of the constitutional ineligibility and disqualification of its occupant.

In the case as made up and presented to the committee the contestant has only that interest in it that is possessed by every other elector in the district; yet there is no petition or memorial from any body of the electors of the district addressed to Congress setting forth any objection to the right of Mr. Barbour to a seat in the House to which he has been elected on the alleged ground that he is not possessed of those qualifications which, by the Constitution of the United States, are indispensable to the holding of a seat in Congress.

Both upon principle and precedent the committee think that those questions which relate solely to the qualifications of Members of Congress should be more appropriately brought to the attention of Congress by a memorial of the electors who are alone interested in the result. This practice could work no wrong, and would be productive of much good in preventing troublesome and gratuitous contests which might be inspired by motives other than the interests of the electors.

The subject being one of great importance, however, they have considered it on the testimony adduced, which is solely upon the question of the qualification of Barbour under the Constitution of the United States.

In support of the voluntary contest thus made by S. P. Bayley against the eligibility of the sitting Member he proceeded to take the testimony of three witnesses in the city of Alexandria, namely, George Duffey, Augustus F. Idensen, and John S. Barbour, the last named being the returned Member himself, the object being to show that the said Barbour was not a bona fide inhabitant of the State of Virginia, as required by the Constitution of the United States. Mr. Duffey was the commissioner of revenue for the city of Alexandria, and Mr. Idensen was clerk to the State assessor of that city for the year 1880. The contestee, Barbour, on his own behalf, took no testimony, but submitted the case upon the evidence of the contestant.

Duffey testifies that it was his duty to assess all real and personal properties, incomes, licenses, etc., also the annual capitation tax prescribed by law upon all male inhabitants of the State abiding in the city of Alexandria over 21 years of age at the time of the assessment.

That the said Barbour had no real property in the city of Alexandria, but that the property of his wife situated there was assessed to her on the property books as an Alexandrian, the law requiring the residence of the owner to be given. Idensen testifies that this was changed in 1880, when Mrs. Barbour, after the election, was put down as a resident of Washington, D.C., when he, as the assessor's clerk, knew that John S. Barbour was an actual resident in the city, and so stated in his deposition. Mr. Barbour testifies that he was a native of the State of Virginia; had always been a citizen of said State; never claimed to have lived elsewhere in a permanent sense or to have exercised citizenship in any

[1] First session Forty-seventh Congress, House Report No. 1040; 2 Ellsworth, p. 676.

other State or Territory; that his post-office, business headquarters, residence required by statute for the service of legal process upon him, were all in the city of Alexandria, and within the limits of said State, and that while he had a temporary winter residence in the city of Washington, he had taken a house in Alexandria, with his family, in September, 1880, and was so actually residing at the date of the Congressional election in November, 1880, and subsequently.

The Code of Virginia, ch. 166, see. 7, which provides for the manner of serving process against corporations, says:

"It shall be sufficient to serve any process against or notice to a corporation on its mayor, rector, president, or other chief officer, or in his absence from the county or corporation in which he resides, etc., * * * and service on any person under this section shall be in the county or corporation in which he resides; and the return shall show this and state on whom and when the service was, otherwise the service shall not be valid."

Under this statute service of process was habitually made upon John S. Barbour, as president of the Virginia Midland Railway, as a resident of Alexandria.

That in July previous to his nomination for Congress he had declined to be listed by the enumerator of Washington City as an inhabitant of that city, but then stated that he was an inhabitant of Virginia.

That when traveling absent from the State of Virginia he invariably registered himself as from Virginia.

That at the time of the election and before he was actually residing in Alexandria, without any intention of removing therefrom permanently. It was contended on behalf of the contestant that although John S. Barbour was an actual resident of the city of Alexandria, Va., within said district, at and before the time of the election, he was not an inhabitant within the meaning of the constitutional requirements to qualify him as a Member of Congress.

In support of this view the case of John Bailey (Clark and Hall's Contested Election Cases, p. 411) was relied upon. Bailey was chosen a Member of Congress from the State of Massachusetts on the 8th day of September, 1823, at which time he was actually residing in the city of Washington, in the capacity of clerk in the State Department. On the 1st day of October, 1817, Bailey, who was at that time a resident of Massachusetts, was appointed by the Secretary of State a clerk in the Department of State and immediately repaired to Washington and entered on the duties of his appointment. He continued to reside in the city from that time with his family—having in the meantime married—in the capacity of a clerk in the Department of State until the 21st day of October, 1823, subsequent to the date of his election, at which time he resigned his appointment. Upon the petition of certain citizens and electors of the Norfolk district, in the State of Massachusetts, the question of his eligibility and qualification under the Constitution was brought to the attention of Congress, and it was contended on behalf of Bailey that, although he had been from the time of his appointment in 1817 up to and subsequent to his election to Congress a resident of Washington, he had retained his citizenship in the State of Massachusetts, and by virtue of this citizenship it was contended that within the constitutional requirement he was qualified as a Member of Congress from that State. The committee considered at some length the distinction between citizenship and inhabitancy, and their report, which was approved by Congress, against the eligibility of Bailey as a Congressman was based upon these distinctions. It was held that, being a citizen of the State, granting that Bailey was such, but residing permanently elsewhere did not satisfy the constitutional requirements necessary to make him eligible as a Member of Congress. The committee say that "the word 'inhabitant' comprehends a simple fact-locality of existence; that 'citizen' comprehends a combination of civil privileges, some of which may be enjoyed in any of the States of the Union."

The case of Barbour differs materially from that of Bailey in this, that not only had Barbour continued to be a citizen of the State of Virginia, but that he had always held his legal residence in said State as hereinabove recited. Added to that was the fact that previous to his election as a Member of Congress from the Eighth Congressional district of Virginia he had removed to said State and had become an actual inhabitant thereof, residing there without any intention of permanently removing, whereas Bailey was, when elected, an actual inhabitant and resident of the District of Columbia, not claiming a residence or inhabitancy actually in the State of Massachusetts, except constructively through and by virtue of his citizenship, which he contended he had never renounced in said State.

It was contended further by the contestant in this case that the elective-franchise in Virginia was one of the essentials of inhabitancy, and that under the local laws of the State of Virginia a residence

of twelve months within the State, and a residence of three months next preceding the election in the county, city, or town where the person offers to vote, was a requisite qualification of an elector, and that with these requisite qualifications a registration was also necessary; that John S. Barbour had never registered as a voter, and therefore he was not an inhabitant within the contemplation of the Constitution.

It was contended that the word "inhabitant" embraces citizenship; that an inhabitant must be entitled to all the privileges and advantages conferred by the laws of Virginia, and that the elective franchise alone confers these; therefore an inhabitant must have a right to vote and, further, that the burdens of inhabitancy were predicated upon the right to vote.

In answer to this position, without deeming it necessary upon the facts of this case to enter into the constitutional signification of inhabitancy, it is only necessary to say that the right to vote is not an essential of inhabitancy within the meaning of the Constitution, which is apparent from an inspection of the Constitution itself. In Article 1, section 2, the electors for Members of Congress "shall have the qualifications requisite for electors of the most numerous branch of the State legislature," but in the succeeding section, providing for the qualifications of Members of Congress, it is provided that he shall be an inhabitant of the State in which he shall be chosen. It is reasonable to conclude that if the elective franchise was an essential the word "elector" would have been used in both sections, and that it is not used is conclusive that it was not so intended.

In the case of Philip Barton Key (Clark and Hall's Contested Election Cases, p. 224), who was elected a Member of Congress from Maryland on the 6th day of October, 1806, and who was seated as such, the facts are these: Mr. Key was an inhabitant of the District of Columbia, and in November, 1805, he purchased about 1,000 acres of land in Montgomery County, Md., about 14 miles from Georgetown; that some time in the summer of 1806 he caused a dwelling house to be erected on said lands, into which he removed with his family on the 18th September, 1806; that he was residing in said house, which was only partially completed, from that time up to the 20th of October, 1806, when he removed back with his family to his seat in the District of Columbia, where he remained till about the 28th of July, 1807, when they again removed to his estate in Montgomery County, where they remained till the 20th of October, 1807, when they again returned to his seat in the District of Columbia. He was only living and inhabiting within his said district in Maryland for the period of little upward of a month, during which time, to wit, on the 6th day of October, 1806, the election took place, at which he was returned as a Representative to Congress from said district. Notwithstanding this short residence, and the fact that Mr. Key, before his removal to Maryland, had been confessedly a citizen and inhabitant of the District of Columbia, it was decided by Congress that he was eligible and qualified under the Constitution as a Member of Congress.

In further answer to the position that the elective franchise is necessary to qualify one as a Member of Congress, it will appear from an inspection of the constitution of Maryland of 1776, and in full force in 1806, when Mr. Key was elected a Member of Congress from Maryland, that the qualifications for electors for the most numerous branch of the legislature—

"Shall be freemen above twenty-one years of age, with a freehold of fifty acres of land in the county in which they offer to vote, and residing therein, and all freemen having property in this State above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election."

Therefore, Mr. Key, who was deemed qualified as a Member of Congress, was not an elector of the State of Maryland, and could not vote at the election at which he was returned as a Member.

Without resting this case, however, upon these grounds, the committee are satisfied from the facts of the case, as developed in the testimony, that John S. Barbour was, in point of fact, before and at the time of his election as a Member of Congress from the Eighth Congressional district of Virginia, an actual inhabitant of the State, enjoying all the rights and subject to all the burdens as such, and that having been duly elected as a Member of Congress from said district he is entitled to his seat.

Resolved, That John S. Barbour was duly elected and is entitled to his seat as a Member of the Forty-seventh Congress from the Eighth Congressional district of the State of Virginia.

The resolutions were agreed to by the House on April 12 without debate or division.[1]

[1] Journal, p. 1031; Record, p. 2811.

436. The Virginia election case of McDonald v. Jones, in the Fifty-fourth Congress.

A contestant who had his business and a residence in the District of Columbia and had no business or residence in Virginia was held ineligible for a seat from that State.

The legal time for serving a notice of contest in an election case is extended by the House only for good reason, and where there seems to be reasonable ground for a contest.

On February 28, 1896,[1] the Committee on Elections No. 1 reported on the case of McDonald *v.* Jones, from Virginia. In this case the contestant applied for leave to serve notice of contest, which he had not served within the time required by the statutes. The committee concluded that with reasonable diligence the notice might have been served within the prescribed time. They did not, however, rest their rejection of the application on this ground entirely, but reported—

(1) That they were convinced from the proofs presented at the hearing that there was no substantial ground for a contest and that the same could not be maintained successfully if the notice should be authorized.

(2) It also appeared that the contestant "at the time of the election in 1894, and prior to and since that time, was engaged in business and resided with his family in the city of Washington, in the District of Columbia, and that he had no place of business and no business or residence of any description in the State of Virginia; and the committee is of opinion that he was not an inhabitant of the State of Virginia at or near the time of the election for Representatives in Congress in the First Congressional district of said State in 1894; and that he was not eligible for said office at or near the time of the said election in the year 1894."

The House, without debate or division, agreed to the resolution of the committee denying the application of the contestant.

437. The Senate considered qualified a Senator who, being a citizen of the United States, had been an inhabitant of the State from which he was appointed for less than a year.—On June 2, 1809,[2] Stanley Griswold, appointed a Senator by the executive of the State of Ohio to fill the vacancy occasioned by the resignation of Edward Tiffin, was qualified and took his seat. On June 9 his credentials were referred to the Committee on Elections, and on June 15 Mr. James Hilhouse, of Connecticut, chairman of that committee, submitted this report:

That Edward Tiffin, a Senator for the State of Ohio, resigned his seat since the last session of the legislature of said State and during their recess; that on the 18th day of May last, and during said recess of said legislature, said Stanley Griswold was appointed by the governor of said State to fill the vacancy occasioned by the resignation aforesaid; that said Stanley Griswold, being a citizen of the United States, removed into the said State of Ohio and has there resided since September last, but the term of residence or other qualifications necessary to entitle a person to become an inhabitant of said State are not, so far as the committee have been able to discover, defined either by the constitution or laws of said State; but the executive who made the appointment having certified that said Stanley Griswold is a citizen of said State, the committee submit the following resolution.

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[1] First session Fifty-fourth Congress, House Report No. 568; Journal, p. 254; Record, p. 2281.

[2] Election Cases, Senate Document No. 11, Fifty-eighth Congress, special session, p. 174.

And thereupon the Senate—

Resolved, That Stanley Griswold, appointed by the governor of the State of Ohio as a Senator of the United States, to fill the vacancy occasioned by the resignation of Edward Tiffin, is entitled to his seat.

438. The Senate overruled its committee and held as qualified Adelbert Ames, who, when elected Senator from Mississippi, was merely stationed there as an army officer, but who had declared his intention of making his home in that State.

Credentials unusual in form and signed by the Member-elect himself as "major-general" and "provisional governor" of Mississippi, were honored by the Senate.

On March 18, 1870,[1] Mr. Roscoe Conkling, of New York, in the Senate submitted the following report from the Committee on the Judiciary:

The Committee on the Judiciary, to whom were referred the credentials of Adelbert Ames, claiming to be a Senator-elect from the State of Mississippi, report the following facts and conclusions:

Mr. Ames was born in Maine in 1835, and resided with his parents in that State until 1856, when he entered the Military Academy at West Point. From 1856 he remained in the military service of the United States until he resigned his commission, which he states was after the passage, but before the approval by the President, of the bill finally declaring Mississippi entitled to representation in Congress.

Until 1862 his parents continued to reside in Maine, and such articles and papers of his as would naturally be kept at his home remained at his father's house. In 1862 his parents removed to Minnesota, carrying with them the effects of their son in their possession, and in subsequent years he occasionally revisited Maine, but owned no land and occupied no habitation there of his own.

In 1868 he was ordered to Mississippi; on the 15th of June in that year he became provisional governor by appointment of General McDowell, then district commander, and in March, 1869, he became himself district commander by assignment of the President of the United States. These relations continued, modified, if modified at all, only as will presently appear.

The election seems to have been regular, and waiving any criticism of the form of the certificate, no question has been made touching the right of Mr. Ames to take his seat, except in regard to the legal character of his residence in Mississippi.

The provision of the Constitution of the United States under which the question arises is this:

"No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen."

It will be seen that to be eligible as a Senator of the United States a person, in addition to other qualifications, must be an inhabitant of the State for which he is chosen, and he must be such an inhabitant "when elected."

The election in this instance occurred on the 18th day of January, 1870.

At this time Mr. Ames was a military officer, stationed in Mississippi by order of superior military authority, and acting as provisional governor by appointment from General McDowell, as already stated. His presence in these two characters comprises everything bearing upon the question of his residence in Mississippi down to the time when he became a candidate for the Senate. The precise date can not be fixed, but not long before the election General Ames determined to allow his name to be submitted to the legislature as one of those from which the choice of Senators might be made.

Having reached this determination, and in connection with it, General Ames declared, as far as he did declare it, his intention in regard to his future residence. His language as delivered to the committee touching his declarations and acts is as follows:

"Upon the success of the Republican ticket in Mississippi I was repeatedly approached to become a candidate for the United States Senate. For a long time I declined—I wrote letters declining. A

[1] Second session Forty-first Congress, Senate Report No. 75; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 375.

number of persons in Mississippi visited this city to find arguments by which I might be influenced to become a candidate. I hesitated because it would necessitate the abandonment of my whole military life. Finally, for personal and public reasons, I decided to become a candidate and leave the Army. My intentions were publicly declared and sincere. (The intentions thus declared were not only to become a candidate for the Senate, but to remain and reside in Mississippi.) I even made arrangements, almost final and permanent, with a person to manage property I intended to buy. This was before I left Mississippi. My resignation was accepted by the President before he signed the bill to admit the State."

The conclusion of the committee upon these facts is that General Ames was not, when elected, an inhabitant of the State for which he was chosen, and that he is not entitled to take his seat.

The committee therefore recommend the adoption of the following resolution:

Resolved, That Adelbert Ames is not eligible to the seat in the Senate of the United States to which he has been appointed.

In opening the debate in support of the resolution, on March 22,[1] Mr. Conkling cited the definitions of "inhabitant" and the precedents of the House in the cases of John Bailey, Jennings Pigott,[2] the British cases of Brown *v.* Smith and Cockrell v. Cockrell. Commenting on what might be considered ambiguous language in the report, Mr. Conkling said that General Ames had not been able to affirm that it was his intention to remain in Mississippi in the event that he should not be elected to the Senate. In opposition, however, it was urged[3] by Mr. Jacob M. Howard, of Michigan, that General Ames had determined irrevocably to make Mississippi his home, and that this was not at all a conditional determination. Mr. Howard also cited the opinion of Chief Justice Shaw as to habitancy (17 Pickering, 234):

It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance. In such a circumstance the mere declaration of the party, made in good faith, of his election to make the one place rather than the other his home would be sufficient to turn the scale.

Against this, on March 23, was cited an opinion of Chief Justice Parker in support of the argument that General Ames did not go to Mississippi of his own free will, and, moreover, that he sustained no municipal relations as a citizen there, and therefore that he was not an inhabitant.

The report was debated at great length on March 22, 23, and 31, and April 1,[4] and on the latter day the motion of Mr. Charles Sumner, of Massachusetts, that the word "not" be stricken out was agreed to—yeas 40, nays 12.[5]

Then the resolution, as amended, was agreed to without division and Mr. Ames took the oath.

A question was also raised in this case as to the credentials. Mr. Ames, as "brevet major-general United States Army and provisional governor," certified to his own election to the Senate.[6] This point was discussed somewhat in the debate,[7] but did not affect the decision.

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[1] Globe, pp. 2127–2129.

[2] See Section 369 of this volume.

[3] Globe, p. 2131.

[4] Globe, pp. 2125–2135, 2156–2169, 2303–2316, 2335–2349.

[5] Globe, p. 2349.

[6] Globe, p. 2125.

[7] Globe, p. 2129.

439. A Senator who, at the time of his election, was actually residing in the District of Columbia as an officeholder, but who voted in his old home and had no intent of making the District his domicile, was held to be qualified.—In 1899,[1] the Senate considered the case of Nathan B. Scott, elected a Senator from the State of West Virginia for the term beginning March 4, 1899. Before Mr. Scott appeared to claim his seat certain memorials were presented to the Senate remonstrating against the seating of Mr. Scott. At the beginning of the first session of the Fifty-sixth Congress Mr. Scott was duly seated as a Senator from the State of West Virginia, without objection at the time. Afterwards a resolution was introduced in the Senate declaring that Mr. Scott was not entitled to a seat in the Senate; which was referred to the Committee on Privileges and Elections, with the memorials referred to.

March 20, 1900, the committee submitted a report with an accompanying resolution that Mr. Scott was entitled to a seat in the Senate as a Senator from the State of West Virginia. A minority of the committee dissented.

The principal element of the case was as to irregularities in the West Virginia legislature at the time of the election of Senator. Another objection is thus treated in the majority report presented by Mr. L. E. McComas, of Maryland:

The fifth objection assigned by John T. McGraw, memorialist, is that at the time of the election of Mr. Scott he was a citizen but not an inhabitant of the State of West Virginia, but was an inhabitant of the District of Columbia.

It is admitted that Mr. Scott was born in Ohio; that when a young man he removed to Wheeling, in West Virginia, engaged in business, had resided there until January 1, 1898, when he was appointed by the President Commissioner of Internal Revenue, and upon his confirmation thereafter he came to Washington to discharge the duties of this Federal office, but with the intent to retain his residence, citizenship, inhabitancy, and domicile in Wheeling, W. Va., his home; that in accord with this intent he exercised unchallenged the right to vote and did vote on November 8, 1898, in the precinct in Wheeling where his residence was and had remained unchanged; that he came here with no intent to change his domicile to Washington from Wheeling, and that he claims to be an inhabitant of Wheeling, W. Va., and that he remained in Washington in the discharge of his official functions with intent to return to his home in Wheeling when his duties of office here ended.

The mere statement of facts should suffice to show that this objection is unfounded. The Federal Constitution requires that the Senator shall bean "inhabitant" of the State. This term is a legal equivalent of the term "resident," and residence is what is required by the law of West Virginia to entitle the male citizens of that State to vote.

The committee, without extended discussion, were unanimously of the opinion that Mr. Scott was an inhabitant of West Virginia at the time of his election to the Senate of the United States and is entitled to retain his seat.

440. During the discussion of the qualifications of a Senator he presented his resignation; but the Senate disregarded it and proceeded to declare his election void.—On March 14, 1849,[2] the Senate was considering the eligibility of Mr. James Shields, of Illinois, to a seat in the Senate, when Mr. Shields tendered a letter containing his resignation. The reading of this letter was not permitted until the pending question had been postponed. Then the letter was

[1] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 888.

[2] Second session Thirtieth Congress, Senate Journal, pp. 364, 365; Appendix of Globe, pp. 338, 342–346.

read, and a resolution directing the Vice-President to inform the executive of the State of Illinois of the resignation was offered.

On March 15 the subject was debated at length, it being urged that if the Senate should inform the executive of Illinois of the resignation, that official might assume that such a vacancy existed as he would have the power to fill by appointment; also that the Senate would be precluded from settling the question as to Mr. Shield's qualifications. Finally the resolution directing the executive of Illinois to be informed was laid on the table, yeas 33, nays 14. Then the Senate resumed the subject of qualification and declared Mr. Shield's election void by reason of his not having been a citizen a sufficient time.

Chapter XIV.

THE OATH AS RELATED TO QUALIFICATIONS.

1. **The question of sanity. Section 441.**
2. **Questions of loyalty arising before the adoption of the fourteenth amendment. Sections 442–453.[1]**
3. **Provisions of the fourteenth amendment. Sections 455–463.[2]**

441. The Senate investigated the sanity of a Senator-elect before allowing him to take the oath.—April 30, 1844,[3] in the Senate, Mr. Spencer Jarnagan, of Tennessee, offered this resolution, just after the reading of the credentials to which it refers:

Resolved, That the credentials presented to the Senate of the election of John M. Niles to be Senator of the United States from the State of Connecticut be referred to a select committee, to consist of five, who shall be instructed to inquire into the election, returns, and qualifications of the said John M. Niles, and into his capacity at this time to take the oath prescribed by the Constitution of the United States.

After some discussion of the condition of Mr. Niles, during which it was stated by a Senator that of his own personal knowledge he could assure the Senate of the sanity of Mr. Niles, the resolution was agreed to. Messrs. Jarnagan; Thomas H. Benton, of Missouri; John M. Berrien, of Georgia; Silas Wright, of New York; and George McDuffie, of South Carolina, were appointed the committee.

On May 16 the committee reported, saying that after conversation with Mr. Niles they became satisfied of his capacity to take the oath. The report concludes:

The committee are satisfied that Mr. Niles is at this time laboring under mental and physical debility, but is not of unsound mind in the technical sense of that phrase; and the faculties of his mind are subject to the control of his will; and there is no sufficient reason why he be not qualified and permitted to take his seat as a member of the Senate; and they most cordially unite with Doctor Brigham (whose letter constitutes a part of the report of the committee) in the hope that such a course (that is, taking his rest in the Senate and participating at least two hours a day actively in its business) will be the means of usefulness and a resource against disease: Therefore,

Resolved, That the Hon. John M. Niles be permitted to take the oath of a Senator in the Congress of the United States, and to take his seat as a member of the Senate.

The resolution having been agreed to, Mr. Niles came forward, qualified, and took his seat.

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[1] See also Blakey *v.* Golladay (sec. 323 of this volume), Switzler *v.* Anderson (sec. 868 of Volume II), and case of Roberts (see. 478 of this volume).

[2] See cases of Sypher *v.* St. Martin (sec. 333 of this volume), Newsham *v.* Ryan (sec. 335 of this volume), and Charles H. Porter (sec. 387 of this volume).

Senate by special act modified oath of loyalty (sec. 391 of this volume).

[3] First session Twenty-eighth Congress, Journal of Senate, pp. 257, 283; Globe, pp. 592–594, 636.

442. The election case of Philip B. Key, of Maryland, in the Tenth Congress.

A Member having been a pensioner of a foreign government, the House considered his case and declared him entitled to his seat, but declined to affirm. that he was qualified.—On December 11, 1807,[1] William Findley, of Pennsylvania, from the Committee on Elections, submitted a report on the petition of certain electors in the Third Congressional district of Maryland, who prayed that the seat of Mr. Philip B. Key be vacated, alleging that he had not fulfilled the condition of a law of Maryland. This law, which imposed on Representatives in Congress from that State a qualification in addition to those prescribed by the Constitution, required a residence of twelve calendar months in the district before election, and it was alleged that Mr. Key did not fulfill this condition and that he was not an inhabitant of the State. The Committee on Elections found upon examination that the law had been repealed so far as Mr. Key's district was concerned, and therefore recommended this resolution:[2]

Resolved, That Philip B. Key, having the greatest number of votes and being qualified agreeably to the Constitution of the United States, is entitled to his seat in this House.

On January 21 and 22, 1808, this report was considered in the House, and at that time a statement was made that Mr. Key was, or had been, a pensioner of the British Government. Debate arising on this point, Mr. Barent Gardenier, of New York, contended that every person was eligible to a seat in the House unless expressly disqualified by the Constitution. There being nothing in the Constitution which disqualified a person from receiving a pension from a foreign government, this charge should not be considered in Mr. Key's case.

The House, however, decided that the report should be recommitted for further examination.

On February 24, 1808, the committee reported their findings of fact on the charge that Mr. Key was a British pensioner. In 1778 Mr. Key had accepted a commission in a provincial regiment of the British army. After the general peace of 1783 the corps he served in was disbanded, and he, with the other officers, was placed on half pay. In 1785 he returned to Maryland, being entitled to draw his half pay. In 1794 he sold his half pay to a brother-in-law, and shortly thereafter was elected to the Maryland legislature, where he served several years. Through the bankruptcy and death of the brother-in-law Mr. Key, in 1805, resumed the receipt of his half pay, but after taking six months' pay he ceased to draw it. In January, 1806, Mr. Key directed his agent in London to resign for him all right and claim to the half pay, and on October 28 or 29, 1807, sent a formal resignation of it to the British minister at Washington by the hands of a notary public.[3] The committee did not find that Mr. Key had ever taken the oath of allegiance to the King of Great Britain, but he had taken the oath required of the public servants

[1] First session Tenth Congress, Journal, pp. 16, 68, 71, 114, 139, 140, 192, 232, 235; Annals, pp. 1490–1495, 1945, 1848, 1849; House Reports Nos. 3 and 5, First session Tenth Congress.

[2] For question as to inhabitancy, see section 432 of this volume.

[3] It appears from the report that Mr. Key was elected October 6, 1806, and took the oath and his seat in the House on the day of organization of the Tenth Congress, October 26, 1807.

of the State of Maryland. The committee concluded that there was nothing in these facts to cause them to alter the conclusion which they had set forth in the former report.

On January 21, in Committee of the Whole, on motion of Mr. John Rhea, of Tennessee, the words "having the greatest number of votes, and being qualified agreeably to the Constitution of the United States," were stricken from the resolution. A little later question was raised as to Mr. Key's relation to the British Government, and the report was recommitted.

On March 17, after the committee had again reported, the question both of residence and half pay was discussed. Mr. John Rowan thought that, even were it true as to the alleged receipt of half pay by Mr. Key, neither the Constitution nor any law of the United States made it any disqualification. If Mr. Key had continued to receive the half pay after becoming a Member, that might be cause for discussion.

On March 18 the resolution was reported from the Committee of the Whole with the amendment adopted January 21. Mr. John Randolph, jr., of Virginia, demanded a division of the amendment, and accordingly the question was taken first upon the words "having the greatest number of votes." The House concurred in striking these out without division. The question then being taken on concurring in striking out the words "and being qualified agreeably to the Constitution of the United States," the yeas were 79 and the nays 28.

The question then recurred on the simple proposition declaring Mr. Key entitled to his seat, and it was agreed to—yeas 57, nays 52. The final debate seems to have been principally on the question of his residence.

443. In 1862, before the enactment of the test oath for loyalty, the Senate, after mature consideration, declined to exclude for alleged disloyalty Benjamin Stark, whose credentials were unimpeached.

In 1862 the Senate decided to administer the oath "without prejudice to any subsequent proceedings in the case" to a Senator-elect charged with disloyalty.

A Senate committee having, on the strength of ex parte affidavits, found Benjamin Stark disloyal, the Senate disagreed to a resolution for his expulsion.

In 1862 a Senator who challenged the right of a Senator-elect to be sworn substantiated his objection with ex parte affidavits.

An argument that a Senator-elect might be excluded for disqualifications other than the three specified by the Constitution.

On January 6, 1862,[1] the Senate, Mr. James W. Nesmith, of Oregon, presented the credentials of Benjamin Stark, appointed a Senator by the governor of Oregon to fill a vacancy occasioned by the death of Edward D. Baker.

Mr. William Pitt Fessenden, of Maine, moved that the oath[2] be not administered and that the credentials, with certain papers which he then offered, be referred to the Committee on the Judiciary. On January 6 and 10 this motion was debated at length. It was admitted by Mr. Fessenden that he considered

[1] Second session Thirty-seventh Congress, Globe, pp. 183, 265–269: Election Cases. Senate Document No. 11, special session Fifty-eighth Congress, p. 294.

[2] The so-called ironclad oath was not then in existence, having been approved July 2, 1862.

the motion unprecedented, but he considered it justified by the papers which he presented. These papers consisted of affidavits of persons in Oregon, who swore that they had heard Mr. Stark make disloyal speeches.

In the debate it appeared that persons presenting credentials as Senators had been denied their seats pending investigation; but that in such cases there had been involved questions of law only, raised by the wording of the credentials themselves or by the Senate taking judicial knowledge of a fact as to the session of a legislature. But in this case a fact as to qualification was raised, and loyalty was not one of the three enumerated qualifications. In support of the motion the cases of Kensey Johns, Ambrose H. Sevier, Lannian, and Dixon were cited.

An amendment striking the word "not" from Mr. Fessenden's motion was disagreed to—yeas 10, nays 29. Then Mr. Fessenden's motion was agreed to—yeas 29, nays 11.

On February 7, 1862,[1] Mr. Ira Harris, of New York, submitted the report of the Committee on the Judiciary, as follows:

The Committee on the Judiciary, to whom were referred the credentials of Benjamin Stark as a Senator from the State of Oregon, with the accompanying papers, have had the same under consideration, and, without expressing any opinion as to the effect of the papers before them upon any subsequent proceedings in the case, they report the following resolution:

Resolved, That Benjamin Stark, of Oregon, appointed a Senator of that State by the governor thereof, is entitled to take the constitutional oath of office.

Mr. Lyman Trumbull, of Illinois, dissented from the conclusions of the committee, and submitted the following views:

A preliminary question was raised in the Senate when this case was referred to the committee, whether it was competent for the Senate for any cause to refuse to allow a person to be sworn as a Member of the Senate whose credentials were in proper form, and who possessed all the qualifications as to age, citizenship, and inhabitancy prescribed by the Constitution, and whether the only remedy which the Senate had to protect itself against the presence of an infamous person, a convicted felon, or an avowed and open traitor, was not by expulsion by a two-thirds vote after he should have been sworn into office. The Senate decided, after debate, to refer the credentials of Mr. Stark, with the accompanying papers, consisting of written statements and affidavits impeaching his loyalty, to the committee without allowing him to be sworn. A majority of the committee now report the case back, with a resolution that Mr. Stark is entitled to take the constitutional oath, expressly stating that they do so "without expressing any opinion as to the effect of the papers before them upon any subsequent proceedings in the case."

This reservation of opinion on the evidence could only have become necessary on the supposition that some subsequent proceedings might be taken in the case, referring doubtless to a motion to expel the Senator after he should have been admitted a Member, for the reasons assigned in the accompanying papers, in effect establishing the principle that evidence of disloyalty, which might be sufficient to expel a Member when admitted, was not sufficient to prevent his qualifying as a Member. To this principle the undersigned can not agree. He believes it was the duty of the committee to examine and pass upon the evidence before it, and if found insufficient to prevent Mr. Stark from taking the constitutional oath, that it would also be insufficient to warrant his expulsion after he was admitted.

It is admitted that neither the Senate, Congress, nor a State can superadd other qualifications for a Senator to those prescribed by the Constitution, and yet either may prevent a person possessing all those qualifications, and duly elected, from taking his seat in the Senate. Does anyone question the right of a State to arrest for crime a person duly qualified for and appointed a Senator, hold him in confinement, and thereby prevent his appearing in the Senate to qualify? Suppose a Senator, after his appointment, and before qualifying, to commit the crime of murder. Would anyone question the

[1] Senate Report No. 11; Globe, p. 696.

right of the State authorities where the crime was committed to arrest, confine, and, if found guilty, execute the murderer, and thereby forever prevent his taking his seat? Or, if the punishment for the offense was imprisonment, would anyone question the right to hold the Senator in prison, and thereby prevent his appearing in the Senate?

Could the Senate in such a case expel him before he had been admitted to a seat? Or must he [be] brought from the felon's cell, be introduced into the Senate, and sworn as a Member before his seat could be declared vacant? If not, must the State go unrepresented till the time for which he was appointed has expired? Or would it be competent for the Senate in such a case, by a majority vote, to declaire the convict incompetent to hold a seat in the body, and thereby open the way for the appointment of a successor? It is manifest that the prescribing of the qualifications for a Senator in the Constitution was not intended to prevent his being held amenable for his crimes. The fact that the Constitution declares that Senators and Representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same," is conclusive that for those offenses they may be arrested. As a punishment for crime, then, it is clear that a Senator-elect, possessing all the constitutional qualifications of age, citizenship, and inhabitancy, may be prevented from taking the oath of office. Congress has repeatedly acted upon the presumption that it was entirely competent for it to prescribe, as a punishment for crime, an inability forever afterwards to hold any office of honor, profit, or trust under the United States.

By a statute passed in 1790, any person giving a reward to a United States judge as a bribe to procure from him any opinion or judgment, and the judge receiving such bribe, are both declared to be forever disqualified to hold any office of honor, trust, or profit under the United States. By an act passed in 1853, any Member of Congress after his election, and whether before or after he is qualified, who shall accept any reward given for the purpose of influencing his vote on any question which may come before him in his official capacity is declared incapable forever of holding any office of honor, trust, or profit under the United States. Similar laws, it is believed, exist in most of the States, prescribing as part of the punishment for particular offenses, such as dueling, bribery, and some others, a disqualification for holding any office under the State, and this notwithstanding the State constitutions may have prescribed the qualifications for members of their legislatures, of which the disqualification arising from the conviction for crime was not one. The power of Congress to prescribe the punishment for treason is expressly given by the Constitution, except that it can not be made to work corruption of blood or forfeiture beyond the life of the person attainted. Does anyone doubt the power of Congress under this clause of the Constitution to declare that a person convicted of treason should forever be incapable of holding any office under the United States? If this were done, would it be pretended that a convicted traitor was entitled to be sworn as a Senator? The clause of the Constitution prescribing the qualifications of Senators and Representatives could never have been intended to limit the power to make disqualification to hold those or any other offices a penalty for the commission of crime, especially treason. Its design, doubtless, was to produce uniformity of qualification in all the States, and to prevent any particular class of persons, such as ministers of the gospel, or others, from being excluded from these positions. If it be competent for Congress to make disqualification to hold office a punishment for an offense against the United States, then it is clearly competent for the Senate, which, by the Constitution, is made "the judge of the elections, returns, and qualifications of its own members," to do the same thing, so far as the right to take a seat in that body is concerned. Doubtless a law of Congress declaring that a person convicted of a particular offense should not hold office under the United States, and the decision of the courts sustaining such a law, would not preclude the Senate from admitting such a person to a seat, should it think proper, because the Senate is the exclusive judge of the elections, returns, and qualifications of its own Members; yet it is hardly conceivable that the Senate ever would admit such a person to be sworn; nor does the fact that Congress has not adopted such a punishment for disloyalty or treason prevent the Senate from refusing to allow to be sworn as a Member a person believed by the body to be guilty of those offenses or other infamous crimes.

That one avowed traitor, a convicted felon, or a person known to be disloyal to the Government has a constitutional right to be admitted into the body would imply that the Senate had no power of protecting itself—a power which, from the nature of things, must be inherent in every legislative body. Suppose a Member sent to the Senate, before being sworn, were to disturb the body and by violence interrupt its proceedings, would the Senate be compelled to allow such a person to be sworn as a Member

of the body before it could cast him out? Surely not, unless the Senate is unable to protect itself and preserve its own order. The Constitution declares that "each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." The connection of the sentence in which the power of expulsion is given would indicate that it was intended to be exercised for some act done as a Member, and not for some cause existing before the Member was elected or took his seat. For any crime or infamous act done before that time the appropriate remedy would seem to be to refuse to allow him to qualify, which, in the judgment of the undersigned, the Senate may properly do; not by way of adding to the qualifications imposed by the Constitution, but as a punishment due to his crimes or the infamy of his character. Hence the undersigned, conceiving that it was the duty of the committee to have expressed its opinion on the evidence of disloyalty before it and to have reported in favor of or against the swearing in of the Senator as the evidence should warrant, and not allow him to be first sworn, and leave the question of his loyalty to be subsequently determined on a motion to expel, the undersigned forbears to review the evidence of disloyalty before the committee or to express any opinion upon it till the pending question of jurisdiction to consider it is determined.

The report was debated long and learnedly on February 18, 24, 26, and 27.[1]

Mr. Harris, in opening the debate,[2] gave the reasons for the conclusion which he had submitted from the committee.

The question submitted to the committee was, whether or not evidence of this description (certain ex parte affidavits alleging treasonable declarations) could be allowed to prevail against his prima facie right to take his seat as a Senator. The committee were of opinion that they could not. The Constitution declares what shall be the qualifications of a Senator. They are in respect to his age, in respect to his residence, in respect to his citizenship; and the committee were of opinion that the Senate were limited to the question, first, whether or not the person claiming the seat and presenting his credentials produced the requisite evidence of his election or appointment; and second, whether there was any question as to his constitutional qualifications. * * * I do not understand that it is competent for the Senate, and I think they step aside from their only jurisdiction when they attempt to punish a man for his crime or misbehavior antecedent to his election. If this were so, the Constitution ought to be amended so as to read that the legislature of a State or the governor of a State, in a certain contingency, shall elect or appoint a Senator, subject to the advice and consent of the Senate. The Senate would then be the ultimate judge whether or not the man ought to have a seat here, and it would be competent for the Senate upon any caprice or any view it might take of the capacity, moral, or intellectual, or political, of a man, to reject him and prevent his taking a seat. Sir, I do not so understand the Constitution. I understand the Senate is the judge of the election of a Senator, of the sufficiency and genuineness of the returns furnished, and the evidence of the election; and also of the constitutional qualifications of the individual to hold a seat in the Senate. Beyond that I apprehend the Senate have no power at all.

On the other hand, it was urged by Mr. Charles Sumner, of Massachusetts,[3] that the Constitution required the oath to support the Constitution, and that this was in effect another constitutional qualification as to loyalty.

This contention was combatted, especially by Messrs. Timothy O. Howe, of Wisconsin, and John Sherman, of Ohio[4] who contended that the clause of the Constitution requiring the oath did not, in effect, impose a fourth qualification.

It was urged by Mr. James R. Doolittle, of Wisconsin:[5]

The power given to a majority to pass upon his qualifications implies the power to pass upon his disqualifications also, and that they may refuse to admit to a seat one who is disqualified as an avowed traitor. I am more inclined to that opinion because, after the question of his right to a seat upon this

[1] Globe, pp. 861, 925, 963, 988–994.

[2] Globe, p. 961.

[3] Globe, pp. 869, 969.

[4] Globe, p. 927, 969.

[5] Globe, pp. 926.

ground is distinctly raised and passed upon by the Senate, it may become res adjudicata, which can not be reopened. While I think this power is in a majority, it is in its nature judicial; and in its exercise, whether by a majority or two-thirds, this body should proceed with the same deliberation and the same freedom from all party bias as if sitting as a court.

In opposition Mr. Howe argued,[1] after enumerating the qualifications of the Constitution:

What other qualifications the Senator should have are to be determined first by the constituent body when they elect; and from their decision there is, in my judgment, no appeal, except to two-thirds of the Senate upon a motion to expel.

It was further urged by Mr. Sherman[2] that the power to expel was unlimited, and he cited English cases to show that it might be applied to offenses committed before election.

On February 27[3] the question was taken first on the amendment proposed by Mr. Sumner to the resolution, viz:

Strike out the words "is entitled to take the constitutional oath of office" and in lieu thereof insert "and now charged with disloyalty by the affidavits of many citizens of Oregon, and also by a letter addressed to the Secretary of State and signed jointly by many citizens of Oregon, some of whom hold public trusts under the United States, is not entitled to take the constitutional oath of office without a previous investigation into the truth of the charge."

This amendment was disagreed to—yeas 18, nays 26.

Thereupon Mr. Doolittle moved that the resolution be amended by adding thereto the words—

without prejudice to any subsequent proceedings in the case.

It was explained that this was proposed so that the Senate might not be precluded from passing on the question of expulsion. In opposition it was urged that the Senate could not be so precluded, but the amendment was agreed to, there being, on division, ayes 24, noes 16.

On the question to agree to the resolution as amended, as follows:

Resolved, That Benjamin Stark, of Oregon, appointed a Senator of that State by the governor thereof, is entitled to take the constitutional oath of office without prejudice to any subsequent proceedings in the case.

It was determined in the affirmative—yeas 26, nays 19.[4]

Mr. Stark then took the oath.

On February 28[5] Mr. Stark offered this resolution:

Resolved, That the papers relating to the loyalty of Benjamin Stark, a Senator from Oregon, be withdrawn from the files of the Senate and referred to the Committee on the Judiciary, with instructions to investigate the charges preferred against said Stark on all evidence which has been or may be presented, and with power to send for persons and papers.

This resolution was debated at length on February 28 and March the 18,[6] discussion relating largely to the effect of the decision to admit Mr. Stark, and the propriety of further action in view of that vote. Some of those Senators who had voted to exclude argued that it was now rather late to propose to purge the Senate

[1] Globe, p. 927.

[2] Globe, p. 970.

[3] Globe, p. 993.

[4] Globe, p. 994.

[5] Globe, p. 1011.

[6] Globe, pp. 1011–1014, 1261–1266.

of an alleged unworthy Member, and that he should have been excluded at the outset.

Finally, after amending the resolution by substituting a select committee for the Judiciary Committee, the resolution was agreed to—yeas, 37; nays, 3.

On April 22, Mr. Daniel Clark, of New Hampshire, chairman of the select committee, submitted a report.[1] This report states that it was not thought practicable, because of the remoteness of Oregon, to take any further testimony, and says:

The committee met on the 24th of March, and the Senator from Oregon attended the meeting in compliance with the invitation of the committee, and desired that the committee should examine the papers before them, and if they should come to the conclusion that grounds were furnished for the charge of disloyalty by the papers and testimony, that the committee should draw up specific charges, to which he would file his answer. This the committee declined to do, for the reason that they did not wish to become his prosecutors, and were charged by the Senate with investigation and not accusation.

Mr. Stark was informed that the committee did not propose to take any further testimony unless he desired it, but would investigate the charges as presented by the papers then before them. To which the committee understood Mr. Stark to reply that he did not wish to take any further testimony as the matter stood. It was then suggested by the committee to the Senator from Oregon that he should submit to the committee his answer in writing to the allegations and evidence then before the committee, with any further evidence he might wish to present, and that the committee would adjourn to afford him the necessary time for that purpose.

The report next quotes the letter of Mr. Stark, a portion of which is as follows:

If the committee propose to confine their investigation exclusively to those statements and ex parte affidavits now before them, in connection with what I may submit for their consideration, it may not be inappropriate for me to express my opinions in regard to them, and I shall do so in the same spirit by which the committee appear to have been actuated in making the request.

As it could not be fairly supposed that I would permit myself to occupy the attitude of self-prosecutor or that I would assume the task of defending myself when no charge on prima facie evidence had been preferred against me, I trust that I may do so without derogating from the true position which my honor and self-respect demand that I should occupy.

With all due deference, therefore, I submit that as a Senator of the United States for the State of Oregon I am entitled to, and I claim, every presumption of honor, integrity, loyalty, and patriotism that can be claimed by any other Senator until such presumption is overborne by competent testimony. It certainly would be very extraordinary to put an honorable Senator upon trial for expulsion without charges and specifications made with reasonable (if not technical) precision, and supported by testimony subjected to all the tests which human wisdom and human experience have found to be essential for the ascertainment of truth. Should such a case ever arise it is reasonable to suppose that it would not be permitted long to interrupt the order or disturb the decorum of the American Senate. Unless the proceedings of your committee are to be regarded as a preliminary inquiry, whether or not charges for expulsion ought to be preferred against me, in what essential particular does this case differ from the one suggested?

The papers referred to you I have again examined with that earnest attention which a deep personal interest in the result of an inquiry must ever stimulate, and with the light reflected upon them by the communication which I had the honor to address to the Committee on the Judiciary under date of January 17 ultimo, I am unable to discover anything upon which a sufficient charge for expulsion can be predicated, or anything in the nature of evidence which an impartial tribunal could receive as sufficient to justify expulsion from the Senate. Accepting all the statements contained in the letters, affidavits, etc., to be true, and there is merely attributed to me opinions which in the field of politics might be regarded as heresies, and expressions charged upon me which might be characterized as idle, mischievous, and unwise. This suggestion, I need not remind the committee, is not made as palliative upon an admission by me of the truth of any part of these statements, but purely as argumentative and as properly

[1] Senate Report No. 38, second session Thirty-seventh Congress.

within the scope of my purpose in addressing to them this communication. Guided by this purpose, I have in these reflections excluded any denial or admission of anything contained in the papers before the committee, my chief design being accomplished if I shall have succeeded in showing the utter impossibility of making, or even entering upon, a defense of any specific charge or of proffering to rebut evidence when none is presented.

I can not conclude this brief statement without asserting, as in substance I did in my communication to the Judiciary Committee, that the declarations of my assailants are utterly false in many particulars which might be deemed important, especially the statements of Hull and Law; that the expressions attributed to me in others of the affidavits have been wickedly and maliciously perverted, and that in every respect their declarations are unjust to my real sentiments and at variance with the whole tenor of my life.

The committee, after giving Mr. Stark opportunity to present further testimony, and after he had failed to do so, reached conclusions which they state as follows:

The committee then proceeded to consider the allegations and charges contained in the papers which had been submitted to them by the Senate, in connection with his answer and statement, and upon mature deliberation do find the following conclusions from the facts proved, viz:

First. That for many months prior to the 21st of November, 1861, and up to that time, the said Stark was an ardent advocate of the cause of the rebellious States.

Second. That after the formation of the constitution of the Confederate States he openly declared his admiration for it and advocated the absorption of the loyal States of the Union into the Southern Confederacy under that constitution as the only means of peace, warmly avowing his sympathies with the South.

Third. That the Senator from Oregon is disloyal to the Government of the United States.

The report gives extracts from the evidence and argument to show the reasons for these conclusions. In support of the third conclusion they cited utterances of Mr. Stark's—

calculated to encourage the rebellion and discourage the efforts to suppress it.

The report was signed by the chairman and by Messrs. J. M. Howard, of Michigan, Joseph A. Wright, of Indiana, and John Sherman, of Ohio.

Mr. W. J. Willey, of Virginia, did not entirely concur:

Concurring in the first two conclusions of the majority of the committee, I am yet constrained, not without hesitation, to differ with them in their third and last conclusion. Distrusting all ex parte testimony, especially in regard to expressions uttered in the heat of high political excitement, seeing that the sentiments and opinions thus attributed to Mr. Stark are virtually denied and repudiated by him in his written statement before the committee; remembering that since it is alleged those conversations took place and those expressions were uttered Mr. Stark, in taking his seat as a Senator, has purged himself of these sinister allegations by taking the oath to support the Constitution of the United States, and especially fearing the danger of making mere difference of opinion, however wide and fundamental, a test of fidelity to the Government, I am not prepared to say that Mr. Stark is now disloyal.

On May 7[1] Mr. Sumner submitted the following resolution for consideration:

Resolved, That Benjamin Stark, a Senator from Oregon, who has been found by a committee of this body to be disloyal to the Government of the United States, be, and the same is hereby, expelled from the Senate.

It was stated at this time by Mr. Sherman, who signed the report, that only a small portion of the session remained, and that the people of Oregon would very

[1] Globe, p. 1983.

soon have the opportunity of passing on the question of Mr. Stark's loyalty. Therefore he did not favor the presentation of a resolution of expulsion.

On June 5 and 6,[1] however, Mr. Sumner pressed the question to the attention of the Senate, and on the latter day, almost without debate, the question was taken on agreeing to the resolution, and it was disagreed to—yeas 16, nays 21.

444. A question being raised as to the loyalty of a Member-elect, the House has exercised its discretion about permitting him to take the oath at once.—On November 21, 1867,[2] the Members-elect from the State of Tennessee appeared to take the oath, when Mr. James Brooks, of New York, challenged Mr. William B. Stokes, alleging that he had been disloyal during the war, and presenting in support thereof a letter alleged to have been written by Mr. Stokes in 1861, announcing an intention to resist the Federal Government.

On the same day Mr. James Mullins was challenged on the charge of disloyalty, in support of which a letter written by an army officer, but not verified by oath, was read, charging Mr. Mullins with disloyal utterances in 1861.

In the debate it was argued that in these two cases the charge was not made on the responsibility of a Member, supported by affidavits, as in the Kentucky cases; that the gentlemen in question were known to have acted loyally during the war, and that the evidence shown against them was not sufficient to preclude their taking the test oath with the approval of their own consciences.

Resolution to refer the credentials and deny the oath to the two Members-elect were disagreed to by the House, and they were sworn.

445. On November 21, 1867,[3] the Members-elect from the State of Tennessee appeared to take the oath, the House being already organized. Thereupon Mr. James Brooks, of New York, challenged the right of Mr. R. R. Butler to be sworn on the ground that he had been disloyal to the Government, presenting in support of the charge the journal of the legislature of the State of Tennessee at the time of the secession acts.

After debate the House agreed to the following resolution:

Resolved, That the credentials of R. R. Butler, from the First district of Tennessee, be referred to the Committee of Elections, and that he be not sworn pending the investigation.

446. On January 31, 1870,[4] Mr. John A. Bingham, of Ohio, presented the following:

Resolved, That the Hon. Lewis McKenzie be now sworn in as Member of this House from the Seventh district of Virginia, he having the prima facie right thereto; but without prejudice to the claim of Charles Whittlesey, contestant to such seat, or to his right to prosecute his claim thereto.

It appeared from the debate that the credentials of Mr. McKenzie were in proper form, but that the Committee of Elections felt themselves bound by the resolution of the House directing them, whenever a contestant should allege that his opponent could not take the oath of loyalty to inquire into the prima facie right, and report

[1] Globe, pp. 2569, 2571, 2572, 2596.

[2] First session Fortieth Congress, Journal, pp. 253, 254; Globe, pp. 768–778.

[3] First session Fortieth Congress, Journal, p. 253; Globe, p. 768. At this time the law providing for the test oath was in force.

[4] Second session Forty-first Congress, Journal, p. 239; Globe, p. 917.

their finding. Such an inquiry had been begun in this case, but the report would not be made up for some time. Under these circumstances, and because several Members vouched for the loyalty of Mr. McKenzie, the House decided to permit him to take the oath, agreeing to the resolution.

447. The House decided that the oath should be administered to a Member-elect, although a Member charged that he was personally disqualified.—On March 4, 1871,[1] while the Speaker was administering the oath to the Members-elect at the time of the organization of the House, the name of Mr. Alfred M. Waddell, of North Carolina, was called, whereupon Mr. Horace Maynard, upon his authority as a Member of the House, objected to the swearing in of Mr. Waddell, on the ground that he was personally disqualified.

Mr. Waddell stood aside; and after the organization of the House had been completed, Mr. Maynard stated that the disqualification which he charged existed under the third article of the fourteenth amendment of the Constitution. Before the war Mr. Waddell had held the office of clerk and master of chancery in North Carolina, an office which required him to take an oath to support the Constitution of the United States. After that he had served as an officer in the Confederate army. The supreme court of North Carolina had determined that the office of clerk and master of chancery was a judicial office.

Mr. William D. Kelley, of Pennsylvania, contended that the office in question was not judicial in character, and that the House was not bound by the decision of the North Carolina court, for they were the judges of the qualifications of their own Members. He then read the law of North Carolina defining the duties of the office to show to the House that they were not judicial in character.

Then, on motion of Mr. Kelley, the oath was administered to Mr. Waddell.

Then, on motion of Mr. Maynard, his credentials were referred to the Committee on Elections.

448. The election case of the Kentucky Members in the Fortieth Congress.

Before the adoption of the fourteenth amendment, and in a time of civil disorders, the House denied the oath to Members-elect who presented themselves with credentials in due form but whose loyalty was questioned; and the credentials were referred to a committee.

In 1867 it was held that no man duly elected should be excluded for disloyalty unless it could be clearly proven that he had been guilty of such open acts of disloyalty that he could not honestly and truly take the oath of July 2, 1862.

Before the adoption of the fourteenth amendment, and in a time of civil disorders, a committee reported and the House sustained the view that no person who had been disloyal should be sworn.

In 1867 the Elections Committee took the view that charges of the disloyalty of a constituency should not prevent a person holding a regular certificate from taking a seat on his prima facie right.

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[1] First session Forty-second Congress, Journal, pp. 9, 13; Globe, pp. 6, 11, 12.

In 1867 Members who challenged the right of a Member-elect to take the oath did so, one on his responsibility as a Member and the other on the strength of affidavits.

On July 3, 1867,[1] the Congress having assembled from a recess caused by a temporary adjournment, the Clerk called the names of 8 gentlemen returned as Members-elect from the State of Kentucky, with credentials in due form.

Thereupon Mr. Robert C. Schenck, of Ohio, challenged the right of one of them, Mr. John D. Young, to take the oath on the ground that he had given aid and comfort to the enemies of the Government. Mr. Schenck produced affidavits in support of this charge. Mr. John A. Logan, of Illinois, also presented affidavits charging Mr. L. S. Trimble, another of the Members-elect from Kentucky, with disloyalty. Mr. John F. Benjamin, of Missouri, on his responsibility as a Member, challenged the loyalty of a third, Mr. J. Proctor Knott. In the course of the debate the fact was developed that only one of the 8, Mr. George M. Adams. was free from the objections which were being urged.

After debate the House—yeas 67, noes 50—agreed to the following:

Whereas it is alleged that in the election recently held in the State of Kentucky for Representatives in the Fortieth Congress the legal and loyal voters in the several districts in said State have been overawed and prevented from a true expression of their will and choice at the polls by those who have sympathized with or actually participated in the late rebellion, and that such elections were carried by the votes of such disloyal and returned rebels; and whereas it is alleged that several of the Representatives-elect from that State are disloyal: Therefore be it

Resolved, That the credentials of L. S. Trimble, John Young Brown, J. Proctor Knott, A. P. Grover, Thomas L. Jones, James B. Beck, and John D. Young, Members-elect from the State of Kentucky, shall be referred to the Committee of Elections for report at as early a day as practicable.

On July 5[2] a proposition that the oath be administered to Messrs. Beck and Grover, against whom the charges of disloyalty were less specific, led to a discussion of the grounds for refusing the oath to a person presenting a certificate in due form, Members asserting that such action was justifiable in a case of alleged personal disqualification. The proposition was referred to the Committee of Elections.

On July 8[3] the Committee on Elections reported, through Mr. Henry L. Dawes, of Massachusetts, reciting the allegations that had been made, and concluding:

The committee are of opinion that no person who has been engaged in armed hostility to the Government of the United States, or who has given aid and comfort to its enemies during the late rebellion, ought to be permitted to be sworn as a Member of this House, and that any specific and apparently well-grounded charge of personal disloyalty made against a person claiming a seat as a Member of this House ought to be investigated and reported upon before such person is permitted to take the seat; but all charges touching the disloyalty of a constituency in a State in which loyal civil government was not overthrown during the late rebellion, or the illegality of an election, are matters which pertain to a contest in the ordinary way, and should not prevent a person holding a regular certificate from taking his seat.

In view of this report the House agreed to a resolution giving the committee

[1] First session Fortieth Congress, Journal, p. 161; Globe, pp. 468–479.

[2] Globe, pp. 501–503; Journal, p. 165.

[3] Journal, pp. 170, 171; Globe, pp. 513–515. Report No. 6; 2 Bartlett, p. 327; Rowell's Digest, p. 218.

the authority necessary to inquire whether any or either of the seven persons were disqualified

from sitting as Members of this House on account of their having been guilty of acts of disloyalty to the Government of the United States, or having given aid or comfort to its enemies.

On December 3, 1867,[1] Mr. Burton C. Cook, of Illinois, submitted the report.[2] After affirming again the principles set forth in the former report the committee say:

It is apparent that there must be power in this House to prevent this [seating of disloyal persons], the House being the judge of the qualifications of its Members, of which fidelity to the Constitution is one, and that this end can only be certainly accomplished by the investigation of any specific and apparently well-grounded charge of personal disloyalty made against a person claiming a seat as a Member of this House, before such person is permitted to take the seat. The House concurred in this view of the committee by adopting the resolution under which the committee is now acting. The principle upon which this preliminary investigation was ordered was adopted by Congress when the oath of office to be taken by Members of this House was prescribed by law, and the preliminary investigation of specific and apparently well-founded charges against a person claiming a seat in this House is only an additional mode of attaining the same result sought to be secured by requiring the oath to be taken by all persons who become Members of the House. * * *

Whether at some future time provisions should be made by law by which those persons who have been at one time guilty of acts of disloyalty, but have by their subsequent conduct given conclusive evidence of loyalty, attachment to the Government, and obedience to the Constitution and laws, should be permitted to take seats in this House, is a matter which addresses itself to the considerate judgment of Congress, but upon which the committee is not now called upon to express an opinion. But while the committee entertained no doubt that it is the right and duty of this House to turn back from its very threshold everyone seeking to enter who has been engaged in armed hostility to the Government of the United States, or has given aid and comfort to its enemies during the late rebellion, yet we believe that in our Government the right of representation is so sacred that no man who has been duly elected by the legal voters of his district should be refused his seat upon the ground of his personal disloyalty, unless it is proved that he has been guilty of such open acts of disloyalty that he can not honestly and truly take the oath prescribed by the act of July 2, 1862; and further, that the commission of such acts of disloyalty to the Government should not be suspected merely, but should be proved by clear and satisfactory testimony, and that while mere want of active support of the Government or a passive sympathy with the rebellion are not sufficient to exclude a person regularly elected from taking his seat in the House, yet whenever it is shown by proof that the claimant has by act or speech given aid or countenance to the rebellion, he should not be permitted to take the oath, and such acts or speech need not be such as to constitute treason technically, but must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion. In obedience to the resolution of this House of July 8, 1867, acting upon the views herein expressed, your committee sent a subcommittee to the State of Kentucky, and carefully examined all the evidence which they could procure upon the question referred to them, and upon an examination of the evidence they find that it is not proved that either James B. Beck, Thomas L. Jones, A. P. Grover, or J. Proctor Knott have been engaged in armed hostility to the Government of the United States, or have given aid and comfort to its enemies, during the late rebellion, and they therefore recommend that they be permitted to be sworn as Members of this House. In relation to the case of Lawrence S. Trimble, John D. Young, and John Young Brown, the committee reports that the seat of each of these gentlemen is contested, and that in each case the contestants have made the point that the person holding the certificate of election had been guilty of direct acts of disloyalty to the Government, and evidence has been taken both by the claimants and contestants, in addition to that taken by the committee, upon that question, which evidence the

[1] Second session Fortieth Congress, Report No. 2; 2 Bartlett, p. 368; Journal, p. 30; Globe, pp. 11, 13.

[2] It was announced in the House that Messrs. Michael C. Kerr, of Indiana, and Joseph W. McClurg, of Missouri, did not concur in the legal propositions laid down in the report.

committee has not yet had time to consider, and is not now prepared to report any conclusion in those cases. The committee believes that it will be able to report in those cases within a short time, as the cases are understood to be ready for a final hearing.

The committee recommends the adoption of the following resolution:

Resolved, That James B. Beck, Thomas L. Jones, A. P. Grover, and J. Proctor Knott are entitled to seats as Members of this House from the State of Kentucky.

The resolution was agreed to without division, and the four persons named were sworn in as Members.[1]

449. The Kentucky election case of Smith v. Brown in the Fortieth Congress.

In 1868 the House excluded a Member-elect who, by voluntarily giving aid and comfort to rebellion, had, in the opinion of the House, made it impossible for him to take the oath of office prescribed by law.

In 1868, a question of loyalty arising, the House in effect held that there might be established by law qualifications other than those required by the Constitution.

In 1868 it seems to have been assumed by the Committee on Elections, if not by the House itself, that the House alone might not add to the qualifications prescribed by the Constitution.

Form of oath prescribed by the act of July 2, 1862, known as the "Ironclad oath."

Discussion as to whether or not the law prescribing the oath of loyalty in 1862 was constitutional.

The House may by resolution modify the legal requirements for taking testimony in an election case.

On July 9, 1867,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, presented this resolution, which was agreed to:

Resolved, That in each of the cases of contested election from Kentucky, the time for taking testimony is hereby extended to the 1st day of December next, in all things else conforming to existing law, except that such testimony may be taken before a notary public.

On January 21, 1868,[3] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted the report of a majority of the committee[4] in one of the above-mentioned cases, Smith v. Brown. Mr. Brown had presented credentials in proper form, but had been excluded with other Kentucky Members.[5]

There was no doubt that he had received a large majority of the votes.

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[1] On December 18, 1863, in the Senate, Mr. Charles Sumner, of Massachusetts, proposed a rule requiring all Senators to take and subscribe in open Senate to the oath or affirmation provided for by the act of July 2, 1862. This gave rise to a lengthy and learned debate on the subject of the oath required and allowed by the Constitution, and upon the question of establishing qualifications outside of those provided by the Constitution. The debate was continued January 20, 21, and 25, 1864, and on the latter day the resolution was agreed to, yeas 28, nays 11. (First session Thirty-eighth Congress, Globe, pp. 48, 275, 290, 320–331, 341.)

[2] First session Fortieth Congress, Journal, p. 177; Globe, p. 546.

[3] Second session Fortieth Congress, House Report No. 11; 2 Bartlett, p. 395; Rowell's Digest, p. 220.

[4] Minority views filed by Messrs. M. C. Kerr, of Indiana, and John W. Chanler, of New York.

[5] See section 448 of this work.

This election case, the first of its kind since the formation of the Constitution, and recognized by the House as of the highest importance, was divided into two branches, which the House decided to debate and decide separately.

(1) The question as to whether or not John Young Brown was disqualified from sitting as a Member of the House on account of his having been guilty of acts of disloyalty to the Government of the United States or having given aid or comfort to its enemies. The majority of the committee, in their report, cite first the oath prescribed by the act of July 2, 1862: [1]

That hereafter every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation:

I, A. B., do solemnly swear (or affirm) that have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: so help me God.

The report then says:

The committee understands itself to be instructed to inquire whether the said Brown has committed any of the acts which he is required by said statute, before entering upon the duties of a Representative, to make oath that he has not done.

The evidence relied upon to support this charge of disloyalty against Mr. Brown is contained in the following letter, written by him at the time it bears date, to the editors of the Louisville Courier, and published in that paper on the 15th day of May following:

[From the Louisville Courier, May 15,1861.]

ELIZABETHTOWN, *April 18, 1861.*

Editors Louisville Courier:

My attention has been called to the following paragraph, which appeared in your paper of this date:

"JOHN YOUNG BROWN'S POSITION.—This gentleman, in reply to some searching interrogatories put to him by Governor Helm, said, in reference to the call of the President for four regiments of volunteers to march against the South—

"'I would not send one solitary man to aid that Government, and those who volunteer should be shot down in their tracks.'"

This ambiguous report of my remarks has, I find, been misunderstood by some who have read it, who construe my language to apply to the *government of the Confederate States!* What I did say was this:

"Not one man or one dollar will Kentucky furnish *Lincoln* to aid *him* in his *unholy war against the South.* If this *northern army* shall attempt to cross our borders, *we will resist it unto the death;* and if one man shall be found in our Commonwealth to volunteer to join them *he ought* and I believe will *be shot down before he leaves the State."*

This was not said in reply to any question propounded by ex-Governor Helm, as you have stated, and is no more than *I frequently uttered publicly and privately* prior to my debate with him.

Respectfully,

JOHN YOUNG BROWN.

[1] 12 Stat. L., p. 502.

The majority and minority differed as to the purport and effect of these words. The minority contended that considering the circumstances at the time the letter was written it was not disloyal. The majority concluded that Mr. Brown having "voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States," he is not entitled to take the oath of office or to be admitted to this House as a Representative from the State of Kentucky.

Therefore the majority of the committee recommended the adoption of the following resolution:

Resolved, That John Young Brown, having voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States, is not entitled to take the oath of office as a Representative in this House from the Second Congressional district of Kentucky or to hold a seat therein as such Representative.

This portion of the report was debated fully on January 31 and February 1 and 3, 1868[1]. The question of fact as to whether the letter actually constituted such an act as the majority contended was considered, but the conflict was especially vigorous over the legality of the proposed action.

In opposition to the action recommended by the majority of the committee it was urged[2] that in the compact known as the Constitution it was agreed that no State should elect any person who should not have three specified qualifications, of age, citizenship, and inhabitancy. Either House might judge the elections, returns, and qualifications of its own Members and might expel. Subject to these limitations the right and power of the States over their Representatives was exclusive and complete. The attempt in the act of July 2, 1862, to impose another qualification was in direct conflict with the terms of the original pact. The imposition of additional limitations not being among the powers granted to the Congress, it must be unconstitutional and void. But even supposing the act of 1862 to be constitutional, it was not competent for the House to inquire whether a Member might take the oath. That was a question for him to determine by himself. It was further urged,[3] although not as vital, that even under the terms of the act of 1862 the oath might not be rightfully required, since there was a broad distinction between a Member of Congress and the officer referred to in that act. Further, the law of the oath was unconstitutional in that it was ex post facto and assumed to punish for alleged offenses committed before its enactment, and also to punish without legal trial and conviction. In the case of ex parte Garland the Supreme Court had held this oath unconstitutional when applied to lawyers. The oath was also unconstitutional, because the Constitution prescribed only an oath "to support this Constitution." Under the legal principle "expressio unius exclusio alterius' it was to be presumed that the Constitution meant what was written and nothing more. The same doctrine would indicate that in enumerating the three qualifications the Constitution intended that there should be no more. In support of this contention Justice Story was quoted. It was true that the House was the judge of the qualifications of its

[1] Globe, pp. 891, 899, 901, 916, 937.

[2] By Mr. James B. Beck, of Kentucky, Globe, p. 902.

[3] By Mr. J. Proctor Knott, of Kentucky, Globe, p. 912.

own Members, but this did not mean that it might create new qualifications. It must sit in a judicial and not a legislative capacity, and decide only whether the Member had the three enumerated qualifications. This argument as to the inability of the House to add qualifications by itself was admitted to be sound by the chairman of the Elections Committee,[1] who presented the report against Mr. Brown, but he of course held that the Congress might by the law of the oath establish the additional qualification of loyalty.

In support of the resolution of exclusion it was argued that the Government might go behind the qualifications enumerated in the Constitution. It was true that only three qualifications were specified, but did not this mean that no man should serve who had not at least these three qualifications?[2] It had been held that the States might not impose other qualifications, but it did not necessarily follow that the Congress, with the approval of the President, i.e., the Government, might not prescribe other qualifications. It was inherently implied in every constitutional provision under which the House had its existence that no man should be qualified to sit as a Member who had not the indispensable qualification of loyalty to the Government. The laws of human society authorized a government to resort to all means to preserve itself. In McCulloch *v.* Maryland, Chief Justice Marshall had set forth views sustaining the argument that Congress had full powers of preservation of itself. The Congress of 1862 had full power to adopt the form of oath in question in this case as a consequence. It was further urged[3] that if under the Constitution no qualifications except those enumerated could be required, then the great leaders of the recent rebellion might be elected to the House and seated. Even expulsion might not be a remedy, since if a man had a right to take a seat he had a right to hold it. By laws passed in 1793 and 1853, disqualifying persons guilty of certain acts from holding any office of honor, trust, or profit under the United States, Congress had asserted its right to prescribe additional qualifications. It could not be said that exclusion from the House in the pending case was an ex post facto punishment, for a disqualification from holding office was not an increase of penalty.

In rebuttal the minority argued that the case of McCulloch *v.* The State of Maryland had no application to the pending case. Also, the effect of the acts of 1793 and 1853 was denied on the ground that a Member of Congress was not an officer within the meaning of those laws.

On February 13[4] the question was taken on a motion of Mr. Michael C. Kerr, of Indiana, to substitute for the resolution proposed by the majority the following:

> That John Young Brown, not having voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility to the United States, and having received a majority of the votes cast in the Second district of Kentucky for Representative in this House, is entitled to admission and to take the oath of office as a Representative from said district.

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[1] Mr. Henry L. Dawes, of Massachusetts, Globe, p. 915. Mr. Dawes cited his report in this case, wherein he said that the House "can judge whether each Member has been elected according to the laws of his State and possesses the qualifications fixed by the Constitution. Here its power begins and ends."

[2] Speech of Mr. Dawes, Globe, p. 894.

[3] By Mr. Burton C. Cook, of Illinois, Globe, p. 909.

[4] Journal, pp. 342, 343; Globe, p. 1161.

This amendment was disagreed to, yeas 43, nays 38.

The resolution of the majority, excluding Mr. Brown, was then agreed to without division.

450. The Kentucky case of Smith v. Brown, continued.

In the Kentucky cases in 1868 a contest was presented and sustained against a person to whom the House had refused the oath on his prima facie showing.

The person receiving the majority of the votes in a district being excluded as disqualified, the House, after careful examination, declined to seat the one receiving the next highest number.

The Elections Committee, in a report sustained on the main issue, held as an incidental question that the English law as to seating a minority candidate, when a vacancy is caused by disqualification is not applicable under the Constitution.

(2) On the second branch of the case, relating to the right of the contestant to the seat, the committee were united. Mr. Young's majority over the contestant was 6,106 votes. The contestant rested his claim to the seat solely on the legal view that where a candidate known to be ineligible receives the highest number of votes, those votes are to be treated as void, and the candidate having the next highest number be seated. The report reviews the English authorities on which contestant mainly relied, showing that the rule rested entirely on the fact that the voters had knowledge of the ineligibility of the candidate before voting for him. The rule laid down by Heywood on County Elections was "that it is a willful obstinacy and misconduct in a voter to give his vote for a person laboring under a known incapacity." Parliament requires the notice of this incapacity to be exceedingly formal, and in almost every instance to be at the polls. The report says:

Now, if it be admitted that this is the rule of law in this country as well as in Great Britain, the facts do not bring this case within it. No such notice as the British Parliament required was given to the electors at the polls in the twelve counties composing this district. Indeed, it does not appear that any notice at all of any alleged ineligibility was given at a single poll. The most that can be claimed, by way of notice, is the alleged notoriety of certain facts, viz, the publication of the letter, which, it is claimed, was evidence from which ineligibility could be inferred by the voter. But how notorious were even these facts? The letter was published in 1861—six years before the election; it was reproduced on the stump; but in how many of these counties, in the hearing of how many of the very men who afterwards, on election day, cast their votes for Mr. Brown, does not appear. It must also be remembered that what would be the legal result arising from these facts was never made certain before the votes. That result depended upon the purpose for which the letter was written, and its effect—all matters of proof and matters at all times in dispute before the voters, and about which even this committee itself, with a better opportunity than any voter ever had to investigate and examine all the evidence, are now, after a full hearing, as nearly equally divided as possible. How can it be said, then, that any voter, in casting his ballot for Mr. Brown, has been guilty of "willful misconduct and obstinacy" by casting a vote for one known to be ineligible? Mr. Heywood says that in England "it is not so in a doubtful case." (Southwark Elections, p. 259.) If, then, it be admitted that this English rule was a law binding on this House, still it would not avail Mr. Smith in this case, for the facts do not bring the case within the rule.

But the committee do not find any such law regulating elections in this country, in either branch of Congress, or in any State legislature, as far as they have been able to examine. Their attention has been called to no case, and it was not claimed before the committee that, as yet, this rule, by which one receiving only a minority of the votes actually cast had been adjudged elected, had ever been applied in this country.

On the other hand, there have been many cases of alleged ineligibility in both branches of Congress since the formation of the Government, in some of which seats have been declared vacant on that ground, and in which, had there existed in this country any such rule, it would certainly have been resorted to.

The report cites the cases of Ramsey *v.* Smith, Gallatin, Bailey, Shields, and the case of Mr. Brown himself (the excluded one), who was not allowed to take his seat in the Thirty-sixth Congress until he had arrived at the constitutional age. Cushing's Law of Legislative Assemblies was also discussed, and shown to be based on English, not American, precedents.

The report goes on to discuss the powers of Parliament, which are often called omnipotent, and which in theory proceed from the Sovereign and not from the people. In the matter of elections it had laid down many arbitrary laws besides the one in question. Comparing the English with the American system, the report says:

There certainly can be no need of argument to show that such law can find no place in our system, or occasion to contrast the limited powers of the House of Representatives with the "omnipotence of Parliament. As Congress, much less the House of Representatives, never conceded, never having the power to concede, to a voter his right to the ballot, neither can it take it away, modify, or limit it. Least of all can this body, the House alone, punish a voter for "obstinacy" or "perversity" in the exercise of his right. It can not touch a voter or prescribe how he shall vote, nor can it impose a penalty on him, much less disfranchise him or say what shall be the effect or the power of his ballot if it be cast in a particular way. The laws of the State determine this. It is unnecessary to discuss how far both Houses by a law can interfere under that clause of the Constitution which says that "the time, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations." It is enough to say that Congress never has touched those regulations, but has left them as made by the States. Both Houses have always absolutely conformed, in the effect to be given to the ballot, to the law of the State. To such extent has it been carried that the Senate has rejected a claimant to a seat who had 29 votes to 29 blanks, because there was a law of the State defining the power of each ballot by prescribing that, to be elected Senator, one must have not only a majority of all the votes cast, but also a majority of all the members elected to the legislature (2 Contested Elections, 608), and there happened to have been 60 members elected to that legislature; and this House has, in obedience to a law of the State of Delaware, rejected votes and given the seat to a contestant, because 4 votes had only the name of the sitting Member on them, when the law required each voter, though there was but one Representative to be elected, to put two names on his ballot of two persons residing in different counties of the State. (1 Contested Elections, 69.) Some States have required a majority of all votes cast for an election, some a plurality alone, some a plurality after one or more unsuccessful attempts. The statute books of the States are full of provisions touching elections, extending as well to the effect and power of each ballot as to the manner of depositing it, all of which are a rule for this House. Congress has not seen fit to enact any law concerning it if it had the power. It is not necessary to inquire whether Kentucky might not provide by law that votes cast for one known to be ineligible shall be thrown away, and one who has received a majority of the votes only shall be declared elected. It is enough to say that that State has not only never passed such a law, but it has enacted by statute that no one shall be declared elected who has not received a majority of the votes cast. As has been shown, Parliament did enact a law that votes cast for one ineligible shall be treated as if not cast, and one having a minority only of the votes be thus elected. But neither has Congress nor Kentucky enacted any such law; much less can this House alone, by a resolution, set it up, and that, too, after the fact, as a punishment for "willful obstinacy and misconduct." The right of representation is a sacred right, which can not be taken away from the majority. That majority, by perversely persisting in casting its vote for one ineligible, can lose representation, but never the right to representation while the Constitution and the State government shall endure. If it be inquired whether a loyal minority have not rights which are thus extinguished, the answer is obvious. If all

are legal voters the right of one is no greater than that of another; nor is it a valid objection that by this rule one district after another might be left without a Representative until representation itself might be destroyed. The Constitution has given into the hands of Congress power by law to make, alter, or amend all regulations as to the times, places, and manner of electing Representatives. If this is power enough to meet the exigency, it will be met when it arises. If there is not power enough then it can not be found in that instrument. When Congress has by law thus regulated elections, this House can, by resolution, conform its actions thereto, but not till then.

The committee are therefore of the opinion that the case does not come within the law of the British Parliament, for want of a sufficient notice to the electors at the polls of an ineligibility, known and fixed by law; that the law of the British Parliament in this particular has never been adopted in this country, and is wholly inapplicable to the system of government under which we live.

The will of the majority expressed in conformity with established law is the very basis on which rest the foundations of our institutions, and any attempt to substitute therefor the will of a minority is an attack upon the fundamental principles of the Government, and if successful will prove their overthrow.

Therefore the committee recommended the following resolutions:

Resolved, That Samuel E. Smith, not having received a majority of the votes cast for Representative in this House from the Second Congressional district of Kentucky, is not entitled to a seat therein as such Representative.

Resolved, That the Speaker be directed to notify the governor of Kentucky that a vacancy exists in the representation in this House from the Second Congressional district of Kentucky.

This branch of the report was debated at length on February 14 and 15.[1] This debate led to a review of precedents and to the citation of several American precedents which the report of the committee had overlooked and which were in harmony with the English rule. The earliest was an instance wherein about seventy years previous a sheriff had been declared elected in one of the counties of Maryland on the principle of the English precedents.[2] A later case was a decision of the Maine supreme court[3] (7 Maine reports), where certain scattering votes cast for an ineligible person had been disregarded, thus allowing an election which otherwise would have been defeated for lack of the required absolute majority. Another precedent was cited from the Maine legislature of 1865, where a candidate who was ineligible was excluded, although he had a majority of the votes, and the minority candidate was seated. The Indiana case of Gulick *v.* New was also cited in support of the same theory. Those who opposed the view of the committee also contended that the alleged disloyalty of Mr. Brown was well known in the district and constituted sufficient notice. In reply, it was argued that it had only recently been decided that such disloyalty was a disqualification and that Mr. Brown's status was a matter of controversy in the district.

Those supporting the report also denied the authority of the English rule and cited, in addition to the precedents referred to in the report, a decision by the supreme court of Georgia in 1852, wherein the English rule was denied and the contrary principle upheld.

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[1] Globe, pp. 1185, 1189–1200.

[2] Speech of Mr. Dawes, Globe, pp. 1185, 1186.

[3] Speech of Mr. John A. Peters, of Maine, Globe, p. 1197.

The question was taken[1] on a motion of Mr. John Coburn, of Indiana, to substitute for the resolution denying to contestant the seat the following:

That Samuel E. Smith, having received a majority of the votes cast in conformity with law, is entitled to take the oath of office as a Representative in this House from the Second Congressional district of Kentucky.

This motion was decided in the negative, yeas 30, nays 102.

Then the resolutions as reported by the committee were agreed to without division.

451. The Kentucky election case of McKee v. Young in the Fortieth Congress.

John D. Young, having, in the opinion of the House, voluntarily given aid and comfort to the enemy by words, although not by acts, was held incapable of taking the oath of July 2, 1862.

Argument that the act of July 2, 1862, prescribing a test oath, did in effect create an additional qualification.

In an exceptional case the House rejected votes cast by persons lately in armed resistance to the Government, although by the law of the State they were qualified voters.

Certain officers of election being held to be disqualified under State law, the House rejected the returns over which they had presided, declining to treat them as de facto officers.

A question as to whether or not the votes of persons deprived of citizenship by an act of Congress should be rejected in a case where the State law did not require a voter to be a citizen of the United States.

On March 23, 1868,[2] Mr. Joseph W. McClurg, of Missouri, from the Committee on Elections, submitted a report of the majority of the committee on the Kentucky election case of McKee *v.* Young. Mr. Young had presented himself at the preceding session with credentials in regular form, but with other Kentucky Members[3] had not been permitted to take the seat until his qualifications for loyalty had been investigated.

The questions arising in this case naturally divide themselves into two main branches:

1. The majority of the committee concluded, from a discussion of the evidence, that the contestant had sustained the allegation in his notice of contest that said Young "voluntarily gave aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the Government of the United States." The report says:

The committee find the allegations of the contestant so sustained by the proof that it is unnecessary to contend that a rule too liberal in favor of those who sympathized with the late avowed enemies of the Government was adopted when report No. 2 of this session was approved by this House in the cases from Kentucky of Beck, Jones, Grover, and Knott. This case is brought within the rule then laid

[1] Journal, pp. 350, 351.

[2] Second session Fortieth Congress, House Report No. 29; 2 Bartlett, p. 422; Rowell's Digest, p. 222.

[3] See section 448 of this work.

down, as it is proven, by clear and satisfactory testimony, that the said John D. Young "has been guilty of such acts of disloyalty that he can not honestly and truly take the oath prescribed by the act of July 2, 1862."

The testimony of witnesses both for and against Mr. Young shows that he was not regarded by any as a Union man, and that he was not merely in passive sympathy with those engaged in the rebellion but desired its success and so expressed himself.

Before quoting testimony on this point the committee would express the opinion that "aid and comfort" may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position. They said John D. Young occupied the official position of county judge, as shown in the testimony.

The majority of the committee make no argument on the right to exclude such a person, regarding that question as settled by the preceding cases.

The minority of the committee[1] deny that the evidence shows those results claimed by the majority, and argue again that the House may not exclude for such a reason. They say:

Upon the whole evidence, therefore, the undersigned maintain that it has not been made to appear by anything like "clear and satisfactory testimony" that John D. Young has been guilty of any such open acts of disloyalty that he can not truthfully take the oath prescribed by the act of July 2, 1862, and that he should be permitted to take his seat as the Representative of the Ninth Congressional district of Kentucky in the present Congress.

The undersigned can not, however, close this paper, lengthy as it has necessarily been made, without entering a most solemn and emphatic dissent from the doctrine assumed by the majority, that a person possessing the qualifications prescribed in the Constitution of the United States for a Member of the House of Representatives can be legally excluded from his seat as such, after having been duly elected thereto, simply because he may not be able truthfully to take the oath prescribed by the act of July 2, 1862. It is more than doubtful, in their opinion, whether the act can, by any proper rule of construction, be made to apply to Members of Congress at all; but, be that as it may, it seems to them to be a violation of the Constitution in more than one particular.

Congress, by an act passed January 24, 1865, extended the provisions of the act of July 2, 1862, so as to require the oath therein prescribed to be taken by lawyers practicing in the courts of the United States. That act was declared by the Supreme Court, upon solemn adjudication, after thorough argument, to be unconstitutional, not only because it was in conflict with the inhibition against the passage of bills of attainder, but because it was to all intents and purposes an ex post facto law, besides being in contravention of that clause in the Constitution vesting the pardoning power in the Executive. (Ex parte Garland, 4 Wall., p. 333.) But there is another and far weightier reason for holding the act of 1862 unconstitutional, when sought to be enforced as to Members of Congress, and that is, that it super adds qualifications, or, which amounts to the same thing, prescribes disqualifications for Representatives unknown to the Constitution, which, in the very nature of things, Congress has no power to do.

The Constitution, section 2, Article I, provides that "no person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not when elected be an inhabitant of the State in which he shall be chosen," the converse of which is that any person who is 25 years of age, has been a citizen of the United States for seven years, and is an inhabitant of the State in which he may be chosen, shall be a Representative if legally elected as such. If the person elected possess the qualifications presented by the Constitution, Congress has no power to inquire any further, or to demand anything more.

This principle was early recognized by Congress in the case of Barney *v.* McCreery, from Maryland, and reaffirmed in the cases of Fouke *v.* Trumbull, and Turney *v.* Marshall, from Illinois. In the latter case the distinguished chairman of the committee at that time, Mr. Bingham, says in his report:

"By the Constitution the people have the right to chose as their Representative any person having only the qualifications therein mentioned, without super adding thereto any additional qualification whatever. A power to add new qualifications is equivalent to a power to vary or change them."

[1] Messrs. M. C. Kerr, of Indiana, and John W. Chanler, of New York.

Yet that this act does in effect prescribe an additional qualification is too plain to admit of an argument. It is self-evident truth. That additional qualification without the possession of which the majority would not permit him to take his seat, is his ability to truthfully take the test oath. If the majority think he can truthfully take it, he gets his seat; if they think otherwise, he is deprived of it. Will any man of ordinary self-respect deny, then, that this act prescribes an additional qualification? If this principle is correct, then there is no limit to the power of Congress in prescribing qualifications for its Members but the will and discretion of the dominant majority, and by prescribing test after test they may exclude everybody but a favored few, and the right of choosing their own Representatives may be taken from the people entirely, or the character of Congress molded to suit the views and interests of one particular section or party forever.

It is no answer to this to say that Congress should have the power to exclude persons who from imbecility or want of integrity might endanger the safety of the Government. The question is, Has it the power? It has only the power to exclude those who do not possess the qualifications prescribed in the Constitution. If the people see proper to elect an imbecile, a person holding opinions distasteful to the majority, or one who may once have held such opinions, to represent them, it is a matter that concerns themselves, and confers no new power on Congress, and suspends no provisions of the Constitution. The only remedy lies in amending the Constitution, in the manner prescribed in the fifth article. Until that is done, Congress can do no more than pass upon the qualifications already prescribed.

It is simply begging the question to claim that Congress has the power to prescribe this test oath to be taken by its Members, because "each House has the power to judge of the elections, returns, and qualifications of its own Members," for the question instantly recurs, "What are the qualifications of which each House may be the judge?" and the answer is, simply the qualifications prescribed by the Constitution. To admit any other rule would be to make each House entirely independent of the Constitution, as to who may or may not be its own Members.

The majority of the committee proposed the following resolution:

Resolved, That John D. Young, having voluntarily given aid, countenance, counsel, and encouragement to persons engaged. in armed hostility to the United States, is not entitled to take the oath of office as a Representative in this House from the Ninth Congressional district of Kentucky, or to hold a seat therein as such Representative.

The report was debated on June 20 and 22,[1] and on the latter day Mr. Kerr offered as a substitute a declaration that Mr. Young "was duly elected a Member of this House" and "should now be admitted to his seat herein upon taking the oath prescribed by law."

This substitute was decided in the negative—yeas 30, nays 96.

The resolution reported by the committee was then agreed to without division.

2. On the question as to the election of contestant a greater diversity of opinion arose in the committee. It was not contended that Mr. McKee should be seated simply because Mr. Young had been excluded for disqualification, the question involved in such a proceeding being regarded as settled in a former case. But a serious division of opinion arose on the question as to whether or not the contestant, Mr. McKee, had actually been elected. In the report presented March 23 all the committee, with one exception, agreed that contestant was not elected. But on June 2 the dissenting Member, Mr. Charles Upson, of Michigan, filed views contending that contestant had been elected.[2] On June 3, by unanimous consent, on motion of Mr. Henry L. Dawes, of Massachusetts, and without debate, the subject was recommitted.[3] On June 17 Mr. Burton C. Cook, of Illinois, presented from a

[1] Journal, pp. 912, 913.

[2] House Report No. 49; Bartlett, p. 452.

[3] Journal, p. 793; Globe, p. 2812.

majority of the committee [1] a report taking the ground that the contestant was elected, and recommending the adoption of the following resolutions:

Resolved, That J. D. Young was not legally elected a Member of the House of Representatives of the Fortieth Congress from the Ninth Congressional district of Kentucky.

Resolved, That Samuel McKee was duly elected a Member of the House of Representatives in the Fortieth Congress from the Ninth Congressional district of the State of Kentucky.

Mr. Young had been returned by an official majority of 1,479 votes. In their final report the majority of the committee find that "the 625 votes of rebel soldiers ought not to be counted," that 883 majority should be deducted from Mr. Young, because it was given in precincts where there were "rebel officers of election," and finally that the votes of eight deserters should be deducted. This would leave a majority of 41 for Mr. McKee, the contestant.

(*a*) As to the 625 votes of "rebel soldiers," the majority in their final report say:

It appears perfectly clear to the committee that persons who had been soldiers in the rebel army had no right to vote or to act as officers of election. They had surrendered to the Government of the United States upon the condition that each company or regimental officer should sign a parole for his men, and each man was allowed to return home, not to be disturbed by United States authority so long as he observed his parole and the laws in force where he resided. These men were especially excepted from the amnesty proclaimed by the President May 29, 1865, under the tenth exception, and there appears to have been no other act of amnesty up to the time of this election which could include them; they were paroled prisoners of war. No reason occurs to the committee why these men should be allowed to vote which would not apply with equal force to them while actually in the field against the Government; the only difference which appears is that they had now been captured; their object, aim, and intent, whether in fighting or voting, was manifestly to destroy the Government. It seems absurd to say that it was a patriotic duty to kill them while they were in arms against the Government to prevent the destruction of the Government by them, and at the same time wholly illegal to refuse to allow them to accomplish the same result by their votes. The whole plan of reconstruction by Congress, as also the plan of reconstruction proposed in the proclamations of the President, has proceeded upon the assumption that those who had renounced their allegiance to the Government and fought against it have forfeited their right to vote.

In debate Mr. Upson [2] elaborated this argument further:

I say that when a rebel throws down the cartridge box he can not take up the ballot box and immediately assume either to come into this House, or to send an agent here to represent him, without the consent of the sovereign power of the nation. * * * No republican government can exist on any such basis. Gentlemen say there is no precedent. Well, of course, in the very nature of things there can be no precedent. There is no precedent for such a rebellion * * * It is necessary for us to distinctly lay down and assert the principles that all political rights do not necessarily revert to all men who engage in rebellion when peace is first restored as they were before the rebellion unless by permission of the sovereign power of the people. * * * It is by virtue of the reconstruction acts of Congress, not by any inherent right of their own, that they have the right to vote in the Southern States.

Kentucky, of course, had not been the subject of reconstruction legislation, never having seceded.

In their first report the majority of the committee had said:

But the committee finding that there is no law of Kentucky disfranchising rebel soldiers, have not been able to see how those votes can be rejected.

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[1] House Report No. 59; 2 Bartlett, p. 458. Mr. Luke P. Poland, of Vermont, who had agreed to the first majority report, dissented from this (Globe, p. 3371).

[2] Globe, p. 3374.

The minority of the committee, Messrs. Kerr and Chanler, concurred, with this argument:

Each State has the exclusive right to determine who shall and who shall not be electors at her polls, The several States possessed that right before the adoption of the Constitution of the United States. They never surrendered it nor delegated to Congress or any other department of the Government the power to alter or interfere with it in any way. The Constitution of the United States, Article I, section 2, provides that "the electors for Representatives in Congress in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." The constitution of Kentucky, in force when this election was held, and still in force, prescribes that all white male citizens of the State, 21 years of age, who shall have resided in the State two years, or in the county, town, or city in which they offer to vote one year next preceding the election, shall be electors of the most numerous branch of the legislature of that State. (New constitution of Kentucky, Art, II, sec. 8.) It follows, therefore, that no vote cast for either Young or McKee can lawfully be rejected on account of the voter's participation in the rebellion, no matter to what extent that participation may have gone, and there is still less pretext for this claim of contestant's, because Congress has never assumed to declare who shall or shall not be voters in Kentucky, even granting that there are those who may be willing to go to the extent of admitting that they have that power. It is true that the legislature of Kentucky, by an act approved March 11, 1862, sought to deprive all who had participated in the rebellion of the right of suffrage, but this act was repealed by an act approved December 19, 1865, * * *.

So that long before the 4th of May, 1867, when this election was held, all who had in any way participated in the rebellion were restored to all their political rights and privileges, and had all the qualifications of an elector as fully as if they had never been in the rebellion at all. What difference, then, does it make in this case whether seven hundred or seven thousand of those who voted for Young had been in the rebel army? What difference whether eight or eight thousand of them had deserted from the Federal army? They were still, under the constitution and laws of Kentucky, qualified electors of the most numerous branch of the State legislature, and had as much right to vote for a Member of Congress under the Constitution of the United States as either of the candidates themselves.

(*b*) The law of Kentucky of February 11, 1858, provided that the judges of elections should be so appointed as to represent the two political parties, and a further law enacted March 15, 1862, provided:

SECTION 1. That in construing the act approved February 11, 1858, to which this is an amendment, those who have engaged in the rebellion for the overthrow of the Government, or who have in any way aided, counseled, or advised the separation of Kentucky from the Federal Union by force of arms, or adhered to those engaged in the effort to separate her from the Federal Union by force of arms, shall not be deemed one of the political parties in this Commonwealth within the provisions of the act to which this is an amendment.

In their second report the majority found that in each of ten precincts one or more returned rebels had acted as officers of election, and that in such precincts a total majority of 883 had been returned for Mr. Young. The report contends that this majority should be rejected.

By the law of Kentucky none but electors can be judges or officers of election. The law of Kentucky also provides that those who have engaged in the rebellion for the overthrow of the Government, or who have in any way aided, counseled, or advised the separation of Kentucky from the Federal Union by force of arms, or adhered to those engaged in the effort to separate her from the Federal Union by force of arms, should not be selected as judges of election. * * * It has long been held that if the officers of election are not capable of holding the office, the election has no more validity than would an election where no officers whatever were appointed; it is otherwise where persons capable of holding the office are appointed, although they may not have complied with the forms of the law. (Easton *v.* Scott, First Contested Election Cases, p. 272; Delano *v.* Morgan, decided the present session.)

Both in the report and in the debate, a state of intimidation in the district was referred to as a fact which showed the necessity of impartial election officers selected according to the law.

The partisan leanings of the election officers were shown from the poll books. As to this, and as to the law providing for representation of two parties, neither of which should include those who had aided the rebellion, Mr. Upson, in his minority views, had said:

It is submitted that such statutes can not be considered as directory merely, but as imperative, and it is insisted also that the condition of this portion of Kentucky, at the time when this election was held, made the rigid enforcement of this law a matter of vital interest to the loyal Union men of that district.

It is stated by the minority of the committee in their report heretofore referred to (p. 16) that all these election officers must, by the laws of Kentucky, have been appointed in June or July, nearly a year preceding this election, and hence they argue that the vote of these officers cast at this election is no evidence of their political status at the time of their alleged appointment the year previous, and they quote from the reasoning of the chairman of the committee in the case of Blakey *v.* Golloday (Report No. 1, of this session, p. 3) in support of this position.

Unfortunately, however, for their argument, they overlooked the fact that this Congressional election was held by virtue of an act of the legislature of Kentucky, passed February 18, 1867, which provided that the officers of election to be appointed by the county courts in March or April of that year, for the election of constables and justices of the peace, should be the officers of election for the election of Members of Congress, on the same 4th day of May, 1867, so that the appointment was only made a month or two, at the furthest, prior to the election, and the vote of the election officer would be a pretty sure criterion of his political party status at the time of his appointment, especially as the Representative in Congress was the most important officer to be chosen at said election.

But the case of Blakey *v.* Golloday was expressly decided on other grounds, and no decision was made as to the political construction to be given to this law of Kentucky.

In their first report the majority of the committee had refrained from taking a position on this feature of the case because from the view they took as to other features a decision on this question would not affect the case.

The minority, composed of Messrs. Kerr and Chanler, held:

It is a sufficient answer to all this to say that there is no law in Kentucky disqualifying a man from acting as am officer of an election, sheriff of a county, or in any other office in the State, on account of his having been in the rebel army; and, besides, if there were, these were, to say the least of it, all officers de facto, duly appointed and acting regularly under color of authority. No complaint is made that either of them acted unfairly, or that either candidate was benefited or injured by their official action, and, therefore, according to the principle above stated, their acts are as valid, so far as the public and the parties to this contest are concerned, as if they had been officers dehjure.

(*c*) In making the 41 majority for contestant, the majority of the committee in their second report rejected the votes of eight deserters from the Federal Army, which were shown to have been cast for Young. Mr. Upson, in his minority views, which seem to have largely influenced the second report, had said:

The act of Congress of March 3, 1865, decitizenizes, by their own voluntary act, all persons who have deserted the military or naval service of the United States who shall not return to said service, or report themselves to a provost-marshal, within sixty days after the issuing of the President's proclamation under the provisions of said act, and makes them forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof, and the act of Congress of July 19, 1867, recognizes expressly this loss of citizenship in consequence of desertion.

The statutes of Kentucky also recognize the right of expatriation on the part of the citizen, and

that naturalization can only be effected under the laws of the United States, so as to make the naturalized person a citizen of that State, and no person by her constitution can be a voter who is not a citizen. Citizenship of white persons in that State is derived by birth within that or some other State of the Union, or residence therein, or by naturalization under the laws of the United States and the like residence in said State. The few exceptional cases it is not necessary to notice. That deserters, by reason of this act of Congress, are not legal voters, has also been expressly held by the majority of the said committee in the recent case of Delano *v.* Morgan, from the Thirteenth Congressional district of Ohio. (Report No. 42 of this session, p. 3.)

In their first report the majority had said:

It is proven that eight deserters from the Federal Army voted for Mr. Young, but no law is found under which Kentucky excludes such a vote.

In the debate Mr. Poland pointed out[1] that in the case of Delano *v.* Morgan the law of Ohio required a voter to be a citizen of the United States, and it was for that reason that deserters who had lost their citizenship because of the law of Congress were rejected in Ohio. In Kentucky there was no State law like that of Ohio.

On June 20 and 22[2] the report was debated at length, and on the latter day the two resolutions reported by the majority were agreed to. On the second of the two, that declaring contestant elected, there were yeas 62, nays 43.

Mr. McKee then appeared and took the oath.

At the outset of this case a preliminary question had been settled as follows:

Before proceeding to state the grounds on which Mr. McKee bases his claim, the committee remark that the notice of contest is objected to by Mr. Young for the reason that the contestant does not "specify particularly the grounds upon which he relies in the contest." It is unnecessary to say whether or no this objection would have been sustained if made in time; for no objection appears in the answer of Mr. Young to the sufficiency of the notice. None appears to have been made during the time of taking testimony, and none in the progress of the argument before the committee by Mr. Young or his counsel. The objection first appears in Mr. Young's printed brief, after both parties had been fully heard in the whole case. In the opinion of the committee the objection as to particularity of specifications comes too late to require further attention.

452. The Kentucky election case of Symes v. Trimble, in the Fortieth Congress.

It not being proved by clear and satisfactory testimony that Lawrence S. Trimble had given aid and comfort to rebellion, the House declined to exclude him.

In the Kentucky cases in 1868 a contest was presented and sustained against a person to whom the House had refused the oath on his prima facie showing.

The House sometimes authorizes a contestant to serve an amended or supplemental notice of contest after the expiration of the time fixed by law for the serving of the notice.

Contestants have sometimes served amended or supplemental notices of contest, trusting to the House to authorize the action later.

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[1] Globe, p. 3372.

[2] Globe, pp. 3328, 3331, 3336, 3368–3375; Journal, pp. 912–914.

On July 11, 1867,[1] Mr. Halbert E. Paine, of Wisconsin, from the Committee on Elections, reported the following:

Resolved, That G. G. Symes, contestant of the claim of L. S. Trimble, to a seat in this House as a Representative of the First district of Kentucky, be permitted to serve an amended or supplementary notice of contest within ten days after the passage of this resolution, and that L. S. Trimble be permitted to serve his answer thereto within thirty days after the service thereof.

Mr. Paine explained that when the House was not in session an amended notice was often served after expiration of the legal time, the contestant trusting to the House to authorize the action when it should meet and consider the case. But it happened that the House was in session at this time, and it seemed better to ask the authority at first. It was objected that as the time allowed by law for filing notice had expired this proceeding was unusual, but the resolution was agreed to, ayes 64, noes 26.

As appears in the case relating to the Kentucky Members generally,[2] Mr. Trimble had received an undoubted majority of the votes cast, and had presented credentials in regular form, but had not been permitted to take the oath because of charges that he was disqualified because of alleged disloyalty.

The Committee on Elections reported on January, 7, 1868,[3] Mr. Charles Upson, of Michigan, presenting the report:

By a resolution of this House, passed July 8, 1867, your committee, was, among other things, instructed to inquire and report whether the said Lawrence S. Trimble was "disqualified from sitting as a Member of this House on account of having been guilty of acts of disloyalty to the Government of the United States, or having given aid and comfort to its enemies;" and in pursuance of said resolution testimony was taken in this case, as well as other cases therein embraced, which evidence, on the 3d of December, 1867, was reported to this House.

The right of the said Trimble to his seat was also contested by G. G. Symes, who likewise claimed to have been elected thereto as the Representative from said district; and one of the points made by the contestant in his allegations was that the said Trimble was "guilty of overt acts of disloyalty and treason to the Government of the United States during the late rebellion, and gave aid and comfort to the rebels by supplying them with medicine, commissary, and quartermasters' stores, to enable them to prosecute the war, and yourself entered their lines and countenanced, aided, and abetted their rebellion." As the whole investigation and contest depends chiefly, if not wholly, on this charge of direct acts of disloyalty as disqualifying Mr. Trimble from sitting as a Member of this House, and as the evidence taken under the aforesaid resolution of the House, and under the notice of contest, relates chiefly to this charge, the committee thought proper to consider the evidence taken under the resolution and under the notice of contest together, and to embody its conclusions in one final report.

Adhering to the rule laid down by the committee in its report made to this House December 3, 1867, in the cases from Kentucky of Beck, Jones, Grover, and Knott (Report No. 2 of this session), which was subsequently approved by the House, the committee, having considered the whole testimony, does not find that it has been "proved by clear and satisfactory testimony" that the said Lawrence S. Trimble "has been guilty of such open acts of disloyalty that he can not honestly and truly take the oath prescribed by the act of July 2, 1862," nor does it find the allegations of contestant sustained by the proof.

The committee found the charge that Mr. Trimble had been concerned in contraband trade with the enemies of the Government too vague and uncertain to be relied on. The report says:

It is also in evidence that subsequent to these alleged illegal transactions, in September, 1861, and after some charges had been made against Mr. Trimble in relation thereto, an investigation was had

[1] First session Fortieth Congress, Journal, p. 187; Globe, p. 591.

[2] See section 448 of this work.

[3] Second session Fortieth Congress, House Report No. 6; 2 Bartlett, p. 370; Rowell's Digest, p. 218.

under the supervision of the Treasury Department, and he was exonerated therefrom, and thereupon he was appointed by the Treasury Department one of the Board of Trade at Paducah, and acted in that capacity, so far as appears, to the satisfaction of the Department.

From the evidence in regard to speeches made by Mr. Trimble, it appears that in 1861 he was the Union candidate for Congress against Burnett, and made Union speeches in that canvass throughout the district. After the emancipation proclamation of President Lincoln was issued, he, in common with many of the originally professed Union men of Kentucky, opposed Mr. Lincoln's Administration and the policy of the war, charging that it was waged as an abolition war, and asserting that he was opposed to voting any more men or money to aid in carrying it on; but it is evident from the whole testimony that his opposition was expressed in language similar to that made use of by the opponents of the Administration about that time on the floor of Congress, the propriety or tendency of which, under the circumstances, it is perhaps unnecessary to discuss here.

Kentucky having had many of her citizens engaged in the rebellion, and others strongly sympathizing with them who remained at home, and having since the surrender of the rebel armies permitted, by law, all returned rebels to vote who are in other respects qualified, it is evident that avowed sympathy with the rebellion does not at present detract from the popularity of a candidate for official position in that State, but rather conduces to his success, and this fact may have somewhat stimulated some candidates in their efforts and intensified their expressions before their constituents. In this case, however, Mr. Trimble having been the outspoken Union candidate for Congress in 1861 against secession, having by authority of the Treasury Department, in September of the same year, served as one of the Board of Trade at Paducah, and having also been elected and having served as a Representative from his district in the Thirty-ninth Congress, his seat uncontested and his loyalty unquestioned, your committee, taking into consideration all the testimony, finds no case made out under the charges against him disqualifying him from taking his seat or disproving his election as a Representative to this Congress from his district.

The committee recommends the adoption of the following resolutions:

Resolved, That G. G. Symes is not entitled to a seat in this House as a Representative from the First Congressional district in Kentucky.

Resolved, That the oath of office be now administered to Lawrence S. Trimble, and that he be admitted to a seat in this House as a Representative from the First Congressional district in Kentucky.

The resolutions were debated in the House on July 10[1] and were agreed to without division.

The oath was thereupon administered to Mr. Trimble.

453. A Senator-elect whose loyalty satisfactorily withstood inquiry, but who seemed unable truthfully to take the oath of July 2, 1862, was finally permitted to take the oath.

In 1866 a Senator having stated in his place that the loyalty of a Senator-elect was doubtful, the credentials were referred to a committee before the oath was taken.

In 1866[2] a question arose in the Senate as to the qualifications of David T. Patterson, a Senator-elect from Tennessee. Mr. Patterson's credentials were presented on July 26, 1866,[3] and after debate were referred to the Committee on the Judiciary, with instructions to inquire into Mr. Patterson's qualifications.

The motion to refer was made by Mr. Charles Sumner, of Massachusetts, and in support of the motion he cited the case of Senator Stark. It was pointed out that in that case affidavits were presented charging disloyalty. In this case a Senator merely stated in his place that there was reason to suspect the loyalty of

[1] Journal, p. 167; Globe, pp. 447–452.

[2] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 329.

[3] First session Thirty-ninth Congress, Globe, pp. 4162–4169.

Mr. Patterson. The debate proceeded to a discussion of the propriety of refusing the oath to a person presenting prima facie evidence of his election, and a distinction was drawn between the Senate, which was a continuing body, and a body like the House, where it was necessary for purposes of organization to give credit to the credentials at the outset. The fact that the House had declined to give full effect to the credentials of the Tennessee Member and had referred them to the committee, in the meantime refusing to allow the bearer to qualify, was cited. The dangers of excluding persons bearing credentials in due form was dwelt on, but the motion of Mr. Sumner was agreed to—yeas 26, nays 14.

On July 27 [1] Mr. Luke P. Poland, of Vermont, presented the report of the committee:

The only question in relation to the qualifications of Mr. Patterson, or his right to hold his seat in the Senate, arises from the fact of his having held the office of circuit judge in the State of Tennessee after that State had passed an ordinance of secession and become a member of the Confederacy.

Circuit judges in Tennessee are elected by the people of the several circuits, and hold their offices for the term of eight years.

Judge Patterson was elected judge in one of the circuits in eastern Tennessee in May, 1854, and his term of office had not expired when the State passed the ordinance of secession. The constitution of the State of Tennessee remained the same after the secession of the State as before, and there was no change made in the form of the State government or in their judicial system. A large majority of the people of East Tennessee were ardently devoted to the Union and deemed it very important for their interest and that of the Union cause that the civil officers in that section of the state should be filled with Union men.

Judge Patterson was a firm, avowed, and influential Union man, and he was urgently pressed by the Union men of that circuit to run as a candidate for reelection as circuit judge, and he finally, though reluctantly, consented to do so. The opposing candidate was an avowed secessionist, and the issue in the election was between Union and secession. The election was held in May, 1862, and Judge Patterson was elected over his rebel competitor by a large majority. At the same election most of the local offices in that section were filled by the election of Union men. At that time it was believed by the Union men of East Tennessee that they would soon be relieved from rebel military rule by the arrival of Union forces; and they desired also to retain the civil power in their own hands. In this expectation they were disappointed, and soon rebel bands were scattered through that region, and the Union people were subjected to great hardships and cruel oppression. When Judge Patterson was thus reelected judge, he did not suppose he would be commissioned by the governor of the State, who was a secessionist; but, after some considerable delay, a commission was sent to him with peremptory orders to take the oath. On the receipt of his commission and order to take the oath, Judge Patterson delayed and hesitated, and consulted other leading Union men as to the proper course for him to take. They advised and urged him to take the oath; that he could thereby afford protection to some extent to Union men against acts of lawless violence on the part of the rebels, and that if he did not accept the office and take the oath the office would be filled by a rebel, and they would then be oppressed by the civil as well as the military power of the rebels. Judge Patterson yielded to their urgency and arguments, and went before a magistrate and took the oath which the Tennessee legislature had prescribed, which, in substance, was that he would support the constitution of Tennessee and the constitution of the Confederate States. Judge Patterson declared at the time to the magistrate that he owed no allegiance to the Confederate government, and that he did not consider that part of the oath as binding him at all. At this time there were rebel troops in the neighborhood, and Judge Patterson had good reason to believe that his refusal to take the oath would subject him to arrest and imprisonment, if not worse treatment; but we do not find that he was actuated at all by personal considerations, but acted solely upon the motive that he could thereby afford some aid and protection to the Union people and also prevent the office from falling into hands that would use it to oppress them.

[1] Senate Report No. 139.

East Tennessee at this time was in a very disturbed and distracted condition. The country was full of bands of armed rebels, and lawless violence held sway. Business was nearly suspended, and no civil business was done in the courts. Judge Patterson held a few terms of court in counties where he could organize grand juries of Union men, and in this way did something toward preserving peace and order in the community. No other business was done by him as judge after his election in 1862.

During all this time Judge Patterson was an open, avowed, and devoted adherent to the Union. He was in constant communication with the officers of the Federal troops nearest that vicinity, and obtained and furnished to them information as to the movements of the rebels. He aided in concealing Union men, and in facilitating their escape to the Union lines, when they generally entered the Union service. He aided the Union people and the Union cause in every way open to him, and too numerous for detail. By these means he became amenable to the hostility of the secessionists, and was subjected to great difficulty and danger. He was several times arrested and held for some time in custody. At times he was obliged to conceal himself for safety, and spent nights in outbuildings and in the woods to avoid their vengeance.

In September, 1863, the Federal troops reached Knoxville, and Judge Patterson succeeded in escaping with his family to that place, and did not return to his home until after the close of the rebellion.

As before stated, the constitution and election laws and judicial system of Tennessee remained the same after the secession of the State as before, and Judge Patterson was elected judge the last time under the same State constitution and laws as existed at his first election, and no laws were enforced by him as judge except such as were in force before the secession of the State.

The committee are all satisfied that during the entire rebellion Judge Patterson was an earnest, firm, and devoted Union man, and suffered severely in support of his principles. In accepting the office of judge, and taking the official oath, he did not intend any hostility to the authority or Government of the United States, nor did he intend to acknowledge any allegiance to, or any friendship for, the confederate government, but acted throughout with a sincere desire to benefit and preserve the Union and the Government of the United States. He always denied the authority of the confederate government over him, and feels an entire willingness and ability to take the oath required upon his admission to a seat in the Senate. The committee recommend the following resolution:

Resolved, That the Hon. David T. Patterson is duly qualified and entitled to hold a seat in the Senate of the United States as a Senator from the State of Tennessee.

On July 27 [1] the resolution was debated and Mr. Lyman Trumbull, of Illinois, objected that on the state of facts Mr. Patterson could not take the oath, since the oath would cause him to swear that he had never taken or exercised the functions of the office, while he undoubtedly had done both. It was suggested that Congress had already proposed a constitutional amendment providing for the removal of political disabilities, and while this amendment bad not been finally ratified, yet Congress might carry out its spirit by passing a joint resolution applying to his case. So a joint resolution was introduced in the Senate that Mr. Patterson be admitted upon his taking so much of the oath prescribed by the act of July 2, 1862, as is not included in the words, "that I have neither sought, nor accepted, nor attempted to exercise, the functions of any office whatever, under any authority or pretended authority in hostility to the United States." This joint resolution passed the Senate, but was laid on the table in the House the same day.

There was considerable debate [2] as to the dilemma resulting from this situation, it being, maintained strenuously that Mr. Patterson could not and should not take the oath, but finally the Senate agreed to this resolution:

Resoved, That the Hon. David T. Patterson, upon taking the oaths required by the Constitution and laws, be admitted to a seat in the Senate of the United States.

On July 28 [3] Mr. Patterson took the oath.

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[1] Globe, pp. 4213–4216.

[2] Globe, pp. 4242–4245.

[3] Globe, p. 4293.

454. By the fourteenth amendment one who, having previously taken an oath as an officer of Government to support the Constitution, has engaged in rebellion, is disqualified as a Member until the disability be removed.—Section 3 of Article XIV [1] of the Constitution provides:

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and VicePresident, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a Member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[2]

455. The Tennessee election case of Roderick R. Butler in the Fortieth Congress.

A Member-elect who was about to be sworn was challenged for disloyalty, whereupon the House denied him the oath and referred the credentials.

A Member-elect who had not been disloyal, but who could not truthfully take the oath of July 2, 1862, was not sworn until he had been relieved of his disabilities by law.

An objection to a Member-elect's qualifications being sustained neither by affidavit nor on the personal responsibility of the Member objecting, the House declined to entertain it.

A bill removing the disabilities of a Member-elect and modifying the test oath for his benefit was passed by a two-thirds vote.

For persons whose disabilities had been removed the oath of July 2, 1862, was modified by the act of July 11, 1868.

On November 21, 1867,[3] at a period after the organization of the House, the Members-elect from the State of Tennessee presented themselves with credentials in regular form.

Thereupon Mr. Charles A. Eldridge, of Wisconsin, objected to the administration of the oath to one of them, Mr. William B. Stokes, presenting a letter tending to show disloyalty on the part of Mr. Stokes. Mr. Eldridge at the same time presented a resolution that Mr. Stokes's credentials be referred to the Committee of Elections and that he be not sworn pending the investigation.

Mr. James Brooks, of New York, then challenged Messrs. Butler, Mullins, and Arnell, alleging disloyalty in their past records. He also challenged the whole delegation on the ground that a republican form of government did not exist in Tennessee. He thereupon moved to amend the pending resolution by adding resolutions that all the certificates of the gentlemen from Tennessee be referred to the

[1] The fourteenth article was proclaimed as ratified on July 28, 1868.

[2] By the act of May 22, 1872 (17 Stat. L., p. 142), the disabilities imposed by this article were removed from all persons whomsoever, except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States; and by act of June 6, 1898, all existing disabilities were removed (30 Stat. L., p. 432).

[3] First session Fortieth Congress, Journal, pp. 253, 254; Globe, pp. 768–778.

Committee of Elections, and that Messrs. Butler, Mullins, and Arnell's credentials be referred previous to their being sworn.

After debate, which disclosed more serious evidence in the shape of a legislative journal of Tennessee against Mr. Butler than against the remaining Members, Mr. Henry L. Dawes, of Massachusetts, proposed the following substitute:

That the credentials of R. R. Butler, from the First district of Tennessee, be referred to the Committee of Elections, and that he be not sworn pending the investigation.

Mr. Brooks's amendment having been disagreed to, the substitute proposed by Mr. Dawes was agreed to, and then the resolution as amended was agreed to yeas 117, nays 28.

Thereupon Messrs. Eldridge and Brooks offered separate resolutions that the oath be not administered to Messrs. Stokes and Mullins until their cases had been investigated. Neither Mr. Eldridge nor Mr. Brooks presented affidavits or asserted on their responsibility as Members that the two persons in question had been disloyal, but left it to be inferred from a copy of a letter in the case of one and an extract from a speech in the case of another.

After debate, in the course of which it was recalled that affidavits were produced in the Kentucky cases, while in this case a Member did not even make the charges on his own responsibility, the House decided the resolutions in the negative.

Thereupon the oath was administered to all the Tennessee Members except Mr. Butler.

On February 25, 1868,[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted a report in the case of Mr. Butler. This report states that the only objection raised against Mr. Butler, who had a large majority of the votes in the district, was disloyalty. It appeared that on December 14, 1861, as a member of the secession legislature of Tennessee, he had voted for resolutions pledging the State to the Southern confederacy. Mr. Butler admitted this, but claimed that nevertheless he then was a Union man and continued to be afterwards. There was also evidence tending to show that he remained in the legislature to be of service to Union men, and that his votes were understood not to express his views. There was no doubt that after returning from the legislature he served actively as a Union man. The committee conclude:

The evidence is very full on these points, and leaves no doubt on the mind of the committee of the sincere loyalty of Mr. Butler, and that the several acts and votes in the legislature laid to his charge as evidence of his disloyalty are capable of the explanation here given.

But the oath of office which the law requires Mr. Butler to take before he can be admitted to a seat as a Representative is in the following words:

"I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my I knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

[1] Second session Fortieth Congress, House Report No. 18; 2 Bartlett, p. 461; Rowell's Digest, p. 224.

that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

It will be observed that he is required to make oath that he has "neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the 'United States." In the opinion of the committee be can not truthfully so swear. Whatever may have been his motives, the fact still stares him in the face that he took and accepted the office which he will be compelled to swear that he has not taken and accepted. But, for the reasons heretofore given, the committee recommends that, by a joint resolution, so much of the oath as thus stands in the way of admission to a seat in this House of one truly loyal throughout the war may be omitted in administering the oath of office to Mr. Butler.

It accordingly recommends the passage of the accompanying joint resolution.

This joint resolution came up for debate on March 4, 1868.[1] It provided that Mr. Butler be admitted to his seat upon taking the usual oath to support the Constitution of the United States, and upon taking all of the "test oath" excepting the words: "That I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States."

After this joint resolution was reported it appeared that Mr. Butler had before the war taken an oath to support the Constitution of the United States, and therefore that his case came within the third section of the fourteenth amendment to the Constitution of the United States. There was some question as to whether this amendment was yet in force. After debate[2] on March 5,[3] the House voted to recommit the joint resolution with instructions to the committee to report a bill for the relief of Mr. Butler, and also a general bill for such persons as might have their disabilities removed by a two-thirds vote in accordance with section 3 of the fourteenth amendment to the Constitution. On March 6[4] two bills were introduced in accordance with these instructions. They were debated at length[5] in both House and Senate, the question of Mr. Butler's loyalty and of the desirability of modifying the requirements of the test oath being especially considered. The bill relating to Mr. Butler passed both the House and Senate by two-thirds votes, and it was understood at the time that a two-thirds vote was necessary.[6]

The law as finally perfected in Mr. Butler's case provided:[7]

That all legal and political disabilities imposed by the United States upon Roderick R. Butler, of Tennessee, in consequence of participation in the recent rebellion, be, and the same are hereby, removed. And the said Butler, on entering upon the discharge of the duties of any office to which he has been or may be elected or appointed, instead of the oath prescribed by the act of July 2, 1862, shall take and subscribe the following oath. [Here followed an oath to support the Constitution.]

This act was approved June 19, 1868, and on June 26 Mr. Butler appeared and took the oath."[8]

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[1] Globe, p. 1662.

[2] Globe, pp. 1662, 1682–1693.

[3] Journal, p. 477; Globe, p. 1693.

[4] Journal, p. 482.

[5] Globe, pp. 1707, 1977, 2192, 2218, 2267, 2559, 3058, 3197, 3733, 3761.

[6] See remarks of Mr. Dawes, Globe, p. 3197.

[7] 15 Stat. L., p. 360.

[8] Journal, p. 935.

The general law approved July 11, 1868,[1] provided the same oath for persons generally whose disabilities should be removed by a two-thirds vote of the two Houses.

456. The North Carolina election case of Boyden v. Shober in the Forty-first Congress.

A Member-elect, enrolled by the Clerk on his regular credentials, did not vote until his disqualifications had been removed and he had been permitted by the House to take the oath.

A State law requiring two ballot boxes to be kept at each polling place was construed by the House as directory only; and in the absence of fraud a neglect of the provision did not nullify the election.

On March 4, 1869,[2] at the organization of the House, the name of Mr. Francis E. Shober, of North Carolina, appears on the Clerk's list of Members-elect. On the yeas and nays on a motion to proceed to the election of Speaker his name appears among those not voting. On the vote for Speaker he did not vote. The Journal does not show affirmatively that he was not sworn in, but on a yea-and-nay vote taken on March 5, after the Members had been sworn in, his name does not appear at all, indicating that he had not been sworn in and that his name had been stricken from the roll of Members.

On April 12, 1870,[3] the President approved an act "to remove political disabilities from Francis E. Shober, of North Carolina." This act removed his disabilities and prescribed the form of oath to be taken by him on being sworn into any office.

On April 13, 1870,[4] Mr. George W. McCrary, of Iowa, presented the following resolution, which was agreed to:

> *Resolved,* That Francis E. Shober be sworn as a Member of this House from the Sixth district of North Carolina and that upon taking the oath prescribed by the act passed at the present session of Congress for his relief he shall be entitled to a seat in this House without prejudice to the right of Nathaniel Boyden to contest the right thereto.

Mr. McCrary stated that Mr. Shober's credentials had been examined by the Committee on Elections and found regular.

On January 16, 1871,[5] Mr. McCrary submitted the report of the Committee on Elections in the contest of Boyden *v.* Shober. This report states that the sitting Member admitted his inability to take the test oath, and did not offer to qualify until after Congress had passed an act to relieve him from disability. Of course the passage of the relieving act disposed of the contestant's allegations of disability. After disposing of some considerations as to charges not sustained by the evidence, the report says:

> We are left, therefore, to the consideration of the first ground of contest, viz, that the election was wholly void by reason of a failure to comply with the statutory provisions concerning the manner of conducting the election.

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[1] 15 Stat. L., p. 85; Revised Statutes, sec. 1757.

[2] First session Forty-first Congress, Journal, pp. 5, 8, 10.

[3] 16 Stat. L., p. 634.

[4] Second session Forty-first Congress, Journal, p. 610; Globe, p. 2648.

[5] Third session Forty-first Congress.

It is said that the law of North Carolina, rightly construed, required that two ballot boxes should have been kept at each poll, and that all ballots for Member of Congress should have been deposited in one, and all ballots for electors for President and Vice-President in the other.

There seems to be some doubt as to the true construction of the statute of North Carolina, but assuming that the construction contended for by contestant is correct, we are of opinion that the statute is directory only, and that the failure to provide two ballot boxes, and the deposit of all the ballots in one box, did not render the election void in the absence of fraud. If the ballots were freely cast, if they were honestly and fairly counted, and correctly returned, we should be unwilling to hold that a mere mistake of the election officers, as to whether the ballots should go into one box or two, should be allowed to defeat the will of the majority.

It is claimed that the certificate of election was not issued to contestee by competent authority; that, it should have been issued by the sheriffs of the several counties comprising the district and not by the governor. The law upon this subject is not cited in the record, and the point is not pressed. Indeed, it has been rendered immaterial by the action of the House in accepting the credentials of contestee and ordering him to be sworn into office thereon. We may remark, however, that the failure or refusal of the proper officer to issue a certificate of election would only render it necessary for the House to go back to the returns and poll books and ascertain, if possible, from these, or from any competent and sufficient evidence, who was actually elected, and award the seat accordingly.

We are of opinion, therefore, that the contestant has failed to sustain the points made by him in his notice of contest, with the exception of the fifth point, which was sustained by the proof but which was rendered immaterial by the act of Congress relieving contestee from his disability.

Your committee are of opinion that the contestant has prosecuted this contest in good faith and with reasonable cause, and that under the practice of the House in similar cases he is entitled to compensation for the expenses incurred by him.

We therefore recommend the adoption of the accompanying resolutions:

Resolved, That Nathaniel Boyden is not entitled to a seat in this House as a Representative from the Sixth district of North Carolina.

Resolved, That Francis E. Shober is entitled to retain his seat in this House as a Representative from said district.

On January 24, 1871,[1] the two resolutions were agreed to without debate or division.

457. In 1867 the Senate, having in view the test oath and the spirit of the fourteenth amendment, excluded Philip F. Thomas for disloyalty.

In 1867 the Senate, upon the statement by a Member that there were rumors affecting the loyalty of a Member-elect, referred the credentials before permitting the oath to be taken.

The right to add other qualifications to the three prescribed by the Constitution was discussed fully in the Senate in 1867.

Discussion of the question as to whether or not the test oath of July 2, 1862, actually prescribed a new qualification for the Member.

On March 18, 1867,[2] the credentials of Philip F. Thomas, Senator-elect from Maryland, were presented in the Senate. Mr. Jacob M. Howard, of Michigan, objected that there were rumors affecting the loyalty of Mr. Thomas and moved that the credentials be referred to the Committee on the Judiciary. In the debate attention was called to the fact that in the cases of Messrs. Stark and Patterson the allegations were more specific; but finally, on March 19, the credentials were referred without division.

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[1] Journal, p. 207; Globe, p. 698.

[2] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 333; first session Fortieth Congress, Globe, pp. 171–180, 200.

On December 18 Mr. Reverdy Johnson, of Maryland, from the Committee on the Judiciary, reported:

That they have taken the evidence submitted herewith, and that they find nothing sufficient, in the opinion of the committee, to debar said Thomas from taking his seat, unless it be found in the fact of the son of said Thomas having entered the military service of the confederacy, and in the circumstances connected with that fact or relating to it, and without the expression of an opinion in regard to this point, they report the whole evidence to the Senate.

Mr. Johnson submitted the following resolution for consideration:

Resolved, That the Hon. Philip F. Thomas, Senator-elect from Maryland, be admitted to his seat on his taking the oaths prescribed by the Constitution and laws of the United States.

458. On January 6, 1868,[1] the report was taken up, and the debate began as to whether or not the act of Mr. Thomas in assisting his son was an act giving aid and comfort to the enemies of the Government. The test oath was also discussed and its bearing on the question of qualifications, Mr. George F. Edmunds, of Vermont, contending[2] that the Constitution did not definitely prescribe all the qualifications, but that there existed the authority to impose other qualifications, citing this passage:

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office of public trust under the United States.

A question was also raised as to whether or not the amendment to the Constitution specifying the disability on account of treason, and providing for its removal by a two-thirds vote of each House, had been ratified.

The report was debated at length on January 20–22, February 12–14, and 17–19.[3] Speaking on January 22, Mr. William Pitt Fessenden, of Maine, said[4] that it might at times be necessary for the Senate to protect itself by refusing admission, but, he continued:

We are exercising in any such case an extra-constitutional power. I think it exists as other powers which we have asserted during the war exist; but, as I said before, they can only be exercised in very extraordinary cases. As we stand now, it would be, in my judgment, dangerous in the extreme for Congress to assume the power of excluding a man who was sent here with the proper credentials on mere presumptions or mere suppositions or mere ideas of what the man is. The ordinary question presented to the Senate in such a case is with regard to his qualifications as prescribed by the Constitution itself; and it is only within a very recent period that it has become necessary to go further, as we have gone further and as we unquestionably had a right to do, and prescribe another qualification, if you choose so to call it; that is to say, prescribe a rule of admission by designating an oath to be taken which has reference to the qualifications, or rather to the disqualifications, of the individual. I voted for that. I think we had a right to pass it. * * * The question, however, as presented to us now, is beyond that. It is whether we shall assume the responsibility of refusing to permit this gentleman to take the oath. He professes himself willing to take it. We are called upon by many gentlemen who have spoken here to say that he shall not be permitted to do it, because it is one of those cases where we are called upon, outside of any constitutional provision and outside of any legal provision, to exclude this man on the doctrine of self-protection, for no other, I think, can be adduced to support the proposition.

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[1] Second session Fortieth Congress, Globe, pp. 320–330.

[2] Globe, p. 327.

[3] Globe, pp. 632–635, 653–662, 678–686, 1144–1156, 1165–1177, 1205–1210, 1232–1243.

[4] Globe, pp. 684, 685.

* * * The power which we have under the Constitution to judge of the qualifications of Members of the body is not a mere arbitrary power to be exerted according to the will of the individuals who may vote upon the subject. It ought to be a power subject to certain rules and founded upon certain principles. So it was up to a very late period, until the rebellion. The rule simply was, if a man came here and presented proper credentials from his State, to allow him to take the ordinary oath which we all took, to support the Constitution, and be admitted, and if there was any objection to him to try that question afterwards.

Speaking on February 13, Mr. Charles Sumner said: [1]

I do not stop to argue the question, if that amendment is now a part of the Constitution; for I would not unnecessarily occupy your time, nor direct attention from the case which you are to decide. For the present I content myself with two remarks: First, the amendment ha's already been adopted by three-fourths of the States that took part in proposing it, and this is enough, for the spirit of the Constitution is thus satisfied; and, secondly, it has already been adopted by "the legislatures of three-fourths of the several States" which have legislatures, thus complying with the letter of the Constitution. Therefore by the spirit of the Constitution, and also by its letter, this amendment is now a part of the Constitution, binding on all of us. As such I invoke its application to this case. In face of this positive peremptory requirement it is impossible to see how loyalty can be other than a "qualification." In denying it you practically set aside this amendment.

But even without this amendment, I can not doubt that the original text is sufficiently clear and explicit. It is nowhere said in the Constitution that certain specified requirements and none others shall be "qualifications" of Senators. The word "qualifications," which plays such a part in this case, occurs in another connection, where it is provided that "each House shall be the judge of the elections, returns, and qualifications of its own members." What these "qualifications" may be is to be found elsewhere. Searching the Constitution from beginning to end we find three "qualifications," which come under the head of form, being (1) age, (2) citizenship, and (3) inhabitancy in the State. But behind and above these is another "qualification," which is of substance, in contradiction to form only. So supreme is this that it is placed under the safeguard of an oath. This is loyalty. It is easy to see how infinitely more important is this than either of the others—than age, than citizenship, or than inhabitancy in the State. A Senator failing in either of these would be incompetent by the letter of the Constitution; but the Republic might not suffer from his presence. On the other hand, a Senator failing in loyalty is a public enemy, whose presence in this council Chamber would be a certain peril to the Republic.

It is vain to say that loyalty is not declared to be a "qualification." I deny it. Loyalty is made a "qualification" in the amendment to the Constitution; and then again in the original text, when in the most solemn way possible it is distinguished and guarded by an oath. Men are familiarly said to "qualify" when they take the oath of office, and thus the language of common life furnishes an authentic interpretation to the Constitution.

But no man can be allowed to take the oath as Senator when, on the evidence before the Senate, he is not competent. If it appear that he is not of sufficient age, or of the required citizenship or inhabitancy, he can not be allowed to go to that desk. Especially if it appear that he fails in the all-important "qualification" of loyalty, he cannot be allowed to go to that desk. A false oath, taken with our knowledge, would compromise the Senate. We who consent will become parties to the falsehood. We shall be parties in the offense. It is futile to say that the oath is one of purgation only, and that it is for him who takes it to determine on his conscience if he can take it. The Senate can not forget the evidence; nor can its responsibility in the case be swallowed up in any process of individual purgation. On the evidence we must act and judge accordingly. The "open sesame" of this Chamber must be something more than the oath of a suspected applicant.

According to Lord Coke, "an infidel can not be sworn" as a witness. This was an early rule which has since been softened in our courts. But under the Constitution of the United States and existing statutes a "political infidel can not be sworn" as a Senator. Whatever may be his inclination or motive he must not be allowed to approach your desk. The country has a right to expect that all who enter here shall have a sure and well-founded loyalty, above all question or "suspicion." And such I insist is the rule of the Constitution and of Congress.

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[1] Globe, p. 1145.

As if to place the question beyond all doubt, Congress by positive enactment requires that every Senator, before admission to his seat, shall swear that he has "voluntarily given no aid, countenance, counsel, or encouragement, to persons engaged in armed hostility" to the United States. Here is little more than an interpretation of the Constitution. The conclusion is plain. No person who has voluntarily given even "countenance" or "encouragement" to another engaged in the rebellion can be allowed to take that oath.

Speaking on the same day, Mr. George F. Edmunds, of Vermont, said,[1] after quoting the passage of the Constitution in relation to qualifications:

Senators will observe that there are negative statements. They are exclusive, every one of them. It is not declaring who shall be admitted into the Senate of the United States. It is declaring who shall not be eligible to election to this body; that is all. It is the same as to the House of Representatives and as to other officers, always in the negative, always exclusive, instead of in the affirmative and inclusive. And upon what principle was this Constitution founded? Will lawyers here deny that we have a right to look to the course of constitutional and parliamentary jurisprudence in that country from which we derive our origin and most of our laws to illustrate our own Constitution and to enlighten us in this investigation? By no means. And what was that? The House of Commons in Parliament, using the very language that in another section of the Constitution is used here, were the exclusive judges of the elections, returns, and qualifications of their own members. What was their constitutional power under that rule? It was that they were the sole and exclusive judges, not only of the citizenship and of the property qualification of persons who should be elected, but of everything that entered into the personnel of the man who presented himself at the doors of the House of Commons with a certificate of election for admission. And what were those rules? One was that an idiot could not be a representative in the Commons; another was that an insane man could not be, and a variety of other disqualifications, of which the Commons themselves alone were the sole and exclusive judges.

We declared in our Constitution that a certain class of persons should never, under any circumstances, whatever their other qualifications might be, be Senators of the United States; no alien should be a Senator. Did it therefore follow that every citizen, male or female, black or white, rich or poor, sane or insane, innocent or criminal, should be a Senator? Not by any means, I take it. We declared then that no person should be a Senator who was not a citizen, who had not a certain qualification of residence and of age, and there we stopped the rule of disqualification, leaving the common law exactly where it stood before. And that common law, in the very language of its immemorial time, was inserted in another section of the instrument, which declared that this body should be the judges of the elections, returns, and qualifications of its members. And that very word "qualifications," by the known history of jurisprudence, had the scope and signification that I have named; and that was, that it was the duty of the body to apply it to the candidate, to keep itself pure from association with criminals and incompetent persons.

Speaking on February 18,[2] Mr. Reverdy Johnson, of Maryland, said:

The only qualifications required by the Constitution are that the party to be chosen shall be at least 30 years of age, etc. * * * Subject to these limitations, the legislature of the State has the unrestricted right of choice. No department of this Government of the United States has any jurisdiction over it. The Constitution, whether we regard its terms or its evident scope, as manifested by its nature, creates a government of delegated powers, and that government has consequently no authority to interfere. * * *

Mr. Johnson went on to substantiate this argument by reference to the clause relating to expulsion. He also expressed the opinion that Congress had no authority to pass the test oath.

In the course of the debate Mr. Sumner had proposed this as a substitute:

That Philip F. Thomas, Senator-elect from Maryland, can not be admitted to take the oath of office required by the Constitution and laws, inasmuch as he allowed his minor son to leave the paternal house to serve as a rebel soldier, and gave him at the time $100 in money, all of which was "aid,"

[1] Globe, p. 1149.

[2] Globe, p. 1237.

"countenance," or "encouragement" to the rebellion, which he was forbidden to give; and further, inasmuch as in forbearing to disclose and make known the treason of his son to the President, or other proper authorities, according to the requirement of the statute in such cases, he was guilty of misprision of treason as defined by existing law.

Mr. Sumner withdrew this, however, it being urged that Mr. Thomas's conduct as a Cabinet officer in 1860 afforded more certain grounds for action.

Mr. Roscoe Conkling, of New York, proposed the following substitute:

That, in the judgment of the Senate, Philip F. Thomas, Senator-elect from Maryland, can not with truth take the oath prescribed by the act of Congress approved July 2, 1862, and that therefore he be not allowed to take said oath,

but withdrew it, after commenting on the variance of opinion as to whether the test oath actually prescribed a new qualification or not.[1]

The question being then taken on the resolution originally proposed by Mr. Johnson, it was disagreed to—yeas 21, nays 28.[2]

Then, by a vote of yeas 27, nays 20, the Senate agreed to the following, offered by Mr. Charles D. Drake, of Missouri:

Resolved, That Philip F. Thomas, having voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States, is not entitled to take the oath of office as a Senator of the United States from the State of Maryland, or to hold a seat in this body as such Senator; and that the President pro tempore of the Senate inform the governor of the State of Maryland of the action of the Senate in the premises.

459. The Georgia case of Wimpy and Christy in the Fortieth Congress.

In 1868 the House denied the oath to two persons who appeared with conflicting credentials which cast doubt on the right of either to the seat.

A question as to whether a State law may give to the minority candidate the seat for which the majority candidate is disqualified.

On December 7, 1868,[3] the Speaker laid before the House credentials from the governor of Georgia, certifying John A. Wimpy as entitled to a seat in the House. These credentials showed that John H. Christy had received the highest number of votes in the Sixth district, but, it appearing to the satisfaction of the governor that said Christy was ineligible under the fourteenth amendment to the Constitution, and the said Wimpy having received the next highest number of votes, the governor had commissioned Wimpy, relying on a law of Georgia providing that when the person receiving the highest number of votes for any office should be ineligible the person receiving the next highest number, and being eligible, should be commissioned.

At the same time Mr. James A. Brooks, of New York, presented credentials signed by Major-General Meade, commander of the military district including Georgia,[4] certifying the election of Mr. Christy. Mr. Brooks stated that this cer-

[1] Globe, pp. 1263, 1264.

[2] Globe, p. 1271.

[3] Third session Fortieth Congress, Journal, p. 8; Globe, p. 7.

[4] The reconstruction act provided for the military districts and the political reconstruction of the States under military supervision. 14 Stat. L., p. 428; 15 Stat. L., p. 73.

tificate was similar to that on which other Members from Georgia had been seated. Mr. Brooks charged that Mr. Wimpy had been a Confederate soldier.

Both certificates were referred to the Committee on Elections, and neither claimant was sworn in.

On January 15[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted a report. They found that the commission of Mr. Christy was signed by General Meade, under whose order the election had been held. That of Mr. Wimpy was signed by Governor Bullock, who was at the same election chosen governor and assumed the duties of the office on relinquishment of command by General Meade.

The committee found that Mr. Christy, by his own admission, had given "aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the Govermment," and in accordance with the precedent in the case of John Y. Brown was not qualified to hold a seat as Representative from the State of Georgia. This appeared independently of any question as to ineligibility under the fourteenth amendment.

Examining the case of Mr. Wimpy, the committee conclude:

The committee was of opinion that at the time of this election Mr. Wimpy, like Mr. Christy, could not take the oath of office because he had "voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the Government of the United States." If, therefore, the provision in the statute of Georgia included Members of Congress and also this cause of ineligibility, still Mr. Wimpy could not avail himself of it because of his own ineligibility at the time of the election. Nor would a subsequent removal of disabilities by act of Congress give Mr. Wimpy the benefit of this act, because the act refers to the eligibility at the time of the election; and if such an act could bring Mr. Wimpy within its provisions, such an act could likewise take Mr. Christy out of its provisions, and upon its passage he would, with a majority of the votes, be instantly entitled to the seat.

This conclusion, arrived at unanimously by the committee, renders it unnecessary to determine other questions raised in this case which would otherwise render it at least very doubtful whether under any circumstances, Mr. Wimpy, with a majority of 100 votes against him, could, by force of the law of Georgia already cited, become entitled to the seat. The committee therefore does not find it necessary to express an opinion whether the statute was intended to affect other than State officers, or could, if intended, include Representatives in Congress, or whether aiding the late rebellion was one of the causes of ineligibility embraced in the "foregoing rules" specified in the one hundred and twenty-sixth section of the act, which was itself enacted long before the rebellion broke out; but, for the reasons already specified, reports adversely on the claim of Mr. Wimpy to the seat. It therefore recommends the adoption of the accompanying resolutions:

Resolved, That J. H. Christy, having voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States, is not entitled to take the oath of office as a Representative in this House from the Sixth Congressional district of Georgia or to hold a seat therein as such Representative.

Resolved, That John A. Wimpy, not having received a majority of the votes cast for Representative in this House from the Sixth Congressional district of Georgia, is not entitled to a seat therein as such Representative.

Resolved, That the Committee of Elections be discharged from the further consideration of the question of removing political disabilities from John H. Christy, and that the same be referred to the tommittee on Reconstruction.

On January 28,[2] the report was debated in the House, rather in reference to

[1] House Report No. 8; 2 Bartlett, p. 464; Rowell's Digest, p. 225.

[2] Globe, pp. 675, 677.

its relation to the question of reconstruction than on the merits of the respective claimants, and on that day was postponed until the third Tuesday of February. It was not taken up on that day, or again. So neither claimant was admitted.

460. The Kentucky election case of Zeigler v. Rice in the Forty-first Congress.

In 1869 John M. Rice, challenged on account of alleged disloyalty, was permitted by the House to take the oath pending examination of the charges.

In 1869 the Elections Committee proposed to exclude for disloyalty one who had already been sworn in; and although the committee were reversed on the facts, the propriety of the proceeding was not questioned.

In a case somewhat inconclusive it was held that notice of disqualification given seasonably to the electors did not modify the rule against seating a minority candidate.

On March 4, 1869,[1] at the organization of the House, the name of Mr. John M. Rice, of Kentucky, was on the roll presented by the Clerk. When the Members-elect were taking the oath objection on ground of disloyalty was made to Mr. Rice, and he stood aside. On the next day the House agreed to this resolution:

Resolved, That Boyd Winchester and John M. Rice, Representatives-elect from the State of Kentucky, be now sworn in, and the papers filed against their admission be referred to the Committee of Elections, when appointed, with directions to report as soon as practicable.

Accordingly Messrs. Winchester and Rice were sworn in and took their seats.

On June 30, 1870,[2] Mr. R. R. Butler, of Tennessee, from the Committee an Elections, submitted the report of the committee on the case of Zeigler *v.* Rice. The contestant alleged that sitting Member was ineligible under section 3 of the fourteenth amendment to the Constitution.

A question of law and a question of fact were involved:

(*a*) The question of law arose from the following specification in contestant's notice of contest:

That notice of this disqualification on your part was given publicly to the voters of the district prior to the said election held on the 3d day of November, 1868, and during the time you stood as a candidate before the people; that this disqualification existed at that time; and that by reason thereof all votes cast for you were and are illegal and void; wherefore I was duly elected by the legal vote of said district on said 3d day of November last, and am lawfully entitled to and claim the seat in the Forty-first Congress of the United States as Representative for said Ninth district of Kentucky.

The majority in their report say they are convinced that sitting Member is ineligible, "but do not agree with contestant that as contestee was ineligible the candidate who was eligible is entitled to the seat."

The views of the minority, presented by Mr. Albert G. Burr, of Illinois, say:

The undersigned concurs with the majority of the committee in the opinion that in no possible aspect of this case can it be pretended that the contestant Zeigler is entitled to the seat as the Representative of the Ninth Congressional district of Kentucky. There is no dispute on that point. The contestant himself does not claim that he received a majority of the votes cast, and no just man can dissent from the conclusion of the committee that he has no shadow of title whatever to the seat.

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[1] First session Forty-first Congress, Journal, pp. 9, 13; Globe, pp. 6, 13.

[2] Second session Forty-first Congress, House Report No. 107; 2 Bartlett, p. 871.

(*b*) The question of the qualification of Mr. Rice was a question of fact. The majority of the committee, from the testimony presented, concluded that he had been disloyal and had given aid and comfort to the enemy. Therefore they proposed the following:

Resolved, That the Hon. John M. Rice is disqualified by the third section of the fourteenth amendment to the Constitution of the United States from holding a seat in Congress, and that the seat now occupied by him as a Representative from the Ninth district of Kentucky, in the Forty-first Congress, is hereby declared vacant, and that the Speaker of the House of Representatives notify the governor of the Commonwealth of Kentucky that such vacancy exists.

The minority construed the evidence as entirely failing to show Mr. Rice disqualified, and recommended the following:

Resolved, That Hon. John M. Rice is justly entitled to his seat as Representative in the Forty-first Congress from the Ninth district of the State of Kentucky.

The report was debated on July 11,[1] the debate being confined entirely to the question of fact, and the proposition to exclude a Member who had already taken the oath and his seat was not discussed. As to the question of fact, Members who bad known sitting Member at the time of the alleged disloyalty raised a question as to the conclusions which the majority had drawn from the testimony.

Finally the question recurred on the substitute proposed by the minority, and it was agreed to without division. Then the resolution as amended was agreed to.

So the report of the majority of the committee was overruled, and Mr. Rice retained the seat.

461. The Virginia election case of Tucker v. Booker, in the Forty-first Congress.

In 1870 no one of the Members-elect from Virginia was seated until the credentials were reported on by a committee and the House had acted.

A Member-elect whose loyalty was impeached was permitted to take the oath; and after that the House was reluctant to take action in his case.

A question as to whether or not a Member who is disqualified, but has been permitted to take the oath, may be excluded by majority vote.

A question relating to a Member's right to his seat being laid on the table, the Member continues in his functions.

At the beginning of the second session of the Forty-first Congress the credentials of all the Members-elect from the State of Virginia were referred to the Committee on Elections, and the claimants were not sworn in until the committee reported. Against Mr. George W. Booker charges of disloyalty were made, but the committee on February 1, 1870[2] reported a recommendation that the oath be administered to him in accordance with the precedent made by the House in the case of Mr. McKenzie. There was much discussion over this motion. The committee had not examined the question of loyalty, and strong allegations of dis-

[1] Journal, pp. 1199, 1200, 1213; Globe, pp. 5442–5447.

[2] Second session Forty-first Congress, Journal, p. 244; Globe, pp. 947–950.

loyalty were made against Mr. Booker. Finally, by a vote of yeas 89, nays 72, it was determined that the oath should be administered, and Mr. Booker was accordingly sworn in.

On March 22, 1870,[1] Mr. George M. Brooks, of Massachusetts, from the Special Committee of Elections, presented the report in the case of Tucker v. Booker. The returns showed Mr. Booker elected by a plurality of 3,533 over contestant. The grounds of contest related entirely to the loyalty of sitting Member, it being charged that he was disqualified because of section 3 of the fourteenth amendment to the Constitution, and also that he was unable to take the oath of July 2, 1862.

The committee found from the testimony of one witness that Mr. Booker had admitted that he voted for the Virginia ordinance of secession.

The remaining testimony was of a documentary character, setting forth facts such as are included in this portion of the report:

From the evidence it appears that on July 14, 1856, said Booker, having been elected a justice of the peace for the county of Henry and State of Virginia for the term of four years from the 1st day of August then next, took the oaths of office prescribed by law, and the oath to support the Constitution of the United States; that acting under this commission, he performed the duties of justice of the peace, and on July 9, 1860, having been again elected a justice of the peace for the term of four years from the 1st day of August then next, he took the several oaths required by law, and on the 10th day of September, 1860, he was elected presiding justice of the court, and that he continued to exercise the duties of such magistrate during the rebellion.

The particular acts of disloyalty that are relied upon by the contestant, and which appear to be proved and are not denied by the the contestee, are as follows: That at a county court held for Henry County, at the court-house, on May 13, 1861, said Booker met with other justices and voted to accept the provisions of an act of the general assembly passed January 19, 1861, authorizing the county courts to arm the militia of their respective counties, and to provide means therefor, pursuant to a resolution of the convention of Virginia "recommending the county courts to levy or raise, by issuing bonds, a sufficient amount of money to equip and arm such volunteers as may be raised within the limits of their respective counties" it was also at said court "ordered that ten thousand dollars be raised by levy on all the lands and all other subjects liable to tax and levies in said county."

That at a county court held July 8,1861, said Booker being present as presiding justice, William Martin was appointed by said court as an agent on the part of Henry County, "to visit the volunteer companies in the service and report to the next court the wants and general condition of said companies, with a view to making provision by the court for the relief of their necessities." At a court held September 9, 1861, Samuel H. Haviston was appointed an agent for the county to purchase full winter equipments for the four volunteer companies in the service.

At a court held October 15, 1861, said Booker was appointed an agent for the county "to repair to the encampments of the several companies from said county and ascertain the wants of each member in clothing, and report thereof to the next court." And at a court held November 12, 1861, said Booker made a report in writing, which is annexed hereto and marked "A"

The sitting Member did not deny the facts presented against him, but claimed that he was from the outset opposed to secession; that he was always a Union man, and that he held the offices he did in order to protect other Union men and save himself from conscription. The testimony of other witnesses convinced the committee of this, and they say:

Although technically said Booker may have seemed to have "given aid and comfort to the enemies 11 of the United States by performing the duties of his office, yet the committee is convinced that he was during the whole rebellion, and to the present time has been, a sincere Union man, and that the acts

[1] House report No. 41; 2 Bartlett, p. 772.

by him performed to which objection is taken are in contravention of the letter but not the spirit of the third article of the fourteenth amendment to the Constitution of the United States. The committee therefore holds that said Booker is not ineligible under the same.

The committee is, however, of the opinion that if no action had been taken by the House upon the claim of said Booker for a seat, it would have reported that having accepted and exercised the functions of an office under the Confederate government, he could not take so much of the oath prescribed by the act of July 2, 1862, as declares that he has "neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States," without being relieved from the disabilities imposed by said act, and that it should have recommended that so much of said oath above recited should be omitted in administering the oath of office to said Booker.

But the House, on the Ist day of February last, upon representation being made that said Booker was loyal, voted that he was entitled to his seat, and he took the oath prescribed by the act of July 2, 1862, and is now a sitting Member of this House. The committee is of the opinion that this vote was an indication of the sense of the House that the fact of his loyalty was the question to be settled, and this being determined in his favor, he was entitled to his seat. The committee also believes that said Booker, conscious of his loyalty, did not consider that he was debarred from taking said oath, holding the office under the circumstances and for the purposes he did so hold it; that he did not deem it was the spirit, intent, or meaning of the same to apply to one who was truly loyal and a Union man through the rebellion, and has been so to the present time.

The committee therefore, believing said Booker to have taken said oath honestly, considering that he was right in so doing, and being desirous of carrying out the will of a large plurality of the voters in his district, and the declared wish of the House as expressed by their vote of February 1, hereby recommends the passage of the following resolution:

Resolved, That the Ron. George W. Booker is entitled to retain his seat as a Member of this Congress from the Fourth district of the State of Virginia.

The report was offered in the House on March 22,[1] and thereupon Mr. Luke P. Poland, of Vermont, proposed a preamble reciting the facts as to sitting Member's acts, and a resolution "That George W. Booker is disqualified from holding a seat as a Member of this House."

On July 5[2] the report was debated in the House. Mr. Henry L. Dawes, of Massachusetts, raised a question as to how Mr. Booker could be excluded, since he had already been admitted to a seat and taken the oath. Mr. Dawes did not see how he could be removed except by expulsion. Mr. Poland seemed to regard the taking of the oath under the circumstances as temporary, and intimated that a majority vote, in his opinion, might exclude the sitting Member.

The remainder of the debate referred largely to the record of Mr. Booker and the question of duress as an excuse for his acts.

Finally Mr. Dawes moved to lay the whole subject on the table.

A question being raised as to the effect of such a motion, if carried, the Speaker pro tempore said:

It is hardly a parliamentary question for the Chair to decide. The Chair is under the impression, however, that it would leave the case just where it was before it was referred to the Committee on Elections.

The motion to lay on the table was then agreed to—ayes 99, noes 24.

On July 6[3] Mr. Booker is recorded as voting, and thereafter to the end of the session.

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[1] Globe, p. 2135.

[2] Journal, p. 1149; Globe, pp. 5195–5199.

[3] Journal, p. 1155.

462. The Virginia election case of Whittlesey v. McKenzie in the Forty-first Congress.

In 1870 the House voted to administer the oath to a Member-elect on his correct prima facie showing, although a question as to his qualifications was pending before the Elections Committee.

In 1870, after a Member-elect had been permitted to take the oath, the House took up and decided a contest based on his alleged disloyalty, deciding that the evidence did not show his disqualification.

An instance wherein the House decided on its own initiative an election case pending before the Committee on Elections.

At the opening of the second session of the Forty-first Congress the credentials of all the claimants to seats from Virginia were referred to the Committee on Elections for examination, pending the administration of the oath. On January 31, 1870,[1] Mr. John A. Bingham, of Ohio, not a member of the Elections Committee, offered the following resolution:

Resolved, That Hon. Lewis McKenzie be now sworn in as a Member of this House from the Seventh district of Virginia, he having the prima facie right thereto; but without prejudice to the claim of Charles Whittlesey, contestant to such seat, or to his right to prosecute his claim thereto.

Mr. Halbert E. Paine, of Wisconsin, chairman of the Committee on Elections, stated that Mr. McKenzie's credentials were in the same form as those of the other Virginia claimants, who had already been allowed to take the oath. But there was a resolution of the House providing that whenever either contestant should allege that the other claimant was unable to take the oath, the Committee on Elections should inquire into the charge and report before the oath should be administered. The charge had been made in this case, and an investigation had been made. The testimony was now in the hands of the printer, and until it was printed and examined the committee could not arrive at a conclusion as to whether or not Mr. McKenzie was entitled to take the oath. Mr. Paine admitted, however, that the House, having all control over the subject, might permit Mr. McKenzie to take the oath, although the order of the House precluded the Committee on Elections from recommending it at this stage.

After debate as to Mr. McKenzie's loyalty, the resolution was agreed to without division.

Mr. McKenzie was accordingly sworn in.

On May 24, 1870,[2] Mr. John C. Churchill, of New York, from the Subcommittee on Elections, submitted a report in the case of Whittlesey v. McKenzie. Contestant raised no question as to the validity of the election or the correctness of the count, but claimed that sitting Member was guilty of acts in the early part of the year 1861 which made him ineligible under the third section of the fourteenth article of amendments to the Constitution, and also made it impossible that he should truthfully take the oath of July 2, 1862.

The contestant gave facts in support of his contention:

1. On the 21st day of January, 1861, the house of delegates of Virginia, of which the sitting Member was then a member, adopted, by a unanimous vote, 108 delegates voting, the following resolution:

"Resolved by the general assembly of Virginia, That if all efforts to reconcile the unhappy difference

[1] Second session Forty-first Congress, Journal, p. 239; Globe, pp. 917–918.

[2] House Report No. 75; 2 Bartlett, p. 746.

existing between the two sections of the country shall prove to be abortive, that, in the opinion of the general assembly, every consideration of honor and interest demand that Virginia shall unite her destiny with the slaveholding States of the South."

The sitting Member, Mr. McKenzie, was present and voted for this resolution.

2. On the 14th day of March, 1861, the senate of Virginia passed, with an amendment, and returned to the house of delegates for their concurrence, "An act to authorize the issue of treasury notes." A motion was made to lay the bill and amendment on the table. For this motion the sitting Member voted, and in support of it made a speech, of which the following is a report which appeared in the Daily Richmond Whig of March 15, 1861, and the substantial correctness of which is not disputed:

"During the debate, Mr. McKenzie said the House had been in session sixty-six days, and, until a few days ago, he had supposed the bill had become the law of the land. He had voted for this bill the time he did because he had believed it was important to the public safety. We had just voted that, so far as Virginia was concerned, we would not permit the coercion on the part of the Federal Government of any of the Southern States. Having come to this conclusion, he, for one, was ready to vote means to arm the State, if need be.

"Does anybody presume that 170,000 voters of Virginia, a commonwealth extending from the Potomac to the Ohio River, a better armed State than any five States in the Union, are acting from any fear of the North? Virginia is not afraid. When the convention comes to a decision, and whatever they do, and it is ratified by the people, she will take her position, and, if necessary, fight. I think the opportunity ought to be given to amend, if necessary; and I shall, therefore, vote to lay it on the table."

The motion to lay on the table was defeated by a large majority, and the amendment of the Senate was then concurred in and the bill passed by a unanimous vote. The sitting Member voting in the affirmative.

3. On the 2d of May, 1861, the sitting Member, being then a member of the common council of the city of Alexandria, voted in favor of an appropriation of $200 each to the Emmet Guards and to the Irish volunteers, to aid in equipping these companies, which soon after entered the Confederate service.

4. On April 30 and May 6, 1861, a quantity of oats belonging to sitting Member were taken by the military authorities of Virginia and were charged to the State.

The committee, examining these charges at length, found that the only government to which Mr. McKenzie yielded support at the times in question was that of the State of Virginia, but that Virginia did not ratify the ordinance of secession until May 23, 1861. Since then Mr. McKenzie had been an outspoken Union man. It could not be pretended that he had yielded support to any government hostile to the United States.

Therefore the only question was as to whether or not he had given "aid or comfort" to the enemies of the United States. The committee found from an examination of the testimony and facts, in relation to all the circumstances, that the charges of the contestant were not sustained. They also found:

A good deal of evidence in this case was taken to show that the sitting Member before, during, and after the occurrence of the acts charged as making him ineligible was known and accepted generally by all, both the loyal and the disloyal people of his acquaintance in Alexandria and vicinity, as a friend of the Union cause. It is well argued by the contestant that this can not be received as a defense for two reasons: First, that the sitting Member has served no answer in this case, as required by the laws, and therefore can not set up in the evidence any matter by way of defense to the charges of the contestant except such as may tend to negative the charges; and, second, that if the acts make him ineligible, neither prior, subsequent, nor contemporaneous loyalty could make him eligible or do more than furnish a ground for him to ask to be relieved from his disabilities. But this evidence, though not receivable as a defense, is properly to be received, as enabling us the better to understand the acts themselves and to determine their true character.

Therefore:

We conclude that nothing shown in the evidence in this case makes the sitting Member ineligible under the fourteenth article of amendments to the Constitution of the United States or debars him

from taking the oath prescribed by law, and this makes it unnecessary for us to consider the question very ably presented by the contestant in his argument as to the effect of such ineligibility, if shown, upon votes cast for the sitting Member; and we conclude with recommending to the House the adoption of the following resolutions:

Resolved, That Charles Whittlesey is not entitled to a seat as a Member of the Forty-first Congress from the Seventh Congressional district of Virginia.

Resolved, That Lewis McKenzie is entitled to a seat as a Member of the Forty-first Congress from the Seventh Congressional district of Virginia.

On June 17[1] the resolutions were agreed to by the House without debate or division.

463. The Senate election case of Joseph C. Abbott in the Forty-eighth Congress.

A Senator-elect being disqualified, the Senate, after elaborate examination, decided that the person receiving the next highest number of votes was not entitled to the seat.

On March 7, 1871,[2] a memorial was presented in the Senate from Joseph C. Abbott, who claimed to have been legally elected a Senator from North Carolina. This memorial was referred to the Committee on Privileges and Elections, and on February 28, 1872, Mr. John A. Logan, of Illinois, submitted from that committee the following report:[3]

The Committee on Privileges and Elections, to whom was referred the memorial of Joseph C. Abbott, claiming to be entitled to a seat in this body as a Senator from North Carolina, for the term commencing on the 4th day of March, A. D. 1871, respectfully submit the following report:

Article I, section 5, of the Constitution of the United States provides that—

"Each House shall be the judge of the elections, returns, and qualifications of its own members."

The duty which devolves upon the Senate in deciding cases that arise under this clause of the Constitution is in the nature of a judicial proceeding, and the cases must be decided upon the evidence presented and in accordance with legal principles as established by former parliamentary and judicial precedents and decisions.

Examining the facts, the committee found as to the election by the legislature:

That the number of members present at the time and so voting constituted a quorum of each house of the legislature, the constitution of North Carolina providing that "neither house shall proceed upon public business unless a majority of all the members are actually present," the numbers so present amounting to a majority of all the members.

On the following day the two houses, in the usual form, declared that Vance had received a majority of the votes cast in both houses and that he was duly elected as such Senator for said term of six years commencing on the 4th day of March, 1871.

It is also further in evidence that said Vance was not on said second Tuesday of November, 1870, and at no time since has been, qualified to serve as such Senator, owing to disability imposed by the fourteenth article of amendment of the Constitution.

It is averred that the members of the legislature of North Carolina so voting for Vance, at the time their votes were cast, had notice of the ineligibility of Vance, but no evidence on this point has been presented to the committee, the memorialist relying upon the assumption that this was a matter of public notoriety.

It appears, therefore, that Abbott rests his claim to the seat solely upon what he assumes to be the legal result of the conceded ineligibility of Vance, who, although receiving a majority of the votes, is not entitled to take the oath of office or hold the seat. He assumes that it is a conclusion of law that if the

[1] Journal, p. 1026; Globe, p. 4519.

[2] Election Cases, Senate Document No. 11, special session, Fifty-eighth Congress, p. 396.

[3] Second session Forty-eighth Congress, Senate Report No. 58.

candidate who has received the highest number of votes is ineligible and that ineligibility was known to those who voted for him before casting their votes, that the votes so cast for him are void, and should be considered as nullities and as though they never had been cast; and consequently the candidate receiving the next highest number of votes is elected.

In support of this view of the case the memorialist has called the attention of the committee to a large number of English authorities bearing on this question. While the committee make no question as to the general tenor of the decisions to which attention has been called, yet it is evident that these are based upon a very different rule from that adopted in our country. To show that this rule is different, the committee would refer to the following authorities, which are cited in the very able report of Mr. Dawes from the Committee on Elections, in the case of Smith *v.* J. Y. Brown (Report of Committees, No. 11 second session Fortieth Congress.) * * *

After citing the authorities in favor of seating a minority candidate, when an election had been made after due notice of disabilities, the report continues:

But is such a principle applicable in a government based upon the theory that the power emanates from the people? In the British Government the case is exactly the reverse, as there the theory is that the power originates with the monarch, and the privileges allowed the people to select representatives are, under that theory, considered as conceded and not as inherent rights. But this Government rests upon an entirely different basis. Here the power originates with the people, and that which the Government is authorized to exercise is conceded by the people. The right to designate who shall exercise this power has never been delegated. The method by which this choice shall be made known consistent with this theory can never be otherwise than by giving the majority or plurality the right to decide. Any attempt to restrict the right of the voter is an attempt to invade that right; therefore the theory that casting a vote knowingly for an ineligible candidate is in the nature of a crime which may be punished by ignoring the act of the majority and recognizing the act of the minority is in direct conflict with that most sacred right which the people of this Government have always guarded with jealous care. Such a rule is consistent with the theory of the British Government, as it affords one means of preventing the power from passing into the hands of the people; but it is directly at variance with the theory of our Government, as it affords one means by which that right which the people have of selecting their representatives may be abridged.

While, therefore, the general tenor of the English authorities to which he refers us is admitted to be as claimed by the memorialist, yet we do not conceive such a rule to be applicable to and consistent with the political institutions of the United States, where the right of the majority to govern and the Government is based upon the consent of the governed is one of the first political lessons to be learned.

There is also another very strong reason why the English authorities relied upon by the memorialist are not applicable in the present case, even if the spirit and fundamental idea of our institutions were insufficient to show this.

The third section of the fourteenth amendment of the Constitution, which imposes the disabilities in question, also contemplates and provides for the removal thereof by Congress. There is no such feature in the English law. The English cases are, therefore, based upon a very different state of facts from those that exist in this country, and are not precedents for this case.

It is difficult to conceive how the Constitution could grant authority to Congress to remove the disabilities under which an individual who has been elected is laboring, and allow him to take his seat as a Member, and yet at the same time embrace the idea that such an election is wholly void and the votes cast for him nullities. Yet Congress by its action in numerous instances has given the first construction to this clause of the Constitution, and if the memorialist in this case shall be admitted to his seat the Senate will have to give the second construction.

After citing at length the judicial decisions and legislative cases against the English theory, the report continues:

But suppose that it is admitted that the English rule is applicable here, do the facts in this case bring it within that rule? Were the votes for Vance cast in willful obstinacy for a candidate the voters knew, or had good reason to believe, would not be entitled to take his seat? The memorialist avers that the fact that Vance was known to be ineligible is not controverted. That his ineligibility was a

matter of public notoriety in North Carolina is doubtless true, and that it was known to most if not all of the members of the legislature is quite probable; yet no evidence has been presented to the committee proving this fact, or that notice of his disqualification was given at the time the vote was taken.

Let us even go one step further, and suppose that the evidence on this point was clear and explicit; are we not justified in believing that those who voted for Vance did so in good faith, believing that his disabilities would be removed after the election by the action of Congress, basing this presumption on the precedents which had recently been set in similar cases? Nor is this by any means an improbable hypothesis, but accords much better with the facts presented to the committee than the hypothesis that the votes given for Vance were cast in "willful obstinacy" for a candidate they knew would not be admitted to his seat. If they were given under the impression that these disabilities would be removed, then, although unavailing, they can not be rejected from the count. And the committee would again refer to the report of the committee in the case of Yulee *v.* Mallory, of Florida, 1852.

* * * * * * *

Under the English rule it is the fact that the voters knowingly and purposely throw away their votes that lays the foundation for saying they assent to the election of the minority man. But no such purpose can be predicated of the legislature of North Carolina. They did not know that their votes for Vance would be thrown away. They did not purposely throw them away, because Congress had in numerous cases previously removed disabilities of a similar character from those elected and allowed them to hold their offices. Nearly all of the officers elected in this State in 1868 had their disabilities removed by the act of June, 1868, and were allowed by virtue thereof to enter upon and discharge the functions of their respective offices.

The same act removed the disabilities of a large number of persons elected in Alabama in February, 1868, and at the close of the section contains this sweeping clause:

"And also all officers-elect at the election commenced the 4th day of February, 1868, in said State of Alabama, and who have not publicly declined to accept the offices to which they were elected." (15 Stat. L., 366, 2.)

These were certainly sufficient to raise in the minds of the members of the legislature of North Carolina who voted for Vance the belief that his disabilities would be removed and that he would be allowed to take his seat. In fact, they had good right to believe that this was the rule, and the opposite the exception, especially where the persons so elected were known to favor the restoration of order and obedience to law.

Again, it may be fairly argued that the fourteenth amendment to the Constitution did not disqualify Vance to be elected, but only to hold the office of Senator in case his disability should not be removed. Upon this interpretation his election was voidable only, and not void, and, as a consequence, Abbott was not elected. But even if this interpretation is erroneous, it is one the legislature of North Carolina might (and as nothing to the contrary is shown, we are to presume did) honestly entertain (especially in view of the action of Congress above referred to), and if they elected Vance under a mistake in law, his election was not void, but only voidable.

Although the committee have referred to the decisions of the courts and legislative bodies of this country bearing upon this case, the tenor of which is believed to be decidedly adverse to the claim of the memorialist, yet this appears unnecessary, as a careful examination of the act of Congress of July 25, 1866 (which has already been alluded to on one point), when applied to the facts in this case, would seem to be an effectual bar to the claim of the memorialist.

The report then cites this act, which in terms requires the election of a Senator by majority vote, and concludes:

It is, moreover, evident from the very wording of this act that Congress did not even contemplate the possibility of an election by a minority under any circumstances, but by this act imply the opposite.

As to another question the report holds:

It has been suggested that there is a distinction in respect to the operation of the rule insisted on by the memorialist between a popular election, under our liberal system of suffrage, for a Member to the House of Representatives by ballot and an election of a Senator by viva voce vote of the members of a legislature.

Your committee are inclined to think this is correct, but that the distinction bears against the claim of the memorialist instead of in favor of it.

The number of persons entitled to vote at a popular election is not fixed and definite, and hence it is impossible to have a quorum or anything answering thereto. There is no power to compel attendance. This is, and necessarily must be, wholly voluntary; therefore it is necessary that those attending should have the right to elect where the election is free, and are prevented from attending by force, intimidation, or fraud. If a candidate receiving the majority is disqualified, and the votes cut for him are declared nullities (as claimed by the memorialist), the remaining votes are as effectual to elect as if every voter of the district had been present; and if those who voted for the candidate receiving the majority had not been present at all, the election nevertheless would have been valid. But the rule is wholly different in legislative bodies. The number is fixed and definite, a quorum can be and is required to act, and the presence of a less number is not effectual. Had but the 32 who voted for Abbott been present in the house at the time the vote was cut, we do not suppose anyone would contend that he had even a shadow to base his claim upon; yet this number would be sufficient to elect in a district of 1,000 voters if no others voted. We therefore coincide in the view that there is a difference, and that, even if the English rule was applicable in the case of an election of a Member to the House of Representatives, it would by no means follow that it was applicable to the election of a Senator where the number voting, of the votes counted, is less than a quorum.

Your committee, therefore, after a full hearing of the case and examination of the authorities, come to the conclusion that the Hon. Joseph C. Abbott, of North Carolina, is not entitled to a seat in the United States Senate, and recommend the adoption of the following resolution:

Resolved, That Joseph C. Abbott, not having received a majority of the votes cast by the North Carolina legislature on the second Tuesday in November, 1870, for the office of Senator of the United States, is not entitled to a seat in said United States Senate as such Senator.

Mr. Matt H. Carpenter, of Wisconsin, on behalf of himself and Mr. B.F. Rice, of Arkansas, submitted minority views, in which they say:

Had Vance been qualified to serve, there would be no question as to his right. But he was disqualified by the fourteenth amendment to the Constitution of the United States, for the reason that he had been a Member of the Congress prior to the rebellion, and, as such Member, had taken an oath to support the Constitution of the United States, and during the rebellion he had acted as colonel in the rebel army, and taken an oath of allegiance to the so-called Confederate States of America; and he had acted as governor of the rebel State of North Carolina from August, 1862, to April, 1865; and this disqualification was notorious—known to all the members of the legislature at the time of his election, and to all the people of that State. The fact that Vance was known to the members of the legislature who voted for him for Senator to be disqualified is not controverted. On the contrary, General Ransom, who claims to have been subsequently elected, upon the resignation of Vance, was heard before your committee, and frankly admitted that the fact that Vance was disqualified was well known to all the members of both houses of the legislature at the time of his pretended election.

It is admitted on all hands that the election which was held, as before stated, conferred no right upon Vance to a seat in this body; but Abbott, who was qualified, and who received the next highest number of votes cast, and a majority of all the votes cast for qualified candidates in both houses, insists that he was elected at said election, and is now entitled to the seat; and this is the question to be determined.

The minority views then go on to cite the statute governing the election of a Senator by the legislature, and continues:

It will be perceived that this act does not attempt to determine what shall be a quorum of each house, but leaves that question to be determined by the constitution and laws of the State. By the constitution of North Carolina it is provided:

"Neither house shall proceed upon public business unless a majority of all the members are actually present."

It is not necessary that all the members should participate in the transaction of public business by either house, but merely that a majority of all the members should actually be present in each house. But in providing for an election by the joint assembly of the two houses the act of Congress does provide that in such election—

"The person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected."

The difference in these two provisions is not one of phraseology merely, but of substance. In the election by the two houses separately in North Carolina, if a majority of the members elected to each house are actually present, the person who shall receive the highest number of votes cast, though that may be less than half of a constitutional quorum, is to be declared elected; but in the election by the joint assembly it is not enough that a candidate should receive a majority of all the votes cast, but he must receive a majority of "all the votes of the said joint assembly—a majority of all the members elected to both houses being present and voting." These provisions are so materially different that the variation can not be regarded as accidental, and the reason for the distinction is, no doubt, that the act intended to leave the matters of a quorum and the proceedings of the houses acting separately to be regulated by the constitution and laws of the State, but the act intended to provide what should be necessary to constitute a quorum and make an election in the joint assembly—a body created by the act, and whose proceedings might not be regulated by the constitution of the State.

It is only necessary in this case to consider the effect of the proceedings in the two houses on the first day, because it is upon those proceedings Mr. Abbott founds his claim. If he was legally elected on that day the subsequent proceedings by the joint assembly could not affect his right, nor can such claim be affected by any subsequent proceedings of the legislature. His claim depends upon the legal effect of what took place in the two houses on the first day of the election.

It is insisted that the provisions of the act in relation to election by the two houses and by the joint assembly are substantially the same, because it is provided by the act that—

"Each house shall openly, by a viva voice vote of each member present, name one person for Senator, etc., and the name of the person so voted for who shall have a majority of the whole number of votes cast in each house shall be entered on the journal," etc.

And hence it results that to be elected on the first day the person must have a majority of all the members present. But this construction, which is equivalent to saying that, to make an election, every member must vote, would put it in the power of a single member of the legislature to defeat an election on that day. This could not have been intended, and that clause must be regarded as relating merely to the manner of voting; and if a number of votes are cast for a qualified candidate, and the other members refuse to vote at all, then the person "who shall have a majority of the whole number of votes cast" must be deemed elected.

The provision concerning the joint assembly is materially different. There it is provided:

"The joint assembly shall then proceed to choose, by a viva voice vote of each member present, a person for the purpose aforesaid, and a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected."

The clause "a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting," undoubtedly requires that to make an election a candidate must receive a number of votes greater than half of the majority of both houses. The difference between the two provisions is this: If a majority or quorum of each house are actually present when each house proceeds to the election on the first day, the person receiving the highest number of votes cast is elected, though receiving less than half of a majority. But in the joint assembly it is necessary to an election that a candidate should receive the votes of more than half of a majority of both houses.

It is a well-established rule for construing statutes that every clause, phrase, and word must be deemed to have been added to the statute for the purpose of accomplishing some end that would not be accomplished without it.

* * * * * * *

Applying this familiar precept to the statute before us, it must be held that the provision in regard to an election by the joint assembly requiring a person to receive "a majority of all the votes of the said joint assembly," which is not found in the act in relation to an election by the two houses acting

separately, was added for the purpose of requiring in one case what was not necessary in the other. It may be said that the same thing ought to be required in the one case as in the other, and that the act of Congress ought not to be so construed as to permit an election by the minority in one case and to forbid it in the other. But the answer to this is obvious. Before the passage of this act the States elected Senators by various methods; some by a joint assembly of both houses and some by the action of the two houses separately. In those States which elected by the latter method the houses might sometimes disagree, and thus defeat an election. It was the manifest intention of the act of Congress to afford to a legislature the opportunity of electing a Senator by the separate action of the houses, and in doing so to leave the whole detail of the election to be regulated by the parliamentary usage of the State. But in providing for an election by the joint assembly, a method not in use in some of the States, it was necessary to provide what should be a quorum, and what should be necessary to an election.

As the act of Congress does not affect the question under consideration. resort must be had to the precedents and authorities, English and American.

It is admitted that when the electors vote for a disqualified candidate, in ignorance of his disqualification, the election is void, and must be remitted to the elective body. But it is insisted that where, as in this case, the electors (the members of the two houses) had full knowledge of the disqualification, votes cast for such person are considered as thrown away, and the qualified candidate receiving the next highest number of votes, and a majority of all votes cast for qualified candidates, is elected. If this proposition is well grounded, Mr. Abbott is entitled to a seat; and this is the precise question upon which we are to consult the authorities.

Mr. Abbott furnished to your committee a printed brief containing references to and quotations from the decisions upon this question from the earliest times, which quotations are embodied in this report. * * *

After citing many decisions referred to in the brief, especially the case of Yulee, the views of the minority proceed:

It was strongly contended before your committee that the case under consideration falls fairly within this equitable principle, because it was said that all the State officers and judges of North Carolina had been elected while under disability imposed by the fourteenth amendment, and Congress had subsequent to their election removed their disabilities and enabled them to hold their offices; and your committee were referred to the act of June 25, 1868 (15 Stat. L., p. 366), by which "all officers elected at the election commencing the 4th day of February, 1868, in the State of Alabama," and who had not publicly declined to accept the offices to which they were elected, were relieved of their disabilities. From these facts it was contended that the members of the legislature who voted for Vance might well believe, and it was said that in fact they did believe, that Congress would relieve Vance of his disability and that he would be admitted to his seat in the Senate.

This suggestion has some force, but a slight examination will show that it is rather plausible than round. In the first place, the case bears no resemblance to that supposed in the report in Yulee's case, because here there was no misapprehension as to any fact then existing. If the electors had supposed that Vance was not disqualified, though in fact he was, or had they believed that an act had already passed Congress relieving him from his disability, though such was not the case, then the electors would have acted under a misapprehension and honestly entertained the belief that Vance was eligible. But such is not the case. Every elector who voted for Vance knew that he was disqualified by the fourteenth amendment and that his disability had not been removed. Every elector therefore knew when he gave his vote for Vance that, as the case then stood, such vote was thrown away. As well might a man claim exemption from the penalty imposed by a statute upon the ground that although he knew he was violating its provisions he expected the legislature would repeal it. It was the duty of that legislature to elect a Senator who, in virtue of that election and without the aid of any other government, would be authorized to demand his seat as a Senator. To elect a disqualified candidate and then refer it to Congress to remove his disqualifications or not is to transfer the election from the legislature to Congress. In such case the legislature would in effect be nominating a Senator and submitting it to Congress to determine whether or not he should be a Senator. Put the case in the strongest possible light for Vance, still it must be admitted that the electors who voted for him knew that as the case then stood their votes were being thrown away; that without the action of Congress, which might or might not be interposed, the election was in violation of the Constitution; and up to the time when

Abbott claimed his seat in this body, and up to the present hour, the votes given for Vance remain wholly inoperative, void, blanks in the law, thrown away for every legal purpose. Mistakes which equity may relieve against are mistakes in regard to existing facts not over sanguine and unfounded hopes looking to the future for realization and accomplishment.

In the second place, the legislation of Congress in regard to the organization of the reconstructed governments of the Southern States furnishes no precedent to bind the Senate in determining the election of its own Members. Those State governments could not be organized without relieving the disabilities of those who had been elected. Congress was therefore compelled to do so or abandon those States to anarchy or remit them to military rule. To quote the language of a great statesman on another subject, "A doubtful precedent should not be followed beyond its necessity." No such necessity exists in regard to the Senate of the United States, and therefore the electors had no right to assume that Congress would do in this case, where there was no necessity for it, what it had been compelled to do in the other cases referred to. And in no case has a Senator elected under disabilities imposed by the fourteenth amendment been relieved of such disability and permitted to take his seat.

Several decisions of the House of Representatives have been referred to which are supposed to be inconsistent with the principle here asserted. But it is believed that in none of those cases was it established that the electors knew of the disqualification of the candidate voted for; and in the very able report of Mr. Dawes, from the Committee on Elections (Report of Committees, 11, second session Fortieth Congress), which is much relied upon, it is expressly stated that this point was not involved, because it did Dot appear that the electors bad such notice.

But there are many reasons for declining a critical examination of the decisions of the other House in regard to the election of its Members. By the Constitution each House is made the judge of the elections, returns, and qualifications of its Members. It would therefore be improper for the Senate—certainly indelicate for a committee of the Senate—to criticise the actions or decisions of the House; and it would be subversive of the Constitution, because it would practically make the House of Representatives not only the judge of the election, returns, and qualifications of its own Members, but also of the Members of this House, if the Senate were to follow as precedents the decisions of the House in conflict with its own opinions.

Again, there is much force and reason in the distinction made by the court, in Commonwealth v. Cluley (56 Penn. St., p. 274), between a popular election, under our system of almost universal suffrage, for a Member of the House of Representatives, by ballot, and an election of a Senator by a viva voce vote of the members of a legislature. And it might well be that the House of Representatives should establish one rule appropriate to the election of its Members and the Senate a different rule in regard to the election of its Members. The difference between the two cases would justify different rules.

In a popular election, by ballot, for a Member of the House of Representatives, where the voters are numerous and scattered over a considerable territory, it would be impossible to ascertain whether or not the electors, or enough of them to change the result, had knowledge of the disqualification of the candidate. Besides, voting by ballot includes the right of the elector to conceal the fact for which candidate he voted. This is his secret, which can not be wrested from him even in a court of justice. And they who voted against the successful candidate, yet failed to defeat him at the polls, might attempt to accomplish the same end by pretending to have voted for him with knowledge of his incapacity. Even perjury in such case, should a voter voluntarily swear falsely in regard to it, could never be detected and punished. Such a principle applied to such elections would be unsatisfactory, often incapable of application, and always a temptation to frauds and perjuries, which might be committed with impunity. And it may be conceded that, in determining who has been elected at such popular election by ballot, no candidate not receiving a majority of all votes cast, counting blanks and ballots for disqualified candidates, ought to be declared elected; and that the decisions of the House of Representatives, as applied to the election of its own Members, ought to proceed upon a different principle than the one here contended for.

But the circumstances which may well induce the House of Representatives to depart from the ancient rule and practice in determining the election of its Members do not exist in relation to the election of Senators. Senators are elected by a small number of persons, the number fixed by law, who are compelled to vote viva voice. Their votes are matters of record, and the record discloses who voted for and who voted against the disqualified candidate. Whether these electors had notice or not of the ineligibility of a candidate is easily, and may be definitely and certainly, ascertained. There

is no inconvenience, no opportunity for fraud, no temptation to perjury, in the application of the principle here contended for to such an election. Every reason that can be given for excluding the application of this principle to popular elections by ballot sustains its application to the election of a Senator by the viva voice vote of the members of the legislature; and it is worthy of remark that the rule of parliamentary and common law, which is established by an unbroken current of decisions in England, had reference to elections, not by ballot, but viva voice. That method of election gave rise to the rule, and no reason has been given, none suggests itself, for departing from it now in regard to such elections. And it should also be observed that in every case in the American courts of law where the judges have, obiter dictum, declared that the minority candidate was not elected, not only was the element of knowledge of the disqualification wanting, but the election was by ballot and not viva voice. Not a dictum of any American court or American law writer of established reputation has been cited to your committee, and it is believed that none exist, which disapproves of the principle as applicable to elections viva voice.

In the report of the majority it is said that this principle belongs to a government where, as in England, the right to vote has been granted or conceded as a boon or franchise by the monarch to his subject; and hence to vote for a candidate known to be disqualified is a crime. But that in this country voting is the inherent right of every citizen; and Roe on Elections, page 256, is cited as sustaining this assertion in relation to elections in England. The author referred to, so far from sustaining such a distinction, does not allude to it. And it is believed, for many reasons, that no such distinction can be maintained.

1. The great charter in England was not a concession in the sense of a grant of rights. It was an admission that certain rights belonged to Englishmen, and always had belonged to them. The rights there admitted to exist were the inherent rights of Englishmen. Blackstone says:

"The great charter" contained very few new grants, but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England."

The great Bill of Rights delivered by the Lords and Commons to the Prince and Princess of Orange February 13, 1688, and afterwards enacted in Parliament, after enumerating the privileges of the people, concludes in the following strain of ancient, manly eloquence:

"And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties."

And the act of Parliament recognizes—

"All and singular the rights and liberties asserted and claimed in the said declaration to be true, ancient, and indubitable rights of the people of this Kingdom."

2. The right of voting in this country is not an inherent right of the citizen. If it were, women as well as men could vote; because women as well as men are citizens and always have been under our Constitution; and every inherent right of the citizen is possessed as fully and may be exercised as freely by the female as the male citizen. Our popular elections are participated in by those who have a constitutional right to vote. Their right to vote does not spring merely from citizenship; it is a right secured, limited, and regulated by the Constitution and laws. A citizen has no more inherent right to be a voter than to be a Senator. The citizen may vote if the Constitution and laws permit, not otherwise; so every citizen may be a Senator if duly elected and qualified, not otherwise.

3. But if such distinction were conceded to exist, it would strengthen the conclusion here arrived at. To test this let us concede that the Englishman in voting is exercising not an inherent right, but a franchise delegated to him by the Crown; therefore it is a crime for him to vote for a disqualified candidate, and for that reason his vote is considered as thrown away and the next highest qualified candidate is to be considered as elected. And let us also concede that at a popular election in this country the voter exercises an inherent right of citizenship; and hence, if he votes for a candidate known to be disqualified his vote is not thrown away. From these admissions what results? Simply this: That in our popular elections, by ballot, for a Member of the House of Representatives the principle here contended for does not apply. Very well. It does not apply upon this hypothesis, because the voter is exercising an inherent right and not a delegated power when he casts his ballot. Now, if this distinction be well taken does not everyone perceive that the principle here contended for must apply to an election of Senators by the members of a legislature who in that election are exercising a delegated power and not an inherent right? The members of the legislature in electing a Senator are exercising a power that is delegated in a double sense. The power to elect a Senator is delegated by this Government—that is,

by the Constitution of the United States—to the legislature of the State; and the people elect members of that legislature who are among other things to exercise this power of electing a Senator. It will not be pretended that a member of the legislature in voting for a Senator is exercising an inherent right of a citizen, and all must admit that he is exercising a delegated power; so that the very argument which exempts the election of Members of the House of Representatives from the operation of the principle under consideration subjects the election of Senators to its full operation.

It has also been urged before your committee that bills passed by Congress to relieve disabilities of Members elected to the House of Representatives rest upon principles inconsistent with the conclusions of this report. To this two answers may be made: (1) The proceedings of Congress in relation to cases of election while reconstruction of the late rebel States was in progress can hardly be relied upon as settling principles by which either House of Congress ought to be bound in times of peace. The circumstances under which such legislation was had were exceptional and the legislation itself ought not to stand as a precedent. (2) The bills which have passed were bills originating in the House of Representatives concerning Members elected to that House, and although the Senate has concurred in the enactment of such laws it ought not to be regarded as settling principles by which the Senate must be bound in determining the election of its own Members. Whenever the House of Representatives manifests its desire to seat a Member, although it may require the enactment of a law by both Houses to accomplish the purpose, still the Senate in concurring in such enactment may be regarded as extending a courtesy to the House of Representatives rather than settling principles which will bind the Senate in relation to the election of its own members. * * *

Therefore it is submitted that upon reason and authority the votes cast for Mr. Vance, with full knowledge on the part of the members of both houses of the legislature that he was disqualified by the Constitution to serve in this body, ought to be considered as thrown away; and that, inasmuch as a majority of all the members elected to each house were "actually present," the election was legal, and that the qualified candidate receiving the highest number of votes, and a majority of all votes cast for qualified candidates, was duly elected. It is conceded that majorities have a constitutional right to govern in this country; but it is not conceded that even the majority of the legislature of a State may morally or constitutionally defeat government by refusing to elect Senators to serve in the Senate of the United States. In this case the majority had a right to elect a qualified person to the Senate; but having waived their right by voting for a person known to be disqualified, as much as though they had refused to vote at all or had voted for a man known to be dead, the minority who complied with the Constitution by voting for a qualified candidate may well be held to have expressed the will of the legislature. If the majority, being. called upon, will not vote they can not complain that the election was decided by those who did vote, though a minority of the elective body. And voting for a person known to be disqualified is not voting. Such votes are void—no votes; and the highest number of votes cast, a quorum being present, must effect an election.

Therefore, in view of the premises, the minority of your committee recommend the adoption of the following resolution:

"Resolved, That Joseph C. Abbott has been duly elected Senator from the State of North Carolina for the term of six years, commencing on the 4th day of March, 1871, and that he is entitled to a seat in the Senate as such Senator."

The reports were debated at length in the Senate on April 11, 12, 15, 22, and 23, 1872,[1] and on the latter day the motion to substitute the minority resolution for that of the majority was disagreed to—yeas 10, nays 42. Then the resolution reported by the majority was agreed to.

[1] Globe, pp. 2387–2390, 2431–2434, 2676; Appendix, pp. 219–229, 245–257, 234–245, 272–279, 328–334.

Chapter XV.

POLYGAMY AND OTHER CRIMES AS DISQUALIFICATIONS.

1. **Cases of Whittemore, Connor, and Acklen. Sections 464–466.**[1]
2. **The polygamy cases of 1868, 1873, and 1882. Sections 467–473.**
3. **The case of Brigham H. Roberts. Sections 474–480.**
4. **The Senate case of Reed Smoot. Sections 481–483.**[2]
5. **Incidental opinion of a House committee. Section 484.**

464. B. F. Whittemore, being reelected to the same House from which he had resigned to escape expulsion for crime, was excluded from taking the oath and his seat.—On June 18, 1870,[3] the Speaker laid before the House the credentials of Mr. B. F. Whittemore, of South Carolina, who had been chosen at a special election to fill the vacancy caused by expulsion proceedings taken by the House against him at an earlier period in this session.[4] Mr. John A. Logan, of Illinois, objected to the administration of the oath to Mr. Whittemore on the ground that he had disqualified himself for being a Member of the House.

It was urged that the credentials should be referred to a committee for examination, and the subject was postponed to a day certain. On June 21 Mr. Logan presented this resolution:

Be it resolved, That the House of Representatives decline to allow said B. F. Whittemore to be sworn as a Representative in the Forty-first Congress and direct that his credentials be returned to him.

Accompanying this resolution was a preamble reciting the facts of the proceedings of expulsion against Mr. Whittemore for the sale of appointments at the Military Academy and the fact that he had escaped expulsion by resigning; and that he had received the censure of the House.

Mr. Logan, in advocating the resolution, said he did not presume that the Constitution contemplated expulsion for any mere political reasons, or for anything except a violation of the rules of the House or an infraction of some existing law. He assumed that where the House had the right to expel for violation of its rules or of some existing law it had the same power to exclude a person from its body. Mr. Logan then had read the law against bribery, for violation of which Mr. Whittemore had been censured. It was right to exclude a man from the House for crime. It was this feature of crime which distinguished this case from those of Messrs. Giddings, of

[1] Discussion of bribery as a disqualification. (See. 946 of Vol. II)

[2] Alleged statutory disqualifications. (Sec. 955 of Vol. II)

[3] Second session Forty-first Congress, Journal, pp. 1040, 1060; Globe, pp. 4588, 4669–4674.

[4] For those proceedings see Chapter XLII, of this work.

Ohio, and Brooks and Keitt, of South Carolina, who, after receiving the censure of the House, had resigned their seats, and after reelection had been admitted to the House. The case of Mr. Matteson, of New York, who had been censured, was also different, because he had returned to a Congress succeeding that in which he had been censured, and which had no jurisdiction of the offense committed against its predecessor.

Mr. John F. Farnsworth, of Illinois, urged that grave constitutional questions were involved, and that the matter should be referred to a committee for examination. He quoted the Wilkes case to illustrate the dangers of a precedent of exclusion.

The resolution offered by Mr. Logan was adopted by a vote of 130 yeas to 76 nays.

465. The Texas election case of Grafton v. Connor, in the Forty-first Congress.

In 1870 the House declined to exclude John C. Connor, who possessed the constitutional qualifications, and satisfactory credentials, but whose moral character was impeached.

Statement of the attitude of the House at the close of the civil war as to qualifications other than those prescribed by the Constitution.

A military order has been accepted as credentials of Members from a reconstructed State; but the said credentials were examined by a committee before the House authorized the bearers to take the oath.

On March 30, 1870,[1] a message from the President announced that he had approved the act to admit the State of Texas to representation in the Congress of the United States. On the same day a letter was presented "from the secretary of civil affairs, State of Texas, inclosing General Orders, No. 5, headquarters Fifth Military District, Texas, giving the result of an election held on the 30th of November and lst, 2d, and 3d of December, 1869." This letter, which constituted credentials of election, was referred to the Committee on Elections, the claimants to seats not being sworn in.

On March 31[2] Mr. Halbert E. Paine, of Wisconsin, from the Committee on Elections, presented the following resolution:

> *Resolved,* That the oath of office be now administered to G. W. Whitmore, J. C. Connor, W. T. Clark, and E. Degener, Representatives-elect from * * * the State of Texas: *Provided,* That the right of any person to contest the seats of either of said Representatives shall not be thereby impaired.

Mr. Joseph P. C. Shanks, of Indiana, proposed an amendment that John C. Connor be not sworn in, but that the contested case of Grafton *v.* Connor be referred to the Committee on Elections, with instructions to examine and report both as to prima facie and final right.

Thereupon Messrs. Shanks and Benjamin F. Butler, of Massachusetts, presented affidavits wherein it was charged that Mr. Connor, while an officer of the Army, about January 5, 1868, had cruelly whipped and otherwise punished certain negro soldiers of his command, and that later, on October 23, 1869, in a public speech in Texas, he had boasted that he used the lash freely on the soldiers, and

[1] Second session Forty-first Congress, Journal, pp. 547, 548; Globe, p. 2297.

[2] Journal, pp. 552, 553; Globe, pp. 2322–2329.

had also stated that he escaped conviction by a military court by bribing the soldiers with circus tickets, so that they would not testify against him. Therefore, it was urged that because of bad character he should not be admitted to take the oath, although the Committee on Elections had found his credentials regular and sufficient.

The debate which followed was summarized by a brief colloquy, wherein Mr. James A. Garfield, of Ohio, asked:

> Allow me to ask * * * if anything in the Constitution of the United States and the laws thereof * * * forbids that a "moral monster" shall be elected to Congress?

To which Mr. Ebon C. Ingersoll, of Illinois, replied:

> I believe the people may elect a moral monster to Congress if they see fit, but I believe that Congress has a right to exclude that moral monster from a seat if they see fit.

The weight of argument was against the position assumed by Mr. Ingersoll. Mr. Henry L. Dawes, of Massachusetts, speaking for the Committee on Elections in the preceding Congress, said:

> When any Member, upon his responsibility as a Member, made any charge against any claimant to a seat that touched his constitutional qualification the House, before swearing him in, would refer the question to the proper committee to report on it. Beyond that the Committee on Elections came to the conclusion, and the House sustained them, it was not proper to go. That question of itself was a very delicate one, and of course might be carried to such an extent as to involve great abuse to the rights of persons claiming seats here. But never did that committee ask the House to go one inch beyond the question of the constitutional qualification of a Member, and never did this House decide that we had the right to go one inch beyond that question. As to the question whether a gentleman claiming a seat has heretofore behaved in a manner unbecoming a Member, I think this is the first time it was ever raised on the floor of the House.

The question being taken on the amendment proposed by Mr. Shanks, the yeas and nays were demanded, but were refused. Tellers also were refused. Then the amendment was disagreed to without division.

Then the resolution proposed by the Committee on Elections was agreed to.

Accordingly the Texas Members-elect, Mr. Connor among them, appeared and were sworn.

On July 15[1] the Committee on Elections reported, and the House agreed to a resolution declaring Mr. Grafton, the contestant, not entitled to the seat.

466. A Member being charged with a crime entirely disconnected from his representative capacity, the House declined to hold that a question of privilege was involved.—On January 7, 1879,[2] Mr. J. H. Acklen, of Louisiana, after a personal explanation, offered the following:

> Whereas J. H. Acklen, a Member of this House, has been charged by affidavit with having seduced Mattie Palfrey Wright, now deceased, in April, 1877, said affidavit having been drawn up by one H. L. Smith, also deceased, and sworn to by said Mattie Wright: Therefore,
>
> *Be it resolved,* That the Speaker of the House be, and he is hereby, authorized to appoint a committee of three Members of this House, whose duty it shall be to investigate the truth or falsity of said charges, etc.

Mr. John H. Reagan, of Texas, raised the question of order that a mere charge of crime, on which no conviction had been obtained, did not justify the House in taking jurisdiction on the question of qualifications.

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[1] Journal, p. 1277.

[2] Third session Forty-fifth Congress, Journal, p. 138; Record, p. 354.

The Speaker[1] said:

The gentleman from Louisiana rose to a question of personal privilege. The Chair has been reluctant to interrupt him and is reluctant now to decide in a matter affecting the character of a Member of this House. The gentleman from Texas raises the question that this does not embrace a question of personal privilege. Since this discussion has been going on, the Chair, so far as his memory enables him to recollect, fails to remember a single instance during his own term of service in this House wherein charges of this character, which do not directly affect the representative character of a Member of this House, have been made a subject of inquiry by the House. The Chair finds in one instance a decision made by one of his predecessors, Mr. Speaker Linn Boyd, which he desires to have read to the House:

"Mr. Thomas H. Bayly submitted, as a question of privilege, the following resolution, namely:

"Resolved, That the special committee of which Hon. Mr. Letcher is chairman be instructed to communicate to this House any communication made to that committee reflecting upon the representative character of T. H. Bayly, a member of this House, by B. E. Green or others, with a view that the House may take such action as to it may seem proper, the said committee having decided that it was not within their jurisdiction."

The decision in that case by Mr. Speaker Boyd was that it was not a subject of investigation unless it did actually affect the official character of the Representative. In a case like this the Chair is quite willing to submit the question to the House with this preliminary statement on his part.

Thereupon Mr. James A. Garfield, of Ohio, said:

If by "personal privilege "is meant the ordinary rights which the House grants to a man to make a personal explanation, I certainly should vote aye. And therefore I want it understood that my vote, which in this case will be "no," means that I do not conceive that this is a case about which the House has any jurisdiction to investigate, and in that sense I vote against it.

The Speaker said:

The Chair desires to say in answer to the gentleman from Ohio that the distinction he has drawn is a very proper one. The Chair himself has allowed the personal explanation to be made. The question whether it embraces a privilege affecting the character of a Member of the House the Chair prefers to submit to the House.

The Speaker having put the question: "Does the said preamble and resolution involve a question of privilege?" it was decided in the negative without division.

On April 15, 1879,[2] Mr. J. R. Chalmers, of Mississippi, claiming the floor for a question of personal privilege, had read a newspaper article describing him as "one of the notorious and bloody-handed butchers of the forever infamous Fort Pillow massacre,"etc. Then Mr. Chalmers offered a resolution providing for a select committee to investigate the subject of General Chalmer's conduct.

Mr. James A. Garfield, of Ohio, made a point of order.

The Speaker did not rule upon the question, which was after debate postponed.

On May 7,[3] after further debate, the House laid the resolution on the table—ayes 98, noes 70.

467. The Utah election case of McGrorty v. Hooper, in the Fortieth Congress.

In 1868 the House declined to pass on the title to a seat of William H. Hooper, Delegate from Utah, who was alleged to have been elected by undue influence of an alleged disloyal organization.

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[1] Samuel J. Randall, of Pennsylvania, Speaker.

[2] First session Forty-sixth Congress, Record, p. 455.

[3] Record, pp. 1125–1132.

In 1868 the House refused a seat to a contestant who received a small minority of the votes in a Territory, but who alleged that the majority voters were disqualified by treasonable antagonism to the Government.

An instance wherein a Delegate gave notice of a contest by a telegram, which was submitted to the House by the Speaker.

In 1868 the House entertained a contest for the seat of a Delegate, although the first notice of contest was irregular and the supplemental notice was not filed within the time required by law.

A resolution declaring a Delegate entitled to his seat being laid on the table, the Delegate continued to exercise his functions.

On March 5, 1867,[1] the Speaker laid before the House a telegram from William McGrorty, giving notice of contest for the seat of William H. Hooper, Delegate from Utah Territory. On March 6 Mr. Hooper was sworn in without any question being raised.

On July 9, 1868,[2] Mr. John W. Chanler, of New York, submitted the report of the committee.[3] The consideration of the case involved a preliminary question as to the notice of contest. Contestant admitted that he had not proceeded according to the terms of the law, explaining his reasons:

> On the 23d of February, 1867, the contestant deposited in the office of Wells, Fargo & Co., at Great Salt Lake City, a notice directed to the Hon. 'William H. Hooper, and a similar notice to the Clerk of the House of Representatives, notifying them that he should contest the seat of said Hooper, which notices were received in this city and delivered to the parties to whom they were addressed some time in the month of March following.
>
> The reasons why the grounds were not stated in the notice are fully set forth in the affidavit of contestant, made on the 18th of January, 1868, which has been placed before the committee, with the other papers in the case; and it is confidently submitted that those reasons are sufficient to excuse him from a literal compliance with the law. It is there shown that it would have been impossible to contest the election in the usual manner because of the hostility of the Mormon leaders, endangering the lives of himself and friends, and the destruction of the ballots and lists of voters, at the time when the notice was sent to Mr. Hooper.

The sitting Delegate objected that the notice had not been filed within the time required by law, that it did not comply with the law, although there existed no valid reasons why it should not have done so, and that the testimony taken was ex parte.

Contestant urged[4] that, while his original notice was defective in specifications, his second amended notice of January 18, 1868, supplied all omissions, and considered that the precedents of the House (citing Kline *v.* Verree) justified its reception. He also urged through his counsel that the law of 1851 concerning contested elections did not apply to the Territories, citing cases of Hunt *v.* Palao and Benner *v.*

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[1] First session Fortieth Congress, Journal, pp. 11, 13; Globe, p. 11; 2 Bartlett, p. 211; Rowell's Digest, p. 216.

[2] House Report No. 79, second session Fortieth Congress.

[3] It was stated in debate that four members of the committee-Messrs. Henry L. Dawes, of Massachusetts; Charles Upson, of Michigan; Joseph W. McClurg, of Missouri, and Glenni W. Scofield, of Pennsylvania—dissented from the views in the report, although agreeing to the resolutions. (Globe, p. 4383.)

[4] Speech of contestant, Globe, pp. 4384, 4385.

Porter, as well as others. Furthermore, it was urged that the law of 1851 was not absolutely binding on the House, being only a wholesome rule which might be departed from for good cause, citing Williams *v.* Sickles.

The committee in their report did not specifically discuss this preliminary question; but the fact that they proceed to consider the case on its merits is an evident decision.

As to the merits of the case, the contestant presented seven grounds of contest, but the report discusses only three:

1. That the sitting Delegate represents a community separated from and hostile to the other portions of the people of the United States, and organized and acting in disregard and violation of the laws of the United States, and under an anti-republican form of government.
2. That he [the sitting Delegate] is the representative of the institution of polygamy.
3. That his secret oath, taken in the Mormon Church, disqualifies him from sitting as a Delegate in the Congress of the United States.

The contestant, as appears from his address to the House, argued that since the constituency was hostile to the Government of the United States those who voted for the sitting Delegate were incompetent electors and their votes were void. He also urged that there were illegalities connected with the election which rendered it impossible to determine what votes were cast according to law. Contestant also argued that as the sitting Delegate had taken oaths pledging him to hostility to the United States he was disqualified for the office and all votes cast for him were void. This disqualification he attempted to prove by affidavits, ex parte in nature, describing the oaths taken by Mormans in the "endowment" ceremonies. Contestant further argued that, although the majority of the people of the Territory were disloyal and incompetent, the loyal minority should not be deprived of its representation.

The official returns had given 15,068 votes for sitting Delegate and 105 for contestant. Therefore contestant claimed the seat as representative of the loyal minority of 105.

The committee discussed at length the people and institutions of Utah, summarizing their conclusions:

So far, therefore, as it was to the interest of the leaders of Mormonism to oppose this Government, to strengthen and enrich themselves and secure the support of new converts, your committee think the organization has been antagonistic to the United States. But from no malice aforethought have they ever, as far as any proof has come to your committee, organized rebellion or sedition against the supreme authority of this Union, or committed treason by any overt act.

To remedy the evils which now exist in this Territory and to prevent them in the future has been a matter of serious consideration for many years by this Government, and a plan is now before the Committee on Territories in the Senate for radically changing the manner of carrying on the government of Utah.

The duties of your committee do not extend to the subject-matter of reform in the Territory further than to protect the purity of the representative system and secure to every citizen of the United States the full enjoyment of his liberty at the polls.

Your committee believe that it is the imperative duty of Congress to enforce the laws by every means in the power of this Government, to prevent undue influence of the hierarchy of the Mormon society over the people of that Territory.

A strong belief exists in the mind of your committee that to considerable extent such influence has been used in the recent elections for Delegate to Congress from Utah, but sufficient proof of its illegality

has not come to their knowledge to warrant, in their opinion, any direct interference by immediate action of Congress.

The vote polled, under whatever control it may have been deposited, is, in the opinion of your committee, in default of full and satisfactory evidence to the contrary, to be deemed and accepted as the legal vote of the people of Utah. Their minds may have been under religious or other prejudice, created or increased by the Mormon leaders in favor of one candidate and against the other, but there is no reason to conclude that the free exercise of the ballot by the citizen was unlawfully prevented by force or fraud. No sufficient proof to that effect has, in the opinion of your committee, been presented by the contestant. The committee therefore unanimously agree to present the following resolutions, to wit:

"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 report was debated on July 23, 1868,[1] the principal argument being made by contestant, and the first resolution, declaring contestant not entitled to the seat, was agreed to without division. The second resolution, declaring sitting Member entitled to the seat, was laid on the table.

The practical effect of this action was to leave sitting Delegate in the seat, as is shown by his appearance at the next session of this Congress.[2]

468. The Utah election case of Maxwell v. Cannon, in the Forty-third Congress.

In 1873 the House seated Delegate George Q. Cannon on the strength of his unimpeached credentials, although it was objected that he was disqualified.

On December 2, 1873,[3] the Delegates from the Territories were called to be sworn after the House had been fully organized. To Delegate George Q. Cannon, of Utah, objection was made by Mr. Clinton L. Merriam, of New York, who presented for the action of the House the following resolution:

Whereas it is alleged that George Q. Cannon, of Utah, has taken oaths inconsistent with citizenship of the United States and with his obligations as Delegate in this House, and has been, and continues to be, guilty of practices in violation and defiance of the laws of the United States: Therefore,

Resolved, That the credentials of said Cannon, and his right to a seat in this House as a Delegate from Utah, be referred to the Committee on Elections, and that said Cannon be not admitted to a seat in this House previous to the report of said committee.

In the course of the debate Mr. Stephen W. Kellogg, of Connecticut, asked if there was any other certificate or credential from the governor of Utah than the one which had already been presented in behalf of Mr. Cannon.

The Speaker replied that the Clerk informed him that that was the only credential that had been presented from Utah.

In the course of the debate the Maryland case in the Forty-first Congress was cited in support of the contention that he was entitled by prima facie right to his seat on the certificate. It was argued (by Mr. Benjamin F. Butler, of Massachusetts) that to take any other course would be to establish precedents that in

[1] Second session Fortieth Congress, Journal, p. 1159; Globe, pp. 4383–4389.

[2] Third session, Journal, p. 181.

[3] Cong. Record, first session Forty-third Congress, pp. 7 and 8.

times of high party excitement might prevent the organization of the House indefinitely.

Mr. Merriam's resolution was laid on the table without division, and Mr. Cannon then took the oath.

469. The Utah case of Maxwell v. Cannon continued.

In 1873 the Elections Committee concluded that a Delegate who had been sworn could be reached on a question of qualifications only by process of expulsion.

The Elections Committee concluded in 1873 that if the Member-elect be disqualified the minority candidate is not thereby entitled to the seat.

Discussion of the right of the House to fix qualifications other than those specified by the Constitution.

Discussion of the distinction between the power to judge of the elections, returns, and qualifications of the Member and the power to expel.

In 1873 the Elections Committee concluded that where a law of Congress extended the Constitution over a Territory, the qualifications of the Delegate should be similar to those of Members.

Discussion as to whether or not the expulsion of a Delegate should be effected by a majority or a two-thirds vote.

On April 30, 1874,[1] Mr. Gerry W. Hazelton, of Wisconsin, submitted the report of the majority of the committee in the Utah case of Maxwell *v.* Cannon, which ,had come before the Committee on Elections like ordinary cases of that kind. It was not claimed by the contestant that he had received a majority of the votes actually cast, although it was maintained that gross irregularities existed in the manner of conducting the election and making the returns. While there was testimony to bear this out, yet the sitting Member undoubtedly had a majority of the legal votes.

Therefore two questions were left for the committee:

(1) Contestant raised the following question:

> George Q. Cannon, the sitting Delegate, is not qualified to represent said Territory, or to hold his seat in the Fortythird Congress, and for cause of disqualification we say it is shown by the evidence that he, at and before the day of the election, to wit, on the 5th day of August, 1872, was openly living and cohabiting with four women as his wives in Salt Lake City, in Utah Territory, and he is still so living and cohabiting with them.

The sitting Delegate in his answer had denied the charges of contestant on the subject of polygamous relations.

The committee first proceeded to consider the question of their own jurisdiction to consider a question of qualifications. They say:

> What are the qualifications here mentioned and referred to the Committee on Elections? Clearly, the constitutional qualifications, to wit, that the claimant shall have attained the age of 25 years, been seven years a citizen of the United States, and shall be an inhabitant of the State in which he shall be chosen.
>
> The practice of the House has been so uniform, and seems so entirely in harmony with the letter of the Constitution, that the committee can but regard the jurisdictional question as a bar to the consideration of qualifications other than those above specified mentioned in the notice of contest and hereinbefore alluded to.

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[1] Report No. 484; Smith, p. 182; Rowell's Digest, p. 291.

It being conceded that the contestee has these qualifications, one other inquiry only under this head remains, to wit: Does the same rule apply in considering the case of a Delegate as of a Member of the House? This question seems not to have been raised heretofore.

The act organizing the Territory of Utah, approved September 9, 1850, enacts that the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable.

It was said on the argument that the Constitution cannot be extended over the Territories by act of Congress, and the views of Mr. Webster were quoted in support of this position.

We do not deem it necessary to consider that question, because it will not be denied that Congress had the power to make the Constitution a part of the statutory law of the Territory as much as any portion of the organic act thereof. For the purposes of this inquiry, it makes no difference whether the Constitution is to be treated as constitutional or statutory law. If either, it is entitled to be considered in disposing of this case.

Now, while it would be entirely competent for Congress to prescribe qualifications for a Delegate in Congress entirely unlike those prescribed in the Constitution for Members, it seems to us, in the absence of any such legislation, we may fairly and justly assume that by making the Constitution a part of the law of the Territory, Congress intended to indicate that the qualifications of the Delegate to be elected should be similar to those of a Member. It would seem to be to that extent an instruction to the electors of the Territory, growing out of the analogies of the case.

We conclude, therefore, that the question submitted to us, under the order of the House, comes within the same principles of jurisdiction as if the contestee were a Member instead of a Delegate.

This position, it will be observed, does not conflict with the right of the House to refer a preliminary inquiry to this committee as to the disqualification of a Member or Delegate to be sworn in and take his seat prior to the oath being administered. In such case the reference is special, and the jurisdiction of the committee follows the order of the House.

The case of Samuel E. Smith against John Young Brown, in the Fortieth Congress, is in point. That case was referred to the Committee on Elections, before the contestee was sworn in, to ascertain and report whether he had committed any of the acts specified in the law of July 2, 1862, which he was required to swear he had not committed, before entering on the duties of a Representative.

It was a preliminary inquiry, made under a special order of the House, and might have been executed as properly by the Judiciary Committee or bys. special committee. It did not relate in the remotest manner to ihe election, returns, and qualifications of the claimant under the Constitution.

The contestee in this case having been sworn in and admitted to his seat, and his name officially entered upon the roll of Delegates, we think he can be reached only under the exercise of the power of expulsion, which it is competent for the House to set in motion by a special order of reference.

(2) The second question related to the claim of the contestant to a seat as the minority candidate, the majority candidate being disqualified. The committee deny the authority of the case of Wallace v. Simpson in support of this contention, and quote the case of Smith v. Brown as establishing a doctrine contrary to that laid down by the contestant.

Therefore the majority of the committee recommended the adoption of the following resolutions:

Resolved (1), That George R. Maxwell was not elected, and is not entitled to a seat in the House of Representatives of the Forty-third Congress as Delegate for the Territory of Utah.

Resolved (2), That George Q. Cannon was elected and returned as a Delegate for the Territory of Utah to a seat i.n the Forty-third Congress.

Mr. Horace H. Harrison, of Tennessee, dissented from the conclusions of his associates wherein they stopped short in their second resolution of declaring Mr. Cannon entitled to the seat, and proposed the following:

Resolved, That George Q. Cannon was duly elected and returned as Delegate from the Territory of U tab, and is entitled to a seat as a Delegate in the Forty-third Congress.

Mr. Harrison considered that a Delegate should not be considered as on any different basis from a Member, and proceeded to make his argument with this proposition understood. Mr. Harrison says:

The qualifications of Representatives in Congress are prescribed by the second section of the first article of the Constitution of the United States.

They are: First, that they shall have attained the age of 25 years; second, that they shall have been seven years citizens of the United States; and, third, that they shall when elected be inhabitants of those States in which they shall be chosen. No other qualifications are prescribed in the Constitution.

If the Constitution of the United States had vested anywhere the power to prescribe qualifications of Representatives in Congress additional to or different from those prescribed by the Constitution itself, it is obvious that this power would have been conferred either upon Congress, or upon the House alone, or upon the States.

In the history of our Government it has never been claimed that the House of Representatives, acting alone, possessed the power to add to or change the qualifications of its Members. The vain attempt made by Mr. Randolph, in the case of Barney v. McCreery, in the Tenth Congress, to vindicate a claim of that kind in favor of the States, signally failed, and has never been repeated in the House.

Mr. Justice Story, in his discussion of the subject of the qualifications of Representatives in Congress, says that it would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office it meant to exclude all others, as prerequisites, and that from the very nature of such a provision the affirmation of these qualifications would seem to imply a negative of all others. And although it is certain that the letter of those constitutional provisions which relate to Representatives from the States does not apply exactly to the cases of Delegates from the Territories, still it is just as certain that their spirit does.

Mr. Harrison declared that no act could be found fixing the qualifications of a Delegate or providing a disqualification for any cause. The act of July 1, 1862, provided a punishment for bigamy; but disqualification for office was not a part of this punishment.

Mr. Harrison then continued:

The precedents of the House are in accordance with this construction of the Constitution. There has been no precedent since the organization of the Government which would justify, any more than would the Constitution itself justitfy, the House acting as the judges of the election, returns, and qualifications of Mr. Cannon, in a decision to deprive him of his seat on the ground that he has violated the law prohibiting polygamy in the Territories of the United States.

The case of B. F. Whittemore, in the Forty-first Congress, is relied upon as an authority for the refusal to admit a Representative-elect on other grounds than mere constitutional disqualifications. But a critical examination of that case will show that the House only decided that a Representative who had by resignation escaped expulsion for an infamous crime from that House should not be readmitted to the same House.

The case of Mr. Matteson, in the Thirty-fifth Congress, relied upon in argument before the committee, was a cue arising, not under the clause of the Constitution which makes each House the judge of the election, returns, and qualifications of its Members, but under that clause which confers the power of expulsion.

The line of demarkatiou between these two great powers of the House, the power to judge of the election, returns, and qualifications of its Members by a mere majority vote, and the power to expel its Members by a two-thirds vote, is clear and well defined. That line is not to be obliterated. It would be necessary to preserve it, even though its obliteration might seem to threaten no disasters, even though its maintenance might promise no benefits to the House, to the people, or to the Constitution. For this barrier is raised by the Constitution itself.

The framers of the Constitution of the United States, in prescribing or fixing the qualifications of Members of Congress, must be presumed to have been dealing with the question with reference to an

obvious necessity for uniformity in the matter of the qualifications of Members, and with a jealous desire to prevent, by the action of either House of Congress, the establishment of other or different qualifications of Members.

It was appropriate and proper-in fact, necessary-that the power should be given to each House to judge of the elections, returns, and qualifications of its Members; that is, to judge of the constitutional qualifications of its Members.

The exercise of this power requires only a majority vote.

But the House possesses another power, to decide who shall and who shall not hold seats in that body. It is altogether distinct, in origin and character, from that to which I have just referred. It is the power of expulsion, which requires a two-thirds vote for its exercise. It is conferred by the following clause of the Constitution:

"Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member."

This power of expulsion conferred by the Constitution on each House of Congress was necessary to enable each House to secure an efficient exercise of its powers and its honor and dignity as a branch of the National legislature.

It was too dangerous a power to confer on either House without restriction, and hence it was expressly provided in the Constitution that there must be a concurrence of two-thirds of the Members to expel.

Under this power, guarded as it has been by the constitutional provision requiring a vote of two-thirds, there have been but a very few instances of expulsion since the organization of the Government, and it would seem that a power so rarely exercised does not require the agency of a standing committee.

The minority views then go on to discuss the cases of Benjamin G. Harris, of Maryland, and of Mr. Herbert, of California, and concluded that the House had always declined to fix qualifications outside of those fixed by the Constitution, and that

the failure of the committee in this case, after that committee has found that the sitting Delegate from Utah has been duly elected and returned, to report that he is entitled to his seat, is unauthorized in principle or by precedent and dangerous, in so far as it tends to break down the distinction between the jurisdiction of the House in such a contest as the present one and the jurisdiction of the House by a two-thirds vote to expel a member from the House.

The report was debated at length on May 12.[1] The debate referred to the status of a Delegate, and to the propriety of adding to the qualifications prescribed in the Constitution. In the course of the debate Mr. E. R. Hoar, of Massachusetts, raised the question as to whether or not a two-thirds vote was needed for the expulsion of a Delegate. Delegates were creatures of statutes, and he doubted the power of a preceding Congress to impose on the present Congress, against its will, the presence of any one besides the Members who came by constitutional right.

At the conclusion of the debate the two resolutions recommended by the majority of the committee were agreed to without division.

Then, by a vote of 109 yeas to 76 nays, the resolution contended for by Mr. Harrison was agreed to.

470. The Utah election case of Maxwell v. Cannon, continued.

In 1873 it was proposed by the majority of the Elections Committee to exclude Delegate George Q. Cannon for polygamy; but the resolution was not considered.

[1] Journal, pp. 959–962; Record, pp. 3813–3819.

Then, by a vote of 137 yeas to 51 nays, the House agreed to the following resolution proposed by Mr. Hazelton, in connection with the report of the Committee on Elections:

Whereas George R. Maxwell has prosecuted a contest against the sitting Member, George Q. Cannon, now occupying a seat in the Forty-third Congress as Delegate for the Territory of Utah, charging, among other things, that the said Cannon is disqualified from holding, and is unworthy of, a seat on the floor of this House, for the reason that he was at the date of his election, to wit, on the 5th day of August, 1872, and prior thereto had been, and still is, openly living and cohabiting with four women as his wives under the pretended sanction of a system of polygamy, which system he notoriously endorses and upholds, against the statute of the United States approved July 1, 1862, which declares the same to be a felony, to the great scandal and disgrace of the people and the Government of the United States, and in abuse of the privilege of representation accorded to said Territory of Utah, and that he has taken and never renounced an oath which is inconsistent with his duties and allegiance to the said Government of the United States; and whereas the evidence in support of such charge has been brought to the official notice of the Committee on Elections: Therefore,

Resolved, That the Committee on Elections be, and is hereby, instructed and authorized to investigate said charge and report the result to the House and recommend such action on the part of the House as shall seem meet and proper in the premises.

On January 21, 1875,[1] Mr. H. Boardman Smith, of New York, submitted the report of the majority of the committee in response to these instructions. The committee give an account of the evidence before them, state that the testimony as to the oath in the Endowment House is conflicting, and say, first quoting the statute:

"That every person having a husband or wife living who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years: *Provided, nevertheless,* That this section shall not extend to any person by reason of any former marriage, whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living, nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court, nor to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract."

The second section disapproves and annuls all acts and ordinances of the provisional government of Deserlt and of the Territory of Utah which establish, support, maintain, shield, or countenance polygamy, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecration, or other contrivances.

This statute was approved on the 1st day of July, 1862, and has since remained the law of the land.

It is proper to add that, after the adoption of the resolution above quoted referring this question to your committee, an act was passed by this House, at the last session, with little or no opposition, which reads as follows:

"[H.R.3679. Forty-third Congress, first session.)

"IN THE SENATE OF THE UNITED STATES, JUNE 17, 1874.—**READ TWICE AND REFERRED TO THE COMMITTEE ON TERRITORIES.**

"AN ACT defining the qualifications of Territorial Delegates in the House of Representatives.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, No person hereafter shall be a Delegate in the House of Representatives from any of the Territories of the United States who shall not have attained the age of twenty-five years, and been

[1] House Report No. 106, second session Forty-third Congress; Smith, p. 259.

seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the Territory in which he shall be chosen; and no such person who is guilty either of bigamy or of polygamy shall be eligible to a seat as such Delegate.

"Passed the House of Representatives June 16, 1874.

"Attest:

EDWARD MCPHERSON, *Clerk.*"

Notwithstanding this fact the said Delegate was a candidate at the recent election, and was actually elected Delegate for the same Territory in the Forty-fourth Congress.

Your committee think the evidence, unchallenged as it is by the Delegate, establishes that, at the date of his election, to wit, on the 5th day of August, 1872, and prior thereto, the said Delegate was, and still is, openly living and cohabiting with four women as his wives, under the pretended sanction of a system of polygamy, which system he notoriously indorses and upholds, in violation of the statute of the United States, approved July 1, 1862, above quoted.

Therefore the majority recommended that the following resolution be agreed to by the House:

Resolved, That George Q. Cannon, Delegate from Utah, being found, upon due consideration of the evidence submitted, and not controverted by said Cannon, to be an actual polygamist, and to have married his fourth wife, having three other wives then living, in the month of August, 1865, in open and notorious violation of the law of July 1, 1862, forbidding such marriage, and declaring the same to be a crime punishable both by fine and imprisonment, and it appearing that he still maintains his polygamous practices in defiance of law, is deemed unworthy to occupy a seat in the House of Representatives as such Delegate, and that he be excluded therefrom.

The minority of the committee, Messrs. Horace H. Harrison, of Tennessee, C. R. Thomas, of North Carolina, L. Q. C. Lamar, of Mississippi, Edward Crossland, of Kentucky, and R. M. Speer, of Kentucky, opposed this proposed action, but Mr. Harrison alone gave his grounds for his opposition, making an elaborate minority report.

This is the first instance [says this report] where it has been sought to expel a Delegate from one of the Territories of the United States, and there is little in the shape of authority to guide us in the examination of the question.

Although there is nothing in the Constitution concerning a Delegate from the Territories of the United States, and no express provision therein for their expulsion as there is in the case of Members, we do not doubt the power of the House to expel. The power results simply from the fact that the Delegate is, in some sense, a Member, or is one of the body. He is entitled, as well by courtesy as by a custom which has obtained in this country upon the organization of Territorial government in the Territories, to certain rights and privileges; he is entitled to introduce and advocate on the floor of the House any measure affecting the people of the Territory, or to oppose in debate any measure he may deem injurious to them. He is amenable to the rules of the House or the regulations concerning its proceedings. He would clearly, as it is assumed, have to possess certain qualifications to entitle him to be a Delegate—at least that of citizenship, as is shown in the contest in regard to the admission of the Delegate from Michigan Territory in 1823, during the Eighteenth Congress.[1]

Everything in relation to the position of a Delegate having the rights and privileges we have mentioned, and every relation he bears to the House or to the Members thereof, in the absence of anything in the Constitution and laws on the subject, would suggest that if a Delegate is expelled it ought to be for the same causes that would justify the House in expelling a Member, and that the power to expel should be exercised as the constitutional power to expel a Member is exercised.

It would seem that all of the reasons that can be urged in favor of the rule which the framers of the Constitution made concerning the expulsion of a Member apply with equal force in the case of a Delegate. The framers of that instrument regarded this power to expel a Member by a mere majority

[1] See section 421 of this work.

vote as a dangerous one, and guarded its exercise by providing, in substance, that an expulsion of a Member could only be ordered by a two-thirds vote. Of course, we will not be understood as contending that the House has not the power, if it choose to exercise it, to expel a Delegate by a mere majority vote, or that there is any express provision of law operating as an inhibition on this power. But we submit that this power should be regulated in its exercise by a legal discretion, and that no safer rule can be found than the one which is deduced from the analogy we have mentioned.

If it is true that the power to expel a Delegate is drawn from analogy to the power given in the matter of the expulsion of members, it would seem to follow that, looking to this fact and to the nature of the office of a Territorial Delegate as a representative of a portion of the people of this country, and as, in some sense, a Member of this body, he ought not to be expelled except for causes which would justify the House in expelling a Member, and by a two-thirds vote on the question.

He certainly ought not to be expelled for political reasons or causes, or on account of the existence of certain practices in the Territory he represents, or to punish him for an alleged indulgence therein or the people he represents by depriving them of representation.

After discussing the subject of Mormonism in the Territory of Utah, and the fact that the Territory had frequently been represented by Delegates who practiced polygamy, the report continues:

But a graver question than those we have considered is the question whether the House ought, as a matter of policy, or to establish a precedent, expel either a Delegate or Member on account of alleged crimes or immoral practices unconnected with their duties or obligations as Members or Delegates, when the Delegate or Member possesses all the qualifications to entitle him to his seat.

If we are to go into the question of the moral fitness of a Member to occupy a seat in the House, where will the inquiry stop? What standard shall we fix in determining what is and what is not sufficient cause for expulsion?

The report discusses the possibilities of such moral and political disqualifications being made a pretext for depriving constituences of their representation. To illustrate the reluctance of the House to expel for such reasons, two cases were cited: That of Benjamin G. Harris, of Maryland, who had been convicted of aiding the rebellion, but who was allowed to hold a seat in the Thirty-ninth Congress;[1] and Representative Herbert, of California, who was charged with homicide, but who was not disturbed in his seat.[2]

The committee also laid stress upon the fact that at the previous session the House had declared Mr. Cannon entitled to his seat.

On February 9, 1875, Mr. Smith, of New York, called up the resolution reported by the majority of the committee. The consideration of it was antagonized on behalf of an appropriation bill, and the House voted by a large majority not to consider.[3]

471. The Utah election case of Campbell v. Cannon, in the Forty-seventh Congress.

In 1882 the House declined to permit the oath to be administered to either of two contesting Delegates until the papers in relation to the prima facie right had been examined by a committee.

The House has given to a committee the right to decide on either the prima facie or final right to a seat before authorizing the oath to be administered to a Delegate.

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[1] On December 19, 1865, the resolution relating to Mr. Harris was introduced.

[2] On February 24, 1857, this case was reported on, no action being recommended.

[3] Second session Forty-third Congress, Record, p. 1083.

On January 10, 1882,[1] the House proceeded to the consideration of this resolution, offered December 6, 1881:

Resolved, That Allen G. Campbell, Delegate elect from Utah Territory, is entitled to be sworn in as Delegate to this House on his prima facie case.

To this Mr. Thomas B. Reed, of Maine, offered the following as a substitute:

Resolved, That the papers in relation to the right to a seat as a Delegate from the Territory of Utah be referred to the Committee on Elections,[2] with instructions to report at as early a day as practicable as to the prima facie right, or the final right, of claimants to the seat as the committee shall deem proper.

After debate the substitute was agreed to, and the resolution as amended was agreed to.

The facts of the case appeared as follows: That Mr. Campbell had the governor's certificate of election; that Mr. George Q. Cannon received 18,568 votes, and Mr. Campbell only 1,357; that Mr. Cannon was a naturalized citizen, and also a Mormon and a polygamist, living with plural wives, and a defender of the institution of polygamy.[3]

472. The Utah election case of Campbell v. Cannon, continued.

A committee having power to report on either prima facie or final right, made a single report on final right only.

Records of returns, duly authenticated by seal, are received as evidence in election cases after the time for taking testimony is closed.

The record of a court of naturalization sufficiently establishes citizenship, even though it be alleged that the certificate of the fact has not been issued regularly.

The court record of naturalization may not be questioned collaterally by evidence impeaching the facts on which the certificate was issued.

On February 28, 1882,[4] the report of the majority of the Committee of Elections in the Utah case of Campbell *v.* Cannon was submitted to the House. The following is a statement[5] of the essential preliminary facts:

The election out of which it arises was held on November 2, 1880, for the choice of a Delegate from the Territory of Utah. The returns, which were duly filed with the secretary of the Territory, were opened and canvassed by him in the presence of the governor of the Territory on December 14, 1880. The canvass of the votes, which was concluded on January 8, 1881, showed that George Q. Cannon received 18,568 votes, and Allen G. Campbell received 1,357 votes. The law provides that the person having the highest number of votes shall be declared by the governor to be elected. The governor,

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[1] First session Forty-seventh Congress, Journal, pp. 255, 256; Record, pp. 322–340.

[2] The Committee on Elections consisted of Messrs. William H. Calkins, of Indiana, George C. Hazelton, of Wisconsin, John T. Wait, of Connecticut, William G. Thompson, of Iowa, Ambrose A. Ranney, of Massachusetts, James M. Ritchie, of Ohio, Augustus H. Pettibone, of Tennessee, Samuel H. Miller, of Pennsylvania, Ferris Jacobs, jr., of New York, John Paul, of Virginia, Frank E. Beltzhoover, of Pennsylvania, Gibson Atherton, of Ohio, Lowndes H. Davis, of Missouri, G.W. Jones, of Texas, and Samuel W. Moulton of Illinois.

[3] Although Mr. Campbell had the certificate of the governor, the Clerk of the preceding. House had placed Mr. Cannon's name on the roll at the opening of the Forty-seventh Congress. The Speaker, however, declined to recognize the roll of delegates, and Mr. Cannon was not sworn in.

[4] House Report No. 559, first session Forty-seventh Congress; 2 Ellsworth, p. 604.

[5] This statement is from the views of Mr. F.E. Beltzhoover, of Pennsylvania, who concurred generally with the conclusions of the majority of the committee.

however, in the mistaken belief that he had the right to go behind the returns, heard evidence and arguments to show that Mr. Cannon was an alien and polygamist, and on these grounds finding them, as he believed, sustained, declared Mr. Cannon ineligible and disqualified to serve as a Delegate. The governor further decided, under an erroneous view of the law, that Mr. Cannon being ineligible, the votes cast for him were void, and Mr. Campbell being a citizen and eligible, and having received the next highest number of votes, was elected. The governor accordingly gave Mr. Campbell a certificate of election, and filed among the records of the Territory, in the office of the secretary thereof, an elaborate opinion containing a full statement of the facts. The secretary of the Territory, on January 10, 1881, gave Mr. Cannon a certified copy of the opinion and declaration of the governor, and also, on January 20, 1881, gave him a certified abstract of all the returns.

Mr. Cannon notified Mr. Campbell, on February 4, 1881, that he would contest his seat on the ground that he (Cannon) had received a large majority of the votes cast. On February 24, 1881, Mr. Campbell replied to Mr. Cannon's notice that he was not elected, and, if elected, was disqualified by reason of his alienage and polygamy. No testimony was taken by Mr. Cannon in support of his notice during the time allowed to him by law, but on May 9, 1881, and subsequently thereto, testimony was taken by Mr. Campbell to show that Mr. Cannon was a polygamist and an unnaturalized alien, and by Mr. Cannon, in reply, to show his citizenship.

The certificates held by Mr. Cannon and Mr. Campbell and all the papers and testimony in the case were placed in the custody of the Clerk of the Forty-sixth Congress, and by him were handed over to his successor at the organization of the Forty-seventh Congress.

When the Forty-seventh Congress was organized and the Delegates from the Territories were called to be sworn, objection was made to both Mr. Campbell and Mr. Cannon, and neither was admitted. After a full discussion of the question as to which of the two gentlemen had the prima facie right to the seat, it was resolved by the House, on January 13, 1882—

"That the papers in relation to the right to a seat, as a Delegate from the Territory of Utah, be referred to the Committee on Elections, with instructions to report, at as early a day as practicable, as to the prima facie right or the final right of the claimants to the seat, as the committee shall deem proper."

While the majority of the committee concurred in a conclusion, they quite generally filed individual views instead of joining in a report. But the views filed by Mr. William H. Calkins, of Indiana, chairman of the committee, who submitted the report to the House, were generally referred to in the debate as representing most nearly the position of the majority.

As to the question of prima facie right, Mr. Calkins took this view, seeming, in doing so, to voice the general opinion of the committee:

At the threshold of this case we were met with a certificate held by Mr. Campbell, the contestee, from the governor of Utah Territory. We decline to enter into a discussion of the prima facie right of Mr. Campbell to take his seat as a Delegate on this certificate, because we construe the action of the House on passing on it as a decision adverse to Mr. Campbell, and, being compelled to report on the whole case, we deem it a piece of supererogation to reopen the case of the prima facie right, being satisfied with the action of the House thereon. We dismiss that part of the case from further consideration.

At the outset Mr. Calkins thus discussed a question of practice:

The next question that meets us is a question of practice raised by the contestee; which is, that there is no competent evidence before the committee relative to the number of votes cast for Mr. Cannon at the last election, and it is therefore contended that, on the certificate issued by the governor to Mr. Campbell, he is entitled pro confesso to the seat on the final hearing.

The facts before us are as follows: A certified transcript made by the secretary of the Territory, under the seal thereof, was filed by Mr. Cannon with the Clerk of the House of Representatives on the —— day of November, 1880, and was duly referred to this committee under a resolution of the House adopted on the —— day of December, 1881. It did not reach the committee at the same time that the other papers in the contest came into its possession, but shortly thereafter it was sent by the Clerk of

the House to this committee. These certificates purport on their face to be certified transcripts of the returns made by the county canvassing boards to the secretary of the Territory, under the laws of Utah.

We therefore hold that certificates of election made by county canvassing boards to the secretary of the Territory (under the Territorial law relative to the election of other Territorial officers of the Territory—see secs. 22, 23, and 38, et seq.) constitute the proper mode to be pursued in the Territories in respect to the election of Delegates, and that that mode gives effect to the law which makes it the duty of the governor to canvass the votes and to give a certificate to the person receiving the highest number of votes for Delegate in Congress. It has been the practice of this committee to receive all records duly authenticated by a seal without having them first introduced before the magistrate who takes and certifies the depositions. We know of no other practice that has obtained since the foundation of the Government. This class of evidence has never been held to fall within the meaning of the law passed by Congress relative to contested-election cases. The testimony there referred to is the testimony of witnesses or the introduction of such documents as need identification or further proof before their competency is admitted, and we hold that it does not apply to records and evidence which a seal may make perfect without further identification. If the contestee has been or is surprised at the introduction of this testimony, his proper course is to make application for a continuance, so that he may be allowed to take further testimony. Not having made such application, we presume that he does not wish to avail himself of that course in this case. McCrary seems to hold the better practice to be otherwise (sec. 362), but section 353 so modifies the doctrine first laid down that it is not in conflict with the view the committee take.

This seems to have been the generally accepted view in the committee, although Mr. William G. Thompson, of Iowa, in his views, antagonizes it:

The contestee had a right to the notice required by law; he had a right to be present and cross-examine the witness; he had a right to show that this statement was not the best evidence and demand that investigation be made into the legality of every ballot cast, as well as the qualifications of each elector, and especially so when we find in evidence this strange law upon the statute books of Utah, then and now in force (act of Feb. 12, 1870, sec. 43, ch. 2): "That every woman of the age of twenty-one years who has resided in the Territory six months next preceding any general election, born or naturalized in the United States, or who is a wife or daughter of a native-born or naturalized citizen of the United States, shall be entitled to vote at any election in this Territory."

The acceptance of these returns as evidence disposed necessarily of the question as to whether or not Mr. Cannon received the highest number of legally cast votes for the office of Delegate to Congress.

The next question in issue was:

Was he a citizen of the United States at the time of his election and did he possess the other necessary qualifications?

This question involved the determination of certain facts as to the naturalization of Mr. Cannon. It was alleged that his certificate had not been regularly issued, but the majority considered that the records of the court established it sufficiently. On another point, however, Mr. Calkins said:

The other point made, that Mr. Cannon had not been a resident of any State or Territory of the United States for five years next preceding the date of naturalization, involves quite a novel question. We hold, however, on this point, that the record can not be collaterally questioned, and that therefore it is incompetent to show by evidence in this proceeding that the certificate is null. (Prait *v.* Cummings, 16 Wend., 616; State *v.* Penny, 10 Ark., 616; McCarthy *v.* Marsh, 1 Seld., 263; In re Colman, 15 Blatchf., 406; Spratt *v.* Spratt, 4 Pet., 393.)

473. The Utah election case of Campbell v. Cannon, continued.

In 1882 the House, by majority vote and for the disqualification of polygamy, excluded Delegate George Q. Cannon, who had not been sworn on his prima facie showing.

A Delegate-elect being excluded for disqualification, the House declined to seat the candidate having the next highest number of votes.

An argument that questions affecting qualifications should be instituted in the House alone and not by proceedings under the law of contest.

In 1882, in a sustained case, the major opinion of the Elections Committee inclined to the view that the constitutional qualifications for a Member did not apply to a Delegate.

An elaborate discussion of the status in the House of a Delegate from a Territory.

The question as to whether or not a law of Congress creating Delegates is binding on the House in succeeding Congresses.

Discussion of the effect, in the matter of qualifications of Delegates, of a law extending the Constitution over a Territory.

The third and last question arising is, Was he a polygamist at the time of his election; and if so, is that a disqualification?

On the question of fact there could be no doubt, for he had given the following written admission:

In the matter of George Q. Cannon. Contest of Allen G. Campbell's right to a seat in the House of Representatives of the Forty-seventh Congress of the United States as Delegate from the Territory of Utah.

I, George Q. Cannon, contestant, protesting that the matter in this paper contained is not relevant to the issue, do admit that I am a member of the Church of Jesus Christ of Latter-Day Saints, commonly called Mormons; that in accordance with the tenets of said church I have taken plural wives, who now live with me, and have so lived with me for a number of years, and borne me children. I also admit that in my public addresses as a teacher of my religion in Utah Territory I have defended said tenet of said church as being, in my belief, a revelation from God.

GEO. Q. CANNON.

Therefore there remains the question, Does the practice of polygamy disqualify a Delegate? This was the really important question at issue, both in the committee and in the debates on the floor. And its discussion involved the question of the status of Territorial Delegates as distinguished from the status of Members.

Mr. Calkins, in his views, said:

We are now brought face to face with the question whether this House will admit to a seat a Delegate who practices and teaches the doctrine of a plurality of wives, in open violation of the statute of the United States and contrary to the judgment of the civilized world. There are several clauses in our Constitution which may have some bearing on this subject.

Section 2, Article I, of the Constitution is as follows:

"The House of Representatives shall be composed of Members chosen every second year by the people of the several States," etc.

SECTION 5.

"Each House shall be the judge of the elections, returns, and qualifications of its own members; and a majority of each shall constitute a quorum to do business. * * * "

CLAUSE 2.

"Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with a concurrence of two-thirds, expel a member."

AMENDMENT I, SECTION 1.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press."

ARTICLE IV, SECTION 3, CLAUSE 2.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

These are the provisions of the Constitution which may be held to have some bearing on the question of the qualifications of Delegates.

In the first place, Is a Delegate from a Territory a Member of the House of Representatives within the meaning of the Constitution? The second section of the first article says: "The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors in the most numerous branch in the State legislature." There is no provision in the Constitution for the election of Delegates to the House of Representatives or to the Senate. They are entirely the creature of statute. They are clearly not within the clause of the Constitution last above quoted, for the House is "composed of Members chosen every second year by the people of the several States;" and nothing is said of the Territories. Delegates have never been regarded as Members in any constitutional sense, because their powers, duties, and privileges on the floor of the House, when admitted, are limited. They may speak for their Territories; they may advocate such measures as they think proper; they may introduce bills and serve on committees; but they are deprived of the right to vote. And we doubt whether Congress could clothe them with the right to vote on measures affecting the people of the States or of the Territories, because they do not represent any integral part of the nation, but simply an unorganized territory belonging to the whole people. Hence Delegates are creatures of statute, and it would be competent at any time for the legislative branch of the Government to abolish the office altogether.

The writer of this report goes further than that. He holds that it is incompetent for Congress and the Executive to impose on any future House the right of Delegates to seats with defined qualifications. That is to say, when the several laws were passed giving the Territories the right to this limited representation, those laws were binding only on the lower House, which permitted them to be or made it possible for them to be passed, and were persuasive only to the Houses of future Congresses. For some purposes each House of Congress is a separate, independent branch of the Government. It is made so by the Constitution. For example, each House is the judge of the elections and returns of its own Members, and neither the Executive nor the Senate can interfere with that constitutional prerogative. Each House is independent in its expenditure of its contingent fund, and in the government of its own officers. It is independent in the formation of its own committees, in clothing them with power to take evidence, to send for persons and papers, and to investigate such matters as are within its jurisdiction. Each House is independent in its power to arrest and to imprison, during the session of the body, such contumacious witnesses as refuse to abide its order. In many other instances that may be cited each House acts independently of the other. And with reference to the election of Delegates, who (if they hold any office or franchise at all) can be nothing but agents representing the property and common territory of all the people, it operates only on the lower branch of Congress, for their election extends no right to them to interfere with the business of the Senate or to act as members thereof. This must not be construed into an opinion that the writer holds that the House of Representatives may disregard any law which Congress has the constitutional power to pass. Such laws are as binding upon this House as upon any citizen or court. Nor does the writer of this report mean to be understood that it is not competent for Congress to provide, under the Constitution, for legislative representation for Territories, but it is denied that Congress can bind the House by any law respecting the qualification of a Delegate. It can not affix a qualification by law for a Delegate and bind any House except the one assenting thereto. The qualification of Members is fixed by the Constitution. Hence they may not be added to or taken from by law. But as to Delegates, they are not constitutional officers. Their qualification depends entirely upon such a standard as the body to which they are attached may make. It is urged this means a legal qualification. This is admitted; but that legal qualification is remitted to the body to which the Delegate is attached, because it is the sole judge of that requisite. It is unfettered by constitutional restrictions and can not yield any part of this prerogative to the other branch of Congress or the Executive. If it could, the right to amend would follow, and the House might find itself in the awkward position of having the Senate fixing qualifications to Delegates, or the Executive vetoing laws fixing them, and by this means the power which by the Constitution resides alone in the House would be entirely abrogated.

It is claimed this is an autocratic power. This is admitted. All legislative bodies are autocratic in their powers unless restricted by written constitutions. In this instance there is no restriction.

It is contended that the act of Congress extending the Constitution and laws of the United States over the Territory of Utah, in all cases where they are applicable, extends the constitutional privilege to Delegates and clothes them with membership as constitutional officers of the House. We can not assent to that view. The very language of the act itself only extends the Constitution and laws over the Territory in cases where they are applicable. They can not be applicable to the election of a Delegate; for if they were, then Congress would have no authority to deprive a Delegate of the right to vote. To contend that the applicability of the Constitution in that respect extends to Delegates proves too much. It is clear, therefore, that that clause of the Constitution relative to the expulsion of a Member by a two-thirds vote cannot apply to Delegates, because they hold no constitutional office. It is equally clear that the clause of the Constitution relative to elections, returns, and qualifications of Members has no applicability except by parity of reasoning; and we do not dissent from the view that, so far as the qualification of citizenship and other necessary qualifications (except as to age) are concerned, they extend to Delegates as well as to Members. (Sec. 1906, R. S. U. S.) This is made so, probably, by the statute, expressly so to all the Territories except to Utah Territory, and inferentially to that Territory. It follows, as a logical sequence, that the House may at any time, by a majority vote, exclude from the limited membership which it now extends to Delegates from Territories any person whom it may judge to be unfit for any reason to hold a seat as a Delegate.

It can not be said that polygamy can be protected under that clause of the Constitution protecting everyone in the worship of God according to the dictates of his own conscience and prohibiting the passage of laws preventing the free exercise thereof.

It is true that vagaries may be indulged by persons under this clause of the Constitution when they do not violate law or outrage the considerate judgment of the civilized world. But when such vagaries trench upon good morals, and debauch or threaten to debauch public morals, such practice should be prohibited by law like any other evil not practiced as a matter of pretended conscience.

The views which we have just expressed render it unnecessary for us to discuss further the various propositions involved. In the face of this admission of Mr. Cannon we feel compelled to say that a representative from that Territory should be free from the taint and obloquy of plural wives. Having admitted that he practices, teaches, and advises others to the commission of that offense, we feel it our duty to say to the people of that Territory that we will exclude such persons from representing them in this House. In saying this we desire to cast no imputation on the contestant personally, because of his deportment and conduct in all other respects he is certainly the equal of any other person on this floor.

Mr. F. E. Beltzhoover, in his views, presented the question of qualification in a somewhat different light:

The only portion of the Constitution of the United States which refers to the Territories is Article IV, section 3, clause 2, which provides:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

This clause of the fundamental law has received the most learned and elaborate consideration by the Supreme Court in Scott *v.* Sanford (19 Howard, 393, etc.), wherein, after going fully into the whole history of the Territories from the time of the first cession to the Government, it is held that this clause—

"Applies only to territory within the chartered limits of some one of the States when they were colonies of Great Britain, and which was surrendered by the British Government to the old confederation of the States in the treaty of peace. It does not apply to territory acquired by the present Federal Government by treaty or conquest from a foreign nation."

To all other territory it is held that the Constitution does not extend, and can not be extended by Congress, except in so far as Congress may enact the provisions of the Constitution into a part of the organic law of such territory. This has been done in regard to Utah, first by the act of Congress which organized that Territory, and which provides that "the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable."

The Revised Statutes, sec. 1891, provides in somewhat different language, but of the same purport, that "the Constitution and all laws of the United States which are not locally inapplicable shall," etc.

The Constitution and all the laws of the United States are, therefore, a part of the statute law of the Territory of Utah, so far as they are applicable locally to that Territory.

Now, what was the design of the framers of the Constitution in reference to the territory which they provided for in the clause which we have quoted above? The history of the subject clearly shows that they intended to commit the unorganized territories wholly to the discretion and unlimited power of Congress. This is so decided by the courts in all the cases in which the subject is considered; this was so held in Scott *v.* Sanford (supra), and Judge Nelson, in Benner *v.* Porter (9 Howard, 235), says:

"They are not organized under the Constitution nor subject to its complex distribution of the powers of government or the organic law, but are the creatures exclusively of the legislative department, and subject to its supervision and control."

It is held by Judge Story that "the power of Congress over the public Territories is clearly exclusive and universal, and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled." (Story, Constitution, sec. 1328; Rawle, Constitution, p. 237; 1 Kent's Commentaries, p. 243.)

The Supreme Court of the United States, in a very recent case, says: "The power is subject to no limitations." (Gibson *v.* Chouteau, 13 Wall.7 99.)

See also Stacey *v.* Abbott (I Am. Law, T. R., 94), where it is held by the supreme court of one of the Territories that they "are not organized under the Constitution; they are exclusively the creatures of Congress."

But there is something more shown by the history of the clause in the Constitution in reference to Territories and by the decisions of the courts thereon. It is clear from both these that it was never intended that the status of the Territories should in any respect approach so near the character and position of sovereign States as to require that whatever agents these Territories might be entitled to on the floor of Congress, should have the status and qualifications of Members of Congress. The Territories in the minds of the framers of the Constitution had none of the rights and attributes of the States. No other parts of the Constitution were made to apply to them except the clause we have quoted. On the contrary, they were spoken of as property, and power was given to Congress to dispose of them as property, and to make all needful rules and regulations respecting them as other property of the United States. They were put in the same category with the other chattels of the Government. There is, therefore, nothing in the Constitution which will justify us in believing in the light of its history that the qualifications of agents who might be appointed to look after the interests of the Territories on the floor of Congress should be the same or even like those of Members of Congress. This is so, we maintain, with regard even to that Territory over which the Constitution extends directly and immediately, because it was within the control of the Government at the time the Constitution was framed. If, therefore, the Constitution did not contemplate the requirement of such qualifications for Delegates as agents of the Territory within its immmediate purview, with much less plausibility can it be contended that it should require them where it is only extended as a part of the statute law. The Constitution clearly puts it in the power of Congress to say at any time and in any way it may see proper what qualifications it will exact of the agents whom as a matter of grace and discretion it permits to come from the Territories into its deliberations, and to sit among its Members. Neither the Senate nor the Executive, nor any other power on earth, has any right to interfere except by permission in fixing the qualifications for admission to the House; and the concurrence and cooperation of the Senate and Executive in the passage of any enactment on the subject can go no further in giving it force and validity than to make it a persuasive rule of action which the House is at liberty to follow or disregard." Each House shall be the judge of the election, returns, and qualifications of its own members." No law that was ever passed on this subject, which is under the exclusive and unlimited control of Congress, by any former Congress is binding on any subsequent Congress. Each Congress may wholly repudiate all such acts with entire propriety. It is customary to regard them as rules of conduct. This is well illustrated by the doctrine laid down by McCrary in his Law of Elections, section 349, in reference to the laws made to govern contested elections:

"The Houses of Congress, when exercising their authority and jurisdiction to decide upon the

election, returns, and qualifications' of Members, are not bound by the technical rules which govern proceedings in courts of justice. Indeed, the statutes to be found among the acts of Congress regulating the mode of conducting an election contest in the House of Representatives are directory only, and are not and can not be made mandatory under the Constitution. In practice these statutory regulations are often varied, and sometimes wholly departed from. They are convenient as rules of practice, and of course will be adhered to unless the House, in its discretion, shall in a given case determine that the ends of justice require a different course of action. They constitute wholesome rules, not to be departed from without cause. It is not within the constitutional power of Congress, by a legislative enactment or otherwise, to control either House in the exercise of its exclusive right to be the judge of the election, returns, and qualifications of its own Members.

"The laws that have been enacted on this subject being therefore only directory and not absolutely binding, would have been more appropriately passed as mere rules of the House of Representatives, since by their passage it may be claimed that the House conceded the right of the Senate to share with it in this duty and power conferred by the Constitution. It is presumed, however, that the provisions in question were enacted in the form of a statute rather than a mere rule of the House, in order to give them more general publicity, etc."

It is also important to observe the wide distinction which Congress has always made between the powers and status of a Member of Congress and a Delegate from a Territory.

A Member of Congress is sent by a State by virtue of its irrefragable right to representation under the Constitution of the United States. This right Congress can not abrogate or control or limit or modify in any way.

A Delegate is an agent of a Territory, sent under the authority or permission of an act of Congress. This right or permission is subject to the merest whim and caprice of Congress. It can be utterly wiped out or modified or changed just as Congress may see proper at any time.

A Member of Congress must have certain qualifications under the Constitution.

A Delegate need have none but what Congress sees fit to provide.

A Member of Congress is the representative and custodian of the political power and interests of a sovereign State, which is itself a factor and part of the Government.

A Delegate has no political power, but is only a business agent of the Territory, for the purest business purposes. He has no right to vote or aid in shaping the policy of the Government in war or peace.

A Member of Congress is an officer named in the Constitution of the United States, and contemplated and provided by the framers thereof at the time of the organization of the Government. He is a constitutional officer.

A Delegate is not a constitutional officer in the remotest sense. There were no Delegates mentioned or thought of by the framers of the Constitution.

A Member of Congress is chosen under section 2, Article I, of the Constitution, which provides that—

"The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. No person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

This specifically and definitely and indubitably fixes how and where and by whom Members of Congress shall be chosen and what qualifications they must imperatively have. "No person shall be a Representative," etc., without these qualifications.

A Delegate is chosen under section 1862 of the Revised Statutes, which provides that—

"Every Territory shall have the right to send a Delegate to the House of Representatives of the United States, to serve during each Congress, who shall be elected by the voters of the Territory qualified to elect members of the legislative assembly thereof. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debating, but not of voting."

This fully and very clearly provides how Delegates shall be chosen and what power they shall have, but does not exact or provide any qualifications or hint at any. This is the same provision substantially which has been made for Delegates from 1787 down to this time. The provision in the act of July 13,1787, for the government of the Northwest Territory, is that the joint assembly of that Territory "shall have

authority, by joint ballot, to elect a Delegate to Congress, who shall have a seat in Congress with the right of debating, but not of voting."

These few marked points of distinction between the two offices not only show that the constitutional qualifications for members do not apply to Delegates, but that none of the legislation which has ever been enacted on the subject seems to have been founded on the belief that they did.

CONGRESS HAS ADDED TO THE CONSTITUTIONAL QUALIFICATIONS OF MEMBERS; WHY NOT OF DELEGATES.

But admitting for the purposes of this discussion, what can not be maintained, that the same qualifications which entitle a Member of Congress to admission shall also entitle a Delegate to the same right, and I still hold that Congress has the right and power to say that a polygamist shall not be admitted as a Delegate. Under the high power inherent in every organization on earth to preserve its integrity and existence Congress has the indubitable right to keep out of its councils any person whom it believes to be dangerous and hostile to the Government.

During the war almost the whole Congressional delegation from the State of Kentucky were halted at the bar of the House, and, on the objection of a Member, were not permitted to be sworn until it was ascertained whether they or either of them were guilty of disloyal practices. They had each every qualification usually required by the Constitution; they were duly and regularly elected and returned; they were sent by a sovereign State, holding all her relations in perfect accord with the Federal Government; but the House proceeded to inquire into each case, and not until a reasonable investigation was had were any of them admitted. The committee which had the matter in charge reported, and the House adopted and laid down, the following rule on the subject of all such cases:

"Whenever it is shown by proof that the claimant has, by act of speech, given aid or countenance to the rebellion he should not be permitted to take the oath, and such acts or speech need not be such as to constitute treason technically, but must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion."

In the case of John Young Brown, who was among the number, the committee almost unanimously reported against his right to admission on the ground that he had written an imprudent and disloyal letter; nothing more. He had never committed an act of treason. He was never arrested or tried or convicted. He denied all treasonable intent in the letter and made every effort in his power to explain and extenuate his offense. But seven out of the nine members of the Committee on Elections of the Fortieth Congress reported that he "was not entitled to take the oath of office, or to be admitted to the House as a Representative from the State of Kentucky." This report was adopted by the House by a vote of 108 to 43. The minority report in that case made an argument against the action of the majority in almost the same words and on identically the same grounds that the minority of the Committee on Elections occupy in the case under consideration. It was argued that Mr. Brown had all the constitutional qualifications, and that Congress had no right to exact more; that in any event he had never been tried or convicted of treason, and unless convicted of the crime even treason was no disqualification. But Congress then laid down the rule above given, and never abrogated since, that, in addition to the ordinary constitutional requirements, every man must be well disposed and loyal toward the Government before he can be admitted to Congress to aid in forming its policy and controlling its destinies.

The act of July 2, 1862, providing what is known as the iron-clad oath, added a new and marked qualification to those required of Members of Congress prior to that time, and every Member who has taken that oath since has submitted to the exaction of that additional qualification. The distinguished counsel who argued the case of Mr. Cannon before the Committee on Elections felt the force of this act, and the long-continued practice of Congress under it and explained it as a war measure. He said:

"The grounds upon which this law was vindicated, although not stated with much care or precision, are nevertheless clearly enough disclosed by the debates. It was enacted as a war measure. The iron-clad oath was adopted as the countersign which should, in time of war, exclude domestic enemies from the civil administration of the Government, in the same manner and for the same reason that the military countersign was employed to exclude those enemies from the military lines of the army. It was enacted as a measure of defense against an armed enemy in time of war, and was as necessary and as justifiable as any other war measure not specifically marked out in the text of the Constitution."

If Congress could, almost without challenge, provide and add such a distinct and imperative qualification, not for Delegate but for a Member of Congress, in 1862, why may we not in 1882 ask a reasonable additional qualification for a Delegate from a Territory who does not come within the letter or spirit of the Constitution? The act of 1862 was a bold and radical assertion of the doctrine of self-preservation on the part of Congress to maintain its integrity and the purity and loyalty of its counsels. The resolution recommended by the majority of the Committee on Elections only says to the people of Utah, you shall not abuse the privilege of representation which we allowed you on the floor of Congress, by sending as your Delegate a person who adheres to an organization that is hostile to the interests of free government, and whose doctrines and practices are offensive to the masses of the moral people of the great nation we represent.

CONCLUSION.

The following is a summary of the reasons for my concurrence in the resolutions of the majority of the committee:

1. The history of the cession and organization of the Territory, which belonged to the Federal Government at the time of its formation, the history of the clause in the Constitution which relates to that Territory, and the Constitution itself, all show clearly that it was not contemplated or intended that Delegates which might be sent from said Territory, then immediately under the Constitution, should have the same qualifications as Members of Congress.

2. The Constitution does not extend over Utah, except as a part of the statute law provided for that Territory by Congress, and there is, therefore, more reason for holding that the qualifications required for Members of Congress by the Constitution do not extend to Delegates from that Territory than there is in relation to Delegates from Territory immediately under the Constitution.

3. The Constitution not only does not provide that Delegates shall have the same qualifications as Members of Congress, but no law, in almost a century of legislation on the subject, has so provided.

4. There is no reason why the qualifications of Delegates should be the same as those of Members of Congress. Their status and dudes and powers are widely different, and their qualifications should be made to conform to those powers and duties, which in case of Delegates are purely of a local and business character.

5. The Territories can only be held and governed by Congress with one single purpose in view, which is to adapt and prepare them for admission as States of the Union. It will hardly be contended that Utah will ever be admitted as a State while polygamy dominates it, or that it is preparing it for admission as a State to hold out to its people the delusive doctrine that a polygamist is not disqualified as a Member of Congress, and therefore that polygamy is no bar to the admission of Utah to the Union.

6. No law fixing the qualifications of Delegates passed by any former Congress would be binding on any subsequent Congress. Each House shall be the judge of the qualifications of its own Members, and, for a much stronger reason, it should be the exclusive judge of the qualifications of the Delegates, which are its creatures and which it admits as matter of its own discretion.

7. Congress has held, from 1862 down to this time, that it has the right to prevent the admission of persons as Members who are hostile to the Government by excluding them on that ground, although they possess all the other qualifications required by the Constitution; with much more propriety, and much less stretch of power, Congress has the right to exclude a Delegate who is not well disposed toward the Government, and who openly defies its laws.

Mr. Ambrose A. Ranney, of Massachusetts, took a different view as to the course of procedure desirable:

2. I agree in the main with the report of the chairman, wherein he says, in substance, that it is clear that the clause of the Constitution relative to elections, returns, and qualifications of Members applies and extends to Delegates, and that substantially the same qualifications (unless it be as to age) are prescribed for both Member and Delegate.

I would add to the concession the assertion that the rule of construction which has been established in regard to Constitution relating to Members, to wit, that other qualifications can not be added to those specified, and none taken away, applies for the same reason to Delegates, when the qualifications for them are prescribed and specified by statute; also, what is undoubted law, that judging of the qualifi-

cations comprehends only a determination of the question whether the Member or Delegate answers the qualifications prescribed as the conditions of his eligibility.

The manifest intent of the Constitution was to fix certain things as unalterable conditions of eligibility, and leave all else for the electors to judge of and determine for themselves. Congress has shown the same intention in statutes erecting Territorial governments, and giving a right of qualified representation. So firmly has the House adhered to this fundamental principle of a representative government that the uniform rule of Congress has been not to entertain questions of alleged bad personal character in judging of what are called "qualifications." In exercising the right of expulsion even the established rule has been not to expel for bad character or even crimes committed before the election and known to the electors at the time. (McCrary, secs. 521, 522, 523.) A few cases connected with the rebellion, and arising out of known disloyalty, are exceptions, but they stand on different grounds. A Delegate's power was so limited and circumscribed that some of the organic acts did not even prescribe citizenship as a condition of eligibility, and Congress held it to be implied, as in the Michigan case. (White's case, Hall and Clark, p. 85.)

It follows that all this committee has to do on this point is to see whether Mr. Cannon was eligible or had the prescribed qualifications.

3. It is sought to avoid the conclusion to which the doctrine of the last point leads, on what I consider most untenable and dangerous grounds. They contravene fundamental principles of law, and a practice which has existed from the beginning of the Government.

Mr. Strong, in 1850, then on Election Committee of the House, since an illustrious judge upon the bench of the United States Supreme Court, has forcibly illustrated and stated that all admissions of Delegates to a seat are by virtue of established laws, and not by grace or within the discretion of the House. (See Smith's case, Messervy's case, Babbitt's case, 1 Bartlett, pp. 109, 117, 116.) Showing that he has been admitted only by right from the formation of the confederation down to the Constitution, and since to this time.

It is said that a Delegate is not named in the Constitution and is not the creature of the same, while a Member is, and that his admission to a seat is ex gratia. The legal purport of the opposite contention, when expressed in words, is: "It is incompetent for Congress and the Executive to impose on any future House the right of a Delegate to a seat;" "they (the acts) were persuasive only to the Houses of future Congresses;" and, "in short, it may be said that Delegates sit in the lower House by its grace and permission, and that it makes no difference whether that permission is expressed in a statute or in a mere resolution of the House. The House can disregard it and refuse to be bound by it, because it affects (somewhat) the organization and membership of the House alone."

It does not change the legal purport, in my judgment, to say Congress had no power to impose upon the House a Delegate "with defined qualifications." I concede that powers could not be conferred upon a Delegate which would infringe upon the constitutional rights of State representation or those of a full Member.

The gist of this doctrine is that a statute which the Constitution authorizes Congress to make may be set aside and made null and void at the pleasure of one branch of the lawmaking power.

If the Constitution authorizes Congress to enact the statutes relating to the Territories, and give a Delegate, duly elected and returned, with the requisite qualifications, a right to a seat and to debate, without a right to vote, no power under heaven can rightfully deprive him of these rights and privileges except Congress itself, by some other statute passed by both Houses.

The doctrine must lead to this: That the statutes organizing the Territories, with such powers and rights, are not authorized by the Constitution, and are void, unless the House sees fit to observe them. But this clause of the Constitution has been sanctioned and sustained as authorizing such things too often to require any discussion of the subject.

How the sitting of a Delegate can be said to infringe upon any constitutional rights of a Member I fail to see. Nobody pretends that the statute attempts to make him a Member in the full sense of that term, and he is not a creature of the Constitution in the exact sense of that term, but he is a creature of a statute which that instrument authorizes, and can subsist and enjoy his rights and privileges without infringing upon the constitutional rights of a Member, and that is enough to sustain the statute as valid; and, if so, it is not merely "persuasive" on all future Houses, but absolutely binding on their consciences, and must be obeyed. It can be disregarded only in the exercise of a power without the right, as a sort of usurpation of authority.

The right of representation on the part of the Territory and of a Delegate to his seat has always been accorded as such, and not as a grace or favor, save as the grace and favor of Congress, and not of one House alone. The doctrine contended for strikes at the very root of the right of representation conferred, and commits the Delegate to the discretion and caprice of the House, instead of the full law-making power.

"The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities, but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution. * * *

"It may do for the Territories what the people under the Constitution of the United States may do for the States." (Waite, Ch. J., in Bank *v.* County of Yankton, 101 U. S., 133.)

It follows that Congress, and Congress alone, can give rights by statute law, adopting and applying, if they please, the principles of the Constitution so far as they can be made applicable, and imposing likewise reciprocal obligations upon every other branch of the Government and the people, so the rights conferred may be guaranteed and enforced.

The section 1891 of the Revised Statutes extends over Territories the laws and Constitution of the United States, except so far as locally inapplicable, and this was designed to give a representative form of government and republican institutions to Territories, which were incipient or prospective States, and give the Constitution effect as law, with reciprocal rights and obligations.

A Delegate becomes in one sense a Member, and yet not properly so called. He is enough so to render applicable in spirit the law in regard to contested elections, which in terms applies only to Members, the clause of the Constitution which makes the House judges of the qualifications, returns, etc., of the Members and the other one which relates to the expulsion of Members. (Maxwell *v.* Cannon, Forty-third Congress.)

The analogy, if justified at all, must be carried and applied all through, and such has been the uniform precedent and practice heretofore. The law should not be changed to meet the strain of a special desire in an individual case.

The discussion in Maxwell *v.* Cannon covers the whole subject-matter, and I adopt its doctrine in the main.

I feel very clear that the organic act of Utah and the Revised Statutes, including sections 1860, 1862, and 1863, are constitutional and valid and as such binding upon the House as much as on anybody else.

Section 1862 reads: "Every Territory shall have the right to send a Delegate to the House of Representatives of the United States, to serve during each Congress, who shall be elected by the voters in the Territory qualified to elect members of the legislative assembly thereof. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debating, but not of voting."

It is to be observed that the language is, "shall have a seat," etc., and we may as well reject everything else as that.

4. It follows, in my judgment, that Mr. Cannon, being eligible and duly elected and returned, makes out his legal right to a seat under the statutes, and having found thus much his "final right" is determined, subject only to the right which the House has to expel him by a two-thirds vote.

The resolution of reference is not to determine which claimant has the strongest case of favor or grace, but which has the "right," i. e., the legal right, and we must find this much only. If no legal right whatever, then we can find that and say so only under this resolution.

5. The only objection urged is polygamy.

My position on that point is: It is not a disqualification affecting the legal right, but concerns only the dignity of the House, and an investigation into matters which concern that alone must be instituted in the House, and can not be started in a contest made by a contestant; for the contest embraced and committed to the committee under chapter 8, page 17, Revised Statutes, affects only the legal right. (Maxwell *v.* Cannon, adopted by McCrary, S. 528.)

The reason for it is apparent and sound, otherwise any outsider, or pretender, or a real contestant, or contestee, may proceed to take evidence of and spread upon the record any amount of scandal or any charge affecting the moral character the private character of any Member of the House.

The House must alone proceed to vindicate its own dignity and character, and does not allow anyone outside of it to start and take evidence for them on that subject unless by special order. Such an investigation is usually referred to a special committee.

The principle involved is of more importance than the seating or unseating of any one Member.

I agree with all that is in the report against polygamy, and in the duty of Congress to obviate by law its evils, so far as is possible, but let it be done by law and not in violation of law.

If Mr. Cannon is eligible under existing law and was duly elected and returned, as we find, we give him his legal right to a seat because the law (sec. 1862) says he shall have it.

We can then exercise our right and expel him under another independent provision of the Constitution upon a proceeding started and conducted in the usual and the legal way. We have his admission, put in under protest, and may act on that if sufficient and if he does not demand a hearing.

Minority views signed by Messrs. S.W. Moulton, of Illinois; Gibson Atherton, of Ohio; L.H. Davis, of Missouri; and G.W. Jones, of Texas, took the view that Mr. Cannon was not disqualified, and was entitled to the seat.

The grave and important question as to whether polygamy is a disqualification for the office of Delegate from the Territories we think is settled by the Constitution, the laws, and the uniform practice of the Government since its formation, now nearly one hundred years.

As to who shall hold seats in Congress, there are two distinct provisions of the Constitution:

Section 5, Article I of the Constitution is as follows:

"Each House shall be the judge of the elections, returns, and qualifications of its own Members; and a majority of each shall constitute a quorum to do business. * * *"

This provision in its operation requires only a majority vote.

Such has been the general practice of the House.

The other provision is, "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." (Second clause, sec. 5, Art. I.)

The qualifications of Representatives are prescribed by the second section of the first article of the Constitution: They shall be 25 years of age, seven years a citizen of the United States, and, when elected, be inhabitants of the State in which they shall be chosen.

This committee is to report upon "the prima facie right or the final right of the claimants to the seat as the committee shall deem proper."

It must be conceded, as we have seen, that Cannon has an overwhelming majority of the votes cast for Delegate to Congress.

We think, also, it must be conceded, from the facts evidenced in the case by the record, that Cannon possesses the constitutional qualifications prescribed by second section of Article I of the Constitution.

Mr. Cannon, at the time of his election, was over 25 years of age, had been seven years a citizen of the United States, and was an inhabitant of the Territory in which he was chosen. These are the only qualifications to be considered.

There is no power, State or Federal, under the Constitution by which these qualifications can be changed, enlarged, or modified in any manner.

The authorities upon this question are all one way.

In the report of the Committee on Elections of the House in the Forty-third Congress, in the case of Maxwell against Cannon, and upon this point, the committee say:

"The practice of the House has been so uniform and seems so entirely in harmony with the letter of the Constitution that the committee can but regard the jurisdictional question as a bar to the consideration of qualifications other than those above specified."

This is the rule we think should be applied to the case before the House.

The following are some of the authorities on this point: Story on the Constitution, sections 625–627; the contested-election cases of Fouk *v.* Trumbull and Turney *v.* Marshall from the State of Illinois (1 Bartlett, 168; McCrary, Election Laws, sections 227, 228, 252); Donnelly *v.* Washburn, Forty-sixth Congress; the case of Wittemore in Forty-first Congress; the case of Matteson in the Thirty-fifth Congress; the case of Benjamin G. Harris, are all in point.

But it is said that it may be conceded that the rule above stated as to the power of the House relating to Members is correct, but that a Delegate from the Territories is not a constitutional officer, and does not as to qualification stand upon the same ground as a Member from a State, and that the constitutional provision does not apply to a Delegate; that he is a nondescript, and has no right and can claim no protection under the Constitution.

So far as our research has extended since the formation of the Government we can find no case reported that makes any distinction between the qualifications of a Member from a State and a Delegate from the Territory.

Whenever that question has arisen the rule as to qualifications has been the constitutional provision, and this has been applied to the Delegates from the Territories. The case of James White, decided in 1794, is not an exception.

It may be that in express terms the Constitution does not apply to Territories; but the spirit and reason of the Constitution does apply and establishes a proper standard.

If the constitutional standard is not adopted as to qualifications, then there is no rule for the government of the House as to Delegates.

The House at this session may establish one rule, and the next session may revoke or establish another and different one, and the right of a Delegate would be wholly uncertain.

There are laws that have been passed by Congress touching this subject that give color to the views we present. These laws show that a Delegate, except as to a vote in the House, is put upon the same footing as a Member from a State.

Besides, there has always been the same practice from the formation of the Government as to Delegates and Members by referring their cases to the Committee on Elections, both being treated alike in this respect.

The time, manner, and places of elections of Members of Congress, including Delegates from the Territories, are prescribed and made the same by 14 United States Statutes, sections 25, 26, and 27.

By section 30, Revised Statutes, the oath of office of Members of Congress and Delegates from the Territories is prescribed, and is the same for a Delegate as a Member.

It is important to remark that this statute was passed June 1, 1789, and has ever since been the law.

Section 35, Revised Statutes, provides that Members and Delegates are to be paid the same salary.

Section 51 provides that vacancies in the case of Delegates are to be filled in the same way as in case of Members.

The organic law for Utah, September, 1850, provides:

"That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable."

This is a law of Congress passed by virtue of the Constitution, and is binding on Congress until repealed.

Now, why is the provision of the Constitution relating to qualification of Members not applicable to the Territories? What reason can be given why it should not apply? What better standard for qualification can be made?

The adoption of the rule establishes uniformity and certainty, the operation is salutary, and its adoption since the formation of the Government demonstrates its advantages and necessity.

The argument is made that a Delegate is not a constitutional officer, and, therefore, not a Member of the House in the sense of the Constitution, and that the House may seat or unseat a Delegate at will.

We believe this is the first time since the formation of the Government that this argument has been advanced.

If a Delegate from a Territory is not a Member by virtue of the Constitution and laws, then what rule or law do you apply to him? Is it the arbitrary will or caprice of the House at each session?

If, as is said, a Delegate is not a Member, certainly you can not invoke any provision of the Constitution as to qualification or expulsion.

The constitutional rule wholly fails upon this theory.

It would follow from this view that the constitutional right of the House to judge of the election, returns, and qualifications of its Members does not apply to Delegates, and therefore the House is without constitutional power in the premises, and that whatever power the House possesses as to Delegates it must be derived from some other source.

The extraordinary and dangerous doctrine is advanced by the majority of the committee—

"That the Delegates sit in the lower House by its grace and permission, and it makes no difference whether that permission is expressed in a statute or mere resolution of the House.

"The House can at any time disregard it and refuse to be bound by it.

"It [Congress] can not affix a qualification by law for a Delegate and bind any House except the one assenting thereto. Congress cannot bind the House by any law as to the qualification of a Delegate."

Our opinion is that it is competent for Congress, by a proper statute, to provide for the election in the Territories of Delegates to Congress, under Article IV, section 3, clause 2:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

It has been decided under this article of the Constitution a great many times that it gives Congress the right to legislate for the Territories, and to make such laws and rules as may be for the advantage of the Territories and of the country.

Now, under this clause of the Constitution, if, in the opinion of Congress, in making needful rules and regulations respecting the Territories, it should be necessary to provide for the election of a Delegate from said Territory to this House, and Congress should so provide that said Delegate should have a seat and the right to debate, could the House alone nullify that law and refuse to seat the Delegate?

Why is not the House bound by constitutional laws? What right has the House to nullify and refuse to obey a law it has helped to make?

We have already referred to various laws of Congress making express provisions for the election of Delegates from the Territories, giving them a right to a seat in the House, and generally applying the same rules to Delegates as Members, except Delegates have not the right to vote.

Also, as we have seen, the organic law of Utah adopts the Constitution and laws of the United States, so far as applicable, as a part of that organic law.

Also, section 1891, Revised Statutes, gives the Constitution and laws force and effect in all the Territories, so far as applicable.

The law-making department of the Government has made these various laws in a constitutional way, and until repealed they are binding upon every individual in the land and every department of the Government, including Congress. No one is above the laws in this country.

Certainly one House alone can not repeal a law of Congress nor nullify it by any direct or indirect proceeding. It is absolutely bound by the law.

If Congress has the right to make a law and provide for the election of Delegates to this House, and if the constitutional qualifications do not apply to them, and there is no statute fixing their qualifications, it would seem to follow that the House would be bound to admit as a Delegate under the law such persons as the people of the Territory might elect to represent them, however obnoxious they might be to the House. The people of the Territory being satisfied, no one else can complain.

Suppose Congress should pass a law providing that Cabinet officers should be allowed seats in the House, with the privilege of answering questions put to them relating to the Executive Department, and the other Departments of which they were chief, and with the right to debate.

Then, could the House refuse to permit these officers seats and the privileges accorded to them under the law?

Could the House refuse them a seat on the ground that they were not qualified, and set up some fanciful standard of qualifications not prescribed by the statute?

Could the House exclude them under the law upon the ground that they were heretics, or Mormons, or polygamists—Catholics, Democrats, Republicans, or Greenbackers?

Would not the House be bound to obey the law that had been made by Congress and permit the Cabinet to seats, however offensive they might be personally?

The logic of the majority of the committee is that one House alone could nullify the laws and exclude ad libitum.

In the Forty-third Congress, in the case of Maxwell *v.* Cannon, precisely the same question was involved in that case as in the one before the committee.

The question was stated this way:

"That George Q. Cannon is not qualified to represent said Territory or to hold his seat in the Forty-third Congress, for the reason, as shown by the evidence, that he, on and before the day of the election, in, August, 1872, was openly living and cohabiting— with four women, as his wives, in Salt Lake City, in Utah Territory, and he is still living and cohabiting with them."

On the question of qualifications, and the effect of making the Constitution a part of the law by act of Congress, the committee say:

"It being conceded that the contestee has these qualifications, one other inquiry only under this head remains, to wit: Does the same rule apply in considering the case of a Delegate as a Member of this House? This question seems not to have been raised heretofore. The act organizing the Territory of Utah, approved September 9, 1850, enacts that the Constitution and laws of the United States are hereby extended over, and declared to be in force in, said Territory of Utah, so far as the same, or any provision thereof, may be applicable. It was said, on the argument, that the Constitution can not be extended over the Territories by act of Congress, and the views of Mr. Webster were quoted in support of this position.

"We do not deem it necessary to consider that question, because it will not be denied that Congress had the power to make the Constitution a part of the statutory law of the Territory as much as any portion of the organic act thereof. For the purposes of this inquiry it makes no difference whether the Constitution is to be treated as constitutional or statutory law. If either, it is entitled to be considered in disposing of this case."

Upon this point there does not seem to have been any difference of opinion in the committee.

The committee, in the same case, referring to the question of polygamy, say:

"The question raised in the specification of contestant's counsel, and above transcribed, is a grave one, and unquestionably demands the consideration of the House. This committee, while having no desire to shrink from its investigation, finds itself confronted with the question of jurisdiction under the order referring the case.

"The Committee on Elections was organized under and pursuant to article 1, section 5, of the Constitution, which declares: 'Each House shall be the judge of the elections, returns, and qualifications of its own Members.' The first standing committee appointed by the House of Representatives was the Committee on Elections. It was chosen by ballot, on the 13th day of April, 1789; and from that time to this, in the vast multitude of cases considered by it, with a few unimportant exceptions, in which the point seems to have escaped notice, the range of its inquiry has been limited to the execution of the power conferred by the above provision of the Constitution.

"What are the qualifications here mentioned and referred to the Committee on Elections? Clearly, the constitutional qualifications, to wit, that the claimant shall have attained the age of 25 years, been seven years a citizen of the United States, and shall be an inhabitant of the State in which he shall be chosen. The practice of the House has been so uniform, and seems so entirely in harmony with the letter of the Constitution, that the committee can but regard the jurisdictional question as a bar to the consideration of qualifications other than those above specified, mentioned in the notice of contest, and here in before alluded to.

"We conclude that the question submitted to us, under the order of the House, comes within the same principles of jurisidiction as if the contestee were a Member, instead of a Delegate."

The minority said:

"It is admitted in the report, and the fact has not been and is not denied, that Mr. Cannon possesses the constitutional qualifications, unless the qualifications of a Delegate in Congress from a Territory differ from the qualifications fixed by the Constitution for a Member of the House. There can be no sufficient reason assigned for the position that the qualifications are any different.* * * The line of demarkation between these two great powers of the Home, the power to judge of the elections, returns, and qualifications of its own Members, by a mere majority vote, and the power to expel its Members by two-thirds vote, is clear and well defined."

The "views" of the minority on the point were further expressed in these words:

"But a graver question than those we have considered is the question whether the House ought, as matter of policy, or to establish a precedent, to expel either a Delegate or Member on account of alleged crimes or immoral practices, unconnected with their duties or obligations as Members or Delegates, when the Member or Delegate possesses all the qualifications to entitle him to his seat.

"If we are to go into the question of the moral fitness of a Member to occupy a seat in the House, where will the inquiry stop? What standard shall we fix in determining what is and what is not sufficient cause for expulsion? If a number of Members engage in the practice of gaming for money or other valuable thing, or are accused of violating the marital vow by intimate association with four women, three of whom are not lawful wives, or are charged with any other offense, and a majority of the House,

or even two-thirds, expel them, it may be the recognition of a dangerous power and policy. If exercised and adopted by one political party to accomplish partisan ends, it furnishes a precedent which it will be insisted justifies similar action by the opposite party, when they have a majority or a two-thirds majority in the House; and thus the people are deprived of representation, and their Representatives, possessing the necessary qualifications, are expelled for causes outside of the constitutional qualifications of Members, or those which a Delegate must possess, so far as his qualifications are fixed by reason or analogy, or are drawn from the principles of our representative system of government."

It may be stated that the reports, both of the majority and minority, were made by Republicans.

That is a precedent that covers the case before this committee in every particular. It was exhaustively discussed in the committee and in the House, and was adopted by the House by an overwhelming majority, and it stands today as the rule and law of the House, unless it shall be reversed.

The issue in that case was sharply made, and the rule established that Delegates from Territories are entitled to the benefit of the constitutional limitations as to qualifications, and that polygamy was not a disqualification.

Now, if the rule that has been established and practiced since the formation of the Government as to qualification for Members and Delegates to the House is to be reversed and a different rule adopted, what standard shall it be?

This House may exclude a Member on a charge of polygamy. The next House may exclude a person elected because he is a heretic or a Catholic or a Methodist, or because he had been charged by his opponent with adultery or some other offense.

Everyone can see that such a rule or license would be dangerous to the rights and liberties of the citizens and an end to republican government.

The party in power would be governed by arbitrary will and caprice alone.

Mr. Cannon, the contestant here, claims in good faith that polygamy is a religious conviction and principle with him and his people, and in this he is entitled to protection under the Constitution.

The people he represents have elected him and are satisfied with him, and this House should be content.

The sixth article of the Constitution provides that—

"No religious test shall ever be required as a qualification for any office of public trust under the United States."

It seems to us that the contestant is entitled to the above provision of the Constitution as a protection. He has been convicted of no crime and there is no law on the statute book that disqualifies him as a Delegate.

On the majority view that Mr. Cannon was disqualified and should be excluded another question arose as to whether or not Mr. Campbell should be admitted to the seat. The majority of the committee took the view that as he had only a minority of the votes he could not be admitted under the American practice.

The question was debated at length on April 18 and 19, 1882,[1] the main point at issue being the status of a Delegate in reference to qualifications. On the latter day the resolution of the minority declaring Mr. Cannon elected and entitled to the seat was offered as a substitute for the majority resolutions and was disagreed to—yeas 79, nays 123.

Then the resolutions of the majority were agreed to without division,[2] as follows:

Resolved, That Allen G. Campbell is not entitled to a seat in this Congress as a Delegate from the Territory of Utah.

Resolved, That George Q. Cannon is not entitled to a seat in this Congress as a Delegate from the Territory of Utah.

Resolved, That the seat of the Delegate from the Territory of Utah be, and the same hereby is, declared vacant.

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[1] Record, pp. 2001, 3045–3075.

[2] Journal, pp. 1072–1074.

474. The case of Brigham H. Roberts, in the Fifty-sixth Congress.

The House declined to permit the oath to be administered to Brigham H. Roberts pending an examination of his qualifications by a committee.

In 1899 a Member who challenged the right of a Member-elect to be sworn did so on his responsibility as a Member and on the strength of documentary evidence.

In 1899 a Member-elect, challenged as he was about to take the oath, stood aside on request of the Speaker.

The House, by unanimous consent, deferred until after the completion of the organization the question of Brigham H. Roberts's right to take the oath.

The right of Brigham H. Roberts to take the oath and his seat being under consideration, he was permitted to speak, by unanimous consent.

In 1899 the House referred the case of Brigham H. Roberts to a committee, with directions to report on both the prima facie and final right.

In the case of Brigham H. Roberts the committee reported at one and the same time on both the prima facie and final right.

On December 4, 1899,[1] at the time of the organization of the House, and while the swearing in of the Members was proceeding, the State of Utah was called. Thereupon Mr. Robert W. Tayler, of Ohio, said:

Mr. Speaker, I object to the swearing in of the Representative-elect from Utah and to his taking a seat in this body. I do so, Mr. Speaker, on my responsibility as a Member of this House, and because specific, serious, and apparently well-grounded charges of ineligibility are made against him. A transcript of the proceedings of court in Utah evidences the fact that the claimant was in 1889 convicted, or that he pleaded guilty, of the crime of unlawful cohabitation. Affidavits and other papers in my possession indicate that ever since then he has been persistently guilty of the same crime, and that ever since then he has been and is now a polygamist. If this transcript and these affidavits and papers tell the truth, the Member-elect from Utah is, in my judgment, ineligible to be a Member of this House of Representatives both because of the statutory disqualification created by the Edmunds law and for higher and graver and quite as sound reasons. I ought also to say, in addition to what I have just said, that I have in my possession a certified copy of the court record under which the claimant to this seat was supposed to be naturalized, and that eminent counsel assert that if that be the record in the case there is grave doubt if the claimant is a citizen of the United States. I offer and express no opinion upon that proposition.

Mr. Speaker, if it were possible to emphasize the gravity of these charges and of the responsibility that is at this moment imposed upon this House, we will find that emphasis in the memorials, only a small part of which could be physically cared for in this Hall, but all of which I now present to the House, from over 7,000,000 American men and women, protesting against the entrance into this House of the Representative-elect from Utah.

The Speaker requested the Member-elect from Utah to step aside until the remainder of the Members-elect were sworn in.

Then Mr. Tayler offered this resolution:

Whereas it is charged that Brigham H. Roberts, a Representative-elect to the Fifty-sixth Congress from the State of Utah, is ineligible to a seat in the House of Representatives; and

Whereas such charge is made through a Member of this House, on his responsibility as such Member and on the basis, as he asserts, of public records, affidavits, and papers evidencing such ineligibility:

Resolved, That the question of the prima facie right of Brigham H. Roberts to be sworn in as a Rep-

[1] First session Fifty-sixth Congress, Record, p. 5; Journal, p. 6.

resentative from the State of Utah in the Fifty-sixth Congress, as well as of his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House, to be appointed by the Speaker; and until such committee shall report upon and the House decide such question and right the said Brigham H. Roberts shall not be sworn in or be permitted to occupy a seat in this House; and said committee shall have power to send for persons and papers and examine witnesses on oath in relation to the subject-matter of this resolution.

By unanimous consent the consideration of the resolution was postponed until after the organization of the House had been completed and the President's message had been received and read.[1]

On December 5,[2] the resolution being considered, Mr. James D. Richardson, of Tennessee, offered the following amendment in the nature of a substitute:

Whereas Brigham H. Roberts, from the State of Utah, has presented a certificate of election in due and proper form as a Representative from said State: Therefore, be it

Resolved, That without expressing any opinion as to the right or propriety of his retaining his seat in advance of any proper investigation thereof, the said Brigham H. Roberts is entitled to be sworn in as a Member of this House upon his prima facie case.

Resolved further, That when sworn in his credentials and all the papers in relation to his right to retain his seat be referred to the Committee on the Judiciary, with instructions to report thereon at the earliest practicable moment.

During the debate Mr. Roberts, by unanimous consent, addressed the House.

On a division the amendment was disagreed to—59 ayes, 247 noes. The resolution was then agreed to—304 yeas, 32 nays.

The Speaker appointed the following special committee: Robert W. Tayler, of Ohio; Charles B. Landis, of Indiana; Page Morris, of Minnesota; R. H. Freer, of West Virginia; Charles E. Littlefield, of Maine; Smith McPherson, of Iowa; David A. DeArmond, of Missouri; Samuel W.T. Lanham, of Texas; Robert W. Miers, of Indiana.

The committee reported[3] on January 20, 1900, the majority holding that Mr. Roberts ought not to have a seat in the House and declaring his seat vacant. As to the prima facie right the committee say:

Upon this question little need be said except what is hereafter said in relation to the final right to a seat. The questions are inextricably interwoven, and for convenience the main body of authority against his prima facie right to be sworn in is presented in the argument made against his final right to a seat.

Both Houses of Congress have in innumerable instances exercised the right to stop a Member-elect at the threshold and refuse to permit him to be sworn in until an investigation had been made as to his right to a seat. In some cases the final right was accorded the claimant; in many cases it was denied.

This question, as we view it, is always to be answered from the standpoint of expediency and propriety. The inherent right exists of necessity. The danger of disorder and of blocking the way to an organization vanishes in view of the proper procedure. The most strenuous objection is made by those who imagine, for instance, that if the person whose name was first called should be objected to, he might refuse to stand aside until the remaining Members were sworn in. The claim is made that this must inevitably result in confusion and demoralization, and in furnishing an opportunity for an arbitrary and unjust exercise of power on the part of the House.

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[1] Mr. Roberts did not vote on the roll call which occurred after this action took place. His name was stricken from the roll and not again called.

[2] First session Fifty-sixth Congress, Record, pp. 38–53; Journal, p. 34.

[3] House Report No. 85, first session Fifty-sixth Congress.

The answer to this is that every person holding a certificate, whose name is on the Clerk's roll, where it is placed by operation of law, is entitled to participate in the organization of the House, whether sworn in or not. Such is the effect and the only effect of the certificate. If the Members-elect, other than the person objected to, desire so to do they can prevent his being sworn in. This lodges no more power in the majority, however arbitrary it may be, than that majority always has, whether on the day of the organization or a week or a month thereafter.

The fear that injustice maybe done by it in time of great party excitement is not justly grounded in theory, nor has it occurred in practice; while on the other hand injustice has often occurred in the unseating of Members in case of contested elections. It is always, whether at the threshold or after the House is fully organized, a question of the power of the majority. It is no more dangerous or disorganizing in the one instance than in the other. There can be no injustice done when every man holding a certificate, whether sworn in or not, is entitled to vote for a Speaker and upon the right of every other Member-elect to be sworn in.

If, by way of illustration, Mr. Roberts had been the first person whose name was called, and he had objected to standing aside, the House, for the purpose of organization, and for the purpose of voting upon the question as to whether he should then be sworn in, would be completely organized, and every other Member present, although not one of them had been sworn in, would be entitled to vote upon that question. This, it seems to us, dissolves every imagined difficulty and permits the easy organization of the House.

If every individual Member had been objected to, seriatim, the only objectionable result would have been the inconvenience and delay involved in the time necessary to vote upon all the cases.

Judge McCrary's statement (sections 283 and 284 in his work on Elections) is a sound and correct declaration of the law applicable to the right of the House to compel a Member who is objected to to stand aside, and not permit him to be sworn in until his case is investigated. It is as follows:

"If a specific and apparently well-grounded allegation be presented to the House of Representatives of the United States that a person holding a certificate of election is not a citizen of the United States, or is not of the requisite age, or is for any other cause ineligible, the House will defer action upon the question of swearing in such person until there can be an investigation into the truth of such allegations.

"It is necessary, however, that such allegations should be made by a responsible party. It is usually made, or vouched for, at least, by some Member or Member-elect of the House. It is to be presented at the earliest possible moment after the meeting of the House for organization, and generally at the time that the person objected to presents himself to be sworn in. The person objected to upon such grounds as these is not sworn in with the other Members, but stands aside for the time being, and the House, through its committee, will with all possible speed proceed to inquire into the facts.

"The certificate of election does not ordinarily, if ever, cover the grounds of the due qualifications of the person holding it. It may be said that by declaring the person duly elected the certificate by implication avers that he was qualified to be elected and to hold the office. But it is well known that canvassing officers do not in fact inquire as to the qualifications of persons voted for; they certify what appears upon the face of the returns and nothing more."

This is not quoted as being authoritative in itself, but because it is an exact statement of what the precedents and authorities on that subject clearly disclose.

The minority of the committee, Messrs. Littlefield and De Axmond, filed views in opposition, holding that Mr. Roberts had the constitutional right to take the oath of office and be admitted to his seat on his prima facie right.[1]

475. The case of Brigham H. Roberts, continued.

In the investigation of the qualifications of Brigham H. Roberts, the committee permitted his presence and suggestions during discussion of the plan and scope of the inquiry.

Witnesses were examined under oath and in the presence of Brigham H. Roberts during the committee's investigation of his qualifications.

[1] House Report No. 85, Part II, first session Fifty-sixth Congress, p. 53–77.

In considering the qualifications of Brigham H. Roberts the committee tendered to him the opportunity to testify in his own behalf.

The committee also state in regard to the method of procedure:

The committee met shortly after its appointment, and in Mr. Roberts's presence discussed the plan and scope of its inquiry. Mr. Roberts submitted certain motions and supported them by argument, questioning the jurisdiction of the committee and its right to report against his prima facie right to a seat in the House of Representatives. The determination of these questions was postponed by the committee, to be taken up in the general consideration of the case.

Subsequently certain witnesses appeared before the committee and were examined under oath, in the presence of Mr. Roberts and by him cross-examined, relating to the charge that he was a polygamist. This testimony has been printed and is at the disposal of the Members of the House.

The committee fully heard Mr. Roberts and gave him opportunity to testify if he so desired, which he declared he did not wish to do.[1]

476. The case of Brigham H. Roberts, continued.

In a sustained report in 1900 the majority of the committee favored the exclusion and not the expulsion of a Member-elect admitted to be engaged in practice of polygamy.

Discussion of the power of expulsion under the Constitution.

May the House expel a Member-elect before he is sworn in?

Preliminary to the discussion the committee agreed unanimously on the following finding of facts:

We find that Brigham H. Roberts was elected as a Representative to the Fifty-sixth Congress from the State of Utah and was at the date of his election above the age of 25 years; that he had been for more than seven years a naturalized citizen of the United States and was an inhabitant of the State of Utah.

We further find that about 1878 he married Louisa Smith, his first and lawful wife, with whom he has ever since lived as such, and who since their mariage has borne him six children.

That about 1885 he married as his plural wife Celia Dibble, with whom he has ever since lived as such, and who since such marriage has home him six children, of whom the last were twins, born August 11, 1897.

That some years after his said marriage to Celia Dibble he contracted another plural marriage with Margaret C. Shipp, with whom he has ever since lived in the habit and repute of marriage. Your committee is unable to fix the exact date of this marriage. It does not appear that he held her out as his wife before January, 1897, or that she before that date held him out as her husband, or that before that date they were reputed to be husband and wife.

That these facts were generally known in Utah, publicly charged against him during his campaign for election, and were not denied by him.

That the testimony bearing on these facts was taken in the presence of Mr. Roberts, and that he fully cross-examined the witnesses, but declined to place himself upon the witness stand.

The examination of the law and the precedents applicable to the facts stated above involved an examination of several subjects:

1. As to whether the proper remedy should be exclusion or expulsion.

The majority of the committee held:

The objection is made to the refusal to admit Mr. Roberts that the Constitution excludes the idea that any objection can be made to his coming in if he is 25 years of age, has been seven years a citizen of the United States, and was an inhabitant of Utah when elected, no matter how odious or treasonable or criminal may have been his life and practices.

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[1] The meetings of the committee during this examination were open and not secret.

To this we reply:

1. That the language of the constitutional provision, the history of its framing in the Constitutional Convention, and its context clearly show that it can not be construed to prevent disqualification for crime.

2. That the overwhelming authority of text-book writers on the Constitution is to the effect that such disqualification may be imposed by the House, and no commentator on the Constitution specifically denies it. Especial reference is made to the works of Messers. Cushing, Pomeroy, Throop, Burgess, and Miller.

3. The courts of several of the States, in construing analogous provisions, have with practical unanimity declared against such narrow construction of such constitutional provisions.

4. The House of Representatives has never denied that it had the right to exclude a Member-elect, even when he had the three constitutional requirements.

5. In many instances it has distinctly asserted its right so to do in cases of disloyalty and crime.

6. It passed in 1862 the test-oath act, which imposed a real and substantial disqualification for membership in Congress, disqualifying hundreds of thousands of American citizens. This law remained in force for twenty years, and thousands of Members of Congress were compelled to take the oath it required.

7. The House in 1869 adopted a general rule of order, providing that no person should be sworn in as a Member against whom the objection was made that he was not entitled to take the test oath, and if upon investigation such fact appeared, he was to be permanently debarred from entrance.

The interesting proposition is made that the claimant be sworn in and then turned out. Upon the theory that the purpose is to permanently part company with Mr. Roberts, this is a dubious proceeding. Such action requires the vote of two-thirds of the Members. We ask if such a vote is posssible or right, in view of the following observations.

The expulsion clause of the Constitution is as follows:

"Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member."

No lawyer can read that provision without raising in his own mind the question whether the House has any power to expel, except for some cause relating to the context. The ablest lawyers, from the beginning of the Republic, have so insisted and their reasoning has been so cogent that these propositions are established, namely:

1. Neither House of Congress has ever expelled a Member for acts unrelated to him as a Member or inconsistent with his public trust and duty as such.

2. Both Houses have many times refused to expel where the guilt of the Member was apparent; where the refusal to expel was put upon the ground that the House or Senate, as the case might be, had no right to expel for an act unrelated to the Member as such, or because it was committed prior to his election.

The majority then proceed to quote and comment on the cases of Humphrey Marshall, John Smith, and William N. Roach in the Senate; and those of 0. B. Matteson, Oakes Ames, James Brooks, George Q. Cannon, Schumacher King in the House.

After commenting on the bearing of these cases, the majority continue:

If there is any fact apparent in this case it is that the constituents of Mr. Roberts knew all about him before his election.

Can there be room to doubt the proper action of the House? Is it prepared to yield up this salutary power of exclusion? Will it declare itself defenseless and ridiculous?

Nor are those who assert that expulsion is the remedy necessarily barred from voting for the resolution declaring the seat vacant. He must, indeed, be technical and narrow in his construction of the Constitution who will not admit that if a vote to declare the seat vacant is sustained by a two-thirds majority the Constitution is substantially complied with. He may not agree with the committee that a mere majority can exclude, but he can reserve the right to make the point of order that the resolution is not carried if two-thirds do not vote for it.

Recurring again in their report to the right to expel, the majority say:

Upon this alternative proposition that the proper method of procedure is to permit the claimant to be sworn in, and then, if a two-thirds vote can be obtained to expel him, we desire to call attention first of all to what Story says on that subject, section 837:

"The next clause is, 'Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member.' No person can doubt the propriety of the provision authorizing each House to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power, and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior or disobedience to those rules. And as a Member might be so lost to all sense of dignity and duty as to disgrace the House by the grossness of his conduct, or interrupt its deliberations by perpetual violence of clamor, the power to expel for very aggravated misconduct was also indispensable, not as a common but as an ultimate redress for the grievance."

And again, section 838:

"What must be the disorderly behavior which the House may punish, and what punishment other than expulsion may be inflicted, do not appear to have been settled by any authoritative adjudication of either House of Congress. A learned commentator supposed that Members can only be punished for misbehavior committed during the session of Congress, either within or without the walls of the House, though he is also of opinion that expulsion may be inflicted for criminal conduct committed in any place."

And after a reference to the Blount case Story says:

"It seems, therefore, to be settled by the Senate upon full deliberation that expulsion may be for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Senator."

On the subject of expulsion, Rawle says, second edition, page 48:

"Both the Senate and the House of Representatives possess the usual power to judge of the elections and qualifications of their own Members, to punish them for disorderly behavior, which may be carried to the extent of expulsion, provided two-thirds concur. It had not been yet precisely settled what must be the disorderly behavior to incur the punishment, nor what kind of punishment is to be inflicted. * * *"

Paschal on the Constitution, page 87:

"It seems to be settled that a Member may be expelled for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Member."

We do not need to call particular attention to the phraseology of the constitutional provision, nor do we think it very important to consider the evolution, from the standpoint of punctuation, through which that provision went in the constitutional convention. It now appears as following in the same sentence as the provision for disorderly behavior, with only the rhetorical separation of a comma from it.

It thus appears that the language of the provision for expulsion, in the view of the ablest commentators, furnishes clear and cogent reasons for its construction, and that neither House ought to expel for any cause unrelated to the trust or duty of a Member.

This has been the uniform practice of both Houses of Congress.

The case of Hiss v. Bartlett (3 Gray, 468) is cited as showing the unlimited power of a legislative body to expel.

A casual reading of this case, which a careful reading confirms, will show that it directly sustains the position of the majority.

As there was no constitutional provision in Massachusetts respecting expulsion, the legislature of that State was, of course, clothed with all the powers incident to expulsion which are inherent in a legislative body whose powers are not limited by a constitution.

In addition to that, Hiss was expelled on the ground that his "conduct on a visit to Lowell, as one of a committee of the House, was highly improper and disgraceful, both to himself and to the House of which he was a member."

Everything said by the court had relation to such a state of facts. The case is one of expulsion for gross misconduct as a member and in the performance of his duty as a member.

Neither House has ever expelled a Member for any cause unrelated to the trust or duty of a Member.

Both Houses have refused to expel where the proof of guilt was clear, but where the offense charged was unrelated to the trust or duty of a Member.

Again the majority review the precedents in the House and Senate, including the case of Herbert in the Thirty-fourth Congress.

The minority views, after discussing the cases of Matteson in the House and Smith in the Senate, say:

The Matteson case was in 1858. With the exception of a suggestion that a case had been decided in Massachusetts, the purport of which was not stated, no reference was made to a leading Massachusetts case. The opinion of the court in that case, an authoritative construction of the clause of the constitution under which they were acting, was written by Chief Justice Shaw, conceded to be one of the greatest judges that ever sat in any court in any land at any time. The report containing it was published in 1857. It is the only case which we have been able to find where the court has had occasion, with authority, to determine this precise question. The constitution of Massachusetts contained no provision authorizing the expulsion of a Member of the House of Representatives. Joseph Hiss was expelled by the House upon the ground that his conduct on a committee at Lowell "was highly improper and disgraceful, both to himself and to this body of which he is a member." This was not disorderly conduct in the House, and it is significant that the facts that made it "improper and disgraceful" were not disclosed by the case.

Hiss, after his expulsion, was arrested at the instance of one of his creditors on mesne process and committed to jail. He brought a petition for habeas corpus on the ground that he was a member of the House of Representatives, and as such privileged from arrest. This raised the precise question of the legality of his expulsion, and speaking through Chief Justice Shaw, the court, among other things, said:

"The question is whether the House of Representatives have the power to expel a member."

After adverting to the fact that the constitution did not in terms authorize expulsion, he says:

"There is nothing to show that the framers of the constitution intended to withhold this power. It may have been given expressly in other States, either ex majori cautela, or for the purpose of limiting it, by requiring a vote of more than a majority."

In the Constitution of the United States it was given evidently "for the purpose of limiting it," as a two-thirds vote is required.

Again:

"The power of expulsion is a necessary and incidental power, to enable the House to perform its high functions, and is necessary to the safety of the State. It is a power of protection. A Member may be physically, mentally, or morally, wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent and disorderly, or in the habit of using profane, obscene, and abusive language. It is necessary to put extreme cases to test a principle.

"If the power exists, the House must necessarily be the sole judge of the exigency which may justify and require its exercise."

After having fully examined the law and practice of Parliament, he says:

"But there is another consideration, which seems to render it proper to look into the law and practice of Parliament to some extent. I am strongly inclined to believe, as above intimated, that the power to commit and to expel its Members was not given to the House and Senate, respectively, because it was regarded as inherent, incidental, and necessary, and must exist in every aggregate and deliberative body, in order to the exercise of its functions, and because without it such body would be powerless to accomplish the purposes of its constitution; and therefore any attempt to express or define it would impair rather than strengthen it. This being so, the practice and usage of other legislative bodies exercising the same functions under similar exigencies and the reason and grounds, existing in the nature of things, upon which the inrules and practice have been founded, may serve as an example and as some guide to the adoption of good rules, when the exigencies arise under our Constitution.

"But independently of parliamentary custom and usages, our legislative Houses have the power to protect themselves, by the punishment and expulsion of a Member.

'"It is urged that this court will inquire whether the petitioner has been tried. But if the House have jurisdiction for any cause to expel, and a court of justice finds that they have in fact expelled—'"

He then held that their action was conclusive, and dismissed the petition. (Hiss *v*. Bartlett, 3 Gray, 468.)

It is instructive on this point to note that this paragraph of the Constitution, as originally drawn, read:

"Each House may determine the rules of its proceedings; may punish its Members for disorderly behavior; and may expel a Member;" making three distinct clauses separated by semicolons.

This extract from the records of the debates in the Federal Convention shows clearly why the two-thirds provision was inserted in the expulsion clause:

"Mr. Madison observed that the right of expulsion (art. 6, sec. 6) was too important to be exercised by a bare majority of a quorum; and, in emergencies of faction, might be dangerously abused. He moved that" with the concurrence of two-thirds," might be inserted between "may" and "expel."

"Mr. Randolph and Mr. Mason approved the idea.

"Mr. Gouverneur Morris. This power may be safely trusted to a majority. A few men, from factious motives, may keep in a Member who ought to be expelled.

"Mr. Carroll thought that the concurrence of two-thirds, at least, ought to be required.

"On the question requiring two-thirds, in cases of expelling a Member, ten States were in the affirmative; Pennsylvania divided."

Article 6, sec. 6, as thus amended, was then agreed to, nem con. (Madison Papers, Vol. V, p. 406.)

While we think this Hiss case establishes beyond successful controversy the power of expulsion as discretionary and unlimited, it is proper to note that no decided case or elementary writer militates against it. We give all that we have found on the question.

In discussing this question the court, in State *v*. Jersey City (25 N. J. L., 539), said:

"The power vested in the two Houses of Congress by the Constitution, article 1, section 5, paragraph 2, is in different phraseology; it is, that "each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a, Member." Under this power, the Senate in 1797 expelled a Member of that body for an offense not committed in his official character as a Member, nor during a session of Congress, nor while the Member was at the seat of government. (Blount's case, Story's Commentaries on the Constitution, ch. 12, sec. 836.) But it is not clear that the power to expel is limited by the Constitution to the cause of disorderly behavior.

Evidently without having in mind the accurate use of the term "qualification" as used in the Constitution, the court, in State ex rel. *v*. Gilmore (20 Kansas, 554), said:

"The Constitution declares (art. 2, sec. 8) that 'Each House shall be judge of the elections, returns, and qualifications of its own Members.' This is a grant of power, and constitutes each House the ultimate tribunal as to the qualifications of its own Members. The two Houses acting conjointly do not decide. Each House acts for itself and by itself, and from its decision there is no appeal, not even to the two Houses. And this power is not exhausted when once it has been exercised and a Member admitted to his seat. It is a continuous power and runs through the entire term. At any time and at all times during the term of office each House is empowered to pass upon the present qualifications of its own Members."

Story says:

"And as a Member might be so lost to all sense of dignity and duty as to disgrace the House by the grossness of his conduct, or interrupt its deliberations by perpetual violence or clamor, the power to expel for very aggravated misconduct was also indispensable, not as a common, but as an ultimate redress for the grievance. But such a power, so summary and at the [same] time so subversive of the rights of the people, it was foreseen, might be exerted for mere purposes of faction or party, to remove a patriot or to aid a corrupt measure; and it has, therefore, been wisely guarded by the restriction that there shall be a concurrence of two-thirds of the Members to justify an expulsion. * * *

"In July, 1797, 'William Blount was expelled from the Senate for' a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator.' The offense charged against him was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British Government among the Indians. It was not a statutable offense, nor was it committed in his official character; nor was it committed during the session of Congress, nor at

the seat of government. Yet, by an almost unanimous vote he was expelled from that body; and he was afterwards impeached (as has been already stated) for this, among other charges. It seems, therefore, to be settled by the Senate, upon full deliberation, that expulsion may be for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Senator." (Story on the Constitution, vol. 1, p. 607.)

Paschal states:

"It seems to be settled that a Member may be expelled for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Member. (Blount's Case, 1 Story Const., sec. 838; Smith's Case, 1 Hall's L. J., 459; Brook's Case, for assaulting Senator Sumner in the Senate Chamber, for words spoken in debate.) It extends to all cases where the offense is such, as in the judgment of the House, unfits him for parliamentary duties. (Paschal's Annotated Constitution, p. 87, par. 49.)

"It has not yet been precisely settled what must be the disorderly behavior to incur punishment, nor what kind of punishment is to be inflicted; but it can not be doubted that misbehavior out of the walls of the House or within them, when it is not in session, would fall within the meaning of the Constitution. Expulsion may, however, be founded on criminal conduct committed in any place, and either before or after conviction in a court of law." (Rawle on the Constitution, 2d ed., 47.)

Cooley is specific:

"Each House has also power to punish Members for disorderly behavior, and other contempts of its authority, as well as to expel a Member for any cause which seems to the body to render it unfit that he continue to occupy one of its seats. This power is generally enumerated in the Constitution among those which the two Houses may exercise, but it need not be specified in that instrument, since it would exist whether expressly conferred or not. It is 'a necessary and incidental power to enable the House to perform its high functions, and it is necessary to the safety of the state. It is a power of protection. A Member may be physically, mentally, or morally wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent, and disorderly, or in the habit of using profane, obscene, and abusive language.' And, 'independently of parliamentary customs and usages, our legislative houses may have the power to protect themselves by the punishment and expulsion of a Member,' and the courts can not inquire into the justice of the decision, or even so much as examine the proceedings to see whether or not the proper opportunity for defense was furnished. (Cooley's Constitutional Limitations, pp. 159, 160.)

"Since there has been repeated occasion to take steps against Members of each House under each of these two clauses, and since the majority has never taken this standpoint, it may now be regarded as finally settled that that interpretation is correct which is the broader and at the same time according to ordinary speech, unquestionably the more natural one. Both Houses of Congress must have been granted every power needed to guard themselves and their Members against any impropriety on the part of a Member, and to preserve their dignity and reputation among the people. It is wholly for them to say what conduct they are to regard as dishonorable enough to require expulsion. An appeal from their decision lies only to the court of public opinion, a court which brings in its verdict at the elections. (Von Holst's Constitutional Law of the United States, 102.)

"The power of expulsion is unlimited, and the judgment of a two-thirds majority is final. (Pomeroy on Constitutional Law, p. 139, 1895.)

"It seems necessary also to remark that a Member may be expelled, or discharged from sitting, as such, which is the same thing in milder terms, for many causes, for which the election could not be declared void. (Cushing, Law and Practice Legislative Assemblies, p. 33, sec. 84.)

"The power to expel a Member is naturally and even necessarily incidental to all aggregate and especially all legislative bodies; which, without such power, could not exist honorably, and fulfill the object of their creation. In England this power is sanctioned by continued usage, which, in part, constitutes the law of Parliament. (Ibid., p. 251, sec. 625.)

"Blount was expelled from the Senate for an offense inconsistent with public duty, but it was not for a statutory offense, nor was it in his official character, nor during the session of Congress, nor at the seat of government; the vote of expulsion was 25 to 1.

"The motion to expel a Member may be for disorderly behavior, or disobedience to the rules of the House in such aggravated form as to show his unfitness longer to remain in the House, and the cases above cited, as well as the reason of the provision, would justify the expulsion of a Member from the House

where his treasonable and criminal misconduct would show his unfitness for the public trust and duty of a Member of either House. But expulsion, which is an extreme punishment, denying to his constituency the right to be represented by him, can only be inflicted by the concurrence of two-thirds of the House, and not by a bare majority only. (Citing Story on the Constitution, see. 837; Tucker on the Constitution, p. 429.)

"It has since been held by the House of Representatives that a Member duly elected could not be disqualified for a cause not named in the Constitution, such as immorality, and that the remedy in such a case, if any, was expulsion. The distinction between the right to refuse admission and the right of expulsion upon the same ground is important, since the former can be done by a majority of a quorum, whereas expulsion requires the vote of two-thirds. The question can not be said to have been authoritatively decided. (Foster on the Constitution, p. 367.)

Mr. Foster's attention does not appear to have been directed to the case of Hiss v. Bartlett, as it is in point on his doubt if the doubt relates to the power of expulsion; he does not refer to it.

It is proper to observe that the determinations of the court and the opinions of eminent legal authors, unexcelled in reputation and learning, are entitled upon these propositions to great weight, as they are in every instance the result of careful, dispassionate, and disinterested research and sound reasoning, unaffected by considerations that must necessarily have been involved in legislative precedents. The two-thirds limitation upon the right to expel not only demonstrates the wisdom of the fathers, but illustrates the broad distinction between exclusion and expulsion.

A small partisan majority might render the desire to arbitrarily exclude, by a majority vote, in order to more securely intrench itself in power, irresistible. Hence its exercise is controlled by legal rules. In case of expulsion, when the requisite two-thirds can be had, the motive for the exercise of arbitrary power no longer exists, as a two-thirds partisan majority is sufficient for every purpose. Hence expulsion has been wisely left in the discretion of the House, and the safety of the Members does not need the protection of legal rules.

It seems to us settled, upon reason and authority, that the power of the House to expel is unlimited, and that the legal propositions involved may be thus fairly summarized: The power of exclusion is a matter of law, to be exercised by a majority vote, in accordance with legal principles, and exists only where a Member-elect lacks some of the qualifications required by the Constitution. The power of expulsion is made by the Constitution purely a matter of discretion, to be exercised by a two-thirds vote, fairly, intelligently, conscientiously, with a due regard to propriety and the honor and integrity of the House, and the rights of the individual Member. For the abuse of this discretion we are responsible only to our constituents, our consciences, and our God.

We believe that Mr. Roberts has the legal, constitutional right to be sworn in as a Member, but the facts are such that we further believe the House, in the exercise of its discretion, is not only justified, but required by every proper consideration involved, to expel him promptly after he becomes a Member.

In the course of the debate, on January 24, 1900, Mr. John F. Lacey raised and discussed the proposition that the House might expel a Member before he was sworn in.[1]

477. The case of Brigham H. Roberts, continued.

In the case of Brigham H. Roberts, the House assumed its right to impose a qualification not specified by the Constitution; and excluded him.

2. As to the qualifications of a Member under the Constitution.

The majority of the committee held that the clause of the Constitution specifying the qualifications of a Member did not preclude the imposition of other disqualifications by the Congress or by either House, arguing thus:

This question meets us at the threshold: Does the constitutional provision, "No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen," preclude the imposition of any disqualification by Congress or by either House?

[1] Record, p. 1135.

Must it be said that the constitutional provision, phrased as it is, really means that every person who is twenty-five years of age, and who has been for seven years a citizen of the United States, and was, when elected, an inhabitant of that State in which he was chosen, is eligible to be a Member of the House of Representatives and must be admitted thereto, even though he be insane, or disloyal, or a leper, or a criminal?

Is it conceivable that the Constitution meant that crime could not disqualify? The whole spirit of government revolts against any such conception.

Not now discussing the question as to whether or not that constitutional provision is exclusive, so far as ordinary qualifications are concerned, is it to be said that there is in it no implied power of disqualification for reasons which appeal to the common judgment of mankind, and which are vital and essential to the very constitution and integrity of the legislative body as such?

We are compelled to answer that that provision, in the sense to which we have just adverted, is not exclusive, and that reasonable disqualifications may attach to certain individuals, which may, for the sake of argument, be assumed to amount in practice to added qualifications.

A marked distinction is to be made between arbitrary disqualifications and those which arise out of the voluntary act of the individual who places himself, by the commission of an offense against the law or civilization, within the prohibited class. We believe, whatever general statements may have been made by public men, that no commentator on the Constitution, no court, or either House of Congress has ever questioned the propriety of that distinction, but that the contrary doctrine has been universally held wherever the question was clearly raised.

In our opinion it is demonstrable that no such exclusive meaning can be given to the provision above quoted as is contended for on the other side of this proposition, and that the sound rule is declared by Burgess in his work on Political Science and Constitutional Law, when on page 52, he says:

"I think it certain that either House [of Congress] might reject an insane person * * * or might exclude a grossly immoral person."

We desire at the very threshold of this discussion to lay down these general propositions, never to be forgotten and always to be kept clearly in mind:

First. That the House has never denied that it had the right to refuse to permit a Member-elect to be sworn in, although he had all of the three constitutional qualifications.

Second. That it has in many instances affirmatively declared that it had the right to thus refuse.

Third. That the right to so refuse is supported on principle and by the overwhelming weight of authority of constitutional writers and judicial opinions on analogous constitutional questions; and

After reviewing the status of Roberts the majority continue:

We assert that it is our duty, as it is our right, to exclude him; to prevent his taking the oath and participating in the councils of the nation.

Three methods present themselves by which to test the soundness of this view:

First. On principle, and this involves—

(1) The nature of the legislative assembly and the power necessarily arising therefrom;

(2) The express language of the constitutional provision;

(3) The reasons for that language;

(4) Its context and its relation to other parts of the instrument;

(5) The obvious construction of other portions of the same instrument necessarily subject to the same rule of construction.

Second. The text-books and the judicial authorities.

Third. Congressional precedents. These are of two classes—

(1) Action respecting the rights of individual Members;

(2) Acts of Congress and general resolutions of either House.

FIRST.—*On principle.*

As to the first proposition, what is the argument on principle? We think it will be undoubted that every legislative body has unlimited control over its own methods of organization and the qualifications or disqualifications of its members, except as specifically limited by the organic law. We do not think that this proposition needs amplifying; it is axiomatic. It is apparent that every deliberative and legislative body must have supreme control over its own membership, except in so far as it may be

specifically limited by a higher law; there is a distinction to be drawn between the legislative power of a legislative body and its organizing power, or those things which relate to its membership and its control over the methods of performing its allotted work. That is to be distinguished from the legislative power to be expressed in its final results.

When our Constitution was framed there was practically no limit to the right and power, in these respects, of the English Parliament. Such power is necessary to the preservation of the body itself and to the dignity of its character. In England it was at one time admissible to permit the admission into the House of Commons of minors, of aliens, and of persons not inhabitants of the political subdivision in which they were elected. To this day it is well known that an inhabitant of London may be elected by a Scotch constituency, and a member has been elected by more than one constituency to the same Parliament.

The framers of the Constitution, familiar with these facts, proposed to prevent their happening in this country. They knew also that a similar latitude of choice had been exercised in the original colonies and in the States of the Federation, and it was proposed to put a stop to it so far as Congress was concerned. A very luminous argument was made on this subject by John Randolph in the House of Representatives in 1807.

We quote as follows from his remarks:

"If the Constitution had meant (as was contended) to have settled the qualifications of Members, its words would have naturally run thus: 'Every person who has attained the age of twenty-five years and been seven years a citizen of the United States, and who shall, when elected, be an inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives.' But so far from fixing the qualifications of Members of that House, the Constitution merely enumerated a few disqualifications within which the States were left to act."

"It is said to the States, 'You have been in the habit of electing young men barely of age. You shall send us none but such as are five and twenty. Some of you have elected persons just naturalized. You shall not elect any to this House who have not been some seven years citizens of the United States. Sometimes mere sojourners and transient persons have been clothed with legislative authority. You shall elect none whom your laws do not consider as inhabitants.'"

In pursuance of the idea in the mind of the framers of the Constitution, we have the peculiar words "no person shall be a Representative who shall not have attained, etc." How happy indeed are these words if we give them precisely the force and meaning for which we contend. How unhappy and how misleading, how impossible, in fact, to the masters of the English language who wrote them, if they were intended to exclude all other possible requirements or disqualifications. We might admit such construction if suitable language was difficult to find or frame; but note how easily such a purpose could have been served in fewer words and with unmistakable meaning. Thus: "Any person," or "a person," or "every person, may be a Representative who shall have attained the age of twenty-five years," etc.

The provision seems to be worded designedly in the negative so as to prevent the suspicion that it was intended to be exclusive, and so as to prevent the application of the rule, "the expression of one thing is the exclusion of another." The immediately preceding clause is affirmative, and says: "The electors in each State shall have the qualifications," etc. With some show of propriety it can be claimed that this provision is exclusive. It at least does not have the negative form to condemn such construction

Story says (Constitution, sec. 448):

"The truth is, that in order to ascertain how far an affirmative or negative proposition excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects, and the scope of the instrument. These, and these only, can properly determine the rule of construction. There can be no doubt that an affirmative grant of powers in many cases will imply an exclusion of all others."

It is a notable fact that in the first draft of this constitutional provision which provides for qualifications of Representatives in Congress the language was affirmative and positive and that when it was finally presented for adoption it appeared in the form in which we now find it.

The slight contemporaneous discussion in the constitutional convention was upon the provision in the affirmative form. Why was it changed in the negative? Surely not for the sake of euphony, and certainly not to make it more explicitly exclusive.

In the report of the committee of detail, submitting the first draft of the Constitution, this section read in the affirmative and as follows:

"Every Member of the House of Representatives shall be of the age of 25 years at least; shall have been a citizen of the United States for at least three years before his election, and shall be at the time of his election a resident of the State in which he shall be chosen."

In the discussion Mr. Dickinson opposed the section altogether, expressly because it would be held exclusive, saying he "was against any recitals of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would, by implication, tie up the hands of the legislature from supplying omissions."

Mr. Wilson took the same view, saying:

"Besides, a partial enumeration of cases will disable the legislature from disqualifying odious and dangerous characters."

The next day after this discussion, and when the clause respecting age, etc., had, in its general sense, been informally approved, a proposed section respecting a property qualification was discussed. Mr. Wilson said (Madison Papers, vol. 5, p. 404) that he thought "it would be best, on the whole, to let the section go out; this particular power would constructively exclude every other power of regulating qualifications." What did Mr. Wilson mean if the result of the discussion in which he participated on the preceding day was to "constructively exclude every other power of regulating qualifications?"

In view of the objections urged by Dickinson and Wilson and their opinions as to the construction that would result and the consequences thereof, the conclusion seems reasonable, if not absolutely irresistible, that the change from the affirmative to the negative form was intentionally made and with the very purpose of obviating such objections, and hence that in being negatively stated it was considered by the convention that the particular qualifications mentioned would not be exclusive and would not render impossible the "disqualifying odious and dangerous characters" and would not prevent "supplying omissions."

This section was finally reported and adopted in the negative form in which it now appears. The report of the committee seems to have been elaborately discussed.

Where do we find ourselves in such a case as this? Suppose that Brigham H. Roberts, instead of being charged with polygamy, was charged with treason, not constructive treason, but actual treason, and suppose that a witness appeared before the committee—a credible witness, whose testimony was undisputed—who testified that he had seen Brigham H. Roberts wage war against the United States in the Spanish war, giving aid and comfort to Spain, not constructively, but actively; and suppose that Roberts appeared himself before the committee and said, "All that this man says is true; I did wage war against the United States; I did give aid and comfort to its enemies in time of war against a foreign foe, and I glory in it." Now, in that state of facts the law could not lay its hand upon him for the crime treason, for the Constitution provides that no person shall be convicted of treason except upon the testimony of two witnesses to the same over fact or by confession in open court. So that under the state of facts thus presented he could not be convicted of treason.

Suppose he was here with a certificate of election from a great State and demanded admission. Upon the theory of the other side we must admit him. The minority insist that in such a case he must be sworn in. It will not do to say that practically no wrong would be done on the ground or on the theory that he might be immediately thereafter expelled, for he would have a right to be heard in his own defense, he would have a right to be heard as to whether the House had a right upon those facts to expel, and it might take much time. In any event he would be there fully armed with all of the powers and privileges of a Member of the American House of Representatives. We think that the civilized world would declare that it made itself ridiculous if it confessed its want of power to keep out from the councils of the nation a man who was a confessed traitor.

Another illustration. Suppose that on the 1st day of January, 1899, two months after his election and two months before his term as a Representative should commence, he had been convicted of the crime of bigamy or of adultery, either one of which is a felony under the statutes of Utah, for an offense, we will presume, committed prior to his election, so that it can not be charged that after his election he voluntarily put himself in that position, and he was tried, convicted, and sentenced to the penitentiary for a term of two years; and it so occurs that his term of imprisonment should expire on the 3d day of March, 1901, the day before his term as Representative in Congress expires. Suppose he presented himself on the 3d day of March, 1901, no action having been previously taken in his case, would the House have to admit him, or would not the proper proceeding be, while he was still in the penitentiary, for such

an offense, for the House to declare his seat vacant; that he ought not to have or retain a seat in the American House of Representatives?

It may be said that that imprisonment would amount to a constructive resignation. There is no precedent for that. The Yell case is entirely different. An election was held for a successor to Yell, and the seat was recognized to be vacant upon the express ground that he had taken another office incompatible with his position as a member of Congress, and that since he was occupying and exercising the functions of that office, of course that vacated ipso facto his position as Representative in Congress.

It is well settled that while the mere appointment or election to an office the duties of which are incompatible with those of one already held will not vacate such an office, the acceptance of the incompatible office ipso facto vacates the first office held. This doctrine is laid down in Willcox, in Angel and Ames on Corporation, section 434; in Whitney against Canique, 2 Hill, 93; Cushing's Law on Practice of Legislative Assemblies, section 479, and many other authorities.

Let us assume, further, that that sentence of imprisonment would not expire until after the 4th of March, 1901, so that during all of that period Roberts would be incapacitated from being present to demand the right to be sworn in; what is the remedy? We think it clear that the seat is not vacated by the mere fact that he does not present himself; by the mere fact that he remains absent. A man might be sick, and he might remain away the entire session, hoping that he might become well enough to attend, and Roberts might indulge the hope that he would be pardoned, and thus get in. Is it to be said that the House on that state of facts can not declare the seat vacant and permit the governor to issue a new writ and call another election? If it can not, then we are face to face with the proposition that the people of the State must remain unrepresented during the entire term of Congress.

Suppose another case. That in the midst of the organization, and before being sworn in, a Member-elect should so indecently and outrageously conduct himself before the eyes of the House and the assembled multitude as to demand and justify expulsion if he had so conducted himself after he had been sworn in. What would the House do? In the midst of his outrageous misconduct must the House, with tender persuasiveness, beg him to honor it by being sworn in so that he may be turned out, or would it refuse to swear him in and proceed to declare his seat vacant? Could the strictest constructionist of the Constitution deny that the Constitution was substantially complied with if he was excluded by a two-thirds vote, even if he did not assent to our view in all respects.

Suppose that the claimant to this seat, while enjoying through the courtesy of the House the privilege of the floor, should declare his contempt for this body and for the Government; that he respected none of its decrees or the laws of the land as having any binding force upon him; that if he became a Member of the House he should become so merely for the purpose of obstructing its business and to tear down the Government. What would the House do? Swear him in that it might have the ineffable privilege of turning him out? Or would it declare him unfit to have a seat in that body and declare his seat vacant?

As Judge Shaw says in Hiss *v.* Bartlett (3 Gray, 473), "it is necessary to put extreme cases to test a principle."

So much for illustrations upon that question. Look, now, at the last paragraph of Article VI of the Constitution:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution."

Here is an affirmative declaration that a certain oath shall be administered to certain officials. If the theory of exclusion is applied to the qualification clause as to Representatives, it must be applied to this clause, and therefore Congress has no power to demand any other oath, or superadd to this oath any other provisions.

And yet the very oath we took as Members of this House has additional provisions. Congress passed also the test oath act in 1862, making vital additions to the constitutional oath, and, indeed, adding a new ground of disqualification for Members of Congress. This act was passed by a large majority and compelled Members of Congress to submit to that oath for many years. Chief Justice Marshall, the great expounder of the Constitution, in the case of McCulloch *v.* Maryland, declared that "He would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution such other oath or oaths as its wisdom might suggest," and the whole opinion in that case is addressed in principle to the very doctrine that is here advocated.

If Congress could add to the constitutional oath, the same theory of construction must permit it to at least add reasonable qualifications to the requirements for members of the legislative body, at least to the extent of declaring disqualifications which in their nature ought to bar a man from entrance into a great legislative body,

The same clause to which we have just referred has this provision:

"But no religious test shall ever be required as a qualification to any office or public trust under the United States."

If the Constitution had laid down all the qualifications which Congress or any other power had the right to impose it was unnecessary to go on and declare that no religious test should be required. That great instrument is inconsistent in its parts and contradictory of itself if it be true that it meant that no disqualifications should be provided except those named. Nor was it necessary, if the proviso means an oath merely, that such exception should be made, for the preceding words of the paragraph set out the required oath.

The effort to make the negative declaration of minimum qualifications exclusive of all others, whatever the necessities of the House may be, falls to the ground if we admit that the paragraph respecting oaths is in the same instrument as that which defines the qualifications of Members of Congress.

SECOND.—*The text-books.*

Let us now proceed with what we have called the text-book and judicial authority.

There is a statement in Story's work on the Constitution to the effect that the clause in the Constitution describing the qualifications for Representatives in Congress would seem to imply that other qualifications could not be added.

Now, whether or not that be sound, these two observations are to be made upon it:

First. That it is dismissed in a very few words. Justice Story himself disclaims explicitly in his work that he gives his own opinion as to what the Constitution means, but asserts that he undertakes merely to give the statements of others.

Second. This statement of Judge Story does not at all interfere with the proposition we have laid down: That the power of the House to exclude from its membership a person who is, for instance, disloyal, a criminal, insane, or infected with a contagious disease is not superadding any qualification, within the meaning of Story, such as a property qualification or an educational qualification.

We find, however, that Story's expression, if it means all that is claimed for it by the minority, does not accord with the opinion of other commentators, with the courts, or with the Congressional precedents. We have already quoted and will not now repeat what is said by Prof. John W. Burgess, professor of history, political science, and international law, and dean of the university of political science in Columbia College, New York. This ambitious work, published in 1896, must be considered an authority on the subject of constitutional law.

In Pomeroy's Constitutional Law, 3d edition, page 138, is the following:

"The power given to the Senate and to the House of Representatives, each to pass upon the validity of the elections of its own Members, and upon their personal qualifications, seems to be unbounded. But I am very strongly of the opinion that the two Houses together, as one House, can not pass any statute containing a general rule by which the qualifications of Members as described in the Constitution are either added to or lessened. Such a statute would not seem to be a judgment of each House upon the qualifications of its own Members, but a judgment upon the qualifications of the Members of the other branch. The power is sufficiently broad as it stands. Indeed, there is absolutely no restraint upon its exercise except the responsibility of the Representatives to their constituents. Under it the House inquires into the validity of the elections, going behind the certificates of the election officers, examining the witnesses, and deciding whether the sitting Member or the contestant received a majority of legal votes. The House has also applied the test of personal loyalty to those claiming to be duly elected Representatives, deeming this one of the qualifications of which it might judge."

Pomeroy is discussing the power of the House, not stating what somebody may have said.

So, also, in the lectures of Justice Miller on the Constitution of the United States, page 194, is the following:

"Very few controversies, if any, have ever arisen in either body (that is, of Congress) concerning the qualifications of its Members. It was at one time a question somewhat mooted whether the States

could add to the qualifications which the Constitution has prescribed for the Members of the Senate or the House of Representatives, but it is now conceded that this must be decided by the Constitution alone, because, though it might be conceivable that Congress might make some conditions or limitations concerning the eligibility of its Members, it has not been done, and the constitutional qualifications alone regulate that subject."

If a profound constitutional authority like Justice Miller had believed that the provision we are considering was absolutely exclusive and prevented the House or the Senate from exerting any such power it seems to us that he would have so declared.

Throop on Public Offices, section 73, says:

"The general rule is that the legislature has full power to prescribe qualifications for holding office in addition to those prescribed by the Constitution, if any, provided that they are reasonable and not opposed to the constitutional provisions or to the spirit of the Constitution."

Who shall say that the exclusion of Roberts on the ground of polygamy is "opposed to the spirit of the Constitution?"

Cushing (Law and Practice of Legislative Assemblies, p. 195, sec. 477) says:

"To the disqualifications of this kind may be added those which may result from the commission of some crime which would render the Member ineligible."

The courts.

What have the courts said on similar propositions? We first have the case of Barker *v.* The People (3d Cowen) [New York]. In that case it was held that every person not specifically disqualified by the Constitution was eligible to election or appointment to office. In so far as that particular statement goes, it is a denial of the broad right to superadd to the constitutional provision as to qualifications. But that statement, as applied to this case, loses all of its applicability, for two reasons:

(1) Because it was not the question that it had to decide.

(2) Because the judge distinctly and positively dedares—and that was the point involved in the case—that notwithstanding that want of power in the legislature to add to the Constitution qualifications it did have the right to disqualify for crime. He proceeds to say that it might disqualify for crime upon conviction thereof. We apprehend that that is unimportant here, for if the House of Representatives has a right to disqualify for crime it has the power and the right to determine for itself whether the crime was committed, and not to depend upon a judicial conviction. The necessity for a judicial conviction is the more apparent where the person who seeks to take office undertakes to assume an executive office to which he has been elected or appointed, for there may not be any other than the ordinarily constituted court in which to try the question of his guilt of the offense that created his ineligibility.

But it is not the settled doctrine of the law that disqualification for crime must be first adjudicated in the courts. The authorities are, the most of them, against that proposition, and for the sake of convenience we shall refer to them here.

We quote from Royall *v.* Thomas (28 Gratton (Va.), 130). The syllabus is as follows:

"Under the constitution and statute of Virginia, a party who has aided and assisted in a duel fought with deadly weapons may be removed from office by proceeding of quo warranto, or if that writ be not in use, by information in the nature of a quo warranto, though he has not been convicted of the offense in any criminal prosecution against him."

The court in this case say that the principal authority relied on in support of the contrary position to that stated in the syllabus is the Kentucky case of Commonwealth *v.* Jones.

"It was held in that case that the clause of the Kentucky constitution imposing the disqualification for office of the offense of dueling is not self-executing, except so far as it prevents those who can not or will not take the requisite oath from entering upon office. It was there held that a citizen willing to take such oath could not be proceeded against for usurpation of such office until he had been first indicted, tried, and convicted of the disqualifying offense.

"It was found, however [said the Virginia court in the Gratton case], on examination, that much of the reasoning of the court in the Jones case turns upon the peculiar phraseology of the Kentucky constitution, in which it is declared that the offender shall be deprived of the right to hold any office, post, or trust under the authority of the State.

"The court agreed that if, instead of the words shall be deprived' the phrase 'shall not be eligible' had been used, some of the difficulties attending the argument to show that the provision is self-executing would have been obviated.

"In the case of Cochran *v.* Jones, involving the same question, the board for the determination of contested elections arrived at a very different conclusion upon the same clause of the Kentucky constitution. It will thus be seen that even in Kentucky there is such conflict of opinion in respect to the true interpretation of the constitutional provisions in question as deprives the decision relied on by the defendants of the weight of being considered even persuasive authority.

"The provision in the Virginia constitution is as follows: 'No person who, while a citizen of this State, has, since the adoption of this constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, shall be allowed to vote or hold any office of honor, profit, or trust under this constitution.'"

The court goes on to explicitly hold that previous conviction was unnecessary, arguing it with great force.

The same doctrine is held in Mason *v.* The State (58 Ohio State), where Mason, who had been elected probate judge of a county in Ohio, had expended more money to bring about his election than the corrupt practices act allowed, and as this act disqualified such person from holding the position to which he was elected, the supreme court held that he could be thus disqualified and kept out of office without conviction.

To the same effect is the case of Commonwealth *v.* Walter (83 Pennylvania State, 105).

Proceeding with the enumeration of authorities as to the exclusive effect of the constitutional provision defining or declaring qualifications for office, the next case to which we call attention is Rogers *v.* Buffalo (123 New York). We quote from page 184:

"The case of Barker *v.* The People (3 Cowan, 686) has been cited by counsel. That case holds the act to suppress dueling, which provided as a, punishment for sending a challenge that the person so sending should, on conviction, be disqualified from holding any public office, was constitutional. The chancellor, in the course of his opinion, said he thought it entirely clear that the legislature could not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the constitution had not required. What he meant by such expression is rendered clear by the example he gives. Legislation would be an infringment upon the constitution, he thought, which should enact that all physicians, or all persons of a particular religious sect, should be ineligible to hold office, or that all persons not possessing a certain amount of property should be excluded, or that a member of assembly must be a, freeholder, or any such regulation.

"But, in our judgment, legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not amount to an arbitrary exclusion from office, nor to a general regulation requiring qualifications not mentioned in the constitution. The 'qualifications' which were in the mind of the learned chancellor were obviously those which were, as he said, arbitrary, such as to exclude certain persons from eligibility under any circumstances. Thus, a regulation excluding all physicians would be arbitrary. But would a regulation which created a board of health and provided that not more than one physician from any particular school, or none but a physician, should be appointed thereon be arbitrary or unconstitutional as an illegal exclusion from office? I think not.

"The purpose of the statute must be looked at and the practical results flowing from its enforcement. If it be obvious that its purpose is not to arbitrarily exclude any citizen of the State, but to provide that there shall be more than one party or interest represented, and if its provisions are apt for such purposes, it would be difficult to say what constitutional provision is violated or wherein its spirit is set at naught."

And, again, on page 188—

"It is said that the legislature had no right to enact that a person who shall be appointed to a public office shall have the qualifications necessary to enable him to discharge the duties of such office, nor to provide that the fact that he does possess such qualifications shall be ascertained by a fair, open, and proper examination. Nothing but the bare oath mentioned in the constitution can be asked of any applicant for an appointive office is the claim of the appellant. We do not think that the provision above cited was ever intended to have any such broad construction. Looking at it as a matter of common sense we are quite sure that the framers of our organic law never intended to impose a constitutional

barrier to the right of the peopie through their legislature to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office. So long as the means to accomplish such end are appropriate therefor they must be within the legislative power.

"The idea can not be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own representatives as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in office. No law involving any test other than fitness and ability to discharge the duties of the office could be legally enacted under cover of a purpose to ascertain or prescribe such fitness. Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of those qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office are not dangerous in their nature, and in their execution they are not liable to abuse in any manner involving the liberties of the people."

And, again, on page 190—

"In this case we simply hold that the imposing of a test by means of which to secure the qualifications of a candidate for an appointive office, of a nature to enable him to properly and intelligently perform the duties of such office, violates no provision of our constitution."

This opinion was delivered by Justice Perkham, now a member of the Supreme Court of the United States.

Another instructive case is that of Ohio ex rel. Attorney-General *v*. Covington, 29 Ohio State, page 102. The opinion is by Judge McIlvaine, one of the ablest and most careful judges that ever sat in the supreme court of Ohio. He says:

"The last objection made to the validity of this act is based on section 4 of article 15 of the constitution, which declares: 'No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector.'

The question arises under the fourth section of the act (which the court is construing), which provides: 'Each member and officer of the police force shall be a citizen of the United States, and a resident citizen for three years of the city in which he shall be appointed, and able to read and write the English language.'

There is no claim made that the qualifications prescribed in the act, in view of the nature of the duties to be performed, are unreasonable, or even unnecessary, to the discharge of the duties. The point made is that disqualifications are imposed by the statute which are not imposed by the constitution.

"It is apparent that this statute is not in conflict with the terms of this constitutional provision. It does not authorize the appointment of a person who is not an elector. The express provision of the constitution is that a person not an elector shall not be elected or appointed to any office in this State. Now, unless the clear implication is that every person who has the qualifications of an elector shall be eligible to any office in this State, there is no conflict between the statute and the constitution. I do not believe that such implication arises. There are many offices the duties of which absolutely require the ability of reading and writing the English language. There are many electors who, from habit of life or otherwise, are wholly unfit to discharge the duties of many offices within this State. If the framers of the constitution had intended to take away from the legislature the power to name disqualifications for office other than the one named in the constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration. The power under the general grant being ample and certain, a statute should not be declared void because in conflict with an alleged implication, unless such implication be clear and indubitable."

We find the same doctrine in the case of Darrow *v*. The People, 8 Colorado, page 417. The syllabus relating to this question is as follows:

"The statute designating the payment of taxes as a necessary qualification of membership in the board of aldermen is not in conflict with section 6, article 7, of the constitution."

The provision of that section is as follows:

"No person except a qualified elector shall be elected or appointed to any civil or military office in the State."

The court says, on page 420, that it is argued that this provision "by implication inhibits the legislature from adding the property qualification under consideration. There is nothing in the constitution which expressly designates the qualifications of councilmen in a city or town, and this section contains

the only language that can possibly be construed as applicable thereto. But it will be observed that the language used is negative in form—that it simply prohibits the election or appointment to office of one not a qualified elector. There is no conflict between it and the statute. By providing that a supervisor or an alderman shall be a taxpayer the legislature does not declare that he need not be an elector. Nor is the provision at all unreasonable. On the contrary, it is a safeguard of the highest importance to property owners within the corporation.

"The right to vote and the right to hold office must not be confused. Citizenship, and the requisite sex, age, and residence constitute the individual a legal voter; but other qualifications are absolutely essential to the efficient performance of the duties connected with almost every office. And certainly no doubtful implication should be favored for the purpose of denying the right to demand such additional qualifications as the nature of the particular office may reasonably require. We do not believe that the framers of the constitution by this provision intended to say that the right to vote should be the sole and exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualifications should ever be demanded, and no other qualifications should be imposed."

THIRD.—*Legislative precedents.*

We proceed now to the legislative precedents upon this matter of exclusion, without admitting the person objected to to be sworn in.

JEREMIAH LARNED.

One Jeremiah Larned, as long ago as 1785, was elected to the legislature of Massachusetts, but it turned out that he had violated a law that that legislature had passed. And what was it? On election day he headed a riot for the purpose of preventing the collection of taxes. What did the fathers of that day do? They were not men who were regardless of human rights; they held that inasmuch as Larned had violated the law he was unworthy to take a seat upon that floor, and they kept him out.

The majority further cite and discuss the cases of John M. Niles, Philip F. Thomas, and Benjamin Stark in the Senate, and, the Kentucky cases and those of Whittemore and George Q. Cannon in the House. The majority then say:

Thus we see that the Senate and the House have taken the ground that they had the right to exclude for insanity, for disloyalty, and for crime, including polygamy, and, as we believe, there is no case in either the House or the Senate, where the facts were not disputed, in which either the Senate or House has denied that it had the right to exclude a man, even though he had the three constitutional qualifications. There is a large amount of debate, where opinions are given on both sides of the proposition, but as against that is the never-varying action of the two bodies themselves.

* * * * * * *

Some importance is given by the minority to the final action of the House of Commons in the Wilkes case. We are asked to infer from some remark attributed to Edmund Burke that he had written "finis" to the chapter on exclusions from parliamentary bodies.

As to that, we have to say that after diligent search we find no cases where the House of Commons ever held or decided that it had not the right to exclude at the very threshold a member whose certificate or credentials were perfect and uncontested, although the ground of exclusion was not a want of legal qualifications, and there are scores of cases since 1780 where it has claimed and exercised that right. We have found several cases where the House of Commons has declared that it possessed (and exercised) the right not only to exclude and suspend, but in a few instances to expel, a member for an offense unrelated to the functions of a member of Parliament, which offense was in a few instances committed before his election to Parliament, but was held to be of a continuing character.

The Houses of the American Congress have not accepted or followed these last-named precedents, due undoubtedly to the radical differences between organization, jurisdiction, and powers of the English Parliament and the American Congress. The most striking of these differences, as stated by Mr. Cushing, are that in this country Members of both branches of Congress are elected for specified terms and that the Members of the House of Representatives are apportioned among and elected by their several constituencies—so far as possible—upon the principle of equality; whereas in England the House of Lords is composed of members who are not elected at all, but who sit as members during their lives by virtue of hereditary or conferred right, as the nobility, or temporal lords, or of their appointment to places of

high dignity in the church, as the archbishops and bishops, or lords spiritual; and the members of the House of Commons, though elected, are not apportioned among the several constituencies and elected upon the principle of equality or representation, but chiefly upon the principle of corporate or municipal right, and for no fixed period of time.

Another important difference is that the existence and powers of the House of Commons rest largely on custom and tradition, aided, of late years, by statute provisions, whereas in the House of Representatives (as well as the Senate) these powers are founded in and for a great part regulated, limited, and controlled by a written Constitution and laws.

It may be said that the House of Commons has uniformly taken the view that under the right to judge of the "qualifications" of its members—their legal election and return being conceded—it rests wholly within the discretion of that body to establish a new test or requirement of qualification for membership, and that it may be either mental, such as for imbecility or insanity; physical, as for paralysis; or for grave offenses against criminal laws.

The minority of the committee, arguing that the three qualifications specified in the Constitution are the only ones which may be imposed, say:

The Constitution, article 1, section 5, provides that "each House shall be the judge of the elections returns, and qualifications of its own Members."

As to qualifications of Representatives, it provides:

"No person shall be a Representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen. (Constitution, article 1, section 2.)"

Is it seriously contended that this House can of its own motion, by its own independent action, create for the purposes of this case a legal qualification or disqualification? This House alone cannot make or unmake the law of the land. Before any one of its acts can become law it must be concurred in by the Senate and approved by the President, or passed by two-thirds of each House over his veto. It is quite clear that the House, by its independent action, can not, if it would, make for this case any disqualifying regulation that would have the force of law.

The qualifications being negatively stated in the Constitution, it is said that Mr. Roberts is ineligible under the provisions of the act of March 22, 1882, section 8, known as the Edmunds law, viz:

"SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States."

The existence of the disqualification in this act is predicated not upon a conviction of or as a punishment for the offenses of polygamy or unlawful cohabitation, but simply as incident to the existence of those conditions.

It is a very grave question as to whether Congress can, by a law duly enacted, add to the qualifications negatively stated in the Constitution. There is no decision of the United States Supreme Court directly or indirectly construing this provision. There is no decision of any State court directly in point. In Ohio *v.* Covington (29 Ohio Stat., 102), relied upon, the court was passing upon the right of the defendants to hold the offices of police commissioner and member of the board of health for the city of Cincinnati. The constitution provided that—

"No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector."

The court distinctly held that "the defendants, as members of the board of police commissioners * * * are officers for whose election and appointment no provision is made in the Constitution of the State or of the United States," and were therefore such as the legislature had, by the express provisions of the Constitution, authority to create. When the legislature created the offices in question, it attached to them the condition that each officer should be "a resident citizen for three years of the city in which he shall be appointed, and able to read and write the English language."

The offices in question were creatures of the statute, and not of the constitution. It is familiar law that whatever office the legislature creates it can create with such conditions, limitations, qualifications,

and restrictions as it sees fit to impose; and this was all that it was necessary for the court to say in that case in upholding the validity of the statute. It is true that it did go further than that, further than the case required, and held that no implication arose, from the negative language of the constitution, that other qualifications could not be added by the legislature. In so far, however, as the opinion goes beyond the requirements of the case, it certainly is doubtful authority. It should be stated that this case has been fully approved in the recent case of Mason *v.* State (58 Ohio St., 54).

The case of Darrow *v.* People (8 Colo., 420), relied on, is also subject to the same criticism as State *v.* Covington, as the office there considered was that of alderman, the creature of the statute.

The case of People *v.* May (3 Mich., 598) is relied upon to support the proposition that statutory additions may be made to the constitutional qualifications. We submit that so far as that case is an authority it is directly in point against the contention. In that case a layman had been elected to an office designated in the constitution as "a prosecuting attorney." The question was whether any person not a lawyer was eligible to the office. It was objected that to hold that eligibility was confined to the legal profession would be adding a qualification in violation of the constitution.

The court held that they must give to the words "a prosecuting attorney" such a construction as would be consistent with the sense in which they were used, and that the obvious intention of the constitution was that the office should be held by an attorney at law. Certainly not a very violent inference. This did not add a qualification; merely held that one already existed. But the court did not stop there, or leave their position as to the right to add qualifications open to doubt, as they emphatically said:

"We concede to the fullest extent that it is not in the power of the judiciary or even the legislature, to establish arbitrary exclusions from office, or annex qualifications thereto, when the Constitution has not established such exclusions, nor annexed such qualifications. But it is begging the question to assume that the act of construing the Constitution has that effect." (610.)

It is not perceived how this case gives any aid or comfort to those who promote the contention adverted to.

The remark of the court in McCulloch *v.* Maryland (4 Wheaton, 416), purely a dictum made by way of illustration, when discussing the powers reasonably to be implied from the concise and general provisions of the Constitution, necessary, appropriate, and plainly adapted to effectuate its purposes, that—"he would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution, such other oath of office as its wisdom might suggest does not impress us as entitled to much weight in construing a provision of the Constitution which the court was not considering and to which the doctrine "that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution," can have little, if any, application. This seems to us more obvious when it is noted that the oath prescribed by the Constitution is simply to support the Constitution. In the line of the doctrine stated it might be said that an oath to faithfully discharge the duties of the office was a proper "means for their execution," and one reasonably involved in the implied powers.

It is suggested that the existence of the clause "but no religious test shall ever be required as a qualification to any office or public trust under the United States," which is found in Article VI of the Constitution, in a paragraph relating wholly to oaths, has a direct tendency to show that the previous paragraph in Article I, section 2, prescribing qualifications, was not intended to be exclusive, inasmuch as this paragraph in Article VI is said to add a qualification which is entirely inconsistent with the idea that the prior paragraph was exclusive. Reflection, however, leads us to the conclusion that this paragraph in Article VI has no proper connection with or relation to the paragraph in Article I, section 2. We think the word "qualification" in connection with "religious test" is used in an entirely different sense from that in which the word "qualification" is used in Article I, section 5. It is clearly applied to and is a description of the "religious test," and must be construed in connection with that phrase, no "religious test * * * as a qualification." The clause is found in a paragraph which relates solely to the oath to be administered.

Qualification, when used in discussing the elements which a member-elect must possess in order to be entitled to enter upon the office, is synonymous with eligibility. This is substantially the definition of legal lexicographers—Bouvier, Rapalje, and Anderson. "The recognized legal meaning in our constitutions" of the word "test" "is derived from the English test acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding

of framers of constitutions." (Attorney-General *v.* Detroit Common Council (58 Mich., 217); Anderson's Dictionary of Law, "Test;" "Test act;" "Test oath.")

The English test acts (25 Geo. II, c. 2) required persons holding office within six months after appointment to take the oath of allegiance and supremacy, and subscribe a declaration against transubstantiation, and receive the sacrament according to the usage of the Church of England. The qualification of a "religious test" thus prohibited relates clearly to something "required" to be done by an officer when entering upon or after having entered upon the office, and not to qualifications or elements of eligibility which he must possess or disqualifications or elements of ineligibility which he must not possess before he can enter upon the office. Qualification or disqualification, eligibility or ineligibility is a status that either does or does not exist at the time of entering upon the office. The qualification of a religious test has no existence as a status; it is not a status, it is simply a condition to be performed. No member can change his status as to the elements of eligibility or qualification as defined in Article I, section 2, at the time of entering upon the office; but if the qualification of a religious test existed every member could, if his conscience were sufficiently elastic, comply with the test. One is predicated upon the past and the other upon the future. One relates to things done or not done; the other to things to be done.

An examination of the constitutional history of this clause fully corroborates this view. The last paragraph of Article VI, with the exception of the clause as to the test oath and the word "affirmation" (which was added by amendment), is substantially Article XX of the first draft of the Constitution, as reported by the committee of detail August 6, 1787. (The Madison papers, containing debates on the Confederation and Constitution, vol. 5, p. 381; Elliott's Debates.)

The clause in question first appears in the proceedings August 20, 1787, and was introduced by Mr. Pinckney, as an independent proposition to be referred to the committee of detail, and then read:

"No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States." (Ibid., 446.)

That the word "qualification" as here used related to the oath, and to nothing else, is too clear for argument, and that it was not used in the sense in which it was used in Article I, section 5, is likewise clear. This conclusion is emphasized by the fact hereafter noted that it was at one time proposed, by an independent constitutional provision, to confer upon the legislature express authority to add one qualification. The effort failed, and it is hardly to be supposed that the Constitution makers would do indirectly by this clause what they had directly decided not to do. Later, when Article XX was being considered, Mr. Pinckney moved as an amendment to the article his original proposition in precisely the language in which it now appears in the Constitution. (Ibid., 498.)

There is nothing in the proceedings to indicate that by a change in the phraseology he intended any change in its meaning. The selection by him for amendment of the clause as to the oath, and not that relating to the qualification, is in harmony with this view.

For these reasons it seems to us that the clause relating to religious tests can serve no legitimate purpose in enlarging that prescribing the elements of eligibility.

With the exception of Barker *v.* The People (20 Johns. (N. Y.), 457), which is affirmed in Barker *v.* The People (3 Cowen, 636) and Rogers *v.* Buffalo (123 N. Y., 173), hereinafter discussed, we do not find any case construing a similar constitutional provision which sustains the right to add qualifications.

Among the elementary writers, Throop on Public Offices, section 73, says:

"The general rule is that the legislature has full power to prescribe qualifications for holding office, in addition to those prescribed by the Constitution, if any, provided that they are reasonable and not opposed to the constitutional provisions or to the spirit of the Constitution."

But he cites no authority to sustain his text as to constitutional offices.

Cushing (Law and Practice of Legislative Assemblies, p. 195, sec. 477) says: "To the disqualifications of this kind may be added those which result from the commission of some crime, which would render the Member ineligible," and cites no authority.

Burgess, in his work on Political Science and Constitutional Law, without giving any authority, says:

"I do not think that either of these bodies can add anything, in principle, to these constitutional qualifications. Certainly the Commonwealths can not add anything in principle or in detail. They have attempted to do so, but Congress has always disregarded these attempts. If the Congress can add anything by law, or if either House can do so through the power of judging of the qualifications of its

Members, it must be something already existing, by reasonable implication, in these constitutional qualifications. For example, I think it certain that either House might reject an insane person, i.e., might require sanity of mind as a qualification, or might exclude a grossly immoral person, i.e., might require fair moral character as a qualification. (Vol. II, p. 52.)

"The Commonwealths can not add to or substract from these qualifications. On the other hand, the Congress may by law, or either House may, in the exercise of the power to judge of the qualifications of its Members, make anything a disqualification that is reasonably implied in the constitutional provisions in regard to this subject. Certainly they may make the corrupt use of his powers by a legislator a disqualification; and they have done so." (Vol. II, pp. 52, 53.)

The case of Whittemore, in the Forty-first Congress, is suggested as a legislative precedent for the right to exclude. We have examined that case with care, and we feel bound to say that we do not think it entitled to any weight as a precedent. The argument upon which it was based shows the action of the House to have been unwarranted and ill advised in excluding Whittemore. The only speeches made in support of the proposition were by Mr. Logan. He does not in any way refer to the one great legal question involved, as to whether Congress, to say nothing of the House, acting alone, had the power to add to the qualifications specified in the Constitution, and that question was not raised during the debate, although at that time (1870) several State courts, one at least, had discussed it, People *v.* Barker having been decided in 1824.

The House had, apparently, never heard that there was such a question. The only provision of the Constitution that could possibly justify the action of the House, that constituting the House the judge of the "election returns and qualifications of its own Members," was not referred to directly or indirectly, and, if the debate is the criterion, the House acted without any reference to it whatever. The clause stating the qualification was incidentally referred to once. Indeed, they apparently acted upon an entirely different provision that does not relate to exclusion or determining eligibility or qualifications, and Mr. Logan distinctly based his case upon it when he says:

"I base my opinion, first, upon the Constitution of the United States, which authorizes Congress to prescribe rules and regulations for the government of their Members, and provides that by a two-thirds vote either House may expel any one of its Members without prescribing the offenses for which either House may expel."

He then proceeded to make this gratuitous and unwarranted assumption:

"This being the theory with which I start out, I then assume that where the House of Representatives has power to expel for an offense against its rules or a violation of any law of the land, it has the same power to exclude a person from its body."

Without giving any attention to the legal distinctions involved, or even referring to the constitutional right of passing upon qualifications, or adverting to the fact that exclusion is the act of a majority and expulsion of two-thirds, he begs the whole question and assumes their identity. He quotes a statute which makes a disqualification to hold office absolutely dependent upon a conviction, and then assumes it disqualified Whittemore, although there had been no conviction. He admits there was no Congressional precedent for the action which he proposed. He cites the Wilkes case in the English Parliament as a precedent, when, as he states it, that case was directly in point against him. Wilkes, he says, was elected four successive times to the same Parliament, three times without opposition and the fourth tune against an opposing candidate. Three times he was expelled. The fourth time his opponent was seated. Neither time, according to his statement, was Wilkes excluded.

Just how that case could be an authority for excluding as against expelling Whittemore we can not see. These considerations (and many more could be suggested), in view of the fact that the House, under Mr. Logan's lead, absolutely refused to allow any committee to examine, for the information of the House, the legal questions involved or to have the case referred to any committee—though such a course was desired by such men as Poland of Vermont, Farnsworth of Illinois, and Schenck and Garfield of Ohio—and would not allow Schenck and Garfield to be heard on the law for even ten minutes each, deprive this case, in our opinion, of all weight as a precedent.

As might perhaps be expected, Mr. Logan's statement of the Wilkes case was by no means accurate. It is extremely interesting, as well as important, to note that the whole history of that case is a striking condemnation of the position of Mr. Logan. While the record is not full, and the distinction between the power of exclusion and that of expulsion was not emphasized in argument, the result makes it the

conspicuous proposition. On the occasion of Wilkes's third election the House of Commons adopted this resolution:

"That John Wilkes, esq., having been in this session of Parliament expelled this House, was, and is, incapable of being elected a member to serve in the present Parliament." (Cavendish, Debates, vol. I) p. 231.)

In opposing the adoption of this resolution, Edmund Burke said:

"I rise to obtain some information upon this great constitutional point. You are going to make a disqualification of a member to sit in Parliament; you are going to make a disqualification contrary to the unanimous opinion of a whole county. Words have been thrown out by the noble lord importing that this is the law of Parliament. Is that, sir, a fact? Is this the law of Parliament? I wish to have that law established on the ground which establishes all laws. Has it acts of Parliament? It has none. Has it records? Has it custom? I have not heard a variety of precedents used." (Ibid., p. 231.)

Here it will be seen that of all who took any part in that debate, the only man who lives in history made the specific point that the House of Commons was adding, in violation of law, by its own action, a disqualification in Wilkes's case. The resolution which declared Wilkes ineligible in effect was adopted by an overwhelming majority February 17, 1769. Before this he had been twice expelled. May 3, 1782, when reason had resumed its sway and the House was no longer overawed by power, a resolution revising in emphatic terms a portion of its prior action in the Wilkes case was adopted. It is significant that it did not attempt to impeach the propriety or validity of the action of the House in twice expelling Wilkes, but it wholly reversed its action in establishing a disqualification and then excluding him therefor. The resolution adopted on the motion of Wilkes himself reads:

"That the said resolution [that of February 17, 1769, declaring him incapable of being elected] be expunged from the journals of this House, as being subversive of the rights of the whole body of electors of this Kingdom." (Hansard, vol. 22, p. 1409.)

That the significance of this resolution and its vital importance, as declaring the lack of power of one branch of the legislature to add a qualification, was fully appreciated at that time, clearly appears from the discussion on its adoption. While Fox conceded the principle, he thought the resolution unnecessary, as it would not have the force of law and would not change the doctrine. The Lord Advocate agreed with Mr. Fox and spoke principally to the "idea of excluding anyone from a seat in that House by a mere resolution of the House, and without the concurrence of the other branches of the legislature. Such a resolution would be contrary to all law, and to the very spirit of the Constitution, according to which no one right or franchise of an individual was to be taken away from him but by law." (Ibid, p. 1411.)

May, in his able work on Parliament, very clearly states the law when he says:

"But, notwithstanding their extensive jurisdiction in regard to elections, the Commons have no control over the eligibility of candidates, except in administration of the laws which define their qualifications." (May on Parliament, p. 53.)

Thus at that early day was the distinction between exclusion and expulsion emphasized by the House of Commons and the first legislative precedent established against the pretended right to add a disqualification for office in violation of law.

So far as the Edmunds Act, which does not require a conviction for disqualification, goes, the case of Barker *v.* The People (3 Cowen, 686) is distinctly adverse to the conclusion of the majority of the committee. The court were passing upon the validity of a statute authorizing a judgment rendering a party ineligible to office on a conviction for sending a challenge to fight a duel, and the court sustained the judgment in the following expressive language:

"Whether the legislature can exclude from public trusts any person not excluded by the express rules of the Constitution, is the question which I have already examined; and according to my views of that question, there may be an exclusion by law, in punishment for crimes, but in no other manner and for no other cause."

Again—

"I therefore conceive it to be entirely clear, that the legislature can not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the Constitution has not required."

It appeared that no qualification whatever in respect to members of the assembly was required

by the Constitution, and the court said, arguendo, that a regulation requiring a member of the assembly to be a freeholder "would be an infringement of the Constitution." There was a blank, not even a negative provision.

We do not understand that Rogers *v.* Buffalo (123 N. Y., 173) in any way affects the authority of Barker *v.* The People, supra, but on the other hand cites it with approval, and clearly distinguishes from it the case which they were deciding. They were construing a statute which created a board of civil-service commissioners, and after citing and assenting to Barker *v.* The People, supra, said (p. 184):

"But, in our judgment, the legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not amount to an arbitrary exclusion from office, nor to a general regulation requiring qualification not mentioned in the Constitution."

The opinion thus clearly eliminated the constitutional question as to eligibility and determined the case upon another ground.

Sound reason does not sustain this claimed right to exclude. If the construction contended for is admitted, it must be conceded that the power of adding qualifications is unlimited, as there is nothing in the Constitution which circumscribes it. The suggestion in Barker *v.* The People that the only power to add is in case of a conviction of crime is purely arbitrary and gratuitous, and absolutely no constitutional authority is given therefor. The rigid confinement by the court of the right to break away from the Constitution to a conviction for crime must have been in the nature of expiation, a satisfying of the judicial conscience for the departure thus made from the Constitution. If the power exists, it must be unlimited, and, therefore, while you can not take from or narrow the two elements first specified, you have unlimited power to add to them. For instance, unless a man is at least 25 years of age he is not eligible, therefore the Constitution does not undertake to say that a greater age may not be required. In fact, the necessary inference is that only the minimum limit as to age has been established, and the legislature has unlimited power to add to that qualification, and hence may require all Representatives to be 50 years of age. The same course could be pursued with reference to the seven years' citizenship clause: You can not act within the domain to which the Constitution has confined itself. Outside of it, you can do anything. We can not indorse any such doctrine or help to work it into a decision of the House in the case now under consideration.

The consequences just suggested are the logical result of the theory, and while the illustrations are extreme, they are the best test of the principle. Would anyone feel justified in asserting that any such change in the age qualification was either contemplated or is possible? Yet it must have been, and must be, if the argument is sound.

Inasmuch as the argument of John Randolph in 1807 is thought to be able, ingenious, and persuasive upon this clause, we have taken occasion to examine it, and find him expressing "extreme surprise" because the Committee on Elections had so construed this clause as to restrict "the States from annexing qualifications to a seat in the House of Representatives. He could not view it in that light. Mark the distinction between the first and second paragraphs. The first is affirmative and positive." Then he draws a contrast between the affirmative and negative provisions. He conceded that if the Constitution had read in the affirmative it would have settled the question of qualification and been exclusive. He does not appear to have gone for light to the proceedings of the Federal Convention. The House in that case, Barney *v.* McCreery (Digest Election Cases, vol. 1, p. 157), decided against his contention, and his proposition has long been obsolete.

The whole case of the right to add qualifications is based upon the fact that such qualifications as are prescribed are negatively expressed. The juxtaposition of the affirmative and negative clauses, it is said, has some significance. It does not appear that any of the courts' elementary writers or lawyers that have had occasion to insist upon this have ever availed themselves of the debates in the Federal Convention for the purpose of ascertaining the intention of the framers of the Constitution. While this precaution has not hitherto been observed, common fairness and a due regard for a thorough investigation require that these great men, whose handiwork has so well withstood the assaults of time, should now and upon this important question be allowed to speak for themselves. An inquiry as to the origin of this clause will not only be interesting and instructive, but possibly determining. This course is stated by Cooley to be proper. (Cooley's Constitutional Limitations, p. 80.)

And Story, in his great work on the Constitution, makes constant use of the debates in the Federal Convention.

In the report of the committee of detail giving the first draft of the Constitution, August 6, 1787 (Madison Papers, etc., vol. 5, p. 376), the paragraph in question appears as an independent section, i. e., section 2, Article IV, and reads:

"SEC. 2. Every Member of the House of Representatives shall be of the age of twenty-five years at least, shall have been a citizen of the United States for at least three years before his election, and shall be at the time of his election a resident of the State in which he shall be chosen."

It is significant that this section is affirmative, and is therefore exclusive, as is conceded, in its character. It is important to inquire whether the change in phraseology was made for the purpose of changing its legal effect. That it was understood by the framers of the Constitution to be exclusive will, we think, clearly appear. The first consideration which indicates this is the incorporation in the same draft of the Constitution of section 2 of Article VI, which reads:

"SEC. 2. The Legislature of the United States shall have authority to establish such uniform qualifications of the Members of each House, with regard to property, as to the said Legislature shall seem expedient."

The inference that the framers of this draft must have understood that section 2 of Article IV was exclusive, and that in order that the legislature might have any power at all over qualifications it was necessary to confer it by a later and specific provision, is imperative and obvious. The debates confirm this idea.

Madison opposed the proposed section 2, Article VI, "as vesting an improper and dangerous power in the legislature. The qualifications of elector and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution. If the legislature could regulate those of either, it can by degrees subvert the Constitution.

"A republic may be converted into an aristocracy or oligarchy, as well by limiting the number capable of being elected as the number authorized to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their constituents, there was the same reason for being jealous of them as there was for relying upon them with full confidence when they had a common interest. This was one of the former cases."

Gouverneur Morris moved to strike out "with regard to property," in order, as he said, "to leave the legislature entirely at large"—precisely what is now claimed without any such constitutional provision. This was objected to by Mr. Williamson on the ground that should "a majority of the legislature be composed of any particular description of men—of lawyers, for example—which is no improbable supposition, the future elections might be secured to their own body."

Mr. Madison further observed that "the British Parliament possessed the power of regulating the qualifications both of the electors and the elected, and the abuse they had made of it was a lesson worthy of our attention. They had made changes in both cases, subservient to their own views of political or religious parties." (Madison Papers, etc., vol. 5, p. 404.)

This article was not agreed to.

Note the significance and primal importance of Mr. Madison's assertion that "the qualifications of electors and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution," as otherwise the legislature might "subvert the Constitution."

His insistence upon these grounds prevented the adoption of the provision that only conferred this power upon the legislature in one particular, and the convention thus evidently adopted his views as to the exclusiveness of the provisions of Article IV, section 2.

Again, when the original proposition which resulted in Article IV, section 2, was under discussion prior to the draft reported by the committee of detail, Mr. Dickinson opposed the section altogether, expressly because it would be held exclusive, saying he "was against any recitals of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would, by implication, tie up the hands of the legislature from supplying omissions." (Ibid., p. 371.)

Mr. Wilson took the same view, saying, "Besides, a partial enumeration of cases will disable the legislature from disqualifying odious and dangerous characters." (Ibid., 373.)

When this section in the draft was under discussion, after "three" had been stricken out and "seven" inserted as to citizenship, Alexander Hamilton moved "that the section be so altered as to require merely citizenship and inhabitancy," and suggested that "the right of determining the rule of naturalization will then leave a discretion to the legislature on the subject which will answer every purpose." (Ibid., p. 411.)

Here it is clear that, as Hamilton construed this provision, without this latitude as to naturalization, the legislature had no discretion or power. From the affirmative language of this provision, then, as it stood in the report of the committee of detail, and the understanding of the framers of the Constitution, it is clear that it was exclusive. This section was not changed to the negative form by amendment or as the result of any debate. In its affirmative form with other sections that had been finally acted upon, and their construction and terms definitely settled, it was referred to a committee "to revise the style of and arrange the articles which had been agreed to by the House," and this committee consisted, among others, of Mr. Hamilton, Mr. Gouverneur Morris, and Mr. Madison. (Ibid., p. 530.)

This committee had no power to make any change in the legal effect of any of the clauses submitted to them. They were simply "to revise the style of and arrange." Certainly, with his very pronounced views, Mr. Madison would not have made a change in Article IV, section 2, that would, in his opinion, have placed it within the power of the legislature to "subvert the Constitution."

Yet, when the committee reported the Constitution as it now stands, Article IV is rearranged so as to be included in Article I, and the original affirmative section 2 of Article IV appears in the negative form as the second independent paragraph of Article I, somewhat changed, it is true, but in no sense connected with or dependent upon the preceding paragraph, which, with an improvement in phraseology, is section 1 of Article IV of the draft. This reference to the original sources of information, we submit, deprives the argument sought to be derived from the juxtaposition of all significance. (Ibid., p. 559.)

An examination of the finished work discloses the fact that the rearrangement and changes in phraseology by the committee were extensive. The object unquestionably was to make the arrangement more orderly and lucid and the language more perspicuous and felicitous. To hold that in any particular any change was intended to be made in the legal effect is to impeach the integrity of men whose characters are of the most illustrious in our history. To assert that they unwittingly made such changes is a much more grievous assault upon their intelligence and ability.

Moreover, we are not left to inference as to how this clause in its present form was interpreted by the most eminent of the framers of the Constitution. The Federalist, as is well known, was published while the Constitution was undergoing public discussion, and while it was being ratified by the States. It had been ratified by six States only when the numbers of the Federalist hereafter referred to appeared. The author of No. 52 evidently assumes that all of the qualifications of representatives had been "very properly considered and regulated by the convention."

He says:

"The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A Representative of the United States must be of the age of 25 years; must have been seven years a citizen of the United States; must at the time of his election be an inhabitant of the State he is to represent, and during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the Federal Government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth or to any particular profession of religious faith."

If the learned author had supposed that any limitations in addition that might appeal to the caprice of a legislature could be added, he would hardly have used the term "these reasonable limitations," as he evidently did, as descriptive of all of the limitations to be imposed. In No. 57 a general reference to this clause is made, which evidently proceeds upon the idea that the qualifications to be required are stated in the Constitution. It reads: "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of the country. No qualification of wealth, of birth, of religious faith, or of civil professions is permitted to fetter the judgment or disappoint the inclination of the people.'

How could he know that unless the Constitution settled the qualifications? The authorship of these two numbers is in doubt between Madison and Hamilton. Hamilton is conceded to be the author of No. 60, and with many no authority is greater than his; and this, so far as his authority goes, settles it beyond cavil. He says:

"The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property, either for those who may elect or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the times, the places, the manner of elections. The qualifications of the

persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution and are unalterable by the legislature."

This unequivocal declaration was made after the negative form of expression had been adopted; made concerning the provision as it now exists in the Constitution. It is not contended that the Federalist was a determining factor in securing the ratification of the Constitution, though it was undoubtedly published for that purpose. So far, however, as this clause weighed in the public mind, as this is the only construction that appears to have been placed upon it, it may be inferred that this construction was adopted by the States which afterwards ratified.

In the light of these facts it is to be deplored that exigencies arise which are supposed to justify a construction in direct conflict with the intention and interpretation of those who framed and assisted in ratifying the Constitution. It seems clear that the negative form of expression has no interpretive significance, and as it affords no support for the proposition which involves the right to add qualifications, that proposition must fall with the erroneous construction upon which it is based.

The great weight of the other authorities sustains this conclusion.

In Thomas *v.* Owens (4 Md., 223) the court said:

"Where a constitution defines the qualifications of an officer, it is not within the power of the legislature to change or superadd to it, unless the power be expressly, or by necessary implication, given to it."

And in Page v. Hardin (8 Ben. Mon., 661) the court said:

"We think it entirely clear that so far as residence is to be regarded as a qualification for receiving or retaining office, the constitutional provision on the subject covers the whole ground, and is a denial of power to the legislature to impose greater restrictions."

In Black *v.* Trover (79 Va., 125), also, the court said:

"Now, it is a well-established rule of construction, as laid down by an eminent writer, that when the Constitution defines the qualifications for office, the specification is an implied prohibition against legislative interference to change or add to the qualifications thus defined."

Mr. Justice Story is conceded to be one of the greatest authorities upon the construction of the Constitution, and upon this point he states the law as follows:

"It would seem but fair reasoning upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." (Story on the Constitution, see. 625.)

Cooley certainly stands equal in authority to Story, and he says:

"Another rule of construction is that where the Constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the supreme court of Maryland that where the Constitution defined the qualifications of an officer it was not in the power of the legislature to change or superadd to them, unless the power to do so was expressly, or by necessary implication, conferred by the Constitution." (Cooley's Constitutional Limitations, p. 78.)

Cushing, as against his former statement, says:

"The Constitution of the United States having prescribed the qualifications required of Representatives in Congress, the principal of which is inhabitancy within the State in which they shall be respectively chosen, leaving it to the States only to prescribe the time, place, and manner of holding the election, it is a general principle that neither Congress nor the States can impose any additional qualifications. It has therefore been held, in the first place, that it is not competent for Congress to prescribe any further qualifications or to pass any law which shall operate as such." (Cushing on Law and Practice of Legislative Assemblies, second edition, p. 27, sec. 65.)

John Randolph Tucker, one of the latest writers on the Constitution, and an able one, is explicit on this point:

"Nor can the Congress nor the House change these qualifications. To the latter no such power was delegated, and the assumption of it would be dangerous, as invading a right which belonged to the constituent body, and not to the body of which the representative of such constituency was a member. (Tucker on the Constitution, 394.)

"The principle that each House has the right to impose a qualification upon its membership which is not prescribed in the Constitution, if established, might be of great danger to the Republic. It was on this excuse that the French directory procured an annulment of elections to the Council of Five Hundred, and thus maintained themselves in power against the will of the people,who gladly accepted the despotism of Napoleon as a relief. (Foster on the Constitution, p. 367.)

"It is a fair presumption that where the Constitution prescribed the qualifications it intended to exclude all others. (Paschal's Annotated Constitution, second edition, p. 305, sec. 300.)

"Where the Constitution prescribed the qualifications for an office, the legislature can not add others not therein prescribed." (McCrary on Elections, see. 312.)

McCrary also takes the ground that statutory and constitutional provisions making ineligible to office any person who has been guilty of crime presuppose a conviction before the ineligibility attaches. (Ibid, p. 345.)

Paine, in his work on elections, takes the same view (pp. 104–108).

Certainly the great weight of authority is against the right to add, even by law, to the qualifications mentioned in the Constitution.

478. The case of Brigham H. Roberts, continued.

In 1900, in a sustained report, the majority of the committee held that a Member of Congress was an officer, subject to statutory disqualifications as such.

Discussion of the laws of Congress against polygamy as creating a statutory disqualification.

Discussion of the oath of July 2, 1862, as creating a statutory disqualification.

3. As to the status of the Member as an officer, and disqualifications under the statute:

The majority report says:

We present now the statutory declarations where disqualifications have been imposed.

Section 21 of the act of April 30, 1790, is as follows:

"That if any person shall, directly or indirectly, give any sum or sums of money, or any other bribe, present, or reward, or any promise, contract, obligation, or security, for the payment or delivery of any money, present, or reward, or any other thing, to obtain or procure the opinion, judgment, or decree of any judge or judges of the United States, in any suit, controversy, matter, or cause depending before him or them, and shall be thereof convicted, and so forth, shall be confined and imprisoned, at the discretion of the court, and shall forever be disqualified to hold any office of honor, trust, or profit under the United States."

Section 5499, which was passed in 1791, provides: "That every judge of the United States who in any way accepts or receives any sum of money or other bribe, etc., shall be fined and imprisoned, and shall be forever disqualified to hold any office of honor, trust, or profit under the United States."

Is a Member of Congress an officer?

Before citing other acts of Congress it is proper to discuss the question as to whether a Member of Congress is an officer within the meaning of the statute.[1]

If a Member of Congress is not an officer, if the qualifications of a Member of Congress are only those named in the Constitution, then, of course, the makers of the Constitution meant that nobody could be made ineligible for Congress, either by law or by the act of either body, even though laws passed immediately after the adoption of the Constitution made him ineligible for all other positions under the Government.

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[1] The question as to whether or not a Member of the Senate or House is an officer of the United States was discussed incidentally in a learned debate in the Senate on December 19, 1863, and January 20, 21, and 25, 1864, the occasion being a proposed rule, which was agreed to, providing that Senators should take and subscribe in open Senate to the oath or affirmation provided by the act of July 2, 1862. (First session Thirty-eighth Congress, Globe, pp. 48, 275, 290, 320–331.)

Now, upon that proposition we make these observations as to the meaning of the word "office."

First. Undoubtedly under the Constitution, in one or two instances, the word "office" does not include Representatives in Congress, as, for example, the last paragraph of section 6, article 1: "No person holding any office under the United States shall be a Member of either House during his continuance in office."

In that case the words "holding any office" means an office other than a Member, but the context is absolutely unmistakable, and no person is in danger of assuming, even if a Member of Congress hold an office, that it meant to say that no Member of Congress shall be eligible to be a Member of Congress.

In the second place, the provision in the last paragraph of section 3 of article 2, relating to the duties of the President, that he shall commission all the officers of the United States, does not mean that he is to commission Members of Congress, but he is himself an officer, and he does not commission himself, nor does he commission the Vice-President, who is also an officer under the United States.

So also paragraph 2, section 1, article 2: "But no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

There the distinction is made "No Senator or Representative, or person holding an office of trust."

But under the Constitution the word "office" must include in certain of its provisions a Representative in Congress.

It is inconceivable that in the Constitution the word "office "never includes a Member of Congress. Look at the last paragraph of section 3, article 1.

Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

It is conceivable that the framers of the Constitution meant that a man might be adjudged guilty in case of impeachment, and that that judgment of guilty could carry with it a judgment disqualifying him from holding any office, save only to be a Representative or Senator in Congress?

Paragraph 8, section 9, article 1, is as follows: "No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state."

Did the Constitution mean that Representatives and Senators in Congress could receive emoluments, presents, office, or title from some king, prince, or foreign state, but no other person holding an office could without the consent of Congress?

But in the next place, as to statutes. Whatever may be held to be the meaning of the word "office" in the Constitution, it does not follow that the same meaning must be given to it in the statutes. We find a varying meaning in the Constitution, and we find a varying meaning in the statutes. The act of 1790 has always been assumed to cover Members of Congress.

Section 5500 of the Revised Statutes, originally passed in 1853, and now in substantially the form in which it was when originally passed, provides: "Any Member of either House of Congress who asks, accepts, or receives any money, or any promise, contract, undertaking, obligation, gratuity, or security for the payment of money, * * * either before or after he has been qualified or has taken his seat as such Member, with intent to have his vote or decision on any question, matter, cause, or proceeding * * * pending in either House, * * * shall be punished by a fine, etc."

Section 5502 is as follows: "Every Member, officer, or person convicted under the provisions of the two preceding sections who holds any place of profit or trust shall forfeit his office or place, and shall thereafter be forever disqualified from holding any office of honor or trust or profit under the United States."

This section applies explicitly to a Member of Congress, and brings forfeiture of the office or place held by him. If "office" in this section does not include a Member of Congress the word "place" must include him.

Now, the word "office" in that concluding part of this section must refer to "Member." First, because the word "office" is used in the preceding line as necessarily including a place that is held by a Member. It can not fail to include that, for it refers to a "Member" and what shall happen to him. In the next place, because it is not conceivable that the legislative body intended that the violation of that law by a Member should forfeit the position that the Member had and then not intend to disqualify him from being elected again as a Member of the House when it disqualifies him from holding all other offices or places under the United States.

But that is not the only statutory construction of the word office. It is still more explicitly declared in the test-oath act, of July 2 1862: "That hereafter every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation:

"'I, A B, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto.

"'And I do further swear (or affirm) that to the best of my knowledge and ability I will support the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.'"

"Which said oath, so taken and signed, shall be preserved among the files of the court, House of Congress, or department to which the said office may appertain."

"Any person who shall falsely take the said oath shall be guilty of perjury, and on conviction, in addition to the penalties now prescribed for that offense, shall be deprived of his office and rendered incapable forever thereafter of holding any office of trust under the United States."

It will be noticed that the only person required to take that oath is an officer, a person elected or appointed to any office of honor or profit, but it does not include in this phraseology a Member.

By reference to the concluding portion of the act it will appear that the word office does not include a Member of Congress.

"Which said oath so taken and signed shall be preserved among the files of the court, House of Congress, or department to which the said office may appertain."

We not only have the use of the word "Congress" as indicating to what the word "office" appertains, but also the universal, unquestioned construction by the acts of the Senate and of the House in compelling the test oath to be taken year after year until it was repealed. Each House of Congress recognized that that oath was an oath to be taken by a Representative in Congress, notwithstanding the fact that the act passed made it apply only to a person elected or appointed to an office of honor or trust in the United States.

We quote this section here, as well for the purpose of showing the Congressional precedents imposing a substantial qualification, or disqualification, upon the Members of Congress, really substantial in its character, as the facts of history show, as to exhibit what is meant in the statutes by the word "office."

There are many other statutory provisions, passed from time to time since 1790, disqualifying for office of trust or profit under the United States persons guilty of the several crimes defined in those statutes. We do not refer to them specifically, but they are illustrated by the statutes already quoted.

It ought also to be said that section 8 of the Edmunds Act, whatever meaning may be given to it, evidences the legislative will to disqualify polygamists for office. It indicated the legislative purpose so aptly described by Justice Matthews, in the Ramsey case, when he said that no more cogent or salutary method could be taken than was taken by the Edmunds Act, which undertook to withdraw from all political influence those persons who showed a practical hostility to the development of a commonwealth based upon the idea of the union for life of one man and one woman in the holy estate of matrimony.

The statutory declaration, if we may use that form of expression as applicable to the joint action of the House, coupled with the President's approval, is only a more solemn declaration by both Houses of the principle that it has the right to exclude under certain conditions; that either House may do it. That very point was made in the discussion on the test oath in the Senate—that of course that law could not with certainty bind any succeeding Senate or any succeeding House, but that it was apparent that so long as there existed any necessity for such an oath, and in the very nature of things the time would come in a few years when it would not be necessary, either House would respect its requirements and compel a submission to it; and that was the action of the Senate and House for nearly twenty years.

The minority, in their views, hold:

If the right to add a disqualification by law be assumed, the disqualification imposed by the Edmunds Act does not apply to a Member of Congress, and therefore does not affect Mr. Roberts. The only portion of the section that can be said to have any application to a Member of the House of Representatives is that which declares that no polygamist, etc., shall "be entitled to hold any office or place of public trust, honor, or emolument, * * * under the United States." Unless a Member of the House holds an office "under the United States," within the meaning of the Constitution and the law, there is no disqualification.

As to the nature of their offices, whether "under the United States" or otherwise, Members of the House and Senate are evidently the same. The words "office" and "offices" occur in the Constitution and amendments twenty-three times, and the words "officer" and "officers" fifteen times, and, with the exception of possibly two instances, these terms are never used, either directly or indirectly, as relating to or in connection with a Representative or Senator.

One possible exception referred to is found in Article I, section 3, and reads: "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States."

The term "office" "in the first clause, as to "removal from office," clearly does not relate to a Member of either House, as it will be seen that the provisions as to impeachment do not apply to them. It would seem that a civil officer guilty of conduct that would justify impeachment ought not to be eligible to a seat in Congress, though unless the clause "office of honor, trust, or profit, under the United States" be held to include a Member, he could not be disqualified thereby. Still, if a Member is not the subject of impeachment, there is perhaps as much reason in exempting him from the disqualifications of impeachment.

The other possible exception is in Article I, section 9, paragraph 8: "No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

Standing alone, we might understand the paragraph as broad enough and comprehensive enough to include Members of Congress, but, taken with the other provisions of the Constitution-and they are numerous-wherein the like terms do not embrace or apply to Senators or Representatives in Congress, what support can this paragraph possibly afford to those who invoke it as authority for adding anything whatever to the prescribed qualifications of a Representative?

The clause in Article I, section 6, provides: "And no person holding any office under the United States shall be a Member of either House during his continuance in office."

Here it is very clear that "any office under the United States" can not include a Member, as otherwise it would be equivalent to a provision that no Member of either House shall be a Member of either House during his continuance in office-an absurdity. A clause in Article II, section 1, provides: "But no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

Here "Senator or Representative" and "person holding an office of trust or profit under the United States" are used in the alternative, or in contradistinction from each other. If they were one and the same, their separate enumeration was unnecessary. If identical, there would be no occasion to particularize "Senator or Representative."

If identical, the adjective "other" should have been used, so that the clause should read, "or person holding any other office of trust or profit under the United States," etc.

These observations apply to the following provisions:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, etc. (Constitution, Art. VI.)

"No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath," etc. (Fourteenth Amendment, see. 3.)

Article II, section 4—"The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors"—has been construed by the only tribunal therefore known to the Constitution,

the Senate sitting as a court of impeachment, which held that a Senator was not a "civil officer," and therefore was not liable to impeachment. It was the case of William Blount, a Senator, who was impeached before the bar of the Senate by the House of Representatives. In his plea he claimed that as a Member of the Senate he was not one of the "civil officers of the United States," and on the 11th of February, 1797, the Senate announced its conclusion as follows:

"The court is of the opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that said impeachment is dismissed." (Annals of Congress, vol. 8, p. 2319.)

Story concurs in this view. (Story on the Constitution, sec. 792.)

Who can be said to hold office "under the United States" was practically decided in United States *v.* Germaine (99 U. S., 508–512), where the court said:

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when officers become numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

In United States *v.* Mouat (124 U. S., 303–308), the Germaine case is cited and approved, the court saying: "In that case it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law or the head of a department."

The same principle is affirmed in United States *v.* Hendee (124 U. S., 309–315).

If, then, "all its officers," "under the Constitution," are appointed in the manner above indicated, clearly a Member of either House does not hold an office "under the United States," and the Edmunds Act can not apply.

(4) Applying the law to the facts the majority of the committee found three distinct grounds of disqualification of Roberts:

(a) By reason of his violation of the Edmunds Act and the declared policy of disqualification in section S.

On this point the majority report holds—

Let us see in what attitude and status the claimant appears and claims the right to be sworn in. No appreciative opinion as to his status can be formed without some knowledge of the judicial and statutory characterization of his offense.

Section 5352, passed by Congress in 1862, declared: "Every person having a husband or wife living who marries another, whether married or single, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years."

It did not, however, make unlawful the practice of polygamous living. There was no pretense of obedience to this law in Utah, the claim being made that it was unconstitutional because an interference with the religion of the Mormons. There is no doubt but that a large body of the Mormons, not only those who practiced polygamy, but those that did not, believed that the act of 1862 was an unconstitutional infraction of their rights.

In 1878, however, in the case of Reynolds v. The United States (98 U. S., 145) the Supreme Court held that section 5352 was "in all respects valid and constitutional." So that after 1878 no man in Utah could claim that the practice of polygamy was right as related to the laws of the land without doing violence, not only to the statute, but to the unanimous opinion of the highest court of the land.

The opinion in this case was by Chief Justice Waite, and in the course of it polygamy receives judicial characterization as follows (we think, it highly important to quote it because it is a judicial declaration and leads us up to a proper recognition of Mr. Roberts's status):

"Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.

"By the statute of James I the offense was made punishable by death.

"It is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration of the bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the legislature of that State substantially enacted the statute of James 1, death penalty included, because as recited in the preamble, 'it hath been doubted whether bigamy and polygamy be punishable by the laws of this Commonwealth.' From that day to this we think it may safely be said there never has been a time in any State of the Union where polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity."

And continuing the quotation:

"Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people to a greater or less extent rests. Professor Lieber says polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle can not long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound.

"Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

So also in Murphy v. Ramsey (114 U. S., 45). Construing the Edmunds Act, Justice Matthews says:

"Certainly no legislation can be supposed more wholesome and necessary in the founding of a free self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment."

How cogent and prophetic are these words. How applicable to this situation; that all political influence ought to be withdrawn from those practically hostile to the establishment of a "Commonwealth on the basis of the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony.

There was no machinery for enforcing the act of 1862 until 1882, when Congress passed what is known as the Edmunds law. This act defined and punished bigamy and polygamy in the same terms as the act of 1862, but also punished unlawful cohabitation, and declared ineligible for office any person who maintained the status of a polygamist or who cohabited with more than one woman.

Section 8 of that act is as follows: "That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to, or be entitled to hold, any office or place of public trust, honor, or emolument in, under, or for such Territory or place, or under the United States."

This law had not only the force of a public law, but it was the outcome of years of agitation and reflection. It crystallized the sober sense of the American people; it represented the settled views of our wisest and most conservative statesmen, and later received the stamp of approval from the Supreme Court of the United States in many well-considered cases.

Prior to 1882 Brigham H. Roberts had married one Louisa Smith. She has borne him six children, and is still living.

About 1885, when Utah was fairly ringing with the blows of the Edmunds Act of 1882; while numerous prosecutions were going on and after the Supreme Court had passed upon the validity of the

act; when the American people supposed that polygamy had received its deathblow; when no man of the many whose cases went to the United States Supreme Court pretended that the provisions against polygamous marriages were invalid, with all these facts insistently before him, Brigham H. Roberts took another wife—his first polygamous wife—Celia Dibble by name, who in the following twelve years, bore him six children.

This second wife he married in defiance of the Edmunds law. He spat upon that law; he declared by his act that he recognized no binding rule upon him of a law of Congress; he declared by it that he recognized a higher law. The Congress of the United States was to him an object of contempt. The Supreme Court of the United States might declare the law for others, but not for him. He laughed at its futile decrees and spurned its admonitions. The Executive which had declared in solemn messages its gratification that polygamy seemed gone forever he defied and despised. Of what consequence to him were laws of Congress and declarations of the highest court and proclamations of Presidents as against his sensual interpretation of a sensual doctrine?

And all the time the Edmunds law declared not only polygamy but cohabitation with more than one woman unlawful. Roberts not only bigamously married a second wife, but he persisted in violating and defiantly trampling under foot every other provision of the act.

But he had not yet sufficiently proclaimed his utter contempt for the Supreme Court, for Congress and its most solemn enactments. A few years later he took a third wife.

From the time of his second marriage to the third he cohabited with two women. From the date of his third marriage down to his election, and, we doubt not, to the present time, he has been cohabiting with three women.

As recently as December 6, 1899, he defined his position as follows:

"These women have stood by me. They are good and true women. The law has said I shall part from them. My church has bowed to the command of Congress and relinquished the practice of plural marriage. But the law can not free me from obligations assumed before it spoke. No power can do that. Even were the church that sanctioned these marriages and performed the ceremonies to turn its back upon us and say the marriages are not valid now, and that I must give these good and loyal women up, I'll be damned if I would."

In this statement he adheres to the audacious assumption that the law of 1882 did not speak to him and that he did not recognize it as a rule of conduct to him.

The amnesty proclamation of 1893 and 1894 never embraced him. There was never a moment when its provisions were complied with by him. There has never been a moment since he married Celia Dibble down to the present moment when he has not been a persistent, notorious, defiant, demoralizing, audacious violator of every provision of the State and Federal law relating to polygamy and its attendant crimes. And this is the man who seeks admission to this body.

It was declared in the Kentucky cases, and in the Thomas case in the Senate, and in the Test Oath Act of 1862 that disloyalty created ineligibility; that fidelity to the Constitution was a necessary qualification to membership in this body. What is loyalty? It is faithfulness to the sovereign or the lawful government. A mere violator of the law may not necessarily be disloyal. One may violate the law and still recognize the sovereign and the lawfulness of the government. His only concern may be that he shall not be found out and punished. But that man is surely disloyal, and in the fullest sense disloyal, when by his words, his acts, and his persistent practices he declares unequivocally in this wise: "You have solemnly enacted certain laws; you have crystallized into statute the will of the sovereign people. I bid defiance to your law. I will not recognize it. I here and now before your very eyes do the things you say I shall not do. I recognize a higher law than your man-made law-no law of yours can relieve me from the obligations which I thus take in defiance of your enactments. The only thing I promise not to do is to take a fourth wife."

The case of a bribe taker, or of a burglar, or of a murderer is trivial, is a mere ripple on the surface of things, compared with this far-reaching, deep-rooted, audacious lawlessness.

What was the case of Whittemore, who was excluded, as hereafter set out? He had not been convicted of any crime, but a committee had found that he had sold a cadetship. He did not pretend that he was wiser or greater than the people, or that he had the right to sell cadetships and was above the law. The acts of Roberts are essentially disloyal. They deny the sovereign; they repudiate the lawful government. Look at them from whatever point you will, they are subversive of government. They do not merely breed anarchy, they are anarchy.

We observe that this is not a moral question. It goes to the root of our own constitutional government. What we have just quoted from Justice Waite and Justice Matthews are as much a part of our Constitution as the written instrument itself.

* * * * * * *

Having in mind that portion of this report in which we have heretofore set out the status and condition of Brigham H. Roberts, we would inquire where the specific provisions of the Edmunds Act place him.

Two facts appear as pertinent to this inquiry:

First. That he was convicted in 1889 of unlawful cohabitation under that act, and served a term in the penitentiary therefor.

Second. That he has been ever since 1885, and is now, a polygamist, as that word is used in section 8 of the Edmunds Act and defined by the Supreme Court of the United States in the cases of Murphy *v.* Ramsey (114 U.S., 15) and Cannon *v.* The United States (116 U.S., 55). Section 8 is as follows:

"No polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to, or be entitled to hold, any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States."

Reading that act as applicable to this case, eliminating the irrelevant portions, it appears as follows: "No polygamist shall be entitled to hold any office or place of public trust, honor, or emolument under the United States."

In the Ramsey case, above referred to, a specific distinction is made between a polygamist and a person cohabiting with more than one woman. A polygamist is a person having a certain status respecting more than one woman. The condition, therefore, of a polygamist may be merely passive and requiring no affirmative act. To cohabit with more than one woman is, however, to do an affirmative thing. The result is that one who has two or more wives that he holds out to the world as such is a polygamist, wherever he may be, while one who cohabits with more than one woman is not cohabiting except in the place in which, of necessity, cohabitation must occur.

In the Ramsey case the court illustrated its definition of a polygamist as being a status or condition like any other qualification for elector, or for office, and declared that it was as if Congress had undertaken to make a married man ineligible. It would be the status in that event of being a married man which would create and continue the ineligibility.

It therefore appears that the fact that a man is a polygamist is a fact that inheres in him and stays with him, and persists in remaining with him wherever he may go, so long as he is the possessor of more than one wife; and just as one who is a married man in the State of Maryland continues to be a married man if he leaves his wife at home and comes to the District of Columbia, so Mr. Roberts, being in the condition or status of a polygamist in the State of Utah, does not leave that status behind, nor does he dissociate himself from that status or cast off the garb of a polygamist by leaving his wives at home and traveling from that State into the District of Columbia.

In the very nature of things the House of Representatives, wherever it is as a House of Representatives, is in a place under the exclusive jurisdiction of the United States; therefore when Roberts comes into the District of Columbia, in the status of a polygamist, he is ineligible under the Edmunds Act to hold any office or place under the United States, and therefore ineligible to hold the position of Member of the House of Representatives.

The minority, in their views, say that if the propositions of law already laid down by them are not conclusive, then—

it seems to us very clear that no ineligibility can be predicated upon section 8 of the Edmunds Act, upon the facts as they must be conceded to exist. A brief statement of the history of the legislation involved may be useful.

The Edmunds Act became a law March 22, 1882. Section 1 amended section 5352 of the Revised Statutes of the United States, and defined and prohibited polygamy. Section 3 defined and prohibited unlawful cohabitation, and reads as follows:

"SEC. 3. That if any male person, in a Territory or other place over which the United States have

exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court."

Section 8, relating to eligibility to hold office, has already been quoted.

The Edmunds-Tucker Act, which became a law March 3, 1887, supplemented the Edmunds law, imposed penalties for various kindred offenses, dissolved the corporation known as the Church of Jesus Christ of Latter-Day Saints, and contained, among other things, various provisions as to dower and the law of descent. With reference to eligibility to office it contained, among others, this paragraph, in the last part of section 24:

"No person who shall have been convicted of any crime under this act, or under the act of Congress aforesaid, approved March twenty-second, eighteen hundred and eighty-two, or who shall be a polygamist, or who shall associate or cohabit polygamously with persons of the other sex, shall be entitled to vote in any election in said Territory, or be capable of jury service, or hold any office or emolument in said Territory."

It will be noticed that this act applied only to "office or emolument in said Territory." It did not go as far as the similar provision in the Edmunds Act and apply to "any office under the United States."

February 4, 1892, Chapter VII of the laws of the Territory of Utah was enacted. Section 1 defined and punished polygamy substantially as did section 1 of the Edmunds Act. Section 2, relating to cohabitation, in all material parts is an exact transcript of section 3 of the Edmunds Act. There is no provision whatever in this act relating to ineligibility to office by reason of any of these offenses. (Laws of Utah, 1892, p. 5.)

The enabling act, authorizing the people of Utah to form a constitution and State government and to be admitted into the Union, became a law July 16, 1894. This act required the convention to provide by ordinance irrevocable without the consent of the United States and the people of the State—

"First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided,* That polygamous or plural marriages are forever prohibited."

The constitution of Utah was adopted by the convention May 8, 1895, by the people November 5, 1895, and the proclamation of the President of the United States announcing the result of the election and admitting the State into the Union was issued January 4, 1896. Article III, ordinance of the constitution, contained the provision as to religious liberty and polygamous or plural marriages in the exact language of the enabling act. (R. S. Utah, 1898, p. 40.)

Article XXIV, section 2, of the constitution reads as follows:

"SEC. 2. All laws of the Territory of Utah now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature. The act of the governor and the legislative assembly of the Territory of Utah entitled 'An act to punish polygamy and other kindred offenses,' approved February 4, A. D. 1892, in so far as the same defines and imposes penalties for polygamy, is hereby declared to be in force in the State of Utah." (R. S. Utah, 1898, p. 67.)

This did not give the State of Utah any law making persons ineligible to any office by reason of polygamy or cohabitation, as no such provisions existed in the act of 1892, chapter 24, or in any of the "laws of the Territory of Utah."

Sections 4208 to 4216, inclusive, of the Revised Statutes of Utah (R. S. Utah, 1898, p. 899) are substantially the act of 1892. Section 2 of the act of 1892 and section 4209 of the Revised Statutes, relating to unlawful cohabitation, are precisely alike. This statute has not been changed.

The laws of the State of Utah, then, do not now impose and never have imposed any disqualification for holding office by reason of polygamy or unlawful cohabitation. Mr. Roberts was a resident of the Territory of Utah, and since its organization as a State has been a resident of the State of Utah. Under these circumstances we do not think that the disqualifications imposed by the Edmunds Act have had any operation as to him since the organization of the State of Utah. It is settled by an unbroken line of decisions that all Territorial Congressional legislation is superseded by the adoption of a State constitution and the organization of a State.

In discussing the effect of the adoption of the constitution of Louisiana upon the laws of Congress, the court, in Permoli *v.* First Municipality (3 How., 610), said:

"So far as they conferred political rights, and secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the State constitution; nor is any part of them in force unless they were adopted by the constitution of Louisiana as the laws of the State."

The case of Strader et al. *v.* Graham (10 How., 94) determines the same question, and says:

"The argument assumes that the six articles which that ordinance declares to be perpetual are still in force in the State since formed within the Territory and admitted into the Union. If this proposition could be maintained, it would not alter the question; for the regulation of Congress, under the old confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the States within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court any control over them. The ordinance in question, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State, nor give this court jurisdiction upon the subject.

"But it has been settled by judicial decision in this court, that this ordinance is not in force.

"The case of Permoli *v.* The First Municipality (3 How., 589) depended upon the same principles with the case before us."

The same doctrine is held in Pollard et al. *v.* Hagan (3 How., 212).

It is approved by all of the court, from Chief Justice Taney to Judge Curtis, in Dred Scott *v.* Sandford (19 How., 490).

It is approved in Woodman *v.* Kilbourne Manufacturing Company (1 Abb. U. S., 162), opinion by Justice Miller, of the United States Supreme Court. Columbus Insurance Company *v.* Curtenius (6 McLean, 212).

This precise question, in the application to the State of Utah of a law of Congress which was not continued in force by any legislation, has been determined in Moore *v.* United States (85 Fed. Rep., 468).

The court were determining whether a law of Congress against unlawful combinations was in force in Utah, and held:

"By its terms the provision of the statute under which this indictment was found applies only to the Territories of the United States, and while it may yet be in full force within the Territories, it is clear that no prosecution could be maintained under it for entering into a combination or conspiracy in restraint of trade in Utah after the date of her admission as a State. * * * When Utah became one of the States of the Union, this statute ceased to be in force within its boundaries, unless, by appropriate legislation it was continued in force for the purpose of prosecuting violations thereof committed during the existence of a Territorial form of government. * * * The act of July 2 was not repealed by the enabling act, for it yet applies to the Territories of the United States. It ceased to be in force in Utah only because it was superseded by the constitution upon the admission of the State."

We have seen that there was no legislation of any kind continuing in force section 8 of the Edmunds Act, relating to disqualification. It is to be observed that this section does not undertake by its terms to operate within the limits of any State. It is expressly confined in its operation, by its terms, to "any Territory or other place over which the United States have exclusive jurisdiction." The meaning of the terms "polygamist" or "person cohabiting," with reference to the restriction as to voting, has been fully settled by the United States Supreme Court in Murphy *v.* Ramsey. (114 U. S., 39; 29 L. C. P., 47.)

This was an action for damages sustained by reason of being deprived, under this section, of the right to vote in the Territory of Utah, and among other things the court held:

"The requirements of the eighth section of the act, in reference to a woman claiming the right to vote, are that she does not, at the time she offers to register, cohabit with a polygamist, bigamist, or person cohabiting with more than one woman. * * * Upon this construction the statute is not open to the objection that it is an ex post facto law. It does not seek in this section and by the penalty of disfranchisement to operate as a punishment upon any offense at all. * * * The disfranchisement operates upon the existing state and condition of the person, and not upon a past offense. It is, therefore, not retrospective. He alone is deprived of his vote who, when he offers to register, is then in the state and condition of a bigamist or a polygamist, or is then actually cohabiting with more than one woman. * * * So that, in respect to those disqualifications of a voter under the act of

March 22, 1882, the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosection for crime.

"In respect to the fact of actual cohabitation with more than one woman, the objection is equally groundless, for the inquiry into the fact, so far as the registration officers are authorized to make it, or the judges of election, on challenge of the right of the voter if registered, are required to determine it, is not, in view of its character as a crime, nor for the purpose of punishment, but for the sole purpose of determining, as in case of every other condition attached to the right of suffrage, the qualification of one who alleges his right to vote. It is precisely similar to an inquiry into the fact of nativity, of age, or of any other status necessary by law as a condition of the elective franchise."

The principles which apply to eligibility as a voter must apply to eligibility to office, as they are in the same section and the same language is employed as to each, and in order to be affected by the disqualification prescribed by this section a person must be a polygamist or unlawfully cohabiting within the meaning of the section "at the time" of entering upon the office. It is not enough to show that at some former period Mr. Roberts was a polygamist or unlawfully cohabiting, as the disfranchisement does not operate "upon a past offense." It would have been entirely competent for Roberts to have taken himself from under the operation of this section while Utah was still a Territory, simply by ceasing to be a polygamist or cohabiting, or by moving into a State, as the "disfranchisement" operates upon "the existing state and condition of the person" only. In other words, the offense must be continuous. The offense and the disqualification are coterminous.

There is a further legal proposition, too well settled to require the citation of authority, and that is, no statute can operate, either directly or indirectly, extraterritorially. The statute in question does not undertake to.

The offense of polygamy and unlawfully cohabiting is localized by the statute. The provision is not general. No polygamist or person thus cohabiting "anywhere, without any restriction as to place," is not the language; on the other hand, the prohibition is confined to a specified locality. No polygamist or any person thus cohabiting—where? "In any Territory or other place over which the United States have exclusive jurisdiction." The United States had no power to make the prohibition apply to any other place, and did not attempt it. The offense and the place defined must coexist. He must be a polygamist or person unlawfully cohabiting in "any Territory," or the statute does not apply. The statute applies only to residents of the Territory.

In the light of these propositions let us analyze the case as it is.

Mr. Roberts presents himself as a Member-elect of this House. It is objected that he is disqualified under this section as a polygamist or person unlawfully cohabiting. The disqualification must exist at the time of his becoming a Member. But since January, 1896, he has resided in the State of Utah, and this statute has not since then operated upon him, and does not now operate upon him. It can not, therefore, now disqualify him. The conditions of offense and place required by the statute to coexist do not coexist in his case, and therefore the statute does not apply. In other words, it is said he is ineligible. Why? Because there is a statute of the United States which says that no polygamist or person unlawfully cohabiting in "any Territory" is eligible, and he is a polygamist or person thus cohabiting. It is a complete answer to say, "while I am a polygamist I am not such in any Territory."'

While the penal provisions of the Edmunds Act are in full force in "any Territory," it would not for a moment be contended that Mr. Roberts would be liable to prosecution thereunder since January, 1896. Why? Simply because since that time he has committed no crime within "any Territory," as all of his acts have been in the State of Utah. A fortiori, the disqualifying provisions do not apply to him, as they do not even "operate as a punishment upon any offense at all." The moment Utah became a State he, living in Utah, became a resident of the State, and one of the indispensable elements of the condition to which the disqualification attaches—residence within "any Territory"—ceased to exist, and the disqualification ceased to apply. The offense of polygamy or unlawful cohabitation in "any Territory" and the disqualification were no longer coterminous. He is now doing no act in "any Territory" to which the disqualification applies, and therefore, as to him, it does not exist.

It is true that while Utah was a Territory Roberts was unlawfully cohabiting, and the disqualification existed, and his status was then that of ineligibility, and therefore, it may be suggested, it continues. But this would make the disqualification the result of a past offense, and the law says that it "operates upon the existing state and condition of the person and not upon a past offense." It does not "operate as a punishment" at all, all of which it clearly would do if the supposition were correct.

If the disqualification attaches to Roberts by reason of acts committed in Utah, the State, then the act would be operating extraterritorily, outside of "any Territory" to which by its specific terms it is expressly confined. The fact that Roberts still resides in the same place where he resided in 1895, though Utah is now a State, but then was a Territory to which the law applied, undoubtedly is the cause of some confusion of thought. It is clear that his legal rights are precisely the same as though since 1896 he had been residing in Maine, and had been elected to Congress from that State. It would not be contended that this act could have any application to him in such case to affect his present status, as it never operated there. No more has it in Utah since January, 1896.

It seems to us beyond question that this act does not now apply to Mr. Roberts. Then there is no law having any application to this case by which the attempt is made to add anything to the constitutional qualifications. This House, by its independent action, can not make law for any purpose. The adding by this House, acting alone, of a qualification not established by law would not only be a violation of both the Constitution and the law, but it would establish a most dangerous precedent, which could hardly fail to "return to plague the inventor." You might feel that the grave moral and social aspects of this case allowed you to

"Wrest once the law to your authority
To do a great right, do a little wrong."

But what warrant have you, when the barriers of the Constitution are once broken down, that there may not come after us a House with other standards of morality and propriety, which will create other qualifications with no rightful foundations, that, in the heat and unreason of partisan contest—since there will be no definite standard by which to determine the existence of qualifications—will add anything that may be necessary to accomplish the desired result? Exigency will determine the sufficiency. It would no longer be a government of laws, but of men. To thus depart from the Constitution and substitute force for law is to embark upon a trackless sea, without chart or compass, with almost a certainty of direful shipwreck.

479. The case of Brigham H. Roberts, continued. The question of loyalty as a qualification of a Member.

(*b*) By reason of disloyalty thus described by the majority report——

He is disqualified because for years he has been living in open, flagrant, and notorious defiance of the statutes of Utah and in open, flagrant, and notorious defiance of the statutes of Congress—of the very body which he now seeks to enter; in defiance of the law as declared by the Supreme Court of the United States, and in defiance of the proclamations of Presidents Harrison and Cleveland. He has persistently held himself above the law. This is disloyalty in its very essence. In the language of Chief Justice Waite, in the Reynolds case, this would in effect "permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

The majority say on this point:

The principles underlying the second main ground of disqualification, hereinbefore asserted, have already been fully discussed, but the ground is appropriately restated at this point.

We assert before the House, the country, and history that it is absolutely and impregnably sound, not to be effectively attacked, consonant with every legislative precedent, in harmony with the law and with the text-books on the subject:

That Brigham H. Roberts's persistent, notorious, and defiant violation of one of the most solemn acts ever passed by Congress, by the very body which he seeks now to enter, on the theory that he is above the law, and his defiant violation of the laws of his own State, necessarily render him ineligible, disqualified, unfit, and unworthy to be a member of the House of Representatives. And this proposition is asserted not so much for reasons personal to the membership of the House as because it goes to the very integrity of the House and the Republic as such.

The minority do not specifically refer to this point, but discuss it generally in their treatment of the subject of qualifications.

480. The case of Brigham H. Roberts, continued.

A constituency having violated the understanding on which it came into the Union, was the status of a Member-elect thereby affected?

(*c*) Because, in the words of the majority report——

His election as Representative is an explicit and most offensive violation of the understanding by which Utah was admitted as a State. It is an act of unmatched audacity, the possibility of which could no more have been considered when the State of Utah was admitted than that a specific permission would have been given to renew the practice of polygamous marriages.

The majority say on this point:

Utah was admitted to the Union with the distinct understanding upon both sides that polygamous practices were under the ban of the church, prohibited and practically eradicated, both as a practice and a belief, and that they would not be renewed.

The effort is made to alarm people upon this proposition that some similar objection might be made to representation from States in which the claim might be made that the right to vote was denied to some citizens. It is a sufficient answer to this to say that if such ground of complaint exists the Constitution specifically tells us what our remedy is, and declares precisely in the fourteenth amendment what we may do in any event when the right of suffrage is improperly denied. There is no possible escape from that position, even assuming that there was anything in the bogie man.

But as to Utah, she was admitted on the express statement that the practice of polygamous living was interdicted by the church, was practically abandoned by the people and eradicated as a belief. Of course, that sporadic instances of the violation of the law against cohabitation might occur no one doubted.

The manifesto forbidding plural marriages and enjoining obedience to the laws relating thereto was issued by Wilford Woodruff, president of the Church of Jesus Christ of Latter-Day Saints, September 25, 1890.

Some doubt having arisen as to whether that manifesto prohibited association in the plural marriage relation, as well as the contracting of plural marriages as a ceremony, President Woodruff himself testified under oath as follows:

"Q. Did you intend to confine this declaration and advice to the church solely to the question of forming new marriages without reference to those that were existing—plural marriages?—A. The intention of the proclamation was to obey the law myself—all the laws of the land on that subject—and expecting that the church would do the same.

"Q. You mean to include, then, in your general statement the laws forbidding association in plural marriages as well as the forming of new marriages?—A. Whatever there is in the law with regard to that—the law of the land.

"Q. Let me read the language and you will understand me, perhaps, better: 'Inasmuch as laws have been enacted by Congress forbidding plural marriages, * * * I hereby declare,' etc. Did you intend by that general statement of intention to make the application to existing conditions where the plural marriages already existed?—A. Yes, sir.

"Q. As to living in the state of plural marriage?—A. Yes, sir; that is, to the obeying of the law.

"Q. In the concluding portion of your statement you say, 'I now publicly declare that my advice to the Latter-Day Saints is to refrain from contracting any marriage forbidden by the laws of the land'. Do you understand that that language was to be expanded to include the further statement of living or associating in plural marriage by those already in the status?—A. Yes, sir; I intended the proclamation to cover the ground—to keep the laws, to obey the law myself—and expected the people to obey the law."

The significance of this statement by the spiritual head of the church is the more apparent when we remember that it was made but a short time before the question of the admission of Utah was debated in the House of Representatives.

Is it to be an occasion for wonder, therefore, that the proclamation of amnesty issued by President Harrison January 4, 1893, should contain these words:

"'Whereas it is represented that since the date of said declaration the members and adherents of

said church have generally obeyed said laws and abstained from plural marriages and polygamous cohabitation; and

"Whereas by a petition dated December the 19th, 1891, the officials of said church, pledging the membership thereof to the faithful obeyance of the laws against plural marriages and unlawful cohabitation, applied to me to grant amnesty for past offenses against said laws."

Is it strange that the House Committee on Territories in 1893 should report that "polygamy is dead?" And if that is not fully convincing, let the unprejudiced mind consider the following extracts from the debate in the House of Representatives on the admission of Utah, December 12, 1893: (Here the report quotes the debate at length.)

And so the enabling act was passed. Every incredulous Member who cast doubt upon the sincerity of polygamists in Utah was whistled down the wind. Every legislator who doubted if the funeral of polygamy had really taken place, was laughed to scorn. Polygamy was dead! That was the battle cry, and on it the battle was fought and won.

What would have become of the bill if Mr. Rawlins had declared that the State of Utah, just about to be born, would reserve the right to send a polygamist to Congress? His bill would have been buried beneath an avalanche of votes beyond the hope of resurrection.

The language of the enabling act is, "provided that polygamous or plural marriages are forever prohibited."

The understanding was that those words prohibited the practice of living in the status or condition of polygamous marriage.

Bouvier's Law Dictionary says:

"*Marriage.*—A contract made in due form of law by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife. Marriage, as distinguished from the agreement to marry, the mere act of becoming married, is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on themselves.

"' Marriage' is the legal status or condition of husbands and wives just as infancy is the legal relation or condition of persons under age. (1 American and English Encyclopedia of Law, volt. 14, p. 470.)

"The act of marriage having been once accomplished, the word becomes afterwards to denote the relation itself. (Schouler on Domestic Relations, 22.)

"Marriage is the civil status of one man and one woman united in law for life under the obligation to discharge to each other and to the community those duties which the community, by its laws, holds incumbent on persons whose association is founded on the distinction of sex. (1 Bishop on Marriage and Divorce, 3.)

"Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of making it is necessary. (Hart's California Civil Code, 55.)

"Marriage is the union of one man and one woman so long as they shall both live together to the exclusion of all others by an obligation which during the lifetime the parties can not of their own volition or will dissolve, but which can be dissolved only by the authority of the State." (19 Indiana, p. 57.)

Senator Rawlins was asked before this committee the following question:

"Without reference to any assumed facts in this case, do you think that Congress would have admitted Utah to statehood if it had been predicted that Utah would send here in a few years a man as her Representative who was polygamously living with more than one wife?"

He answered: "I do not think the Congress of the United States would have admitted Utah if they at that time had believed that a revival of the practice of polygamy would occur."

It is not to be assumed from the fact that a rare or sporadic case of polygamous marriage occurred in Utah, or sporadic instances of unlawful cohabitation had come to light, that that would be a violation of the agreement; but we take it that it is in the last degree a violation of the agreement or understanding when that State sends to Congress a man who is himself engaged in the persistent practice of the very thing the abandonment of which was the condition precedent to its admission; and that man the most conspicuous defier of the law and violator of the covenant of statehood to be found in Utah.

As bearing on this, we here quote the manifesto issued a few days ago by the Mormon Church and presented by Senator Rawlins to the Senate:

"In accordance with the manifesto of the late President Wilford Woodruff, dated September the 25th, 1890, which was presented to and unanimously accepted by our general conference on the 6th of

October, 1890, the church has positively abandoned the practice of polygamy, or the solemnization of plural marriages, in this and every other State, and that no member or officer thereof has any authority whatever to perform a plural marriage or enter into such a relation. Nor does the church advise or encourage unlawful cohabitation on the part of any of its members."

In other words, the Mormon Church has left it to us and not to the church to say what shall be done with Mr. Roberts. Is the House of Representatives to respond in any uncertain tone?

The minority, in their views, say:

It is contended that if all other reasons assigned for exclusion are found to be insufficient, as we believe they are, still Mr. Roberts should be excluded, upon the alleged ground that, by virtue of the enabling act, a compact now exists between the United States and Utah which has been violated by the election of Roberts to Congress, and that the State can be in this manner punished for such breach of the compact. Compact is synonymous with contract. The idea of a compact or contract is not predictable upon the relations that exist between the State and the General Government. They do not stand in the position of contracting parties. The condition upon which Utah was to become a State was fully performed when she became a State. The enabling act authorized the President to determine when the condition was performed. He discharged that duty, found that the condition was complied with; and that condition no longer exists.

What did Congress require by the enabling act? Simply that "said convention shall provide by ordinance irrevocable," etc., and the convention did in terms what it was required to do. It was a condition upon the performance of which by the "convention" the admission of Utah depended. Its purpose accomplished, its office is gone, and as a condition it ceases to exist. No power was reserved in the enabling act, nor can any be found in the Constitution of the United States, authorizing Congress, not to say the House of Representatives alone, to discipline the people or the State of Utah, because the crime of polygamy or unlawful cohabitation has not been exterminated in Utah. Where is the warrant to be found for the exercise of this disciplinary, supervisory power? This theory is apparently evolved for the purposes of this case; is entirely without precedent; and has not even the conjecture or dream of any writer or commentator on the Constitution to stand upon.

In accordance with the facts and arguments as set forth in their report the majority recommended the following:

Resolved, That under the facts and circumstances of this case, Brigham H. Roberts, Representative elect from the State of Utah, ought not to have or hold a seat in the House of Representatives, and that the seat to which he was elected is hereby declared vacant.

The minority proposed as a substitute the following:

Resolved, That Brigham H. Roberts, having been duly elected a Representative in the Fifty-sixth Congress from the State of Utah, with the qualifications requisite for admission to the House as such, is entitled, as a constitutional right, to take the oath of office prescribed for Members-elect, his status as a polygamist, unlawfully cohabiting with plural wives, affording constitutional ground for expulsion, but not for exclusion from the House.

The resolutions were called up in the House on January 23, 1900,[1] and debated until January 25, when the question was taken on substituting the minority for the majority resolutions, and resulted—yeas 81, nays 244. The question then recurring on the adoption of the majority resolution, there were—yeas 268, nays 50. So the majority resolution was agreed to unamended.[2]

During the debate, on January 23,[3] Mr. Roberts was permitted, by unanimous consent, to address the House.

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[1] First session Fifty-sixth Congress, Record, pp. 1072–1104, 1123–1149, 1175–1217; Journal, pp. 187, 192, 196–198.

[2] Mr. John F. Lacey, of Iowa, had proposed an amendment for expelling Mr. Roberts without swearing him in; but it was ruled out on a point of order as not germane. First session Fifty-sixth Congress, Record, pp. 1215, 1216; Journal, p. 196.

[3] Record, p. 1101.

481. The Senate case relating to the qualifications of Reed Smoot, of Utah, in the Fifty-eighth Congress.

Although it was understood that objection was made to a Senator-elect on the question of qualification, yet the oath was administered on his prima facie showing.

Form of resolution authorizing the investigation of the right and title of Reed Smoot to a seat in the Senate.

It was objected that Senator Smoot, by reason of fealty to a "higher law" than the law of the nation, was disqualified to hold a seat in the Senate.

Argument that expulsion applies only to acts of a Senator or Member done by him while in such office or in relation to his functions as such officer.

Contention that a Senator may be excluded for disqualification by majority vote, even though he may have been sworn in.

Discussion as to the right of the Senate to exclude by majority vote for lack of qualifications other than those enumerated in the Constitution.

Complaint in the Smoot investigation that the rules of evidence were not adhered to by the Senate committee.

On March 5, 1903,[1] at the special session of the Senate, and before the newly elected Senators had been called for the administration of the oath, Mr. George F. Hoar, of Massachusetts, was permitted by unanimous consent to make the following statement:

The chairman of the Committee on Privileges and Elections, the Senator from Michigan [Mr. Burrows], is obliged to be absent. He desired me to state in his behalf that he understands the orderly and constitutional method of procedure in regard to administering the oath to newly elected Senators to be that when any gentleman brings with him or presents a credential, consisting of the certificate of his due election from the executive of his State, he is entitled to be sworn in, and that all questions relating to his qualification should be postponed and acted upon by the Senate afterwards.

If there were any other procedure, the result would be that a third of the Senate might be kept out of their seats for an indefinite time on the presenting of objection without responsibility, and never established before the Senate by any judicial inquiry. The result of that might be that a change in the political power of this Government which the people desired to accomplish would be indefinitely postponed.

I make this statement at the request of the Senator from Michigan [Mr. Burrows].

The oath was then administered to the Senators-elect, among that number being Mr. Reed Smoot, of Utah, who took the oath without question.

On January 27, 1904,[2] the Senate agreed to the following resolution:

Resolved, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate the right and title of Reed Smoot to a seat in the Senate as Senator from the State of Utah; and said committee, or any subcommittee thereof, is authorized to sit during the sessions of the Senate, to employ a stenographer, to send for persons and papers, and to administer oaths; and that the expense of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

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[1] Special session Senate, Fifty-eighth Congress, Record, pp. 1, 2.

[2] Second session Fifty-eighth Congress, Record, p. 1329.

The investigation continued during the third session of the Congress, and during that session the arguments [1] were made.

The investigation had shown that Mr. Smoot was an officer of the Mormon Church. No claim was made that he was himself a polygamist. Mr. Robert W. Tayler, who had conducted the presentation of the case against him, stated in his argument:

Now, gentlemen, this is the broad claim we make: That the church is in fact higher than the law; that the hierarchy and its members are in fact higher than the law. I do not mean that they consciously realize that in every act that they perform they are above the law, or that they do not quite unconsciously generally obey the law, as most men obey it, but that after all when we get to the inner consciousness that controls them they are obedient to a higher law, and they are so, because as I indicated incidentally earlier in my argument, they or it receive revelations, because its membership, especially the hierarchy, are in immediate contact with God. I shall have more to say about that as we go along. This is basic. I should like that every word I say from now on should be considered in view of the fact and with constant apprehension of the fact that revelation runs through the Mormon mind and is the basis of the Mormon religion and of its hold on the Mormon people to-day—revelation by actual contact with the Almighty.

In that thought we discover the explanation of everything that has happened. The defiance of law, not because it was law—that is, the law of the land—not because it was the law of the land, but because there was a law of God that was higher than the law of the land; the constant defiance of the law of the land, from Independence, Mo., in 1836 to 1840, down to the present hour, all are due not to lawlessness, but to the fact that there is a higher law that speaks to them.

So, also, from this spirit of authority growing out of revelation, and without that they had not the right to do it, we know of their institution of courts, sometimes and in some regions exercised more generally than in others, but absolutely exercised, as we know by the official records of the case.

Now, all these things involve and determine Senator Smoot's status, and I am now only outlining the claim as to him.

First, in his attitude toward revelation, to which I have already made reference, and to which the order that I have in mind to pursue will make it necessary for me to refer again.

Second. His integral partnership in the hierarchy. He is not an independent person. No individual member of the hierarchy is independent. They are a unit. But of that I will speak further on.

His acts of omission and commission. Different views will be taken as to the extent of his duty, as well as of the extent of his power. But we do know what his relation is and was to the Cluff incident—the president of the Brigham Young University, an institution in which there were a thousand young people of both sexes—wherein Senator Smoot, a trustee and member of the executive committee, if he did not have knowledge, said he had reason to believe that the president of that institution was not only a polygamist, but that he had taken another plural wife, the daughter of a high official of the church, as recently as 1899, and he permitted him—that is to say, he made no objection, and made no investigation—this new polygamist, as well as old polygamist, to remain at the head of that institution, and then when he retired he voted or consented to, and now approves of, the election of another polygamist in his place; his participation since this case commenced in the election of Penrose, a polygamist, to the apostleship to succeed one who was not a polygamist; his relation to Joseph F. Smith, whom he voted to make the president of the church, and whom he has sustained regularly ever since, and also the other apostles.

Next, his determination not to interfere with polygamists, his statement not only that he has not complained of it, that he has not disapproved of it, that he has not criticised his associates in the hierarchy, but also that he will not, and does not intend to, speak to them or to take any steps toward seeing that they, his associates in this close institution, should either be prosecuted or disciplined in the church, whose rules they violate.

His attitude with respect to this endowment ceremony, his refusal to disclose what it was, and his statement made here in the presence of this committee that he could imagine nothing that could induce him to reveal it, not even the Senate, not even the courts, not even the power of the law.

[1] See arguments in the Smoot case, Washington, Government Printing Office, 1905.

Mr. Tayler then proceeded to discuss the method of reaching Mr. Smoot:

I do not need to say to this committee that the power of the Senate on any subject within its general scope is exceedingly broad. There is no limitation upon its power except that which the Constitution imposes, and the Constitution imposes very few limitations. It imposes absolutely no conditions upon the power of the Senate respecting the matter of the elections, returns, and the qualifications of its members. It is the sole judge of all questions which, within the Senatorial mind, may be encompassed within that inquiry. It does limit the power of expulsion by requiring that two-thirds of the members shall concur in such a motion. The constitutional provision giving the power to expel is very peculiar, and has given rise to much discussion since the institution of the Government. I myself have very decided convictions upon the meaning of that provision, and I do not think there ought to be any great difficulty in construing it. The language is:

"Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

Now, if we construe that according to the ordinary rules which apply to the construction of the English language, we of course take it all together. The context relates to the words "with the concurrence of two-thirds expel a member;" and I have always assumed that the power to expel referred to that conduct which the Senate could carry on respecting a member who had a right to be there, whose title there was unquestioned, and for something that he did, or for some status in which he was while a Senator. I think that is the only sound construction of that clause in the Constitution. It has never had another construction, in fact, by the acts of the Senate.

No Senator has ever been expelled, no Member of the House has ever been expelled, except for some act done by him while a Senator or Representative, or relative to his functions as a Senator or Representative; and I think no serious effort was ever made to expel for any other reason than that.

In the present case the power of expulsion could be invoked, because the claim is made that the status of Senator Smoot, his relation to this law-defying hierarchy, his own attitude toward law, the view that he takes of his capacity to receive revelations from Almighty God, all indicate a present status that, if necessary, brings it within the power of the Senate to expel. But if what I have said concerning Senator Smoot be true, that status and that state of mind—that personal relation that he must sustain, if he understands himself, to law and respect for law—of course preceded his entrance into the Senate and is a part of his constitutional temperamental make-up.

The broad power of the Senate is that it is the judge of the elections, returns, and qualifications of its own members. We have heard a good deal of talk about the Constitution making three qualifications for membership in either House; that one must be an inhabitant of the district from which he is elected; that he must be a citizen of the United States, and must be of a certain age. That is true. Those three things must exist.

Beyond that legislation is vain. Congress can add no qualifications, can take none away, for one Congress can not limit the power of another Congress. The Constitution has done the limiting. But that is very far from denying that under the constitutional power of each House to be the judge of the elections, returns, and qualifications of its members either House may not upon proper occasion define and declare ineligibility or disqualification in one who seeks to enter the body, or who, having entered it, is charged with want of eligibility or qualification. That occurs constantly in the House, where elections are contested for various reasons—sometimes for invalidity in the election itself; sometimes for want of qualification in the elected himself. But always the question is answered by the House to which it is put, controlled only by the general provision of the Constitution that makes it the judge.

Suppose it were true that Senator Smoot was a polygamist? If a polygamist, he would have no other relation to his seat—he could not be looked upon by the Senate in any other light—than as a lawbreaker or as a defier of law. So, continuing the use of that expression, if Senator Smoot were in law to be defined as a lawbreaker, or a defier of law, what would be the duty of the Senate? What would he be? Would he be merely the subject of expulsion, assuming this defiance to have continued, to have commenced back of his election, back of his entrance into the Senate, the condition that exists now being a condition that antedated his entrance here? The acts that he thus committed, the status that he thus sustained toward law, would, according to my view of it, render him ineligible to become a member of the legislative body. I do not think that any man who came marching down the aisle of the Senate to be sworn in, proclaiming himself a lawbreaker, if that were possible, would have the right to be sworn in, or, being sworn in, could not be ejected by a majority vote. The Senate would

be the judge of the qualifications of its members; and it would say then, as the House has said in more cases than one, and which neither body has ever declared that it had not the right to say, that the time to settle that question was when he thus presented himself.

Senator BEVERIDGE. You asked for interruptions from members of the committee?

Mr. TAYLER. Yes.

Senator BEVERIDGE. Do I understand your contention at this point to be—and I imagine it is very important—that if Senator Smoot is not legally a member of the Senate, then a majority of the Senate may determine. If he is legally a member of the Senate, then all questions affecting his expulsion would require two-thirds. Is that the contention?

Mr. TAYLER. No, not exactly, Senator. When one is sworn in, no matter what may be the infirmity in his title as later developed by testimony, he has his seat. He is a Senator.

Senator BEVERIDGE. He is a member?

Mr. TAYLER. He is a member; but the same cause that would justify his exclusion, if all the facts were known and the Senate in full knowledge of its power had acted before he took his seat, will suffice to exclude him or declare his seat vacant by a majority vote after he has taken his seat.

Senator BEVERIDGE. In other words, if these facts had been known at the time and the contest had been raised before he took the oath, it is conceded that under such circumstances a majority would have been competent to act. Now, if those facts are developed later on, do you contend that although he is a member technically, nevertheless a majority still is competent to act?

Mr. TAYLER. Undoubtedly. The House does it every session. Suppose it should appear today that Senator Smoot was not a citizen of the United States, his seat could be declared vacant by a majority vote. Expulsion would not be the method.

Senator BEVERIDGE. That notwithstanding the fact that he is technically a member—

Mr. TAYLER. Actually a member.

Senator BEVERIDGE. Let me state my question.

Mr. TAYLER. Yes.

Senator BEVERIDGE. The two-thirds rule does not operate. Is that your contention?

Mr. TAYLER. Undoubtedly.

Senator BAILEY. Permit me to interrupt you here. The qualifications which the two Houses are authorized to judge of are the qualifications laid down in the Constitution. In other words, the Constitution provides that "no person shall be a Senator who shall not have attained to the age of 30 years and been nine years a citizen of the United States, and who shall not when elected be an inhabitant of that State for which he shall be chosen." As I have always understood it, that provision fixes the qualifications of a Senator, and it is not competent either to add to these qualifications or to subtract from them and that when the two Houses are authorized to judge of the elections, returns, and qualifications of their members, it has reference to the questions of age, citizenship, and residence within the State.

Mr. TAYLER. No. If there is any subject upon which I have a decided conviction it is on that—that the constitutional provision does not confine the inquiry of either House to the question as to whether the member is qualified in the three respects which the Senator from Texas has suggested.

Senator BEVERIDGE. Then why did the Constitution enumerate those? If the Constitution leaves it open for either House to determine something in addition to those, why did it enumerate these at all? Why did it not leave it all open?

Mr. TAYLER. That is a long argument. But, for instance, the Constitution does have other qualifications. Although it proceeds to set out in the first section that Representatives and Senators shall have attained a certain age, and have qualifications with respect to citizenship and inhabitance, yet the Constitution in other places shows that those three were not intended to be the only qualifications required. For instance, it says that no test oath shall be required. Why should the Constitution have such a provision in it if it had already exhausted the subject?

Senator BEVERIDGE. If the Constitution leaves it open with reference to other qualifications than those enumerated, and which have been read, why did it not leave it open with reference to all the qualifications if it meant that either House might enlarge upon the qualifications which have just been read?

Mr. TAYLER. My answer in the first place is that it did not do that. It goes on to say in another part of the Constitution that some other certain things shall not be required to qualify a person to become a member of either House.

Senator BEVERIDGE. Adding those things specifically enumerated elsewhere in the Constitution to these, the question still is, Why, if the Constitution enumerates some things and meant to leave other things open to the sense of the Senate, it should have enumerated any?

Mr. TAYLER. I think I have answered it by saying—

Senator BEVERIDGE. All right.

Mr. TAYLER. It proceeds to enumerate the three different qualifications upon which it is said we ought to base our argument, and we find that twice thereafter, once with respect to holding other offices and once with respect to taking an oath, it did not do so. I do not think the Constitution is to be construed as though men wanted the Senate of the United States or the House to be bound in some Procrustean bed that would not permit it to live. Is it not an institutional question that the body should have some control over the subject of its membership?

Senator BEVERIDGE. It may be.

Mr. TAYLER. Suppose that a maniac walked down the aisle to be sworn in. Suppose he was there. Suppose it was not a case of expulsion at all. Suppose that he was a traitor, known to be a traitor, with respect to whom it had been determined within the constitutional method that he was guilty of treason. Is it to be said that, although he possessed every constitutional qualification, nevertheless he is not disqualified to be a member of the Senate?

Senator BAILEY. You do not mean to say that the Senate could not protect itself in a case of that kind without raising the question of qualification, as we understand it in the Constitution?

Mr. TAYLER. I do not know how it could.

Senator BAILEY. It could expel him provided it could obtain the two-thirds.

Mr. TAYLER. Of course it could. But why should it require two-thirds of the Senate to keep out a maniac or a traitor?

Senator BAILEY. And it could expel him as being unfit for or incapable of performing the duties of his office. But I will ask you this question: Do you think that Congress could provide that hereafter no person shall be chosen a Senator who had ever been convicted or who had ever been accused of any crime?

Mr. TAYLER. No. Congress is absolutely without power—

Senator BAILEY. It, then, could not by statute add to those qualifications?

Mr. TAYLER. Not at all.

Senator BAILEY. But it can by a vote—

Mr. TAYLER. Of course not Congress, if the Senator please, but the House into which the Member comes; each House, but not Congress.

Senator BAILEY. You think it would be competent for one House to establish with respect to its Members a rule of exclusion that the two Houses could not establish by law?

Mr. TAYLER. Undoubtedly, because when the Senate, for instance, establishes a qualification for its Members it establishes it for that Congress alone—that is to say, for that session, for that Senate.

Senator BAILEY. Is it not compelled to establish those qualifications under the constitutional provision under the protection of which every man comes to the House or the Senate?

Mr. TAYLER. Undoubtedly.

Senator BEVERIDGE. Narrowing the question from Congress to either House, it is competent for the Senate to make rules, which it does respecting many things. It is competent for the Senate to pass a rule for its own government and guidance that no man who has ever been accused of any crime shall be permitted to take the oath?

Mr. TAYLER. The Senate whose term expires on the 4th of March has no more power to control the action of the Senate that begins on the 4th of March than I have— not a particle more.

Senator BEVERIDGE. The Senate is a continuing body.

Mr. TAYLER. I understand it is a continuing body.

Senator BEVERIDGE. Is it not like the House.

Mr. TAYLER. But the next Senate can undo that.

Senator BEVERIDGE. There is no next Senate. The Senate is a continuing body.

Mr. TAYLER. I understand that.

Senator BEVERIDGE. To narrow the question put to you, do you think it is competent for the Senate to establish such a rule, and that it would be effective while it lasts?

Mr. TAYLER. Undoubtedly, because when that rule was not overthrown by the succeeding Senate

it would continue by implication to be its rule. But the Senate can not make a rule to-day which it can not undo tomorrow. It can not make a rule now which it can not undo at 1 o'clock on the 4th of March. It is not law. Of course the two Houses can not pass laws laying qualifications, because the two Houses have no power at all over the constitution of the membership of succeeding Congresses except as to the number. But each House is in control of the subject of its own Members.

Senator PETTUS. Mr. Chairman, I most respectfully ask that this argument may be allowed to be made by counsel. We can get no benefit if it is to be a debate between the members of the committee and the counsel on the floor. There are places where counsel are not allowed to make their arguments to the court, but must make it with the court. Whenever counsel gets in that fix he is in a bad situation.

Senator BAILEY. It may be that some members of the committee are entirely satisfied without having their minds enlightened. I do not happen to be one of that kind.

I really am trying to ascertain just how far we can go, and my opinion was not that of the counsel, and I thought if the counsel could convince me that on the question of qualifications we could proceed outside of the Constitution it might make a difference in my opinion.

But I will conform to the wishes of my senior, with this statement, that when counsel replied to me that the Constitution treated these as not the only qualification and then provided that no test oath should ever be required, Mr. Tayler will, of course, recognize that that did not apply merely to Members or Senators. It applied to everybody, and therefore could not have been incorporated in the provision with respect to Senators. It declares, toward the end of the Constitution, that—

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution, but no religious test shall ever be required as a qualification to any office or public trust under the United States."

It looks like that did not exactly make a qualification, but excluded a disqualification.

The CHAIRMAN. The Chair will state that Mr. Tayler at the outset—possibly the Senator from Alabama was not then here—invited interruptions upon any point where members of the committee might desire further explanation, and the Chair thinks interruptions were entirely in order. Of course, if they were continued, they might consume the entire hour. But with that the committee has nothing to do; and it certainly will serve to enlighten the committee upon these points about which there may be an honest difference of opinion.

Senator BEVERIDGE. I should like to state, if I may, before Mr. Tayler proceeds, that Mr. Tayler asked the members of the committee specifically to ask any questions, and said he did so because he thought it would tend to clarify the case and save time. I think, so far as I am concerned, I shall have no other questions to ask Mr. Tayler.

Mr. TAYLER. Of course it has given me pleasure to be interrupted. There is no subject that I should like to talk on more than the one about which I have just been inquired of, because there is not any subject on which I have talked as much as I have on it.

Senator BAILEY. I remember that question was up when we were both Members of the House.

Mr. TAYLER. Yes, sir.

Senator BAILEY. I did not agree with you then.

Mr. TAYLER. I recall the fact.

Senator BAILEY. And I voted the other way.

Mr. TAYLER. I was not surprised at the question of the Senator from Texas, for I knew that he did not agree with me at that time.

I may, perhaps, ask the indulgence of the committee, in view of these questions, that I may, in my argument as printed, elaborate this question by making some extracts from a very full discussion of it which is in the argument that I made in the Roberts case. Perhaps, historically, it would be better that it be inserted.

Senator FORAKER. I wish to make a remark at this point, not to interrupt you or unduly take the time of the committee. I understand your proposition to be that, notwithstanding the grounds of disqualification enumerated in the Constitution, if when a Member has been elected and presents himself to be sworn in it be manifest that he is a maniac or a lunatic, he may be, on that ground, excluded?

Mr. TAYLER. Yes.

Senator FORAKER. For want of qualification?

Mr. TAYLER. For want of qualification or for a crime. My argument in the Roberts case cites a large number of constitutional authorities on that proposition.

Senator KNOX. In order to get your view absolutely I think there should be added to the question of Senator Foraker this: By what vote may he be excluded?

Mr. TAYLER. By a majority vote.

Senator BEVERIDGE. That is, in the case you have stated, when he presents himself?

Mr. TAYLER. Yes.

Senator BEVERIDGE. Suppose later on it should develop that he is a lunatic?

Mr. TAYLER. Of course, if we consider that for a moment the logical and inevitable conclusion from it is that that which may be done before one enters may be done after he comes in. That which justifies exclusion before getting rid of him afterwards.

Senator BEVERIDGE. By the same method?

Mr. TAYLER. By the same vote; by the same method.

Senator BEVERIDGE. My mind does not follow that.

Mr. TAYLER. Just as is done in the House.

Senator FORAKER. That is, his position would not be bettered any, your contention is, by having been given his seat?

Mr. TAYLER. Not at all. The question of right in him and of power in the Senate is precisely the same in either case. Of course if the thing complained of occurred after taking his seat, then it would not be a case of exclusion, but of expulsion.

Another observation on that which I leave with the committee to work out in its own way is that which was made by Jeremiah Wilson, who was the counsel of the Mormon Church and appeared for it in many of its cases. He made an especially full and able argument in one of the applications made by Utah for admission. This pamphlet is entitled "Admission of the State of Utah, 1889," and in connection with the hearing a large number of people bore testimony or made arguments, and among those who made arguments was Jeremiah M. Wilson. The subject of obedience to the constitutional provision that was to go in was up. This is not exactly that, but it is analogous to it. He then said—

The CHAIRMAN. May I call your attention to the case of Philip F. Thomas?

Mr. TAYLER. I have it here.

The CHAIRMAN. It is found on page 133 of the Compilation of Senate Cases. There a party was excluded because his son had taken up arms against the Government of the United States, and the party seeking admission to the Senate had contributed $100 in support of his son and in encouragement of his entering the rebellion. The Senate refused to admit him. You will come to that later?

Mr. TAYLER. I will refer to it right now. Philip Thomas had been elected to the Senate from Maryland, and there was a very elaborate debate in March, 1867. The charge made against him was that he was disloyal, and therefore incapable of taking the test oath which had been provided in the act of July, 1862. A resolution was then adopted and under the provisions of it he was excluded from the Senate because he had voluntarily given aid, countenance, and encouragement to persons engaged in rebellion. The vote on the question of his exclusion was 27 to 20. Among those voting in the negative was Lyman Trumbull, but he voted in the negative because he thought the proof of disloyalty was unsatisfactory.

The CHAIRMAN. The evidence in the cause of Thomas was that his son had entered the Confederate service, and his father had contributed $100.

Mr. TAYLER. I do not attach so much importance to those cases growing out of the war as I do to those which came under circumstances when passion was less effective in dispelling reason.

Senator FORAKER. In the Thomas case he was denied his seat.

Mr. TAYLER. Yes; he was denied his seat.

Senator FORAKER. He was not allowed to take his seat?

Mr. TAYLER. He was not allowed to take his seat.

Senator BEVERIDGE. He was not expelled. He did not become a Member.

Mr. TAYLER. My contention is that the Senate does not lose its rights because a man happens to get in whom it might have excluded for conditions existing prior to that time. If ineligibility or other cause that justified his exclusion existed, the same method and the reason would apply after he got in.

The CHAIRMAN. There was no question in the Thomas case that he was of a proper age, a citizen of the United States, and a resident of the State. He had all the enumerated constitutional qualifications.

Mr. Waldemar Van Cott, arguing for Mr. Smoot, discussed this subject:

The contention has no merit that Senator Smoot is subject to be expelled by a majority vote.

The Federal Constitution, Article 1, section 4, provides "Each House may * * * with the concurrence of two-thirds, expel a Member."

To give proper meaning to the above provision, it is best to inquire as to the motive that induced the constitutional fathers to insert this clause. In those early times there was considerable jealousy among the different States—that one State should not gain an advantage over another in the matter of representation; in other words, each State wished to protect its rights in the National Government, and to accomplish that end insisted upon a two-thirds vote to expel. If the provision had been that a majority might expel, then the States might the more easily be deprived of their representation, as combinations, corrupt or otherwise, could be formed to expel a member. A majority vote might be successful, while a two-thirds vote would probably be unsuccessful. Therefore, it is reasonable to assume that the two-thirds rule was inserted in the Constitution so as to guard the more carefully each State's representation. This idea has been expressed by the Supreme Court of the United States. In 6 Wheaton, 233, Anderson v. Dunn, it is said:

"The truth is that the exercise of the powers given over their own Members was of such a delicate nature that a constitutional provision became necessary to assert or communicate it. Constituted as that body is, of the delegates of confederated States, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a Representative would indirectly affect the honor or interests of the State which sent him."

From the above quotation it is apparent that the States were jealously guarding their honor and interests by providing that their Representative should not be expelled without the concurrence of two-thirds of the Members of the House in which he was sitting.

In 1 Story on the Constitution, section 837, in speaking of the power to expel, it is said:

"But such a power, so summary, and at the same time so subversive of the rights of the people, it was foreseen might be exerted for mere purposes of faction or party to remove a patriot or to aid a corrupt measure; and it has therefore been wisely guarded by the restriction that there shall be a concurrence of two-thirds of the Member to justify an expulsion."

This subject is very fully discussed in I Story on the Constitution, sections 837 and 838. They are too long, however, to quote in full.

Justice Story refers with approval to the case of John Smith, Senator from Ohio, decided in the United States Senate. This case will be found in the compilation of Senate election cases, from 1789 to 1885, page 934. This case is exactly in point. John Smith was elected Senator from Ohio from October 25, 1803, until he resigned, April 25, 1808. In the statement it appears that certain bills of indictment were found in connection with the Aaron Burr conspiracy in the August before John Smith took his seat in the Senate, the latter date being October 25, 1803. The case is very lengthy. There was a long debate on the resolution to expel. Nineteen voted to expel and ten not to expel, and the syllabus of the case says: "* * * so that, two-thirds of the Senate not concurring therein, he was not expelled." It will be observed that if a majority had been sufficient, John Smith would have been expelled. This case was decided in the Tenth Congress, first session, in 1808.

Keeping carefully in mind the reason for the constitutional provision, it is apparent that it is just as logical to require a two-thirds vote to expel a member for a crime that was committed before taking his seat as there is for a crime committed after taking the seat.

Suppose A commits an offense against the laws of the United States after his election to the United States Senate. In such case Mr. Tayler concedes that it would take a two-thirds vote to expel. Suppose, on the other hand, the same Member had committed the same offense before taking his seat. In that case Mr. Tayler argues that such Senator might be expelled by a majority vote, because the objection existed at the time of taking the seat. The only difference in the two cases is time; there is no difference in reason.

There is a substantive difference between a constitutional ineligibility on the part of a man to be a United States Senator and a mere personal objection, and the two principles should be kept distinct in the mind. Suppose A is elected to the United States Senate and is not a citizen of the United States. In that case there is a constitutional ineligibility. Such person may take the Senatorial oath and take his seat, yet it is evident that such person, while he may be for the time a Senator de facto, he is not

a Senator de jure, because he has not the necessary requirements. In such case it appears entirely reasonable that a majority vote could oust him.

But suppose A is constitutionally eligible to be elected a United States Senator, and is so elected. Further, suppose that A at the time of the election has such personally offensive habits as to be intolerable to decent men. Nevertheless, suppose A presents himself to the United States Senate and takes the oath and enters upon the performance of his Senatorial duties, and then these intolerably offensive habits are discovered. In the latter case the objection to A existed at the time of his election. Who, except Mr. Tayler, would contend in such case that A could be expelled by a majority vote? The constitutional reason that a two-thirds vote shall be required to expel a member applies with full force in such case; in the latter instance the Senators may waive or not the objection to the personal habits of A. Under the Constitution, however, they would not have the power to waive A's constitutional ineligibility, as this in effect would override the Constitution.

Senator Smoot was constitutionally eligible to be a United States Senator at the time of his election. When he took the oath of office and entered upon the performance of his official duties he was still eligible under the Constitution. In argument, however, and objection is made to Senator Smoot for one alleged reason. Even if it were established as true, the United States Senate has the power to ignore it, and to allow Senator Smoot to retain his seat. The United 8tates Senate may do this because it has the power to pass on the qualifications of its own members; but if Senator Smoot were not a citizen of the United States the Senate would not have the power to waive that requirement, and could not waive it, unless it should arbitrarily override the express provision of the Constitution.

Mr. A. S. Worthington, also arguing for Mr. Smoot, said:

I would like to say, as preliminary to the argument in this case, that I have been greatly impressed with the contrast between the proceedings in the case when an officer of the Government is to be impeached by the Senate, or before the Senate, even though he may be an officer so comparatively unimportant as a district judge of the United States, and the proceedings which are provided in case one who is a member of the highest legislative body of this great nation is called to an account. When a district judge is impeached there is a carefully prepared indictment, setting forth exactly what he is to meet, and that he is called to respond in the Senate of the United States, with his counsel, and there the witnesses are heard before the assembled Senate, the presiding officer, as he did the other day, carefully reminding Senators that it is very important that they should all be present and hear the testimony and see the witnesses. And I see that you have carefully provided rules for the conduct of such an investigation as that, and have provided that counsel may be there to make objections, and that if any Senator wishes to ask a question he shall reduce it to writing and it shall be handed to the presiding officer and asked by him; and that if any objection is made to testimony, while the presiding officer shall rule upon it in the first place, it may, upon his motion, or upon the request of any Senator, be submitted to the entire Senate.

Yet, in the case in which a Senator is to be visited, if he be found guilty, with punishment like that which shall be inflicted upon the judge, of being turned out of his office, we find that we are here, as we found, and as Senators have found during the progress of this case, compelled to scramble through a record of nearly three thousand printed pages to find out what the issues are which we are trying, and that, in all probability, if every member of the committee should be asked the question, no two of them would agree as to precisely what the issues are. And we find that, while the testimony has been taken and reduced to print, the great mass of it has been heard by very few Senators, and that even on one occasion there was but one Senator present, the distinguished chairman of this committee, and when he was called out of the room for a moment, he intimated that we might go on in his absence-, which we did not do.

I make this suggestion in no spirit of complaint or fault-finding, but as bringing to the attention of the committee, and I might hope of the Senate, a question of importance, not only in the determination, of this case, but of all like cases hereafter, because Senator Smoot is to be tried and his case decided by a tribunal not one-tenth of which has seen any of his witnesses or heard any of them testify. We all know how exceedingly important it is, in determining what weight shall be attributed to the testimony of a witness, to see him and to hear him. I have in mind some witnesses in this case whose testimony reads as though it might be credible, when I do not believe any Senator who heard the witnesses would believe them for a single moment.

The slightest examination of the record will also show that, unlike, I should suppose, the proceedings in the impeachment of a judge or other officer of the United States, we are practically without rules of evidence, because, as was stated several times in the progress of the case, this is not a trial at all, but an investigation, and the committee has the right to inquire for hearsay evidence, because A may tell that B told him something, and B may say that he got it from C, and so we may lead to the original evidence. When my associate undertook to argue that in that way the record would be filled with matter which might come before members of the Senate who are not lawyers and who would not be able to distinguish between legal and illegal evidence, we were told that was a matter which had become so well settled in the practice of the Senate that we would not be allowed to further argue it.

So that we are here before a great tribunal in which a defendant is called upon to respond to charges so serious that they may evict him from the Senate of the United States—and no greater punishment could be inflicted upon an honorable man, a man with any sense of the proprieties or honors of life—and his counsel are called upon to argue the case for him, upon a record which contains evidence ninetenths of which we believe is not competent and may not be considered, and yet we do not know what may be in the minds of even members of the committee on that subject, much less in the minds of other Members of the Senate who probably have not yet considered it.

Under all these difficulties I proceed to consider the questions which seem to arise in the case, guessing as to some of them and having probable ground as to the others.

Now, in the first place, and at the forefront of this case, there lies a question, which even if I had had the time to prepare for it, I should doubt my ability to properly present it to such a tribunal as this, and I am going to say very little about it in this argument, and that is the question which arises as to the grounds upon which Senator Smoot may be expelled from the Senate at this time, be having been duly admitted to office, and having been sworn in and taken his seat, and as to the grounds in any case, whether they be made as an objection before a Senator is sworn or after he is admitted, upon which the Senate would proceed.

Of course it has the power to proceed upon any ground, but we all assume, as has been done here so far in this discussion, and everybody will assume that the committee and the Senate will act judicially in the matter, and not arbitrarily.

The whole learning on this subject, so far as I have been able to ascertain, is gathered up in two places. One is where my friend, Mr. Tayler, as the chairman of a special committee of the House of Representatives, investigated the question of the right of Brigham H. Roberts to a seat in the House of Representatives, where there was a majority report and a minority report on the questions that were involved there. With that you are all familiar.

There is another case with which Senators may not be so familiar, because it has not found its way into the compilation which I have seen, and that is the case of Roach.

Roach was at one time the cashier of the Citizens' Bank of this city, and it was charged, and apparently never denied, that he had embezzled, while cashier, about $30,000 of the bank's money. His friends or relatives settled with the bank and he was never prosecuted. He went to North Dakota, and after a while he came back as a Senator from that State and was admitted and took his seat without objection. Afterwards, in some way, the question was raised that he should not be entitled to his seat, and great discussion took place then as to whether it was a case in which the Senate had any power to act at all, because it was a crime that he had committed before his election.

That matter was discussed by the leading lawyers of the Senate on both sides, and all the authorities were gone over there, with the result that a resolution to refer the matter to the Committee on Privileges and Elections was never passed upon at all, and he served out his term. (Vol. 25, pt. 1, Cong. Rec., 53d Cong., special sess., pp. 37, 111, 137 to 162.)

I would also like to refer for just one moment to the celebrated case in England of John Wilkes.

Many years ago Wilkes, while a member of the House of Commons, libeled the King and was expelled from the House of Commons for that offense. His constituency immediately reelected him, and the House refused to receive him on the ground that a man who had been expelled was not a fit man to sit there. His constituency sent him back once more, and again the House refused to receive him; he was again sent back, and again the House refused to receive him. So it went on, as I remember, for about fourteen years, when at last the House came to the conclusion that his constituency had a right to be represented in the body, and he was admitted to his seat. Thereupon annually for several

years afterwards he moved that all the previous resolutions of the House to the effect that he was not entitled to have a seat therein should be expunged. Finally that motion was carried; and the clerk of the House, on its table and in the presence of the assembled House of Commons, expunged all the previous resolutions to the effect that a member who represented his constituency could be expelled from his seat because the House at some prior time had adjudicated him to be unfit for his seat. As the resolution of expulsion expressly stated, this was done, not because the orders of the House which were obliterated were in derogation of the rights of Wilkes himself, but because they were "subversive of the rights of the whole body of electors" of England. (Paine on Elections, 872–878.)

And I ask this committee to remember that you have here not merely the question of whether Reed Smoot shall be entitled to retain his seat, but as to the right which a sovereign State—Utah—has in the selection of persons to represent it here, and whether it may be said that for causes which lie back of his election and which were known to his constituents, he shall be expelled.

If Mr. Tayler's present contention on this point should be sustained it would come in the end to this, that instead of the States of this Union having the right to select the men to represent them in the United States Senate they would have the right merely to nominate candidates for the office, who would be admitted only after obtaining the advice and consent of those who were already here.

There is one case, too, in this country to which I wish particularly to direct the attention of the committee. That is the case of George Q. Cannon, a polygamist, who, while a polygamist and living in polygamy, was sent to the House of Representatives as the Delegate of the Territory in the House, and attention being called to the fact that he was a polygamist, it was undertaken to expel him on that ground. The House, by a very large majority, a very few Members voting to the contrary, decided that notwithstanding he was a polygamist and was living in polygamy, the fact that he had been admitted to a seat and was sitting there precluded the House from taking any action in reference to expelling him. That is all set forth with great strength and with approval by Mr. Tayler in the Roberts case, as affording an instance of the danger of letting Roberts take his seat, because then there could not be taken into consideration anything that had happened before his election, and it would require a two-thirds vote to expel him instead of a vote of the majority only.

Mr. Tayler has suggested and argued here that a majority vote only could be required on the ground that the question is as to the qualifications of Senator Smoot, and that you can take into consideration other qualifications than those fixed by the Constitution itself. But when he came to his argument, he urged that you should not allow Reed Smoot to take his seat because of things that have happened since he took his seat—not since the election merely, but since he took his seat, aye, since this inquiry began; and perhaps the part of his argument upon which he laid the most force and strength was that since this investigation began, and since Senator Smoot learned certain things from the testimony of witnesses here, he had not done certain things.

Now, it would be a remarkable thing if this committee of the Senate should come to the conclusion that when the State of Utah selected this man as one of her Senators, and when the Senate admitted him to his seat, he was not qualified, and established it by facts that have happened since he came into the Senate.

No report on this case was made by the committee during the Fifty-eighth Congress.

482. Senate case of Reed Smoot, continued.

While a majority of the Senate committee agreed that Reed Smoot was not entitled to his seat, they could not decide whether he should be excluded or expelled.

Consideration of the qualifications, the lack of which may render a person unfit to remain a member of the Senate.

Summary of protest against Reed Smoot as a Senator and his answer thereto.

A majority of the Senate committee considered Reed Smoot's membership in a religious hierarchy that countenanced and encouraged polygamy a reason for removing him from the Senate.

Reed Smoot's membership in a religious hierarchy that united church and state contrary to the spirit of the Constitution was held by the majority of the Senate committee a reason for vacating his seat.

Convinced that Reed Smoot had taken an oath of hostility to the nation, a majority of the Senate committee held this a reason for vacating his seat as a Senator.

On June 2, 1906,[1] in the Senate, Mr. Julius C. Burrows, of Michigan, said:

Mr. President, I am directed by the Committee on Privileges and Elections to report the action of the committee upon the resolution referred to that committee to inquire into the right and title of Reed Smoot to hold a seat in the Senate of the United States as a Senator from the State of Utah, and to say that the committee reached a conclusion at its last meeting and authorized the chairman to report to the Senate that the senior Senator from Utah is not entitled to a seat in the Senate of the United States. The committee directed the chairman to make a formal report, which will be done some time during the coming week.

An expression of opinion was had by the committee upon what steps would be necessary to take if the report of the committee was adopted by the Senate that the Senator from Utah is not entitled to a seat, and upon that there was a difference of opinion. The committee were divided as to whether it would have to be followed by a resolution to expel the Senator from Utah or whether a declaration that he is not entitled to a seat would be sufficient. That will be a matter, however, for the Senate to determine.[2]

On June 11[3] the formal report was made in the Senate by Mr. Burrows.

A preliminary question as to the authority of the Senate was discussed at length:

Before proceeding to an examination of the protest and answer and the testimony taken by the committee, it may be well to examine, briefly, the authority of the Senate in the premises and the nature and scope of the investigation.

The Constitution provides (art. 1, sec. 5, par. 1) that "Each House shall be the judge of the elections, returns, and qualifications of its own members." It is now well established by the decisions of the Senate in a number of cases that, in order to be a fit representative of a sovereign State of the Union in the Senate of the United States, one must be in all respects obedient to the Constitution and laws of the United States and of the State from which he comes, and must also be desirous of the welfare of his country and in hearty accord and sympathy with its Government and institutions. If he does not possess these qualifications, if his conduct has been such as to be prejudicial to the welfare of society, of the nation, or its Government, he is regarded as being unfit to perform the important and confidential duties of a Senator, and may be deprived of a seat in the Senate, although he may have done no act of which a court of justice could take cognizance.

The report then proceeds to discuss the Senate cases of William Blount, John Smith, Jesse D. Bright, Philip F. Thomas, and also the following English cases:

In the British Parliament the same principle has been recognized in a number of cases and is now fully established.

In the year 1812 Benjamin Walsh was expelled from the House of Commons as "unworthy and unfit to continue a member of this House," on account of said Walsh having been guilty of "gross fraud and

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[1] First session Fifty-ninth Congress.

[2] Seven members of the committee concurred that Mr. Smoot was not entitled to his seat—Messrs. Julius C. Burrows, of Michigan; Jonathan P. Dolliver, of Iowa; Edward W. Pettus, of Alabama; Fred T. Dubois, of Idaho; Lee S. Overman, of North Carolina; James B. Frazier, of Tennessee, and Joseph W. Bailey, of Texas. A minority of five dissented—Messrs. J. B. Foraker, of Ohio; Albert J. Beveridge, of Indiana; William P. Dillingham, of Vermont; Albert J. Hopkins, of Illinois, and Philander C. Knox, of Pennsylvania. While Mr. Bailey concurred in the majority report he did not agree that Mr. Smoot could be excluded, but favored expulsion. Mr. Chauncey M. Depew, of New York, the thirteenth member of the committee, took no part in the decision.

[3] Senate Report No. 4253.

notorious breach of trust," although his offense was one "not amounting to felony." (67 Commons Journal, 175–176.) In that case the chancellor of the exchequer said:

"He could not think that because an act of Parliament did not make a moral crime a legal one the House of Commons should be prevented from taking cognizance of it." (Hansard's Parliamentary Debates, first series, vol. 21, p. 1199.)

In the year 1814 Sir Thomas Cochrane was expelled from the House of Commons for being concerned in a conspiracy to spread the false report that the French army had been defeated, Napoleon killed, and that the allied sovereigns were in Paris, the object to be attained by such false report being "to occasion a temporary rise and increase in the prices of the public Government funds," to the injury of those who should purchase such funds "during such last-mentioned temporary rise and increase in the prices thereof." (69 Commons Journal, 427–433.)

The report then summarizes as follows the protest against the seating of Mr. Smoot, which protest was signed by "eighteen reputable citizens" of Utah.

The protest before referred to against the seating of Mr. Smoot as a Senator from the State of Utah is stated in such protest to be "upon the ground and for the reason that he is one of a self-perpetuating body of fifteen men who, constituting the ruling authorities of the Church of Jesus Christ of Latter-Day Saints, or 'Mormon Church,' claim, and by their followers are accorded the right to claim, supreme authority, divinely sanctioned, to shape the belief and control the conduct of those under them in all matters whatsoever, civil and religious, temporal and spiritual, and who, thus uniting in themselves authority in church and state, do so exercise the same as to inculcate and encourage a belief in polygamy and polygamous cohabitation; who countenance and connive at violations of the State law prohibiting the same, regardless of pledges made for the purpose of obtaining statehood and of covenants made with the people of the United States, and who by all the means in their power protect and honor those who, with themselves, violate the laws of the land and are guilty of practices destructive of the family and of the home."

In support of this protest the protestants make certain charges and assertions, the substance of which is as follows:

1. The Mormon priesthood, according to the doctrines of that church, is vested with supreme authority in all things spiritual and temporal.

2. The first presidency and twelve apostles (said Reed Smoot being one of said twelve apostles) are supreme in the exercise of the authority of the Mormon Church in all things temporal and spiritual. In support of this second proposition instances are given of the interference of the first presidency and twelve apostles in the political affairs of the State of Utah, and quotations at length are given from the declarations of officials in the Mormon Church regarding the authority of the leaders in said church to dictate to the membership thereof concerning the political action of said members.

3 and 4. That the first presidency and twelve apostles of the Mormon Church have not abandoned the principles and practice of political dictation; neither have they abandoned their belief in polygamy and polygamous cohabitation.

5. That the first presidency and twelve apostles (of whom Reed Smoot is one) also practice or connive at and encourage the practice of polygamy, and have, without protest or objection, permitted those who held legislative offices by their will and consent to attempt to nullify enactments against polygamous cohabitation.

6. That the supreme authorities of the Mormon Church, namely, the first presidency and twelve apostles (of whom Mr. Smoot is one), not only connive at violations of the law against polygamy and polygamous cohabitation, but protect and honor the violators of such laws.

The protest further asserts that the leaders of the Mormon Church (of whom Mr. Smoot is one) are solemnly banded together against the people of the United States in the endeavor of said leaders to baffle the designs and frustrate the attempts of the Government to eradicate polygamy and polygamous cohabitation.

The protest further charges that the conduct and practices of the first presidency and twelve apostles (of whom Mr. Smoot is one) are well known to be, first, contrary to the public sentiment of the civilized world; second, contrary to express pledges which were given by the leaders of the Mormon Church in procuring amnesty; third, contrary to the express conditions upon which the escheated property of the Mormon Church was returned; fourth, contrary to the pledges given by the representa-

tives of that church in their plea for statehood; fifth, contrary to the pledges required in the enabling act and given in the State constitution of Utah; sixth, contrary to a provision in the constitution of Utah providing that "there shall be no union of church and state, nor shall any church dominate the State or interfere with its functions;" and seventh, contrary to law. The protest concludes by asking that the Senate make inquiry touching the matters stated in said protest.

This protest is followed by certain charges made by one John L. Leilich under oath, which are in the main of the same tenor and effect as the charges made in the protest, with the additional charge that Mr. Smoot is a polygamist, having a legal wife and a plural wife, and the further charge that Mr. Smoot has, as an apostle of the Mormon Church, taken an oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States Senator."

Mr. Smoot made answer, of which the report says:

To the statements made in the protest and the charges by Mr. Leilich Mr. Smoot made answer, which answer is in the nature of a demurrer to all the charges contained in the protest and to the charges made by Mr. Leilich, except two, namely, that Mr. Smoot is a polygamist and that he is bound by some oath or obligation which is inconsistent with the oath taken by him as a Senator. Both these charges he denies, and further denies, specifically and categorically, the charges made in the protest and by Mr. Leilich.

(1) The majority of the committee in their report first proceed to discuss the nature of the Mormon hierarchy and the encouragement of polygamy and polygamous cohabitation by the Mormon authorities, saying:

The first reason assigned by the protestants why Mr. Smoot is not entitled to a seat in the Senate is, in effect, that he belongs to a self-perpetuating body of fifteen men who constitute the ruling authorities of the Church of Latter-Day Saints, or "Mormon Church," so called; that this ruling body of the church both claims and exercises the right of shaping the belief and controlling the conduct of the members of that church in all matters whatsoever, civil and religious, temporal and spiritual. It is then alleged that this self-perpetuating body of fifteen men, of whom Mr. Smoot is one, uniting in themselves authority in both church and state, so exercise this authority as to encourage a belief in polygamy as a divine institution and by both precept and example encourage among their followers the practice of polygamy and polygamous cohabitation.

That the first presidency and twelve apostles of the Mormon Church are a self-perpetuating body of fifteen men seems to be well established by the testimony of the one most competent to speak upon that subject, the president of the Church of Latter-Day Saints, Mr. Joseph F. Smith, who testifies, as will be seen on pages 91 and 92 of volume 1 of the printed copy of the proceedings in the investigation, that vacancies occurring in the number of the twelve apostles are filled by the apostles themselves, with the consent and approval of the first presidency. * * *

It further appears that any one of the twelve apostles may be removed by his fellow-apostles without consulting the members of the church in general. It is also in proof that the first presidency and twelve apostles govern the church by means of so-called "revelations from God," which revelations are given to the membership of the church as emanating from divine authority. It is also shown that those members of the Mormon Church who refuse to obey the revelations so communicated by the priesthood thereby become out of harmony with the church and are thus practically excluded from the blessings, benefits, and privileges of membership in the church.

It is also well established by the testimony that the members of the Mormon Church are governed in all things by the first presidency and twelve apostles; that this authority is extended to the membership through a series and succession of subordinate officials, consisting of presidents of seventies, presiding bishops, elders, presidents of stakes, bishops, and other officials; that one of the chief requirements by the leaders of the church is that members shall take counsel of their religious superiors in all things whatsoever, whether civil or religious, temporal or spiritual; that the failure to receive and obey counsel in any of these matters subjects the one who refuses to the discipline of the church; that this discipline is administered in the first instance by the subordinate officials, subject to the right to appeal to the higher officials of the church, and ultimately to the first president and twelve apostles. These rules, enforced, as they are, by the discipline of the Mormon Church, constitute the first president and twelve apostles a hierarchy, a body of men at the head of a religious organization

governing their followers with absolute and unquestioned authority in all things relating to temporal and political as well as to spiritual affairs.

The testimony taken before the committee also shows beyond a reasonable doubt that this authority of the first presidency and twelve apostles is so exercised over the members of the Mormon Church as to inculcate a belief in the divine origin of polygamy and its rightfulness as a practice, and also to encourage the membership of that church in the practice of polygamy and polygamous cohabitation. While this is denied on the part of the officials of the church, the truthfulness of the claim of the protestants in this regard is shown by a great number of facts and circumstances, no one of which is perhaps conclusive in itself, but when taken together form a volume of testimony so cogent and convincing as to leave no reasonable doubt in the mind that the truth is as stated by the protestants. It is proved without denial that the Book of Doctrine and Covenants, one of the leading authorities of the Mormon Church, and still circulated by that church as a book equal in authority to the Bible and the Book of Mormon, contains the revelation regarding polygamy, of which the following is a part:

"61. And again, as pertaining to the law of the priesthood: If any man espouse a virgin and designs to espouse another and the first give her consent, and if he espouse the second, and they are virgins and have vowed to no other man, then he is justified—he can not commit adultery, for they are given unto him; for he can not commit adultery with that that belongeth to him and to no one else.

"62. And if he have ten virgins given unto him by this law he can not commit adultery, for they belong to him and they are given unto him; therefore is he justified.

"63. But if one or either of the ten virgins, after she is espoused, shall be with another man, she has committed adultery and shall be destroyed, for they are given unto him to multiply and replenish the earth, according to my commandment, and to fulfill the promise which was given by my Father before the foundation of the world; and for their exaltation in the eternal worlds, that they may bear the souls of men; for herein is the work of my Father continued, that he may be glorified.

"64. And again, verily, verily, I say unto you, if any man hath a wife who holds the keys of this power and he teaches unto her the law of my priesthood as pertaining these things, then shall she believe and administer unto him or she shall be destroyed, said the Lord your God, for I will destroy her; for I will magnify my name upon all those who receive and abide in my law.

"65. Therefore, it shall be lawful in me, if she receives not this law for him to receive all things whatsoever I, the Lord his God, will give unto him, because she did not minister unto him according to my word; and she then becomes the transgressor, and he is exempt from the law of Sarah, who ministered unto Abraham according to the law when I commanded Abraham to take Hager to wife."

It is also shown that numerous other publications of the Mormon Church are still circulated among the members of that church with the knowledge and by the authority of the church officials, which contain arguments in favor of polygamy. The Book of Doctrine and Covenants is not only still put forth to the members of the church as authoritative in all respects, but the first presidency and twelve apostles have never incorporated therein the manifesto forbidding the practice of polygamy and polygamous cohabitation, nor have they at any time or in any way qualified the reputed revelation to Joseph Smith regarding polygamy. And this Book of Doctrine and Covenants, containing the polygamic revelation, is regarded by Mormons as being of higher authority than the manifesto suspending polygamy.

Bearing in mind the authority of the first presidency and twelve apostles over the whole body of the Mormon Church, it is very evident that if polygamy were discountenanced by the leaders of that church it would very soon be a thing of the past among the members of that church. On the contrary, it appears that since the admission of Utah into the Union as a State the authorities of the Mormon Church have countenanced and encouraged the commission of the crime of polygamy instead of preventing it, as they could easily have done.

A sufficient number of specific instances of the taking of plural wives since the "manifesto of 1890,' so called, have been shown by the testimony as having taken place among officials of the Mormon Church to demonstrate the fact that the leaders in this church, the first presidency and the twelve apostles, connive at the practice of taking plural wives, and have done so ever since the manifesto was issued which purported to put an end to the practice.

The report then goes on to cite specific instances as shown in the testimony.

The committee also charged that the Mormon Church had suppressed other testimony, and had denied the committee access to records.

The report continues:

Aside from this it was shown by the testimony, and in such a way that the fact could not possibly be controverted, that a majority of those who give the law to the Mormon Church are now, and have been for years, living in open, notorious, and shameless polygamous cohabitation. The list of those who are thus guilty of violating the laws of the State and the rules of public decency is headed by Joseph F. Smith, the first president, "prophet, seer, and revelator" of the Mormon Church.

The committee cites names in support of this and continues:

These facts abundantly justify the assertion made in the protest that "the supreme authorities in the church, of whom Senator-elect Reed Smoot is one, to wit, the first presidency and twelve apostles, not only connive at violation of, but protect and honor the violators of the laws against polygamy and polygamous cohabitation."

It will be seen by the foregoing that not only do the first presidency and twelve apostles encourage polygamy by precept and teaching, but that a majority of the members of that body of rulers of the Mormon people give the practice of polygamy still further and greater encouragement by living the lives of polygamists, and this openly and in the sight of all their followers in the Mormon Church. It can not be doubted that this method of encouraging polygamy is much more efficacious than the teaching of that crime by means of the writings and publications of the leaders of the church, and this upon the familiar principle that "actions speak louder than words."

And not only do the president and a majority of the twelve apostles of the Mormon Church practice polygamy, but in the case of each and every one guilty of this crime who testified before the committee the determination was expressed openly and defiantly to continue the commission of this crime without regard to the mandates of the law or the prohibition contained in the manifesto. And it is in evidence that the said first president, addressing a large concourse of the members of the Mormon Church at the tabernacle in Salt Lake City in the month of June, 1904, declared that if he were to discontinue the polygamous relation with his plural wives he should be forever dammed, and forever deprived of the companionship of God and those most dear to him throughout eternity. Thus it appears that the "prophet, seer, and revelator" of the Mormon Church pronounces a decree of eternal condemnation throughout all eternity upon all members of the Mormon Church who, having taken plural wives, fail to continue the polygamous relation. So that the testimony upon that subject, taken as a whole, can leave no doubt upon any reasonable mind that the allegations in the protest are true, and that those who are in authority in the Mormon Church, of whom Mr. Smoot is one, are encouraging the practice of polygamy among the members of that church, and that polygamy is being practiced to such an extent as to call for the severest condemnation in all legitimate ways.

THE MANIFESTO A DECEPTION.

Against these facts the authorities of the Mormon Church urge that in the year 1890 what is generally termed "a manifesto" was issued by the first presidency of that church, suspending the practice of polygamy among the members of that church. It may be said in the first place that this manifesto misstates the facts in regard to the solemnization of plural marriages within a short period preceding the issuing of the manifesto. It now appears that in a number of instances plural marriages had been solemnized in the Mormon Church, and, in the case of those high in authority in that church, within a very few months preceding the issuing of the manifesto.

It is also observable that this manifesto in no way declares the principle of polygamy to be wrong or abrogates it as a doctrine of the Mormon Church, but simply suspends the practice of polygamy to be resumed at some more convenient season, either with or without another revelation. It is now claimed by the first president and other prominent officials of the Mormon Church that the manifesto was not a revelation, but was, at the most, an inspired document, designed "to meet the hard conditions then confronting" those who were practicing polygamy and polygamous cohabitation, leaving what the Mormon leaders are pleased to term "the principle of plural marriage" as much a tenet of their faith and rule of practice when possible, as it was before the manifesto was issued. * * *

And one of the twelve apostles has declared the fact to be that "the manifesto is only a trick to beat the devil at his own game." Further than this, it is conceded by all that this manifesto was intended to prohibit polygamous cohabitation as strongly as it prohibited the solemnization of plural

marriages. In the case of polygamous cohabitation, the manifesto has been wholly disregarded by the members of the Mormon Church. It is hardly reasonable to expect that the members of that church would have any greater regard for the prohibition of plural marriage.

The contention that the practice of polygamy is rightful as a religious ceremony and therefore protected by that provision of the Constitution of the United States which declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," ought to be forever set at rest by the repeated decisions of the Supreme Court of the United States. In the case of the Mormon Church *v.* The United States, Justice Bradley, in delivering the opinion of the court, said:

"One pretense for this obstinate course is that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugee of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one on that account would hesitate to brand these practices now as crimes against society and obnoxious to condemnation and punishment by the civil authority."

In the case of Davis *v.* Beason Justice Field, in delivering the opinion of the court, said:

"Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind."

ONE LIVING IN POLYGAMOUS COHABITATION IS IN LAW A POLYGAMIST.

The members of the first presidency and twelve apostles of the Mormon Church claim that there is a distinction between what they term polygamy—that is, the contracting of plural marriages—and polygamous cohabitation with plural wives. But under the circumstances his distinction is little short of ridiculous. As is demonstrated by the testimony, the so-called manifesto was aimed at polygamous cohabitation as well as against the taking of plural wives, and it is the veriest sophistry to contend that open, notorious cohabitation with plural wives is less offensive to public morals than the taking of additional wives. Indeed, it is the testimony of some of those who reside in communities that are cursed by the evils of polygamy that polygamous cohabitation is fully as offensive to the sense of decency of the inhabitants of those communities as would be the taking of plural wives.

And this excuse of the Mormon leaders is as baseless in law as it is in morals. In the case of Murphy *v.* Ramsay, decided by the Supreme Court of the United States and reported in the United States Supreme Court Reports, volume 114, page 15, it was decided that any man is a polygamist who maintains the relation of husband to a plurality of wives, even though in fact he may cohabit with only one. The court further held in the same case that a man occupying this relation to two or more women can only cease to be a polygamist when he has finally and fully dissolved the relation of husband to several wives. In other words, there is and can be no practical difference in law or in morals between the offense of taking plural wives and the offense of polygamous cohabitation. The same doctrine is affirmed in the case of Cannon *v.* United States (116 U. S. Supreme Court Reports, p. 55).

The minority views admit the existence of polygamous cohabitation, but say, after quoting testimony in support of their view:

In other words, the conditions existing in Utah since Reed Smoot became an official of the Mormon Church in 1900 have been such that non-Mormons and Mormons alike have acquiesced in polygamous cohabitation on the part of those who married before the manifesto of 1890, as an evil that could best be gotten rid of by simply tolerating it until in the natural course of events it shall have passed out of existence.

(2) The majority report then proceeds to urge that Mr. Smoot is responsible for the conduct of the organization to which he belongs:

It is urged in behalf of Mr. Smoot that, conceding it to be true that the first president and some of the apostles are living in polygamy and that some of the leaders of the Mormon Church encourage polygamous practices, Mr. Smoot himself is not a polygamist, does not practice polygamy, and that there is no evidence that he has personally and individually encouraged the practice of polygamy by members of the Mormon Church, and that he ought not to be condemned because of the acts of his associates. This position is wholly untenable. Mr. Smoot is an inseparable part of the governing body of the Mormon Church—the first presidency and twelve apostles—and those who compose that organization form a unit, an entirety, and whatever is done by that organization is the act of each and every member thereof, and whatever policy is adopted and pursued by the body which controls the Mormon Church Mr. Smoot must be held to be responsible for as a member of that body. That one may be legally, as well as morally, responsible for unlawful acts which he does not himself commit is a rule of law too elementary to require discussion. "What one does by another he does by himself" is a maxim as old as the common law. And as the first presidency and twelve apostles of the Mormon Church have authority over the spiritual affairs of the members of that church, it follows that such governing body of said church has supreme authority over the members of that church in respect to the practice of polygamy and polygamous cohabitation.

In England in former years and under the canon law, matters of marriage, divorce, and legitimacy were under the jurisdiction of the ecclesiastical courts of the Kingdom, in which the punishment was in the nature of a spiritual penalty for the good of the soul of the offender, this penalty in many cases being that of excommunication or expulsion from the church. (1 Blackstone's Commentaries, 431; 3 Blackstone's Commentaries, 92; 4 Blackstone's Commentaries, 153 and note; Reynolds *v.* United States, 98 U.S., 145, 164–165.) And in later years, while the civil law now prohibits and punishes bigamy, the authorities of every Christian church in this country take cognizance of matrimonial affairs and by the authority of the church in spiritual matters prevent and punish by censure or expulsion any infraction of the rules of the church regarding marriage.

The testimony taken upon this investigation shows beyond controversy that the authority of the first presidency and the twelve apostles of the Mormon Church over the members of said church is such that were the said first presidency and twelve apostles to prohibit the practice of polygamy and polygamous cohabitation by its members and abandon the practice themselves and expel from the church all who should persist in the practice those offenses would instantly cease in that church. And the fact that not a single member of the Mormon Church has ever fallen into disfavor on account of polygamous practices is conclusive proof that the ruling authorities of that church countenance and encourage polygamy.

The conduct of Mr. Smoot in this regard can not be separated from that of his associates in the government of the Mormon Church. Whatever his private opinions or his private conduct may be, he stands before the world as an integral part of the organization which encourages, counsels, and approves polygamy, which not only fails to discipline those who break the laws of the country, but, on the contrary, loads with honors and favors those who are among the most noted polygamists within the pale of that church.

It is an elementary principle of law that where two or more persons are associated together in an act, an organization, an enterprise, or a course of conduct which is in its character or purpose unlawful the act of any one of those who are thus associated is the act of all, and the act of any number of the associates is the act of each one of the others.

An eminent legal authority says:

"Every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties before or afterwards in furtherance of the common design. The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted is that by the act of conspiring together the conspirators have jointly assumed to themselves, as a body, the attribute of individuality so far as regards the prosecution of the common design, thus rendering whatever is done or said by anyone in furtherance of that design a part of the res gestae and therefore the act of all. (2 Greenleaf on Evidence, secs. 93, 94. See also Commonwealth *v.* Warren, 6 Mass., 74; People *v.* Mather, 4 Wend.,

229, 260; People v. Peckens, 153 N. Y., 576, 586, 593; United States *v.*. Goodiing, 12 Wheaton, 459, 469; American Fur Company *v.*. United States, 2 Peters, 358, 365; Nudd et al *v.*. Burrows, 91 U. S., 426, 438 United States *v.*. Mitchell, 1 Hughes, 439 (Federal Cases, No. 15790); Stewart *v.*. Johnson, 3 Har. (N. J.), 87; Hinchman *v.*. Ritchie, Brightley's N. P. (Pa.), 143; Freeman *v.*. Stine, 34 Leg. Int. (Pa.), 95; Spies et al. *v.*. People, 122 Illinois, 1.)"

The case last cited illustrates this principle more forcibly than any of the others referred to. In that case, which is commonly known as "the anarchists' case," there was, as to some of the defendants, very little evidence, and as to others of the defendants no satisfactory evidence that they were present at the commission of the murder with which they were charged, or advised or intended the murder which was committed by an unknown person. But it was proved that the defendants were members of an organization known as the International Association of Chicago, having for its object the destruction of the law and government and incidentally of the police and militia as the representatives of law and government, and that some of the defendants had, by spoken and printed appeals to workingmen and others, urged the use of force, deadly weapons, and dynamite in resistance to the law and its officers.

In denying the motion for a new trial in the anarchists' case the judge who presided at the trial used the following language:

"Now on the question of the instructions, whether these defendants, or any of them, anticipated or expected the throwing of the bomb on the night of the 4th of May is not a question which I need to consider, because the conviction can not be sustained, if that is necessary to a conviction, however much evidence of it there may be, because the instructions do not go upon that ground. The jury were not instructed to find the defendants guilty if they believed they participated in the throwing of that bomb, or advised or encouraged the throwing of that bomb, or anything of that sort. Conviction has not gone upon the ground that they did have any personal participation in the particular act which caused the death of Degan, but the conviction proceeds upon the ground, under the instructions, that they had generally by speech and print advised large classes of the people, not particular individuals, but large classes, to commit murder, and have left the commission, time, and place to the individual will and whim, or caprice, or whatever it may be, of each individual man who listened to their advice and, influenced by that advice, somebody not known did throw the bomb which caused Degan's death." (Century Magazine, April, 1893, p. 835.)

It will be seen by the decision of the court upon the motion for a new trial in the case of Spies et al. *v.*. People that the anarchists were not convicted upon the ground that they had participated in the murder of which they were convicted. Whether they were or were not participants in the commission of this crime was not the main question at issue. They were convicted because they belonged to an organization which, as an organization, advised the commission of acts which would lead to murder.

Of like import is the decision in the case of Davis *v.* Beason, decided by the Supreme Court of the United States in 1889, the decision being reported in volume 133, United States Supreme Court Reports, page 333. At the time of this decision the Revised Statutes of the State of Idaho provided that no person "who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association or otherwise, is permitted to vote at any election or to hold any position or office of honor, trust, or profit within this Territory."

This provision of law the Supreme Court of the United States held to be constitutional and legal. It will be observed that this act disfranchises certain persons and makes them ineligible to any position or office of honor, trust, or profit, not for committing the crime of polygamy, nor for teaching, advising, counseling, or encouraging others to commit the crime, but because of their membership in an organization which teaches, advises, counsels, and encourages others to commit the crime of polygamy. In Wooley *v.*. Watkins (2 Idaho Rep., 555, 566), the court say:

"Orders, organizations, and associations, by whatever name they may be called, which teach, advise, counsel, or encourage the practice or commission of acts forbidden by law, are criminal organizations. To become and continue to be members of such organizations or associations are such overt acts of recognition and participation as make them paxticeps criminis and as guilty, in contemplation of criminal law, as though they actually engaged in furthering their unlawful objects and purposes." (See also Innis *v* Bolton, 2 Idaho Rep., 407, 414.)

It being a fact that the first presidency and the twelve apostles of the Mormon Church teach, advise, counsel, and encourage the members of that church to practice polygamy and polygamous cohabitation, which are contrary to both law and morals, and Mr. Smoot, being a member of that organization, he must fall under the same condemnation.

And the rule in civil cases is the same as that which obtains in the administration of criminal law. One who is a member of an association of any nature is bound by the action of his associates, whether he favors or disapproves of such action. He can at any time protect himself from the consequences of any future action of his associates by withdrawing from the association, but while he remains a member of the association he is responsible for whatever his associates may do.

But the complicity of Mr. Smoot in the conduct of the leaders of the Mormon Church in encouraging polygamy and polygamous cohabitation does not consist wholly in the fact that he is one of the governing body of that church. By repeated acts, and in a number of instances, Mr. Smoot has, as a member of the quorum of the twelve apostles, given active aid and support to the members of the first presidency and twelve apostles in their defiance of the laws of the State of Utah and of the laws of common decency, and their encouragement of polygamous practices by both precept and example.

It is shown by the testimony of Mr. Smoot himself that he assisted in the elevation of Joseph F. Smith to the presidency of the Mormon Church. That he has since repeatedly voted to sustain said Joseph F. Smith, and that he so voted after full knowledge that said Joseph F. Smith was living in polygamous cohabitation and had asserted his intention to continue in this course in defiance of the laws of God and man. He also assisted in the selection of Heber J. Grant as president of a mission when it was a matter of common notoriety that said Heber J. Grant was a polygamist. He voted for the election of Charles W. Penrose as an apostle of the Mormon Church after testimony had been given in this investigation showing him to be a polygamist. It is difficult to perceive how Mr. Smoot could have given greater encouragement to polygamy and polygamous cohabitation than by thus assisting in conferring one of the highest honors and offices in the Mormon Church on one who had been and was then guilty of these crimes. As trustee of an educational institution he made no protest against the continuance in office of Benjamin Cluff, jr., a noted polygamist, as president of that institution, nor made any effort to discover the truth that said Cluff had taken another plural wife long after the manifesto. Nor did he make any protest, as such trustee, against the election of George H. Brimhall, another polygamist, in the place of Benjamin Cluff, jr.

Since his election as an apostle of the Mormon Church Mr. Smoot has been intimately associated with the first president and with those who—with himself—constitute the counsel of the twelve apostles. The fact that many of these officials were living in polygamous relations with a number of wives was a matter of such common knowledge in the community that it is incredible that Mr. Smoot should not have had sufficient notice of this condition of affairs to at least have put him on inquiry. If he did not know of these facts it was because he took pains not to be informed of them. At no time has he uttered a syllable of protest against the conduct of his associates in the leadership of the Mormon Church, but, on the contrary, has sustained them in their encouragement of polygamy and polygamous cohabitation both by his acts (as hereinbefore set forth) and by his silence. In the judgment of the committee, Mr. Smoot is no more entitled to a seat in the Senate than he would be if he were associating in polygamous cohabitation with a plurality of wives.

The minority of the committee take issue with this conclusion:

The testimony on this point is also carefully collated and analyzed in the annexed statement.

It will be found by an examination of that testimony that he has never at any time, and particularly he has not since the manifesto of 1890, countenanced or encouraged plural marriages; but that, on the contrary, he has uniformly upheld the policy of the church, as announced by that proclamation, by actively advocating and exerting his influence to effect a complete discontinuance of such marriages, and that in the few instances established by the testimony where plural marriages and polygamous cohabitation, as a result of them, have occurred since 1890 they have been without any encouragement, countenance, or approval whatever on his part.

As to polygamous cohabitation in consequence of plural marriages entered into before the manifesto of 1890, there is no testimony to show that he has ever done more than silently acquiesce in this offense against law. In view of his important and influential position in the church. this acquiescence might be

regarded as inexcusable if it were not for the peculiar circumstances attending the commission of this offense.

To understand these circumstances it is necessary to recall some historical facts, among which are some that indicate that the United States Government is not free from responsibility for these violations of the law. Instead of discountenancing and prohibiting polygamy when it was first proclaimed and practiced, the Congress remained silent and did nothing in that behalf. While Congress was thus at least manifesting indifference, President Fillmore and the Senate of the United States, in September, 1850, gave both recognition and encouragement by the appointment and confirmation of Brigham Young, the then head of the church and an open and avowed advocate and representative of polygamy, to be governor of the Territory of Utah. When his term of office expired under this appointment he was reappointed by President Pierce and again confirmed by the Senate.

There was no legislation or action of any kind by Congress on this subject until the act of July 1, 1862, which was in language as well as legal effect nothing more than a prohibition of bigamy in the Territories and other places over which the United States had jurisdiction.

After this act for a period of twenty years plural marriages and polygamous cohabitation continued in the Territory of Utah practically unrestrained and without any serious effort of the part of the United States to restrict the same.

Finally, in response to an aroused public sentiment, Congress passed the act of March 22, 1882, by which it prohibited both plural marriages and polygamous cohabitation, but legitimized the children of all such marriages born prior to the 1st day of January, 1883. Under this act prosecutions were inaugurated to enforce its provisions, but it was soon demonstrated that public sentiment was such that only partial and very unsatisfactory success could be secured.

Then followed what is known as the "Edmunds-Tucker Act" of March 3, 1887, by which, among other things, the rules of evidence were so changed as to make it less difficult to secure evidence in prosecutions for polygamy and polygamous cohabitation. Again, by the terms of this act all the children born within twelve months after its passage were legitimized.

This statute was upheld by the Supreme Court of the United States, and efforts to prosecute such offenses were redoubled, with such success that on the 26th day of September, 1890, the then president of the church, Wilford Woodruff, issued what is known as the "manifesto of 1890," forbidding further plural marriages. So far as the testimony discloses there have been but few plural marriages since, perhaps not more than the bigamous marriages during the same period among the same number of nonMormons.

The evidence shows that there were at this time about 2,400 polygamous families in the Territory of Utah. This number was reduced to five hundred and some odd families in 1905. A few of these families may have removed out of the State of Utah, but so far as the testimony discloses the great reduction in number has been on account of the deaths of the heads of these families. It will be only a few years at most until all will have passed away. This feature of the situation has had a controlling influence upon public sentiment in the State of Utah with respect to the prosecutions for polygamous cohabitation since the manifesto of 1890.

Whether right or wrong, when plural marriages were stopped and the offense of polygamy was confined to the cohabitation of those who had contracted marriages before 1890, and particularly those who had contracted marriages before the statutes of 1887 and 1882, the disinclination to prosecute for these offenses became so strong, even among the non-Mormons, that such prosecutions were finally practically abandoned.

It was not alone the fact that if no further plural marriages were to be contracted, polygamy would necessarily in the course of time die out and pass away, but also the fact that Congress having, by the statutes of 1882 and 1887, specifically legitimized the children of these polygamous marriages, it was inconsistent, if not unwise and impossible, in the opinion of even the non-Mormons, to prohibit the father of such children from living with, supporting, educating, and caring for them; but if the father was thus to live with, support, educate, and care for the children, it seemed harsh and unreasonable to exclude from this relationship the mothers of the children.

Such are some of the reasons assigned for the lack of a public sentiment to uphold successful prosecutions for polygamous cohabitation after 1890. It is unnecessary to recite others, for it is enough to say that whatever the real reason or explanation may be, the fact was that after 1890 it became practically impossible to enforce the law against these offenses, except in flagrant cases.

Such was the situation when the Territory applied for admission to the Union and Congress passed the enabling act of July 16, 1894, by which the people of Utah, in order to entitle them to admission into the Union, on terms prescribed by Congress, were required to incorporate in their constitution a proviso that "polygamous or plural marriages are forever prohibited;" not, polygamous cohabitation, it will be observed, but only polygamous marriages. The testimony shows that there was a common understanding both in Congress and Utah that there were not only to be no more plural marriages, but that prosecutions for polygamous cohabitation had become so difficult that there was a practical suspension of them, and that time was the only certain solution of the perplexing problem.

This sentiment has not only ever since continued, but with the constant diminution of the number of polygamous families and the rapid approach of the time when all will have passed away there has come a natural strengthening of the sentiment. The testimony in this respect is set forth at length in the annexed statement, but we make the following quotations in order that it may appear in this summary that there is this common disposition among non-Mormons as well as Mormons.

Judge William McCarthy, of the supreme court of Utah, a non-Mormon and an uncompromising opponent of polygamy, who has held many important offices of trust, among others that of assistant United States attorney for Utah, and who, as such, was charged with the duty of prosecuting these offenses, testified as follows:

"I prosecuted them (offenses of polygamous cohabitation) before the United States commissioners up until 1893, when the United States attorney refused to allow my accounts for services for that kind of work, and then I quit and confined my investigations before the grand jury in those cases."

In explanation of his action he testified—we quote from the annexed statement:

"That he found the press was against the prosecutions; that the public prosecutor, whose attention he invited to the matter, refused to proceed. From this and other facts which came to his knowledge, Judge McCarthy reached the conclusion that the public sentiment was against interfering with men in their polygamous relations who had married before the manifesto."

The minority quote other testimony, including that of Mr. Dubois, one of those concurring in the majority report, as justification for their opposition to the conclusions of the majority on this point.

(3) The majority report next discusses at length the participation in and domination of the Mormon Church in secular affairs, especially in political matters:

A careful examination and consideration of the testimony taken before the committee in this investigation leads to the conclusion that the allegations in the protest concerning the domination of the leaders of the Mormon Church in secular affairs are true, and that the first presidency and twelve apostles of the Church of Jesus Christ of Latter-Day Saints exercise a controlling influence over the action of the members of that church in secular affairs as well as in spiritual matters; and that, contrary to the principles of the common law under which we live and the constitution of the State of Utah, the said first presidency and twelve apostles of the Mormon Church dominate the affairs of the State and constantly interfere in the performance of its functions. The domination by the leaders of the church under their claim to exercise divine authority in all matters is manifested in a general way in innumerable instances.

The right to do so is openly claimed by those who profess to speak in behalf of the church. As late as February 26, 1904, one of the twelve apostles, in a public address, said "that from the view point of the gospel there could be no separation of temporal and spiritual things, and those who object to church people advising and taking part in temporal things have no true conception of the gospel of Christ and the mission of the church."

The method by which the first presidency and twelve apostles of the Mormon Church direct all the temporal affairs of the members of that church under the claim that such direction is by divine authority is by requiring the members of the church in all their affairs, both spiritual and temporal, and especially the latter, to "take counsel." This means that they are to be advised by their immediate superiors. These superiors in turn take their instructions from those above them, and so on back to the point whence most, if not all, these directions emanate-that is, the first presidency and twelve apostles.

The report cites at length instances of this participation in secular affairs, and then says of political domination:

But it is in political affairs that the domination of the first presidency and twelve apostles of the Mormon Church is most efficacious and most injurious to the interests of the State. The constitution of the State of Utah provides "There shall be no union of church and state, nor shall any church dominate the State or interfere with its functions." (Vol. 1, p. 25.) Notwithstanding this plain provision of the constitution of Utah, the proof offered on the investigation demonstrates beyond the possibility of doubt that the hierarchy at the head of the Mormon Church has for years past formed a perfect union between the Mormon Church and the State of Utah, and that the church through its head dominates the affairs of the State in things both great and small. Even before statehood was an accomplished fact, and while the State was in process of formation, and afterwards, during the sessions of the first and succeeding legislatures, it was notorious that a committee appointed by the leaders of the Mormon Church was supervising the legislation of the State.

At about the same time, or shortly prior thereto, it became known throughout Utah that the leading officials of the Mormon Church desired that the voters belonging to that church should so divide on political lines that about one-half should belong to one of the great political parties of the nation and the other half to the other party, leaving a considerable number unassigned to either party, so that their votes could be cast for one party or the other, as might be necessary to further the interests of that church.

It is, of course, intended by the leaders of the church that this influence shall be secretly exerted, and this is in many cases, if not in most cases, easily accomplished by means of the perfect machinery of the church, which has been adverted to, by which the will of the first presidency and twelve apostles is transmitted through ecclesiastical channels, talked over in prayer circles of the high councils of the church, and then promulgated to the members of the church as "the will of the Lord." Notwithstanding this attempt at secrecy, it has for many years been a matter of common knowledge among the people of those States in which the Mormon Church is strongest that political influence is being continually exerted in the matter of State and lower municipal officials. As was said by one of the witnesses who testified on the investigation, "Whenever they indorse a man, he will be elected. Whenever they put upon him the seal of their disapprobation, he will not be."

The report also at this point cites instances at length, and then continues:

Not only is Mr. Smoot one of those by and through whom the political affairs of Utah are dominated, but his election to the Senate was, it is believed, the result of such domination.

When Mr. Smoot concluded to become a candidate for the Senate he was careful to obtain the "consent" of the first presidency and twelve apostles to his candidacy. But this so-called "consent" of the rulers of the church was naturally regarded by the people of Utah, who were familiar with the ways of the Mormon high-priesthood, as being, under the circumstances, equivalent to an indorsement and made it impossible for anyone else to become an aspirant for the same position with any hope of success.

A PRACTICAL UNION OF CHURCH AND STATE.

The fact that the adherents of the Mormon Church hold the balance of power in politics in some of the States enables the first presidency and twelve apostles to control the political affairs of those States to any extent they may desire. Thus a complete union of church and state is formed. This is in accordance with the teachings of the priesthood of the Mormon Church, as promulgated in the writings of men of high authority in the church, to the effect that the church is supreme in all matters of Government as well as in all things pertaining to the private life of the citizen. In one of a series of pamphlets, "On the Doctrines of the Gospel," by Apostle Orson Pratt, it is affirmed:

"The kingdom of God is an order of government established by divine authority. It is the only legal government that can exist in any part of the universe. All other governments are illegal and unauthorized. God having made all beings and worlds has the supreme right to govern them by His own laws and by officers of His own appointment. Any people attempting to govern themselves and by laws of their own making and by officers of their own appointment are in direct rebellion against the Kingdom of God." (Vol. 1, p. 666.)

The union of church and state in those States under the domination of the Mormon leaders is most abhorrent to our free institutions. John Adams declared that the attempt of the Church of England to extend its jurisdiction over the colonies "contributed as much as any other cause to arouse the attention, not only of the inquiring mind, but of the common people, and to urge them to close thinking of the constitutional authority of Parliament over the colonies[2] and to bring on the war of independence. After the colonies had achieved their independence, the complete enfranchisement of the church from the control of the state and of the state from the control of the church was brought about through the efforts of men like Thomas Jefferson and James Madison in Virginia and those of almost equal prominence in other States. And thus the natural desire of the people of this nation for the entire separation of church and state was incorporated in the Constitution of the United States by the first amendment to that instrument.

The right to worship God according to the dictates of one's own conscience is one of the most sacred rights of every American citizen. No less sacred is the right of every citizen to vote according to his conscientious convictions without interference on the part of any church, religious organization, or body of ecclesiastics which seeks to control his political opinions or direct in any way his use of the elective franchise.

In the interest of religious freedom and to protect the State from the influence of the Mormon Church, the framers of the constitution of Utah incorporated in that instrument the provision which has been quoted in a preceding part of this report. That provision of the constitution of Utah has been persistently and contemptuously disregarded by the first presidency and the twelve apostles of the Mormon Church ever since Utah was admitted into the Union. They have paid as little regard to this mandate of the constitution of Utah as they have to the law which prohibits polygamy and the law which prohibits polygamous cohabitation.

The minority say, as to Mr. Smoot's connection with the church:

So far as mere belief and membership in the Mormon Church are concerned, he is fully within his rights and privileges under the guaranty of religious freedom given by the Constitution of the United States, for there is no statutory provision, and could not be, prohibiting either such belief or such membership.

Moreover, having special reference to the Mormons residing in Utah and their peculiar belief, it was provided in the act of Congress passed July 16, 1894, that the people of Utah should provide in their constitution "by ordinance irrevocable without the consent of the United States and the people of said States—

"1. That perfect toleration of religious sentiment shall be secured, and that no inhabitants of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided,* That polygamous or plural marriages are forever prohibited."

In consequence there was embodied in the constitution of the State of Utah a compliance with this requirement, and thereupon the Territory was duly admitted as a State of the Union.

Accordingly, members of the Mormon Church, open and avowed believers in its doctrines and teachings, have been admitted without question to both Houses of Congress as Representatives of the State.

(4) The committee next discuss the oath alleged to be inconsistent with Mr. Smoot's duties as a Senator:

In the protest signed and verified by the oath of Mr. Leilich it is claimed that Mr. Smoot has taken an oath as an apostle of the Mormon Church which is of such a nature as to render him incompetent to hold the office of Senator. From the testimony taken it appears that Mr. Smoot has taken an obligation which is prescribed by the Mormon Church and administered to those who go through a ceremony known as "taking the endowments." It was testified by a number of witnesses who were examined during the investigation that one part of this obligation is expressed in substantially these words:

"You and each of you do covenant and promise that you will pray and never cease to pray Almighty God to avenge the blood of the prophets upon this nation, and that you will teach the same to your children and to your children's children unto the third and fourth generation."

An effort was made to destroy the effect of the testimony of three of these witnesses by impeachment of their reputation for veracity. This impeaching testimony was not strengthened by the fact that

the witnesses by whom it was given were members of the Mormon Church and would naturally disparage the truthfulness of one who would give testimony unfavorable to that church. The testimony of the witnesses for the protestants, before referred to, was corroborated by the testimony of Mr. Dougall, a witness sworn in behalf of Mr. Smoot, and no attempt was made to impeach the character of this witness. It is true that a number of witnesses testified that no such obligation is contained in the endowment ceremony; but it is a very suspicious circumstance that every one of the witnesses who made this denial refused to state the obligation imposed on those who take part in the ceremony.

The evidence showing that such an obligation is taken is further supported by proof that during the endowment ceremonies a prayer is offered asking God to avenge the blood of Joseph Smith upon this nation, and certain verses from the Bible are read which are claimed to justify the obligation and the prayer. The fact that such a prayer, if offered, and that such passages from the Bible are read was not disputed by any witness who was sworn on the investigation. Nor was it questioned that by the term "the prophets" as used in the endowment ceremony reference is made to Joseph and Hyrum Smith.

That an obligation of vengeance is part of the endowment ceremony is further attested by the fact that shortly after testimony had been given on that subject before the committee Bishop Daniel Connelly of the Mormon Church denounced the witnesses who had given this testimony as traitors who had broken their oaths to the church.

The fact that an oath of vengeance is part of the endowment ceremonies and the nature and character of such an oath was judicially determined in the third judicial court of Utah in the year 1889, in the matter of the application of John Moore and others to become citizens of the United States. In an opinion denying the application the court say:

"In these applications the usual evidence on behalf of the applicants as to residence, moral character, etc., was introduced at a former hearing and was deemed sufficient. Objection was made, however, to the admission of John Moore and William J. Edgar upon the ground that they were members of the Mormon Church, and also because they had gone through the endowment house of that church and there had taken an oath or obligation incompatible with the oath of citizenship they would be required to take if admitted. * * *

"Those objecting to the right of these applicants to be admitted to citizenship introduced eleven witnesses who had been members of the Church of Jesus Christ of Latter-Day Saints, commonly called the 'Mormon Church.' Several of these witnesses had held the position of bishop in the church, and all had gone through the endowment house and participated in its ceremonies. The testimony of these witnesses is to the effect that every member of the church is expected to go through the endowment house, and that nearly all do so; that marriages are usually solemnized there, and that those who are married elsewhere go through the endowment ceremonies at as early date thereafter as practicable, in order that the marital relations shall continue throughout eternity.

"On behalf, of the applicants fourteen witnesses testified concerning the endowment ceremonies, but all of them declined to state what oaths are taken, or what obligations or covenants are there entered into, or what penalties are attached to their violation; and these witnesses, when asked for their reason for declining to answer, stated that they did so 'on a point of honor,' while several stated they had forgotten what was said about avenging the blood of the prophets. * * *

"The witnesses for the applicants, while refusing to disclose the oaths, promises, and covenants of the endowment ceremonies and the penalties attached thereto, testified generally that there was nothing in the ceremonies inconsistent with loyalty to the Government of the United States, and that the Government was not mentioned. One of the objects of this investigation is to ascertain whether the oaths and obligations of the endowment house are incompatible with good citizenship, and it is not for applicants' witnesses to determine this question. The refusal of applicants' witnesses to state specifically what oath, obligations, or covenants are taken or entered into in the ceremonies renders their testimony of but little value, and tends to confirm rather than contradict the evidence on this point offered by the objectors. The evidence established beyond any reasonable doubt that the endowment ceremonies are inconsistent with the oath an applicant for citizenship is required to take, and that the oaths, obligations, or covenants there made or entered into are incompatible with the obligations and duties of citizens of the United States." (Vol. 4, pp. 340–343.)

The obligation hereinbefore set forth is an oath of disloyalty to the Government which the rules of the Mormon Church require, or at least encourage, every member of that organization to take.

It is in harmony with the views and conduct of the leaders of the Mormon people in former days, when they openly defied the Government of the United States, and is also in harmony with the conduct of those who give the law to the Mormon Church today in their defiant disregard of the laws against polygamy and polygamous cohabitation. It may be that many of those who take this obligation do so without realizing its treasonable import; but the fact that the first presidency and twelve apostles retain an obligation of that nature in the ceremonies of the church shows that at heart they are hostile to this nation and disloyal to its Government.

And the same spirit of disloyalty is manifested also in a number of the hymns contained in the collection of hymns put forth by the rulers of the Mormon Church to be sung by Mormon congregations.

There can be no question in regard to the taking of the oath of vengeance by Mr. Smoot. He testified that he went through the ceremony of taking the endowments in the year 1880, and the head of the Mormon Church stated in his testimony that the ceremony is now the same that it has always been.

An obligation of the nature of the one before mentioned would seem to be wholly incompatible with the duty which Mr. Smoot as a member of the United States Senate would owe to the nation. It is difficult to conceive how one could discharge the obligation which rests upon every Senator to so perform his official duties as to promote the welfare of the people of the United States and at the same time be calling down the vengeance of heaven on this nation because of the killing of the founders of the Mormon Church sixty years ago.

The minority say on this point:

As to the "endowment oath," it is sufficient in this summary to say that the testimony is collated and analyzed in the annexed statement, and thereby shown to be limited in amount, vague and indefinite in character, and utterly unreliable, because of the disreputable and untrustworthy character of the witnesses.

There were but seven witnesses who made any pretenses of testifying about any such obligation. One of these was shown by the testimony of two uncontradicted witnesses to be mentally unsound. Another, to have committed perjury in the testimony given before the committee on another point. The third was shown by the uncontradicted testimony of a number of witnesses to have a bad reputation for truth and veracity, and to be thoroughly unreliable. A fourth admitted that he had been for years intemperate, and was shown by indisputable testimony to have lost his position on that account, and thereupon and for that reason to have withdrawn from the church and to have assumed such a hostile and revengeful attitude as to entirely discredit him as a reliable witness. The other three witnesses were so indefinite as to their statements that their testimony amounted at most to nothing more than an attempt to state an imperfect and confessedly uncertain recollection.

All that it is attempted to show as to the character of this oath is positively contradicted by Reed Smoot and a great number of witnesses, whose standing and character and whose reputation for truth and veracity are unquestioned, except only in so far as their credibility may be affected by the fact that they are or have been members of the Mormon Church.

Upon this state of evidence we are of opinion that no ground has been established on which to predicate a finding or belief that Mr. Smoot ever took any obligation involving hostility to the United States, or requiring him to regard his allegiance to the Mormon Church as paramount to his allegiance and duty to the United States.

(5) As to the charge that Mr. Smoot was a polygamist, the majority report says:

In the protest signed by Mr. Leilich alone it was charged that Reed Smoot is a polygamist, and that, as an apostle of the Church of Jesus Christ of Latter-Day Saints, commonly called the "Mormon Church," he had taken an oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States Senator." No one appeared, however, to sustain either of these charges. No evidence has been offered in support of either of them, but, on the contrary, both charges were refuted by a number of witnesses.

The minority say:

Aside from his connection with the Mormon Church, so far as his private character is concerned, it is, according to all the witnesses, irreproachable, for all who testify on the subject agree or concede

that he has led and is leading an upright life, entirely free from immoral practices of every kind. He is not a polygamist; has never had but one wife, and has been noted from early manhood for his opposition to plural marriages, and probably did as much as any other member of the Mormon Church to bring about the prohibition of further plural marriages.

In accordance with the above considerations, the majority summarize their conclusions as follows:

The more deliberately and carefully the testimony taken on the investigation is considered, the more irresistably it leads to the conclusion that the facts stated in the protest are true; that Mr. Smoot is one of a self-perpetuating body of men, known as the first presidency and twelve apostles of the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church; that these men claim divine authority to control the members of said church in all things, temporal as well as spiritual; that this authority is, and has been for several years past, so exercised by the said first presidency and twelve apostles as to encourage the practice of polygamy and polygamous cohabitation in the State of Utah and elsewhere, contrary to the constitution and laws of the State of Utah and the law of the land; that the said first presidency and twelve apostles do now control, and for a long time past have controlled, the political affairs of the State of Utah, and have thus brought about in said State a union of church and state, contrary to the constitution of said State of Utah and contrary to the Constitution of the United States, and that said Reed Smoot comes here, not as the accredited representative of the State of Utah in the Senate of the United States, but as the choice of the hierarchy which controls the church and has usurped the functions of the State in said State of Utah.

It follows, as a necessary conclusion from these facts, that Mr. Smoot is not entitled to a seat in the Senate as a Senator from the State of Utah, and your committee report the following resolution:

Resolved, That Reed Smoot is not entitled to a seat as a Senator of the United States from the State of Utah.

The minority declared, in addition to the positions taken above, that—

Reed Smoot possesses all the qualifications prescribed by the Constitution to make him eligible to a seat in the Senate, and the regularity of his election by the legislature of the State of Utah is not questioned in any manner.

And made no recommendation for action.

483. The Senate case of Reed Smoot continued.

The Senate declined to exclude Reed Smoot for alleged disqualifications other than those specified in the Constitution.

The Senate apparently held the view that Reed Smoot might be deprived of his seat only by the two-thirds vote specified by the Constitution for expulsion.

Final arguments in the Smoot case as to what are the constitutional qualifications of a Senator.

The consideration of the resolution declaring Mr. Smoot Dot entitled to his seat proceeded at intervals during the second session of the Fifty-ninth Congress.

On Febniary 14, 1907,[1] Mr. Philander C. Knox, of Pennsylvania, in debating the resolution, said:

Mr. President, the Constitution provides that the Senate shall be the judge of the qualifications of its members; a majority of the Senate can determine whether or not a Senator possesses them. The Constitution also provides that the Senate may, with the concurrence of two-thirds, expel a Member.

I have intentionally referred to the proposed action against Senator Smoot as expulsion. I do not think the Senate will seriously consider that any question is involved except one of expulsion, requiring

[1] Second session Fifty-ninth Congress, Record, p. 2934.

a two-thirds vote. There is no question as to Senator Smoot possessing the qualifications prescribed by the Constitution, and therefore we can not deprive him of his seat by a majority vote. He was at the time of his election over 30 years of age and had been nine years a citizen of the United States, and when elected was an inhabitant of Utah. These are the only qualifications named in the Constitution, and it is not in our power to say to the States, "These are not enough; we require other qualifications," or to say that we can not trust the judgment of States in the selection of Senators, and we therefore insist upon the right to disapprove them for any reason.

This claim of right to disapprove is not even subject to any rule of the Senate specifying additional qualifications of which the States have notice at the time of selecting their Senators, but it is said to be absolute in each case as it arises, uncontrolled by any canon or theory whatever.

Anyone who takes the trouble to examine the history of the clause of the Constitution as to the qualification of Senators must admit that it was the result of a compromise. The contention that the States should be the sole judges of the qualifications and character of their representatives in the Senate was acceded to with this limitation: A Senator must be 30 years of age, nine years a citizen of the United States, and an inhabitant of the State from which he is chosen. Subject to these limitations imposed by the Constitution, the States are left untrammeled in their right to choose their Senators. This constitutional provision secures a measure of maturity in counsel, and at least a presumption of interest in the welfare of the Nation and State.

By another provision—namely, that relating to expulsion—the Constitution enables the Senate to protect itself against improper characters by expelling them by a two-thirds vote if they are guilty of crime, offensive immorality, disloyalty, or gross impropriety during their term of service.

I specify these reasons because I can not imagine the Senate expelling a member for a cause not falling within one of them.

* * * * * * *

I know of no defect in the plain rule of the Constitution for which I am contending. l know of no case it does not reach. I can not see that any danger to the Senate lies in the fact that an improper character can not be expelled without a two-thirds vote. It requires the unanimous vote of a jury to convict a man accused of crime: it should require, and I believe that it does require, a two-thirds vote to eject a Senator from his position of honor and power, to which he has been elected by a sovereign State.

The simple constitutional requirements of qualification do not in any way involve the moral quality of the man; they relate to facts outside the realm of ethical consideration and are requirements of fact easily established. Properly enough, therefore, as no sectional, partisan, or religious feeling could attach itself to an issue as to whether or not a man is 30 years of age, had been a citizen of the United States and an inhabitant of a State for the periods prescribed, the decision as to their existence rests with a majority of the Senate. When, however, a different issue is raised, dehors the Constitution, upon allegations of unfitness, challenging the moral character of a Senator, involving a review of questions considered and settled in the Senator's favor by the action of his State in electing him, then the situation is wholly changed, and a different function is to be performed by the Senate, calling for its proper exercise the highest delicacy and discretion in reviewing the action of another sovereignty.

If I were asked to state concisely the true theory of the Constitution upon this important point, I would unhesitatingly say:

First. That the Constitution undertakes to prescribe no moral or mental qualification, and in respect to such qualifications as it does prescribe the Senate by a majority vote shall judge of their existence in each case, whether the question is raised before or after the Senator has taken his seat.

Second. That as to all matters affecting a, man's moral or mental fitness the States are to be the judges in the first instance, subject, however, to the power of the Senate to reverse their judgment by a two-thirds vote of expulsion when an offense or an offensive status extends into the period of Senatorial service, and such a question can only be made after the Senator has taken his seat.

If to this it is objected that it contemplates admitting a man who may be immediately expelled, I reply that it is hardly proper to adopt a rule of constitutional construction and Senatorial action based upon the theory that the States will send criminals or idiots to the Senate. Besides, it does not seem to me to be conceding much to a State, after it has deliberately and solemnly elected a Senator after the fullest consideration of his merits, to concede on the first blush of the business the State's intelligent and honorable conduct by allowing its chosen representative admission to the body to which he is accredited.

On February 20,[1] Mr. Julius C. Burrows, of Michigan, said:

Under the first head it is insisted that the Senate, in examining into the qualifications of a Senator, is restricted in its inquiry to the question of age, citizenship, and residence, and beyond that the inquiry can not go, and no other qualifications can be imposed. The junior, Senator from Illinois, in his very able speech, said upon this point:

"The power that is given to the Senate under the Constitution is not to create Senators, but to judge of their qualifications. The States create the Senators. The qualifications to be judged are those I have already stated, prescribed in the Constitution itself. If the Senate find those qualifications exist for the applicant for a seat in this body from any given State, then under all precedents such Senator is entitled to take the oath of office and take his place among the Members of this great legislative body."

If such contention can be maintained, that ends the controversy, for no one questions but that the senior Senator from Utah has, in the language of the Constitution, "attained to the age of 30 years, been nine years a citizen of the United States, and is an inhabitant of the State from which he is chosen."

If the possession of these attributes constitutes the "be all and end all" of the qualifications of a Senator, then is the Senate helpless indeed. If this contention be sound, then Joseph F. Smith, the head of this organization to which the Senator belongs, possessing, as he does, the constitutional qualifications of age, citizenship, and residence, would be entitled to admission to this body if elected by the legislature of Utah, and his five wives and forty-three children could witness from the galleries of the Senate his triumphal entry, unquestioned and unopposed, into the membership of this august assembly.

It is impossible for me to give assent to such doctrine, and I have been unable to find it sustained either in reason or upon authority, and the contention is resisted both upon principle and precedent and can, in my judgment, find no warrant in either.

I submit that the provision of section 3, Article 1, was not inserted with the purpose of determining or fixing the qualifications of Senators, but it was ingrafted into the Federal Constitution expressly as a limitation upon the power of the States in making selection of Senators, restrictffig the choice to a certain class of its citizens. It excluded a certain class as being ineligible to the office of Senator. The purpose of it was to correct an evil which had grown up during the years of the Continental Congress and the Congress of the Confederation. It was for the purpose of insuring a national Congress for the new Government to be composed of a body of men of mature judgment, residents of the State or district, and thoroughly American.

Noah Webster said, speaking of the leading principles of the Federal Constitution:

"A man must be 30 years of age before he can be admitted into the Senate, which was likewise a requisite in the Roman Government. The places of Senators are wisely left open to all persons of suitable age and merit, and who have been citizens of the United States for nine years, a term in which foreigners may acquire the feelings and acquaint themselves with the interests of the native Americans."

A brief reference to the facts of history will suffice to show the exigency which called this constitntional provision into existence.

Under the Continental Congress and the Congress of the Confederation there were no restrictions as to age, residence, or citizenship, except such as the various colonies or States saw fit to impose, and which were as varied as the number of colonies or States, and of the 348 different individuals from the thirteen colonies who held seats in the Continental Congress and the Congress of the Confederation from 1774 to 1788, the ages of the delegates varied from 16 to 76 years. Charles Pinckney, of North Carolina, a member of the Continental Congress, was but 19 years of age when elected to that body, and James Sykes, of Delaware, also of the Continental Congress, was only 16 years old when elected to Congress, and twenty-five members of that body were under 30 years of age.

With these examples before them, it was deemed wise to place some restrictions in the Federal Constitution upon the power of the States in their choice of Senators and Representatives to the Federal Congress.

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I repeat, therefore, that this provision of the Constitution was evidently intended to be nothing more than a statement of a few of the many disqualifications which would or might render one unfit to hold the office of a Senator and to make ineligible all persons laboring under the disabilities named, and leaving the question of qualifications in other respects to be determined by the Senate according to the

[1] Record, pp. 3418, 3419, 3420.

facts in each particular case, under the right conferred by the Constitution to judge of the qualifications of its own members. To contend otherwise would be to assert that the fathers who framed our Constitution deliberately intended that an idiot, a lunatic, an enemy of the Government, or a notorious criminal must be allowed a place in the Senate if of proper age, residence, and citizenship. I submit that no such interpretation of that clause of the Constitution is justifiable or reasonable, and that the provision in question must be interpreted as being a limitation, to a certain extent, upon the powers of the State in choosing members to the Senate. This contention, I insist, is sustained not only in reason, but upon authority.

Mr. Burrows then referred to the cases of Niles, Thomas, and Roberts; and continued:

Mr. President, it is contended in behalf of Senator Smoot that even if it were to be conceded that the Senate would have a right to inquire into the qualifications of Senator Smoot as regards his past history, his associations, his acts, and his fitness to be a Senator from the State of Utah, still Mr. Smoot, having taken the oath of office as a Senator, can not be excluded from the Senate or in any way be removed from this body except by expulsion, requiring a two-thirds vote. It is proposed, as I understand, to amend this resolution so as to require a two-thirds vote by inserting, after the word "Resolved," the words "two-thirds of the Senate concurring," and thereby to erect an additional barrier behind which the Senator from Utah may take refuge.

It is admitted that if the status of Senator Smoot at the time he presented himself for admission in this body would have justified his exclusion, then the same status or condition continuing until this time would justify his removal. However, I have no desire to discuss at length that question, because to my mind it is not material.

In the Senate, whenever one has presented himself claiming the right to a seat in that body with credentials which upon their face were fair and regular in form but whose right to a seat was challenged for any reason, the almost uniform practice has been to admit him to a seat and inquire into his qualifications afterwards. Such was the course pursued in the case of Albert Gallatin, of Pennsylvania, in 1793; of Asher Robbins, of Rhode Island, in 1833; of James Shields, of Illinois, in 1849 1 of James Harlan, of Iowa, in 1853, and in a great number of other cases which might be cited.

On the same day[1] the question recurred on the resolution recommended by the committee:

Resolved, That Reed Smoot is not entitled to a seat as a Senator of the United States from the State of Utah.

Mr. Albert J. Hopkins, of Illinois, proposed a substitute amendment, to strike out all after the word "Resolved" and insert a new text, so that it should read as follows:

Resolved (two-thirds of the Senators present concurring therein), That Reed Smoot is not entitled to a seat as a Senator of the United States from the State of Utah.

The amendment of Mr. Hopkins was agreed to—yeas 49, nays 22.

Thereupon Mr. Edward W. Carmack, of Tennessee, proposed a substitute as follows:

Resolved, That Reed Smoot, a Senator from Utah, be expelled from the Senate of the United States.

This substitute was disagreed to—yeas 27, nays 43.

Then the resolution of the committee as amended on motion of Mr. Hopkins was disagreed to—yeas 28, nays 42—two-thirds not voting in favor thereof.

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[1] Record, pp. 3428–3430.

484. Discussion by a House committee as to the power of the House to impose qualifications not enumerated in the Constitution.—On February 27, 1899,[1] Mr. Adin B. Capron, of Rhode Island, submitted a report from the Committee on Election of President, Vice-President, and Representatives in Congress, which contained this discussion:

If the constituted authorities of a State fail, either willfully or after the exercise of every legal process, to enforce and maintain its laws against polygamous or plural marriages or unlawful cohabitation, and such failure results in the election to Congress of a person who is a polygamist, but who is qualified under the Constitution of the United States, the question of eligibility would not thereby be necessarily raised, but it could at least serve to show the lack of power on the part of each House of Congress to deal with such a condition, except in one way, namely, by admission to membership followed by expulsion.

The Constitution, Article I, section 5, constitutes each House the judge of the "elections, returns, and qualifications of its own members." The qualifications of Senators and Representatives are prescribed by the Constitution as follows:

"No person shall be a Representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." (Art. I, sec. 2, par. 2)

"No person shall be a Senator who shall not have attained to the age of thirty years and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen." (Art. I, see. 3, par. 3.)

One notable case only need be cited to show the operation of those provisions—that of Albert Gallatin, of Pennsylvania, whose election was declared void by the Senate on the ground that he had not been a citizen of the United States the term of years required as a qualification to be a Senator of the United States. (Senate Journal, first session Third Congress, p. 37.)

It will be seen that, the qualifications of Senators and Representatives being fixed by the Constitution, it is only within the power of each House to determine whether a person otherwise entitled to a seat possesses those qualifications and no more. Should the person possess those qualifications and the question be raised that he is ineligible in another or other respects—for instance, that he is a polygamist in violation of the laws of his State—is a question which it is generally conceded (the case being hypothetical and, we believe, never having been actually raised) neither House would have the right to entertain. The case of George Q. Cannon *v.* Allen G. Campbell, in the Forty-seventh Congress, presents features resembling the hypothetical one stated, but that case originated in the Territory of Utah, over which the laws of the United States extended, while in the one under consideration we are dealing with the States and the limitations placed upon Congress by the Constitution to judge of the qualifications of its members duly elected by the States.

In the case of Cannon *v.* Campbell the conclusion was reached that the contestant having admitted that he has plural wives and that he teaches and advises others to the commission of that offense, he should be excluded from the House, and contestant having only received a minority of the votes cast was not elected, and the seat was declared vacant. (See House Report 559 and House Journal, first session Forty-seventh Congress, p. 1074.)

The distinction should be clearly noted between this case and one growing out of a State.

In a hypothetical case of the kind presented above what could either House of Congress legitimately do? Your committee do not feel it is their right, even if they were so disposed, to volunteer an answer to the question. The author of the so-called "Edmunds Act," an acknowledged constitutional lawyer of great ability, recently expressed the opinion in the press that in such a case the House would have to admit the Representative-elect to membership and then, if it saw fit, expel him, as permitted by Article I, section 5, paragraph 2 of the Constitution. This would be the only power left to either House, the exercise of which would require the concurrence of two-thirds. (For action by both Houses expelling members see cases of Jesse D. Bright, John C. Breckinridge, Trusten Polk, and Waldo P. Johnson, Senate Journal, second session Thirty-seventh Congress, pp. 23, 97, 98, 176; and John B. Clark and John W. Reid, House Journal, second session Thirty-seventh Congress, pp. 8, 75.)

[1] Third session Fifty-fifth Congress, Report No. 2307.

Chapter XVI.

INCOMPATIBLE OFFICES.

1. **Provision of the Constitution. Section 485.**[1]
2. **Cases of Van Ness, Hammond, Baker, and Yell. Sections 486–489.**
3. **Cases of Vandever, Lane, Schenck, and Blair. Sections 490–492.**
4. **General examination as to military officers, paid and unpaid services, etc. Sections 493–496.**[2]
5. **Cases of Mumford, Earle, Herrick, and Wheeler. Sections 497–500.**
6. **Questions as to vacancies, contestants, etc. Sections 601–506.**[3]

485. No person holding any office under the United States shall be a Member of either House during his continuance in office.

No Member may, during the term for which he was elected, be appointed to any office which shall have been created or the emoluments of which shall have been increased during such term.

Section 6 of Article I of the Constitution provides:

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a Member of either House during his continuance in office.[4]

486. The New York case of John P. Van Ness in the Seventh Congress.

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[1] Senate discussion of. (Sec. 563 of this volume.)

[2] Office of assistant district attorney of the United States not incompatible necessarily. (Sec. 993 of Vol. II.)

[3] Investigation after a Member's resignation as to his acceptance of. (Sec. 2590 of Vol. III.)

Conclusions when contestants have accepted incompatible offices under the United States (secs. 46 and 746 of this volume), and office under State government (sec. 1003 of Vol. II).

A contestant must prove election before admitted to seat left vacant by returned Member's acceptance of an incompatible office. (Sec. 807 of this volume.)

[4] On January 4, 1825, the subject of the appointment of Members of Congress to office was debated at length, and resulted in the passage of a resolution calling on the President for a list of all the Members appointed to office since the foundation of the Government. (First session Nineteenth Congress, Journal, pp. 114, 117; Debates, pp. 868–872.) On April 25 the President presented the desired information. (Journal, p. 471.)

A Member who had been appointed a militia officer in the District of Columbia by the President was deprived of his seat in the House.

A Member charged with acceptance of an incompatible office was heard in his own behalf during the debate.

On January 11, 1803,[1] Mr. John Bacon, of Massachusetts, from the Committee on Elections, made a report in the case of Mr. John P. Van Ness, a Representative from New York, who had in the recess between the first and second sessions of this Congress accepted an office under the United States. The committee found that this was in violation of the provision of Article I, section 6, of the Constitution, which provides that "No person holding an office under the United States shall be a Member of either House during his continuance in office," and recommended the adoption of this resolution:

Resolved, That John P. Van Ness, one of the Members of this House, having accepted and exercised the office of major of militia, under the authority of the United States, within the Territory of Columbia, has thereby forfeited his right to a seat as a Member of this House.

Mr. Van Ness, who was heard in his own behalf, urged that the provision of the Constitution was intended to apply only to civil officers; that he was an officer only of a dependent, or colonial district, of the United States; that his exclusion would mean the exclusion of militia officers of the States, since they were subject to the command of the United States; and that there were no emoluments to the office which he had accepted, and therefore could be no danger of corruption.

Mr. Bacon responded that the Constitution used the expression "any office," and the committee felt themselves bound by its terms.

Mr. John Randolph, jr., of Virginia, called for the yeas and nays, and asked the House, in the important precedent which it was about to establish, to vote unanimously to exclude even the shadow of Executive influence. The vote being taken on the resolution, it was agreed to—yeas 88, nays, 0.

487. A Member, Samuel Hammond, having accepted an Executive appointment, the House declared his seat vacant—. On January 30, 1805,[2] the House—

Resolved, That the President of the United States be requested to inform this House whether Samuel Hammond, a Member of this House, has not accepted an Executive appointment, and when.

Ordered, That Mr. Bryan and Mr. Eppes be appointed a committee to present the foregoing resolution to the President of the United States.

On February 1, President Jefferson, by message, informed the House that—

by a letter of the 30th of May last, from the Secretary of War to Samuel Hammond, a Member of the House, it was proposed to him to accept a commission of colonel commandant for the district of Louisiana, when the new government there should commence. By a letter of the 30th of June he signified a willingness to accept; but still more definitely by one of October 26.

The President stated further that a commission had been made out for him, bearing date the 1st day of October last, and forwarded before the receipt of his letter of October 26.

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[1] Second session Seventh Congress, Journal, pp. 280, 290 (Gales & Seaton ed.); Annals, pp. 395–399.

[2] Second session Eighth Congress, Journal, pp. 112, 113, 116 (Gales & Seaton ed.); Annals, pp. 1033, 1139.

On February 2, on motion,

Resolved, unanimously, That Samuel Hammond, a Member of this House from Georgia, having accepted an Executive appointment, has vacated his seat in this House.

Resolved, That a copy of the foregoing resolution be sent to the governor of Georgia by the Speaker of this House.

488. The election cases of Edward D. Baker, of Illinois, and Archibald Yell, of Arkansas, in the Twenty-ninth Congress.

In the cases of Baker and Yell the Elections Committee held that the acceptance of a commission as an officer of volunteers in the National Army vacated the seat of a Member.

Form of resolution declaring vacant the seat of a Member who had become an officer in the Army.

Instance wherein a Member, having appointed a future day for his resignation to take effect, remained and participated in the proceedings of the House before the arrival of that date.

On December 24, 1846,[1] Mr. Edward D. Baker, of Illinois, appeared in his seat, and on the same day the Speaker presented to the House Mr. Baker's letter announcing that he had forwarded to the governor of Illinois his resignation, to take effect from January 15, 1847.

On December 30,[2] some criticism having been made in relation to his position both as an officer of the Army and as a Member, Mr. Baker arose and resigned his seat, saying:

Mr. Speaker, I now resign my seat as Representative from the Seventh district in the State of Illinois in the Twenty-ninth Congress.

On January 5, 1847,[3] on motion of Mr. Robert C. Schenck, of Ohio, the Committee on Elections were instructed to examine the status of Mr. Baker.

On February 26,[4] the Committee on Elections reported that Edward D. Baker had not been entitled to a seat in the House since the acceptance by him of a commission as colonel of volunteers in the Army of the United States. The committee included in their report a consideration of a similar case relating to Mr. Archibald Yell, of Arkansas, and discussed them together in reference to the provision of the Constitution.

The question then arises, are the offices which have been accepted by these gentlemen offices under the United States, within the meaning of the Constitution? We think they are. If it be urged that the commission is derived from the State authorities, the answer is, that a commission does not confer the office; it is only the evidence of the right to exercise its functions. The commissions of Members of Congress, or, in other words, their certificates of election, are derived from the State authorities. Like the colonels, whose cases are now under consideration, their services are rendered to the United States, and they are paid by the United States, but their commissions are derived from the State authorities. It seems to the committee that the question whether the office is held under the United States or under a State does not depend upon the question who gave the commission, made the election, or conferred the appointment, but upon the question, What are the duties to be performed, the Government for whom they are to be performed, and to what government is the office responsible

[1] Second session Twenty-ninth Congress, Journal, p. 91; Globe, p. 82.

[2] Journal, p. 112; Globe, p. 99.

[3] Journal, p. 136; Globe, p. 115.

[4] Journal, p. 436; 1 Bartlett, p. 92. House Report No. 86.

for a failure to perform? Testing the offices in question by this standard, and there can remain but very little doubt. These colonels perform like services with those of the Regular Army. They are responsible to the laws of the United States for the manner in which they discharge the duties of their offices.

The committee believe that to hold an office in the Army of the United States is incompatible with the office of a Member of Congress, and that therefore the two offices can not be held at the same time by the same individual; that it is against the whole theory and spirit of our form of government. The Constitution intended that the President should have no power to control the action of Congress in any respect; that it should be perfectly independent. Now, suppose that every Member of Congress were a colonel in the Army in the service of the United States, and the President, who is by the Constitution the Commander in Chief of that Army, should come into the Halls of Congress and order each individual Member to retire immediately, under the penalties inflicted for disobedience to orders, to his post in the Army, what would become of Congress?

The committee therefore reported the following resolution:

Resolved, That Edward D. Baker has not been entitled to a seat as a Member of the House of Representatives since the acceptance and exercise by him of the military appointment of colonel of volunteers from the State of Illinois, in the service of the United States.

The report and resolution were submitted, and without discussion were laid on the table.[1] This action was undoubtedly taken on the report because Mr. Baker had already resigned, and Mr. Yell's case had been settled by the House by the admission of his successor.[2]

489. The election case of Thomas W. Newton, of Arkansas, in the Twenty-ninth Congress.

In 1847 Thomas W. Newton presented credentials showing his election in place of Archibald Yell, of Arkansas, who was an officer in the Army; and was admitted on his prima facie right.

The Elections Committee found that Thomas W. Newton, already seated on prima facie showing, was entitled to the seat made vacant by Archibald Yell's acceptance of an office in the Army.

On February 6, 1847,[3] Thomas W. Newton appeared at the bar of the House, presented his credentials as a Representative in the Twenty-ninth Congress from the State of Arkansas in place of Archibald Yell, and asked that the oath to support the Constitution of the United States might be administered to him, and that he be permitted to take a seat in the House.

Mr. George W. Jones, of Tennessee, proposed the following:

Resolved, That Thomas W. Newton, having presented credentials of his election as a Member of this House from the State of Arkansas, and the House having received no information of the death, resignation, or disqualification of Archibald Yell, heretofore elected and qualified a Member of the Twenty-ninth Congress, the said credentials be referred to the Committee of Elections, and that the said committee report thereon at the earliest practicable day.

Mr. William P. Thomasson, of Kentucky, proposed an amendment in the nature of a substitute providing—

That Thomas W. Newton, who now presents his credentials of election as a Member of Congress from the State of Arkansas, be sworn as a Member and take his seat; and that the credentials of his election be referred to the Committee on Elections.

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[1] Journal, p. 437; Globe, p. 527.

[2] See section 489 of this work.

[3] Second session Twenty-ninth Congress, Journal, pp. 305, 306; Globe, p. 339.

Debate arose on these propositions, it being asserted that Mr. Yell had taken his seat at the last session of Congress, and that of his resignation the House had received no notice. Therefore there might be a conflict of his rights with those of Mr. Newton. Moreover, there was a question as to the existence of the vacancy which it was now proposed to fill.

On the other hand, it was urged that Mr. Newton should be sworn in on his prima facie right.

A document received from the executive department was then read, showing that Mr. Yell was serving with the Army in Mexico.

Thereupon the amendment and the resolution as amended were agreed to, and Mr. Newton took the oath.

On February 26 [1] the Committee of Elections reported the following facts:

Archibald Yell was regularly elected as a Member of the Twenty-ninth Congress from the State of Arkansas; that some time in the month of July, 1846, he accepted a commission as colonel of volunteers raised in the State of Arkansas under an act of Congress approved May 13, 1846; that the commission thus accepted was made out by the State authorities, but that Colonel Yell and the volunteers under his command were, in said month of July, mustered into the service of the United States; that he yet continues in the service of the United States as a colonel, and receives his pay from the Government of the United States. And that Thomas W. Newton was, on the 14th of December, 1846, elected a Representative in the Twenty-ninth Congress from the State of Arkansas. To use the language of his certificate of election, he was elected "to fill the unexpired term of Archibald Yell." The committee have no legal evidence before them that Archibald Yell, at any time before the election of Mr. Newton, resigned his seat as a Member of Congress. The committee are of opinion that the facts above enumerated present precisely the same question for their consideration under the second resolution as is presented to the House in the first resolution.[2]

The committee are of opinion that under the fifth section of the first article of the Constitution of the United States the House has the right to ascertain and decide upon all questions of law and of fact necessary to be ascertained and decided in order to enable it to determine upon the rights of each individual who may claim to be one of its Members. And hence the committee instituted an inquiry * * * for the purpose of ascertaining whether such a vacancy existed as entitled the people of Arkansas to "elect a successor to Mr. Yell," and concluded "that at the time of the election of Thomas W. Newton there existed a vacancy from the State of Arkansas, occasioned by the acceptance by Archibald Yell of a commission to serve as a colonel of volunteers in the Army of the United States."

The committee, after giving the reasons, identical with those in the case of Mr. Baker,[3] recommended the following:

Resolved, That Thomas W. Newton is entitled to a seat as a Member of this House from the State of Arkansas.

The report and resolution, when reported to the House, were without debate laid on the table.[4]

490. The Iowa election case of Byington v. Vandever, in the Thirty-seventh Congress.

A Member who had been mustered into the military service of the United States was held by the Elections Committee to have forfeited his right to his seat.

A Member having disqualified himself by accepting an office in the Army, a resolution for his exclusion may be agreed to by majority vote.

[1] 1 Bartlett, p. 92; House Report No. 86.

[2] See case of Edward D. Baker. Section 488.

[3] See case of Mr. Baker.

[4] Journal, p. 437; Globe, p. 527.

An instance wherein a contestant in an election case participated in debate on incidental questions arising out of the said case.

Form of resolution declaring vacant the seat of a Member who had become an officer in the Army.

On April 11, 1862,[1] the Committee on Elections reported on the Iowa case of Byington *v.* Vandever. There were two features in this case. It was claimed that sitting Member had not been elected on the day prescribed by the laws of Iowa. The committee briefly state that in their opinion Mr. Vandever had been duly elected and rightfully admitted to the seat.

The question which the report really presented was as to the qualifications of the sitting Member. After his election Mr. Vandever had offered to furnish a regiment for the service of the country, and on July 23, 1861, the President had, by authority of law, accepted this offer. On August 30, 1861, Mr. Vandever was appointed colonel of the Ninth Iowa Volunteer Infantry, and on September 24 was mustered into the actual service of the United States, where he was at the time of the making of the report. He had been commissioned by the governor of Iowa as colonel of militia, but the committee found that in respect to being a colonel of militia the commission was inaccurate. The report, which was unanimous, says:

Colonel Vandever, under the facts, claims, however, that he is simply an officer of the State of Iowa, because (as his letter would seem to imply), in his opinion, the volunteer force he enlisted and commands is simply a part of the militia of Iowa.

But whether Colonel Vandever is to be regarded as an officer in the Army proper of the United States, or as an officer of the militia of Iowa, is, in the opinion of the committee, of little importance. If he was actually mustered into the service of the United States, he was, by that act, placed in an office totally incompatible with that of Representative in Congress.

He has no right as Representative to absent himself from the House without leave, and if he does, is liable to be arrested by the officer of the House and returned and punished. But he is also bound as an officer of the Army to be with his regiment (perhaps a thousand miles distant), ready to execute the commands of his superior officer; and for his default is liable to punishment—it may be with death. Or his military superior may take him by force from his seat and duties in the House to his post in the Army.

That such a physical impossibility as is thus created, to execute the duties of both offices, renders them incompatible, would seem to be beyond a doubt.

But there is also that in the nature of the powers incident to the two positions which renders them incompatible. As Representative he may by his vote repeal the law or army regulation creating a duty or imposing a penalty which, as officer of the Army, he has neglected or incurred. Or in the exercise of his right (and perhaps duty) as Representative, to speak of the conduct of his superior military officers, he might utter words for which, as an officer of the Army, the superior would have an equal right to cause him to be tried by court-martial and punished.

These instances of conflicting irreconcilable duties and powers are sufficient to illustrate the incompatibility of the two offices; and that the acceptance by the same person of an office incompatible with another held by him, is a virtual resignation or forfeiture of the office first held, is too plain a proposition to need illustration. It results from the presumption that no man can intend, as well as from the policy that no man shall be permitted, to hold a trust the duties of which he has disqualified himself from performing. All the authorities agree in this principle.

And again admitting, for the sake of the argument, that Colonel Vandever was originally simply an officer of the militia of Iowa, still your committee are of the opinion that the act of mustering him into the military service of the United States made him an officer of the United States. The authority which an officer is bound to obey and to which he is responsible, and whose pay he receives, determines under what Government he acts and whose officer he really is.

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[1] Second session Thirty-seventh Congress, Report No. 68; 1 Bartlett, p. 395.

But your committee are of the opinion that Colonel Vandever was really and truly appointed colonel, not of Iowa militia, but of the Ninth Regiment of Iowa Volunteer Infantry, and that the latter force is in no sense of the term a militia force, but is a force raised solely by the authority of the Federal Government, and hence that its officers (Colonel Vandever among the rest) hold their offices under the United States.

The commission, it is true, styles him colonel of the Ninth Infantry of the militia of the State of Iowa. But a commission does not confer the office. It is, at most, but evidence of an appointment. An error in the commission can not confer a right to an office to which the person holding the commission has not been appointed, neither can it take away his right to exercise the powers and receive the emoluments of one to which he has been appointed. There are numerous officers which the President commissions that are appointed by others. Suppose there should be an error in the commission he confers; certainly it would not take away the office. The appointment itself, and the entrance upon and actual discharge of the duties of an office (by the appointee), under a claim of right, are the real requisites constituting a person an officer, and decisive of the office to which he is appointed.

Neither does the fact that he was commissioned by the governor of Iowa militate against the position that Colonel Vandever is an officer of the United States. The act of Congress under which the force Colonel Vandever commands was raised authorizes the governors of the States where the force is raised to commission certain of the officers. The governor acts only by virtue of that law. He is the mere agent of the United States for the purposes indicated in the act. The appointment and commission would have been just as valid had any other agent been selected to have made and issued them.

But the force Colonel Vandever really was appointed to command, and with which he has ever since been in service as commander, was enlisted by direction of the President under the authority of the act of Congress entitled "An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property," which act could have been passed only under that clause of the eighth section of the Constitution which provides that Congress shall have power to raise and support armies.

The cases of Messrs. Van Ness and Yell were cited as conclusive precedents.

The committee therefore concluded that Colonel Vandever's case fell clearly within the provisions of the sixth section of Article I of the Constitution, and recommended that the House agree to this resolution:

Resolved, That William Vandever has not been entitled to a seat as a Member of this House since he was mustered into the military service of the United States as colonel of the Ninth Regiment of Iowa Volunteer Infantry, to wit, since the 24th day of September, A. D. 1861.

On May 8 [1] the report came up in the House and a debate occurred on a motion to postpone until the next session of Congress. The contestant, who had been admitted to the floor and to debate under the provisions of a general order, participated in the debate on this preliminary question. The motion to postpone was agreed to—yeas 79, nays 49.

On January 20, 1863,[2] the report was debated on the constitutional question of qualification, and after a motion to postpone had been defeated—yeas 53, nays 74—the resolution was agreed to—ayes 65, noes 37.

Thereupon Mr. Horace Maynard, of Tennessee, raised the question of order that the resolution was in fact one of expulsion, and therefore required a two-thirds vote for its adoption.

This point of order was debated on January 20, [3] and the Speaker [4] overruled the point of order.

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[1] Journal, pp. 655, 656; Globe, p. 2021.

[2] Third session Thirty-seventh Congress, Journal, p. 212; Globe, p. 403.

[3] Globe, pp. 405, 406.

[4] Galusha A. Grow, of Pennsylvania, Speaker.

Thereupon Mr. Maynard appealed, and on January 21[1] the appeal was laid on the table—yeas 82, nays 36.

Thereupon Mr. Elihu B. Washburne, of Illinois, moved to reconsider the vote whereby the resolution was agreed to, and the motion to reconsider was agreed to—yeas 70, nays 64.

Mr. Washburne then moved to postpone the subject until March 3, the last day of the session. The question was debated at length,[2] both as to the status of Colonel Vandever in the light of the constitutional requirement and also in the light of the decision of the Speaker that a majority might pass the resolution.

After the debate, the House, by a vote of yeas 78, nays 68, agreed to the motion to postpone.[3]

No action was taken on March 3.

On February 5, 1863,[4] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, reported a resolution discharging the Committee on Elections from the further consideration of the case of Byington v. Vandever.

He explained that the contestant wished to be heard on that branch of the case which included the question whether Mr. Vandever was actually elected.

Thereupon it was moved to amend the resolution of the committee by substituting resolutions declaring that Mr. Vandever was not elected, and that Mr. Byington was elected.

After debate the proposed substitute was disagreed to. A motion to reconsider was made, and a motion to lay the motion to reconsider on the table. The latter motion was agreed to—yeas 84, nays 28.

Then the resolution of the Committee on Elections was agreed to.

491. The Senate election case of Stanton v. Lane, of Kansas, in the Thirty-seventh Congress.

A Senator-elect who had, before qualifying, exercised the authority of an army officer de facto, was held not to have vacated his seat.

A State executive having issued credentials in due form on the assumption that a Senator had vacated his seat by accepting an army office, the credentials were referred and the bearer was not seated.

Instance wherein a Senator participated in debate on credentials of a claimant for his seat.

On July 12, 1861,[5] the credentials of Frederick P. Stanton, claiming a seat from Kansas, were presented in the Senate. Mr. James H. Lane, who occupied the seat claimed by Mr. Stanton, was present in the Senate and spoke on the motion to refer the papers to the Committee on the Judiciary, which reference was made.

On August 2, 1861,[6] the Senate Committee on the Judiciary reported in the contested case of Stanton v. Lane, of Kansas, finding the following facts:

> That the sitting member, the Hon. James H. Lane, was, by the Executive, appointed a brigadier-general in the volunteer forces of the United States on the 20th of June, 1861; that he accepted said appointment, and was legally qualified to perform its duties.

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[1] Journal, p. 215; Globe, p. 427.

[2] Globe, pp. 428–434.

[3] Journal, p. 219; Globe, p. 434.

[4] Journal, pp. 338, 401; Globe, pp. 742, 964–971.

[5] First session Thirty-seventh Congress, Globe, p. 82.

[6] 1 Bartlett, p. 637; Globe, p. 406.

In the opinion of the committee the office of brigadier-general under the United States is incompatible with that of member of either House of Congress. By accepting the office of brigadier-general, the sitting member, Mr. Lane, virtually resigned his seat in the Senate, and it became vacant at that time.

On the 8th of July, 1861, the governor of Kansas gave the contestant, Mr. Stanton, a commission in due form appointing him a Senator of the United States from the State of Kansas to fill the aforesaid vacancy, and by virtue of that commission Mr. Stanton now claims his seat.

The committee therefore recommended resolutions declaring Mr. Lane not entitled to the seat, and declaring Mr. Stanton entitled to a seat.

On August 6 [1] the report was considered but not acted on.

At the next session of Congress, on December 18, 1861,[2] when the case came up it was urged that the committee had not been fully informed when it made its report; that the brigadier-generalship to which Mr. Lane had been appointed was not in existence at the time of his appointment; and that since the office had been created he had not signified his acceptance. The Senate by a vote of yeas 26, nays 9, recommitted the report.

On January 6, 1862,[3] the Judiciary Committee reported again, stating that the committee unanimously found that the status of the case was not changed by the additional evidence.

On January 8, 13, 15, and 16 [4] the subject was debated at length on a motion to strike the word "not" from the first resolution of the committee:

Resolved, That James H. Lane is not entitled to a seat in this body.

It was contended on the one side that Senator Lane had been appointed to the office of brigadier-general; that such office existed de facto if not de jure; that he accepted the office, taking an oath, issuing a declaration to the people of Kansas, and on June 26, 1861, had as brigadier-general made requisitions for supplies. If the President had no authority to make the appointment at the time, yet subsequent legislation had legalized such emergency acts.

On the other hand, it was insisted that on June 20, 1861, there was no such office as that to which Mr. Lane was said to have been appointed, but that the appointment was in anticipation of the creation of the office; that Mr. Lane did not qualify as a Senator until July 4, 1861, and prior to that had told the President that he would not accept the army office, having learned that it was incompatible with his office as Senator. The cases of Van Ness, Herrick, Earl, and Mumford were cited to show that his appointment while a Senator-elect did not preclude him from electing to accept the office of Senator by resigning the military office before the meeting of the Senate and his qualification. It was further urged that the oath he took as a brigadier-general was not technically the oath required for the office. Mr. Charles Sumner, of Massachusetts, who opposed the report of the committee, summarized the argument:

First, that at the time in question General Lane was not a Senator; and secondly, that at the time in question he was not a brigadier. The whole case is unreal. It is a question between an imaginary Senator and an impossible brigadier; or rather it is a question whether an imagined seat in this body was lost by any acts under an impossible military commission.

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[1] Globe, pp. 450–454.

[2] Second session Thirty-seventh Congress, Globe, pp. 127–130.

[3] Globe, p. 185.

[4] Globe, pp. 222, 290, 336, 359.

After a thorough debate, on January 16,[1] the motion to strike out the word "not" was agreed to—yeas 24, nays 16.

Then the amended resolution, declaring Mr. Lane entitled to the seat, was agreed to.

The second resolution, relating to Mr. Stanton, was postponed indefinitely.

492. The case relating to the alleged disqualification of Messrs. Blair and Schenck in the Thirty-eighth Congress.

A Member-elect was held to have disqualified himself by continuing to hold an incompatible office after the meeting of the Congress.

A Member-elect may defer until the meeting of the Congress his choice between the seat and an incompatible office.

Form of resolution declaring vacant the seat of a Member-elect who has accepted an incompatible office.

On June 13, 1864, Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, made a report[2] on the cases of Gen. Robert C. Schenck, of Ohio, and Gen. Frank P. Blair, jr., of Missouri, who had held commissions in the Army after their election as Members of Congress. This report gives the following summary of precedents:

The House has ever been awake to this constitutional guaranty of its independence (Art. I, sec. 6): "No person holding any office[3] under the United States shall be a member of either House during his continuance in office"), and has never failed when occasion required to resist any invasion of its privileges in this particular. In the Seventh Congress (1803) John F. Van Ness, a Representative from the State of New York, accepted the office of major of the militia, under the authority of the United States, within the Territory of Columbia (District of Columbia), and after due examination and report by the Committee of Elections the House unanimously declared that he had "thereby forfeited his seat as a Member of this House." (Contested Elections, Clark and Hall, p. 122.)

In the Twenty-ninth Congress (1847) Archibald Yell, a Representative from the State of Arkansas, while a Member, accepted the office of colonel of a regiment in the volunteer service of the United States in the war with Mexico. He received his comission from the governor of Arkansas, but was mustered into the service of the United States. The people of Arkansas treated this act as vacating his seat as a Representative in Congress and elected Thomas W. Newton in his place. When he appeared at the bar of the House to be sworn in, discussion arose upon the question whether the House had any evidence before it of the acts of Mr. Yell which were alleged to have vacated his seat, and the Globe contains this statement (vol. 17, p. 341): "It now appears by an official statement, made in reply to a call of the House, by the Adjutant-General, of the names of Members of Congress who had received commissions and been mustered into the service of the United States, that Archibald Yell was among the number. As soon as the document was read Members withdrew all opposition. Mr. Newton was then qualified and took his seat." The Committee of Elections, to whom his credentials were referred, at a subsequent day of the session made a report (No. 86, second session Twenty-ninth Congress), including also the subject matter of an inquiry "whether the Hon. Edward D. Baker, a Representative from the State of Illinois, having accepted a commission as colonel of volunteers in the Army of the United States, and being in the service of and receiving compensation from the Government of the United States as such army officer, has been entitled since the acceptance and exercise of said military appointment to a seat as a Member of the House of Representatives."

This report concluded with a resolution that "Edward D. Baker has not been entitled to a seat as a Member of the House of Representatives since the acceptance and exercise by him of the military

[1] Senate Journal, p. 117; Globe, p. 363.

[2] House Report No. 110, first session Thirty-eighth Congress.

[3] Discussion of the distinction in the Government service between an officer and an employee. (Decisions of the Comptroller, vol. 4, p. 696.)

appointment of colonel of volunteers from the State of Illinois, in the service of the United States," and also with another resolution that "Thomas W. Newton is entitled to a seat as a Member of the House from the State of Arkansas." This report was not made till February 26, 1847, only seven days before the end of the session. An ineffectual attempt was made on the last day of the session (Globe, vol. 17, p. 573) to call up the report for action. No opposition to the report itself is disclosed upon the record, and the failure to act upon it may fairly be imputed to the pressure of business upon the last day of the session. The same question arose in the last Congress. William Vandever, a Representative from the State of Iowa, accepted, while such Representative, the office of colonel of the Ninth Regiment of Iowa Volunteers. He received his commission from the governor of Iowa, but was mustered into the service of the United States under the law authorizing the raising of volunteers to suppress the rebellion. The question whether he had not forfeited his seat by accepting and discharging the duties of the military office thus conferred upon him was directly raised before the Committee of Elections, by whom an elaborate report was made to the House (Report No. 68, second session Thirty-seventh Congress), concluding with a resolution "That William Vandever has not been entitled to a seat as a Member of this House since he was mustered into the military service of the United States as a colonel of the Ninth Regiment Iowa Volunteer Infantry, to wit, since the 24th day of September, A.D. 1861." This resolution was adopted without a division (Globe, vol. 47, p. 405). The vote upon this resolution was afterwards reconsidered and its further consideration postponed until the 3d of March, when, in the pressure of business on the last day of the session, it was not called up.

The report also gives the following precedent as bearing upon the branch of the question raised particularly by the case of General Schenck:

In October, 1816, Samuel Herrick, who was then holding the office of United States district attorney for the district of Ohio, was elected one of the Representatives of that State in the Fifteenth Congress, whose regular session did not commence till one year from the December following. Mr. Herrick continued to hold the office of United States district attorney until November 29, 1817, when he resigned that office and entered upon the duties of the office of Representative in Congress at the commencement of the regular session on the first Monday of the following month. Upon a proper reference to the Committee of Elections an elaborate report was made in conformity with the views here taken, and concluding with a resolution "That Samuel Herrick is entitled to a seat in this House." (Contested Elections in Congress, p. 287.) This report was very fully and ably discussed, and some doubts seem to have been at first entertained whether, by discharging the duties of the office of United States district attorney while he was a Representative-elect, Mr. Herrick had not disqualified himself from holding the office of Representative. The resolution confirming him in his seat was nevertheless adopted. Its position was subsequently ratified by the same Congress in two or three other cases involving the same principle, with little or no opposition. And it is believed that the practice of the House from that time to the present has been uniformly in conformity with this position.

The report concluded with the recommendation of the passage of two resolutions, which summarize the two cases:

Resolved, That Robert C. Schenck, having resigned the office of major-general of volunteers, which he then held, on the 13th day of November, 1863, which resignation was accepted November 21, 1863, to take effect December 5, 1863, was not, by reason of having held such office, disqualified from holding a seat as a Representative in the Thirty-eighth Congress, whose first session commenced on the 7th day of December, 1863.

Resolved, That Francis P. Blair, jr., by continuing to hold the office of major-general of volunteers, to which he was appointed November 29, 1862, and to discharge the duties thereof till January 1, 1864, the date of his resignation, did thereby decline and disqualify himself to hold the office of Representative in the Thirty-eighth Congress, the first session of which commenced on the first Monday in December, 1863.

The facts on which these resolutions and the report were based were transmitted to the House in a message from the President on April 28, 1864.[1] This message

[1] First session Thirty-eighth Congress, Globe, p. 1939.

was referred to the Committee on Elections, which reported as outlined above. Later, on May 2,[1] the President transmitted additional facts in response to the request of the House. The committee reported on June 24,[2] and on June 29 the resolutions were adopted without debate.[3]

Meanwhile, on May 11, 1864, in the Senate Mr. Davis offered a resolution[4] referring to an alleged arrangement whereby Generals Blair and Schenck were to be allowed to give up temporarily their commissions in the Army while they were in the House, with the understanding that they might withdraw the resignations and return to the field, and declaring such arrangement in derogation of the Constitution. The resolution was discussed May 16,[5] and referred to the Committee on the Judiciary. On June 30 the Senate agreed to the following resolution, which the Judiciary Committee had reported on July 15:[6]

Resolved, That an officer of the United States whose resignation has been duly accepted and taken effect, or who, having been elected a member of either House of Congress, qualifies and enters on the discharge of the duties of a Member, is thereby, in either case, out of the office previously held, and can not be restored to it without a new appointment in the manner provided by the Constitution.

In the first session of the Thirty-seventh Congress, July 12, 1861, the question was raised by a resolution introduced by Mr. Vallandigham, reciting that Gilman Marston, of New Hampshire; James E. Kerrigan, of New York; Edward McPherson and Charles J. Biddle, of Pennsylvania, and Samuel R. Curtis, of Iowa, were rumored to have been sworn into the military service of the United States, and that James H. Campbell, of Pennsylvania, had admitted on the floor of the House that he had been so sworn in, and directing the Committee of Elections to inquire whether Members of the House might constitutionally hold positions under the Government in the military service. Messrs. Curtis and Campbell contended that they held commissions from the governors of their States, and were merely State officers loaned to the National Government for the time being. The resolution was laid on the table after a slight discussion—92 yeas to 51 nays. Mr. Vallandigham had previously brought this subject to the attention of the House on July 4 before the organization of the House was effected.[7]

The subject was also brought up informally in the House in the Fifty-fifth Congress, during the war with Spain.[8]

It has been decided that an officer on the retired list of the Army is entitled to receive the salary appropriate to his army rank while he is also in receipt of the salary of a Member of Congress.[9]

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[1] Globe, p. 2031.

[2] Globe, p. 3242.

[3] Globe, p. 3389.

[4] Globe, p. 2218.

[5] Globe, p. 2275.

[6] Globe, p. 3412.

[7] First session Thirty-seventh Congress, Globe, pp. 3, 93.

[8] Second session Fifty-fifth Congress, Record, pp. 5406, 5407, remarks of Messrs. Joseph W. Bailey, of Texas, and Charles H. Grosvenor, of Ohio.

[9] Decision of Second Comptroller C. H. Mansur in the case of Maj. Gen. Daniel E. Sickles, a Member of the Fifty-third Congress, February 24, 1894.

493. The examination of 1898 as to incompatible offices.

Conclusion of the Judiciary Committee that the member of a commission created by law to investigate and report, but having no legislative, judicial, or executive powers, was not an officer within the meaning of the constitutional inhibition.

Visitors to academies, regents, directors, and trustees of public institutions appointed by the Speaker under the law are not regarded as officers within the meaning of the constitutional inhibition.

Discussion of the meaning of the word "offices" as used in the constitutional provision prohibiting the Member from holding such as are incompatible.

On December 21, 1898,[1] this resolution was agreed to by the House:

Resolved, That the Committee on the Judiciary be, and it is hereby, instructed to ascertain and report to this House—

First. Whether any Member of the House has accepted any office under the United States; and

Second. Whether the acceptance of such office under the United States has vacated the seat of the Member accepting the same.

On February 21, 1899, Mr. David B. Henderson, of Iowa, from that committee, submitted a report[2] less in accordance with the resolutions of instruction.

After a careful examination of facts, a review of arguments, and a discussion of the origin and framing of the clause of the Constitution under which the questions arose, the report proceeds as follows in regard to the two branches of the question:

(1) As to members of commissions:[3]

While it may be admitted that all of the commissions, examining boards, regents, etc., considered by the committee do differ in many particulars as to their duties, still the legal principles involved in the consideration of this class of public servants apply to all of them, and therefore they will be considered together in discussing the law in respect to them.

It can not be contended that every position held by a Member of Congress is an office within the meaning of the Constitution, even though the term office may usually be applied to many of these positions. We are therefore led to an analysis and discussion of the word "office."

The chairman of a committee of Congress is in one sense an officer holding a position different from other members of the committee. Marks of honor and distinction are given to Members of Congress in many ways, but all incident to or growing out of their position as a Member of Congress. It is a mark of distinction to be selected as members of escorts to those of our number who die; designations are made of committees to notify the Senate and the President of certain matters. The mind will

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[1] Third session Fifty-fifth Congress.

[2] House Report No. 2205.

[3] On March 2, 1905 (Third session Fifty-eighth Congress, Record, pp. 3849–3851), in the Senate, Mr. Louis E. McComas, of Maryland, submitted the following summary of instances wherein members of Congress had been appointed to commissions:

"The appointment by the President of Senators, Representatives, and Federal judges upon commissions to inquire into and settle or arbitrate international disputes in cases of special importance or emergency has been so strongly opposed by several eminent Senators in debate here that I concluded to make and place in the Record the full list of such commissions in their order. The category of the names of those who have served on the commissions and the public events to which the commissions have related, in my humble opinion, prove the proposition with which I will conclude.

"It has been said that the practice is unconstitutional; that Senators and other officials thus hold two offices—two incompatible offices—at the same time; that the practice is hurtful to the country,

readily run over a list of many positions of trust and honor that are conferred upon Members of Congress where no pretense will be made that they are offices within the meaning of the Constitution.

In United States *v.* Hartwell (6 Wall., 393) it is laid down that "an office is a public station or employment conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emolument, and duties."

Elsewhere it is held that an office is "an employment on behalf of the Government, in any station or public trust, not merely transient, occasional, or incidental." (20 John., Rep. 492, 7th Ohio State, 556.)

A careful consideration of all of the positions above referred to will show that they are merely transient, occasional, or incidental in their nature, and none of them possess the elements of duration, tenure, or emolument. All of these appointees were but instruments to procure detailed information

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injurious to the courts and the House; that it lessens the constitutional power of the Senate and has not benefited the country.

In Hartwell's case (6 Wall., 385) it was said that—

"'The term [office] embraces the idea of tenure, duration, emolument, and duties. The duties must be continual and permanent, not occasional or temporary.'

"When President McKinley sent in the names of two Senators and one Representative for confirmation as commissioners to visit Hawaii, the Senate declined to take action thereon. An eminent Senator expressed the view of the Senate:

"'If these gentlemen are to be officers, how can the President appoint them under the Constitution, the office being created during their term, or how can they hold office and still keep their seats in Congress? If they are not officers, under what constitutional provision does the President ask the advice and consent of the Senate to their appointment?'

"That membership upon such temporary commissions is not the holding of an office, or at least is not the holding of an incompatible office, is affirmed by the practice and by the contemporary construction of all the departments of the Government during a century. The recital of the instances I give is the best evidence upon this point. The most liberal view as to incompatible offices was shown by the acts of the great Chief Justice and our earlier Presidents.

"Chief Justice John Marshall accepted that office February 4, 1801, and continued to act as Secretary of State under President John Adam, who had appointed him to the highest judicial office, until March 4, 1801. President Jefferson on that day formally appointed Chief Justice Marshall Secretary of State 'until a successor shall be appointed'—not an appointment for a definite term, but for a temporary exigency.

"In like manner Gen. Samuel Smith, a Member of Congress from Maryland,was actually in charge of the Navy Department under President Jefferson from March 31, 1801, until June 13, 1801.

"The offices thus held were held only by an indefinite tenure temporarily, but I am not now concerned with the holding of incompatible offices. I have confined my research to the special commissions constituted in whole or part of Senators and Representatives and Federal judges.

"It is a suggestive fact that the Presidents and Congress from the earliest days of the Republic continued to practice this method of meeting great emergencies. The most striking instances occur at the very beginning of our Government and were sanctioned by the men who made the Constitution. Those who had the most to do with that instrument made the least objection to the practice of sending such officials upon such special missions.

"If the practice be unconstitutional, President Washington and John Jay, who had so much to do with the making and adoption of the Constitution, were the first violators of it.

"President Washington on April 19, 1794, appointed Chief Justice Jay to be envoy extraordinary to Great Britain, and empowered him to negotiate the treaty. The result was the treaty of amity, commerce, and navigation of November 19, 1794, so famous in our history. This treaty, which accomplished the evacuation of the British posts in our country, really avoided a war with Great Britain. Mr. Jay, who negotiated it, was Chief Justice of the Supreme Court from September 26, 1789, until June 29, 1795. He was Chief Justice during the whole term of his special mission to Great Britain.

"Oliver Ellsworth, of Connecticut, early took the view of the proposition I am now maintaining, the view which has been so strongly and so well stated here by the very able Senator from Connecticut [Mr. Platt], who now honors me with his attention. Ellsworth was appointed by President John Adams

for the better information and guidance of Congress and are wholly lacking in the essential elements of an office within the meaning of the Constitution.

"A public office is the right, authority, and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public." (Mechem's Public Offices and Officers, sec. 1; Matter of Hathaway, 71 N.Y., 238–243; 3 Greenleaf (Me.), 481; Public Officers, Throop, sec. 6; Olmstead *v.* The Mayor, etc., 42 N.Y. Sup. Ct., 481.)

It has been held that these functions must be either legislative, executive, or judicial, and that to constitute the person an officer he must have conferred upon him either legislative, executive, or judicial powers. (Mechem's Public Offices, etc., see. 4, and cases cited.)

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a joint envoy extraordinary to France, with William Vans Murray, of Maryland, and William R. Davie, of North Carolina, on February 26, 1799. The convention of peace, commerce, and navigation of September 30, 1800, was the result of this commission's work. That treaty avoided actual hostilities with France, and it also secured a recognition by France of the rights of neutral vessels and prospective indemnity for depredations by privateers and men-of-war. The echoes of this treaty still linger in the spoliation claims in our annual appropriation bill to-day.

"Mr. Ellsworth did not resign the office of Chief Justice until after the making of the treaty.

"In 1800 Senator Uriah Tracy during the summer visited and examined the state of the garrisons in the Northwest Territory, and it appears that Tracy was paid $1,232 for compensation and $1,985.05 for expenses, in addition to his pay as a Senator, without objection. Mr. Wolcott, Secretary of the Treasury, maintained that Senator Tracy's employment was an executive agency and not an office of the United States, contending that such powers pertained to the Executive and had been generally exercised. Compared with our view to-day, such construction was very liberal.

"David Meriwether, of Georgia, was a Member of the House of Representatives from 1802 to 1807. Under President Jefferson Mr. Meriwether was appointed, on April 28, 1804, a commissioner to conclude a treaty with the Creek Indians until the end of the next session of the Senate.

"The Indians were then regarded as dependent and yet semi-independent nations.

"Samuel Nelson, of New York, was associate justice of the Supreme Court from 1845 to 1872, and he was appointed by President Grant on February 10, 1871, as one of the members of the Joint High Commission to negotiate the "Treaty of Washington." This treaty was concluded May 8, 1871, and signed by Justice Nelson. It is the historic treaty for the settlement by arbitration of the Alabama claims, for the determination of fisheries rights and claims, canal navigation, transit of merchandise in bond, and the submission of the boundary question of Article I of the treaty of 1846 to arbitration by the Emperor of Germany.

"Frank Morey, of Louisiana, while a member of the House of Representatives, was appointed by President Grant honorary commissioner to the Vienna Exposition of 1873, under the act of February 14,1873.

"It is not a very marked case, and yet it comes within the rule of objection stated by the very strict construction I have heard maintained on this floor.

"Under the act of August 5, 1892, Senator William B. Allison, of Iowa, the leader of the Senate, its guide, philosopher, mentor, and friend, who now sits before me, Senator John P. Jones, of Nevada, and Representative James B. McCreary, of Kentucky, were appointed by President Harrison on November 3, 1892, Commissioners to the International Monetary Conference, held at Brussels November 22, 1892.

"President Harrison, on June 6, 1892, appointed John M. Harlan, then and ever since an associate justice of the Supreme Court, and John T. Morgan, then and ever since a Senator of the United States from Alabama, as arbitrators on behalf of the United States under the treaty of February 29, 1892, between the United States and Great Britain, to determine the jurisdictional rights of the United States in waters of the Bering Sea for the preservation of the fur-seal herds.

"President Cleveland, on January 4, 1896, appointed David J. Brewer, then and ever since an associate justice of the Supreme Court, and Richard H. Alvey, then and continually until January 1, 1905, chief justice of the court of appeals of the District of Columbia, to be members of the Venezuelan Boundary Commission. Justice Brewer was president of the Commission, a tribunal appointed by

Says the author:

"SEC. 4. Office involves delegation of sovereign functions. The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer."

This involves necessarily the power to (1) legislate, or (2) execute law, or (3) hear and determine judicially questions submitted.

Therefore, mere power to investigate some particular subject and report thereon, or to negotiate

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President Cleveland to make an independent examination of the merits of the case respecting a boundary line between Venezuela and Great Britain. Neither Government was formally represented before the Commission, but the question before it was afterwards, and partly because of the investigation by this Commission, submitted to arbitration between Great Britain and Venezuela practically at the instance of our Government.

"President Cleveland appointed William L. Putnam, then and ever since a circuit judge of the United States, on July 11, 1896, a commissioner under the convention of February 8, 1896, between the United States and Great Britain, to determine through the joint commission the British claims for damages in certain cases additional, and also in the cases mentioned in the findings of fact by the fur-seal tribunal at Paris in 1893. Judge Putnam was our commissioner, and Judge George Edward King, of the supreme court of Canada, was the commissioner on the part of Great Britain, and on December 17, 1897, this commi ion awarded damages in favor of British claimants to the amount of $473,151.26.

"President McKinley, on April 14, 1897, appointed Senator Edward O. Wolcott, of Colorado, the eloquent and brilliant Senator the tidings of whose death we have received today, and whose death has caused profound sadness in this Senate and among all the people of the country, special envoy to France, Germany, Great Britain, and other countries to seek an international agreement to fix the relative value between gold and silver under the act of March 30, 1897.

"President McKinley, on July 13, 1898, appointed Senator Shelby M. Cullom, of Illinois, the present occupant of the chair, and Senator John T. Morgan, of Alabama, and Representative Robert R. Hitt, of Illinois, to serve until the end of the next session of the Senate, as commissioners to recommend legislation concerning the Hawaiian Islands under the joint resolution of July 7, 1898. It is true the Senate declined to confirm them when asked and did not appear to regard this as other than a legislative committee, not requiring executive nomination and confirmation by the Senate.

"President McKinley, on July 16, 1898, appointed Senator Charles W. Fairbanks, of Indiana; Representatives Nelson Dingley, of Maine, and Senator George Gray, of Delaware, as a joint high commission to settle differences between Great Britain and the United States in respect of Canada, and this commission was appointed under the deficiency act of July 7, 1898. Senator Gray resigned later to accept a place upon another commission. Mr. Dingley served until his death. Senator Charles J. Faulkner, of West Virginia, and Representative Sereno E. Payne, of New York, were appointed to fill these vacancies. Senator Fairbanks and former Senator Faulkner and Mr. Payne still remain members of that Commission.

"President McKinley, on September 13, 1898, appointed Senator Cushman K. Davis, of Minnesota, Senator William B. Frye, of Maine, and Senator George Gray, of Delaware, as members of a commission to negotiate a treaty with Spain. This Commission met at Paris on October 1, 1898, and concluded the treaty of Paris on December 10, 1898, the famous treaty which restored peace between the two countries, assured the independence of the people of Cuba, the acquisition of Porto Rico, Guam, and the Philippines by the United States, and, all must concede, greatly advanced the prestige of the United States.

"President Roosevelt, on March 4, 1903, appointed Senator Henry Cabot Lodge, of Massachusetts, a member of the tribunal to consider and decide the boundary line between Alaska and Canada under the provisions of the convention between the United States and Great Britain signed at Washington, January 24, 1903. The decision of the Alaskan Boundary Tribunal, rendered October 20, 1903, was very favorable to the contention of the United States, and of marked importance in settling the last of the series of questions of difference between the two nations.'"

a treaty of peace, or on some commercial subject, and report without power to make binding on the Government, does not constitute a person an officer.

"It (public office) implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office." (3 Greenleaf (Me.), 481; Mechem's Public Office, etc., sec. 2; Olmstead *v.* The Mayor, 42 N. Y. Sup. Ct., 481; Public Officers, Throop, sec. 6.)

Again, the employment must not be merely transient, occasional, or incidental.

In United States *v.* Hartwell (6 Wall., 385) the court held that the term public office embraces the ideas of tenure, duration, emolument, and duties, and that the duties were continuing and permanent, not occasional or temporary.

In United States *v.* Germaine (99 U. S. Sup. Ct., 508) the question of who is or who is not a public officer was again up, and the court said:

"If we look to the nature of defendant's employment we think it equally dear that he is not an officer. In that case (referring to United States *v.* Hartwell) the court said the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us the duties are not continuing and permanent, and they are occasional and intermittent. * * * He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised. * * * He is but an agent of the Commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. * * * There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case."

The duties of the commissioners appointed under the statutes (to which attention will be called, are not continuing or permanent; they have no place of business for the public use, or even for their own use; they give no bond and take no oath. In fact, they are mere agents appointed by direction of Congress for the purpose of gathering information and making recommendations for its use if the Congress sees fit to avail itself of the labors of the commission. The commissioners appointed under these statutes or resolutions can not be compelled to attend or act, and in the broadest sense they are mere agents of the Congress. These commissioners are not to execute any standing laws which are the rules of action and the guardians of rights, nor have they the right or power to make any such law, nor can they interpret or enforce any existing law.

Under a statute of Maine the governor was authorized "to appoint one or more agents for the preservation of timber on the public lands and for other purposes," and the judges held that these agents were not a civil office of profit under the State, although they were entitled to compensation. (See 3 Greenleaf Reports (Me.), p. 481.)

In United States *v.* Hendee (124 U. S., 309) it was held that a paymaster's clerk in the Navy is an officer of the Navy, and in United States *v.* Mouat (124 U. S., 303) it was held that such paymaster's clerk, appointed by a paymaster in the Navy, with the approval of the Secretary of the Navy, is not an officer of the Navy in the sense that he is an officer of the United States.

The constitution of the State of New York, 1846, article 6, section 8, prohibits the judges of the court of appeals and justices of the supreme court from exercising any power of appointment to public office.

Section 16, chapter 280, laws of 1847, conferred upon the chancellor power to issue a commission to some person empowering him to act as a surrogate in a particular case when by reason of statutory disqualifications the officers designated to act could not do so. It was contended that such person when designated to act as surrogate became a public officer, inasmuch as for the time being and in the matter before whom he was to act as a judicial officer with full power to hear, try, and determine the particular case, but the court of appeals In matter of Hathaway (71 N. Y., 238) held:

"The term 'public office,' as used in the constitution, has respect to a permanent public trust or employment, to be exercised generally and in all proper cases. It does not include the appointment, to meet special exigencies, of an individual to perform transient, occasional, or incidental duties, such as are ordinarily performed by public officers; as to such appointments the legislature is left untrammeled, and at liberty to invest the courts with power to make them." (Church, Ch. J., Andrews and Miller, JJ., dissenting.)

In Hall *v.* State (39 Wis., 79, chap. 40, laws of 1857) [the law] appointed certain-named persons "com-

missioners to make a geological, mineralogical, and agricultural survey of the State," and provided that such commissioners should arrange and distribute the functions of such survey by mutual agreement. The law provided a salary and provided for filling vacancies, and gave the governor power to remove any member for incompetency or neglect of duty. The court held that these commissioners were officers. The court said:

"The geological survey commissioners were appointed directly by the legislature; no specific term of office was fixed (except by the governor, whose power to do so may well be doubted); provision was made by law for removing them for cause and for filling vacancies; their salaries were paid out of the State treasury, and their functions were not of merely private, local, or temporary concern, but related to the material and permanent interests of the whole State. The duty imposed upon them was an important public trust, to be exercised for the benefit of all the people of the State, and could only be discharged properly by gentlemen of high attainments in physical science. * * * It may safely be asserted that any person charged by law with the performance of public functions affecting the general interests of society, especially if he be elected thereto by the people or appointed directly by the legislature, and who receives his compensation out of the public treasury, is a public officer, and as such can have no vested right in his office, unless secured by the constitution. * * * It may be difficult to draw the exact line between an office and a mere service or employment; but, as already observed, when public functions are conferred by law upon certain persons elected by the people or appointed by the legislature, if those functions concern the general interests of the State, and are not of a nature merely local or temporary, such persons are public officers, especially if they are paid a salary for their services out of the public treasury."

In re Corliss (11 R. 1., 638) the question was up whether the office of a commissioner of the United States Centennial Commission is an office of trust under Article II, section 1, of the Constitution of the United States, and it was held that he was such an officer. The law creating that commission provided "for the holding of an exhibition of American and foreign arts, products, and manufactures, under the auspices of the Government of the United States," and the functions of such commissioners were to continue until the close of the exhibition, and their duties were "to prepare and superintend the execution of a plan for holding the exhibition." By the act of Congress approved June 1, 1872, the duties and functions of the commission were further increased and defined, and a corporation was created called "The Centennial Board of Finance," to cooperate with the commission and to raise and disburse the funds. It was to be organized under the direction of the commission. The commission was also to adopt plans for the erection of buildings, and the corporation created was to erect them in accordance with these plans.

The act also provided that the commission should "have power to control, change, or revoke all such grants, and shall appoint all judges and examiners and award all premiums." The commission was also "to supervise the closing up of the affairs of said corporation, to audit its accounts, and submit in a report to the President of the United States the financial results of the centennial exhibition." The act also provided "no compensation for services shall be paid to the commissioners or other officers provided by this act from the Treasury of the United States." The only other officers provided for by the act were alternates to serve as commissioners when the commissioners were unable to attend.

The court properly held that these commissioners were officers of the United States. They were certainly vested with sovereign functions of the Government which were to be exercised by them for the benefit of each and every State in the Union, and for the benefit of all the people of the United States.

In Bunn *v.* The People (45 Ill., 397) the court held:

"A person employed for a special and single object, in whose employment there is no enduring element, nor designed to be, and whose duties when completed, although years may be required for their performance, ipso facto terminate the employment, is not an officer in the sense in which that term is used in the constitution of Illinois."

In re Attorneys, etc. (20 Johnson, N. Y.), the court defines the legal meaning of the term "office" to be "an employment on behalf of the Government in any station or public trust not merely transient, occasional, or incidental."

In matter of Hathaway (71 N. Y., 238–243) the court said:

"'Public office' as used in the Constitution has respect to a permanent trust to be exercised in behalf of the Government, or of all citizens who may need the intervention of a public functionary or officer,

and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally and in all proper cases the functions of a public trust or employment."

In McArthur *v.* Nelson (81 Ky., 67) the question was up as to whether certain commissioners were district officers, and the case says:

"The first section of the act authorizes the judge of the circuit court to appoint three commissioners, residents of the district, who shall hold their office at the will and pleasure of the judge. It is made the duty of the commissioners to have the court-house constructed at a cost not exceeding $50,000, and, to enable them to raise this money, they are authorized to issue bonds, with coupons attached, bearing interest at 5 per cent, payable semiannually; and, to redeem the bonds and pay the interest, they are further empowered to levy an annual tax on the real and personal property in the district not exceeding 12 cents on the $100, etc. * * * They are not district officers within the meaning of section 10 of article 6 of the constitution, but are the mere agents for the district, required by the act to discharge certain duties with reference to the building of the court-house, and when those duties end, their employment terminates."

In United States *v.* Germaine (99 U. S., 508) the question as to who are and who are not officers of the United States was quite fully considered. Under section 4777 of the Revised Statutes, United States, it is provided:

"That the Commissioner of Pensions be, and he is hereby, empowered to appoint, at his discretion, civil surgeons to make the periodical examinations of pensioners which are or may be required by law, and to examine applicants for pensions where he shall deem an examination by a surgeon appointed by him necessary; and the fee for such examinations, and the requisite certificates thereof in duplicate, including postage on such as are transmitted to pension agents, shall be two dollars, which shall be paid by the agent for paying pensions in the district within which the pensioner or claimant resides, out of any money appropriated for the payment of pensions, under such regulations as the Commissioner of Pensions may prescribe."

It was held in the case cited that the appointees under this statute are not officers of the United States but mere agents of the Commissioner of Pensions.

The report next applies the principles discussed to the commissions as to which question had been raised.

It is perfectly clear, therefore, that the commissioners appointed under the act approved July 7, 1898, "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1898, and for prior years, and for other purposes," the resolution approved July 7, 1898 (Public Resolution—No. 51) entitled "Joint resolution to provide for annexing the Hawaiian Islands to the United States," and the act approved June 18, 1898, entitled "An act authorizing the appointment of a nonpartisan commission to collate information and to consider and recommend legislation to meet the problems presented by labor, agriculture, and capital," are not persons "holding any office under the United States."

They are persons designated by authority of Congress to make certain investigations, inquiries, etc., or to conduct certain negotiations preliminary to and as a basis for possible action by the Congress of the United States or by one branch of it. They neither make law, execute law affecting the rights of the people, nor perform judicial functions. These commissioners are and are intended to be mere advisory agents of the Congress of the United States. Their investigations are confined to some particular matter or subject, and they are not required to take an oath of office. They have no power to decide any question or bind the Government or do any act affecting the rights of a single individual citizen.

If the House or Senate authorizes or directs the Speaker or President of the Senate, as the case may be, to appoint a special committee to investigate some particular matter or subject and report and recommend legislation, can it be claimed that an office is created or that the members of the House or Senate appointed hold "an office?" Suppose the President of the United States is authorized to make the appointments. Does this create offices, and are the appointees "officers?"

The acts performed are for the information of the Congress, and it alone. Their suggestions and recommendations have no force; they may or may not be adopted. To make their suggestions or recommendations operative, bills or resolutions must be introduced embodying the provisions recom-

mended, or their substance, and these must be enacted into law. If a treaty is recommended by peace commissioners it must be submitted to the Senate and by it ratified. The acts of such a commission do not bind the President, the Senate, or the Government. Then such commissioners neither make, execute, nor interpret law. They do not possess or exercise any of the sovereign power of the Government of the United States.

That the Senate may feel that it ought to ratify or approve the recommendations of such a commission can make no difference, the fact remains that their acts are not binding upon anyone or upon any departments of the Government.

If the Congress of the United States should see fit by joint resolution to authorize the President to appoint ten persons as commissioners, whose duties it should be to investigate the condition of the people residing in Porto Rico and recommend laws suitable to their government, and should appropriate money to pay the expenses of the commission, would anyone contend that such commissioners when appointed would become other than mere agents of the Congress for the purposes specified? Would they possess or exercise legislative, executive, or judicial functions or powers? Such commissioners would possess the mere naked power to investigate and report, and their action would conclude no one, nor would they execute or interpret any law. Their action would not affect in the slightest degree the personal or property rights of a single citizen of the Republic. They would be answerable to no power for misconduct, they would be bound by no oath.

"The officer is distinguished from the employee," says Judge Cooley, "in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position."

Attorneys and counselors admitted to practice in the courts of the United States are not officers of the United States. (Ex parte Garland, 4 Wall. (U. S.), 333; see also, In re Robinson, 131 Mass., 376.)

In People *v.* Nichols (52 N. Y., 478), one of the judges of the court of appeals was designated by statute as one of three persons to examine and report upon the genuineness and value of certain relics which the State proposed to purchase, and upon the certificate of these commissioners the purchase price was to be paid. The court held that this was not an office or a public trust within the meaning of the constitution of that State, which prohibits such judge from holding an office or public trust. Said the court: "It is very plain that the doing of such an act, a single act like this, is not within the meaning of the constitutional prohibition against holding any other office or public trust" (p. 485).

Applying these principles to what is known as the Postal Commission the committee finds that those Members of the House of Representatives appointed or designated as commissioners under public act 131, "An act making appropriations for the fiscal year ending June 30, 1899," are not, nor are any of them, officers under the United States within the meaning of the Constitution.

In respect to the Industrial Commission, the committee finds that those Members of the House of Representatives appointed or designated as commissioners under public act No. 146, "An act authorizing the appointment of a nonpartisan commission to collate information and consider and recommend legislation to meet the problems presented by labor, agriculture, and capital," approved July 7, 1898, are not, nor are any of them, officers under the United States within the meaning of the Constitution.

In respect to the Canadian Commission the committee finds that those Members of the House of Representatives appointed or designated as commissioners under public act No. 182, "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1898, and prior years, and for other purposes," are not, nor are any of them, officers under the United States within the meaning of the Constitution.

In respect to the Hawaiian Commission the committee finds that those Members of the House of Representatives appointed or designated as commissioners under public resolution No. 51, "Joint resolution providing for annexing the Hawaiian Islands to the United States," are not, nor are any of them, officers under the United States within the meaning of the Constitution.

In respect to visitors to the Military Academy, etc., the committee finds that those Members of the House of Representatives appointed and designated as visitors to the Military Academy at West Point, to the Naval Academy at Annapolis, and the regents and directors and consulting trustees to the various public institutions in the District of Columbia and appointed by the Speaker of the House, are not, nor are any of them, officers under the United States within the meaning of the Constitution.

494. The examination of 1898 as to incompatible offices, continued.

In 1898 the Judiciary Committee found that four Members, by accepting commissions in the Army and being mustered into the service after taking the oath as Representatives, thereby vacated their seats.

An opinion of the Judiciary Committee that persons on the retired list of the Army do not hold office under the United States in the constitutional sense.

(2) As to Members of Congress who had accepted commissions in the United States Army the report [1] held:

Before entering into a discussion of the law governing Members of Congress holding commissions in the United States Army, it is but due to the committee to say that it has approached the consideration of the questions involved with a delicacy growing out of their appreciation of the patriotic services tendered to their Government and rendered by these officers. Every opportunity has been given to them to be heard. The committee has proceeded with deliberation and care, and there is not a member of the Committee on the Judiciary but entertains the highest respect for the gentlemen interested. But the resolution was sent to this committee by a vote of the House, and it becomes our duty to consider and report to the House our findings of the law and fact governing these cases.

The most exhaustive treatment that has been given to these questions will be found in Report No. 110, Thirty-eighth Congress, first session, in the matter of the military appointment of Hon. F. P. Blair, jr., which is known as the "Dawes Report." The feeling of this committee can not be better expressed than by quoting a paragraph from that report:

"These questions are all of the gravest importance, and have ever been so considered whenever they have arisen. They affect seriously the privileges and the independence of the House, and can not be disregarded without trifling with both; and when the House of Representatives shall cease to guard its own privileges, and even its own independence, it will cease also to be worthy of a free people, and be fit only to be cast out."

The facts already found in this report clearly show that four Members of the present House of Representatives, after being duly elected, qualified, and acting as such, accepted commissions in the United States Army in the Spanish-American war, and acted in the Army as United States officers under such commissions.

The first question that presents itself is this:

Does a Representative in Congress, duly elected, vacate such office by accepting, during the term for which elected and after he has qualified as such, a commission, issued by the President, as an officer in the Army of the United States? Is the practical question suggested by the inquiry directed by the House to be made by the Committee on the Judiciary.

The question is not now presented for the first time, and we have, therefore, precedent, as well as the plain and unequivocal language of the Constitution, to guide us in answering the question propounded.

Section 6 of Article I of the Constitution of the United States provides as follows:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a Member of either House during his continuance in office."

A person holding a commission in the Army or Navy of the United States and not on the retired list is an officer of the United States and he holds that office under the United States. The office is created by law and filled by appointment of the President, when such appointment is confirmed by the Senate. Such a person is not, however, a civil officer—he does not hold a "civil office."

It follows that a person while holding the position of Senator or Representative in the Congress of the United States may be appointed to an office in the Army or Navy either created or the emolu-

[1] Mr. John J. Jenkins, of Wisconsin, dissented from this report.

ments of which have been increased during the time for which he was elected, or to any office in that service.

(Story on the Constitution, sections 791–792.)

The first prohibition relates solely to a "civil office." May such person accept such new office or any office under the United States and still hold his position as Representative in Congress?

It is evident that it was the policy of the framers of our Constitution to prohibit Senators and Representatives in Congress from creating civil offices or increasing the salaries pertaining to civil offices and then enjoying the fruits of their own work during the term for which they were elected. This provision removes, to some extent, the temptation to bad or unnecessary legislation by Members of Congress. It is true that they may vote to create a civil office or to increase the emoluments thereof and be appointed thereto after their term has expired, but the idea seems to have prevailed that a newly created office might, and probably would, be filled by the appointing power at once, or at least before the legislators creating it would be out of office and so situated as to accept its benefits or emoluments.

But the Constitution goes further and in the same connection declares that "no person holding any office under the United States shall be a Member of either House (of Congress) during his continuance in office." (The office held by him under the United States.)

The second prohibition relates to "any office" held under the United States whether it be civil or military or naval. It is evident that the framers of the Constitution used the word "civil" understandingly and intentionally in the first prohibition and for the purpose of distinguishing civil offices from military and naval offices. It is also evident that the framers of the Constitution used the word "any "in the second prohibition intentionally and for the purpose of declaring that no Senator or Representative in Congress shall hold an office under the United States and at the same time "be a Member of either House" of Congress.

It has been suggested that it was the purpose of the framers of the Constitution to declare that a person shall not act as a Senator or Representative in Congress during the time he holds an office under the United States, and that the effect of the constitutional provision is to permit a Senator or Representative in Congress to hold his position as such Representative and at the same time hold, accept, and perform the duties of another office under the United States, his right to act in the first capacity being suspended while holding and performing the duties of the second.

Such a construction of this section of the Constitution imputes to its framers the inability to express their ideas with any clearness whatever. It is plainly declared that "no person shall be a Member of either House during his continuance in office" if he holds any office under the United States. This language goes to the very existence of the individual as a Member of the Senate or House of Representatives while holding another office under the United States. Had suspension of the power to act been aimed at, apt words expressing the purpose would have been used. The words "act as" would have been substituted for "be." "Be" means "to exist, have existence or being." Therefore the Constitution declares that no person holding any office under the United States shall exist or have existence or being, while in such office, as a Member of either House of Congress.

At the present time, when the patriotic impulses of our people have been so deeply stirred, it may seem unpatriotic to say this—to assert that a Member of this House may not accept a commission in the Army, go upon the field of battle and fight for his country, and still retain his seat in the House of Representatives; but the manifest dangers that would follow any other construction of the Constitution (even were any other construction possible), must make the meaning of the framers of that instrument plain, and no mere patriotic sentiment should be permitted to override the plain language of the fundamental written law.

Both Story and Rawle, in their able and admirable works on the Constitution, have accepted the language of the Constitution of the United States above quoted as prohibitory, and without discussion have proceeded to point out the wisdom of the provision.

Rawle says, chapter 19:

"But although no reasons merely of a legal nature might be opposed to it, the impolicy of admitting such officers to compose a part of the legislature is exceedingly plain."

Again, he says:

"The public officer being therefore considered with us as having actual living duties which he is bound to perform, and as having no more time than is necessary to perform them, the Constitution expressly excludes him from a seat."

Story says, Vol. I, section 869:

"The other part of the clause which disqualifies persons holding any office under the United States from being Members of either House during the continuance in office has been still more universally applauded, and has been vindicated upon the highest grounds of public policy."

In section 871 he says:

"It is true that an acceptance of any office under the Crown is a vacation of a seat in Parliament. This is wise, and secures the people from being betrayed by those who hold office and whom they do not choose to trust."

The Hon. James Wilson, LL. D., one of the associate justices of the Supreme Court of the United States, and professor of law in the college of Philadelphia (and also a signer of the Declaration of Independence and a member of the convention that framed the Constitution of the United States), in his lectures delivered in 1790–91 (I Wilson's Works, pp. 446–449) takes the same view of the Constitution, and after condemning in severe language the English practice of appointing members of Parliament to other offices under the Crown and then permitting them to be reelected to Parliament while holding such offices, says:

"The result is that a provision by which the members of the legislature will be precluded, while they remain such, from offices, finds, with great propriety, a place in the Constitution of the United States. In this important particular it has a decided superiority over the constitution of Great Britain."

This language, contemporaneous with the adoption of the Constitution itself, and coming from one of the framers of that instrument, is significant.

And see also Angell and Ames on Corporations, section 434, Wilcox on Municipal Corporations, section 617, in which the doctrine is distinctly laid down that "a resignation by implication may not only take place by an abandonment of the official duties, as before mentioned, but also by being appointed to and accepting a new office incompatible with the former one."

Again it is stated:

"It is a rule of general law that an officer who accepts another appointment inconsistent with the first is held to have thereby resigned the first." (Rawle on the Constitution, chap. 19, p. 184.)

And again we find the doctrine clearly laid down as follows:

"By force of the constitutional inhibition against the holding of two lucrative offices by the same person at the same time, the acceptance of and qualification for a second office incompatible with the precedent one, ipso facto, vacates the precedent office; and neither a quo warranto, nor other amotion, from the office thus vacated is necessary before the vacancy can be supplied." (Biencourt *v.* Parker, 27th Texas, 558; Rawle on the Constitution, chap. 19, p. 184.)

Clearly one accepting an office under the United States, he having previously qualified as a Member of Congress, vacates his seat by such acceptance, and there is no way that he can again hold a seat in Congress but through a reelection by the people and then again becoming qualified as a Member of Congress without the disqualification of holding another office under the United States.

The report then goes on to cite the cases of Yell, Vandever, Blair, Herrick, Earle, Schenck, Lane, and continues:

It may be claimed that an exception is found in the action of the Thirty-seventh Congress when on July 12, 1861, Mr. Vallandigham offered the following resolution:

"Whereas it is rumored that Gilman Marston, of New Hampshire; James E. Kerrigan, of New York; Edward McPherson and Charles J. Biddle, of Pennsylvania, and Samuel R. Curtis, of Iowa, holding seats in this Congress as Members thereof, have been sworn into the military service of the United States and hold military offices under the authority of the same; and

"Whereas James H. Campbell, of Pennsylvania, also holding a seat in this House as a Member thereof, has admitted upon the floor of this House that he has been so sworn and does so hold office as aforesaid: Therefore,

"Resolved, That the Committee of Elections be instructed to inquire, and without unnecessary delay to report, whether the gentlemen above named, or any others claiming or holding seats as Members of this House and at the same time holding any military office under the authority of the United States, are constitutionally disqualified to be Members of this House by holding such military office."

This resolution upon its introduction was discussed and the facts denied, and on motion was laid on the table without being sent to the Committee on Elections or to any other committee. It was laid upon the table by a vote of 92 yeas to 51 nays, such gentlemen as Roscoe Conkling, Crittenden, Holman, Voorhees, and others voting in the negative. Nothing was settled, excepting that in the then temper of the House and country the House was determined not to allow Mr. Vallandigham's motion to be investigated either as to the law or the facts. If it settles anything it demonstrates what many will remember, that this was at a heated and exciting time in the history of our country, and the majority of the House was in no temper to receive suggestions from Mr. Vallandigham, who at that time was far from being in harmony, as many believed, with the burning patriotic sentiment of the country in the North. It should be borne in mind also that notwithstanding this action the same Congress, as shown in this report, laid down the doctrine that military officers of the United States could not at the same time be Members of the House.

It is evident that it was the policy of the framers of our Constitution to prohibit Senators and Representatives in Congress while remaining such from holding any other office under the United States, and no plainer language to declare the purpose could have been used than the words of the Constitution, viz: "No person holding any office under the United States shall be a Member of either House during his continuance in office." The framers of the Constitution intended to keep the legislative, judicial, and executive branches of our Government separate and distinct; to prevent Cabinet officers from being Members of Congress, and thereby giving undue power to the President and his immediate advisers; to prevent the centralization of power and office-holding power in a few hands; to prevent judges from acting at the same time as legislators and thus concentrating power in the courts; to avoid the manifold dangers to the existence and perpetuity of our free institutions and a representative government that would follow a concentration of the legislative and judicial or the legislative and executive (the military and naval power being a branch of the executive) in a few and thesame hands.

Without this constitutional restraint it would be possible for a President and the Congress to act in collusion; for the Congress to create high military and naval positions without limit and for the President to fill these offices from the ranks of unscrupulous, unpatriotic, and ambitious Senators and Representatives in Congress (the Senate confirming as a matter of course), and as the President is Commander in Chief of the Army and Navy, to thus concentrate all power in the hands of the executive branch of the Government. These military legislators might increase the Army, control the elections by the bayonet, and government by the people and for the people would end. Two printed lines in the Constitution of the United States has made all this impossible.

The thirteen infant colonies, subsequently the thirteen original States of this Union, were dependencies of Great Britain, and in England a person holding a seat in the House of Commons at once vacates it by accepting any public office under the Crown. (One Story on the Constitution, sec. 871.)

This had been the law of England for more than a hundred years prior to the Revolution. It is true, however, that persons holding such an office might be reelected to the House of Commons without vacating the office and then hold both at the same time. The evils and the alleged advantages of this system are many and have been ably pointed out by many writers. It is fair to presume that the framers of our Constitution carefully considered this question, and inserted the language quoted for the express purpose of avoiding the abuses that had sprung up under the English system and of making our liberties the more secure.

So long as we keep the legislative, the judicial, and the executive departments of this Government separate and keep the legislative independent of the military and naval power, seeing to it that competent and patriotic men administer the affairs of each of these branches of Government, we may hope for national prosperity and to preserve our liberties and maintain good government. But when those who make the laws shall at the same time also interpret and execute them, or when those who make the laws hold high places in our Army and Navy, powerful branches of the executive, the lust of power may and probably will lead to encroachments upon the rights and liberty of the citizens, and our form of government will be at an end.

There would be no danger to the Republic in allowing the gentlemen whose seats are in question here to hold their places as Representatives in Congress and their commissions in the Army at the same time, but the question is one of law, and involves a principle of vast importance which must be met and decided without reference to individual cases.

If it be proper and constitutional for one general in the Army to hold the position of Senator or Representative in Congress at the same time, it is also lawful for the President to appoint every Senator and Representative in Congress to a high place in the Army and Navy, and the result would be to transform the National Legislature into a band of military officials, and, while there is no present danger that this will be done, it is easy to see, in the light of history, that this very danger was guarded against by the framers of the Constitution, who believed that the safety of the Republic depended upon the making of encroachments by the military upon the legislative powers impossible.

The result is and must be that the acceptance of an office in the Army under the United States by a Representative in Congress at once and by force of this constitutional provision vacates his position as such Representative and he ceases to be such. Such acceptance of office is per se equivalent to an absolute resignation of the seat in Congress. (See the numerous cases hereafter cited.)

As already stated, there is no prohibition upon the President in appointing Senators or Representatives in Congress to offices in the Army or Navy. It is evident that in times of war it may be necessary to create a large number of military and naval offices, and the public good and safety may demand that such offices be at once filled by men holding seats in the National Legislature. Soon after the close of our civil war many of our most able, experienced, and distinguished generals, after being mustered out, were elected to Congress. Had a war broken out with some foreign nation, and a large increase of the Army or Navy, or both, been made necessary, and had a score of important army and naval positions been made necessary and created by the Congress, the public good and safety would have demanded the appointment of such men as Logan and Garfield to high military commands.

During the late war with Spain the appointments of General Wheeler from the House of Representatives and of General Sewell from the Senate to high office in the Army were commended as wise and proper. It was, however, incumbent upon these gentlemen to elect whether they could best serve their country in its legislative halls or upon the field of battle, and he who accepted the position in the Army necessarily and, ipso, facto, vacated his position as a Member of the Congress of the United States. (See cases cited hereafter.)

It may be said that there are many offices under the United States of little importance and carrying little or no pay, and that it can not be possible that the framers of the Constitution contemplated forbidding a Member of the National Legislature to hold one of these small offices. This is not the question. No line could be drawn between the large and the small offices. The principle declared was that a Member of the Congress of the United States shall not hold any office under the United States and retain his seat as a national legislator.

It will not do to say that the appointment of a Representative in Congress to an office under the United States and its acceptance by him merely operates to suspend the power of the legislator to act, for, if so, the President of the United States by collusion with the Congress might appoint a majority of the legislators chosen by the people to high offices, and thus destroy a quorum in the law-making body, and as the people would be powerless to elect others in their places, there being no vacancies, the power to enact laws for the protection of the people and the preservation of the Republic would be destroyed. Thus by indirection and collusion between the executive and the legislative bodies might the destruction of the Republic be accomplished. In any event great inconvenience would result.

It may be politic and wise at times for some legislator skilled in military science to abandon the halls of Congress for the field, but when he does this his place should be filled by the people of his district or State, who have the right to be represented at all times by a living, acting Member. It was not intended by the framers of the Constitution that a Congressional district or a State should go unrepresented. while the elected Member or Senator, with the approval of the President and Senate, sees fit to absent himself and serve as a military or naval officer, or as a judge, or in some other office under the United States. The Senator or Representative in Congress is a representative of the people, and is elected by them to perform certain specified constitutional duties in their interest, and he has no right to enter some other public office under the United States and, even temporarily, abandon the performance of the duties of the position to which he was elected.

It is evident that our Constitution contemplates, and that public policy demands, that no Representative in Congress shall suspend by his own act, and without the consent of his constituents, his power and duty to act as their Representative during such time as he sees fit to serve in some other obtainable Government office. From a legal standpoint it is immaterial whether such action is taken from patriotic or selfish motives.

It may be argued that our executive and legislative bodies are composed of men too pure minded and patriotic to endanger the nation. This is undoubtedly true as matters now are, but once open the door, extend the temptations, and who can foresee the results?

It may be suggested that there is not an entire and complete severance of legislative and judicial or of legislative and executive powers, duties, and functions under the Constitution. This is true in a limited and restricted sense. The President of the United States must approve acts of the Congress before they become laws, unless passed over his veto, and, as he is to execute the laws, we have here the Executive taking part in the enactment of laws. So the President, heads of Departments, and judges may openly suggest and recommend legislation. As the President is also the Commander in Chief of the Army and Navy, we find here a mild and modified blending of the legislative and military powers. But the President is not a member, even ex-officio, of the legislative branch of the Government. So the Senate forms an integral part of the court for the trial of impeachments. Again, both the Senate and House act judicially in determining the rights of persons to seats in those bodies, respectively.

After quoting Black's constitutional law on this point, the report continues:

It must be remembered that our Constitution was framed soon after the close of the Revolutionary war, during the exciting times of the French Revolution, and that it was the declared purpose of the founders of our Republic in establishing its system of government to establish and perpetuate by constitutional guaranties the rights and liberties of the citizen.

See debates where this very provision of the Constitution was discussed and adopted. (Compilation of Senate election cases, Senate Mis. Doc., second session Fifty-second Congress (vol. 6), pp. 13–19.)

We may well ask, and the inquiry is a pertinent one, who in this Republic desires to see a single Member of the National Legislature under the absolute command of the President of the United States? And who desires to see generals of the Army with the Army under their command and bound to implicit obedience, exercising power as legislators or clothed with the power to pass from the Army into Congress and from the Congress into the Army, exercising the powers of either position without reference to the will of the people and only as the President might command?

It can not be that the framers of the Constitution wrote therein a provision so repugnant to the spirit prevailing in that body and among the people—a provision that might completely subordinate the legislative to the military power. In this country we do not fear an encroachment by the military upon the legislative power, because of this very provision, which makes it impossible for an officer in the military department to hold a place in the legislative, and for the further reason that the legislative body, by refusing to raise taxes or vote supplies or appropriate money, may absolutely cripple the military and naval organizations. But fill our legislative halls with army officers, or with those who may swing back and forth at their election, or, in some cases, place therein a small number, and a military despotism will in the end usurp the government in fact, even if the name and form remain the same.

It may be suggested that military officers after being retired and placed on the retired list have been members of Congress.

This is true; but it is settled law that persons on the retired list of the Army do not hold office under the United States in the constitutional sense. (People *v.* Duane, 121 N. Y., 367; In re Hathaway, 71 N. Y., 238; U. S. *v.* Hartwell, 6 Wall., 385; U. S., *v.* Germaine, 99 U. S., 508; U. S. *v.* Tyler, 105 U. S., 244.)

It may be contended that persons on the retired list of the Army do hold office under the United States, citing Badeau *v.* United States (130 U. S., 439), but this authority does not so hold. That case simply relates to salary under particular statutes.

These persons are still in the service, but hold no office unless assigned to duty.

To hold an office under the United States the person must occupy a public station or employment conferred by the appointment of government; and it embraces tenure, duration, emoluments, and duties.

Says the court in 212 New York, page 373:

"It is difficult to conceive of the existence in this country of a military office without the power of command, the right of promotion, or the obligation to perform some duty."

And for the reason that retired army officers are not entitled to promotion, do not perform duty, and exercise no command, it is held that when retired they cease to be officers.

It remains to consider what action, if any, is necessary on the part of the House of Representatives.

It is the settled and unquestioned law in England and the United States that—

"The appointment of a person to an office incompatible with one aleady held by him is valid, and he has a right to elect. (Angell and Ames on Corporations, 255). If he has e accepts, takes the oath, and enters ed. (People v. Ca *qu m 2 Hill, Milwaxd v. Thatcher, 2 Tr Ref, win, Doug., 383, note 22; Rex V. 17; Dillon on Municipal Corp., 3d ed., 46 N. Y., 381; People v. Board Of Poh v. Hawkes, 123 Mass., 525 (per Gray, C. J.); State v. Butz, 9 S. C., 156; Stubbs v.ee, 64 Me., 195; State v. Draper, 45 Mo., 355; Cotton v. Phillips, 56 N. H., 220; Kerr v. Jones, 19 Ind., 351; Regents of the University v. Williams, 9 Gin. & Johns. (Md.), 365; State v. Kirk, 44 Md., 401; Foltz v. Kerlin, 105 Md., 221; People V. Hamifaxr 96 Ill., 420; State v. Hutt, 2 Ark., 282; State v. West, 33 La. Ann., 1261.)"

In People *v.* Nostrand, supra, the court says:

"It is a settled rule that the acceptance of an incompatible office operates as a resignation of the incumbent of the office then held by him.'

In People *v.* Kelly, supra, the court said:

"The moment he accepted the new office the old became vacant. His acceptance of the one was an absolute determination of his right to the other and left him no shadow of title, so that neither quo warranto nor a motion was necessary (citing cases). These cases also show that this would be so at common law and independent of the statute. * * * The office was and is as vacant as if Mr. O'Reilley had never been born; his removal is as complete as if caused by death. When he accepted the new office, the other ceased to have an incumbent."

Says Angell and Ames on corporations, first edition, 255:

"This is an absolute determination of the original office and leaves no shadow of title to the possessor, so that neither quo warranto nor a motion is necessary before another may be elected.

Said Parke, J., in Rex *v.* Patteson, supra:

"Where two offices are incompatible they can not be held together, is founded on the plainest principles of public policy, and has obtained from very early times."

This rule is not limited to corporate offices, but extends both in principle and application to all public offices. (Dillon on Mun. Corp., 3d ed., sec. 227; Glover on Corp., 139.)

The whole question is somewhat fully discussed in McCrary on Elections (3d ed.), sections 302904, inclusive.

Is the position or office of Representative in Congress incompatible with any other office under the United States?

The Constitution itself answers the question when it declares "and no person holding any office under the United States shall be a member of either house during his continuance in office."

This is a constitutional declaration that the two positions are incompatible. In the care of Stanton *v.* Lane (Compilation of Senate Election Cases, p. 181, where the report of the Senate committee on the Judiciary is found in full) the report says:

"In the opinion of the committee the office of brigadier-general under the United States is incompatible with that of member of either House of Congress. By accepting the office of brigadier-general the sitting Member, Mr. Lane, virtually resigned his seat in the Senate, and it became vacant at that time."

In Kerr *v.* Jones (19 Ind., 351), the court held:

"The offices of reporter of the Supreme Court and colonel of militia are incompatible, and the acceptance of the latter vacates the former."

In addition to these authorities, the report in the cases of Blair and Schenck is quoted at length, after which the argument proceeds:

Again, Article 1, section 1, of the Constitution says:

"All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives."

The powers of Congress are then specified.

Article II, section 1, says: "The executive power shall be vested in a President of the United States of America." Section 2: "The President shall be Commander in Chief of the Army and Navy of the United States and of the militia," etc. Article III, section 1: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts," etc.

It is therefore apparent that it was not intended that the duties of those three departments should be performed by the same man or bodies of men.

"Whether offices are incompatible depends upon the charter or statute and the nature of the duties to be performed. (1 Dillon on Mun. Corp., 3d ed., sec. 227; Milward *v.* Thatcher, 2 Term Rep. (D. & E.), 87; People *v.* Carrique, 2 Hill, 93.)

"Incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one incumbent to retain both. (1 Dillon Mu. Corp., 3d ed., sec. 227 and note; Kerr *v.* Jones, 19 Ind., 351.)"

The light of the common law, of the Constitution, of the fact that a person should not at the same time both make and execute the law, and that the legislative should not be subservient to the Executive, it is clear that the position of Representative in Congress and of an officer in the Army of the United States are incompatible offices.

The duties of a Member of the National Legislature demand his presence in the legislative chambers at Washington, making laws, as a Representative of the people, while the duties of a military officer demand his presence in other places at all times and that he engage himself in executing the laws of Congress under the command of the President.

It is true that the mere impossibility of the incumbent of two offices being present at all times to perform the duties of each does not make them incompatible, but

"Offices are said to be incompatible and inconsistent, so as not to be executed by the same person when from the multiplicity of business in them they can not be executed with care and ability, and when their being subordinate and interfering with each other it induces a presumption that they can not be executed with impartiality and honesty." (5 Bacon's Abridgement, Title Offices, K; Public Offices; Throop, sec. 33; People *v.* Green, 58 N.Y., 304–305, per Folger, C. J.)

Is it proper and public policy for the officers of the Army and Navy acting as legislators to appropriate the money for the support of these departments, expend it as they see fit under laws of their own making, while governed and restrained only by such limitations and restrictions as they see fit to place upon themselves?

If their power as legislators is suspended only while holding offices in the Army or Navy, they may first (and in anticipation of commissions) make obnoxious laws and then go into the military and naval service to execute them, leaving the people powerless, for while there is no possible quorum to do business there are no vacancies in either House, and hence a repeal of obnoxious laws or the enactment of new ones is made impossible. Even repentant and patriotic Representatives would be unable to return to the halls of legislation, unless by the consent of the President, without committing the crime of desertion and incurring the death penalty. Even the court of impeachment might be in the Army and Navy, unable to convene, and the whole Government would be in the hands of what might prove to be an ambitious and unscrupulous Executive.

It is no answer to say, what we all concede, that our present patriotic Executive is above suspicion. What is constitutional to-day will be so until the fundamental law is changed. We are building for the centuries and to avoid all probable, if not all possible, dangers. Our fathers had all these dangers in mind when the Constitution was framed.

In Indiana, State *v.* Allen (21 Ind., 516), the court went so far as to hold that an enlistment in the Army of the United States for three years, or during the war, was an abandonment and vacation of a civil office held under the State. (See also Willcock on Corp., 238. But see Bryan *v.* Cattell, 15 Iowa, 537.)

The question may be asked, What will be the situation if a person holding a commission in the Army of the United States is elected to Congress and, without resigning his office in the Army, presents himself as a Member of the House? In such case does he vacate the Army position? Assume that he refuses to resign either and claims to act in both positions. It will be time enough to cross that bridge when reached. It is clear, however, that in such case he is not entitled to his seat in Congress and should not be sworn in or allowed to act.

It follows that the seats of those Members of the House of Representatives in the Fifty-fifth Congress who entered the Army as officers, commissioned by the President, during the late war with Spain, and took the oath and acted as such, are vacant, and have been since they accepted their commissions in the Army. The only action necessary is to so declare by resolution, as matter of convenience and to aid the Speaker and others in discharging their public duties. No act or resolution of Congress can change the legal effect of their acts.

Our attention has been called to the case of Bryan *v.* Cattell (15 Iowa, 538), as sustaining the doctrine that a Member of Congress might hold a military appointment in the Army. But this case will not sustain the doctrine. Bryan was appointed a captain in the Army, being at the time district attorney for the fifth judicial district of Iowa, for four years commencing with the 1st day of January, 1859. At that time there was no provision of law against holding two offices, but by chapter 54, laws of 1862, it was provided as follows:

"The acceptance of a commission to any military office. either in the militia of this State, or in the volunteer service of the United States, which requires the incumbent in the civil office to exercise his military duties out of the State for a period not less than sixty days."

This was enacted as a ground for the vacation of any civil office where the officer had entered the United States Army.

Captain Bryan sued for his salary for the entire period covered by his election. The court denied that for such part of the time as came after the enactment just quoted. This clearly sustains the position that with the provisions of Article I, section 6, clause 2, United States Constitution, the office would have been declared vacant by the Iowa court. For the period prior to the enactment just quoted the court allowed the Captain his salary as district attorney upon the ground that he might discharge the duties of district attorney and also the duties of captain. The language of the court is:

"It by no means necessarily follows that the person in the military service might not discharge all the substantial duties of the attorneyship. It is scarcely probable that he could or would, and yet he might."

Upon this line of thought, not at all sustained by the current authorities, they allowed Captain Bryan to recover for that portion of his salary for the time heretofore stated. But the court laid down this doctrine in the same decision:

"If a party accepts another office which, within the meaning of the law and the case is incompatible with that which he holds, we have no doubt but the first one would become vacant."

We can well understand how the very patriotic chief justice, Judge Wright, in the great patriotic State of Iowa, then throbbing with very generous impulses for the Government, would use the reasoning quoted in respect to the possibility of his discharging the duties of the two offices. But this case, taken as a whole, thoroughly sustains the position taken by the committee, and when we are confronted with the constitutional provisions it is absolutely certain that had such a case arisen as a Member of Congress holding a commission in the Army, Judge Wright and the supreme court of Iowa would have held, as Congress as ever held, that the offices were absolutely incompatible.

We have then, in considering this matter, two kinds of incompatibility in respect to offices: First, where in the very nature of the two offices they are incompatible and can not be held by the same person at the same time. Clearly, for reasons above given and sustained by the authorities without reference to the Constitution, the office of Member of Congress and an officer in the Army of the United States are incompatible and can not be held at the same time. But while we have considered this view of the case fully it was not really necessary, for the constitutional provision in itself makes it absolutely impossible to hold these two offices at the same time.

The committee therefore recommend to the House the adoption of the following resolution:

"Resolved, That Joseph Wheeler, a Representative in the Fifty-fifth Congress of the United States from the Eighth district of the State of Alabama; Edward E. Robbins, a Representative in the Fifty-fifth Congress of the United States from the Twenty-first district of the State of Pennsylvania; David G. Colson, a Representative in the Fifty-fifth Congress of the United States from the Eleventh district of Kentucky, and James R. Campbell, a Representative in the Fifty-fifth Congress of the United States from the Twentieth district of the State of Illinois, by accepting commissions in the Army of the United States, and being mustered into such service after being sworn in as such Representatives, thereby vacated their seats as such Representatives and ceased to be members of this House as of the dates they accepted such military offices, respectively, and are not now members of the Fifty-fifth Congress of the United States."

On March 2[1] this report was called up for action on the resolution relating to the army officers. Mr. John F. Lacey, of Iowa, having raised the question of con-

[1] Record, p. 2751.

sideration, the House, by a vote of 77 yeas and 163 nays, declined to consider the resolution.

495. The House has distinguished between the performance of paid services for the Executive by a Member, and the acceptance of an appointment to an incompatible office.

The House has investigated the constitutional right of a Senator to perform services for the Executive.

On January 3, 1822,[1] Mr. Daniel P. Cook, of Illinois, offered a resolution of inquiry directing the Secretary of the Treasury to report, among other things, the names of the persons appointed to examine the various land offices of the United States. This resulted in developing the fact that a Senator of the United States had been appointed as one of the examiners, and an examination of the subject by a select committee appointed as follows: Messrs. Cook, Jonathan Russell, of Massachusetts; Cadwallader D. Colden, of New York; Lewis McLane, of Delaware; David Trimble, of Kentucky; Andrew Stevenson, of Virginia, and William Lowndes, of South Carolina.

On March 29, 1822,[2] Mr. McLane[3] submitted a report from this committee:

> That, in the year 1820, Jesse B. Thomas, esq., a Senator of the United States, from Illinois, was permitted by the Secretary of the Treasury to examine the offices in Ohio, Indiana, Illinois, and Missouri, for which as appears by the documents before the committee, he received a sum amounting to the allowance which has been established since the year 1817. * * *
>
> The committee are clearly of opinion that the examination of the land offices by Jesse B. Thomas, esq., was not a violation of the Constitution of the United States.
>
> That instrument forbids the appointment of Members of Congress, during the time for which they were elected, to any civil office, created, or the emoluments whereof shall have been increased, during that time; and, also, prevents any person holding an office under the Government from being a Member of Congress during his continuance in office. * * *
>
> But your committee are of opinion that the duty of examining the land offices is not such an office as was contemplated by the Constitution of the United States, which opinion seems to have received the sanction and regulated the practice of the Government since the adoption of the Constitution, by those who bore a principal share in composing it, and must, therefore, be supposed to have understood its real import.

The committee refer to the appointment of Mr. Tracy, a Senator of the United States, by President Adams, in the year 1800, to inspect the posts on the northern and northwestern frontier. For this service, Mr. Tracy received a liberal compensation, and extra mileage, which is stated on the records of the Senate of that day. Under the Administration of Mr. Jefferson, Mr. Dawson, a Member of the House of Representatives from Virginia, was appointed as the bearer of a treaty to France, and was paid for performing the duty; and during the Administration of the same President, Mr. Smith, a Senator from Tennessee, was appointed a commissioner to treat with the Indians, and actually executed two treaties under this appointment. They also refer to the instance, at a still more recent period, during the Administration of President Madison, of the appointment of Mr. Worthington, a Senator, and Mr. Morrow, a Representative from Ohio, to negotiate with the Indians. In

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[1] First session Seventeenth Congress, Journal, pp. 111, 284; Annals, pp. 635, 829, 912, 1113.

[2] Annals, pp. 1407–1414; Journal, pp. 410, 470.

[3] The Journal says Mr. Cook submitted the report (Journal, p. 410).

each of these, cases, the individuals referred to executed the trusts confided to them, still retained their seats in Congress, and, in the Senate, passed upon their own acts.

The committee next proceeded to consider the law of April 21, 1808, "An act concerning contracts." They found that the words of the act were broad, but did not consider that they were intended to include a case like that under examination. By various examples of Members and Senators who had performed services for the Executive Department, the committee concluded that the examination of land offices was not among the inhibited functions.

Therefore the committee recommended no action. But Mr. Cook moved the adoption of the following:

Resolved, That the employment of Members of Congress by the Executive, or any executive officer of the United States, in the performance of any public service, during the continuance of their membership, for which they receive compensation out of the Public Treasury, is inconsistent with the independence of Congress, and in derogation of the rights of the people, and, if it be not already, ought to be prohibited.

On April 18 Mr. Cook called this resolution up for consideration, but the House declined to consider it.

496. The House has declined to hold that a contractor under the Government is constitutionally disqualified to serve as a Member of the House.

Discussion of the meaning of the word "officer" in the constitutional provision relating to the qualification of Members.

On February 24, 1806,[1] Mr. John Randolph, of Virginia, after some general remarks on the independence of the membership of the House, offered the following:

Whereas it is provided by the sixth section of the first article of the Constitution of the United States that no person holding any office under the United States shall be a Member of either House of Congress during his continuance in office: Therefore,

Resolved, That a contractor under the Government of the United States is an officer within the purview and meaning of the Constitution, and, as such, is incapable of holding a seat in this House.

Resolved, That the union of a plurality of offices in the person of a single individual, but more especially of the military with the civil authority, is repugnant to the spirit of the Constitution of the United States and tends to the introducing of an arbitrary government.

Resolved, That provision ought to be made by law to render any officer in the Army or Navy of the United States incapable of holding any civil office under the United States.

After debate, in which the meaning of the word officer as used by the Constitution was discussed at length, the first resolution was decided in the negative—yeas 25, nays 26.

On the second resolution there was debate, it being urged that it was not the duty of the House to construe the Constitution; that in several instances like that of General Wilkinson, governor of the Northwest Territory, offices had been combined in the same person to advantage, etc. The resolution was disagreed to—yeas 31, nays 81.

On April 2 the third resolution was agreed to by the House—yeas 94, nays 21—and a committee was appointed to prepare a bill. This bill (H. R. 136) passed the House, but did not become a law, the Senate postponing it.

[1] First session Ninth Congress, Journal, pp. 295, 349, 359 (Gales & Seaton ed.); Annals, pp. 507, 880–892, 923–930, 935, 1011.

497. The election case of George Mumford, of North Carolina, in the Fifteenth Congress.

A collector of the Federal direct tax, whose office expired after his election but before he took his seat as a Member of the House, was held entitled to the seat.

On February 6, 1818,[1] the Committee on Elections reported in the case of George Mumford, of North Carolina, who had been appointed a principal assessor in 1813 for the collection of direct taxes and internal duties, and who had not resigned the office on December 1, 1817, when he qualified as a Member of the House of Representatives.

The committee make the following explanation in regard to the office:

The act of July 22, 1813, under which Mr. Mumford held his appointment, was prospective and without limitation. No law then existed laying a direct tax. But, as Congress intended resorting to that system of revenue, it was enacted "that, for the purpose of assessing and collecting direct taxes," the United States should be divided into collection districts, and a principal assessor appointed for each district. If this act has neither expired nor been repealed Mr. Mumford is still in office, and can not rightfully be a Member of this House. But by the second section of the act to provide additional revenues, etc., approved January 9, 1815, the said act was repealed, except so far as the same respected collection districts, internal duties, and the appointment and qualification of collectors and assessors; in all which respects it was enacted that the said act should be and continue in force for the purposes of the last-mentioned act. The act of July 22, 1813, so far as the same was not repealed, was thereby limited to the duration of that act, and was continued in force only for its purposes. By that act a direct tax of $6,000,000 was annually laid upon the United States, and apportioned agreeably to the provisions of the Constitution. At the first session of the Fourteenth Congress that act was modified by repealing so much thereof as laid an annual tax of six millions, by reducing the same to three millions, and by limiting its continuance to one year; and it was expressly enacted that all the provisions of the act of January 9, 1815, except so far as the same had been varied by subsequent acts, and except the first section thereof (which related to the apportionment of the tax), should be held to apply to the tax of three millions thereby laid. Thus the act of July, 1813, was again limited, and it was continued in force for the purposes of the three million tax laid March 5, 1816. Whenever those purposes were fulfilled that act expired, and, of course, all offices created by it ceased to exist.

The committee found from official sources that the entire tax assessed in the district for which Mr. Mumford was collector was accounted for previous to the 1st of December, 1817, and that no official duty remained to be performed by Mr. Mumford. His office therefore expired previous to his taking his seat in the House.

As a part of their report the committee included a letter from Mr. Mumford, in which, after stating the case, he argued at length its constitutional aspects.

On March 21, 1818, after the report had been considered in Committee of the Whole, the House agreed to the following resolution, which had been recommended by the Committee on Elections:

Resolved, That George Mumford is entitled to a seat in this House.

498. The South Carolina election case of Elias Earle in the Fifteenth Congress.

A Member-elect who continued in the office of postmaster after his election, but resigned before taking his seat, was held to be entitled to the seat.

[1] First session Fifteenth Congress, Contested Election Cases in Congress from 1789 to 1834, p. 316.

On January 5, 1818,[1] the Committee on Elections reported in the case arising as to the qualifications of Mr. Elias Earle, of South Carolina. The committee reported the following facts: In April, 1815, Mr. Earle was appointed postmaster at Centerville, S. C. On September 10, 1816, Mr. Earle mailed his resignation as postmaster to the Postmaster-General. His successor was appointed but never commissioned, so. Earle continued to superintend the post-office until June 12, 1817, when his connection with it ceased.

Mr. Earle was elected at the last Congressional election one of the Representatives in Congress, and on February 10, 1817, the governor executed a certificate of his election, which Mr. Earle received in April or May following.

The question arose as to the discharge of the duties of postmaster after he was a Member-elect of the House, but before he had taken his seat.

The committee reported this resolution, which, on March 21, was agreed to by the House:

Resolved, That Elias Earle is entitled to a seat in this House.

499. The Ohio election case of Hammond v. Herrick in the Fifteenth Congress.

After a careful consideration of the status of a Member-elect the House decided that such an one was not affected by the constitutional requirement that an officer of the United States shall not be a Member.

On January 5, 1818,[2] the Committee on Elections made a report in the case of C. Hammond's contest for the seat of Mr. Samuel Herrick, of Ohio. On the 19th of December, 1810, Mr. Herrick had been appointed attorney of the United States for the district of Ohio, which office he accepted and held until his resignation thereof on the 29th of November, 1817. In October, 1816, he was elected one of the Representatives of the State of Ohio for the Fifteenth Congress. The result of the election was publicly announced on the 7th of January, 1817, in the presence of the senate of that State. On the 15th of September, 1817, the governor executed a certificate of Mr. Herrick's election, according to the law of Ohio, which was received by him on or about the 30th day of the same month. Mr. Herrick, therefore, continued in office almost nine months after the 4th of March and two months after receiving the certificate of his election. Congress met December 1, 1817, and Mr. Herrick took his seat on that day in the House of Representatives.

The Committee on Elections which examined the case consisted of Messrs. John W. Taylor, of New York, John Tyler, of Virginia, Ezekiel Whitman, of Massachusetts, Orsamus C. Merrill, of Vermont, Solomon Strong, of Massachusetts, John L. Boss, jr., of Rhode Island, and Henry Shaw, of Massachusetts. Their report, which seems to have been unanimous, examined very carefully whether or not the sixth section of Article I of the Constitution[3] had been violated. After referring to the cases of John P. Van Ness[4] and Philip Barton Key[5] and certain

[1] First session Fifteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 314.

[2] First session Fifteenth Congress, Journal, pp. 32, 103, 355, 359, 363; Annals, pp. 1435–1447; House Report No. 30.

[3] See section 7 of this work.

[4] See section 486 of this volume.

[5] See section 442 of this volume.

English precedents the report proceeds to a very full consideration of the status of a Member-elect of the House:

Persons elected to the House of Commons become at one time members for certain purposes and at another time for other purposes. Thus immediately upon executing the indenture of return by the sheriff or other returning officer, the person elected becomes entitled to the privilege of franking, although the day at which the Parliament is made returnable may not have arrived. Yet he is not a member, for he may thereafter be a candidate for election in another district at any time before the Parliament is made returnable and the return actually filed in the Crown office. From the time last mentioned he becomes a member so far that he can not be a candidate for another district, but yet he may thereafter hold an office incompatible with membership, and upon resigning his office he may immediately qualify and take his seat in the House. It has often been decided by their committee of elections that a person holding an office incompatible with membership is, nevertheless, capable of prosecuting his claim to a fact. After examination of all the parliamentary registers, histories, and journals within our reach we have found no case where a person elected to the House of Commons was brought in on a call of the House before he had voluntarily appeared, qualified, and taken his seat, nor do we find any instance of a person having been expelled until after such time.

A very particular case occurred on the 10th of February, 1620. Sir John Leech having been elected a member of the House of Commons, and appearing to take the oaths of supremacy and allegiance, was asked whether he had not already sat in the House that Parliament in violation of the statute. He confessed that on the Wednesday morning previous he did sit in the House a quarter of an hour, being unsworn. For this offense Sir John was not expelled, but it was resolved that he was disabled to serve in the House, and a new writ of election was issued to supply the vacancy, in the same manner as if no election and return had taken place. The same course of proceeding has been pursued when a person duly elected and returned comes into the House and refuses to be sworn. Such was the case of Mr. Archdale, in the year 1698, who, being elected and returned, came into the House of Commons and said he was ready to serve if his affirmation of allegiance could be accepted instead of his oath. The House resolved that it could not. Mr. Archdale, still declining to take the oath, was refused admittance to a seat and a new writ was issued to supply his place. This case is more peculiar because a person elected to the House of Commons can not relinquish his right to a seat either before or after qualification otherwise than by accepting an incompatible office. But by refusing to be sworn he may do that indirectly which he is not permitted to do directly. We have seen several similar cases which occurred in the colonial assembly of New York, but not now having access to the journals we are unable to report the particulars.

Persons elected and returned to the House of Commons may be chosen members of committees before they appear and qualify. But it is allowed for a reason similar to that which, in courts of law, permits a declaration to be filed de bene esse before the defendant appears in court. In both cases the act is conditional; and it is ineffectual unless the condition of appearance be performed.

The practice of this House, which does not allow the appointment of persons to be members of committees[1] until they shall have been sworn and shall have taken their seats, is obviously more reasonable and convenient than the other. It was decided as early as the first session of the Second Congress, in the case of John F. Mercer, who was chosen to supply a vacancy in the representation of the State of Maryland, occasioned by the resignation of William Pinckney, that a Representative-elect might decline his election before taking his seat and before the first session of the Congress to which he was elected. We do not find that the question has since been agitated, although similar cases have often occurred. Our rule in this particular is different from that of the House of Commons; it is also better, for it makes our theory conform to what is fact in both countries, that the act of becoming in reality a Member of the House depends wholly upon the will of the person elected and returned. Election of itself does not constitute membership, although the period may have arrived at which the Congressional term commences. This is evident from the consideration that all the votes given at an election may not be returned by a returning officer in season to be counted, whereby a person not elected may be returned

[1] See, however, sections 4477–4483 of Volume IV of this work. Jefferson's Manual has by rule been made authority in the House since 1837. In the Fifty-sixth Congress Mr. Joseph Wheeler, of Alabama, a Member-elect, was not appointed to any committee.

and take the seat of one who was duly elected. Neither does a return necessarily confer membership, for if he in whose favor it be made should be prevented taking a seat at the organization of a House of Representatives, he might find upon presenting himself to qualify that his return had been superseded by the admission of another person into the seat for which he was returned.

At an election held in the State of Georgia in October, 1804, Thomas Spalding was duly chosen a Representative to the Ninth Congress, but because the votes of three counties were not returned to the governor within twenty days after the election, Cowles Mead received a certificate and took his seat. Mr. Spalding afterwards presented his petition. The House vacated Mr. Mead's seat and admitted Mr. Spalding.[1]

In April, 1814, Doctor Willoughby was elected a Representative of the State of New York to the Fourteenth Congress; but by reason of a clerical error of certain inspectors in returning certificates of votes to the office of the county clerk, General Smith was declared duly elected, and a certificate of election was accordingly delivered to him; but he, having omitted to take a seat at the commencement of the session, was, on the ninth day thereafter, declared not entitled, and thereupon Doctor Willoughby was admitted in his seat.[2]

Several other cases might be cited where persons were returned who never in fact became Members, and where others became Members who were not returned. Neither do election and return create membership. These acts are nothing more than the designation of the individual, who, when called upon, in the manner prescribed by law, shall be authorized to claim title to a seat. This designation, however, does not confer a perfect right, for a person may be selected by the people destitute of certain qualifications, without which he can not be admitted to a seat. He is, nevertheless, so far the Representative of those who elected him that no vacancy can exist until his disqualification be adjudged by the House. Yet it would be easy to state cases where he would not be permitted for a moment to occupy a seat, notwithstanding the regularity of his election and return. To no practical purpose could he ever have been a Member. So, also, if a person duly qualified be elected and returned and die before the organization of the House of Representatives, we do not think he could be said to have been a Member of that body, which had no existence until after his death. We say which had no existence, for we consider that concept altogether fanciful which represents one Congress succeeding to another as members of the same corporation. It has no foundation either in fact or in the theory of our Government. Each House of Representatives is a distinct legislative body, having no connection with any preceding one. It commences its existence unrestrained by any rules or regulations for the conducting of business, which were established by former Houses, and which were binding upon them.[3] It prescribes its own course of proceeding, elects its officers, and designates their duties. Even joint rules for the government of both Houses of Congress are not binding upon a new House of Representatives, unless expressly established by it. Although the Fourteenth Congress had never assembled the Fifteenth would have met, under the Constitution, clothed with every legislative power, as amply as it was enjoyed by the Thirteenth. The Constitution does not define the time for which Representatives shall be chosen. It is satisfied provided the choice take place at any time in every second year. The rest is left to the discretion of each State. Accordingly.. in some States Representatives are usually chosen for one year and seven months, and in other States for a longer time.

The privilege of exemption from arrest, granted by the Constitution to Representatives before a meeting of the House, and after its adjournment, furnishes no argument in favor of their membership at such times. Exemptions from arrest is a privilege as old as the Parliament of England. There it is extended, not only to members, but to their servants, horses, and carriages. Our Constitution adopts the very words of the common law, but restricts the privilege to Members. In both countries the object is the same, not the benefit of the Member, but of the public service. It is an essential incident to the right of being represented, and a consequence of that right. But that membership is not coextensive with the enjoyment of that privilege is manifest from the consideration that such a construction might make the Members of one Congress continue in office, not only after the Congress had expired, but also

[1] First session Ninth Congress, Journal, pp. 192, 205, 210–215 (Gales & Seaton ed.).

[2] First session Fourteenth Congress, Journal, pp. 28, 31, 45.

[3] See also sections 6743–6755 of Volume V of this work.

after the next Congress was actually in session.[1] This construction, therefore, is not only absurd, but it serves to illustrate the fallacy of that suggestion which fancies the Representatives of one Congress succeeding to the seats of their predecessors as members of the same corporate body.

The privilege of franking letters, and of exemption from militia duty, are not granted by the Constitution. They are established by law and liable to be changed at the will of the Government. They have been extended and may be restricted, as public convenience shall require. Previous to the last Congress the privilege of franking was not enjoyed until after the commencement of each session. But as that does not prove negatively that persons elected to the House of Representatives were not Members before that time, so the existing law does not prove affirmatively that they are. It is true that the words "Members of the House of Representatives" are used as descriptive of the persons to whom the privilege is granted, but they certainly were used without intending thereby to express an opinion, much less to decide when membership commences, and probably without in any wise adverting to that inquiry.

The conclusion of the committee was embodied in this resolution:

Resolved, That Samuel Herrick is entitled to a seat in this House.

On March 19 this report, which had been committed to the Committee of the Whole[2] was considered. Mr. Richard C. Anderson, jr., of Kentucky, spoke at length in opposition to the idea that a Member-elect was not a Member. He said the provision of the Constitution that, "a majority of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent Members," must refer to the first as well as to any subsequent session of Congress, and therefore was the plainest evidence that a person elected might be a Member of the House before he had appeared and taken his seat. Other sections of the Constitution, that giving Representatives privilege from arrest while going to and returning from the sessions, that prohibiting a Representative from being appointed an elector, and that fixing the age of the Representative at least 25 years were also evidence of the same thing. If a Member-elect was not a Representative he might be an elector, and thus, in certain contingencies, vote for President once as an elector and again a little later as a Representative on the floor of the House, a situation evidently not contemplated by the Constitution. Also if a Member-elect was not a Representative, a man under 25 years might be chosen provided he would become 25 by the time Congress should meet. But a provision making the eligibility of a Representative depend upon the time of year at which Congress might meet was an evident absurdity.

On March 20, on motion of Mr. Benjamin Adams, of Massachusetts, and by a vote of 67 ayes to 66 noes, the Committee of the Whole inserted the word "not" in the resolution, so it should read that Mr. Herrick was not entitled to the seat.

When this amendment was reported to the House, the House disagreed to it—yeas 74, nays 77. The resolution declaring Mr. Herrick entitled to the seat was then adopted-yeas, 77, nays 70.

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[1] This probably refers to such a case as actually happened in 1869, when the Fortieth Congress expired March 3, and the Forty-first convened the next day, March 4. A Member of the Fortieth, who was not reelected to the Forty-first, might not reach his home until long after his successor had taken his seat.

[2] The Committee of the Whole was not in those days limited so exclusively to the consideration of subjects involving the expenditure of money.

500. A Member-elect, who held a commission in the Army and had not taken the oath or his seat in the House, having resigned, a question arose as to when the compensation of his successor should begin.

Opinion of the Judiciary Committee that when a Member-elect retains an incompatible office and does not qualify, a vacancy exists in his seat.

An opinion that a Member-elect becomes a Member from the very beginning of the term to which he has been elected.

As to what acts may constitute a declination of the office of Member of the House.

Conclusions of law as to the time of beginning of compensation of a Member elected to fill a vacancy.

On February 4, 1901,[1] Mr. George W. Ray, of New York, from the Judiciary Committee, submitted a report on the following letter, which had been referred to that committee, with instructions to examine into the facts and law relating thereto and report conclusions:

OFFICE SERGEANT-AT-ARMS, HOUSE OF REPRESENTATIVES
WASHINGTON, D.C., JANUARY 5, 1901.

SIR: A question has arisen in regard to the payment of Hon. William Richardson, Member from the Eighth district of Alabama, who was elected on August 6, 1900, to succeed Hon. Joseph Wheeler. As I am informed, Mr. Wheeler has notified you, under date of August 17, 1900, that he resigned, the resignation to take effect August 6, 1900, while the governor of Alabama has certified to you that the resignation of Mr. Wheeler, hearing date April 20, 1900, was received on April 23 at the executive department of Alabama and unconditionally accepted on that date. Mr. 'Wheeler has not demanded or received pay since March 4, 1899, the date of the beginning of the Fifty-sixth Congress.

The question which arises is as to the date at which the compensation of Mr. Richardson should begin.

In view of the somewhat complicated legal question involved, I should like to have further advice before making the payment.

RESPECTFULLY,

HENRY CASSON,
Sergeant-at-Arms, House of Representatives.

Hon. DAVID B. HENDERSON,
Speaker of the House of Representatives.

The committee ascertained and reported the following facts:

At the regular general election held in the State of Alabama in the year 1898 Hon. Joseph Wheeler was duly elected Representative in the Fifty-sixth Congress from the Eighth district of Alabama. His credentials (or certificate of election) were duly filed with the Clerk of the House of Representatives February 23, 1899.

At the time of his election Joseph Wheeler held the office of major-general, United States Volunteers, to which office he was commissioned May 5, 1898, to rank from May 4, 1898. He took the required oath of office as such major general May 6, 1898, and was honorably discharged as such April 12, 1899. He drew his pay as such major-general during all of said time. April 12, 1899, the same day he was discharged as major-general, United States Volunteers, he was commissioned brigadier-general, United States Volunteers, to rank from April 12, 1899, and took the oath of office as such April 15, 1899. He held this office and drew his pay from April 15, 1899, up to and including June 16, 1900, when he was commissioned brigadier-general, United States Army, to rank from June 16, 1900, and he took the oath of office as such June 18, 1900, and continued in active service and drew his pay from June 18, 1900, up to

[1] Second session Fifty-sixth Congress, House Report No. 2656. The letter was referred January 8, 1901; Journal, pp. 95, 96; Record, p. 707.

September 10, 1900, when he was placed upon the retired list of the Army, under the provisions of existing law, since which date he has drawn his pay as brigadier-general, United States Army, retired.

A communication to the Speaker of the House of Representatives from Joseph J. Johnston, governor of the State of Alabama, under date November 16, 1900, says:

"I hereby certify that the resignation of Hon. Joseph Wheeler as a Member of the Fifty-sixth Congress, bearing date April 20, 1900, was received by me on April 23, 1900, and unconditionally accepted on that date.[1]

"Respectfully,

JOSEPH F. JOHNSTON, *Governor."*

A letter from Joseph Wheeler to the Speaker of the House of Representatives, bearing date August 17, 1900, says:

"I resigned my seat in Congress, and the resignation was accepted by the governor, to take effect on August 6, 1900. My successor was elected on that date.

"Respectfully,

JOSEPH WHEELER."

General Wheeler drew no salary as Representative in the Fifty-sixth Congress and exercised none of the functions of such office.

By virtue of existing law the Fifty-sixth Congress came into existence at 12 o'clock noon on the 4th day of March, 1899. In other words, the Fifty-sixth Congress commenced at that time.

That Congress was not called in extra session, but the first session under the provisions of existing law commenced at 12 o'clock noon on the 4th day of December, 1899.

Joseph Wheeler did not appear at that time or present himself at the bar of the House and take the oath of office or offer so to do. He never has presented himself to take the oath of office. He never exercised any of the functions of Representative or Representative-elect in the Fifty-sixth Congress.

On the 4th day of May, 1900, the governor of the State of Alabama, recognizing that a vacancy existed or, as he states it, would exist in the office of Representative in Congress from the Eighth Alabama district, called a special election to fill such vacancy (see call), and such election was held on the first Monday in August (August 6, 1900) to fall such vacancy, and at such election William Richardson was duly elected. He appeared and took the oath December 4, 1900, and is the sitting Member from that district.

The report then reviews at length the various statutes relating to the pay of Members, quoting them all and noting the changes made from time to time. Among those quoted is section 51 of the Revised Statutes:

Whenever a vacancy occurs in either House of Congress, by death or otherwise, of any Member or Delegate elected or appointed thereto after the commencement of the Congress to which he has been elected or appointed, the person elected or appointed to fill it shall be compensated and paid from the time that the compensation of his predecessor ceased.

After quoting section 6, Article I, of the Constitution[2] the report says in relation thereto:

First, Representatives during the time for which elected can not be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time. They may be appointed to other civil offices. Then follows an absolute constitutional prohibition upon Senators and Representatives in Congress. They are prohibited from being a Member of either House if they hold any office, civil or military, under the United States. The first provision prohibits them from being appointed to certain civil offices, while the second provision prohibits their being a Member of either House if they hold any other office under the United States. By statute an officer of the Army on the active list is prohibited from holding any civil office.[3]

It follows that Joseph Wheeler could not be a Member of either House of Congress or hold any civil office under the United States while he held a commission and was on the active list in the Army of the

[1] A letter from Governor Johnston to General Wheeler, dated April 23, 1900, says: "I accept the resignation, to take effect on the day your successor is elected." Report, p. 3.

[2] See section 485 of this work.

[3] Section 1222 of the Revised Statutes, quoted in full below.

United States. He held a commission in the Army of the United States continuously from the time of his election in the fall of 1898 up to and including March 4, 1899, the day that the Fifty-sixth Congress came into existence, and continuously on down to the time he was placed upon the retired list on the 10th day of September, 1900, and was in active service. True, for three days at one time and for two days at another, while waiting to take the oath of office, he drew no pay, but he held his commission and accepted the army offices and took the oath. Section 1756, Revised Statutes, prohibited his drawing pay until the oath was taken.

The two offices were incompatible at common law and he could not hold both. So under the Constitution as always held.[1]

By holding the office in the Army the civil office is declined.[2]

The report goes on to quote section 6, Axticle I, of the Constitution, which provides that Representatives "shall receive a compensation for their services," and the various statutes prohibiting the same person receiving the emoluments of two offices,[3] including section 1222 of the Revised Statutes:

"No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

The effect of these statutes, taken together [says the report], on the question of compensation has been passed upon by the Supreme Court of the United States in Badeau v. United States.[4]

It is there held that a person on the retired list of the Army, and by expressed statute entitled to pay as such, can not receive that pay while he holds a civil office and draws the pay or compensation of that office if the duties required or that may be required are incompatible.

Accordingly held that Badeau, who was on the retired list and accepted a position in the diplomatic and consular service and drew his pay, was not entitled to pay as a retired officer while he held such position.

Officers of the Army retired from active service are still in the military service of the United States.[5]

Their pay is expressly provided for by statute.[6]

It follows that Gen. Joseph Wheeler, from 12 o'clock noon March 4, 1899, the time when the Fifty-sixth Congress commenced, was not entitled to pay and could not draw pay as Representative or Representative-elect (so called), conceding for the sake of the argument that he had not declined the election, for the reason that he held a commission in the Army on the active list and was discharging the duties and drawing the pay of an army officer and most of the time was on the ocean or in active service in the Philippines, over 8,000 miles from the capital of the United States. His pay as major-general was $7,500 per year and as brigadier-general $5,500 per year.

Therefore Hon. William Richardson has had no predecessor, as to compensation, in the Fifty-sixth Congress.

We have not overlooked the cases holding that the above-quoted sections relating to compensation do not apply to persons holding two civil offices the duties of which are distinct but not incompatible, the duties and compensation of each office being expressly fixed by law and appropriated for.[7] In the Badeau case the court points out the distinction very clearly.

The report then propounds the question whether or not Hon. William Richardson had a predecessor in office de jure or de facto in the Fifty-sixth Congress.

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[1] Here are cited the cases of Van Ness, Yell, Vandever, Blair, and Wheeler. The reports also cites law cases in point.

[2] The Blair resolution is here quoted. (See section 492 of this work.)

[3] Sections 1763–1765 of the Revised Statutes.

[4] See 130 U. S., pp. 439, 448, 450–452.

[5] See United States *v.* Tyler, 105 U. S., 244.

[6] Sections 1275, 1276, Revised Statutes.

[7] See 120 U.S., 126; 21 How., 463; 110 U.S., 688.

In response to this the committee finds that all Representatives elected[1] become "Members" from the very hour and minute of the commencement of the term for which elected; that is, on the 4th of March next preceding the meeting of the Congress. Therefore the Member-elect is the holder of an "office" as well as the Member who has been sworn.

The report continues:

No person elected or appointed to an office becomes an officer from the mere fact of his election or appointment. Acceptance is necessary. Seeking the office or consenting to be appointed or elected does not constitute an acceptance.[2]

General Wheeler might have accepted the election to the Fifty-sixth Congress. He could have accepted in more ways than one. He might have signed certificates for drawing his pay and have drawn his pay. He might have exercised the franking privilege. When Congress assembled, he might have appeared, participated in the organization of the House by voting for Speaker, and then have taken the oath of office, which act would have entitled him to take a seat in the House. He did none of these things.

At the time of his election he held a commission as major-general in the Army of the United States on the active list and was in the active service. When the 4th day of March, 1899, arrived, he continued in the Army; continued to perform the duties of his army office; continued to draw his pay as an army officer; in fact, he continued to exercise all the prerogatives and powers and to enjoy all the privileges of an officer of the Army of the United States on the active list.

After referring to the fact that General Wheeler had been a Member of Congress before, and presumably knew of the law forbidding an army officer holding a civil office, the report continues:

The law as well as common sense placed and places an interpretation upon these acts. That interpretation is that he declined to accept the election to the Fifty-sixth Congress. * * * If Wheeler declined the civil office to which elected at the general election in 1898, he never filled the office, was never in it, and it is immaterial whether he declined on or before March 4, 1899, or at the assembling of Congress December 4, 1899. A declination of the office or of the election at any time before acceptance left it vacant from the very beginning of the term. It is not conceivable that a person who declines either an election or an appointment to a civil office the term whereof is fixed and definite has ever filled it for a single moment.

It follows that Joseph Wheeler never held the office of Representative in the Fifty-sixth Congress or of Member of the House of Representatives in the Fifty-sixth Congress and that the office was always vacant until the election of Hon. William Richardson, August 6, 1900.

Therefore the Hon. William Richardson never had a predecessor de jure or de facto in the Fifty-sixth Congress.

The resignation of Hon. Joseph Wheeler as Representative amounted to nothing, as he did not hold the office, and therefore could not resign it. He had declined it.

The report next goes on to show that section 51, of the Revised Statutes, which provides for payment of the successor when a vacancy occurs after the commencement of the Congress, does not apply to the case of Mr. Richardson, because no person occupied the seat of Representative from the Eighth Alabama district in the Fifty-sixth Congress, either de jure or de facto, or was entitled to the pay prior to Mr. Richardson's election. Section 51 of the Revised Statutes had been passed upon by the court, in the case where—

One Pirce held the certificate of election as Representative from the Second district of Rhode Island in the Forty-ninth Congress. He was sworn in, performed his duties as Representative, and drew his pay. The seat was contested, and the contestants claimed that Pirce was not elected to

[1] The status of the Member-elect is discussed at length.

[2] Mechem's Public Offices, secs. 247, 249.

the Forty-ninth Congress. The House finally decided that Pirce was not elected, and that the seat was vacant. The vacancy existed from the very beginning of the Forty-ninth Congress, March 4, 1885, for the reason that no person was elected from the Second district of Rhode Island to fill that seat. February 21, 1887, Page was elected to fill such vacancy, and he claimed that under section 51, Revised Statutes, he was entitled to pay from March 4, 1885, when the Forty-ninth Congress commenced. The court held that section 51 did not apply, because Page in law had no predecessor in the Forty-ninth Congress. As to pay he did have a predecessor, and that predecessor drew his pay so long as he occupied the seat. The court held therefore that under a proper construction of section 51 Page had a predecessor as to compensation within the meaning of section 51 and that therefore Page was entitled to his pay only from the time that the compensation of Pirce ceased. The plain holding is that if Pirce had never occupied the seat and drawn his pay section 51 would not have applied at all.

The following is the unanimous holding of the court in that case:

"The proper construction of section 51 is that the predecessor of the person elected to fill a vacancy must be a person who was the predecessor in the same Congress. If no such person is to be found, because no such person was duly elected, Page had no predecessor in the sense of section 51, and that section does not apply to his case. But we think that, under the proper construction of section 51, Pirce was the predecessor of Page as to compensation or salary. His credentials showed that he was regularly elected; he must have been placed on the roll of Representatives-elect, under section 31 of the Revised Statutes; he was sworn in, took his seat, voted, served on committees, and drew the salary and the mileage. Under sections 38 and 39 he was entitled to his salary, because his credentials, in due form of law, had been duly filed with the clerk, under section 31, and because he took the required oath. Section 51 refers only to a vacancy occurring after the commencement of a particular Congress and in the membership of that Congress, and the reference to a 'predecessor' is plainly intended to apply only to a predecessor in that Congress. If there was any such predecessor of Page, it was Pirce. If there was no predecessor of Page in that Congress, section 51 does not apply to that case."

In the case of Hon. William Richardson, now under consideration, as we have already seen, no person occupied the seat of Representative from the Eighth Alabama district in the Fifty-sixth Congress, either de jure or de facto, or was entitled to the pay of such Representative prior to the election of Hon. William Richardson, and therefore within the decision just quoted section 51 of the Revised Statutes does not apply.

As section 51 has no application, we are relegated to the rules of the common law, and here there is no dispute. A person elected to fill a vacancy, in the absence of any statute establishing a different rule, is entitled to compensation only from the time of his election or appointment. It follows that the Hon. William Richardson is entitled to pay from August 6, 1900, only, that being the date of his election.

Your committee also, by a vote of 10 to 5, 1 member being absent and 1 not voting,[1] adopted the following resolution, which is respectfully reported to the House, viz:

"Resolved, That Hon. William Richardson, Representative from the Eighth Congressional district of the State of Alabama, is entitled to pay only from August 6, 1900, the date of his election to the Fifty-sixth Congress."

This resolution was not acted on by the House, but the Speaker certified the salary checks of Mr. Richardson in accordance with the findings of the committee.

501. A Member having informed the House of his acceptance of an incompatible office, the House has assumed or declared the seat vacant.— On December 6, 1792,[2] the Speaker laid before the House a letter from Joshua Seney,

[1] Messrs. William H. Fleming, of Georgia, Richard W. Parker, of New Jersey, and D. H. Smith, of Kentucky, while supporting the conclusions filed individual views. Mr. John J. Jenkins, of Wisconsin, filed views in support of the opinion that Mr. Richardson's salary began at the date of Mr. Wheeler's resignation, April 20, 1900. Messrs. Charles E. Littlefield, of Maine, and Julius Kahn, of California, taking issue with the conclusions of the report as to the status of the Member-elect, held that Mr. Richardson's pay should begin December 4, 1900, the date when they held that Mr. Wheeler's right to compensation ceased.

[2] Second session Second Congress, Journal, p. 635 (Gales & Seaton ed.); Annals, p. 738.

one of the Members for the State of Maryland, stating his acceptance of an appointment in the judiciary department of the said State, which disqualified him for a seat in the House. The letter was read and ordered to lie on the table.

January 23, 1793,[1] the Speaker laid before the House a letter from the governor of Maryland with the return of William Hindman, "in room of Joshua Seney, who has resigned," as the Journal expresses it.

502. On February 27, 1804,[2] the Speaker laid before the House a letter addressed to him from John Smith, of New York, stating that "having been elected by the legislature of the State of New York a Senator of the United States, he had accepted the appointment and taken his seat in the Senate."

On motion—

Resolved, That John Smith, one of the Representatives from the State of New York, having accepted the appointment of Senator from that State, in the Senate of the United States, has thereby vacated his seat in this House; and that the Speaker be requested to notify the executive of the said State of New York accordingly.

503. Instance wherein a Senator-elect continued to act as governor of a State after the assembling of the Congress to which he had been elected.—On January 4, 1906,[3] during the first regular session of the Fifty-eighth Congress in the Senate Mr. John C. Spooner, of Wisconsin, said:

Mr. President, I present the credentials of Hon. Robert M. La Follette, Senator-elect from the State of Wisconsin, which I ask may be read and placed on file.

The Vice-President said:

The Secretary will read the credentials.

The credentials of Robert Marion La Follette, chosen by the legislature of the State of Wisconsin a Senator from that State for the term beginning March 4, 1905, were read and ordered to be filed.

Mr. Spooner then said:

Mr. La Follette, the Senator-elect, is in attendance, and I ask that the oath of office be now administered to him.

The Vice-President said:

The Senator-elect will present himself at the Vice-President's desk and take the oath of office prescribed by law.

Mr. La Follette was escorted to the Vice-President's desk by Mr. Spooner, and the oath prescribed by law having been administered to him, he took his seat in the Senate.[4]

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[1] Journal, p. 677.

[2] First session Eighth Congress, Journal, pp. 602, 603 (Gales & Seaton ed).

[3] First session Fifty-ninth Congress, Record, p. 674.

[4] The Senate had met in special session on March 4, 1905, but Mr. La Follette, who was governor of Wisconsin, did not appear either then or at the assembling of Congress at the first regular session, on December 4, 1905. On January 1 he resigned as governor of Wisconsin.

504. A resolution declaring vacant the seat of a Member who has accepted an incompatible office may be agreed to by a majority vote.—On January 20, 1863,[1] the House agreed to the following resolution:

Resolved, That William Vandever has not been entitled to a seat as a Member of this House since he was mustered into the military service of the United States as colonel of the Ninth Regiment Iowa Volunteer Infantry, to wit, since the 24th day of September, A. D. 1861.

Mr. Horace Maynard, of Tennessee, made the point of order that, as a majority only had voted in favor of the resolution, it was not adopted, since the resolution in effect brought about the expulsion of a Member, which under the Constitution required the concurrence of two-thirds of the Members.

The Speaker[2] overruled the point of order.

Mr. Maynard having appealed, the appeal was debated on this and the succeeding day, the ground being taken in support of the ruling that Mr. Vandever, by accepting an incompatible office, had in effect vacated his seat.

On January 21 the decision of the Chair was sustained—yeas 82, nays 36—the appeal being laid on the table.

505. The South Carolina election case of Bowen v. De Large in the Forty-second Congress.

The House has manifestly leaned to the idea that a contestant holding an incompatible office need not make his election until the House has declared him entitled to the seat.

It being impossible to determine who is elected, the House declares the seat vacant.

In a case where sitting Member's counsel had surreptitiously suppressed his evidence, the taking of further testimony was permitted.

On January 18, 1873,[3] Mr. George F. Hoar, of Massachusetts, from the Committee on Elections, submitted a report in the South Carolina case of Bowen *v.* De Large:

The committee find, upon the whole evidence, that said De Large did not receive a majority of the votes legally cast at the election in said district, and is not entitled to a seat.

This case came on to be heard before the committee at the December session of 1871–72. Mr. De Large then applied for a postponement, and for leave to take further testimony, on the ground that the counsel employed by him to prepare his cause and take testimony in his behalf had possession of the evidence, and refused to surrender the same to be used before the committee, and, further, that said counsel had been tampered with and bribed by said Bowen to act for him. The committee found both these allegations to be proved. Some of the committee are of opinion that this proceeding, which would furnish ground for the expulsion of the contestant, if he were a Member, would justify a refusal to permit him to proceed with the contest, or to award him the seat.

The report goes on to say that the sitting Member was allowed to take further testimony, from which a state of fraud and irregularity was shown that made it impossible to determine who was elected.

It further appeared that on a day after the day when contestant claimed to have been elected to the House he was chosen a member of the South Carolina

[1] Third session Thirty-seventh Congress, Journal, pp. 212, 213, 215; Globe, pp. 405–407, 427.

[2] Galusha A. Grow, of Pennsylvania, Speaker.

[3] Third session Forty-second Congress, House Report No. 37; Smith, p. 99.

house of representatives for two years, and on November 1, 1872, took his seat and the oath therein.

The committee also say:

It further appeared that in the fall of 1872 said Bowen was elected sheriff of Charleston, S. C., for the term of four years, and on the 19th of November, 1872, took the oath of office and entered upon the duties of the same, which office he now holds. These offices are, in their nature, incompatible with the office of Member of this House, and are expressly declared to be so by the constitution of South Carolina.

Some of the committee are of opinion that the acceptance of these offices by Mr. Bowen disqualifies him from the further prosecution of a claim to a seat in this House, and from taking a seat therein, if he shall be found to have been duly elected.

The committee are unanimous in finding all the facts herein reported.

They are not unanimous in holding that each one of the reasons aforesaid is sufficient of itself to disqualify the contestant.

But they are unanimously of opinion, on the whole case, that Mr. Bowen is not entitled to the seat.

Therefore the committee recommended resolutions declaring that neither the contestant nor the sitting Member was entitled to the seat.

The report was considered in the House on January 24, 1873.[1] The contestant, Mr. Bowen, urged in argument that the acceptance of incompatible offices should not bar him out since the doors of the House were not open to him. When it should be decided that he was entitled to admission to the House he might then resign his State offices and elect the seat in the House. He cited the cases of Herrick, Mumford, Blair and Schenck. This argument impressed the House with its strength, and Mr. Hoar expressly stated that the committee relied entirely on the fact that an investigation of the election on its merits rendered it impossible to determine who was elected. It is evident that the House also preferred to decide the case on that basis, rather than on the basis of qualifications.

The resolutions were adopted without division, and so the seat was declared vacant.

506. In 1815 the House questioned the constitutional right of a Member to accept an appointment as commissioner, the office being created under the terms of a treaty during the period of his membership.—On December 11, 1815,[2] Mr. Peter B. Porter, of New York, appeared and took his seat in the House. He had not been a Member of the preceding Congress.

On January 23, 1816,[3] the Speaker laid before the House a letter from Mr. Porter, stating that he had transmitted his resignation as a Member to the executive of New York.

On February 9, 1816,[4] Mr. John Randolph, of Virginia, afford this resolution:

Resolved, That a committee be appointed to inquire whether the appointment to and acceptance by the Hon. Peter B. Porter, late a Member of this House from the State of New York, of the office of commissioner under the late treaty of Ghent is in contravention of the Constitution of the United States.

Considerable debate arose over the resolution. Mr. John Forsyth, of Georgia, urged that Mr. Porter had been elected for the term beginning March 4, 1815, and terminating March 4, 1817. The office which he accepted had existed, if it existed at all, from the day of the exchange of the ratifications of the treaty of peace—

[1] Journal, p. 238; Globe, pp. 842–847.

[2] First session Fourteenth Congress, Journal, p. 32.

[3] Journal, p. 212.

[4] Journal, p. 303; Annals, pp. 940–948.

February 18, 1815. It was not pretended that commissioners for any purpose of foreign intercourse as regulated by treaty might not be created by the President and Senate. The sanction of the House was required only to make an appropriation to pay them for their services. If their services were to be compensated by any act that Mr. Porter had assisted in passing, there would be some evidence of a violation of the Constitution, but no such fact existed. Mr. Robert Wright, of Maryland, said that the provision of the Constitution [1] was intended to guard against the creation of office and the increase of emoluments by Members of Congress for the benefit of themselves. The office in question was not the kind contemplated by the Constitution. It was a ministerial, not a civil, office, made necessary by the treaty, but of which the obligation of the President to appoint was imposed by the Constitution.

On the other hand, Mr. Randolph urged that the House should be very jealous of any invasion of these guaranties of the Constitution, and appealed to the older Members, especially Mr. Richard Stanford, of North Carolina, the "father of the House," who responded by urging the Members "to avoid the crumbs of office from the Executive, and to look to the people only, to whom they owed their appointments, as the source of honor."

Mr. Randolph's resolution was then agreed to, yeas 70, nays 55, and Messrs. Randolph, Thomas P. Grosvenor, of New York, Forsyth, John G. Jackson, of Virginia, and John B. Yates, of New York, were appointed the committee. They made no report.[2]

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[1] Section 6 of Article I, which provides: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a Member of either House during his continuance in office."

[2] See also opinion of the Comptroller of the Treasury as to the payment of salary to Matt. W. Ransom, as minister to Mexico, the emoluments of the office having been increased while he was a Senator of the United States from North Carolina, and the appointment and confirmation by the Senate and the signing and sealing of his commission having taken place before the expiration of his term as Senator. (Vol. II, Decisions of Comptroller, p. 129.)

Chapter XVII.

TIMES, PLACES, AND MANNER OF ELECTION.

1. **Provisions of Constitution and statutes. Sections 507 516.**[1]
2. **Power of State executive to call elections to fill vacancies. Sections 517, 518.**[2]
3. **Time fixed by schedules of new State constitutions. Sections 519, 520.**[3]
4. **Disputes as to legal day of election. Sections 521–525.**
5. **Failure of Territorial legislature to prescribe manner, etc. Sections 526, 527.**

507. The times, places, and manner of elections of Representatives are prescribed by the State legislatures, but Congress may make or alter such regulations.

Reference to discussions of the constitutional provision as to fixing the time, etc., of elections.

Section 4 of Article I of the Constitution provides:

SECTION 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of chusing Senators.[4]

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[1] Election must be by the people and not by lot. Section 775 of this volume.

[2] Discussion of the functions of the State executive. Section 312 of this volume.

[3] Relative powers of State constitutional conventions and legislatures in fixing times, places, and manner. Sections 363, 367, 388 of this volume; sections 846, 856, 1133 of Volume II.

Is the establishing of districts a prescribing of "manner?" Sections 310, 311 of this volume.

Respective powers of Congress and the States discussed. Section 313 of this volume.

Argument that State laws are, as to Congressional elections, really Federal laws. Section 1105 of Volume II.

Federal statutes in relation to State laws. Section 961 of Volume II

The Federal Constitution the source of the States' power. Sections 947, 959 of Volume II.

May the State legislature delegate the power of prescribing the "manner?" Section 975 of Volume II.

[4] The history and intent of this clause of the Constitution have been discussed elaborately in House and Senate in connection with legislation. Thus in the Fifty-first Congress, in connection with a bill (H. R. 11045) relating to Federal regulations for elections, Mr. Henry Cabot Lodge, of Massachusetts, from the Committee on the Election of President, Vice President, and Representatives in Congress, submitted a report (House Report No. 2493, first session Fifty-first Congress) discussing the meaning of the clause. Mr. C. R. Buckalew, of Pennsylvania, submitted minority views in connection with this report. In reference especially to a limited construction of the clause the minority views submitted by Mr. Henry St. George Tucker, of Virginia, from the same committee, in connection with the bill [H.R. 7712] discussed the subject very elaborately. (House Report No. 1882, first session Fifty-first Congress.) In 1893, in the Fifty-third Congress, the clause was again examined fully in connection with the bill H.R. 2331) to repeal certain portions of the Federal election laws. Mr. Tucker in this case submitted the report, and Mr. Martin N. Johnson, of North Dakota, submitted the minority views. (Report No. 18, first session

508. A Federal law fixes the Tuesday next after the first Monday of November of every second (even numbered) year for election of Members and Delegates.

Certain States, by special exception, elect their Members on a day other than the day fixed generally by Federal statute.

Section 25 of the Revised Statutes, embodying the laws of February 8, 1872, and March 3, 1875, provides:

The Tuesday next after the first Monday in November, in the year 1876, is established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the Forty-fifth Congress; and the Tuesday next after the first Monday of November, in every second year thereafter, is established as the day for the election, in each of said States and Territories, of Representatives and Delegates to the Congress commencing on the fourth day of March next thereafter.

By the act of March 3, 1875,[1] the above provision was modified—

so as not to apply to any State that has not yet. changed its day of election and whose constitution must be amended in order to effect a change in the day of the election of State officers in said State.[2]

509. Territorial laws fix the times, places, and manner of election of Delegates.—Section 1863 of the Revised Statutes provides:

The first election of a Delegate in any Territory for which a temporary government is hereafter provided by Congress shall be held at the time and places and in the manner the governor of such Territory may direct, after at least sixty days' notice, to be given by proclamation; but at all subsequent elections therein, as well as at all elections for a Delegate in organized Territories, such time, places, and manner of holding the election shall be prescribed by the law of each Territory.

510. A Federal law provides that votes for Representatives to be valid must be by written or printed ballot or by voting machine indorsed by State law.—Section 27 of the Revised Statutes, dating from February 28, 1871, and May 30, 1872, provides:

All votes for Representatives in Congress must be by written or printed ballot, and all votes received or recorded contrary to this section shall be of no effect. But this section shall not apply to any State voting otherwise whose election for Representatives occurs previous to the regular meeting of its legislature next after the twenty-eighth day of February, 1871.

Fifty-third Congress.) The Senate report at the next session merely quoted the House report. (Senate Report No. 113, second session Fifty-third Congress.)

In the Forty-fifth Congress an ambiguity in Colorado law as to the date of the election led to the contest of Patterson and Belford. In order to remove all further doubt Congress passed a law, approved June 11, 1878, "designating the times for the election of Representatives to the Forty-sixth and succeeding Congresses from the State of Colorado." (20 Stat. L., p. 112, second session Forty-fifth Congress, Record, pp. 4082, 4083.)

Also in the same Congress an act (approved June 19, 1878) (2 Stat. L., p. 174) was passed to regulate the election in North Carolina in the coming Congressional elections, specifying that an election conducted by the sheriffs or other duly appointed persons in accordance with certain specified North Carolina laws should be legal. See history of bill, H. R. 4931, second session Forty-fifth Congress, for further explanation.

In 1879, in connection with proposed legislation to repeal the Federal election laws, the subject was discussed. See Record, first session Forty-sixth Congress, p. 513 (Senator Teller's speech); also President Hayes's veto message (first session Forty-sixth Congress, Record, p. 1710).

The Supreme Court has also considered this clause. See, for instances, ex parte Siebold, 100 U. S., 371; ex parte Clarke, 100 U. S., 399; ex parte Yarbrough, 110 U. S., 651; in re Coy, 127 U. S., 731.

[1] 18 Stat. L., p. 400.

[2] The States of Maine, Vermont, and Oregon elect under the law providing the exceptions.

On February 14, 1899,[1] the above section was amended to read as follows:

All votes for Representatives in Congress must be by written or printed ballot or voting machine, the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect.[2]

511. A Federal statute provides that all citizens of the United States qualified to vote shall be allowed to do so without distinction of race, etc.—Section 2004 of the Revised Statutes, which dates from May 31, 1870, provides:

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.[3]

512. No officer of the Army or Navy shall prescribe qualifications of voters or interfere with the suffrage. Section 2003 of the Revised Statutes provides:

No officer of the Army or Navy of the United States shall prescribe or fix, or attempt to prescribe or fix, by proclamation, order, or otherwise, the qualifications of voters in any State, or in any manner interfere with the freedom of any election in any State or with the exercise of the free right of suffrage in any State.[4]

Section 5530 of the Revised Statutes, dating from February 25, 1865, provides:

Every officer of the Army or Navy who prescribes or fixes, or attempts to prescribe or fix, whether by proclamation, order, or otherwise, the qualifications of voters at any election in any State shall be punished as provided in the preceding section [section 5529].[5]

513. A Federal law provides a penalty against armed interference of Federal troops at an election.—Section 5528 of the Revised Statutes, dating from February 25, 1865, provides:

Every officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, who orders, brings, keeps, or has under his authority or control, any troops or armed men at any place where a general or special election is held in any State, unless such force be necessary to repel armed enemies of the United States or to keep the peace at the polls, shall be fined not more than five thousand dollars and suffer imprisonment at hard labor not less than three months nor more than five years.

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[1] 30 Stat. L., p. 836.

[2] The Revised Statutes, sections 14 to 17, inclusive, provide for the times and manner of election of Senators.

[3] The following decisions relate to the above: 2 Abb. U. S., 120; McKay *v.* Campbell, 1 Saw., 374; U. S. *v.* Reese et al., 92 U. S., 214; U. S. *v.* Cruikshank et al., 92 U. S., 542.

The above section was originally the first section of the act of May 30, 1870, "to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes." (16 Stat. L., p. 140.) This section simply declared a right, without providing for its enforcement. Other sections of the act provided penalties for the denial of the right. The decisions of the court impaired somewhat the efficiency of the act, and in the Fifty third Congress the sections of the statutes containing the efficient provisions of the act were repealed. (28 Stat. L., pp. 36, 37.) The declaratory section was permitted to remain, however.

[4] This law dates from February 25, 1865.

[5] See section 514 of this chapter.

514. A penalty is provided against interference by military or naval force in the exercise of the right of suffrage and conduct of elections.— Section 5529 of the Revised Statutes, dating from February 25, 1865, provides:

Every officer or other person in the military or naval service who, by force, threat, intimidation, order, advice, or otherwise, prevents, or attempts to prevent, any qualified voter of any State from freely exercising the right of suffrage at any general or special election in such State shall be fined not more than five thousand dollars and imprisoned at hard labor not more than five years.[1]

Section 5531 of the Revised Statutes, dating from February 25, 1865, provides:

Every officer or other person in the military or naval service who, by force, threat, intimidation, order, or otherwise, compels, or attempts to compel, any officer holding an election in any State to receive a vote from a person not legally qualified to vote, or who imposes, or attempts to impose, any regulations for conducting any general or special election in a State different from those prescribed by law, or who interferes in any manner with any officer of an election in the discharge of his duty shall be punished as provided in section 5529 [of the Revised Statutes].

515. The executive of a State issues writs of election to fill vacancies in its representation in the House.—Section 2 of article 1 of the Constitution, provides:

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

516. A Federal law empowers the States and Territories to provide by law the times of elections to fill vacancies in the House.—Section 26 of the Revised Statutes, dating from February 2, 1872, provides:

The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

517. The Pennsylvania election case of John Hoge, in the Eighth Congress.

An election to fill a vacancy, called by the governor in pursuance of constitutional authority, was held valid although no State law prescribed time, place, or manner of such election.

In 1804,[2] the House considered a petition alleging the undue election and return of Mr. John Hoge, of Pennsylvania, who claimed a seat as successor of William Hoge, resigned. On December 19, 1804, the Committee on Elections, in their report in favor of John Hoge, found the following state of facts:

That William Hoge, Member of the House of Representatives for the Eighth Congress, having, by letter to the governor of the State of Pennsylvania, dated the 15th of October, resigned his seat in Congress, the governor, in pursuance of the provisions made in the second section of the first article of the Constitution of the United States, issued a writ of election to supply the vacancy which had thus taken place. That the said writ was issued on the 22d day of October, and the election directed to be held on

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[1] Sections 5507 to 5510 of the Revised Statutes, inclusive, provide penalties for punishment of persons who, individually or in conspiracy, influence or prevent by bribery or intimidation the exercise of the right of suffrage by those to whom it is guaranteed by the fifteenth amendment.

Sections 5516 to 5519 (the Hains case (106 U. S., 629) involves the constitutionality of section 5519), inclusive, provide penalties for obstructing the enforcement of the Civil Rights Law, and for denying to persons offices or privileges thereunder.

[2] Second session Eighth Congress, Contested Elections in Congress, from 1789 to 1834, p. 135.

the 2d day of November, eleven days after the date of the said writ; that the writ was brought by the mail to the prothonotary's office in Washington County on the 30th of October, but not proclaimed by the sheriff till the 31st.

It appears to the committee that, though, by the second section of the first article of the Constitution of the United States, it is made the duty of the executive authority of the respective States to issue writs of election to fill vacancies, yet, by the fourth section of the said article, it is made the duty of the legislature of each State to prescribe the times, places, and manner of holding such elections. It appears, however, that several elections to supply vacancies in Congress have been held heretofore in Pennsylvania; yet, on examining the laws of that State, it appears that no law exists prescribing the times, places, and manner of holding elections to supply such vacancies as may happen in the representation in Congress; and, consequently, if the election of John Hoge is, on this account, set aside, no election can be held to supply the vacancy until the legislature of the State enact a law for that purpose.

The committee go on to show that the Pennsylvania law for general election of Representatives to Congress required a notice of thirty days. In this special election the governor directed the election to be held on the same day on which the electors of President and Vice President were to be chosen. And although it so happened that the notice was in effect but two days, the committee found no evidence of abuse in the manner of conducting the election. Therefore they reported the opinion that John Hoge was entitled to a seat in the House.

On December 19, after full debate, the recommendation of the committee was concurred in, by a vote of 69 yeas to 38 nays, and John Hoge was admitted to his seat.

518. The Mississippi election cases of Gholson, Claiborne, Prentiss, and Word in the Twenty-fifth Congress.

Discussion of power of a State executive to call an election to fill a vacancy, although the State law did not provide for the contingency.

Examination of the term "vacancy" as used in the Federal Constitution to empower a State executive to issue writs for an election.

An instance wherein a State law prescribed a day of election which arrived after the beginning of the term of the Congress affected.

The House declined to give prima facie effect to credentials regular in form but relating to seats already occupied.

The House gave prima facie effect to credentials, although there appeared a question as to the regularity of the writs of the election.

In a case wherein a contestant appeared after a determination of final right to a seat by the House the sitting Member was unseated and a vacancy declared.

There being rival claimants to a seat, elected on days different but each constitutionally fixed, the House declared the seat vacant.

On September 25, 1837,[1] the Committee on Elections reported in the case of Messrs. Gholson and Claiborne, of Mississippi.

The law of Mississippi provided that Representatives in Congress should be elected once in every two years, to be computed from the first Monday in November, 1833. And, acting in pursuance of this law, the people of Mississippi would, on the first Monday of November, 1837, elect Representatives for the Congress actually

[1] First session Twenty fifth Congress, 1st Bartlett, p. 9; Globe, pp. 95, 97; Journal, p. 142.

beginning March 4, 1837, but not to assemble, in the ordinary course, until December, 1837.

But the President, by proclamation of May 15, 1837, called an extra session of the Twenty fifth Congress, to meet September 4, 1837. Thus it happened that Mississippi had no Representatives, the terms of the Representatives in the Twenty fourth Congress having expired March 4, 1837.

The governor of Mississippi—there being no State law providing for such a contingency issued his proclamation under the clause of the Constitution of the United States:

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The governor accordingly issued his writ calling an election for the third Monday in July "for two Representatives to Congress, to fill said vacancy, until superseded by the Members to be elected at the next regular election on the first Monday and day following in November next."

When the House organized, Messrs. Samuel J. Gholson and John F. H. Claiborne appeared with credentials showing their election at the election called in pursuance of the governor's writ.

Objection to their taking their seats was overruled, and the question was referred to the Committee on Elections.

Two objections were urged before the committee. In the first place, the point was raised in relation to the power of the governor to restrict the terms of those elected to the time of the next regular election. The committee, with one Member only dissenting, held that the writ of election might not make such restriction, and that the two Members were elected for the whole term of the Congress. They did not conceive, moreover, that the election was invalidated by the illegal clause in the writ.

The second objection occasioned considerable controversy, involving the meaning of the word "vacancy" as used by the Constitution in this connection. The committee were divided, a majority holding that in this case a vacancy existed as much as if it had been occasioned by death or resignation. The committee were of the opinion that the Constitution authorized the executive power of the States, respectively, to order the filling of all vacancies which have actually happened, whether by death, resignation, or expiration of the terms of Members previous to the election of their successors. The word "happen" made use of in the Constitution, was not necessarily confined to fortuitous or unforeseen events, but was equally applicable to an events which by any means occur or come to pass, whether foreseen or not; and as in this case confessedly the vacancy existed, it might properly be said to have happened, although the means or circumstances by which it was brought about may have been foreseen.

Therefore the committee reported the following resolution, which, on October 3, was agreed to by the House—yeas 118, nays 101:

Resolved, That Samuel J. Gholson and John F. H. Claiborne are duly elected Members of the Twenty fifth Congress, and, as such, are entitled to their seats.

On the first Monday of November—the time for the regular election—Messrs. Gholson and Claiborne announced that they were not candidates, considering that their reelection was not necessary, in view of the decision of the House. Nevertheless, there was an election for Congress, Messrs. S. S. Prentiss and Thomas J. Word contesting. Votes were cast for Messrs. Gholson and Claiborne, however, although they were not candidates. Messrs. Prentiss and Word received large majorities over Messrs. Gholson and Claiborne; but the general state of the poll indicated the probability that the two latter gentlemen would have been elected had they entered the contest.

The governor of the State issued credentials to Messrs. Prentiss and Word, which were presented soon after the opening of the regular session, on December 27, 1837.[1]

The subject was, after debate, referred to the Committee on Elections, Messrs. Prentiss and Word not being sworn in.

On January 12, 1838,[2] the committee reported the facts of the case, and on January 16[3] consideration by the House began, when Mr. Isaac H. Bronson, of New York, offered the following:

Resolved, That Sergeant S. Prentiss and Thomas J. Word are not Members of the Twenty-fifth Congress and are not entitled to seats in this House as such.

On January 31[4] this resolution was amended by striking out all after the word "Resolved" and inserting:

That the resolution of this House on the 3d of October last, declaring that Samuel J. Gholson and John F.H. Claiborne were duly elected Members of the Twenty-fifth Congress be rescinded; and that John F.H. Claiborne and Samuel J. Gholson are not duly elected Members of the Twenty-fifth Congress.

This amendment was agreed to—yeas 119, nays 112.

On February 1 a motion was made to further amend the resolution as amended by adding the following:

Resolved, That Sergeant S. Prentiss and Thomas J. Word are not Members of the Twenty-fifth Congress.

On February 5[5] that resolution was carried—yeas 118, nays 117, the Speaker voting in the affirmative to break the tie.

A motion was agreed to to further amend by adding the following:

Resolved, That the Speaker of the House do communicate a copy of the above resolutions to the governor of the State of Mississippi.

The question then recurred on agreeing to the original amended resolution as amended by the addition of the second and third resolutions. A division of the question being demanded, the first resolution, rescinding the decision of October 3 and unseating Messrs. Gholson and Claiborne, was agreed to—yeas 121, nays 113.

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[1] Second session Twenty-fourth Congress, Journal, p. 150; Globe, p. 56.

[2] Journal, p. 257.

[3] Journal, p. 289; Globe, p. 104.

[4] Journal, p. 338; Globe, p. 150.

[5] Journal, p. 354; Globe, p. 158.

Then the second resolution, declaring Messrs. Prentiss and Word not entitled to seats, was agreed to—yeas 118, nays 116.

The third resolution was agreed to—yeas 122, nays 88.[1]

519. The Minnesota election case of Phelps, Cavanaugh, and Becker, in the Thirty-fifth Congress.

Objection being made to the administration of the oath to a Member-elect, the Speaker held that the question should be decided by the House and not by the Chair.

The House declined to give immediate prima facie effect to credentials when historic facts impeached the authority of the governor and the legality of the election.

The House gave prima facie effect to the perfect credentials of a State delegation, declining at that time to inquire whether or not the election was invalidated by choice of three persons for two seats.

The House sometimes seats Members-elect on their prima facie showing, stipulating that this shall not preclude examination as to the final right.

Representatives elected at the time the constitution of a new State was adopted were seated after the State was admitted to the Union.

Indorsement of the principle that a State may elect Representatives on a general ticket, even though the law of Congress requires their election by districts.

On May 13, 1858,[2] Mr. Henry M. Phillips, of Pennsylvania, announced the presence of Representatives from the recently admitted State of Minnesota and moved that they be sworn in, at the same time presenting the following credentials:

I, Samuel Medary, governor of Minnesota, hereby certify that at a general election held on the 13th day of October, 1857, under the constitution adopted by the people of Minnesota preparatory to their admission into the Union as a State, W. W. Phelps received a majority of the votes cast at said election as one of the Members of the United States House of Representatives of the Thirty-fifth Congress from the State of Minnesota; and by an official canvass of said votes was, on the 17th day of December, 1857, declared duly elected one of said Members.

{ Great Seal of Minnesota. } In testimony whereof I have hereunto set my hand, and caused to be affixed the great seal of Minnesota, at the city at the city of St. Paul, this 18th day of December, 1857. S. MEDARY.

A similar certificate was presented for James M. Cavanaugh.

Mr. John Sherman, of Ohio, objected to the motion to swear in the two gentlemen. The constitution of Minnesota had provided for the election of three Representatives, while only two had appeared. Furthermore, Samuel Medary, who signed the certificates, was no longer governor of Minnesota. He had been Territorial governor, but the only mode by which the House could judge was by the certificate of the executive officer of the State, under the seal of the State.

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[1] Besides the debates printed in the Globe on the days the subject was considered, several able speeches are found in the Appendix (pages 68, 93, 124, 127), wherein the constitutional features are discussed.

[2] First session Thirty-fifth Congress, Journal, p. 792; Globe, p. 2108.

Question being raised as to the procedure, the Speaker[1] said:[2]

The Chair will follow the precedent, which he thinks is a correct one, which was set in the case of the California Members. The Chair did not undertake thereto decide that the Members should be sworn in when they presented themselves, inasmuch as the Constitution of the United States provides that each House shall be the judge of the election, returns, and qualifications of its own Members. The Chair then referred the question to the House to let it decide whether the Members purporting to be elected should be sworn in or not. Therefore the Chair now entertains the motion of the gentleman from Pennsylvania as a proper one, which refers the question to the House to decide whether they should or should not be sworn in.

As a substitute for the pending motion, Mr. Sherman offered a proposition referring the credentials to the Committee on Elections,

with instructions to inquire into and report upon the right of those gentlemen to be admitted and sworn as Members of this House.

This amendment was agreed to, yeas 91, nays 84.

The original motion as amended was then agreed to, yeas 108, nays 84.

On May 20 the Committee on Elections reported.[3] The following facts appeared:

By the act of February 26, 1857, Minnesota Territory was authorized to form a constitution and State government preparatory to admission into the Union; and it was declared that they should have one Representative, and as many more as their population might entitle them to under the existing ratio.

On October 13, 1857, the people of Minnesota voted on and adopted a constitution, and on the same day elected three Representatives in Congress, in accordance with a section of the constitution providing that the State should consist of one district and elect three Representatives. The votes for the three Representatives were canvassed and the results declared. It was alleged by the minority that certificates were issued to the three; but only two were presented to the House.

On May 11, 1858, an act of Congress admitted Minnesota to the Union and provided that the State should "be entitled to two Representatives in Congress."

The majority of the committee contended that their only jurisdiction was to inquire into the prima facie right of Messrs. Phelps and Cavanaugh to be admitted and sworn. The question of election was not involved, and hence the question as to the election of three Members did not arise. The committee had seen no other credentials, and had no evidence before them that more than two were elected. The House would not voluntarily search for evidence to reject those appearing with credentials, regular on their face. The committee quoted the constitution of the State of Minnesota to show that the certificates were "in due form, certified according to law." The majority therefore recommended a resolution admitting Messrs. Phelps and Cavanaugh to be sworn, but reserving the privilege of contesting their final right.

The minority admitted the inexpediency of discussing the right to the seat on the presentation of credentials, but doubted the strict propriety of such a course whenever the papers in possession of the House and the laws which the House was presumed to know showed that there could have been no legal election. The House must know that an election was held under the constitution of Minnesota for three

[1] James L. Orr, of South Carolina, Speaker.

[2] Globe, p. 2109.

[3] House Report No. 408; 1 Bartlett, p. 248; Rowell's Digest, p. 154.

Representatives, and that under the law admitting the State only two were allowed. If the law of Minnesota was valid, three were elected. If not valid, none were elected. The case of Reed *v.* Causden had shown that the people only should elect, and that no power could prefer two out of three elected by the people.

The minority further objected that on October 13, the election day, Minnesota was still a Territory, and the people were engaged in voting under a law of Congress on a constitution. The Territorial laws and authorities, as decided by the Supreme Court, continued exclusively in force until the passage of the act of admission. Therefore the election of the Representatives was an act of usurpation and void. There is no case" say the minority, "where the people of a Territory have presumed to elect, by the same ballots which determined whether they should adopt the constitution preparatory to admission, Representatives to Congress; still less when on that day they elected more Representatives than the act, under which they were proceeding, said they should have when admitted as a State." The census so far as completed indicated that the State would be entitled to but one Representative under the act of Congress authorizing the adoption of the constitution.

In reply to this contention, the majority say:

An objection is urged to the right of the claimants to their seats on the ground that their election was prior to the admission of the State into the Union. In the opinion of the committee, if it be admitted that there is no force in numerous precedents scattered through the journals of Congress, and extending back to the earliest times of the Republic, sanctioning this course, it should be considered that Congress, by the enabling act authorizing the formation of a constitution and State government, thereby fully empowered the people of Minnesota to prepare themselves to assume, upon their admission, all the rights, powers, and attributes of a sovereign State in the Union. One of these rights is that of being represented in Congress; and were elections held prior to admission for Members of the House of Representatives held void, States must remain unrepresented after their admission, and until elections can be subsequently held, presenting the anomalous spectacle of States in the Union without representation or voice in the national councils. The act of admission into the Union upon being consummated, relates back to and legalizes every act of the Territorial authorities exercised in pursuance of the original authority conferred. As the election of Members to this House looks directly to the end in view contemplated by the enabling act of Congress, the committee think it entirely within the scope of action conferred upon the people of the Territory, and should be respected by Congress.

As to the objection that the Representatives were elected on a general ticket, which was forbidden by the act of 1842, the majority say that even if the act of 1842 were still in force, yet the decision of the House in the cases from New Hampshire, Georgia, etc., would dispose of this objection.

On May 20 to 22 [1] the report was considered by the House. The debate occurred on the latter date, when attention was called to a certificate on the files of the House dated December 18, 1857, and certifying the election of three Representatives, George L. Becker being the third. A signed statement of the canvassers was also presented to show that the highest votes were thrown for Messrs. Phelps and Cavanaugh.

Mr. Thomas L. Harris, of Illinois, who had made the majority report, said these papers had not been brought to the attention of the committee, and did not form part of the case. The majority of the committee still adhered to the opinion that the question involved was not one of election, but of prima facie right.

[1] Journal, pp. 859, 870, 883; Globe, pp. 2275, 2292, 2310, 2315.

The minority proposition, that Messrs. Phelps and Cavanaugh be not sworn, was disagreed to—yeas 74, nays 125.

Then the resolution of the majority, providing that they be sworn, but that a contest should not thereby be precluded, was agreed to, yeas 135, nays 63.

Then the two Representatives from Minnesota were sworn in.

520. The California election case relating to Gilbert and Wright in the Thirty-first Congress.

The House has sworn in on prima facie showing Members-elect chosen at an election the day, etc., of which was fixed by the schedule of a constitution adopted on that election day.

Objection being made to the administration of the oath to a Member-elect, the Speaker held that the question should be decided by the House and not the Chair.

References to elections of Representatives in new States wherein no legislation had fixed the time, place, and manner.

On September 10, 1850,[1] the credentials of Edouard Gilbert and George W. Wright, as Representatives from California, were presented to the House. These credentials showed that the two gentlemen had been elected on November 13, 1849, "in pursuance of the sixth section of the schedule appended to the constitution of the State of California." This section of the schedule provided, among other things, that "this constitution shall be submitted to the people for their ratification or rejection at the general election to be held on Tuesday, the thirteenth day of November" [1849], and furthermore provided machinery for holding the election. Section 8 of the schedule provided that on the above date "two Members of Congress" should be elected.

Mr. Abraham W. Venable, of North Carolina, objected to the swearing in of the two gentlemen, and moved that the credentials be referred to the Committee on Elections.

Mr. James Thompson, of Pennsylvania, made the point of order that it was the duty of the Speaker, immediately upon the presentation of the credentials under the seal of the State, to administer the oath of office.

The Speaker[2] overruled the point of order, saying that if objection was made it was the duty of the House, not of the Speaker, to determine the question. This decision the Speaker justified under the clause of the Constitution providing that—

each House shall be the judge of the elections, returns, and qualifications of its own Members.

Mr. Venable then presented his objections to the swearing in of the two gentlemen. He said that the credentials and the annexed schedule of the constitution of the State of California showed that at the time of the election there was no constitution, no legislature, and no law in California other than the Constitution and laws of the United States. The constitution perfected by the California convention was of no force until ratified by the people. By the provisions of the Constitution itself it was not legally ratified until after a comparison of the votes and a proclamation of the governor, thirty days after the election. Elections to be valid must

[1] First session Thirty-first Congress, Journal, p. 1442; Globe, pp. 1789, 1795; Appendix, p. 1253.
[2] Howell Cobb, of Georgia, Speaker.

take place under the constitution and not anterior to its ratification. The Constitution further provided that the times, places, and manner of elections of Representatives in Congress "shall be prescribed in each State by the legislature thereof." This condition had not been complied with, for California was not legally a State when the election took place. There was no legislature in existence to regulate the times, places, and manner. There was no standard of qualification of voters as provided by the Constitution. Furthermore, the convention of California, without a census, had assumed that they were entitled to two Representatives. If California had assumed for herself 10 Members, they would have been admissible on the same reasoning that would admit the 2. It could not be argued that the constitutional convention was a primary assembly of the people, and its action equivalent to a corresponding act of a legislature, because the instrument carried on its own face the evidence of its nullity until ratified by the people.

In reply to this argument it was stated that all the new States, except Missouri and Texas, had sent Representatives before any law had been passed by the legislatures designating the times, places, and manner of holding elections. It was customary for a schedule to be appended to the constitutions such as had been appended in this case. It was true that in most cases the constitutions had been adopted before the Members of Congress were elected; but in the case of Michigan the constitution had been voted on the very day when the Members of Congress were elected.

On September 11, by a vote of yeas 109, nays 59, the motion of Mr. Venable was amended by adding—

that the Speaker proceed to administer the oath, as prescribed by law, to Edouard Gilbert and George W. Wright, as Members of the House from the State of California.

The original motion, as amended, was then agreed to. So it was ordered that the credentials be referred, and that the gentlemen be sworn in.

521. The election case of Tennessee Members in the Forty-second Congress.

Members-elect from Tennessee were seated in 1871 on prima facie showing, although there was a question as to whether or not the day of their election was the legal day.

An opinion that the House, in construction of a State law, should follow the construction given by the proper State officers.

On March 22, 1871,[1] Mr. George W. McCrary, of Iowa, submitted the report of the Committee on Elections in the case of the Tennessee Members, who had been sworn in at the organization of the House, but of whose election there was doubt because they had been chosen on November 8, 1870, while there was a question as to whether or not the law of Tennessee did not provide for election in August instead of November.

The committee, after a discussion of the Tennessee statutes, concluded that November 8 was the legal day of election. They further said:

If, however, the question as to whether by the act of 1870 the time for holding the election in question was changed from August to November was one of doubt, we should feel bound to follow the construction given to it by all the authorities of the State of Tennessee whose duty it has been to construe it and to execute it. It is admitted that the governor and all other authorities in Tennessee having

[1] House Report No. 1, first session Forty-second Congress, Smith, p. 3; Rowell's Digest, p. 261.

anything to do with the construction and enforcement of this act of 1870 have construed it as in nowise affecting the act of 1868, and by common and universal assent the election was held at the time fixed in the latter act. It is a well established and most salutary rule that where the proper authorities of the State government have given a construction to their own constitution or statutes that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex governments, State and National, and your committee are not disposed to be the first to depart from it. The committee recommend the adoption of the following resolution:

Resolved, That the election for Members of Congress from the State of Tennessee, held on the 8th day of November, 1870, was held on the day fixed by law, and was not void by reason of having been held on the said day.

On April 11 [1] the resolution was agreed to by the House without debate or division.

522. The election case of the West Virginia Members in the Forty-third Congress.

The House seated a claimant elected on what it decided to be the legal day.

Discussion as to the power of a State convention to fix the time for election of Representatives in Congress, when the legislature had already acted.

Discussion as to the retroactive effect of the schedule of a new State constitution, whereby a date for election of Congressmen was fixed.

A question as to whether or not a State might make the time of election of Congressmen contingent on the time of the State election.

Credentials issued by a governor raising a doubt as to election, the Clerk and the House declined to allow to them prima facie effect, although positive credentials authorized by the State legislature accompanied.

Discussion as to whether or not credentials which required reference to State law to make certain their import should be given prima facie effect.

Instance of an amendment changing the character of a resolution by striking out the word "not."

At the session of 1873–74 [2] the House was confronted with a question relating to the validity of the election of the three Representatives from West Virginia, at the election due to be held in that State in 1872 for Members of the Forty-third Congress.

A law enacted by the West Virginia legislature in 1869 provided:

1. The general election of State, district, county, and township officers, and members of the legislature, shall be held on the fourth Thursday of October.

2. At the said elections in every year there shall be elected delegates to the legislature and one senator for every senatorial district. And in the year 1870, and every second year thereafter, a governor, secretary of state, treasurer, auditor, and attorney general for the State, a prosecuting attorney, surveyor of lands, recorder, and the number of assessors prescribed by law, and a Representative in the Congress of the United States for the term beginning on the 4th day of March next after the election, for every Congressional district; and in the year 1870, and every fourth year thereafter, a judge of the supreme court of appeals for the State, and a clerk of the circuit court, and a sheriff for every county; and in the year 1874, and every sixth year thereafter, a judge for every circuit.

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[1] Journal, p. 146; Globe, p. 582.

[2] First session Forty-third Congress.

In the early winter months of 1872 a constitutional convention was in session in West Virginia, and prepared a new constitution, one of the provisions of which was:

The general elections of State and county officers and members of the legislature shall be held on the second Tuesday of October until otherwise provided by law.

The constitutional convention also agreed to a schedule as follows:

SEC. 3. The officers authorized by existing laws to conduct general elections shall cause elections to be held at the several places for voting established by law in each county on the fourth Thursday of August, 1872, at which elections the votes of all persons qualified to vote under the existing constitution, and offering to vote, shall be taken upon the question of ratifying or rejecting this constitution and schedule.

SEC. 7. On the same day, and under the superintendence of the officers who shall conduct the election for determining the ratification or rejection of the constitution and schedule, elections shall be held at the several places of voting in each county for senators and members of the house of delegates, and all officers, executive, judicial, county, or district, required by this constitution to be elected by the people.

The new constitution did not specify any requirement as to the election of Members of Congress by the people. It did provide as follows:

Such parts of the common law and of the laws of this State as are in force when this constitution goes into operation, and are not repugnant thereto, shall be and continue the laws of this State until altered or repealed by the legislature.

The schedule further provided, in event of ratification, that "this constitution and schedule shall be operative and in full force from and including the fourth Thursday of August, 1872." They were ratffied by the people on the said day.

Several things are evident from the above state of facts:

(*a*) That the constitutional convention, by its schedule, established a new date and a new machinery for the election of State officers, thereby superseding the requirements of the law passed by the legislature in 1869.

(*b*) That the constitutional convention did not specifically name the Congressional elections as taking place on the day set apart for election of State officers.

(*c*) That the Constitution of the United States provides that the times for holding Congressional elections shall be prescribed by the "legislature" of the State, and that the West Virginia law of 1869 fulfilled that requirement, although it might be claimed that the schedule of the constitutional convention had swept away the machinery of that act.

(*d*) That the schedule was of doubtful validity in prescribing the time of a Congressional election, especially since it was ratffied only on the very day when that election would be held.

There was much doubt in West Virginia as to what should be done, and elections for Congressmen were held both on the fourth Thursday of August and the fourth Thursday of October. At the August election 81,875 votes were cast on the constitutional question and 44,917 for Congressmen.

In the Third district Frank Hereford was a candidate and was elected at each election. Therefore the Clerk of the House put his name on the roll at the organization of the House.[1]

[1] First session Forty-third Congress, Record, p. 5.

In the other districts the following took place,[1] as stated in the report of the Committee of Elections in its description of the August election:

At this election, in the first district—

	Votes.
Mr. Davis received	13,361
Mr. Wilson	12,948
H.W. Rook	4
Aggregate	26,313

In the second district the Congressional conventions of both parties met before the August election and adjourned without making nominations. At the August election, however, Mr. Hagans received 3,441 votes returned, and, it is claimed, other votes which were not returned. There were 600 votes for other candidates.

Upon the fourth Thursday of October another election for Representatives was held, at which the aggregate vote cast was 22,146. In the first district—

	Votes.
Mr. Wilson received	3,708
Thirty nine other candidates	381
Total vote	4,089

In the second district, at the October election, Mr. Martin received nearly 6,000 votes, which was a majority over all other candidates.

The governor of West Virginia gave Messrs. Davis and Hagans credentials certifying that they were elected, provided the fourth Thursday of August was the legal day for electing Representatives in Congress; and to Messrs. Wilson and Martin like credentials certifying that they were elected, provided the fourth Thursday of October was the legal day for electing Representatives.

The legislature of West Virginia subsequently passed an act directing certain State officers to give certificates to the Representatives elected to Congress, who gave formal certificates to Messrs. Wilson and Martin,

who had been elected in October.

The form of the certificates[2] given was:

STATE OF WEST VIRGINIA, *to wit*:

I, John J. Jacob, governor of the said State, pursuant to the act of the legislature thereof in such case made and provided, do hereby certify that Benjamin Wilson was duly chosen on the 24th day of October, 1872 (provided that was the time prescribed by law for holding an election for Representatives in the Congress of the United States), a Representative in the Congress of the United States for the First Congressional district of this State, composed of the counties, etc. * * *, for the term commencing on the 4th day of March next.

Given under my hand and the great seal of the State of West Virginia, this 29th day of January, 1873.

[SEAL.]

JOHN J. JACOB.

By the governor:

JOHN M. PHILLIPS,
Secretary of State.

The certificate given in pursuance of the act of the legislature was in this form:

STATE OF WEST VIRGINIA, *to Wit:*

We [names of officials enumerated], of said State, pursuant to the act of the legislature thereof in such case made and provided, do hereby certify that Benjamin Wilson, of the county of Harrison, was duly chosen and regularly elected, in accordance with the laws of this State, on the 24th day of October, 1872, a Representative in the Congress of the United States, for the First Congressional

[1] See House Report No. 7.

[2] Record, p. 40.

district of this State, composed of the counties, etc., * * *, for the term commencing on the 4th day of March, 1873.

Given under our hands and the great seal of the State of West Virginia, which is hereto affixed by the secretary of state, this 22d day of November, 1873.

CHARLES HEDRICH , *Secretary of State, etc.*

(Other signatures being appended.)

The Clerk, in view of the alternative nature of the certificates issued by the governor, announced to the House, at its organization on December 2, 1873,[1] that he considered them inadmissible for enrolling either of the candidates from the First and Second districts.

On December 3[2] Mr. John Cessna, of Pennsylvania, proposed the following resolution:

Resolved, That the name of John J. Davis be placed on the roll of this House as a Representative from the First Congressional district of West Virginia, without prejudice to the right of Benjamin Wilson to contest the seat hereafter; and that the name of J. Marshall Hagans be placed on the roll of this House as a Representative from the Second Congressional district of West Virginia, without prejudice to the right of Benjamin F. Martin to contest his seat hereafter, and that they be forthwith sworn in as Members of this House.

This resolution precipitated a long debate on the sufficiency of the prima facie evidence in the case. The argument for the resolution was based on the supposition that a reference to the law of West Virginia would show the August election legal. On the other hand it was argued, especially by Mr. L.Q.C. Lamar, of Mississippi, that such an argument was fatal, since no prima facie right could be based on a certificate which had to be supported by reference to other matters, whether circumstances of law or fact. Furthermore, the alternating feature of the governor's certificate emasculated the certificates. Also the Clerk had, acting under the law, rejected the certificates, and the House ought not to reverse his decision until after examination by a committee.

The demand for the previous question on the resolution was negatived—ayes 54, noes 109. Then the resolution was, without division, referred to the Committee on Elections, and the oath was not administered to either of the claimants.

On January 14, 1874,[3] the report of the committee was submitted by the chairman, Mr. H. Boardman Smith, of New York. It was also signed by Mr. C. K. Thomas, of North Carolina; Edward Crossland, of Kentucky; R. M. Speer, of Pennsylvania, and L.Q.C. Lamar, of Mississippi. Messrs. Lemuel Todd, of Pennsylvania; Horace H. Harrison, of Tennessee, and Ira B. Hyde, of Missouri, gave a qualified approval. Mr. Speer submitted views supplemental to the report, giving the argument in a different way. Messrs. J. W. Hazelton, of Wisconsin, and J.W. Robinson, of Ohio, filed minority views sustaining the August election, while the majority of the committee sustained the October election.

The questions discussed may be divided into several branches, and for convenience the minority propositions may be stated first, since the House ultimately decided in favor of the minority views:

(1) May a constitutional convention prescribe the time for electing Representatives in Congress?

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[1] Record, p. 5.

[2] Record, pp. 35 46; Journal, pp. 39 41.

[3] House Report No. 7; Smith, p. 108; Rowell's Digest, p. 284.

The minority say:

The constitutional convention had authority to prescribe a time, after its ratification, for the election of Representatives. The case of Michigan is in point. The State constitution was adopted on the 24th day of June, 1835. Section 6 of the schedule contained these words:

"The first election of governor, lieutenant-governor, members of the State legislature, and a Representative in the Congress of the United States shall be held on the first Monday of October next and on the succeeding day."

The Representative was so elected on the first Monday and succeeding day in October, 1835, and was subsequently admitted to his seat in the House.

See also the case of Iowa. The constitution of Iowa was adopted May 18, and ratified August 3, 1846. The sixth section of the schedule provides as follows:

"The first general election under this constitution shall be held at such time as the governor of the Territory, by proclamation, may appoint, within three months after its adoption, for the election of a governor, two Representatives in the Congress of the United States (unless Congress shall provide for the election of one Representative), members of the general assembly, and one auditor, treasurer, and secretary of state."

Representatives were chosen under the governor's proclamation on the 26th of October, 1846, and subsequently admitted to seats in the House.

We are very firmly impressed with the conviction that the precedents cited are conclusive upon this question. The word "prescribe," as used in the Constitution of the United States in connection with the election of Representatives, may well be said to have a settled meaning and construction.

We may add, in conclusion, that we are all the more willing to follow this construction in the present case, because it saves us from the alternative of disfranchising a State, while it seems to do no injustice to anyone.

As a precedent, it is entirely without consequence one way or the other, because Congress has already fixed a uniform time for electing Representatives in Congress, and thus taken the whole subject out of State control, after the year 1876.

The supplemental majority report, presented by Mr. Speer and signed by Messrs. Lamar and Crossland, took the contrary view:

But if it is possible to claim that the convention did change the day for holding Congressional elections in West Virginia from the fourth Thursday of October to the fourth Thursday of August, in 1872, then it is respectfully submitted that its act was unauthorized and void. Where the legislature has prescribed no time, a different question may arise. But in this case the legislature had prescribed a time, had obeyed the requirement of the Federal Constitution, had discharged its sworn duty, and had exercised its undoubted power. What shadow of authority, therefore, was there in the convention to interfere? The State constitution had not given to the legislature the power to say when Congressmen shall be elected (for it did not have it to give), and neither State constitution nor State convention could take it away. The legislature derived it from the supreme law of the land, the Constitution of the United States, and in its exercise it knew but one master.

In the Massachusetts convention of 1820 a resolution was submitted declaring that the State constitution ought to be so amended as to provide for the election of Members of Congress in such districts "as the legislature shall direct," thus limiting its discretion to prescribe "the times, places, and manner" of their election. In the discussion that followed Justice Story opposed the resolution, declaring that it "assumes a control over the legislature which the Constitution of the United States does not justify. It is bound to exercise its authority according to its own views of public policy and principle; and yet this proposition compels it to surrender all discretion. In my humble judgment, and I speak with great deference for the convention, it is a direct and palpable infringement of the constitutional provisions to which I have referred."

Mr. Webster followed, limiting himself, however, to the expediency of the proposition. He declared that "whatsoever was enjoined on the legislature by the Constitution of the United States, the legislature was bound to perform; and he thought it would not be well by a provision of this constitution to regulate the mode in which the legislature should exercise a power conferred on it by another constitution." And the proposition failed.

In the case of Baldwin *v.* Trowbridge, in the Thirty-ninth Congress, this House held that "where there is a conflict of authority between the constitution and the legislature of a State in regard to fixing the place of elections, the power of the legislature is paramount."

This case goes further than is required in the cases now pending.

An apparently contrary doctrine was sustained in the case of Shiel *v.* Thayer, from Oregon, in the Thirty-seventh Congress. The committee there say they "have no doubt that the constitution of the State has fixed, beyond the control of the legislature, the time for holding an election for Representative in Congress."

But this part of the report was a mere dictum, for there was nothing in the case to require the committee to determine any such question. Shiel had been elected on the day fixed by the constitution, while Thayer claimed to have been elected on the day of the Presidential election—a day not prescribed by any authority for the election of a Member of Congress. No question as to the power of the legislature to fix the time arose in the case; and what was said upon this point was wholly unnecessary, in view of the undisputed facts.

In the debate,[1] quoting the Federal Constitution, Mr. Wilson, of Maryland, contended that the word "prescribe" meant the laying down beforehand of an absolute rule, not a conditional one, and therefore that the schedule in question did not "prescribe" sufficiently.

Mr. Lamar contended[2] that the distinction between the words "legislature" and "convention" were well understood by the framers of the Constitution. A convention could not by its essential nature and functions overrule the legislature. A convention, like the legislature, was not sovereign, but only one of the agencies of absolute sovereignty which resided in the people.

Mr. Robinson, of Ohio, argued[3] that the issue was not drawn between the convention and the legislature, since the convention merely changed the occasion which the legislature had prescribed as the time for holding Congressional elections.

(2) Might the schedule of the constitution, the ratification of which could be certain only at the conclusion of the election, actually attempt to prescribe the time for the election of Representatives in Congress?

The minority say:

We maintain the affirmative of this proposition. Even if we concede that the word "prescribe" shall have here its narrowest and most technical signification, there seems to us to have been a sufficient prescription of the time.

The schedule submitted with the new constitution provides that, in case of adoption, the same shall be deemed and taken to have been in force from and during the whole said fourth Thursday of August. The law knows no fraction of a day. Being ratified, it became and was, in fact as well as legal intendment, the law of the State prior to the opening of the polls on that day. The time was therefore prescribed when the ballot boxes were opened on that day; that is to say, the law making that day the day of the general election for State and local officers was in force before a vote was polled. But it is said that this was not a prescription of the time, because, if the constitution had not been ratified, the election would have amounted to nothing. Saying nothing just here about the impolicy and injustice of applying so technical a rule for the purpose of disfranchising a State, we submit that it is too late to raise that question.

The majority report thus combats this theory:

5. In answer to these difficulties, it is suggested that by night of election day the old constitution was superseded, and that the new constitution was thereupon "operative and in full force from and including the fourth Thursday of August, 1872," and that "fractions of days are not noticed by the makers either of statutory or organic laws."

But the answer suggested admits that down to the morning of the fourth Thursday of August any

[1] Record, p. 934.

[2] Record, p. 846.

[3] Record, p. 848.

law or ordinance prescribing the holding of a Congressional or State election on that day was unconstitutional and void. Nor (if this be material) is it unqualifiedly true that "fractions of a day are not noticed."

"Common sense and common justice equally sustain the propriety of allowing. fractions of a day whenever it will promote the purposes of substantial justice." (Potter's Dwarris, 101; see 2 Story, C. C. R., 571.)

It is also suggested that the admission of Senators and Representatives simultaneously with the admission of new States, who have been elected at the same time with the ratifications of the first State constitutions, is sufficient authority for sustaining the validity of the August election. But these cases have always been put upon the ground of "necessity," and upon the theory, whether it be a "legal fiction" or whatever else, that a State is not fully in the Union until it is in its normal and constitutional relations with the Union and represented in Congress. Of course between such cases, whether right or wrong, and the case of West Virginia no analogy can be drawn. The constitutional provision had been in full sway in West Virginia for some ten years. What suspended it?

At page 409 of Jameson's work on constitutional conventions the author says of these precedents:

"There being as yet no State, and of course no State legislature, unless the convention could make a temporary arrangement for the election of Members of Congress, the new State must, after its admission into the Union, be unrepresented in that body until a State legislature could be elected and could pass the necessary laws—a condition involving often a considerable delay. In such cases, accordingly, the custom has been for the convention to anticipate the action of the legislature, a course which, on account of its obvious convenience, has been commonly acquiesced in. These cases, however, form exceptions to a rule which is general—that it is the State legislatures which apportion their several States for Congressional elections. I have failed to find a single exception to that rule, save in the cases of Territories seeking to become States or of States standing substantially upon the same footing as Territories.

"Besides, in one view of the subject such action of the Territories, taken in connection with that of Congress following it, involves no impropriety, if it is not strictly regular. Immediately following that clause of the Federal Constitution giving the power of determining the 'times, places, and manner of electing Senators and Representatives' to the State legislature, is the important reservation, 'but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators.' Hence, having the power to make or alter, Congress doubtless might ratify such regulations, however made; or if a State, actual or inchoate, were in such a condition that it had no lawful legislature, Congress might itself, for the sake of convenience, establish them by its direct action. This it does, in substance, by anticipation in those cases in which it accepts and admits into the Union Territories presenting themselves with constitutions containing the apportionments referred to."

In the course of the debate [1] the chairman of the committee, Mr. Smith, called attention to the fact that the old constitution of West Virginia provided that the ordinances of the constitutional convention should have no effect until they were ratified, and that they should not have any retroactive effect. Senators and Members admitted simultaneously with the admission of new States had always been elected outside the constitution. Such was the case in elections under the reconstruction acts, such as that of March 11, 1868. These precedents could not be applied to the case of a State already within the Union. It was further urged by Mr. Lamar [2] that the schedule was a mere addendum, temporary in its nature, to test the will of the people and secure the transition from the old to the new system. As to the point that the schedule was retroactive, and no one could tell in advance whether the election was to be valid or not, Mr. Benjamin F. Butler, of Massachusetts, pointed out [3] that it proved too much, since if the objection was good it went to the whole State government of West Virginia and invalidated it.

(3) Might the State make the election of Representatives in Congress contingent upon the date of election of State officers, and moveable therewith?

[1] Record, pp. 818, 819.

[2] Record, p. 843.

[3] Record, p. 959.

The minority views say:

The legislature of 1869, when it framed the election law and provided all the machinery for conducting an election, and enacted that Representatives in Congress should be elected at said elections, intended to point out and designate the occasion for electing such Representatives; intended that the one election should be held in conjunction with the other; in other words, that when it provided the means or agencies for holding the State election, and authorized Representatives to be elected at the time of said election, and under and by virtue of the machinery for said election, it did not intend that Representatives in Congress should not be elected at said election and without any legal "manner" whatever provided therefor.

Connecting the election of Representatives with an occasion was, moreover, entirely in harmony with the practice of the old State of Virginia, which for some forty years, it seems, was authorized to elect Representatives in Congress under a statute which fixed the election at the holding or opening of certain terms of court, which latter were constantly changing with successive acts of the legislature.

It being, we think, clearly the purpose of the legislature that Representatives in Congress should be elected at the general election, it follows that when the occasion was changed, transplanted, the election of Representatives in Congress went with it.

The majority say, in the views filed by Mr. Speer—

West Virginia was a State in full life, with all the departments of her local government in active and harmonious operation. It was the duty—the sworn duty—of her legislature to prescribe the time of electing her Representatives in Congress. Recognizing this duty, the legislature, as we believe, did definitely prescribe the time, and if it did, there was no power in the State or out of it competent to change the time except Congress and the legislature itself. It is claimed by those who hold the August election to be valid that the legislature prescribed only the "occasion" and not the time. But this assumes that the legislature did not only not do its duty, but that it did not intend to do it. For whence does it derive the power to prescribe the occasion for holding Congressional elections—to prescribe an event, the happening of which may be placed utterly beyond its control or authority? It not only has the power, but it is under the most positive obligation, to prescribe the time. But naming an event on the occurrence of which the election shall be held, and leaving the time of the event to be fixed or changed by another body, which has no power to fix the time of the election itself, it seems to us can in no just sense be regarded as a compliance with the mandate of the Federal Constitution. And hence no intention on the part of the legislature so to evade its duty is to be inferred, and no such construction should be placed upon its act, unless the language absolutely demands it. If the legislature can discharge its duty by naming an occasion, which occasion may be fixed by some other power in the State, then that other power may, under the same reasoning, entirely abolish the occasion. If it is competent to postpone it for a day, it is equally competent to postpone it for a year or for all time. Under this view the legislature would legally prescribe the occasion, which occasion could legally never happen.

Premises which lead to such a conclusion can not be sound, and any construction of the statute of a State legislature which logically leads to such a result should be adopted with extreme hesitation, and only from absolute necessity.

The report of the majority says:

A general State election can only be "prescribed" by law. Does it stand to reason that section 2, chapter 3, of the code meant to fix any other kind of a State election as the "occasion" of the Congressional election? But this convention could not enact a "law," and if it could, and had full legislative power, a law (though it may be made to take effect on the happening of a future contingency) must be a valid law, in presenti, when it leaves the hands of the legislature, and can not become a "law" by the approval of a popular vote. (4 Seld., N. Y., 483, etc.; Rice *v.* Foster, Brightly's Election Cases, 3.)

The right of the legislature to hinge the Congressional election on the State election was strongly combated in debate. Mr. Lamar said[1] that the Congressional

[1] Record, p. 843.

elections must be final and unconditioned by any contingencies which looked to their nullification. If the makers of the West Virginia law of 1869 had intended such a construction they would have made it plain. Mr. Lamar challenged the alleged Virginia precedents; but Mr. Robinson, of Ohio, replied[1] by quoting the Virginia law of 1813, which was in force forty years, and fixed the Congressional elections "on the first day of their April court" in each county. He also quoted a Kentucky statute of 1802, a Louisiana law of 1841, and a New Jersey law of 1820 to the same effect.

(4) Did the law of 1869 actually prescribe the fourth Thursday of October as the date for the election of Representatives in Congress independent of the State election?

Speaking of the West Virginia law of 1869, already quoted, the minority views say:

The second section says—

At the said election, * * * in the year 1870, and every second year thereafter, a governor, secretary of state, etc., "and a Representative in the Congress of the United States" shall be elected.

At the said election; at what said election? Clearly that election mentioned in the first section, to wit, the general election for State, district, county, and township officers.

The word which is employed to introduce the said second section, as well as the general meaning and obvious intent of the section, render this very manifest.

"At the said election for State and local officers Representatives shall be elected." "At," in its ordinary and usual application as applied to time, means contemporary with, in conjunction with.

Now, how can it be claimed that Representatives in Congress can be elected at the general election for State and local officers on the fourth Thursday of October when there is no general election for State and local officers on that day?

Again, we fail to understand what authority there was for holding an election for Representatives in Congress only, on the fourth Thursday of October. The law of the State, the code of 1869, regulating the manner of holding the elections, prescribing the officers who should conduct the same, directing as to the making returns, etc., had reference to the State election—the election of the officers of the State government as distinguished from the Federal Government. The election of Representatives in Congress was hinged on to the State election. It was a mere incident of the State election. They were to be elected at the general election for State and local officers.

Where is the authority for setting in motion the machinery provided for the State government to elect Representatives in Congress alone? Who is to give the requisite notice; who to act as inspectors; who to furnish places for conducting the election; who to make the returns and declare the result? The code of West Virginia does not require one of the officers named in the election act to take a step or lift a finger at any election of Representatives in Congress apart and distinct from the State election. Their duty relates exclusively to the State election and the election of Representatives in connection with such election.

The majority report joins issue on this point:

Section 2 is simply an enumeration of the officers, the day of whose election was prescribed under generic terms in section 1.

The legislature therefore had implicitly obeyed the requirement of Article I, section 4, of the Constitution of the United States, and had "prescribed" for the election of Representatives in Congress a day certain in section 1 and not an occasion in section 2.

The fact that Representatives are specially mentioned in section 2 does not affect the question, except to demonstrate that they are included in the term "district officers" in section 1. So is the governor mentioned in section 2, though plainly included in the class of "State officers" mentioned in section 1.

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[1] Record, p. 847.

4. Is there any opportunity for "construction" here? If there be, then the old election law of West Virginia, passed November 13, 1863, quoted above, and which was codified and somewhat abbreviated in chapter 3 of the code, seems to be important on this question. By the second paragraph of that act it is provided, "And on the fourth Thursday of October, in 1864, and on the same day in every second year thereafter, a governor, * * * a Representative in the Congress of the United States," etc., shall be elected.

This act prescribed a day certain. Can it be fairly claimed that, as abbreviated in the codification, there was an "intention" to change the "prescribed time" from a day certain to an ambulatory "occasion?"

The attempt at abbreviation consisted in the mention but once of the prescribed day, whereas in the act codified it was often repeated, and in grouping each class of officers to be elected under a generic term in the first section, which alone prescribes the time.

In the debate[1] Mr. Robinson, of Ohio, urged that the code of 1869 in failing to specify Representatives particularly in the first section, had intended to change the more specific designation of the former law. It was also urged[2] by Mr. Wilson, of Maryland, that manifestly the lawmakers of West Virginia never contemplated that the fourth Thursday of October should continue an election day for Congressmen after it had ceased to be a State election day. It was further argued that in 1872 there manifestly could be no State election in October, because the new constitution had abrogated it.

(5) Did the schedule of the new constitution actually provide for a general election and repeal the law of 1869 prescribing the October election?

The minority views say:

It is true it was not held at the same time as had previously been designated for the general election, but uniformity of time is not of the essence of a general election. It may be one year in October and the next in November and yet be the general election. In the State of Iowa, for instance, the general election every fourth year is held in a different month from that in which it occurs in the intermediate years.

The legislature in a State where there is no constitutional inhibition may change the time of the election every year or every other year, but it is no less the general election.

It is true it was not "to count" in case the constitution should fail to be ratified. It is equally true that an acknowledged general election does not count in case of a tie. If a mere uncertainty as to results varies the case in one instance, it does in another.

It is not true that it was an election simply to ratify or reject the constitution. It was equally an election—made so by the same section of the schedule—to officer the State. Every officer required to be elected by the people, from governor down to constable, was to be elected on that day. The people were required to do exactly that thing in August, 1872, which in October, two years before, was known to everybody to be the general election and which all concede will be the general election when it occurs in October, 1874; and yet for some reason it is insisted that it was, nevertheless, not a general election then. It is unnecessary to enlarge upon what is a general election. Definitions are easy. The case under consideration seems to us to comprehend all the elements of what we every day speak of and recognize as a general election. It was the only general election held in 1872. It was intended to and did provide the entire official staff of the State government.

The minority hold that the convention had full and ample authority to change the election from October to August.

The majority, in the views submitted by Mr. Speer, quoted the language of the schedule and say:

Here is a plain, clear designation by name or class, of all the officers to be voted for at the August election. Members of Congress are not named, and as they are not State officers and are not "required

[1] Record, p. 847.

[2] Record, p. 935.

by this constitution to be elected," they are excluded from the provisions of the section upon the familiar maxim, "expressio unius, exclusio alterius." The convention, apparently conscious of its want of power, was careful in the use of its language.

Under what authority, then, could an election for Representatives in Congress be held on the fourth Thursday of August, 1872? The code prescribed the fourth Thursday of October, and the constitution and schedule were intentionally silent upon the subject. No change in the time of holding the Congressional election in West Virginia has been directly made or attempted by any power, competent or incompetent, authorized or unauthorized. If made at all, it has been made indirectly by a body that had no power to make it directly, or, if it had, clearly did not attempt to exercise it. If the code, as claimed by those who hold the August election valid, prescribed only the occasion, and that the general election, yet the new constitution did not provide that the general elections should be held in August, but "on the second Tuesday of October until otherwise provided by law." The election held in August, 1872, was for the special purpose of voting for or against the constitution; specially for this purpose, because a candidate for any of the offices voted for might have received every vote cast, and yet he would not have been elected, or, what is practically the same, would not have been entitled to hold the office if the constitution bad been defeated, for there would have been no office to hold. It is not easy to understand how the "general elections" provided for by the code can be construed to mean a single election, held for an extraordinary purpose, on a day not prescribed by the legislature, and never to be held again on that day or for that purpose, and which, in a certain contingency, is not to elect anybody! The code provides that "at the said elections" certain officers shall be elected; and yet it is urged that the schedule supplants these "said elections" with an election at which nobody can, in one event, be elected! It seems to us too clear for argument that no legal election for Congressmen could be held in August, either under the code or the constitution. There was no provision in the schedule for such an election, and there was clearly none in the constitution, for upon its ratification it became operative for every hour of the day on which the August election is held, and, by the express language of section 7, article 4, transferred the "general elections" to the second Tuesday of October. Hence, from the earliest hour of that day it was the organic law of the State that the "general elections" must be held in October, until otherwise provided; and yet it is claimed that the general elections prescribed in the code were held in August by virtue and force of this same constitution.

Neither Congress nor the legislature having changed the time of holding the Congressional election, and the convention not having done so directly, if changed at all, how was it done?

The schedule could not by implication carry with it the repeal of the law prescribing a time for the election of Congressmen, as there was nothing repugnant to the new constitution in that law.

In debate [1] an equal diversity of views arose as to whether or not the election provided by the schedule was a special or general election.

(6) As to the merits of the case, considering the elections as expressions of the will of the people.

The minority views argue:

In view of the foregoing considerations, and of the further facts that nearly double the number of votes were polled in August as in October; that the Representative from the Third district has already taken his seat and entered on his duties; that in the First district, at the August election, a joint discussion was held, a larger vote was polled—larger than that for several of the candidates on the State ticket—and that no public interest is likely to be subserved by imposing upon the State the expense, agitation, and delay of another election, we are in favor of sustaining the August election.

The majority call attention to the fact that in the Second district the conventions of both parties assumed that the election would be in October and that the vote received by Mr. Hagans in August was much smaller than that received by Mr. Martin in October.

[1] Record, pp. 843, 934, 958.

In the debate this point was dwelt on at greater length, Mr. Todd denying that a sufficient number of votes was cast in October in the First district to constitute an election, and quoting various cases in support thereof.

After having been debated on January 21, 22, 23, 26, and 27,[1] the questions came to an issue on the latter date.[2]

The first question was on two resolutions of the majority of the committee declaring the two persons claiming seats by virtue of the August election not entitled thereto:

First. *Resolved,* That Mr. Davis, claiming to have been elected a Representative in the Forty-third Congress from the First Congressional districts of West Virginia, was not duly elected, and is not entitled to a seat in this House.

Second. *Resolved,* That Mr. Hagans, claiming to have been elected a Representative in the Forty-third Congress from the Second Congressional district of West Virginia, was not duly elected, and is not entitled to a seat in this House.

On behalf of the minority Mr. Hazelton moved to strike out the word "not" in the first of the two resolutions; and this motion was agreed to—yeas 147, nays 82. Then the resolution as amended was agreed to—yeas 137, nays 81.

Thereupon Mr. Davis appeared and took the oath.

In a similar manner the word "not" was stricken from the second resolution by a vote of yeas 119, nays 88, and then the resolution as amended was agreed to—yeas 115, nays 75.

Thereupon Mr. Hagans appeared and took the oath.

523. The Colorado election case of Patterson and Belford in the Forty-fifth Congress.

The Clerk declined to enroll the bearer of credentials regular in form but showing an election at a time apparently not that fixed by law.

The House declined to give prima facie effect to credentials perfect in form, but referring to an election on a day of doubtful legality.

Instance wherein credentials were referred to a committee with instructions to inquire either as to prima facie or final right.

Form of resolution instructing a committee to inquiry either as to prima facie or final title to a seat.

On October 15, 1877,[3] at the organization of the House, after the roll of Members had been called, the Clerk[4] announced that there had been received from the State of Colorado a certificate signed by the governor and under the seal of the State, declaring the election of James B. Belford on the 3d day of October, 1876. The Clerk stated that under the law he could enroll only those whose credentials showed them to be elected in accordance with the laws of their States respectively, or the laws of the United States. In the opinion of the Clerk there was no law of Colorado or the United States authorizing the election of a Representative to the Forty-fifth Congress on the 3d day of October, 1876. Therefore he had not enrolled the name of Mr. Belford. The Clerk also announced that he had received a protest signed by Thomas M. Patterson, claiming to be a Representative-elect from the State

[1] Record, pp. 816, 842, 875, 933, 958–964.

[2] Journal, pp. 325–331.

[3] First session Forty-fifth Congress, Record, p. 52.

[4] George M. Adams, Clerk.

of Colorado, and accompanying that protest a certified copy of an abstract of the votes cast in each county on the Tuesday after the first Monday of November for Representative to the Forty-fifth Congress. The abstract showed, however, that the votes were never canvassed by any board of canvassers and that no certificate was ever issued by anyone declaring the result of the election. While of the opinion that the November election was the one provided for by law, the Clerk did not consider that Mr. Patterson's credentials entitled him to be enrolled.

On October 17,[1] after the House had been organized, Mr. Eugene Hale, of Maine, presented Mr. Belford's certificate, and moved that he be sworn in. The question was discussed on the 17th, 22d, 24th, and 25th.[2] Mr. Hale urged that as Mr. Belford had a certificate in due form he was entitled prima facie to the seat. But it was objected that as the certificate specified that the election was on October 3, it became the duty of the House in determining the prima facie right to decide whether October 3 was really the election day.

On October 25,[3] by a vote of yeas 137, nays 130, the House substituted for the motion of Mr. Hale the following, proposed by Mr. John T. Harris, of Virginia:

Resolved, That the certificate presented by James B. Belford and the certified abstracts of votes cast upon the 7th day of November, A. D. 1876, for Representative to the Forty-fifth Congress, and accompanying papers, presented by Thomas M. Patterson, upon which each claims the office of Representative to the Forty-fifth Congress of the United States from the State of Colorado, be referred to the Committee on Elections, to be appointed hereafter, with instructions to said committee to report either as to the prima facie right or final right of said claimants, as the committee shall deem proper, and that neither claimant be sworn in until said committee reports.

Then Mr. Hale's motion as amended by the substitute was agreed to.

524. The election case of Patterson and Belford, continued.

A question as to the right of a constitutional convention of a State to fix the time for the election of Representatives in Congress.

A claimant who received a small vote, not officially canvassed or declared, but cast on the legal day, was preferred to one receiving a far larger vote on a day not the legal one.

Votes cast on a legal election day were held valid by the House although the State official had withdrawn his proclamation calling the election for that day.

The fact that a large portion of the electors fail to participate does not invalidate an election held on the legal day.

A question as to the authority of a construction of law by State officials and people in a case relating to time of electing Congressmen.

On December 6, 1877,[4] Mr. John T. Harris, of Virginia, from the Committee on Elections, submitted the report of the majority of the committee.

The report disregarded the question of prima facie right, and proceeded at once to a discussion of the merits of the case.

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[1] Journal, p. 25; Record, p. 94.

[2] Record, pp. 94, 118, 135, 150–163.

[3] Journal, pp. 38–40.

[4] House Report No. 14, second session Forty-fifth Congress; 1st Ellsworth, p. 52.

In brief, two elections were held in the State, and the question at issue was as to which, if either, was the legal election. The circumstances of the two elections were thus stated in one of the minority views:

At a general election held in that State on the 3d day of October, A. D. 1876, votes were cast for a Representative in both the Forty-fourth and Forty-fifth Congresses. A little over 26,000 votes were polled for the two candidates, which is admitted to be a full vote for the State. The vote for the Representative for the Forty-fifth Congress, as polled and returned, was a little larger than that for Representative in the Forty-fourth Congress. There is no reasonable doubt that both political parties did, in fact, cast their full vote at that election for Representative in both Congresses, and that if said election can be considered as a lawful election for a Member of the Forty-fifth Congress, James B. Belford is entitled to the seat, he having received a majority of the votes cast. As to this there is no dispute.

Thomas M. Patterson, who received a minority of the votes cast for Representative in the Forty-fifth Congress at the election above mentioned, seems to have claimed, prior to the October election, that no valid election for the present Congress could be held in October, but that the 7th of November, the day fixed by Federal statute (if such statute controlled the matter), was the day on which the election for the Forty-fifth Congress must be held. He accordingly seems to have taken steps to have an election held on said 7th of November, and on that day 3,829 votes were cast for Representative in this Congress, of which 3,580 were cast for said Patterson and 172 for said Belford, the rest scattering. If said 7th of November was the lawful day for holding said election, and if a real election was then held by the people of Colorado, Thomas M. Patterson is entitled to the seat, he having received nearly all the votes cast.

A question arose in the course of the discussion as to whether or not the November election could, in view of the small number of votes cast, be considered an election. The majority of the committee held that it could be, saying:

Objection has been made to the seating of Mr. Patterson, upon the ground that there was a light vote polled at the November election, compared with the vote at the October election. But Mr. Belford can not complain of this, nor can his political supporters, for his name was withdrawn from the canvass three weeks before the November election, and his supporters were advised not to participate in the election. The absence of 9a. contest would naturally result in a light vote. At the recent election for governor and other State officers in the State of Virginia there were polled in the city of Richmond less than 2,000 votes out ofan aggregate voting population of 13,000. There was no contest between opposing forces, and a light vote was the result. But no one will seriously contend that this impaired, in the slightest degree, the validity of the election. The law is well settled on this point. Mr. McCrary, in his work on the law of elections, states the rule thus (see. 448):

"If an election is held according to law, and a fair opportunity is presented to all voters to participate, those who do not vote are bound by the result."

In the case of Rem *v.* Munday (2 Couper, 238), Lord Mansfield, in delivering the opinion of the court, said:

"Upon the election of a member of Parliament, where the electors must proceed to an election because they can not stop for that day to defer it to another time, there must be a candidate or candidates; and in that case there is no way of defeating the election of one candidate proposed but by voting for another."

In the case of The Commonwealth *v.* Read (Brightly's Election Cases, 130–131) this rule is recognized to the fullest extent. In this case it was the duty of the board of county commissioners, under the statute, to elect a county treasurer. The board consisted of 20 members, all of whom were present, but a controversy arose among them as to the manner of voting, whether viva voce or by ballot, and only one of their number, Abraham Miller, voted by ballot, while the others voted viva voce. The statute required the election to be by ballot, and by virtue of this one vote Read claimed to be elected. The court instructed the jury as follows:

"In all our public elections those who neglect or refuse to vote according to law are bound by the votes of those who do vote, no matter how small a minority those who do vote are of the whole constituency. It is an historical fact that about 40,000 electors who voted for one or the other of the candidates for governor at the late election did not cast any vote for or against the amended constitution,

and yet that instrument has, by a comparatively small minority, become the supreme law of the land. The result of our opinion is that if you are satisfied from the evidence that Abraham Miller tendered a vote by ballot for the defendant, and that his vote by ballot was received as such, then has the defendant sustained his plea of having been, on the 1st of April last, duly elected county treasurer."

A former Committee of Elections of this House (Nineteenth Congress, first session), in the case of Biddle and Richard *v.* Wing (Clark and Hall, p. 507), laid down the rule which has always been recognized. The report in that case held that—

"The law appoints a particular time and place for the expression of the public voice. When that time is past it is too late to inquire who did not vote, or the reason why. The only question now to be determined is for whom the greatest number of legal votes have been given."

The small vote on the 7th of November in Colorado was not the result of intimidation of voters; but, on the contrary, the supporters of one of the claimants of the seat voluntarily absented themselves from the election by preconcerted arrangement, and for the very purpose of invalidating the election, so far as it was in their power to do so by their absence. Conceding that there was an honest difference of opinion among the voters of Colorado as to the legal day for the election, some believing the 3d day of October and others the 7th day of November to be the lawful day, yet it will not be pretended that the proper construction of an act of Congress is to be determined by the voters of a particular district. The provisions of law which fix the time or place of holding elections are mandatory. As to the time of election, the day cannot be changed even by the consent of all the voters. (McCrary, sec. 114.)

Ignorance of the proper time or a misunderstanding of the law on the part of a portion of the electors will not deprive those who do understand the law and who do act upon the day prescribed by law from their right to vote and control the election. It is not denied that the election on the 7th day of November was conducted in accordance with the general election law of the State, that all electors who desired to do so were permitted to vote, and that the canvass and result were honestly made and published.

Mr. J.D. Cox, of Ohio, who filed individual views, held the opposite view:

In regard to the 7th of November election, the day was not only not the lawful one, as we have above shown, but the State officials had become convinced of this and withdrawn the election proclamation and notices.

The condition of the public mind is probably best described by the secretary of state, Mr. Clark, who testifies:

"Many were doubting the legality of an election for Representative in the Forty-fifth Congress on the 7th day of November, others claiming that it would be a mere matter of form anyway, because there was some kind of an understanding between Mr. Belford and Mr. Patterson that whichever was beaten at the October election would not be a contestant against the other at the November election; others claimed that only a Member to the Forty-fourth Congress could be elected under the constitution and that the general assembly must provide by law for the holding of an election for the Forty-fifth Congress." (Record, p. 16.)

When in the midst of the public uncertainty thus described, in which the confusion was increased by the acts of party committees, prompted by the fear that their opponents would get the start of them, an election was nominally held, in which hardly more than one-seventh of the electors took part, less than one-third, even, of the party claiming the victory, and almost none of their opponents; when in the city of Denver, the capital of the State, and where were the political managers and committeemen, the proportion of votes cast was not larger than in the rest of the State; and when in eight counties there was not even a show of election, it would be doing violence to language and to justice to call the result an expression of the popular will or the formalities which took place an election by the people of the State.

In the debate on December 13,[1] this feature of the case was discussed somewhat at length, the minority citing the case of Buttz *v.* Mackey, where after casting out a third of the poll it was decided that the remainder of the votes were not sufficient to constitute an election and the seat was declared vacant. In opposi-

[1] Record, pp. 186, 187.

tion the majority cited the West Virginia election cases of 1873 and the vote for Mr. Hagans.

But the main issue of the case was as to which election was legal. Section 25 of the Revised Statutes of the United States provided:

The Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the Forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is established as the day for the election, in each of said States and Territories, of Representatives and Delegates to Congress commencing on the fourth day of March next thereafter.

On March 3, 1875, after the above law had been enacted, the law admitting Colorado as a State was approved. It contained this provision:

That until the next general census said State shall be entitled to one Representative in the House of Representatives of the United States, which Representative, together with the governor and State and other officers provided for in said constitution, shall be elected on a day subsequent to the adoption of the constitution and to be fixed by said constitutional convention; and until such State officers are elected and qualified under the provisions of the constitution, the Territorial officers shall continue to discharge the duties of their respective offices.

In accordance with this enabling act the constitutional convention of Colorado adopted the following sections:

One Representative in the Congress of the United States shall be elected from the State at large at the first election under this constitution, and thereafter at such times and places and in such manner as may be provided by law.

SEC. 16. The votes cast for Representative in Congress at the first election held under this constitution shall be canvassed and determined in the manner provided by the laws of the Territory for the canvass of votes for Delegates in Congress.

Section 7 of the Colorado constitution provided:

A general election shall be held on the first Tuesday of October, in the years of our Lord 1876, 1877, and 1878, and annually thereafter on such day as may be prescribed by law.[1]

These conflicting provisions left a doubt as to when the election of 1876 for Congressman should be held. The majority report thus sets forth what was done:

The following facts are established beyond controversy:

1. That the secretary of state did, on the 31st day of August, 1876, issue his proclamation (printed Record, p. 138) notifying the people that there would be an election on the 3d day of October, 1876, for State officers and for "one Representative for the unexpired term, Forty-fourth Congress; "that this proclamation made no mention of the election of a Representative in the Forty-fifth Congress, and that the sheriffs of the several counties of the State promulgated like proclamations and notices.

2. That on the 14th day of September, 1876, the secretary of state issued his proclamation (printed Record, p. 254) giving notice of an election to be held November 7, 1876, for a Representative from the State at large for the Forty-fifth Congress; that no other officers were to be elected at such election, and that the sheriffs of the several counties issued like notices in their several counties.

3. That these proclamations by the secretary of state and the sheriffs of the several counties were the only notices published by legal authority or otherwise relating to said elections until after the election on the 3d day of October.

4. That the names of both contestant and contestee were printed generally upon the tickets used at the election on the 3d day of October for both the Forty-fourth Congress (unexpired term) and the Forty-fifth Congress; but there was no agreement between the respective claimants or their friends

[1] This provision of the constitution appears in full in the debates, Record, p. 147.

as to whether the 3d day of October was the day prescribed by law for holding the election for a Representative in the Forty-fifth Congress.

5. That on the 10th day of October, one week after the election on the 3d day of that mouth, J.C. Wilson, chairman of a State political committee favoring the election of Mr. Belford, issued an address (Record, pp. 45–47) calling on the friends of Mr. Belford to prepare by registration and otherwise for the election on the 7th day of November.

6. That on the 16th day of October the secretary of state issued a proclamation withdrawing his proclamation of September 14, which gave notice of the election on the 7th of November.

7. That on the 14th day of October the said J. C. Wilson, on behalf of Mr. Belford, withdrew his name from any further candidacy for Congress, claiming that he had been elected on the 3d day of October to the Forty-fifth Congress, as well as to the unexpired term of the Forty-fourth Congress, and advised Mr. Belford's friends to take no part whatever in the election on the 7th day of November.

8. That the votes cast at the election on the 7th day of November were counted by the proper officers in 11 counties and transmitted to the secretary of state, but were not canvassed by that officer or by any State canvassing board; that in the other 15 counties of the State no abstracts of the votes cast were sent to the secretary of state by the county clerks; but the stipulation filed by the parties to the contest, and above set forth, shows the true result of the votes actually cast in the whole State.

A diversity of opinion existed in the committee and the House as to which day the law designated for the election. The majority contended that November 7 was the legal day. The minority views, presented by Mr. John T. Wait, of Connecticut, contended that the October election was the legal one, while Mr. Cox contended that neither was legal.

The majority admitted that the failure of the proper officer to give notice of the election of a Congressman in October did not invalidate the election, since it was settled by authorities (Cooley and McCrary) "that where the time and place for holding an election are fixed by statute, any voter has a right to take notice of the law and to deposit his ballot."

Also the majority held that the failure to canvass the votes and declare the result "does not invalidate an election otherwise regular and valid."

This therefore left as the important question the determination of the day fixed by law.

The majority held that the enabling act did not repeal the statute fixing generally the day of election in all the States, citing authorities to show the danger of the doctrine of repeal by implication. The law of Congress was the supreme law of the land, and Congress having, in the exercise of its constitutional power, fixed the time for holding the election for Representative in the Forty-fifth Congress in all the States, from the moment of the passage of the act of Congress it became and was engrafted upon the statutes of every State in the Union, and it required no auxiliary State legislation to give effect to the national statute. But the election laws of the several States which fixed the places and prescribed the manner of such elections were not affected, altered, or repealed; and the national statute fixing the time and the State statutes fixing the places and prescribing the manner of holding the Congressional elections, formed a complete election machinery for the election of Representatives in Congress.

The schedule to the Colorado constitution (sec. 1) provided that all laws in force in Colorado at the adoption of the constitution should remain in force until altered or repealed by the legislature. It was not disputed that there was a well-defined and perfect code of election laws in force in Colorado at the time of the adoption

of the constitution. In pursuance of these laws, the State election and the election for Representative in Congress for the unexpired term of the Forty-fourth Congress were held on the 3d day of October, 1876, and Mr. Belford did not question the validity of such laws, for he claimed his own election on the 3d of October, 1876, to this Congress, by virtue of an election held in pursuance thereof. These State laws provided fully for the places and prescribed the manner in which "all general and special elections" should be held in the State. There were, then, in force in the State of Colorado on the 7th day of November, 1876, laws providing a full, complete, and perfect election machinery for electing a Representative to the Forty-fifth Congress—the time fixed by Congress, and the places and manner provided by the State statutes.

The minority, after quoting section 16 of the Colorado constitution, say:

> That the constitutional convention assumed it had full jurisdiction of the question and intended to exercise it the last-quoted section makes apparent; it continued the election laws of the Territory to the election in October and no further, and by the provisions of the constitution fixing the time of the assembling of the first legislature of the State and its methods of enacting laws, it was impossible for it to provide election laws for the first Tuesday after the first Monday in November (see constitution of Colorado); the inference follows it assumed a Representative to this Congress was to be elected in October, 1876; otherwise it intended not to make provision for such an election.

The minority contended, on another point, that the action of the people of Colorado settled the question:

> But the State of Colorado and her people alone are interested in this question. She is entitled to representation, and the proper and only function of the House is to see that, within the principles of representation underlying the legislative branch of our Government, she has her constitutional right. And upon this complex question—for we suppose it must be complex, since the views of members of your committee are so diverse—her people have put a construction.
>
> We suppose it to be well settled in cases of the doubtful construction of a statute involving the rights of the people, and only their rights as distinguished from individual rights, the adoption of a particular construction with entire unanimity has never been disturbed by a power only interested to preserve the rights of the State; certainly never when the only possible injury to the constituency is in the political associations of the individual who shall represent the State if that construction shall remain unreversed. And we affirm most confidently the people of Colorado have construed the provisions hereinbefore discussed in accordance with our views.

The majority considered that the constitution of Colorado intended to fix only the day for the election of the first Congressman, and it was contended in debate that this was as far as a constitutional convention might go.[1] The minority views, however, contended that the convention might fix also the times of other elections, citing the case of Shiel *v.* Thayer. This also was urged in debate.[2]

The majority concluded that Mr. Patterson was entitled to the seat and presented a resolution so declaring.[3]

The minority presented a resolution declaring Mr. Belford entitled to the seat.

The report was debated at length on December 12 and 14.[4] On the latter day the House disagreed to the minority resolution, yeas 109, nays 126. The proposi-

[1] Record, p. 160.

[2] Record, p. 180.

[3] Congress passed a law to remove any ambiguity as to the next election in Colorado. Second session Forty-fifth Congress, Record, pp. 4082, 4083; 20 Stat. L., p. 112.

[4] Record, pp. 145, 178–199.

tion declaring that there had been no legal election was decided in the negative, yeas 116, nays 117. Then the resolution of the majority was agreed to, yeas 116, nays 110. Mr. Patterson was then sworn in.[1]

525. The Iowa election case of Holmes, Wilson, Sapp, and Carpenter in the Forty-sixth Congress.

An instance after the enactment of the law regulating election contests wherein a contest was instituted by petition.

An election for Congressmen not called or sanctioned by State officers, and participated in by a fraction merely of the people, would not be valid even although held on the legal day.

Discussion of the force to be given by the House to a construction by the proper State officials of a State law fixing the time for electing Congressmen.

The constitution of a State may not control its legislature in fixing, under the Federal Constitution, the time of election of Congressmen.

Reference to practice of agreeing to questions of fact in contested election cases as liable to abuse.

An instance wherein an elections committee held certain testimony, which was not legal in form, as an offer of proof.

On December 21, 1880,[2] Mr. Walbridge A. Field, of Massachusetts, from the Committee on Elections, submitted a report in the Iowa election cases raised by the petitions of J. C. Holmes and John J. Wilson. All of the committee but one concurred in the conclusions of this report, but four of the ten stated that they did not concur in all the legal opinions stated in the report. Mr. Walpole G. Colerick, of Indiana, filed minority views dissenting from both the reasoning and the conclusion.

The salient facts underlying the question are included in the following extract from the minority views:

The Constitution of the United States declares that "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." (Art. I, sec. 4.)

Under this provision of the Constitution the legislature of the State of Iowa was authorized and required to prescribe the time, place, and manner of holding elections in that State for Representatives in Congress, subject to the power of Congress to alter at any time such regulations. By virtue of this provision of the Constitution the legislature of that State did enact a law prescribing "the time, place, and manner" of holding elections for Representatives, and designated the second Tuesday in October as the time for the holding of said election. Subsequently, in February, 1872, Congress, exercising the power conferred upon it by the Constitution, altered the regulations so prescribed by the legislature of Iowa, as to the time designated for the holding of said election, by the following enactment:

"The Tuesday after the first Monday in November, in the year 1876, is established as the day in each of the States and Territories for the election of Representatives and Delegates in the Forty-fifth Congress, and the Tuesday next after the first Monday in November in every second year thereafter is established as the day for the election in each of said States and Territories of Representatives and Delegates to the Congress commencing on the 4th day of March thereafter." (Sec. 25 Rev. Stat., U.S., 1878.)

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[1] Journal, pp. 113–116.

[2] Third session Forty-sixth Congress, House Report No. 19; 1 Ellsworth, p. 322.

Afterwards Congress modified said law, as follows:

"That section 25 of the Revised Statutes, prescribing the time for the holding elections for Representatives to Congress is hereby modified so as not to apply to any State that has not yet changed its day of election, and whose constitution must be amended in order to effect a change in the day of the election of State officers in said State." (Sec. 6, ch. 130, acts 2d sess. 43d Cong., approved Mar. 3, 1875.)

The question presented to us is, Does the State of Iowa come within the exception named in said act, as modified? Must her constitution be amended "in order to effect a change in the day of the election of State officers in said State"?

The constitution of Iowa provides that "The first election for secretary of state, auditor, and treasurer of state, attorney-general, district judges, members of the board of education, district attorneys, Members of Congress, and such State officers as shall be elected at the April election in the year 1857, * * * shall be held on the second Tuesday of October, 1858." (Sec. 7, art. 12.)

This language of the constitution gave rise to a doubt as to whether the constitution would have to be amended in order to effect the change prescribed by the law of Congress.

At the general election of October 8, 1878, in Iowa, Messrs. William F. Sapp and Cyrus C. Carpenter were elected Representatives, respectively, from the Eighth and Ninth districts of Iowa, received their certificates from the governor, and were seated in the House.

But Mr. J. C. Holmes, in the Eighth district, and Mr. John J. Wilson, in the Ninth district, offered themselves for election on November 5, 1878, claiming that it was the legal election day, according to the constitution and laws of Iowa.

In Mr. Holmes's district votes were cast in four townships, and the report thus summarizes:

The result is, in the case of Holmes, that the papers, if taken to be true statements, show that in these four townships certain voters got together and went through the forms of an election for Representative in Congress; that in all 171 votes were cast, of which Holmes received 162, Sapp 2, and Chapman 6, and there was 1 blank; and that these votes were never canvassed by any State officers and no certificate of election issued. In the Congressional Directory, which refers to the election held in October, Sapp is put down as receiving 15,343 votes, against 7,453 votes for Keatley, Democrat, and 7,760 votes for Hicks, National, in all 30,556 votes.

It does not appear that the voters of this Representative district understood generally that an election was to be held on the 5th day of November, being the Tuesday next after the first Monday of November, for Representative in Congress, or that any attempt would be made by anybody to hold such an election or that any person had notice that any such election would be held, except the persons voting.

It does not appear that the governor issued his proclamation for any such election, which by section 577 of the code of Iowa he is required to issue thirty days before any general election, "designating all the offices to be filled by the votes of the electors of the State, or by those of any Congressional, legislative, or judicial district, and transmit a copy thereof to the sheriff of each county."

It does not appear that the sheriff gave "at least ten days' notice thereof, by causing a copy of such proclamation to be published in some newspaper printed in the county, or if there be no such paper, by posting such a copy in at least five of the most public places in the county," as required by section 578 of the code.

It does not appear that any registry of voters was established, or that any of the regularly appointed officers, except one township clerk, took any part in this election, or that the board of supervisors of the county canvassed the returns and made abstracts thereof, as provided in section 635 of the code of Iowa, or that any abstracts thereof were forwarded to the secretary of state or filed by the county auditor (section 637 of code), or that any canvass was made by the executive council (sections 651, 652, code), or that any certificate of election was issued under the seal of the State (section 653 of code). So far as appears this might have been an election held by a few persons in only four townships, without

any knowledge on the part of anybody except themselves that any attempt to hold an election would be made, and without any recognition at all by the authorities of the State.

It was stated in argument that Mr. Holmes had his ballots secretly printed in St. Louis, Mo., and that the election was in fact a secret to nearly all the electors of the district, but as the committee have not been authorized to take testimony, the undersigned have considered this as hearsay, and have not regarded it.

In Mr. Wilson's district the result is thus summarized:

If the statements in these papers are taken to be true there were votes cast in twelve townships on the 5th of November, 1878, for Representative in Congress to the number of 357, of which Wilson received 260 and Carpenter 97. In the Congressional Directory, which refers to the October election, Carpenter is put down as receiving 16,489 votes, against 1,202 for W. H. Brown, Democrat, and 12,338 votes for L. Q. Hoggatt, National; in all, 30,029 votes.

There is the same absence of any evidence of action on the part of the authorities of the State in making proclamation and giving notice of the election and canvassing the votes cast after the elections as in Holmes's case, and there is no evidence whatever that it was generally understood that an election for Representative in Congress was to be held on the 5th day of November, or that any attempt was to be made to hold any election on that day, or that it was known to anybody except the persons voting that any such election was to be held. The papers do show that the governor of Iowa was advised by the persons named that such an election could lawfully be held only on the second Tuesday of October.

Several questions arose from this dispute as to the date of election and the proceedings resulting therefrom:

(1) Both Holmes and Wilson petitioned, not against the election of Messrs. Sapp and Carpenter, but that such action might be taken as would give them their legal rights as Representatives elected in November. Their petitions were referred to the Committee of Elections. That committee, after discussing its own powers, said:

The power of the House to judge of the elections, returns, and qualifications of its members is ample, and it can proceed in its own way; a committee of the House has such power as is given it.

The importance of election cases demands that the testimony should be taken on notice to all persons interested, with the right on their part to cross-examine witnesses and to exhibit testimony in reply, so far as their rights may be affected by the inquiry.

This may be done under or after the analogy of the statute relating to contested elections, or by summoning witnesses before the committee, or in any other manner the House may direct.

None of the certificates or affidavits found in the papers in a judicial court would prove themselves or be judicially recognized except the certificates of the sitting Members.

The committee sent notice of the pendency of these petitions to the Members in Congress from the State of Iowa, and some of them appeared specially, without acknowledging by their appearance that their rights could be determined under these petitions. The undersigned agree with the remainder of the committee that chapter 8 of the Revised Statutes of the United States, relating to contested elections, has no direct application to a contest between persons claiming under elections held on different days, and could only be made applicable by a resolution of the House authorizing such parties to proceed after the analogy of the statute and fixing in the resolution a time from which the first thirty days should begin to run.

The undersigned think that the words "such election" in the third line of section 105 of the Revised Statutes mean an election contested, and a person claiming to be elected on a subsequent day might not be elected until more than thirty days after the result of the first election had been determined, and might not be able under the statute to give any notice at all; but they think that the provisions of that chapter or some analogous provisions ought in general to be made applicable to any contest in which the rights of sitting Members are involved, or else that the Committee on Elections should be authorized to summon persons and take testimony, with notice to the sitting members, and perhaps, in a case like this, to the State of Iowa, to appear and by testimony and arguments be heard. The

petitions in these cases should not, therefore, be dismissed merely because they do not conform to the statutes.

The agreement of parties has sometimes been received as to disputed questions of fact, but it has always been held that this should be done with great caution, as these are not merely contests between the parties, but the rights of the people of the district and of the State and of the people of the United States are involved and can not be agreed away.

In these cases no testimony has been taken by the committee; there are no parties and no agreement of parties. Certain facts have been stated in argument for and against the cases of the petitioners, and have been conceded in argument by counsel, but the undersigned do not feel at liberty to consider them as agreed facts.

It was suggested to the counsel of the petitioners that if they proposed to prove any other facts than those set forth in their papers, they should state them; but there was no intimation that they desired to offer evidence of any other facts than those alleged in the papers.

In determining what should be done with the petitions, the undersigned were of the opinion that the affidavits and certificates accompanying the petitions should be regarded as offers of proofs; that is, statements by the petitioners of the facts which they propose to prove; and that the committee should consider whether, if all these statements of facts were taken to be true, the petitions could be maintained; that if they could not, it would not be worth while to ask this House for authority to take testimony on the subject, or to take any other action than to dismiss the petitions.

(2) After reviewing the facts as to the alleged November elections, the report says:

The undersigned think that it is impossible to hold on these alleged facts, if proved, that either Mr. Holmes or Mr. Wilson has been duly elected Representative in Congress, whether the Tuesday after the first Monday of November or the second Tuesday of October be the lawful day for such an election, and that there is no need of taking testimony in these cases, because the facts alleged, if proved, would not entitle either of these gentlemen to a seat, and that the committee should be discharged from any further consideration of these petitions; and that in coming to this conclusion it is not necessary to decide whether the authorities of the State were right or not in determining that the legal day of election was the 8th day of October, because if it be assumed to be true that the 5th day of November was the legal day of election, the election was not held under the sanction of the authorities of the State of Iowa, was not generally known so far as appears, and was not participated in by such numbers of the people of Iowa that on any grounds this House would be justified in declaring Mr. Holmes or Mr. Wilson entitled to a seat.

These petitions, as has been said, can not be considered as petitions of citizens or voters of Iowa asking that the whole election in Iowa for Representatives in Congress in October should be declared void.

They are not drawn with any such intention and pray no such relief. So far as appears, if Holmes and Wilson can not be seated they are content as citizens of Iowa that the existing delegation of Iowa should retain their seats.

If resolutions should be offered in the usual form declaring either Mr. Holmes or Mr. Wilson entitled to a seat, the undersigned think that they should be decided in the negative.

The minority views reach the same conclusion:

While, in my judgment, the failure of the governor to issue a proclamation, and the omission of other officers to perform their duties would not alone invalidate the election, as their neglect or refusal to comply with their duties should not result in depriving the people of the right to elect their officers at the time fixed by law for that purpose, yet it is quite evident from the very small vote cast that the voters of the district generally abstained from voting or taking any part whatever in said election, and it is fair to assume that the cause of their failure to do so is alone attributable to the fact that they believed that the election which had been held in October for Representative to Congress was authorized by law and legal, and that said subsequent election was unauthorized and illegal, and by reason of this belief, so created, they failed to participate in said election and thereby the will of the people was not fairly or fully expressed at the election held in November, and therefore I do not think that the claimants who base their right to the seats in dispute under and by virtue of said election are entitled to the same.

(3) The majority further held that under the petitions in the present case the committee might not investigate the validity of the October election:

And if resolutions should be offered declaring Mr. Sapp and Mr. Carpenter entitled to their seats, that they should be decided in the affirmative, because nothing as yet has appeared to invalidate the title by which they now hold them; and that as a decision of the validity of the election of Messrs. Sapp and Carpenter, or perhaps of all the delegation from Iowa, is not necessary, in the opinion of the undersigned, in order to make a proper disposition of these petitions, a decision against them or against the whole delegation of Iowa should not be made without formal notice to the Representatives of Iowa, and perhaps to the State of Iowa, and after taking testimony of such facts and circumstances surrounding the election on the second Tuesday of October as might properly be considered in construing the statutes and laws relating to the legality of an election on that day.

Mr. Colerick, having concluded that the law and constitution of Iowa were so worded that the legal time of election was in November, said that it followed that the seats of Messrs. Sapp and Carpenter were vacant, and he proposed resolutions declaring the vacancies.

(4) The majority, while deeming it unnecessary under their view of the case to investigate the legality of the October election, still discussed the question, since other opinions had been expressed. In this discussion the following questions appeared:

(*a*) The report points out that the House might, if it chose, take action as to Messrs. Sapp and Carpenter independently of the petitions. But it appeared that both political parties and the State officials, with the acquiescence of the great mass of the people, had decided that the laws and constitution of Iowa were of such tenor as to make the October election the legal one. These facts were undoubted, although there might be a question as to whether they were properly before the committee. They were of great significance, for—

It is the doctrine of the Supreme Court of the United States that decisions of the highest judicial court of a State upon the meaning of the State laws and constitution, when its decisions are uniform, are binding on that court.

The construction of the Constitution and laws of the United States belongs of course to the courts of the United States in any controversy before those courts; but in considering whether the laws and constitution of a State conflict with the laws and Constitution of the United States as construed by the courts of the United States, those courts take the laws and constitution of the State as construed by the courts of the State when their decisions are uniform.

The undersigned are not prepared to hold that the decision of the highest authority of a State upon the meaning of its constitution in reference to whether the day of the election of State officers is fixed by that constitution or not, so far as it is material in determining the legality of an election of Representatives in Congress, is absolutely binding upon this House.

In a report from the Committee on Elections, adopted by this House April 11, 1871, in the matter of the Tennessee election (Digest of Election Cases, compiled by J. M. Smith, p. 1), the committee say:

"It is a well established and most salutary rule that where the proper authorities of the State government have given a construction to their own constitution or statutes, that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex Government, State and national, and your committee are not disposed to be the first to depart from it."

We are not disposed to be the first to depart from it, and we certainly think that such a decision made in good faith and acquiesced in at the time by the people of the State, and followed by a full and fair election, should not be overthrown or questioned except for the gravest reasons, founded on an undoubting conviction that it was plainly an error, and that the error had worked some substantial injury.

Mr. Colerick, in the minority views, denied this reasoning:

While it is true that the Federal courts have repeatedly held that the construction placed upon the constitution and laws of the respective States by the latest utterances of the highest judicial tribunals thereof, will be respected and adopted by the Federal courts (7 Wallace, 523; 9 Wallace, 35; 14 Howard, 438; 23 Wallace, 108), yet they have never, so far as I am aware, extended the limits of this rule so as to embrace decisions rendered by any other than the judicial department of a State. It is not claimed that the highest or any other judicial tribunal of the State of Iowa has given a construction to these provisions of her constitution, and in the absence of such decision we are left unrestrained to place our own construction thereon.

(*b*) As to the sufficiency of a provision in a State constitution prescribing the time of electing Representatives in Congress, the majority report says:

Section 4, article 1, of the Constitution of the United States confers power on the legislatures of the States to prescribe the time of electing Representatives in Congress in the absence of any controlling regulations by Congress.

The provisions of the constitution of a State can not take this power from the legislature of a State and Congress can not take from a State the right to fix either by its constitution or by its laws the day of electing State officers.

The object of section 6, chapter 130, of the acts of 1875, was to prevent compelling any State against the will of its legislature to have two elections on different days, one for Representatives in Congress and one for State officers, or else to change its constitution.

We are therefore of opinion that the governor of Iowa adopted the right construction of the constitution of that State in deciding that it did fix the day of election of State officers (with the exception perhaps of the attorney-general), whether those State officers were to be elected on the odd or even numbered years, so that it would require a change in that constitution to elect State officers (who were required by the State constitution to be regularly elected by the people in the year 1878) on the Tuesday next after the first Monday in November, and that the election of Representatives in Congress, held in accordance with the laws of the State on the second Tuesday in October, 1878, was held on the day on which alone it could lawfully have been held.

In reaching this conclusion we disregard altogether the provision for the election of Members of Congress found in section 7, article 12, of the constitution of Iowa. That provision may tend to show that it was the intention of the people of Iowa that Members of Congress should be elected on the second Tuesday in October of the even numbered years not Presidential, but the time of electing Members of Congress can not be prescribed by the constitution of a State, as against an act of the legislature of a State or an act of Congress, and the amendment to the twenty-fifth section of the Revised Statutes of the United States is confined to States whose constitutions fix the day of election of State officers in said State.

The only apparent exception has been in the constitutions which have been formed by Territories, and with which such Territories have been admitted into the Union as States; but this, if it be a valid exception, does not prove that Territories have the right by a constitution to fix the time for electing Representatives in Congress when they become States; but the authority of these provisions rests on the sanction and adoption of them by Congress in admitting such Territories as States with constitutions containing such provisions.

(*c*) As to the interpretation of the constitutional provision of Iowa, the majority concluded that it would need to be amended in order to effect a change of the election day, and so the law of Congress fixing elections in November would not apply in Iowa. Mr. Colerick took the opposite view.

In accordance with their conclusions the majority reported the following:

Resolved, That the petitioner, J. C. Holmes, in the matter of his petition asking to be admitted to a seat in the Forty-sixth Congress as a Representative from the Eighth Congressional district of the State of Iowa, have leave to withdraw his petition.

And also a similar resolution applying to Mr. Wilson.

On January 31, 1881,[1] these resolutions were agreed to in the House without debate or division.

526. The election case relating to Delegate Wilcox, of Hawaii, in the Fifty-sixth Congress.

Failure of a Territorial legislature to prescribe specially time, place, and manner of electing a Delegate did not invalidate an election actually held.

Instance of the impeachment of the election and qualifications of a Delegate through proceedings instituted by a memorial.

Instance of examination by a House Committee of charges of bigamy and treason against a Delegate.

The organic act of Hawaii fixed the qualifications of the Delegate therefrom.

A memorial preferring charges against Mr. Robert W. Wilcox, Delegate from Hawaii, having been referred to the Committee on Elections No. 1, at a time after the Delegate had taken the oath, that committee on March 1, 1901,[2] submitted a report.[3] The charges were three: (1) that he was guilty of bigamy; (2) that he was guilty of treason against the United States, and (3) that there had been no valid election for Delegate from Hawaii.

1. As to the first charge the committee found that Mr. Wilcox had married his second wife under an erroneous impression that he had secured a valid divorce from his first wife. But as there was no pretense that he had lived with the two women at the same time or held himself out as the husband of two women the committee did not conceive that a question of ineligibility was presented.

2. In regard to the charge of treason the committee found:

On the 7th of July, 1898, Congress adopted a joint resolution to provide for annexing the Hawaiian Islands to the United States. The organic act providing for a system of government for these islands was not passed until April 30, 1900. Early in 1899 Wilcox wrote several letters to an Italian friend of his in Washington, and one letter of introduction of this friend to certain representatives of the Philippines then in Washington, in which he gave expression to unpatriotic and treasonable propositions. In one of these letters he told the Philippine representatives that he was ready to give his services to their country and ready to obey orders to go to their country and fight for the independence of their people.

Your committee has carefully considered the duty of the House in this relation, and after full discussion and consideration are clearly of opinion that under the circumstances of the case no action ought to be taken by the House.

Wilcox was one of the adherents of Queen Liliuokalani, and therefore of the "royalist party." Against his will, and in spite of his objection and the objection of his associates, the monarchy was overthrown and a republic created. No doubt this revolution was in the interest of civilization and good government, but the attitude of those who believed in the monarchy and whose government was overthrown was not to be scrutinized with the same care as if those whose conduct was questioned could justly be compelled to show instant allegiance to the new governing power.

When in 1898 the Republic of Hawaii proposed to the United States terms of annexation, which were accepted by the joint resolution of July 7, 1898, it is not strange that those who were opposed to the Republic and hoped for the restoration of the monarchy should be unwilling to yield allegiance to the power which, as it seemed to them, had forcibly assumed jurisdiction of their country. At the time

[1] Record, p. 1074.

[2] Second session Fifty-sixth Congress, House Report No. 3001; Rowell's Digest, p. 601.

[3] The report was drawn by Mr. R. W. Tayler, of Ohio.

when Wilcox wrote his treasonable letters the only government which the Hawaiian people had was that which the Republic of Hawaii had set up, supplemented by the resolution of 1898, which merely transferred nominal sovereignty to the United States. When in 1900 Congress provided a system of government for the Hawaiian people at once just and generous, by the orderly operation of which the Hawaiian people, on a full and representative vote, elected Wilcox as their Delegate in Congress, it was natural that a revolution in public sentiment should occur.

A Territorial Delegate has no legislative power; he can in no respect influence the legislation applicable to the States; he has no power to be feared, and is indeed merely the agent and spokesman of his people. Such being the case, in view of the changed—the radically changed—politics relations between the Hawaiian people and the United States, resulting from the act of April, 1900, we do not think that the conduct of a native of the Hawaiian Islands a year or more prior to the adoption of that organic act, however improper it may have been, abstractly viewed, ought to deprive the Hawaiian people of the representative whom they have solemnly sent.

3. The objection that the election was not valid was found by the committee to be technically of some force:

The organic act passed April 13, 1900, has this provision:

"SEC. 85. That a Delegate to the House of Representatives of the United States, to serve during each Congress, shall be elected by the voters qualified to vote for members of the house of representatives of the legislature; such Delegate shall possess the qualifications necessary for membership of the senate of the legislature of Hawaii. The times, places, and manner of holding elections shall be as fixed by law. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debate but not of voting."

It is not clear that the expression "shall be as fixed by law" does not mean as fixed by the law then in force in the Hawaiian Islands. This organic act reenacts all of the election laws of the Republic of Hawaii, in so far as they are applicable to the conditions then existing, or made to exist, by the organic act itself. Under the Hawaiian system of government the only officials elected were the representatives and senators to the legislature of the Republic. For the election of these senators and representatives full and complete machinery was devised and had been in operation up to the time of the joint resolution annexing the islands. Of course they made no provision for the election of a Delegate to Congress, nor was any additional legislation had, except that which is contained in section 85 of the act of Congress above referred to. With no machinery of election except that provided by the laws of the Republic of Hawaii and section 85 above quoted, it is claimed that no valid election could be held. In this view we do not concur.

Previous to the election of November, 1900, the proper officers issued a proclamation calling for the election of a Delegate to the United States Congress, as well as for the election of representatives and senators to the Territorial legislature. Separate ballot boxes were provided, tickets were printed, and the whole machinery set in perfect motion for the election of the Delegate to Congress. The same precautions were observed and the same kind of machinery of election provided for the election of Delegate as for representative and senator in the Territorial legislature. Practically all of the people voted, and quite as many voted for Delegate to Congress as for representatives and senators in the Territorial legislature. There was a full and free expression of the popular will, under the theory that the Territory was entitled to send a Delegate to Congress, and as a result of that full and free popular expression, Wilcox was chosen by a considerable plurality. He comes here, therefore, as the agent of his people, chosen apparently under the forms of and with all the solemnity which surrounds the most carefully conducted election, and we think he ought to be permitted to retain his seat as their representative in the capacity of a Delegate.

We are not uninfluenced, in arriving at this conclusion, by a consideration of the fact that the people who send him here are to a large extent unfamiliar with the methods, the policy, and the inspiration, of a free government.

The report was not acted on by the House, and Mr. Wilcox of course retained his seat.

527. The election case of Iaukea v. Kalanianaole from the Territory of Hawaii in the Fifty-ninth Congress.

Instance in the absence of specific law of an election of a Delegate on rules based on analogy to the law providing for election of other Territorial officers.

Ballots which were by error cast with a numbered stub still attached were deducted from the poll as bearing a distinguishing mark forbidden by law.

An informal removal of a numbered stub by election officers from ballots erroneously cast with such illegal distinguishing mark did not save the ballots from rejection by the House.

On March 26, 1906,[1] Mr. Michael E. Driscoll, of New York, from the Committee on Elections No. 3, submitted the report of the committee in the case of Iaukea *v.* Kalanianaole from the Territory of Hawaii.

The report sets forth at the outset the following conditions:

The Territory of Hawaii is divided into 6 election districts and 69 election or voting precincts. The said election took place on the 8th day of November, 1904. Thereafter the votes cast at said election for the office of Delegate to Congress were counted and canvassed, and as the result of said count and canvass Hon. Jonah K. Kalanianaole, the contestee, was declared to have received 6,833 votes, Hon. Curtis P. Iaukea, the contestant, to have received 2,868 votes, and the Hon. Charles Notley, the candidate of the Home Rule party, to have received 2,289 votes, making a total of 11,990 votes cast for this office, and the governor of the Territory issued to the contestee herein the certificate of election.

The notice of contest was served by the contestant on the contestee within the time specified by law, and sets forth the allegations and charges on which this contest is based, and which, briefly stated, are substantially as follows:

That the official ballots prepared by the secretary of the Territory of Hawaii and furnished to the various inspectors of election throughout the Territory were illegal, in that said ballots had printed thereon numbers whereby they could be identified, contrary to the express provisions of law regulating such election; that said ballots with the numbers on were actually cast or voted in many of the precincts; that the numbers on such ballots corresponded with the numbers entered on the poll book opposite the electors' names, and by that method the secrecy of the ballot was destroyed; that many of the electors in the Territory were, prior to and at the time of said election, in the employ of the Territorial government, whose officers and agents were the party friends and supporters of the contestee, and the fact that the election inspectors could determine how any man voted afforded a means of intimidating and coercing those employees to vote for the contestee even against their convictions; that employees of the Territorial government engaged in the construction of roads and other public works were organized into political clubs by government officials in authority over them and were prevented from attending or participating in meetings held in behalf of contestant, and were threatened with loss of employment if they manifested any favor for his candidacy, and that such employees were marched to the polls and voted in bodies while wearing the uniforms of such clubs, and were threatened with loss of employment if they did not vote for the contestee; that there were several precincts in which ballots were cast with the numbers on, and such numbers were torn off by the election officers before they were counted or before they were opened and credited to the several candidates; that this was a mutilation of the ballots, and that those ballots were void and should have been rejected.

In due time the contestee filed an answer to the notice of contest, which is, in substance, a general denial of the material allegations set forth in the notice of contest.

The contestant, through his counsel, expressly stated that the contestee was not personally responsible, directly or indirectly, for any of the irregularities or violations of law set forth in the notice of contest.

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[1] First session Fifty-ninth Congress, Record, p. 4285; House Report No. 2651.

Section 85 of the organic act for the government of the Territory of Hawaii provides:

"That a Delegate to the House of Representatives of the United States, to serve during each Congress, shall be elected by the voters qualified to vote for members of the house of representatives of the legislature. Such Delegate shall possess the qualifications necessary for membership of the senate of the legislature of Hawaii. The times, places, and manner of holding elections shall be as fixed by law. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives with the right of debate, but not of voting."

Section 6 of that act provides: "That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

Section 64 of said act provides that the rules and regulations for holding elections under the Republic shall continue in force after the annexation, with a few modifications therein set forth, which were made necessary by the change of government from the Republic to its present status as a Territory of the United States, and no provision is there made for the election of a Delegate to the Congress.

Section 65 of said act provides: "That the legislature of the Territory may from time to time establish and alter the boundaries of election districts and voting precincts, and apportion the senators and representatives to be elected from such districts."

Section 55 of said act, which sets forth and enumerates the legislative powers of the Territory, confers no jurisdiction on the Territorial legislature to modify or amend the election law, and makes no reference to it. The election laws of the Republic contained no provision for the election of a Delegate to Congress, for no such office existed, and the organic act has no provision for that purpose except as contained in section 85, and apparently confers no power on the legislature of Hawaii to amend or supplement those laws. But Hawaii is entitled to a Delegate in Congress, and such Delegate must be elected by the voters qualified to vote for members of the house of representatives of its legislature. The time for holding such election is fixed by section 14 of the organic act, but neither in that act nor in the laws of the Territory is there any definite procedure for the conduct of such election. Therefore the secretary of the Territory was obliged to formulate entirely new and independent rules and regulations for the election of a Delegate, or to so adjust and supplement its present election laws and machinery as to accomplish the same purpose. The counsel for both parties to this contest assumed that the Delegate should be elected according to the election laws of the Territory, so far as they applied, and made their briefs and arguments on that assumption. The report in the Wilcox contested-election case (Rowell's Digest of Contested Election Cases, p. 601) is an authority in support of their action.

The committee were unanimous (with the possible exception of one Member) in declaring that they did not find in the record sufficient evidence of intimidation, fraud, corruption, or irregularities of any kind to justify it in unseating the contestee or in setting aside the election.

In conclusion the committee respectfully recommended to the House of Representatives that the election laws of the Territory of Hawaii be so amended and supplemented as to provide definitely for the election of a Delegate to the Congress.

On the remaining question, that of the ballots, five Members concurred in the report, which purged the poll, while three, Messrs. W. E. Humphrey, of Washington, Marshall Van Winkle, of New Jersey, and Frank B. Fulkerson, of Missouri, did not agree that any ballots should be rejected.

The report found as follows in regard to the ballots:

Under the Hawaiian election law it was the duty of the secretary of state to have all the ballots printed and sent to the several voting precincts, to furnish ballot boxes, and generally to provide the ways and means for holding elections. This he undertook to do. The statute requires that two suitable ballot boxes be provided for each election precinct. That one be marked in plain letters, "For senators," and the other "For representatives." That was done, and a third box was provided and marked, "For Delegate." The statute requires that ballots for senators be of blue paper, and the ballots for representatives of white paper, and in the absence of statutory direction the ballots for Delegate were

made of pink paper. Thus far no fault is found with the preparations made or criticism offered on the action of the secretary of state in supplementing the statute by providing for separate balloting for Delegate. Aside from the Delegate to Congress, senators and representatives to the legislature of the Territory of Hawaii are the only officers of that government elected by the people. The secretary of state and election officers of Hawaii, having attempted to follow the election law in the choice of Delegate, with the apparent consent of the several candidates for that office, are bound by that law.

They should not be permitted to invoke it for one purpose and reject it for another. So far as it goes it is definite and clear. It declares that the ballot shall bear no word, motto, device, sign, or symbol other than allowed therein, and shall be so printed that the type shall not show a trace on the back; and if a ballot contains any mark or symbol contrary to the provisions therein set forth it must be rejected, and otherwise carefully guards and protects the secrecy of the ballot. It has no provision for numbering the ballots, or implied authority so far as your committee can discover. However, in the year 1903 the ballots prepared for the county election did contain numbers. Those were on the sides of and separated from the main parts of the ballots by perforated lines. This was done to avoid substitutions and perhaps other possibilities of fraud or irregularity, and according to the evidence they proved satisfactory and tended toward honest elections. In the preparation of the ballots for the general election of 1904 the secretary of state adopted the same plan so far as numbering was concemed. But the numbers were not placed in the same relative positions.

The ballots were printed and put up in pads of 100 each and numbered in sequences from 1 to 100. Clear across the top of each ballot and separating it from its stub was a distinctly perforated line, and a number on such stub corresponded with the number on the upper right-hand corner of the ballot separated from the balance of it by less distinctly perforated lines. It was the intention that the ballot should be torn off from the stub on such large perforated line. But this, by mistake of the election officers, was not done in all instances. The two numbers, one on the stub and one on the upper righthand corner of the ballot proper, were liable to lead to confusion and mistakes on the part of election officers, some of whom naturally had not much experience and were not particularly instructed as to their duty. When an elector was given a ballot his name was put down on the poll list, and his number, which was apt to correspond with the last figures on his ballot number. It is therefore clear that if the number were not removed from the ballot before depositing it in the box the identity of his vote could be determined by the election officers or other persons who afterwards examined the ballots and poll lists, and the secrecy of the ballot was violated. This was admitted by contestee's counsel. It was the intention of the secretary of state that the number in the upper right-hand corner of the ballot should be removed before such ballot was deposited in the box, for the instructions sent out by him to the voters and election officers alike contained this provision:

"Before leaving the compartment the voter is to refold his ballot just as he received it from the chairman, and thus folded deliver it to the inspector of election in charge of the ballot box and announce his name. After his name is checked on the register, the inspector shall remove the perforated slip, so that the ballot shall have no mark of identification, and then deposit it in the ballot box."

The "perforated slip" here referred to is clearly intended to be the perforated slip in the upper right-hand corner. This perforation is not so distinct as the one across the top of the ballot dividing it from the stub, and it was claimed by contestant's counsel that it was not in fact a perforation, but an indentation. However, it is very frequently spoken of by witnesses for both parties as a "perforation" and a "perforated line." Besides, if the number were left on the ballot it would contain a mark of identification, which the instruction sought to guard against.

In many of the precincts the election officers, by a misconception of the law and directions, did not detach the numbers in the upper right-hand corners of the ballots before depositing them in the boxes. Of those ballots 5,127 were cast. In the afternoon of election day the secretary of state learned that at some of the precincts ballots were being deposited with the numbers on, and he immediately notified the election officers as far as possible, by the use of the telephone and special messengers, that they were making mistakes. After the polls were closed some of them undertook to correct those mistakes by removing the numbers from such ballots before they were counted, or, at all events, before they were opened and credited to the several candidates. Of those ballots from which the numbers were removed there were 2,200, leaving 2,927 on which the numbers were allowed to remain. The counsel for the contestee in their briefs and arguments admitted that these 2,927 ballots were void and should be rejected from the count. But they insisted that the 2,200 ballots from which the numbers had been removed were valid and should be counted. With this conclusion your committee can not agree. If the 2,927 ballots from which the numbers were not removed were void, we are of the opinion that the 2,200 from which the numbers

had been removed were valid and should be counted. With this conclusion your committee can not agree. If the 2,927 ballots from which the numbers were not removed were void, we are of the opinion that the 2,200 from which the numbers were removed were void also. Those ballots were cast when they were deposited in the boxes, and if void then nothing which the election officers did afterwards could make them valid.

Section 95 of the Hawaiian election law provides that "all questions as to the validity of any ballot shall be decided immediately, and the opinion of a majority of the inspectors shall be final and binding, subject to revision by the supreme court as herein provided."

But this does not permit the inspectors to add to, take from, or change any ballot, nor is any power or discretion to do that given them anywhere in the law. They must pass on the validity of a ballot and return it just as it is, with their decision thereon, subject to revision by the supreme court. Open the door and permit election inspectors, after the polls are closed, to meddle with the ballots, even to correct their own mistakes, and no one can tell what the abuse of that discretion may lead to. The duties of such inspectors are and should be strictly ministerial. There should be no relaxation of the law in this regard. They should be required to carefully follow the statute, leaving discretionary power, if at all, to the court or reviewing boards. This procedure is apt to secure more uniformity and safer results. If the election inspectors had the right to remove the numbers from the 2,200 ballots and count them, it may be argued with considerable force that the canvassing board had a right to remove the numbers from the 2,927 ballots and count them.

We therefore reject 5,127 ballots as void. Deducting these from the total of 11,990 it leaves 6,863 valid ballots. Of these, contestee received 4,097; contestant, 1,578; Mr. Notley, 1,188.

The contestee received a plurality over contestant of 2,519, and a majority over all of 1,331. We are of the opinion, after a careful examination of the record, that the secretary of state intended no wrong in preparing the ballots in the manner described, nor do we find that a conspiracy was entered into for party success by means of fraud or intimidation. We believe that the depositing of the ballots without detaching the numbers was done by mistake and misapprehension on the part of the election inspectors, and not through any design or concerted plan to commit any wrong against the contestant or any other candidate. An examination of the returns confirms this view. One would naturally expect, if there was a scheme devised for the purpose of intimidating voters to support contestee, that he would have received an unduly large proportion of the votes where such scheme was carried out, whereas the contrary appears to be the fact, for his percentage of the void and rejected ballots was not as large as of all the ballots cast nor was it as large as his percentage of the valid ballots.

The following resolutions, in which all the committee concurred, were agreed to without division by the House:

Resolved, That Curtis P. Iaukea, the contestant, was not elected a Delegate to the Fifty-ninth Congress from the Territory of Hawaii.

Resolved, That Jonah K. Kalanianaole, the contestee, was duly elected a Delegate to the Fifty-ninth Congress from the Territory of Hawaii, and is entitled to a seat therein.

Chapter XVIII.

CREDENTIALS AND PRIMA FACIE TITLE.[1]

1. **In due form from Recognized Constituency, sections 52–37.[2]**
2. **Questions as to Validity of, sections 538–543.[3]**
3. **In Relation to Questions as to the Fact of Election, sections 544–552.[4]**
4. **Refusal of State Executives to Issue, sections 553–564.[5]**
5. **In relation to Questions as to Vacancy, sections 565–570.[6]**
6. **As related to Contested Elections, sections 571–588.[7]**

528. The House admits on his prima facie showing and without regard to final right a Member-elect. from a recognized constituency whose

[1] Question of prima facie title not to be reopened when once decided. Section 847 of Volume II

As related to enrollment by the Clerk. Chapter II, sections 30–60 of this volume.

As related to qualifications. Cases of Connor (sec. 469 of this volume). Roberts (sec. 474). Smoot (sec. 481), and others (secs. 415, 416, 420, 429, 432, 443, 468); also cases involving question of loyalty (secs. 443, 448, 453, 457, 460, 461, 462).

[2] In relation to districts distracted by war. Cases of Foster (sec. 362); Segar (sec. 363); Clements (sec. 365); Wing *v.* McCloud (sec. 368); Pigott (sec. 369); Grafflin (sec. 371); McKenzie *v.* Kitchen (sec. 374); Chandler and Segar (sec. 375); Fields (sec. 376); Flanders and Hahn (sec. 379); Johnson, Jacks, and Rogers (sec. 380); Louisiana Members (sec. 381); also Senate cases, sections 382–384.

Members-elect from States lately in secession not admitted on prima facie title. Chapter XI, sections 387–388 of this volume. Senate decisions, sections 389–395.

Delegates elected in unorganized Territories not admitted on prima facie title. Sections 405, 410 of this volume.

[3] See cases of Brockenbrough *v.* Cabell (sec. 812 of this volume), and Wiggington *v.* Pacheco (sec. 927 of Vol. II).

[4] Case of the New Jersey Members (secs. 791–794 of this volume); of Tennessee Members (sec. 521); Gilbert and Wright (sec. 520); Minnesota members (sec. 519), and a case involving apportionment (sec. 309).

[5] Refusal of State executive to sign. Sections 353, 415 of this volume.

[6] Cases of Mississippi Members (sec. 518 of this volume); Newton (sec. 489); Blakely *v.* Golladay (sec. 322), and cases wherein States have sent Members in excess of the apportionment (secs. 314–318 of this volume); also the Senate case of Stanton *v.* Lane (sec. 491).

[7] See also House cases as follows: Letcher *v.* Moore (sec. 53); "Broad Seal" case (sec. 103); Smith *v.* Brown (sec. 459); Symes *v.* Trimble (sec. 452); Louisiana cases (secs. 328, 332); Chalmers *v.* Manning (secs. 44, 45); Gunter *v.* Wilshire (sec. 37); Wallace *v.* McKinley (sec. 986 of Vol. II); Atkinson *v.* Pendleton (sec. 1020 of Vol. II); McGinnis *v.* Alderson (sec. 1036 of Vol. II).

As to prima facie right when returned Member dies pending a contest. Section 735 of this volume.

Contestant not to be seated because a partial investigation reveals for him a prima facie title. Section 772 of this volume.

The certificate of the State executive is prima facie evidence only. Section 637 of this volume.

Also see Senate cases as follows: Kellogg, Spofford, and Manning (secs. 354–357); Ray *v.* McMillen (sec. 345); Finchback, McMillen, Marr, and Eustis (secs. 347–353); Sykes *v.* Spencer (sec. 342); Morgan and Lamar (sec. 359); Sanders, Power, Clark, and Maginnis (sec. 358).

credentials are in due form and whose qualifications are unquestioned.—

On September 4, 1837,[1] at the organization of the House, the Clerk was calling the roll of Members-elect by States, and had reached Mississippi when Mr. Charles F. Mercer, of Virginia, arose and having questioned the right of the two gentlemen from Mississippi present to seats, offered this resolution:

Resolved, That sufficient evidence has not been afforded to this House that John F. H. Claiborne and Samuel J. Gholson are lawfully entitled to seats therein.

It appeared in the course of the debate that the Members from Mississippi had regular credentials from the governor of the State, and one of them announced his purpose, in case he was challenged, to challenge every Member present to produce his credentials.

Mr. Mercer's resolution was laid on the table—ayes 131, noes 5—and the names of the Members from Mississippi were called.[2]

529. On December 1, 1856,[3] Mr. John S. Phelps, of Missouri, presented the credentials of John W. Whitfield as a Delegate from the Territory of Kansas, to fill the vancancy existing by the decision of the House unseating Mr. Whitfield at the first session of the present Congress.

The credentials having been read, Mr. Phelps stated that the Delegate-elect was now present and was ready to take the usual oath.

Mr. Galusha A. Grow, of Pennsylvania, objected to the administration of the oath to the said Delegate-elect, when the Speaker[4] said that the question was for the determination of the House, viz, Shall the oath to support the Constitution of the United States be administered to John W. Whitfield as the Delegate-elect from the Territory of Kansas?

It was urged by Mr. Phelps that, the credentials being in due form, the Delegate-elect was entitled, by prima facie right, to be sworn in. Such had been the practice of the House.

On the other hand, Mr. Grow cited the New Jersey cases, and that of Moore and Letcher, in former Congresses, as precedents to justify the objection in the present case.

The question being taken, the House, by a vote of yeas 97, nays 104, decided that the oath should not be administered to Mr. Whitfield.

Thereupon a motion was made to reconsider, and after a parliamentary struggle of long duration, the vote was reconsidered, and on December 9, the question being again taken, the House voted, by ill yeas to 108 nays, that the oath should be administered to Mr. Whitfield, and he was accordingly qualified.

530. On March 4, 1869,[5] Mr. William Lawrence, of Ohio, submitted the following resolution during the administration of the oath to Members at the organization of the House:

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[1] First session Twenty-fifth Congress, Journal, p. 4; Globe, pp. 2, 3.

[2] See section 518 of this volume for fall explanation of the conditions under which these credentials were given.

[3] Third session Thirty-fourth Congress, Journal, pp. 7, 8, 84, 85; Globe, pp. 2, 68, 69.

[4] Nathaniel P. Banks, jr., of Massachusetts, Speaker.

[5] First session Forty-first Congress, Journal, p. 9; Globe, p. 7.

Resolved, That A. A. C. Rogers, claiming to be the Representative in the Forty-first Congress from the Second district of Arkansas, shall not now be permitted to take the oath of office or a seat as such Representative, but his credentials shall be and are referred to the Committee of Elections when appointed.

Mr. Lawrence stated that he held a certificate from the governor of Arkansas stating that in a portion of the district which Mr. Rogers represented there had been great disorder and no fair election.

It was urged in opposition that Mr. Rogers held a certificate regular in form and that he should be sworn in, leaving his final right to the seat to be determined later.

A motion to lay the resolution on the table was agreed to, and the oath was administered to Mr. Rogers.

531. On March 4, 1869,[1] after the election of the Speaker, and while the oath of office was being administered to the Members-elect, Mr. James Brooks, of New York, proposed, when the Members from Missouri presented themselves to be sworn, the following:

Resolved, That the right of Robert T. Van Horn and David P. Dyer to seats upon this floor be inquired into by the Committee of Elections before they are permitted to be sworn in as Members of the Forty-first Congress.

The reason given for the presentation of this resolution was that the two gentlemen had not been elected, although it appeared that their credentials were regular in form. It was urged against the adoption of the resolution that, while there might be a question as to the final right of the two gentlemen to their seats, there could be no question as to their prima facie right. Mr. John F. Benjamin of Missouri submitted a motion that the oath be administered.

After further debate, Messrs. Van Horn and Dyer stood aside, and on the succeeding day the motion was put that the oath be administered to them. On a motion to lay that motion on the table, there appeared, yeas 4, nays 163. The motion that the oath be administered was then agreed to. Messrs. Van Horn and Dyer then appeared and took the oath.

532. On December 5, 1870,[2] at the opening of the session, the credentials of R. W. T. Duke, Member-elect from the Fifth Congressional district of Virginia, were presented to the House.

Mr. James H. Platt, jr., of Virginia, presented a resolution referring the papers in a contest against the right of Mr. Duke to a seat, as well as the credentials, to the Committee on Elections, with instructions to report at an early date on his prima facie right to a seat.

Mr. Samuel J. Randall, of Pennsylvania, urged that it was in accordance with the practice of the House to allow the Member-elect to be seated when his credentials were in due form, leaving the question of final right to the seat to be determined later. In this case Mr. Randall showed the credentials were in proper form according to the provisions of the law of Virginia.

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[1] First session Forty-first Congress, Journal, pp. 9, 10; Globe, pp. 7, 10.

[2] Third session Forty-first Congress, Journal, pp. 7, 8; Globe, pp. 11, 12.

The House having declined by a vote by tellers of ayes 57, noes 60, to second the previous question on the motion of Mr. Platt, it was then, on motion of Mr. Randall,

Ordered, That the oath of office be administered to the said R. W. T. Duke.

533. On January 24, 1871,[1] Mr. P. M. B. Young, of Georgia, presented the credentials of Mr. Stephen A. Corker, of the Fifth Congressional district of Georgia, and asked that he be sworn in.

Mr. Benjamin F. Butler, of Massachusetts, objected, and after presenting the memorial of Thomas P. Beard, claiming the seat, moved that the petition and the credentials of Mr. Corker be referred to the Committee on Elections. The objection urged in behalf of Mr. Beard was that there had been outrage and intimidation in the district which had rendered illegal the election of Mr. Corker. It was not denied that Mr. Corker's credentials were in regular form, properly signed and sealed.

In the course of the debate on Mr. Butler's motion, Mr. Henry L. Dawes, of Massachusetts, said:

Sir, I, as the organ of the Committee on Elections for twelve years, have time and again so stated. It has been stated on behalf of that committee on the floor of this House, and it stands in the Globe, as well on the part of one side of the House as on the other, that the certificate of a Member, where there was no allegation against his eligibility, of his lack of loyalty, or other ineligibility, entitled him to be sworn in. It has been the struggle during all these disturbed times of that Committee on Elections to hold to the precedents and to the law against passion and against prejudice, so that if the party should ever fall into a minority they should have no precedent of their own making to be brought up against them to their own great injury. Now, with nothing to be gained, but with everything to be lost, by the precedent now sought to be established, I entreat the House to adhere to the ancient rule.

The question being taken, the motion of Mr. Butler was disagreed to—yeas 42, nays 147.

The question then recurred on the motion of Mr. Young that the oath be administered to Mr. Corker, and it was agreed to. Thereupon Mr. Corker appeared and took the oath.

534. On December 5, 1881[2] at the time of the organization of the House, and while the Speaker was administering the oath to the Members-elect, Mr. George W. Jones, of Texas, challenged Mr. Joseph Wheeler, of Alabama, and later offered the following resolution:

Resolved, That the question of the prima facie as well as the final right of Joseph Wheeler and William M. Lowe, contestants, respectively claiming a seat in this House from the Eighth district of Alabama, be referred to the Committee on Elections hereafter appointed, and until such committee shall report and the House decide such question neither of said contestants shall be seated.

The credentials of Mr. Wheeler were read, and proved to be regular in form and in accordance with the law and the Constitution.

The House, after debate, and without division, voted that Mr. Wheeler be permitted to take the oath in accordance with his prima facie right.

On the same day Mr. James R. Chalmers, of Mississippi, was challenged, and under similar circumstances, the House without division voted that he be allowed to take the oath.

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[1] Third session Forty-first Congress, Journal, p. 209; Globe, pp. 703–707.

[2] First session Forty-seventh Congress, Journal, pp. 11, 12; Record, pp. 9–14.

535. Credentials being in regular form, and unimpeached, the House honors them, although there may be a question as to the proper limits of the constituency.

Credentials being unimpeached, the status of the district under an apportionment law is a question of final rather than prima facie right.

Forms of credentials borne by persons elected to fill vacancies.

On December 13, 1880,[1] Mr. Amos Townshend, of Ohio, presented the following credentials:

In the name and by the authority of the State of Ohio, Charles Foster, governor of said State,

to all whom these presents shall come, greeting:

By virtue of the powers conferred on me by law, I do hereby certify that at the special election held on the fifth Tuesday, being the 30th day of November, A. D. 1880, Ezra B. Taylor was duly elected Representative in the Forty-sixth Congress of the United States for the Nineteenth district of Ohio, to fill the vacancy caused by the resignation of James A. Garfield.

In testimony whereof I have hereunto subscribed my name and fixed the great seal of the State of Ohio, at Columbus, this 8th day of November, 1880.

[SEAL.]

CHARLES FOSTER, *Governor.*

MILTON BARNES,
Secretary of State.

Mr. Frank Hurd, of Ohio, objected to the immediate swearing in of Mr. Taylor, on the ground that after the election of Mr. Garfield and prior to the election of Mr. Taylor, the legislature of Ohio, had by law changed the limits of the Congressional districts of that State, and that the Nineteenth district resulting from that change of law contained one county not in the district before the change, and had lost one county that it contained before the change. After the resignation of Mr. Garfield the governor had issued the writ of election, not to the new Nineteenth district, but to the counties composing the old Nineteenth, although that district had ceased to exist. Therefore Mr. Taylor had been elected from a district that had no existence at all.

On the other hand it was argued by Mr. William McKinley, of Ohio, and by others that Mr. Taylor's prima facie right to be sworn in was perfect, the certificate raising no doubt as to its completeness and legality.

The House, after Mr. Hurd had withdrawn his objection, voted that Mr. Taylor should be sworn in, and referred the credentials to the Committee on Elections.

536. On December 19, 1883,[2] the credentials of Thomas G. Skinner, of the First Congressional district of North Carolina, were presented to the House. Mr. J. Warren Keifer, of Ohio, objected to the administration of the oath to him, and offered a resolution, with a preamble. This preamble recited that Walter R. Pool was at the November election, in 1882, elected to Congress from the First Congressional district of North Carolina, composed of certain counties, including the county of Bertie, but not including the county of Carteret. By Mr. Pool's death, on August 25, 1883, a vacancy occurred in the district. Since the election of said Pool the legislature of the State had redistricted the State, constituting a new First district,

[1] Third session Forty-sixth Congress, Journal, p. 58; Record, pp. 102–106.

[2] First session Forty-eighth Congress, Journal, pp. 149, 150; Record, pp. 179–189.

which did not include the county of Bertie but did include the county of Carteret. The preamble then proceeds:

Whereas to fill the vacancy occurring as aforesaid, the governor of North Carolina ordered an election in the said new First district, by virtue of which election Hon. Thomas G. Skinner now claims a seat in this House; and

Whereas to admit him to the seat would leave the said county of Bertie without any district representation in this Congress, and the said county of Carteret would be doubly represented; therefore,

Be it resolved, That the credentials of Mr. Skinner be referred to the Committee on Elections of this House, when appointed, with power to ascertain and report all the facts pertaining to this vacancy and the said election to fill the same, at as early a day as practicable, together with the law governing the case.

Mr. Keifer cited precedents applying to the case, but after debate the House, by a vote of 117 yeas to 108 nays, preferred the following substitute:

Resolved, That Thomas G. Skinner be sworn in, and that it be referred to the Committee on Elections, when appointed, to report at the earliest practicable moment whether the said Thomas G. Skinner was elected from the First Congressional district of North Carolina as created before the last Congressional apportionment of Representatives in Congress or from a district in North Carolina created in that State since the election of Walter R. Pool, deceased, and to further report whether in the judgment of said committee said Skinner was elected from the proper district.

537. The Virginia election case of Garrison v. Mayo, in the Forty-eighth Congress.

The House should not disturb the prima facie title of a Member already seated on credentials in due form and unimpeached by anything properly presented to the House.

The House overruled the action of State officers who had rejected a county return because of a writing on the seal of the clerk's certificate.

Votes found in the wrong ballot box have been counted without proof of mistake, although there was dissent in the committee.

A question as to the best rule for elimination of an excess of ballots in the box.

Testimony as to what a voter said after election as to his vote is not admissible to prove for whom the vote was cast.

Where voters are disqualified for crime, a vote should not be rejected unless there is proper evidence of the conviction of the person offering it.

On December 3, 1883,[1] at the organization of the House, the name of Robert M. Mayo, of the First district of Virginia, appeared on the clerk's roll of members-elect, and the oath was administered to him without objection.

On December 4, Mr. J. Randolph Tucker, of Virginia, offered this resolution:

Resolved, That the certificates and all other papers relating to the election of a Representative of the First Congressional district of Virginia in the Forty-eighth Congress be referred to the Committee on Elections, when appointed, with instructions to report at as early a day as practicable which of the rival claimants to the seat from that district has the prima facie right thereto, reserving to the other party the privilege of contesting the case upon the merits.

It was at once objected, especially by Mr. William H. Calkins, of Indiana, who had been chairman of the Committee of Elections in the preceding Congress, that it was unusual, if not unprecedented, for the House to inquire into the prima

[1] First session Forty-eighth Congress, Journal, pp. 21, 31; Record, pp. 3, 28, 43, 44.

facie right of a Member after he had been sworn in. The swearing in was the decision on the prima facie right.

The debate on the resolution was resumed December 5, and Mr. Tucker maintained that the House being judge of the election, returns, and qualifications of its own Members, it certainly might inquire as to the right of the Member to hold the seat during the intermediate time between the swearing in and the decision as to the final right.

Mr. Aylett H. Buckner, of Missouri, offered this resolution, which was agreed to:

Resolved, That the resolution be committed to the Committee on Elections, when formed, with instructions to report on the legal question involved therein.

On February 8, 1884,[1] Mr. Robert Lowry, of Indiana, submitted the report of a majority of the committee. The report held—

It will be observed that by the resolution adopted the former resolution was simply referred to this committee to report upon the legal question involved, without any instructions to determine whether, upon the face of the papers filed in the contested election case, and as appears by them, the contestor or contestee is prima facie entitled to the seat. This being so, especially as the contestee has been sworn in, unless the House itself shall determine to go behind the certificate of the governor (which, under some circumstances, and keeping within the rules of parliamentary law, the House, in the opinion of this committee, is empowered to do), the committee is further of the opinion, upon the legal question involved, that the certificate of the governor of the State of Virginia, showing that Robert M. Mayo was regularly elected as such Representative, being in due form, in the absence of anything properly presented to us to impeach it, is conclusive.

This conclusion is based upon the premise that the House has not instructed the committee to consider the evidence outside of the certificate referred to in the original resolution proposed by Mr. Tucker, tending to impeach the certificate of the governor of Virginia, but merely referred that resolution to the committee with instructions to report upon the legal question involved; and the certificate being regular upon its face, and the House not having authorized or directed the consideration of extrinsic evidence to impeach the commission of the sitting Member, the conclusion reached is based upon the principle that the integrity of the certificate is not duly challenged.

In order to dispose of the question submitted, the committee therefore recommends the adoption of the following resolution, and that the committee be discharged from the further consideration of this part of the case:

"Resolved, That upon the legal question involved in the case of Garrison *v.* Mayo, the return of the governor, in the absence of anything appearing thereon or properly presented in connection therewith tending to impeach it, is conclusive as to the prima facie right, and that, pending the contest on the merits, the sitting Member is therefore in this case entitled to retain the seat."

It does not appear that this proposition was acted on.[2]

On March 20[3] Mr. Henry G. Turner, of Georgia, submitted the report on the question of final right in the contest of Garrison *v.* Mayo.

As to what may be termed the actual result shown by the returns that came to the State canvassing board the report says:

Upon the basis of this statement giving Mr. Mayo a plurality of 1 vote, the board further certified that Mr. Mayo was duly elected. It is due to the governor to say that he did not sign this latter certificate.

This plurality of 1 vote, upon which Mr. Mayo was accredited as a Representative of Virginia, was obtained by the rejection of the return of the election in Gloucester County. That return was in the

[1] House Report, No. 286; Mobly, p. 53; Journal, p. 532; Record, p. 995.

[2] It was stated in the debate that the report was not acted on. Record, p. 2114.

[3] House Report No. 954; Mobly, p. 55.

usual form, and was excluded by the board from the canvass upon the ground that the certificate of the clerk of the county court of that county was authenticated by a seal impressed upon the paper from which it appeared that the word "circuit" in the seal had the word "county" written over it. That county gave the contestant a majority over Mr. Mayo of 57 votes.

It also appears that the return from Hog Island, in Northampton County, an island situate in the bay, many miles from the mainland, was delayed for a day or two, and was therefore excluded from the count.

That precinct gave the contestant a majority of 14.

Mr. Mayo, during the argument before the committee having conceded that the majorities for contestant cast in Gloucester County and Hog Island precinct of Northampton County should be counted for contestant, no argument is necessary to justify their addition to the votes allowed to him by the State board of canvassers. Indeed, no reason can be given for their exclusion, and none was attempted.

This statement demonstrates for contestant a majority of 72 votes. It being thus made to appear that the contestant was elected, the burden is devolved upon the sitting Member to show by other evidence that he was himself elected. This he undertook to accomplish by the various methods which will now be stated.

Passing to the objections made by sitting Member, the committee considered the following questions of law:

(1) The report says:

It appears that on the day of the election in question there was a separate box for votes on constitutional amendments then submitted to the people for ratification. At Saluda precinct, in Middlesex County, 6 ballots for Congressional candidates were found in the box set apart for the constitutional amendments. The judges of election burnt these ballots. There were also found in the box provided for the reception of ballots for Members of Congress 6 ballots or tickets on the constitutional amendment. The judges of election, who are charged by law with the duty of holding the election and certifying the result, did not regard this coincidence as sufficient evidence of mistake to justify counting these votes, and no other evidence of mistake has been presented. Mr. Mayo insists that these 6 votes should be counted for him. But only 2 of the 6 are shown by any satisfactory evidence to have contained his name. The witness had the impression that one of them was a ticket for contestant, and thought, from the appearance of the paper, that the other 3 were tickets for Mr. Mayo. It is obvious, therefore, that in no view of this evidence can all of these ballots be counted for the sitting Member.

4. At Wicomico Church precinct, Northumberland, 2 ballots for Mr. Mayo were found in the box for constitutional amendments, and 2 ballots for constitutional amendments were found in the box provided for candidates for Congress. At Jamaica precinct, Middlesex, 25 ballots for Mr. Mayo were found in the constitutional amendment box, and a number (not known by the witness) of ballots for constitutional amendments were found in the box provided for the Congressional election. Waiving the question as to whether this state of facts sufficiently shows that these 27 votes for Mr. Mayo should have been counted for him under the precedents, we can not add them to the vote certified for him, because it nowhere appears in the evidence that the commissioners of election who canvassed the votes of these two counties (Middlesex and Northumberland) in fact excluded the votes in question. The testimony shows that the precinct judges at Jamaica counted and returned separately the 25 votes found for Mr. Mayo in the wrong box, and that the same was done by the judges at Wicomico precinct as to the 2 votes in like situation at that place, "so that the commissioners [at the county site] might count them or not, as they thought proper" (Record, pp. 321, 365, 369, 370). The sitting Member claims these 27 votes in addition to the votes certified for him from these two counties and allowed by the board of State canvassers. We can not accede to his demand, because he has not shown that they were rejected by the county commissioners.

While the report of the committee was unanimous as to the conclusion that sitting Member was elected, and while no minority views were presented, Mr. Ambrose A. Ranney, of Massachusetts, one of the members of the committee, said in debate[1] that he believed that votes in a wrong box should not be counted unless

[1] Record, p. 2115.

a satisfactory explanation was made to show that they were put into the box by the mistake of the voter or by the error or fraud of the election officer. If it were to be held otherwise, a dishonest voter might put a vote for Congressman in each box, and so have two votes. It was true that the House had adjudicated otherwise in the case of Cook *v.* Cutts, but he dissented then and should dissent now.

(2) The report rules in another case:

Mr. Mayo claims that 7 votes cast for him at The Hague, in Westmoreland County, were illegally rejected by the precinct judges. At this precinct there were found in the ballot-box for candidates for Congress 7 more tickets than names on the poll-books. In such a case the law of Virginia requires the excessive ballots to be taken from the box by one of the judges, who shall be blindfolded, etc. In this case one of the judges (who is the witness for the sitting Member) swears that "without seeing any difference in the tickets he turned his back on the box and drew out 7 tickets." He adds that they were Mayo tickets. If the witness is to be believed, he did not see the tickets until alter they were taken from the box. There seems to have been a substantial compliance with the law. But if these ballots were unfairly and illegally taken from the box and rejected from the count, it does not follow that 7 votes should be added to the votes returned for Mr. Mayo. The question remains, By what process shall we eliminate the excess of votes? 'We can not count more votes than were cast by the voters. Shall we count them all, and then deduct the excess from the two candidates, as suggested by one of the text writers, in proportion to the relative vote of each at the precinct where the excess occurs? We can not comply with this rule, because there is no evidence in the record showing the relative vote of each candidate at this precinct. The return of the aggregate vote cast in the entire county of Westmoreland shows that Mr. Mayo received 868 and Mr. Garrison 383. Upon the ratio of these numbers, Mr. Mayo would lose, on account of the excessive votes, more than twice as many as Mr. Garrison would lose under the rule suggested. We think the clearer course is to acquiesce in the action of the precinct judges.

(3) A question as to the evidence of how a voter voted is thus discussed:

At Wicomico precinct, Northumberland County, the name of Charles Yeatman appeared twice on the poll book. This name, where it first appeared on the poll book, was changed by the judges of election to Charles Hartman; but why this change was made is not explained. If any such person as Charles Hartman voted it was illegal, because no such name appeared on the registration book; but it is not shown how he voted. It is insisted by the sitting member that the best theory is that Charles Yeatman voted twice, and perhaps this view is correct. But there is no evidence to show how Yeatman voted, except that a witness swears that Yeatman said, on the Sunday following the election, that he voted for contestant.

Mr. Ranney also dissented from this, holding that the evidence was competent to show how Yeatman voted.[1]

(4) The report rules as to evidence to justify the rejection of a vote:

We think that the vote of Henry Bromly, offered for Mr. Mayo at Wicomico Church precinct, was illegally rejected, and ought to be counted for him. We also think that three other persons whose votes would have been for Mr. Mayo, but whose votes were rejected because of alleged disqualifications on account of crime, should be counted for the sitting Member, there being no proper evidence of their conviction and punishment to be found in the record.

The decision of these questions, and the settlement of certain questions of fact, made it clear to the committee that sitting Member had not overcome the real majority of the contestant, so the committee recommended these resolutions:

Resolved, That Robert M. Mayo was not elected as a Representative to the Forty-eighth Congress from the First Congressional district of Virginia, and is not entitled to the seat.

Resolved, That George T. Garrison was duly elected from the First Congressional district of Virginia, and is entitled to his seat.

[1] Record, p. 2115.

After debate,[1] the resolutions were agreed to without division, and Mr. Garrison appeared and took the oath.

538. The Kentucky election case of Chrisman v. Anderson, in the Thirty-sixth Congress.

An instance wherein the Elections Committee reported on both prima facie and final right after one of the parties to the contest had taken the oath.

A county board, charged by law with the immediate canvassing and transmittal of precinct returns, may not change a prima facie result by correcting alleged errors in precinct returns.

Returns of State officers are not binding on the House, which may go behind all returns in determining final right.

A return not certified by any of the officers of election was rejected, although on report of a divided committee.

On June 14, 1860,[2] the Committee on Elections reported in the Kentucky election case of Chrisman *v.* Anderson.[3]

This case involved two questions:

(1) The first as to the prima facie right to the seat.

(2) The second as to the final right, involving a question of the rejection of the vote of a precinct for informality in the return.

As to the first point, the report of the committee makes the following statement of facts:

The Fourth Congressional district of Kentucky comprises eleven counties and sixty-four voting precincts. By the laws of that State the election board at each precinct consists of two judges, a clerk (who are appointed by the county court), and the sheriff or his deputy. It is the duty of this board to count the votes cast at each precinct and certify the result, under their signatures, to the board of county canvassers. The latter board consists of the presiding judge of the county court, the clerk thereof, and the sheriff or other officer acting for him at an election.

The poll books from the different precincts are required by law to be deposited with the county clerk within two days after an election. On the next day the board (that is, the county board) shall meet in the clerk's office, between 10 and 12 o'clock in the morning, compare the polls, ascertain the correctness of the summing up of the votes, and in case of an election for a Representative in Congress, it is made the duty of the board of examiners of each county, immediately after the examination of the poll books, to make out three or more certificates in writing, over their signatures, of the number of votes given in the county for each candidate for said office; one of the certificates to be retained in the clerk's office, another the clerk shall send by the next mail, under cover, to the secretary of state, at Frankfort, and the other to be transmitted to the secretary by any private conveyance the clerk may select.

The governor, attorney-general, and secretary of state, and, in the absence of either, the auditor, or any two of them, are a board for examining the returns of elections for Representatives in Congress and certain State officers.

The State board is required when the returns are all in, or on the fourth Monday after an election, whether they are in or out, to make out, in the secretary's office, from the returns made, duplicate certificates in writing, over their signatures, of the election of those having the highest number of votes.

These are the main features of the law prescribing the mode of canvassing the votes and ascertaining the result of an election in Kentucky; and your committee believe, from an examination of the

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[1] Record, pp. 2112–2117; Journal, pp. 885, 886.

[2] First session Thirty-sixth Congress, House Report No. 627; Bartlett, p. 328; Rowell's Digest, p. 167.

[3] Mr. Anderson had received the certificate, been enrolled by the Clerk, and had taken the oath with the other Members after the election of the Speaker. Journal, p. 166.

evidence and exhibits in the case, with the exception of a single precinct (which we shall hereafter refer to), these requirements were substantially complied with.

The voting is viva voice, the name of each voter and of the candidate for whom he votes being publicly cried by the sheriff or his deputy and recorded by the clerk.

According to the summing up and certificate of the board of State canvassers, of the whole number of votes cast Mr. Anderson received 7,204 and Mr. Chrisman 7,201.

The returns were made in accordance with the above provisions of law, but after they were made certificates were received by the State canvassers from the board of three counties amendatory of the original returns. In Boyle County after the county canvassers had adjourned they reassembled to correct an alleged error, made a recount, and transmitted an amended certificate to the State canvassers. It seems that in this county the mistakes were discovered in the poll book by gentlemen to whom the county clerk had loaned them. The corrections made in the return of Boyle County and two other counties were sufficient to show a majority for the contestant.

The State board of canvassers declined to admit these corrections. The law provided that the judges should sum up the votes, certify the poll books, and "deliver them in a sealed envelope to the sheriff." The State canvassers thought that this provision for sealing the poll books negatived the idea of a correction after the books had been opened and in the hands of other persons. Furthermore, the State canvassers concluded that after the county board acted on the poll book of the whole county and their certificate had been transmitted to the secretary of state they had no power to recall or change those certificates. Their functions, which were confined to the summing up of votes and could not be construed to justify inquiry as to corrections, ceased when the return was made.

The majority of the committee approved this decision of the State canvassers. The minority disapproved it, holding that the sealing of the poll books for delivery to the county board was not the imposition of a seal of authority, but the mere act of sealing the envelope to perfect the security of returns in passing from the judges of election to the county canvassers, and also contending that it was a perversion of right that a county board should be precluded from correcting an error. The period of twenty-five days allowed by law between the meetings of the county and State canvassers suggested that such corrections were expected. The minority also urged that a precedent of the State board in 1857 justified this view. The majority denied the force of this precedent.

But while the majority of the committee found that the prima face title could not be changed, they say:

Your committee, however, do not suppose that the action of the State board is final and conclusive upon this House. In every case of a contested election we believe it to be the duty of the House, by its constituted agents, to go behind all certificates for the purpose of inquiring into and correcting all mistakes which may be brought to its notice.

The committee then proceeded, in the light of the testimony, to make corrections in the poll, showing enough errors, besides those which the county boards had sought to correct, to give a majority of 7 votes for the sitting Member.

Besides these, the majority of the committee made a change still further in favor of the sitting Member by throwing out the entire vote of Casey precinct,

because it was "not certified to by any of the officers of the election, neither judges nor clerk. Its correctness is vouched for by no one." It appears from the debate[1] that the return came in as a mere loose piece if paper, with certain figures on it and the words "George W. Eagles, clerk." There was nothing about it to show that it was a copy of a poll book required to be made by law and certified by the proper and legal officers.

The minority of the committee did not approve this disposal of the Casey precinct return, and say:

> The answer to the objection is very simple, that the provision of the statute is directory merely, and the omission of the judges to do their duty was not intended by the legislature to disfranchise the voters. That would be punishing the innocent voters for the sin of the judges. (See The People *v.* Cook, 14 Barbour, 259; S. C., 4 Selden, 67; Truehart *v.* Addicts, 2 Texas, 217; Ex parte Heath et al., 3 Hill, 43; Batman *v.* Meguvan, 1 Metcalf's Ky. Rep., 535.)
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> It might as well be contended that if an envelope was not used for inclosing the poll book, before delivering it to the sheriff, that circumstance would vitiate the election, though the poll book was more surely protected than it could be in an envelope. The construction of the sitting Member would invalidate almost every election.

There were also certain questions as to illegal votes, easily disposed of because of the viva voice method of election.

On the whole the majority found a majority of 109 for the sitting Member, and reported a resolution declaring him entitled to the seat.

The minority found contestant entitled to a majority of at least 8 votes.

On June 16 and 18[2] the report was debated at length in the House, and the recommendation of the majority was agreed to—yeas 112, nays 61.

539. Although a member stated that credentials were based on forged returns, the House seated the bearer, there being no conflicting credentials.—On October 17, 1877,[3] the House considered the case of Mr. Romualdo Pacheco, of California, who was challenged at the organization of the House and stepped aside without taking the oath, although his name was on the Clerk's roll.

Mr. William M. Springer, of Illinois, who had challenged Mr. Pacheco and objected to his receiving the oath, stated that by reason of fraud Mr. Pacheco's opponent had been deprived of two votes, whereby Mr. Pacheco had been declared elected by one vote. The fraud had been committed by the clerk in Monterey County, who had altered the record by changing a figure "9" to a "7." The secretary of state had declined to certify the vote to the governor because of this fraud, but had been compelled by mandamus proceedings to certify the vote as it was certified to him by the clerks. Therefore it was claimed that fraud vitiated the credentials.

It was urged that the credentials of Mr. Pacheco were regular in form, according to the law, and that there were no other credentials. His prima facie right was therefore absolute and unquestioned.

The House, without division, voted that Mr. Pacheco be sworn in.

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[1] Globe, P. 3076.

[2] Journal, P. 1127; Globe, pp. 3075, 3123–3133.

[3] First session Forty-fifth Congress, Journal, P. 24; Record, pp. 92, 93.

540. The House honored credentials regular in form, but impeached by a document alleging that the election was not held on the day provided by law.—On March 4, 1871,[1] while the Speaker was administering the oath to the Members-elect at the time of the organization of the House, Mr. Job E. Stevenson, of Ohio, objected to the administration of the oath to the Tennessee delegation, and presented and had read the remonstrance of W. F. Prosser, which stated that the gentlemen of the delegation were not elected according to the laws of Tennessee, in that, as he alleged, they had not been elected on the day provided by the law.

After debate, the House, without division, agreed to a motion that the Tennessee Members be sworn in, and that the memorial and their credentials be referred to the Committee on Elections.

541. The New Mexico case of Chaves v. Clever, in the Fortieth Congress.

Credentials being impeached by a paper from a Territorial officer, the House declined to permit the oath to be administered until the prima facie right had been examined.

Credentials issued in accordance with the organic law of a Territory are recognized in preference to credentials authorized by a conflicting Territorial law.

Credentials should be based on the face of the returns and not on an examination of the votes.

On November 21, 1867,[2] the Speaker laid before the House credentials from the governor of New Mexico showing the election of Charles P. Clever as Delegate from the Territory. At the same time a communication addressed to the Speaker and signed by the secretary of the Territory was presented. The secretary asserted in this communication that the law of the Territory made it the duty of the secretary to give the certificate of election, that the governor had assumed that duty and given an illegal certificate, and that he, the secretary, had affixed the seal thereto under protest. The secretary further asserted that the election of Mr. Clever was shown by including votes false and fraudulent, and that Mr. J. Francisco Chaves had really been elected. The letter of the secretary showed the returns to be in favor of Mr. Clever, however.

Mr. Henry L. Dawes, of Massachusetts, referring to the precedent in the Colorado case, moved that the credentials and communication be referred to the Committee on Elections, and that neither claimant be sworn in until after investigation. This motion was agreed to without division.

On December 19[3] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, reported that Mr. Clever had the prima facie right.

It appeared that the organic law organizing the Territory provided for a certificate such as the governor had given Mr. Clever. It further appeared that in preceding years certificates had uniformly been issued in that form. A Territorial law prescribed that the votes should be returned and counted by the secretary

[1] First session Forty-second Congress, Journal, p. 9; Globe, p. 7.

[2] First session Fortieth Congress, Journal, p. 255; Globe, p. 778.

[3] Journal, p. 126; Globe, pp. 291–294.

and that he should give the certificate; but the committee held that this law, if in conflict with the organic law, must yield to it.

Furthermore the letter of the secretary showed that on the face of the returns Mr. Clever had a majority; and this was as far as the secretary was authorized to go. When he attempted to say that some of Mr. Clever's votes were not good votes he trenched on the prerogatives of the House.

The question being taken on agreeing to the report, there were-yeas 78, nays 31; so Mr. Clever was sworn in.

On three several occasions, December 20, 1867, and February 20, and July 25, 1868,[1] the time for taking testimony in this case was extended.

542. The case of Chaves v. Clever, continued.

Instance wherein the person seated after examination of prima facie right was unseated after examination of final right.

The returns of a precinct being shown to have been fraudulently altered, the House corrected the return by the count as made at the polls.

Although the voting place was illegally and fraudulently located, and there was intimidation at the polls as well as fraudulent alteration of the returns, the entire vote was not rejected.

Votes cast at precincts having no legal existence at the time of the election were thrown out by the House.

Returns made up from additions of names of voters on the poll books instead of from count of the ballots were rejected, although there was no evidence of error or fraud in the returns.

Poll books not being authenticated by a proper certificate as required by law, the returns of the precinct were rejected.

On February 9, 1869[2] Mr. S. Newton Pettis, of Pennsylvania, reported from the Committee on Elections on the final right to the seat. On the face of the returns sitting Member had received a majority of 540 votes. The committee, as a result of their investigations, found a majority of 389 for contestant. In reaching this result several questions were determined:

(1) In one precinct of Rio Arriba County, and one precinct of Mora County, the votes were apparently correctly counted at the close of the polls; but after the counting and before the probate judge sent an abstract with the poll books to the secretary of the Territory, as prescribed by law, the poll books were fraudulently altered so as to increase sitting Member's majority by 518 votes. The committee determined that this excess should be deducted, leaving the vote to stand as counted at the close of the polls.

(2) In La Junta precinct, in Mora County, it appeared that—

The place of voting was illegally and fraudulently placed beyond the settlements and resident voters of the precincts and held in a shed erected for that purpose upon an open plain, and that persons who were desirous of voting for him were grossly and violently assailed by the friends of the sitting Member, and by such means were intimidated and entirely prevented from voting, and that after the polls were closed the returns were so changed as to fraudulently increase the vote of the sitting Delegate 100, and that the great majority of persons who voted at such poll were camp followers and had no legal right to vote under the laws of the Territory.

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[1] Journal, pp. 131, 371, 1195; Globe, pp. 312, 1293, 4479.

[2] Third session Fortieth Congress, House Report No. 18; 2 Bartlett, p. 467; Rowell's Digest, p. 225.

The committee is unable to find any good reason for the fixing of a place so unusual as was the one in this instance for the holding of an election, and does believe from the evidence that coarse, improper, vulgar, and threatening language was used by the friends and followers of the sitting Member, and evidently for the purpose of intimidating and preventing persons from voting for the contestant; yet the committee can not for such reasons recommend the throwing out of the whole vote of such precinct.

It appearing, however, that the poll book had been so altered as to give 100 votes to sitting Delegate more than he was entitled to, the committee corrected the return.

(3) It appeared that pretended elections were held in several precincts which had no legal existence in September, 1867, the time of the election, but were created by the legislature of 1868. Therefore the committee were of opinion that the entire votes of such precincts should be thrown out.

(4) It appeared—

That the poll books and abstract of the probate judge of Mora County were not by him sent to the said secretary of the Territory by a special messenger, as required by law, but came to the hands of William H. Moore, acting sutler within the military reservation and post of Fort Union, and were then indorsed to Robert B. Mitchell, the governor of said Territory, and marked value $5,000, and put in the charge of the civil express company carrying the mails, and by said express conveyed to Governor Mitchell, who produced the poll books and abstract to the secretary of said Territory.

The committee finds, upon reference to the Territorial law, a plain provision requiring the probate judge of each county to forward to the secretary of the Territory, by special messenger, a true extract of the votes cast in their respective counties, together with a poll book of each precinct, and from the testimony of Vicente Romero and Henry V. Harris that the law of the Territory in this respect was disregarded, which, to say the least, is censurable so far as the conduct of the officers in that behalf is concerned, since there is much force in the argument of contestant's counsel in favor of throwing out the entire vote of Mora County for the reason that a plain provision *of the law was violated in the transmission of the returns from that county, and especially when considered in connection with the evidence that seems to point toward the presumption that the returns as forwarded were tampered with upon the way, and the additional fact in evidence that in two districts or precincts in said county the vote of 1867 amounted to 948, although in 1866 the same precincts were in one and polled but 337 votes.

(5) In Bernalillo precinct, in the county of that name, the majority was declared for the contestant from an addition of the poll books without counting the votes in the ballot box, and although there was no evidence that the returns were incorrect or fraudulent, yet the committee recommended that the majority of 139 returned for the contestant from this precinct be stricken out.

(6) The committee also deducted the vote of Chilili precinct because "the poll books were not authenticated by a proper certificate required by law."

The report was debated at length on February 20,[1] and on that day the resolutions as reported, unseating Mr. Clever and seating Mr. Chaves, were agreed to—ayes 105, noes 10.

Mr. Chaves then appeared and qualified.

543. In the Senate, in 1857, credentials regular in form were honored, although a memorial from the State legislature impeached the election of the bearer.—On February 9, 1857,[2] the credentials of Graham N. Fitch as Senator-elect from Indiana, were presented in the Senate. At the same time a protest was presented from the senate of Indiana in impeachment of the election

[1] Journal, p. 405; Globe, pp. 1421, 1423, 1424; Appendix, p. 248.

[2] Third session Thirty-fourth Congress, Globe, p. 626; Appendix to Globe, pp. 193–210.

of Mr. Fitch. A question at once arose as to whether or not the oath should be administered to Mr. Fitch on the prima facie evidence of the certificate. A long and learned debate followed, covering the precedents of the Senate from its earliest years, from the case of Mr. Kensey Johns, of Delaware, who in 1794 was not allowed to take the seat on presentation of his credentials, down to the recent case of Mr. Dixon, of Kentucky. It was held, on the one hand, that the credential, when it did not on its face suggest a doubt, should allow the oath to be taken. On the other hand, it was argued that the credential, being prima facie evidence, was liable to be rebutted at any stage.

Finally, on February 10, on a motion to commit the credentials, a test vote was had, and by a vote of yeas 12, nays 33, the motion to commit was disagreed to. Thereupon the oath was administered to Mr. Fitch.

544. There being a question as to a Member's election, he was sworn in and his credentials were referred to a committee with instructions.— On December 1, 1902,[1] on the first day of the session, the Speaker administered the oath of office to several new Members, including Mr. Carter Glass, of Virginia. No question was raised at the time the oath was taken, but later Mr. Robert W. Tayler, of Ohio, presented a resolution as follows:

Resolved, That the credentials this day presented by Carter Glass, esq., as Representative in the Fifty-seventh Congress from the Sixth district of Virginia be, and they are hereby, referred to Committee on Elections No. 1, with direction to inquire and report with all convenient speed, whether they are based upon returns of a lawful election for Members of Congress, held in Virginia, November 4, 1902, and upon what character of registration lists, and under color of what constitution or ordinances said election was held; and whether at said election the right of franchise was accorded to all citizens of Virginia alike, without regard to race or color; and whether any citizens of the United States who were entitled to vote for Members of Congress at said election were, under color of any constitution, law, statute, or ordinance, unlawfully deprived of their rights, privileges, and immunities secured to diem under the Constitution and laws.

Resolved, That said committee be empowered to hold its sessions at such times and places in or out of the State of Virginia as it may seem best, and to summon before it and examine any and all persons and papers which it may deem necessary to the investigation hereby provided for, and to employ such stenographers and clerks as may be necessary to perform its business; and the expenses of such inquiry and investigation shall be paid out of the contingent fund of the House on the voucher of the chairman of said committee.

This resolution was referred to the Committee on Elections No. 1[2]

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[1] Second session Fifty-seventh Congress, Journal, p. 6; Record, p. 4.

[2] On April 28, 1900 (first session Fifty-sixth Congress, Record, p. 4805), Mr. Francis R. Lassiter, of Virginia, appeared at the bar of the House with credentials in due form entitling him to his seat as Representative from the Fourth Congressional district of Virginia.

There had also been filed a protest against the seating of Mr. Lassiter, directed to "The Speaker and Members of the House of Representatives," alleging defects in the vote in the district, and signed by "James Selden Cowden, the candidate receiving the highest acknowledged opposition vote to Major Lassiter."

The certificate and protest having been read, the Speaker, David B. Henderson, of Iowa, said:

"The time has not expired for the party whose communication has been read to file notice of contest, and the Chair sees no reason why the gentleman whose credentials have been read should not be sworn in unless the House desires to take some action in the matter. [A pause.] The gentleman will please come forward and take the oath."

Mr. Lassiter came forward, accompanied by Mr. Ray and Mr. Underwood, and was duly qualified by taking the oath prescribed by law.

545. The Senate election case of Lane and McCarthy v. Fitch and Bright, from Indiana, in the Thirty-fourth and Thirty-fifth Congresses.

The Senate decided that a person presenting credentials in due form should be sworn in, although a question had been raised as to his election.

In a State whereof the constitution required two-thirds for a quorum of each house of the legislature, a Senator was elected by a majority merely of the total membership of the two houses.

In the absence of a State or Federal law regulating election of Senators the Senate declined to hold that an election must be participated in by each house in its organized capacity.

On February 9, 1857,[1] the credentials of Mr. Graham N. Fitch, of Indiana, for the term ending March 4, 1861, were presented in the Senate, and at the same time was presented a protest from the Senate of Indiana urging that he and Jesse D. Bright had not in fact been elected. The oath was administered after debate as to prima facie right of Mr. Fitch to be sworn, and the papers in the case were referred to the Committee on the Judiciary.

On March 13[2] Mr. Robert Toombs, of Georgia, submitted a report in favor of an investigation of the question. With this report were two documents explanatory of the issues. The first was a memorial of certain members of the Indiana house:

The undersigned, duly elected and qualified members of the house of representatives of the general assembly of the State of Indiana, hereby protest against the pretended election of Jesse D. Bright and Graham N. Fitch, on the 4th day of February, A.D. 1857, as Senators of the State of Indiana in the Congress of the United States, the former for the six years from the 4th day of March next, and the latter for the six years from the 4th day of March, 1855, by a portion of the senators and representatives of said general assembly, for the following reasons:

First. There was no agreement of the two houses of the general assembly, by resolutions or otherwise, to proceed to the appointment or election of Senators in Congress on said day, or any other day of the present session of the general assembly.

Second. There was no joint convention of the two houses of the said general assembly on said day; nor was there any law of the State authorizing a joint convention on that or any other day for the appointment or election of United States Senators; nor was there any resolution, or joint resolution, approved or adopted by the two houses of the said general assembly, or either of them, authorizing such joint convention.

Third. Said pretended joint convention was a mere assembly of a portion of the senators and representatives of the said general assembly, not in a legislative capacity, but as individuals, without any authority of law, without precedent in the history of legislature of the State, and having no legislative sanction; and said senators and representatives, when so convened, had no more constitutional right to appoint or elect Senators than any equal number of private citizens of the State.

Fourth. There was not a constitutional quorum of either house of the general assembly present in said pretended joint convention, there being only twenty-three senators and sixty-one representatives, when, by the eleventh section of the fourth article of the constitution of this State, it requires two-thirds of each house to constitute a quorum to do business, and when, by the law of the State, the number of senators is fixed at fifty and the number of representatives at one hundred in said general assembly.

Fifth. Because the undersigned, as legally elected and qualified representatives in said general assembly, have been deprived of their constitutional right to assist in the legal election of the Senators in the Congress of the United States by said illegal, revolutionary, and unauthorized election.

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[1] Third session Thirty-fourth Congress; Globe, pp. 626, 774; Appendix, pp. 193–210.

[2] Senate Report No. 2, third session Thirty-fourth Congress.

Sixth. Because the legislature of Indiana, as such legislature, either by separate action of the two houses, or otherwise, as such legislature, had no part or voice in such pretended elections, and the same were in direct violation of the third section of the first article of the Constitution of the United States and the fourth section of the said article.

Seventh. Because said pretended elections are wholly void.

Eighth. Because if said elections are held valid, such decision will destroy the legal existence of the general assembly of this State, and install in its place any mob which may see proper to take forcible possession of the house as a joint convention of the general assembly, without the concurrence of either body, the sanction of the Constitution, or authority of law.

For these and other reasons which might be named the undersigned protest against the validity of said pretended elections and ask that the Senate of the United States may declare them null and void.

Given under our hands this 4th day of February at Indianapolis, A.D. 1857.

Also this statement of Mr. Fitch:

The undersigned, a Senator of the United States from the State of Indiana, and now acting as a duly qualified Senator of the United States, submits to the honorable Judiciary Committee of the body to whom the validity of his election has been referred, the following as points upon which he believes and is advised that his own rights and the rights of his State require that evidence be taken and be before the committee in order to enable them to decide understandingly and justly in the premises.

First. That he was elected to said office by a majority of all the members composing the legislature of the State, they being then and for that purpose assembled in joint convention.

Second. That he was elected, whilst in such joint convention, by a majority of the legally qualified members of the senate of the State and of the legally qualified members of the house of representatives, respectively.

Third. That in order to ascertain the facts stated in the preceding point, he will be able, by evidence, to show that three of the persons who are contesting his election were not then, and are not now, legally members of the said State senate, and had no right whatever, under the laws and constitution of the State, to be considered, or, in any particular, to act as members of that body; and that this was at the time, and still is, well known to the other contestants.

Fourth. That in the organization of the State senate, according to the constitution, laws, and usage of the State, the lieutenant-governor presides and superintends the admission of the members, and the taking the required oaths of office. That upon this occasion, in violation of such constitution, laws, and usage, the said three members, who were without the expressly required credentials of election, the certificate of the proper and only returning officer, and whose seats were also known to be contested, and on grounds of fraud, also known to be true, were, by a presiding officer, chosen for the purpose by the members of the senate, designated as Republicans, contrary to all law, and by naked wrong, directed, notwithstanding, to be sworn in, and for the clear purpose, illegal and fraudulent in fact, of defeating an election of Senators of the United States.

Fifth. That the said convention by whom, as hereinbefore alleged, the undersigned was elected a Senator of the United States, was assembled in accordance with an express provision of the constitution of the State, and that, in accordance with the long and uniform usage of the State in that particular, the same was adjourned from day to day by the proper presiding officer thereof, and vested with the authority so to adjourn, and that each adjournment was made without objection by a majority of the senate even considering the three persons aforesaid to have been members of that body being present.

Sixth. That there is not now, in said State, as the undersigned is advised, any law for the regulation of the election of Senators of the United States, or in any way providing for the same; and that according to the best professional and judicial opinions in the State, the election is to be made by the convention of the legislature assembled under the constitution of the State, to count the votes and decide upon the election of governor and lieutenant-governor, as a power necessarily existing in the legislature, and from the obligations of the State to elect Senators.

Seventh. That before the adoption of the present State constitution there was a law regulating such election, and that although the same was no longer in force, the said convention did, as far as it was possible, conduct the present election according to the provisions thereof.

The undersigned, in conclusion, submits what, indeed, must be obvious to the committee, that as the witnesses and proofs to the matters above stated are only to be had in the State of Indiana, and can only properly be obtained by careful examination, and under the Superintendence of himself, that it can not be in his power to procure it at this or the approaching extra session of the United States Senate, even were he to abandon his duty as a Senator, which he has no right to do, and proceed at once to the place where the testimony is to be had. He further submits, therefore, that the committee will so dispose of the matter now as will enable him and the contestants at a future period to present the entire case fairly and fully before them.

No action was taken before the expiration of the Congress.

At the first of the next session the papers were again referred to the Judiciary Committee, and on January 21, 1858,[1] Mr. James A. Bayard, of Delaware, from that committee, reported a resolution:

Resolved, That in the case of the contested election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, Senators returned and admitted to their seats from the State of Indiana, the sitting members, and all persons protesting against their election, or any of them by themselves or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting members touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis.

Mr. Lyman Trumbull, of Illinois, submitted views of the minority:

The legislature of Indiana, called the general assembly, is composed of a Senate of fifty members and a house of representatives of one hundred members, and two-thirds of each house is, by the constitution, required to constitute a quorum thereof. Each house is declared to be judge of the election and qualification of its members, and required to keep a journal of its proceedings. No regulation exists by law in Indiana as to the manner in which members of the State senate are to be inducted into office. No law or regulation is there existing providing the time, place, or manner of electing United States Senators.

It appears by the journal of the senate of Indiana that on the opening of the senate at the meeting of the legislature, January 8, 1857, forty-nine of the senators were present, and that all the newly elected members were duly sworn, took their seats, and continued thereafter to act with the other senators till the close of the session. The only absentee senator took his seat January 13, 1857. Protests were filed contesting the seats of three of the newly elected members, which were afterwards examined and considered by the senate, and they were each found and declared to be entitled to seats, respectively, by majorities more or less numerous, all which is entered upon and appears by the journal of said senate.

The State constitution makes it the duty of the speaker of the house of representatives to open and publish the votes for governor and lieutenant-governor in the presence of both houses of the general assembly. No provision exists by the constitution making such meeting or presence of the two houses a convention, or providing any officers therefor, or authorizing or empowering the same to transact any business whatever, except by joint vote forthwith to proceed to elect a governor or lieutenant-governor in case of a tie vote.

Both houses being, in session, the speaker notified them that he should proceed to open and publish the votes for governor and lieutenant-governor on Monday, the 12th day of January, at 2.30 o'clock p.m., in the hall of the house. Shortly before the hour arrived the president of the senate announced that he would proceed immediately to the hall of the house of representatives; and thereupon, together with such senators as chose to go, being a minority of the whole number thereof, he repaired to the hall of the house of representatives, and there, in their presence, and in the presence of the members of the house, the votes for governor and lieutenant-governor were duly counted and published by the speaker, and A. P. Willard, the then president of the senate, was declared duly elected governor and A. A. Hammon lieutenant-governor of said State.

At the close of this business, a senator present, without any vote for that purpose, declared the meeting (by him then called a convention) adjourned to the 2d day of February, 1857, at 2 o'clock.

[1] First session Thirty-fifth Congress, Senate Report No. 19.

The senate hearing of this proceeding, on the 29th day of January, 1857, as appears by its journal, passed a resolution protesting against the proceedings of said so-called convention, disclaiming all connection therewith or recognizance thereof, and protesting against any election of United States Senators or any other officer thereby. On the 2d of February, 1857, the president of the senate, with a minority of its members, again attended in the hall of the house, and without proceeding to any business, and without any vote, declared the meeting (by him called a convention) adjourned until the 4th day of February, 1857, at which time the president of the senate, with twenty-four of its members, went to the hall of the house of representatives, and there they, together with sixty-two members of the house, proceeded to elect two Senators of the United States, to wit, Graham N. Fitch and Jesse D. Bright, they each receiving eighty-three votes, and no more, at their respective elections, twenty-three of which votes were by members of the senate.

Against these elections so made protests by twenty-seven members of the senate of Indiana and thirty-five members of the house of representatives of said State have been duly presented, alleging that, in the absence of any law, joint resolution, or regulation of any kind by the two houses composing the legislature of Indiana providing for holding a joint convention, it is not competent for a minority of the members of the senate and a majority, but less than a quorum, of the members of the house of representatives of said State to assemble together and make an election of United States Senators.

Of the facts as herein stated there is no dispute, as we understand.

It is now alleged by the sitting Senators, respectively, as we understand the substance of their allegations, in contradiction of the senate journal, that the three State senators whose seats were contested were not legally elected and qualified; that they were without the expressly required credentials, the certificate of the proper and only returning officer, and that they were, notwithstanding, directed to be sworn in by a presiding officer chosen for the purpose by the members of the senate designated as Republicans, for the clear purpose, illegal and fraudulent in fact, of defeating an election of Senators of the United States.

Under these circumstances we object to the adoption of the resolution for the taking of testimony to sustain these allegations, because the said election of United States Senators, so conducted, is obviously illegal and insufficient, and can not be cured by any proof of these allegations; and we insist that the Senate should now proceed to a definitive decision of the question.

The report was debated on February 15 and 16, 1858,[1] resulting in agreement to the resolution in amended form as follows:

Resolved, That in the case of the contested election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, Senators returned and admitted to their seats from the State of Indiana, the sitting members, and all persons protesting against their election, or any of them, by themselves or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting members touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis: *Provided,* That the proofs to be taken shall be returned to the Senate of the United States within ninety days from the passage of this resolution: *And provided,* That no testimony shall be taken under this resolution in relation to the qualification, election, or return of any member of the Indiana legislature.

On May 24[2] Mr. George E. Pugh, of Ohio, from the Committee on the Judiciary, submitted a report as follows:

The Committee on the Judiciary, to whom were referred the credentials of Graham N. Fitch and Jesse D. Bright, Senators from the State of Indiana, together with the documents and testimony relative to that subject, have had the same under consideration, and report, by resolution, as follows:

Resolved, That Graham N. Fitch and Jesse D. Bright, Senators returned and admitted from the State of Indiana, are entitled to the seats which they now hold in the Senate as such Senators aforesaid, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863, according to the tenor of their respective credentials.

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[1] First session Thirty-fifth Congress, Globe, pp. 698–710, 720–724.

[2] Senate Report No. 275; Globe, p. 2353; 1 Bartlett, p. 629.

On June 11 [1] this resolution was debated at length, and on June 12,[2] Mr. Hannibal Hamlin, of Maine, proposed to amend the resolution by striking out all after the word "resolved," and inserting:

That the case of Jesse D. Bright and Graham N. Fitch be recommitted to the Committee on the Judiciary, with instructions to report specially the grounds on which the resolution is based declaring said Bright and Fitch elected.

On motion by Mr. Trumbull to amend the proposed amendment by striking out all after the word "that" and inserting "in the opinion of the Senate, no election of a Member of this body made by the legislature of a State consisting of two branches is valid, when made in a meeting of individual members of both, unless such meeting for that purpose was prescribed by law, or had been previously agreed to by each house acting separately in its organized capacity, or is participated in by a majority of the members of each house, or is subsequently ratified in some form by each house in its organized capacity," it was determined in the negative yeas 17, nays 26.

Mr. Hamlin's motion was then disagreed to—yeas 16, nays 34.

On motion by Mr. Trumbull to amend the resolution by inserting after the word "are" and before the word "entitled" the word "not," it was determined in the negative—yeas 23, nays 30.

Then the resolution reported by the Judiciary Committee was agreed to.

546. The case of Lane and McCarty v. Fitch and Bright, continued.

In 1859 the Senate declined to admit claimants of seats to the privileges of the floor.

A State legislature may not revise a decision of the United States Senate that two persons have been duly elected Senators.

A decision of the Senate, made after examination of all the facts, as to election of a Senator is judicial in its nature and final, precluding further inquiry.

At the next session of Congress, on January 24, 1859,[3] the Vice-President presented a memorial of the State of Indiana, by its senators and representatives in general convention assembled, representing that it is the wish and desire of the State that the Hon. Henry S. Lane and the Hon. William Monroe McCarty be admitted to seats in the Senate of the United States as the only legally elected and constitutionally chosen Senators of the State of Indiana; which was read and referred to the Committee on the Judiciary.

On the same day Mr. William H. Seward, of New York, presented this resolution, which, on January 26, was laid on the table after debate: [4]

Resolved, That the Hon. Henry S. Lane and the Hon. William M. McCarty, who claim to have been elected Senators from the State of Indiana, be entitled to the privileges of admission on the floor of the Senate until their claims shall have been decided."

On February 3, 1859,[5] Mr. James A. Bayard, of Delaware, submitted from the Committee on the Judiciary a report reviewing the proceedings as to Messrs.

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[1] Globe, pp. 2923–2949.

[2] Globe, p. 2981.

[3] Second session Thirty-fifth Congress, Globe, pp. 534, 535.

[4] Globe, pp. 599–602.

[5] Senate Report No. 368.

Fitch and Bright up to the consideration of the resolution declaring them entitled to their seats, and continues:

The resolution was under consideration in the Senate, and fully debated at several subsequent times, and was finally, after the rejection of several proposed amendments, passed by the Senate without amendment or alteration. In the opinion of the committee, this resolution (no motion having been made to reconsider it) finally disposed of all questions presented to the Senate involving the respective rights of the Hon. Graham N. Fitch and the Ron. Jesse D. Bright to their seats in the Senate as Senators from the State of Indiana for the terms stated in the resolution. 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.

Mr. Jacob Collamer, of Vermont, presented views of the minority, on behalf of himself and Mr. Lyman Trumbull, 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 any one might retain his seat who had once wrongly procured a decision of the Senate in his favor by fraud or 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 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.

At the first session of the legislature of Indiana after the present sitting members were declared by the Senate as entitled to their seats, and at the earliest time it could take action, it declared their pretended election as inoperative and void, and that the State was in fact unrepresented; and they proceeded to elect H. S. Lane and William M. McCarty as Senators of the United States for said State, according to the Constitution of the United States; and they send here their memorial, alleging that the present sitting members were never legally elected; and they show facts, in addition to what was heretofore presented to the Senate, tending, as they consider, to sustain this allegation. The said Lane and McCarty present their certificates and claim their seats. We consider the matters stated in said memorial as true. The said Lane and McCarty have presented their brief sustaining their claim to seats, which is in the words following:

Brief of W. M. McCarty and Henry S. Lane, submitted to the Judiciary Committee of the Senate.

The State is entitled to the office. The legislature is her supreme instrument and donee of the power to elect Senators. It is the creature of the constitution, which is the chart of its power, vested only in two coordinate branches; a quorum of two-thirds of the members is requisite to give either a legal entity; each is equivalent in power, with an absolute veto on the power of the other.

The legislature is a corporation aggregate, with only such power as its creator has seen fit to endow it with, to be exercised in conformity to the laws of its birth.

To the joint wisdom and counsel of these colleges is the legislative power intrusted. It is not parceled out to its component elements in integrals, neither is it vested in an amalgamated body of the two. The one is erected as a barrier to the other. The ordeal of both must be passed. This guaranty against abuse can not be broken down without destroying one of the safeguards of our Government. The sovereign voice is an unit. The power that utters it is an entirety—an invisible, intangible, artificial person. The power is in the organism called "the general assembly," and not in the individual members. It is not the rights or powers of the members, but the delegated trust powers of the State that are wielded in senatorial elections or other exercises of legislative powers. Without a quorum of either house it did not exist—without either, the legislature did not exist, and without a legislature no election would be had.

Now, the facts are that a quorum of neither house was present at the pretended election of Messrs. Bright and Fitch, nor even a majority of the senate, nor did either house prescribe the time, place, or manner of electing.

It is of the essence of legislative power that its exercise shall be free from all restraint; each body free to deliberate and act in its duties; each entitled to its full powers. The facts are that the senate, upon eight occasions, refused to go into joint convention with the house, and at no time consented. She could not be compelled to merge her individuality, or surrender her veto power, or adopt the joint-vote mode of electing Senators; or, in other words, dilute or annihilate her power, upon the mandate of the house, as that would degrade her from an equal to an inferior. On the contrary, she had the right to determine the time, place, and manner, and did do it by resolution, to elect by separate vote, at a proper time, in which the house never concurred. Where diverse duties are imposed, she must determine which are most imperative and shall have priority.

The constitution of Indiana only provides for a joint convention upon the contingency of a tie vote for governor and lieutenant-governor. That contingency did not exist; therefore the convention did not. To say that a duty to form a joint convention creates it is as absurd as to say that the subpoena of a witness works his presence, or the commands of the decalogue their observance.

Failing to get the senate into a joint convention, a false record of that pretended fact was made, to be used as evidence, and which has been used as veritable and true, and the absolute verity and the unimpeachable quality of a record claimed for the fabrication.

The resolves of the senate are those of the whole body. The mutinous senators who usurped the name and power of the senate in said pretended convention were subject to arrest by order of that body for absence, and the attempt to nullify the will of the majority by attempting a business at a time, place, and in a manner vetoed by that body by a resolve, then unvacated and unrescinded. Said convention,

if it existed, expired with the duty that called it into life. The president of the senate, when inaugurated governor, his office as president of the senate expired, and with it that of his deputy president. The president not only usurped the power to appoint a clerk—an office not known to the law and void—who only authenticated this pretended election by interpolating it into the journal of the house. This president, whose power expired with that of his creator, arrogated that of adjourning it to a fixed day; in other words, commanding it to obey his arbitrary rescript; and, at a subsequent one, the more imperious mandate commanded them to elect Senators, no agreement whatever having been had by the house therefore as to time, place, and manner.

We aver that not only did no usage exist in Indiana, but that in no solitary instance was an election had without the consent of both houses, fixing time, place, etc., by law or resolution. While said pretended convention was in existence, but adjourned to a fixed day, numerous attempts were made in both houses to create one by the members who voted for Messrs. Bright and Fitch, thus offering evidence that they did not consider that one had been formed and was in existence. No forced convention could be had. Mutual consent was necessary, and it was never had by a vote, which is the only mode of altering the will of a legislative body.

The history of joint conventions in Indiana will also show that no other business was ever transacted than that for which it was specially convened. And we insist that the validity of the acts of a joint convention is due to the separate action of the two houses as the general assembly. It is also necessary to the validity of all elections by corporate bodies that notice be given of the time, etc., and the journals of neither house show any such notice or any conventional agreement for the same.

Upon the facts and law above no legal election could have been had.

To sustain the title of Messrs. Bright and Fitch the constitution of Indiana, depositing her legislative power in two coordinate houses, must be broken down—that which requires two-thirds of the members to exercise any of her attributes of sovereignty, and that one house can not coerce the other. Not only is this election in defiance of these injunctions, but in the face of a positive dissent by one branch, armed by the people with an absolute veto. But a presiding officer, who is no part of the legislature, usurped the powers and prerogatives of the legislature; all the forms and guaranties with which the people hedged in their legislative servant were disregarded, and it is claimed that the act is as valid as if they had been observed.

To sustain Messrs. Bright and Fitch the constitution of Indiana is made a dead letter. Will the Senate, the peculiar guardians of State rights, reared up for that especial purpose, exclude Indiana from her weight and voice in it by instruments empowered by her? Will she be allowed to interpret her own constitution and acts, or will the Senate, under any pretense, blot her out of the confederacy, and realize all those fears portrayed by some of the framers of the Constitution by an absorption of and encroachment upon State rights?

The legislative power enshrines and protects all rights subject to its jurisdiction. Prior to the confederation the several States owed this duty to their citizens. They did not surrender it, but intrusted it to the Federal for their better protection, with the right guaranteed them of a voice in the Senate as a means of enforcing this duty through the Federal instrument.

We deny that under a constitutional grant of power, with prescribed modes of its exhibition, that you can discriminate between elections and laws. The selection of a general, upon whose skill the fate of an army or the country may depend, or of a judge upon whose legal attainments and integrity the lives, liberties, and property of the citizen may depend, is of less moment than some petty law.

The same power is as requisite to the creation of the one as the other.

But it may be said that this question is res adjudicata.

We deny that our rights or title are barred by a decision had before they were created.

We deny that the judicial power of the Senate is capable of self-exhaustion. We deny that the political right of the State is capable of annihilation without annihilating the Constitution which creates the right.

We insist that the right to judge of the election and qualification of members must continue while the term continues.

The qualifications are continuing conditions of title.

We deny that courts are ever estopped by their own action.

We deny that sovereigns are estopped.

We deny that Indiana was, prior to this time, a party to the proceedings of the Senate, or had opportunity to allege or elicit the true facts.

We deny the power of the Senate, under the power to judge, to create Senators for Indiana.

We claim for her a superior knowledge of her own acts and grants.

We insist that the simple admission of a Senator to his seat upon credentials is a decision, and that it was never pretended this precluded his ouster if his title were not good.

If the Senate have not power to exclude foreign elements at all times, it is not equal to the duties intrusted to its guardianship.

And we will not believe that the Senate is the only tribunal on earth whose wrongs, once done, are eternal and irrevocable.

W. M. McCarty.
H. S. Lane.

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.

On February 14[1] the report was considered by the Senate, and an amendment was proposed by Mr. Seward to amend the resolution to discharge the Committee on the Judiciary by striking out all after "resolved" and inserting:

That Henry S. Lane and William M. McCarty have leave to occupy seats on the floor of the Senate pending the discussion of the report of the Committee on the Judiciary on the memorial of the legislature of Indiana declaring them her duly elected Senators, and that they have leave to speak to the merits of their rights to seats and on the report of the committee.

On motion by Mr. Pugh to amend the amendment proposed by Mr. Seward, by striking out all after "that" and inserting "the resolution of the Senate, adopted June 12, 1858, affirming the right of Graham N. Fitch and Jesse D. Bright as Senators elected from the State of Indiana, the former until the 4th day of March, 1861, and the latter until the 4th day of March, 1863, was a final decision of all the premises then in controversy, and conclusive as well upon the legislature of Indiana, and all persons claiming under its authority, as upon the Senators named in the resolution."

On motion by Mr. Harlan—

That all the papers in this case be recommitted to the Committee on the Judiciary with instructions to inquire whether Graham N. Fitch and Jesse D. Bright or Henry S. Lane and W. M. McCarty, or any one of them, has been elected to the office of Senator of the United States from the State of Indiana as provided by the Constitution of the United States, and in accordance with the laws and usages of the State of Indiana, and report the facts connected with and bearing on the supposed election of each to the Senate, and that the contestants be allowed to appear at the bar of the Senate when such report shall be made and argue their right to seats.

After debate, a division of the motion made by Mr. Harlan was called for by Mr. Stuart; and the question being taken on the first division, viz, "that all the papers in this case be recommitted to the Committee on the Judiciary," it was determined in the negative—yeas 14, nays 32; so the motion to recommit with instructions was disagreed to.

The question recurring on agreeing to the amendment proposed by Mr. Pugh to the amendment proposed by Mr. Seward, it was determined in the affirmative—yeas 30, nays 16.

On the question to agree to the amendment of Mr. Seward, as amended, it was determined in the affirmative—yeas 29, nays 16.

[1] Globe, pp. 1014–1019; Appendix, pp. 129–448.

On the question to agree to the resolution from the Committee on the Judiciary, amended, as follows:

Resolved, That the committee be discharged from the further consideration of the memorial of the State of Indiana, and that the resolution of the Senate adopted June 12, 1858, affirming the right of Graham N. Fitch and Jesse D. Bright as Senators elected from the State of Indiana, the former until the 4th day of March, 1861, and the latter until the 4th day of March, 1863, was a final decision of all the premises then in controversy, and conclusive as well upon the legislature of Indiana, and all persons claiming under its authority, as upon the Senators named in the resolution.

It was determined in the affirmative—yeas 30, nays 15.

547. An instance wherein the House authorized an investigation of the credentials and elections of persons already seated on prima facie showing.

Instance wherein the House ordered examination of the title to a seat on the strength of a memorial.

At the organization of the House on March 4, 1871,[1] a question was raised as to the swearing in of the Mississippi delegation, whose names were on the roll of the Clerk. But after debate the House ordered the oath to be administered to them, and the credentials to be referred to the Committee on Elections.

On April 17[2] Mr. Luke P. Poland, of Vermont, from the Committee on Elections, reported this resolution, which was agreed to by the House:

Resolved, That the Committee on Elections be authorized to take testimony in relation to the credentials of the sitting Members from the State of Mississippi, the validity of the election under which said Members claim seats, and the allegations touching the same, contained in the memorial of A. C. Fisk, and that said committee, for that purpose, be authorized to send for persons and papers.

548. Certain instances wherein the House has referred credentials to the Elections Committee, the oath not being administered to the bearers.— On March 16, 1871,[3] the Speaker laid before the House the credentials of Thomas H. Reeves, claiming to be a Representative at Large from the State of Tennessee. The credentials were referred to the Committee of Elections, Mr. Reeves not being, sworn in.

On March 4[4] the credentials of J. P. M. Epping, elected Representative at Large from the State of South Carolina, were referred to the Committee of Elections, Mr. Epping not being sworn in.

On March 7[5] the credentials of R. T. Daniels, as Member at Large from Virginia, were similarly referred to the Committee of Elections.

549. Federal law directs the issuance and prescribes the form of credentials of Senators-elect.—The Revised Statutes, section 18, provide:

It shall be the duty of the executive of the State from which any Senator has been chosen to certify his election, under the seal of the State, to the President of the Senate of the United States.

The above law dates from July 25, 1866.

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[1] First session Forty-second Congress, Journal, p. 10; Globe, pp. 7–10.

[2] Journal, p. 178; Globe, p. 736.

[3] First session Forty-second Congress, Journal, p. 73; Globe, p. 132.

[4] Journal, p. 13; Globe, p. 11.

[5] Journal, p. 15; Globe, p. 16.

Section 19 of the Revised Statutes, dating also from July 25, 1866, provides:

The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State.[1]

550. The Speaker declined to administer the oath to a person whose prima facie right was under investigation by the House.—On February 15, 1884[2] the House had under consideration the contested election case of Chalmers v. Manning. The resolution before the House was to discharge the committee from further consideration of the prima facie right to the seat, and to this was pending a substitute declaring that Manning held perfect credentials and was entitled to be sworn in.

During the debate Mr. Andrew G. Curtin, of Pennsylvania, advanced to the Clerk's desk, in company with Mr. Manning, and said:

I present Van H. Manning to be sworn in as a Member of this House upon the certificate of the governor of Mississippi, attested by the broad seal of that great and loyal State.

A point of order being made, the Speaker[3] said:

The Chair thinks it unnecessary to decide any point of order in this case, because the question whether or not Mr. Manning is entitled to take the oath of office is the very question which the House is now considering and upon which it is about to vote. Of course the Chair would not undertake to administer the oath of office to any person claiming to be a Member-elect while the House is considering his right to a seat.

551. The Senate election case of David Turpie in the Fiftieth Congress.

The Senate gave immediate prima facie effect to regular credentials, although a memorial impeached the regularity and legality of the election.

The Senate declined to inquire into the titles of the members and presiding officer of a legislative body, the legality of the organization being unimpeached.

On February 10, 1887,[4] the President pro tempore laid before the Senate resolutions adopted by a joint convention of the two houses of the general assembly of the State of Indiana, reciting that at the joint convention of February 2, 1887, Hon. Alonzo G. Smith, a member of the senate of the said assembly, had declared that Hon. David Turpie had received a majority of all the votes cast in the said convention for United States Senator; that the speaker of the house of representatives presiding at the joint convention had declared that there had been no legal election of a United States Senator, and that it was believed that there were enough illegal votes cast for the said Hon. David Turpie to overcome the apparent majority of votes cast for him. This document was referred to the Committee on Privileges and Elections.

On February 16[5] the President pro tempore presented "what purported to be the credentials of Hon. David Turpie, elected a Senator from the State of Indiana for six years from the 4th of March next."

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[1] Credentials of Members of the House are in forms prescribed by the laws of the several States.

[2] First session Forty-eighth Congress, Record, p. 1168; Journal, pp. 587, 588.

[3] John G. Carlisle, of Kentucky, Speaker.

[4] Second session Forty-ninth Congress, Record, p. 1564.

[5] Record, p. 1801.

These credentials were in form as follows:

THE STATE OF INDIANA, EXECUTIVE DEPARTMENT.

In pursuance of the provisions of section 18 of the Revised Statutes of the United States, I, Isaac P. Gray, governor of the State of Indiana, do hereby certify that the legislature of said State assembled in joint assembly at 12 o'clock meridian on Wednesday, the 2d day of February, 1887, pursuant to adjournment, to elect a Senator in Congress, to serve for a term of six years, commencing on the 4th day of March, 1887; that the Hon. David Turpie, of the State of Indiana, received 76 votes, being a majority of the votes of all the members of said joint assembly, and a majority of all the members elected to said legislature, all the members elected to said legislature being present and voting; and the said David Turpie was declared duly elected Senator in Congress, to represent the State of Indiana in Congress for the said term of six years, commencing on the 4th day of March, 1887.

In witness whereof I have hereunto set my hand and caused to be affixed the seal of the State, at the city of Indianapolis, this 9th day of February, in the year of our Lord 1887, the seventy-first year of the State, and of the independence of the United States the one hundred and eleventh.

ISAAC P. GRAY,
Governor of Indiana.

The above and foregoing is the certificate, and the signature thereto attached the genuine signature of Isaac P. Gray, governor.

CHARLES F. GRIFFIN,
Secretary of State.

TO HON. JOHN SHERMAN,
President of the Senate of the United States of America.

On motion of Mr. George F. Hoar, of Massachusetts, the paper was referred to the Committee on Privileges and Elections.

On March 1, 1887,[1] at a later date in the same session, Mr. Hoar offered the following, which was agreed to:

Ordered, That the Committee on Privileges and Elections be discharged from the further consideration of * * * a paper purporting to be the credentials of David Turpie, and a resolution of the joint convention of the legislature of Indiana contesting the validity of the election of David Turpie as United States Senator from that State.

On the same day, at a later time, Mr. Orville H. Platt, of Connecticut, inquired whether or not the action taken would have any effect on the question of accepting the credentials. If it would have such effect, he proposed to make a motion to reconsider.

Mr. Hoar replied:

Under the rules of the Senate all papers committed to any committee are to be returned to the files of the Senate at the expiration of the Congress, and the function of the committee itself expires with the Congress. If the credentials of Mr. Turpie had been retained by the Committee on Privileges and Elections without action until noon on the 4th day of March, under the operation of that general rule precisely the thing would have happened then that has happened this morning—that is, the paper would have gone back to the files of the Senate and the committee would have been discharged from its consideration. The only alternative to that course would have been an assumption by the committee or by the Senate at the present session to deal with the credentials of a gentleman claiming to be a Senator-elect before the time had arrived for the beginning of his term, and before he had presented himself to be heard upon the subject.

The Senate is a continuing body which was organized at the beginning of the Government in 1789, and that organization is to continue, as we fondly hope, until time shall be no more, certainly

[1] Record, pp. 2461, 2474.

until the destruction of the American Constitution. It is therefore possible that it might be within the constitutional power of the Senate to determine in advance the right of a Senator to seat upon this floor, and it would be a violation of all constitutional precedent, and it would be, in my judgment, a violation of the sense of justice and propriety of the Senate and of the American people.

The effect, therefore, of this report is simply to remand to the action of the Senate to be taken after the 4th of March without prejudice—without being in the least affected by any action now (on) any question which any person may see fit to raise, and that is all. No prejudice, for no prejudice against any person who may conceive himself entitled to a seat on this floor hereafter will arise or has arisen in consequence of the report of the committee or of the Senate in accepting it.

On March 3,[1] Mr. Benjamin Harrison, of Indiana, presented a memorial of eighteen State senators of Indiana, and of the house of representatives of that State, protesting against the alleged election of Mr. Turpie. This memorial was laid on the table.

On December 5, 1887,[2] at the swearing in of Senators-elect, Mr. Turpie appeared and took the oath without objection. But immediately thereafter Mr. Hoar presented the memorial of a committee of members of the general assembly of Indiana in regard to Mr. Turpie's election. This paper, together with all other papers on file relating to the case, were referred to the Committee on Privileges and Elections.

On May 14[3] Mr. Hoar submitted the report of the committee, as follows:

Mr. Turpie received a certificate of his election from the governor of Indiana, which constitutes a prima facie title to his seat, and has been admitted thereupon to take the oath.

The two houses of the legislature of Indiana, having failed to concur in the appointment of a Senator, met in joint convention, and after sundry ballotings, in which no person had a majority of the votes cast, a ballot was had in which Mr. Turpie received 2 more votes than all others. A quorum of said joint convention and a quorum of each house was present and voted. The proceedings were in all respects regular, and resulted in a valid election of Mr. Turpie, unless the facts which the remonstrants offer to prove constitute a valid objection.

They offer to show, first, that, there being a vancancy in the office of lieutenant-governor, the Hon. Robert S. Robertson was duly elected to fill such vacancy, and thereby became entitled by the constitution and laws of Indiana to preside over the senate; but that, on the meeting of the senate on the 6th day of January, 1887, being the first day of the session of the legislature at which said alleged election of Mr. Turpie took place, one Alonzo G. Smith usurped the office and function of such presiding officer, was supported and maintained in such usurpation by a majority of said body, excluded Mr. Robertson from said office and function, and continued so to preside and so to exclude Mr. Robertson during all the sessions of said senate, including its attendance on said joint convention, until after the said alleged election of Mr. Turpie.

Second. That before said alleged election the senate wrongfully, and for the purpose of obtaining a majority for said Turpie in said joint convention, declared two members, who had been duly and lawfully elected members thereof, not entitled to their seats, and declared two other persons, who had not been duly and lawfully elected, to be entitled to such seats, and thereupon seated such persons, and that this was done without right, without evidence, and without hearing or debate; and that said persons so seated thereafter were present and voted for Mr. Turpie in said convention, and that without such votes said Turpie would not have received a majority.

The committee are of the opinion that the facts offered, if proved, will not warrant the Senate in declaring the sitting Member not entitled to his seat. There can be no doubt that the body in question was the constitutional senate of Indiana. The journals of both houses of the legislature of the State have been submitted to us. It appears that the body was recognized as the senate by the governor and by the house of representatives. Statutes, to which its constitutional assent was necessary, were enacted and have become part of the law of the State.

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[1] Record, p. 2627.

[2] First session Fiftieth Congress, Record, p. 4.

[3] Senate Report No. 1291.

It seems to us that, without entering upon the question whether there was a vacancy in the office of lieutenant-governor which Mr. Robertson was duly elected to fill, the recognition of Mr. Smith by a majority of the senate as its lawful presiding officer, and the recognition of the senate as a lawfully organized body by the other house as well as by all its own members who remained and took part in its legislative proceedings, and by the executive department, require us to consider it as the lawful senate, lawfully organized so far as to be entitled to take part in the joint convention which elected a Senator of the United States.

We also think that the judgment of the senate of Indiana as to the title of Messrs. Branahan and McDonald, the two members in question, to their seats is binding upon the Senate of the United States. This body is made by the Constitution the judge of the elections, qualifications, and returns of its members. The senate of Indiana is likewise the judge of the election, qualifications, and returns of its own members. We must determine all questions arising out of the proceeding of the electors. But who sustain the character of electors is to be determined by the legislative body of the State. We can not inquire into the motive which controlled its judgment. In rendering that judgment, whether it shall give a hearing to parties, permit debate, examine witnesses, act upon evidence or without evidence, are matters within its own discretion. If that discretion were exercised in the manner charged by the remonstrants, a majority of the committee think that a great public crime was committed, for which the offenders are responsible to the people of Indiana. But we can not try the question.

A majority of the committee do not mean to be understood as now committing ourselves to an opinion upon the question whether the Senate can not refuse to admit to a seat a claimant who owes his election to a legislative body which is itself the result of fraud or crime, which has overcome the true will of the people, even if it have possessed itself of legislative authority, and of the technical evidence of a rightful character, or whether the judgments of such a body as to the title to seats of its individual members are entitled to any respect whatever. If that question shall hereafter unhappily arise it will be dealt with on its own merits. The committee ask to be discharged from the further consideration of the several memorials.

On May 15[1] the question of discharging the committee was debated. Mr. William E. Chandler, of New Hampshire, took exception to the latter portion of the report, which held that the judgment of the senate of Indiana was binding on the Senate of the United States on the question at issue. It seemed to him that the power of unseating Members might be carried to such an extent in a legislative body that the Senate of the United States would be justified in reviewing the decisions of the legislature. Mr. Hoar and others sustained the position of the report.

The motion to discharge the committee was agreed to without division.[2]

552. The Senate election case of La Fayette Grover, of Oregon, in the Forty-fifth Congress.

The credentials of a Senator-elect being regular and unimpeached, and the election having been by the one legally organized legislature,

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[1] Record, pp. 4145–4147.

[2] In 1891 the Senate considered the case of Wilkinson Call, of Florida. December 7, 1891, R. H. M. Davidson presented the credentials from the governor of Florida and at the same time a transcript of the proceedings of the two houses of the legislature of Florida in a joint convention, composed of a majority of the members of the two houses, but not of a majority of the members of each, recording what purported to be the election of Wilkinson Call. Mr. Call presented himself on the same day, claiming the right to take the oath by virtue of the proceedings of that joint convention. The facts set forth in the transcript were undisputed. The matter went over under objection to the next day, when Mr. Call was admitted to take the oath, on motion by Mr. Hoar, and the credentials were referred to the Committee on Privileges and Elections. (Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 805.)

the Senate seated the bearer at once, although charges were filed against him personally.

Discussion of the elements of a prima facie case as made out by the credentials of a Member-elect.

On March 2, 1877,[1] in the Senate, the credentials of La Fayette Grover, elected a Senator by the legislature of Oregon for the term commencing March 4, 1877, were presented.

On March 7, 1877,[2] Mr. Grover presented himself to be sworn, when Mr. Hannibal Hamlin, of Maine, stated that Mr. John H. Mitchell, Senator from Oregon, had certain papers relating to Mr. Grover's title to the seat, and suggested that the oath be deferred until Mr. Mitchell should be present.

Later in the day Mr. Mitchell presented the following memorial:

To the Senate of the United States:

Whereas it is currently reported and generally believed that L. F. Grover, by bribery, the corrupt use of money, and other unlawful and dishonorable means, procured his election to the Senate of the United States by the legislature of the State of Oregon at its last session; and

Whereas the said L. F. Grover, in obedience to a corrupt scheme to defraud the State of Oregon of its proper electoral vote, as the governor thereof did unlawfully, dishonestly, corruptly, and by acts of usurpation, declare elected to the office of Presidential elector for the State of Oregon, on the 6th day of December, 1876, and did issue a certificate of election to one E. A. Cronin, who had been defeated by the people for said office by more than 1,000 majority; and

Whereas the said L. F. Grover did fraudulently undertake to sustain his said act by falsely testifying as a witness concerning the same before the Senate Committee on Privileges and Elections on or about the 6th day of January, 1877:

Now, therefore, we, the undersigned, citizens of the State of Oregon, earnestly but respectfully ask that the said L. F. Grover be denied a seat in the United States Senate as a Senator from the State of Oregon until the foregoing charges are thoroughly investigated and disproved.

M. L. WILMOT AND OTHERS.

On March 8,[3] at the suggestion of Mr. Aaron A. Sargent, of Pennsylvania, and after modification by Mr. Roscoe Conkling, of New York, this resolution was presented by Mr. William A. Wallace, of Pennsylvania:

Whereas, under the Constitution and the laws and the practice of the Senate, La, Fayette Grover, claiming to be a Senator from the State of Oregon—his credentials being regular and in due form and there being no contestant for the seat—and there being in said State but one body claiming to be the legislature, and but one person claiming to be the governor, and there being no doubt or dispute as to the existence of one legal, rightful State government, is entitled to admission to a seat in this body, on the prima facie case presented by such credentials, notwithstanding the objections contained in the petition of citizens of the State of Oregon against his admission: Therefore,

Resolved, That the credentials of La Fayette Grover be taken from the table and the oaths of office be now administered to him.

Resolved further, That the petition of citizens of Oregon containing charges against La, Fayette Grover lie on the table until the Committee on Privileges and Elections is organized, when they shall be referred to such committee, together with his credentials, with instructions to investigate such charges and report to the Senate as to their truth or falsity.

Mr. Conkling had suggested the words "and there being in the said State but one body claiming to be the legislature, and but one person claiming to be governor."

[1] Second session Forty-fourth Congress, Record, p. 2069.

[2] Special session of Senate, Forty-fifth Congress, Record, pp. 17, 22.

[3] Record, pp. 31–39.

In the debate Mr. Conkling went on to show that the condition set forth in these words constituted an essential element of a prima facie case. Mr. Oliver P. Morton, of Indiana, did not concur in the idea that these words should be followed to their ultimate significance. "A prima facie case, as I understand it," he said, "is one which is regular upon its face—good upon its face according to the law of the State from which it emanates. The idea that the existence of a pretended legislature can invalidate the effect and value of a prima facie case seems to me to be a contradiction in terms. If a Senator of the United States or a person elected to the Senate comes here with the certificate of the governor and the proper credentials according to the forms of law, his prima facie case is not invalidated if some other person presents a certificate which is not signed or executed according to the forms of law."

The question being taken on the preamble and the first resolution, they were agreed to without division.

The second resolution was withdrawn, on the assurance that at a later day, Mr. Grover proposed to demand an investigation.

553. The election case of James H. McLean, from Missouri, in the Forty-seventh Congress.

The State authority having declined to issue credentials to a person whose election was not disputed, the House administered the oath to him on satisfying itself of his election.

Where the fact of election was not disputed the House seated a Member-elect without reference to the Elections Committee, although the State authority had denied him credentials.

On December 15, 1882,[1] Mr. Thomas B. Reed, of Maine, claiming the floor for a question of privilege, presented the memorial of James H. McLean, which set forth that a vacancy was caused in the Second Congressional district of Missouri by the death of Thomas Allen on April 7, 1882; that on November 7, 1882, at an election duly called by the governor of the State, for the said Second district, there were cast 8,264 votes for the memorialist, 8,087 for James D. Broadhead, and 362 for B. A. Hill, the said memorialist thereby receiving the highest number of votes ;[2] "that the abstracts of the votes so cast and duly certified were forwarded to the secretary of state of Missouri, where the same are required by law to be sent, but that the secretary of state of said State has failed and utterly refuses to give your memorialist a certificate of his election as aforesaid." With the memorial were presented two certificates from the county clerk and recorder, giving the abstract of the votes cast.

It appeared from the remarks of Mr. Reed and from uncontradicted statements of Representatives from Missouri that there was no doubt as to the correctness of these returns; and that Mr. Broadhead, the rival candidate, did not contest the fact that Mr. McLean was elected.

It appeared that under the law of Missouri it was the duty of the secretary of state to issue the credentials, but that he had declined to do so, apparently for the

[1] Second session Forty-seventh Congress, Record, pp. 328–331.

[2] The highest number of votes was required for election in Missouri, although the memorial did not so specify.

reason that the State had been redistricted after the election of Thomas Allen and before the special election called to fill the vacancy caused by his death; but nothing before the House indicated whether the governor had called the special election in the old or the new district. For this reason especially Mr. Richard D. Bland, of Missouri, urged that the memorial should be referred to the committee on credentials for examination, but Mr. Reed pointed out that the only reason why Mr. McLean was not sworn in without dissent was because the secretary of state had declined to do his duty, since no one, not even his opponent, doubted his right to the seat. There was not time for Mr. McLean to compel the secretary of state by mandamus to issue the certificate, and in justice to Mr. McLean and the constituency who elected him he should be given the seat at once.

The House voted—ayes 144, noes 15—that Mr. McLean should be permitted to take the oath, and he appeared and qualified.

554. The Pennsylvania election case of Morris v. Richards in the Fourth Congress.

The governor having declined to issue credentials because of doubt as to the election, the House, in 1796, determined the final right before seating the one surviving claimant.

An election return, required by law to be made on or before a certain day, should be counted if presented after that day, provided it be otherwise correct.

A vote not returned within the time required by law, and of which the returns were not in the required form, was rejected.

A return seasonably made and in legal form, but giving certain proxy votes and votes of persons disqualified, was purged and not rejected.

On January 18, 1796,[1] the House decided that John Richards, of Pennsylvania, was entitled to a seat in the House.

This was a case in which the governor of Pennsylvania, after the election, had issued no certificate because he was in doubt whether James Morris or John Richards was elected. Mr. Morris died before the meeting of Congress. After Congress assembled Mr. Richards petitioned for the seat.

The committee found that, by the law of Pennsylvania, the county judges of election were required to meet on November 10, and that the district judges should meet on November 15, to examine the county returns and certify the result. Certain of the voters were away on the western expedition, so it was provided that army returns should be sent to the prothonotaries of the respective counties by the said 10th of November, and that on that day the prothonotaries should deliver them over to the county judges. The return of the Montgomery County soldiers was received by the prothonotary after the 10th and before the 15th, and by him delivered over to some of the county judges, two of whom made up a return and certified it on the 14th. This return was laid before the judges of the district on the 15th, but was not counted by them. The Committee on Elections reported, however, that the district judges should have counted this return, in spite of the

[1] First session Fourth Congress, Contested Elections in Congress from 1789 to 1834, p. 95; Rowell's Digest, p. 45.

informality.[1] It also appeared that the vote of the Bucks County soldiers, not being returned before the 15th of November and not being canvassed by the district judges, was filed with the secretary of state on January 18, 1795. These returns were also defective on their face, being unaccompanied by a list of names of those voting. So the Committee on Elections reported that this return should not be counted. It further appeared that the return of the Northampton soldiers, which alone was properly received before the required date, November 10, contained 2 proxy votes and 16 votes of persons evidently not qualified to vote. These 16 votes were for James Morris.

The Committee on Elections, therefore, by counting the Montgomery return, rejecting the Bucks return and the 18 unauthorized votes in Northampton, found that John Richards was duly elected.

The House, in accordance with this finding, seated Mr. Richards.

555. The Pennsylvania election case of John Sergeant in the Nineteenth Congress.

Two candidates having equal numbers of votes, the governor did not issue credentials to either, but ordered a new election after they had waived their respective claims.

Candidates at an inconclusive election having waived their claims, the House held that the result of a new election might not be disturbed because of alleged errors in the first election.

Instance of an election case instituted by sundry citizens.

On January 14, 1828,[2] the Committee on Elections reported in the case of sundry citizens v. Sergeant, of Pennsylvania,

At the election of October 10, 1826, John Sergeant and Henry Horn had an equal number of votes. It appearing that the people had failed to make a choice, the executive seems to have considered the case in the light of a vacancy, but not to an extent sufficient to warrant him in directing another election until both Mr. Sergeant and Mr. Horn informed him in writing that they relinquished all claims to the seat in virtue of the election of 1826. In consequence of this letter the governor ordered an election to supply the vacancy, to be held on October 9, 1827.

At that election it appeared that John Sergeant was duly elected.

But the memorialists alleged that the rectification of an error which they pointed out in the count of the election of 1826—the first election—would show the election of Henry Horn.

Certain letters and ex parte depositions were submitted to the committee and decided insufficient to invalidate the rights of the sitting Member. The committee asserted that they thought it quite unnecessary to go into an investigation of the rights of the parties under the first election, because, whatever those rights were, they had been voluntarily relinquished. Therefore the committee reported the following resolution, which was agreed to without debate or division:

Resolved, That John Sergeant is entitled to a seat in this House.

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[1] In a first report, which was recommitted, it was held that these returns should be rejected.

[2] First session Nineteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 516; Rowell's Digest, p. 85.

556. The Pennsylvania election cases of Koontz v. Coffroth and Fuller v. Dawson in the Thirty-ninth Congress.

Conflicting returns rendering it impossible for a governor to issue any credentials, the Clerk enrolled neither claimant to the seat.

Neither claimant to a seat having credentials, the House referred the papers with instructions that the prima facie right be determined, without prejudice to a later contest on the merits.

In determining prima facie right the majority of the Elections Committee, in a sustained report, declined to consider papers other than those coming legally from the proper certifying officers of the district.

The House, acting on a divided report, determined the prima facie right by the returns of the district certifying officers, although they were impeached by accompanying papers.

Form of resolutions for seating a claimant on prima facie showing and for the institution of a contest on the merits.

On December 5, 1865,[1] the House agreed to the following resolution:

Resolved, That the certificates and all other papers relating to the election in the Sixteenth Congressional district of Pennsylvania be referred to the Committee of Elections, when appointed, with instructions to report, at as early a day as practicable, which of the rival claimants to the vacant seat from that district has the prima facie right thereto, reserving to the other party the privilege of contesting the case upon the merits, without prejudice from lapse of time or want of notice.

On January 26, 1866,[2] the Committee of Elections reported. In this case the names of neither Mr. Coffroth nor Mr. Koontz, the rival claimants for the seat, had been put on the Clerk's roll, for the reason that the governor of Pennsylvania, in his proclamation of the names of the persons elected in the various Congressional districts, had declared—

that no such returns of the election in the Sixteenth Congressional district have been sent to the secretary of the Commonwealth as would, under the act of assembly of July 2, A.D. 1839, authorize me to proclaim the name of any person as having been returned as duly elected a Member of the House of Representatives of the United States for that district.

The act of July 2, 1839, provided the following method for returning the results of an election in a Congressional district, as stated by the report:

When two or more counties compose a district for the choice of a Member of the House of Representatives of the United States, it is provided, after an election has been held, that the judges of election in each county having met, the clerks shall make out a fair statement of all the votes which shall have been given at such election, within the county, for every person voted for as such Member, which shall be signed by said judges and attested by the clerks; and one of the said judges is to take charge of said certificates of votes, and produce the same at a meeting of one judge from each county, at such place in such district as is, or may be, provided by law for that purpose. The judges of the several counties (composing such district) having met as aforesaid, are then required to cast up the several county returns and make duplicate returns of all the votes given for such office of Representative in Congress in said district, and of the name of the person elected, and to deposit one of said returns for said office of Representative in the office of the prothonotary of the court of common pleas of the county in which they shall meet, and to place the other return in the nearest post-office, sealed and directed to the secretary of the Commonwealth.

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[1] First session Thirty-ninth Congress, Journal, p. 32; Globe, p. 10.

[2] 2 Bartlett, p. 25; House Report No. 12.

The said return judges are also required to transmit to the person elected to serve in Congress a certificate of his election, within five days after the day of making said return.

On the receipt of the return of the election of Members of the House of Representatives of the United States, as aforesaid, by the secretary of the Commonwealth, the governor is required (section 113) to declare, by proclamation, the names of the persons so returned as elected in the respective districts, and also to transmit, as soon as conveniently may be thereafter, the returns so made to the House of Representatives of the United States.

There were five counties in the district—Adams, Bedford, Franklin, Fulton, and Somerset.

In each of the three last counties all of the precinct judges united in certifying the results, and there was no question as to them. But in Franklin County there was a difficulty as to the selection of the judge who should present the return of the county at the meeting of the district board. Mr. Wilhelm was at first chosen, but later this action was rescinded and Mr. Laker was chosen, and appears to have become the actual possessor of the return.

In Adams and Bedford counties there was a difficulty about the counting of the soldiers' votes, and the return from each of these counties was certified by a majority only of the precinct judges. In each of these counties the minority judges made another return.

The next complication occurred when the board of district judges (composed of one judge from each county, bearing the return of his county) met to make up the district return. In fact two boards met—a Coffroth and a Koontz board.

The Koontz board appears to have been composed of the two representatives of the minority judges in Adams and Bedford counties; of Mr. Wilhelm, the superseded representative of Franklin County; of Mr. Winter, the regular representative of Fulton County, who later attended the Coffroth board; and Mr. Willis, the lawful bearer of the undisputed return of Somerset County, who did not attend the Coffroth board at all. This Koontz board made the return in the form required of the district board, and the return was transmitted to the State authorities in regular order. This return showed a majority of 32 votes for Mr. Koontz.

The Coffroth board, which assembled later in the day, was composed of the two majority judges of the counties of Adams and Bedford, of Mr. Laker, the last-chosen representative judge of Franklin County, and of Mr. Winter, the regular representative of Fulton County. This board made out in regular form a district return, and transmitted it to the State authorities in the regular way. This return showed a large majority in favor of Mr. Caffroth, but also showed on its face that the return of the county of Somerset was not included.

In point of fact, although it did not officially appear on this district return, the vote of Somerset County, which was undisputed, would have reduced but not overcome the majority showed for Mr. Coffroth by the other four counties. Mr. Coffroth's majority on this basis was 93 for the whole district.

The attorney-general of Pennsylvania, in an opinion given to the governor, maintained that the action of a majority of the return judges of a county was to be presumed to be valid; but also held that the district judges should have by adjoinment endeavored to procure the complete return, including the county of Somerset.

The Committee on Elections, acting under direction of the House, examined the question as to where they should look for the prima facie title to the seat, and in

their conclusions the committee divided, a bare majority concurring in the report. The majority say:

The return certified by the majority certainly embraces the counties of Adams, Bedford, Franklin, and Fulton, and is an official certificate of all the returns presented, and of the aggregate returns of votes from these counties; and as the vote of Somerset County is undisputed and would not have changed the result, we see no occasion or justification, on a prima facie hearing, for going beyond the action of these return judges who met on the day and at the place fixed by law, and did all that the law required them to do.

If, however, we should waive this position and go beyond, not behind, the action of the district return judges, it would only be to ascertain the vote of Somerset County; and that being obtained and added to the other certified returns, as we have seen, still gives Mr. Coffroth the certified majority of all the votes cast in the district and the prima facie right to the seat.

Clearly the district board of return judges had no right to go behind the certified returns brought by each return judge from his county, and in determining a prima facie right to a seat the same rule would seem applicable to and binding upon the Committee on Elections and the House. But suppose we should see fit, in violation of this rule, to go behind the action of the district return judges, we come then next to the certified returns of the several boards of county return judges of each county in the district, which returns were not separately before the governor. In three of these, viz, Franklin, Somerset, and Fulton, all of the return judges unite in certifying the result, and the claimants each admitted before the committee, that on this hearing of a claim to the prima facie right to the seat, neither of them could go behind any one of these three returns thus certified.

The home vote of Bedford County is also certified by all of the return judges, and is undisputed by the claimant, but the soldiers' vote of Bedford County is certified by a majority of the return judges, as 318 for Koontz, and 94 for Coffroth, while the minority of the return judges sign another return, which, of course, is of no validity.

A majority of the return judges of Adams County certify to the returns of votes cast in that county, including the soldiers' vote, giving Coffroth 2,707 votes, and Koontz 2,366.

The minority sign another return, purporting to include the home vote and the soldiers' vote, but nothing appears on the face of the majority return, from either Adams or Bedford County, to show but what they constitute the whole board of return judges present for each of said counties.

The majority of the committee also say:

But it is claimed, on the part of Mr. Koontz, not only that the act of the majority of the county return judges in certifying these returns from Adams and Bedford is void, but that the Committee on Elections and the House, in this investigation of the prima facie right to the seat, may not only go behind these returns from Adams and Bedford, but also, in effect, behind the unanimous returns of all the other counties of Franklin, Fulton, and Somerset, so far as the soldiers' vote is concerned. The statement of such a proposition on an investigation of this kind would seem to be sufficient for its own refutation. It would be attempting to hear the case on the merits, without giving the claimants the opportunity of presenting their evidence in full; would be utterly disregarding all credentials, and would obliterate all distinction between a prima facie right on the certificates and papers from the proper certifying officers and a claim founded on the merits on a full hearing of all the evidence that might be adduced by either claimant in support of his claim. (See case of Jayne *v.* Todd, vol. 1, p. 1, Reports of Committees, first session Thirty-eighth Congress.)

It should be borne in mind that by the resolution of the House referring this case to the committee, the committee are restricted in their first examination and report to the prima facie right of either claimant to the seat; and the committee are to determine this from the certificates and papers referred to them, including always the admission of the claimants themselves before the committee; but only those papers are to be considered which come from the proper certifying officers, and which those officers are authorized by law to make, and also which are pertinent to the case.

Many papers have been referred to the committee which, on this hearing, are not evidence for any purpose.

From the legal certificates and returns of the district and county boards of return judges in this case, nothing appears in relation to the rejection of any soldiers' votes; and those who allege such rejection are

compelled to look outside of these certificates and returns and resort to papers and statements which are not legitimate evidence on this investigation and which, without further proof, would few, if any of them, be evidence of themselves on the hearing of a contest on the merits.

The committee therefore recommended the following resolution:

Resolved, That Alexander H. Coffroth, upon the certificates and papers relating to the election in the Sixteenth Congressional district of the State of Pennsylvania, has the prima facie right to the vacant seat from that district and is entitled to take the oath of office and occupy a seat in this House as the Representative in Congress from said district, without prejudice to the right of William H. Koontz, claiming to have been duly elected thereto, to contest his right to said seat upon the merits.

Resolved, That William H. Koontz, desiring to contest the right of Hon. Alexander H. Coffroth to a seat in this House as a Representative from the Sixteenth district of the State of Pennsylvania, be, and he is, required to serve upon the said Coffroth, within fifteen days after the passage of this resolution, a particular statement of the grounds of said contest, and that the said Coffroth be, and he is hereby, required to serve upon the said Koontz his answer thereto within fifteen days thereafter, and that both parties be allowed sixty days next after the service of said answer to take testimony in support of their several allegations and denials, notice of intention to examine witnesses to be given to the opposite party at least five days before their examination, but neither party to give notice of taking testimony within less than five days between the close of taking it at one place and its commencement at another, but in all other respects in the manner prescribed in the act of February 19, 1851.

The minority of the committee took the view that neither claimant had showed a prima facie case. The proclamation of the governor of Pennsylvania, which would have been the best evidence, showed that no such returns had been received as would authorize him to proclaim anyone elected. The return of the board of district judges transmitted by the governor would establish such a prima facie right if unimpeached.

But neither by a return of the district board to the secretary of the commonwealth, nor by a certificate of that board to either of the claimants, has such prima facie right been shown in this case before the committee.

The minority rather considered that the House intended the committee to determine from all the papers submitted the title to the seat. Therefore they examined into the validity of the returns of soldiers' votes and came to a conclusion favorable to Mr. Koontz.

On February 16 and 19[1] the report was debated at length, after which the question was taken on the motion of the minority to substitute resolutions declaring Mr. Koontz entitled prima facie to the seat. This motion was disagreed to—yeas 58, nays 83.

The resolutions as reported from the committee were then agreed to, and Mr. Coffroth was sworn in.

557. The cases of Koontz v. Coffroth and Fuller v. Davidson, continued.

The name of a witness who swore to his own vote not being mentioned in the notice to take depositions as required by law, the vote was rejected.

A precinct return, defective because the certificate of oaths of election officers was wanting, but supplemented by a paper containing the required certificate, was accepted by the House, the State law forbidding rejection for mere informalities.

[1] Journal, pp. 282, 297, 298; Globe, pp. 887, 923–930.

Two companies of soldiers having voted together where the law required a separate poll for each, the vote was counted on testimony showing honesty and fairness in the proceedings, the law forbidding rejection for mere informalities.

Returns of soldiers' votes made to the county of their residence were not rejected by the House because a vote from another county was included, but that vote was rejected.

On July 9, 1866,[1] the Committee on Elections reported on the question of the final right, finding that Mr. Coffroth had not been elected and that Mr. Koontz was entitled to the seat.

The contestant alleged that the official count omitted in the counties of Bedford, Fulton, and Adams the votes of certain soldiers, 258 of which were cast for Mr. Koontz and 99 for Mr. Coffroth. He further alleged that certain votes of paupers had been unlawfully cast for sitting Member.

The sitting Member, besides opposing the allegations of contestant, alleged that certain votes counted for contestant in the official returns were illegal.

In the examination of contestant's claims questions of fact as to the casting and counting of soldiers' votes were largely dealt with. Certain principles were laid down by the committee, however, in determining the result.

The contestant claimed one vote at the Cuyler Hospital, in Philadelphia. The committee decided not to count this vote in the table of votes claimed by contestant for the following reason:

> The committee need not examine this return, notwithstanding all informality is cured by the testimony of the voter who swears he voted for Mr. Koontz. But the name of the witness is not mentioned in the notice to take depositions, as required by the law regulating contests in elections cases, and of this the sitting Member claims the benefit. We therefore deduct one, which is estimated for Mr. Koontz in the above table.

The return of the McClellan Hospital, in Philadelphia, was claimed by the sitting Member to be fatally defective, but the committee held:

> It is the duty of the committee to approach as nearly as possible the ballot box, and, by an examination of all the testimony, see that no legal voter is deprived of his just right to the elective franchise.
>
> We find in the evidence referred to the committee by the House two properly certified papers, one, if taken by itself, defective, because the certificates of oaths are wanting, * * * but, nevertheless evidence of what it contains, to wit, the poll book and tally paper, with signatures of the judges and clerks; the other, which is not in conflict with the first, poll book, certificate of oath of officers, and names and number of electors, signed by same judges and clerks. This makes the testimony complete. The last-mentioned poll book, etc., of itself, though informal, is substantially in compliance with the law. This committee and the House are not circumscribed by the formalities that regulate proceedings of a board of return judges. They can go to the ballot box if necessary. In this instance, by looking at the two returns, no doubt remains of the fact that Mr. Koontz received three votes, which should be counted.

At Front Royal, Va., two companies of the One hundred and thirty-eighth Pennsylvania Regiment voted together, although the law directed that a poll should be opened in each company. While this was sufficient to exclude the return as a prima facie case, yet in a case on the merits the majority of the committee concluded that, as the testimony showed the voting to have been conducted honestly,

[1] First session Thirty-ninth Congress, Report No. 92; 2 Bartlett, p. 138; Rowell's Digest, p. 207.

and with perfect fairness, the votes should be counted. The report also notes the fact that this decision did not affect the result.

As to the One hundred and eighty-fourth Regiment, the return of which came to Adams County, the sitting Member objected that it contained a voter of Franklin County. The committee say:

In his argument he objected to the return because it contained a voter in Franklin County.

That objection can not deprive the qualified voters of Adam County of their right, when a perfect return, as this is, is properly certified by the prothonotary.

But the certificate of prothonotary of Adam County is not evidence to us of vote in Franklin County. In the absence of other testimony we reject one vote from this return for Mr. Koontz, and count for Mr. Koontz 38, for Mr. Coffroth 21.

558. The cases of Koontz v. Coffroth and Fuller v. Davidson, continued.

Instance wherein a claimant seated after examination of prima facie title was unseated after examination of final right.

Election judges and clerks sworn by one having no legal right to administer the oath were regarded by the House as de facto officers and the returns were counted, the State law forbidding rejection for mere informalities.

The State law being silent as to the right of paupers to vote, the House has counted the votes of such persons.

Oral testimony impeaching a return already counted by return judges was held not sufficient to cause rejection of the vote, the actual return not being identified and offered.

As to the Twenty-first Pennsylvania Cavalry at City Point, Va., the committee say:

The judges and clerks were sworn by Capt. James Mickley, who was a qualified voter, but not a judge or clerk of the election who are authorized by the law to administer such oath.

The sitting Member claims this return should be deducted, because Captain Mickley was not an election officer. The soldiers' law, section fifth, says "the oath maybe administered by judges or clerks." Others may administer. But Captain Mickley not being a public officer, had no legal right to administer the oath. But the judges and clerks became, by taking the oath in good faith, public officers de facto, for the purpose of conducting the election, and their acts are valid. This principle is laid down in second Kent, page 339: "In the case of public officers who are such de facto, acting under color of office, by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, their acts are held valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice."

The decision in the Thirty-sixth Congress (see Bartlett's Election Cases, p. 313), in the case of Blair v. Barret, is also in point. We find the following language in the report, of the majority, which was sustained: "There was no evidence (referring to certain precincts) "returned with the return of votes, now before the committee, in any shape at the hearing that the judges of election were sworn. Had it appeared from the evidence that the election had been fairly conducted at these precincts, and there were no traces of fraud, no taint of the ballot box, the committee would not have been willing to have recommended a rejection of these polls. The honest electors should not be disfranchised and their voice stifled from a mere omission of the officers of election to take the oath of office." In the case before us there was not an omission, as we have seen. The evidence is, that "the election was conducted very strictly and fairly; inquiry was made as to age and payment of taxes. Those whom we were not positively certain were of age were sworn. The voters presented certificates showing the payment of tax within two years," etc.

We are therefore clearly of the opinion that this poll should be counted.

The committee finally concluded that Mr. Koontz had a majority of 40 votes.

The House, on July 18,[1] without division, seated Mr. Koontz, the contestant.

The committee make, as a part of their report, a compilation of the Pennsylvania election laws, among which was the following section relating to the voting of soldiers:

> No mere informality in the manner of carrying out or executing any of the provisions of this act shall invalidate any election held under the same, or authorize the return thereof to be rejected or set aside; nor shall any failure on the part of the commissioners to reach or visit any regiment or company, or part of company, or the failure of any company or part of company to vote, invalidate any election which may be held under this act.

The contestant also claimed that the votes of 16 paupers should be deducted from the poll of the sitting Member in Adams County. The committee say:

> The committee can not see why the 16 in Adams County should be deducted from the count of the sitting Member. Each State frames its own laws for the maintenance and care of its poor. The laws provide protectors for the poor, who, "by reason of age, disease, infirmity, or other disability," become unable to work. With regard to the exercise of the elective franchise by such, the laws of Pennsylvania are silent. As they are not expressly deprived of the right, we can not see why the unfortunate, provided for by the public, may not vote as well as if provided for by a parent or a son—certainly not until the authorities of Pennsylvania shall have decided for themselves the law, for which they have had frequent opportunities; therefore we here make no deductions.

The sitting Member claimed the deduction of certain votes on the ground that soldiers' returns improperly made up had been improperly counted in the original official count. This was attempted to be proven by testimony of clerks of county return boards, who testified that certain returns were counted by the return judges, but the actual returns so counted were not identified and made part of the record in the case.[2]

559. The Pennsylvania election case of Covode v. Foster in the Forty first Congress.

The governor having declined to issue credentials because of unsatisfactory returns, the Clerk declined to enroll either claimant, although the governor officially expressed an opinion that a certain one was elected.

In a case where there were no credentials the House, in examining as to prima facie right, declined to permit the election returns to be considered by the committee.

The law requiring a formal proclamation of the governor, the House declined to give prima facie effect to an informal executive communication, especially as the House had the returns.

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[1] Journal, p. 1039.

[2] On June 21, 1866, the Committee on Elections reported on the case of Fuller v. Dawson, from Pennsylvania—a case involving instances of informalities in returns of soldiers' votes under the terms of the Pennsylvania law. The majority of the committee and a large majority of the House sustained the sitting Member, whose majority depended on rather a strict requirement as to records of oaths of election officers and accuracy and regularity of returns, etc. In the debate, which occurred on July 11 and 12, it was urged that the provisions of the Pennsylvania law waiving strict requirements had not been given full effect; but the House sustained the committee and the sitting Member. (First session Thirty-ninth Congress, Journal, p. 1014; Globe, pp. 3747, 3771, 3802; House Report No. 83; 2 Bartlett, p. 126; Rowell's Digest, p. 207.)

Form of resolution instituting a contest in a case wherein neither claimant is seated on prima facie showing.

Certain papers being sent to a committee as the basis of a decision and report, the committee does not take into account other pertinent papers in possession of the House.

On March 4, 1869,[1] at the time of the organization of the House, when the Clerk's roll of Members-elect was called, it appeared that no name had been entered for the Twenty-first district of Pennsylvania. A proposition to amend the roll in this particular was superseded by a motion to proceed to the election of Speaker.

On the next day, March5,[2] after the election of Speaker, the subject came up in the House again. It appeared that there were before the Clerk and also in possession of the House:

(*a*) The general proclamation of the governor of Pennsylvania, dated November 17 1868, declaring who were elected to Congress from the several districts of that State, but stating, in regard to the Twenty-first district:

> That no such returns of the elections have been received by the secretary of the commonwealth as would, under the election laws of the State, authorize me to proclaim the name of any person as having been returned duly elected a Member of the House of Representatives of the United States for that district.

(b) The following letter from the governor to the Clerk of the House, dated some months later than the proclamation:

> Pennsylvania Executive Chamber,
> *Harrisburg, Pa., February 28, 1869.*
>
> SIR: I have the honor to transmit herewith additional affidavits and evidences of fraud submitted to me in regard to the election of Member of Congress in the Twenty-first Congressional district of this State.
>
> These affidavits were taken before officers properly authorized to administer oaths, and indicate the election of Hon. John Covode.
>
> Most respectfully, your obedient servant,
>
> JNO.W. GEARY,
> *Governor of Pennsylvania.*
>
> Hon. Edward McPherson,
> *Clerk House of Representatives, Washington, D. C.*
>
> STATE OF PENNSYLVANIA,
> OFFICE OF THE SECRETARY OF THE COMMONWEALTH,
> *Harrisburg, Pa., February 23, 1869.*
>
> I hereby certify that the signature of John W. Geary, governor of this Commonwealth, to the attached letter, is his genuine signature; and that the accompanying affidavits and papers are the originals filed in this office from time to time since the election held on the 13th of October last.
>
> In testimony whereof I have hereunto set my hand and caused the seal of the secretary's office to be affixed the day and year above written.
>
> [SEAL.]
>
> F. JORDAN,
> *Secretary of the Commonwealth.*

(c) The affidavits reciting the alleged frauds which had determined the mind of the governor as to the right to the seat.[3]

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[1] First session Forty-first Congress, Globe, p. 3.

[2] Journal, pp. 13, 14; Globe, pp. 13–16.

[3] For these affidavits, see Globe, p. 452.

(d) The official returns, both of the district returning board and from the three county boards. One of the three district judges, after participating in the proceedings, had refused to sign the district returns, which was signed by two judges only. These two judges had appended a certificate of the refusal of the third judge to sign.

The Clerk had declined to put the name of either claimant on the roll on the strength of these papers.

The case being taken up in the House, Mr. George W. Woodward, of Pennsylvania, proposed a resolution that "the returns of the election" be referred to the Committee on Elections with instructions to report which claimant had the prima facie right to the seat. Mr. Glenni W. Schofield proposed a resolution seating one claimant, Mr. Covode, on the strength of the documents furnished by the governor.

Both of these propositions were finally put aside in order to adopt the following substitute proposed by Mr. Henry L. Dawes, of Massachusetts:

Resolved, That so much of the proclamation of the governor of Pennsylvania, dated November 17, 1868, as relates to the election of Representative in the Twenty-first district of that State, and the letter of said governor, dated February 23, 1869, relative thereto, together with all the papers referred to in said letter, be referred to the Committee of Elections, when appointed, with instructions to report to the House what person, according to said proclamation, letter and papers, is entitled prima facie to represent said Twenty-first district in the Forty-first Congress pending any contest that may arise concerning the right to such representation.

It is to be noticed that the returns were not included among the papers referred to the committee; and on March 18[1] Mr. Woodward proposed a resolution as follows:

That the certified returns of the return judges of the said Twenty-first district, and all the papers connected therewith now in the hands of the Clerk of the House, be referred to the Committee on Elections with the same effect as if they had been included in the resolution of the 5th instant.

After debate, in which there seemed to exist some confusion as to the real nature of the documents required of the governor to constitute a prima facie case, the House laid Mr. Woodward's resolution on the table.

On March 26[2] the committee reported, the report of the majority being presented by Mr. John Cessna, of Pennsylvania. After quoting the proclamation of the governor and his later letter to the Clerk of the House, the report says:

The signature of the governor to this document was duly certified by the secretary of the Commonwealth, and the seal of the State attached.

It is claimed by Mr. Covode that this letter gives him a prima facie right to the seat—it being a supplemental proclamation, as he alleges, and intended to be the decision of the governor that he, Covode, was elected in the Twenty-first district.

By the general election law of Pennsylvania (Purdon's Digest, eighth edition, section 63) it is provided, where two or more counties compose a district for the choice of a Member of the House of Representatives, that after an election has been held, the judges of election in each county having met, the clerks shall make out a fair statement of all the votes which shall have been given at such election, within the county, for every person voted for as such Member, which shall be signed by said judges and attested by the clerks; and one of the said judges is to take charge of said certificates of votes and produce the same at a meeting of one judge from each county, at such place in such district as is, or may be, provided by law for that purpose. The judges of the several counties having met, are required

[1] Journal, p. 71; Globe, pp. 139–143.

[2] Journal, p. 122; Globe, p. 309; House Report No. 2; 2 Bartlett, p. 519; Rowell's Digest, p. 231.

(see. 64) to cast up the several county returns and make duplicate returns of all the votes given for such office of Representative in Congress in said district, and of the name of the person elected, and to deposit one of said returns for said office of Representative in the office of the prothonotary of the court of common pleas of the county in which they shall meet, and to place the other return in the nearest post-office, sealed and directed to the secretary of the Commonwealth.

The said return judges are also required (sec. 65) to transmit to the person elected to serve in Congress a certificate of his election within five days after the day of making said return.

On the receipt of the return of the election of Members of the House of Representatives of the United States, as aforesaid, by the secretary of the Commonwealth, the governor is required (sec. 113) to declare by proclamation the names of the persons so returned as elected in the respective districts, and also to transmit as soon as may be conveniently thereafter the returns so made to the House of Representatives of the United States.

The committee go on to say that their investigations were confined strictly to the papers referred to them by the committee. And they say that they believe the governor had a right to decide as he did in the letter to the Clerk, being justified in the precedents in the case of Butler v. Lehman. The committee further say:

As there is no prescribed form in the law of Pennsylvania for the proclamation, nor any time fixed at which it shall be issued, nor any specified mode of publication required to be made, it is difficult to see that anything is required by the proclamation named in the law more than a decision as to who is duly elected in the respective districts of the State, and notice of such decision given to the parties elected and to the House of Representatives.

A majority believes that the committee has but little discretion in the premises. The language of the resolution under which we are acting requires us to report to the House what person is entitled, prima facie, to represent the Twenty-first district of Pennsylvania in the Forty-first Congress, according to the papers referred to us. It would seem from this resolution of reference that the House was satisfied that some one had a prima facie right to the seat on these papers, and that the only inquiry for us was as to the person so entitled.

The committee is further sustained in this view from the fact that at the time these papers were referred, an effort was made in the House to refer other papers seeming to be connected with the case, and this effort was unsuccessful. This effort was subsequently repeated with a like result.

Therefore the committee, finding that the other claimant is nowhere mentioned in the papers before the committee, except in an unfavorable light, find Mr. Covode having the prima facie right.

Therefore the majority of the committee reported resolutions giving the seat to Mr. Covode and providing that Mr. Foster, the other claimant, might contest.

The majority of the committee[1] concede that the proclamation of the governor was legal evidence, but they do not admit the same as to the letter to the Clerk:

This letter, being unauthorized by law, has no official character. It is not the act of the governor, but the individual. It is no more legal evidence than would be the unsworn statement of any other citizen of Pennsylvania. Furthermore, it is not under the great seal of the State. It is correctly characterized in the authenticating certificate of the secretary of the Commonwealth, and in the resolution of the House, as a "letter." It does not, like a solemn proclamation, begin, "In the name of the Commonwealth of Pennsylvania," and end with the words "Given under my hand and the great seal of the State," but, like an ordinary epistle, it begins with "Sir," and ends with "Most respectfully, your obedient servant." It is true that it is subscribed "Jno. W. Geary, governor of Pennsylvania." But a letter addressed by the governor, as this is, to the Clerk of the House, recommending an applicant for a position in his department, might have been, and probably would have been, subscribed in the same way, and if so subscribed, would have had the same official character which this letter has. And an

[1] H. E. Paine, of Wisconsin; John C. Churchill, of New York; Albert G. Burr, of Illinois, and Samuel J. Randall, of Pennsylvania, signed minority views.

authenticating certificate of the secretary of the Commonwealth would contribute as much of official character to such a recommendation as the secretary's certificate in this case does to the letter. Inasmuch as this letter is not legal evidence, it is not material to inquire whether, if it really were competent evidence, it would amount to prima facie proof that either claimant is entitled to the seat.

But conceding, for the moment, the right of the governor to issue a supplemental proclamation, is the document of date February 23 such an instrument as is contemplated by the law of Pennsylvania? "A proclamation" is an official notice to the public, a public declaration made by competent authority. By Webster a proclamation is defined as "publication by authority, official notice given to the public," "the paper containing an official notice to a people." But the document in question is a mere private communication sent by Governor Geary to the Clerk of this House. It has none of the elements of a proclamation, is not issued by competent authority, for it lacks authority of law; and an unauthorized act by an official has no more legal force than the same act by a private citizen. It is not addressed or directed to the public, nor is it intended for their consideration. It does not declare a result, but merely ventures an opinion, and that only incidentally, for the object alone of the document was to transmit papers, called "affidavits and evidences of fraud," to the Clerk. The Clerk himself does not consider it in any sense an official document, else he surely would have acted upon it and placed on the rolls the name of Hon. John Covode as the Member from the district in question. Further, the paper under consideration has no "great seal of the Commonwealth," as has the proclamation of November 17; and if it be said that the certificate of the secretary of the Commonwealth shows this paper to have been issued by John W. Geary, as governor, it will be seen that, by the same certificate, the secretary designates the paper in question, not as a proclamation or official document, but as a "letter" only. So far as this is a private communication we have nothing to do with it; but in so far as we are required to consider it in deciding a prima facie right to the vacant seat, the preceding comments are considered justifiable. In the view of the undersigned, for the reason aforesaid, neither the letter of February 23, nor the affidavits accompanying, have any legal value in determining the question submitted. So far as the affidavits are concerned, suppose all were considered as true and in all respects competent as testimony, what do they show? At most, that some votes were wrongfully received, and some erroneously rejected, at the election in question. They do not, nor do any papers before the committee, show how many votes were cast for anyone as a candidate in that district. The only manner in which the "affidavits" could "indicate" a result would be to furnish information whereby we might add to or subtract from the aggregate vote previously ascertained to have been cast for the respective parties; but the only ascertained result is embodied (if anywhere) in the "returns," which have been carefully excluded from consideration here, and which had been sent from the governor months before he ascertained what the affidavits in question "indicated."

The minority deny the right of the governor to do what he did:

By virtue of what law of Pennsylvania were affidavits of any character submitted to the governor for his consideration? By the sanction of what law did he transmit them to the Clerk of this House? By what legal right did he base any act of his on such affidavits, or on any affidavits connected with an election? He had already done all that in his judgment he had any authority to do; and had parted with all the records which gave him an original right to do anything whatever in the case. If he had before that time done all his duty, the duty was ended. If he had omitted any duty, in not having officially declared a result in the Twenty-first district, the time for the discharge of that duty passed, and the power to discharge it ceased, when the returns left his possession; and any later act of his in the premises was without sanction of law, of none effect, and entitled to no consideration here or elsewhere.

The authority of the case of Butler *v.* Lehman is denied after discussion of the precedent.

The minority therefore proposed a resolution declaring that the papers referred to the committee did not show what person was entitled prima facie to represent the district.

The report was debated on April 2.[1] It was pointed out that the law of Pennsylvania did not require the governor to send his proclamation to the House, but did

[1] Globe, pp. 452–466.

require him to send the returns. The returns had in fact been sent, and it was asserted that these returns made out a prima facie case for Mr. Foster. But the House had excluded the Committee on Elections from taking those returns into consideration. But it was urged that the House might consider the returns if the committee did not. Mr. H. E. Paine, of Wisconsin, proposed the following resolution, which was agreed to without division:

Resolved, That the contested election case from the Twenty-first Congressional district of Pennsylvania be recommitted to the Committee on Elections with instructions to report upon the merits of the case, who is entitled to represent said district in this House, with authority to make regulations to govern the mode of conducting the contest and taking testimony.

On April 5 [1] the committee reported and the House agreed to the following regulations:

Each of the claimants shall serve upon the other a notice of the grounds on which he claims the seat before June 1, 1869, and an answer to the notice of his opponent before June 20, 1869. Said Covode shall take his testimony between the 1st and 15th days, inclusive, of July, August, and September, 1869; and said Foster shall take his testimony between the 16th and last days, inclusive, of the same month. The statutory provisions regulating ordinary cases of contest shall apply to this case so far as the same are consistent with these regulations. All testimony shall be transmitted under seal, by the officers before whom the same shall be taken, to the Clerk of the House at Washington, so as to be received by said Clerk before the 15th day of October, 1869; before which days the notices, answers, evidence, and exhibits in the case shall be filed with said Clerk. And the clerk of the Committee on Elections shall immediately thereafter arrange the papers for the Public Printer, and cause the same to be printed before the 1st day of November, 1869; and printed arguments of the claimants shall be filed with the Committee on Elections on the fast day of next session.

560. The case of Covode v. Foster, continued.

An instance of rejection of a poll where irregularities in both the reception and counting of votes, cumulatively considered, showed a want of good faith and regard for law.

Participation of an unsworn person in the count may be held a contributory irregularity in justifying rejection of a poll.

On January 27, 1870,[2] Mr. John C. Churchill, of New York, from the Committee on Elections, submitted a report, the case being called Covode *v.* Foster. The report finds from the certificates of the return judges of the several counties in the district that Henry D. Foster had a returned majority of 41 votes. The majority of the committee were convinced that certain obviously proper corrections would increase this majority to 64.

The majority found, however, that this vote was successfully assailed by Mr. Covode. The examination of this question divided itself into several branches.

(1) In Dunbar Township, where a majority of the board of election officers belonged to Mr. Foster's party, ballots were received for a time in a cigar box and a hat, and afterwards transferred to the regular boxes, the proceeding being contrary to the requirements of Pennsylvania law; persons, some under the influence of liquor, were near the boxes during the day; one inspector of election was under the influence of liquor; challenges were disregarded, in violation of law, and evi-

[1] Globe, p. 510.

[2] House Report No. 15, second session Forty-first Congress, 2 Bartlett, p. 600; Rowell's Digest, p. 237.

dently resulted in the voting of persons not entitled to vote; while the votes were being counted one election officer was taken sick and one, William Speers, shown to be an unscrupulous partisan of Mr. Foster, took the vacant place without being sworn, and officiated until the end of the count; six more ballots were found in the box than could be accounted for by the names on the tally list. The majority of the committee say:

From all the evidence, I think we must conclude that the returns of such an election are too unreliable to be received, and as neither party has attempted to prove what votes were cast for him at that election, that the whole poll of Dunbar Township must be rejected.

While it is well established that mere neglect to perform directory requirements of the law, or performance in a mistaken manner, where there is no bad faith and no harm has accrued, will [not) justify the rejection of an entire poll, it is equally well settled that where the proceedings are so tarnished by fraudulent, or negligent, or improper conduct on the part of the officers as that the result of the election is rendered unreliable, the entire returns will be rejected, and the parties left to make such proof as they may of votes legally cast for them.

The minority [1] do not agree to this:

We do not concur in this conclusion, believing that in such Case it should be made the duty of each party to a contest, respectively, to prove the illegal votes cast at such poll, and for whom such illegal votes were given. Those not proved to be illegal should stand; that is to say, that such poll be purged of its illegal votes only; those left to be duly counted. The merits of a contested election depend upon the finding out which of the candidates received the greatest number of legal votes. The only way to arrive at this is to show of the votes cast for each candidate those that were illegal. It is at no time justifiable to throw out an entire poll, and in this way disfranchise the whole voting population of a district, if it can be purged of its illegal portion. In this case the testimony is full as to Dunbar Township, and the illegal votes, by said testimony, can be readily and conclusively determined. This is a Pennsylvania case, and the courts of that State have, in all contested elections, held that impossibility of ascertaining the true state of the poll is the only ground for rejecting it. To show that the majority themselves are in doubt as to the justness of rejecting this entire poll, they present to the consideration of the House the condition of the poll after they have purged it of all the illegal votes alleged and proved to have been cast. This latter course should commend itself to your judgment, and while being in strict accordance with law and precedent, is, at the same time, a protection to the honest voters in every poll.

After reviewing each irregularity the minority say:

One by one we have disposed of the complaints and irregularities made against this (Dunbar) township poll. Surely, if they can not stand singly, they should not be made to prop each other and thus have force combined.

In the debate [2] the majority did not contend that any one of the irregularities would justify the contemplated action, but did urge that taken together they showed—

a want of that good faith and regard for law the presumption of which is the foundation of the authority which is given to the returns of an election board.

The position of the minority against the rejection of the return was analyzed in the debate [3] the point being made that the rejection of returns in which no confidence could be placed was not a disfranchisement of legal voters. It was simply

[1] The minority views were signed by Messrs. Samuel J. Randall, of Pennsylvania; Albert G. Burr, of Illinois, and P. M. Dox, of Alabama.

[2] Remarks of Mr. Churchill, Globe, p. 1116.

[3] By Mr. Luke P. Poland, of Vermont, Globe, p. 1158.

a declaration that the candidates could not use the discredited return to prove the votes, but must prove the votes otherwise. Not having submitted any proof, no votes could be counted.

561. The case of Covode v. Foster, continued.

Neglect of a mandatory law requiring a voting list to be furnished at a poll was, in connection with questionable acts of partisan election officers, sufficient to justify rejection of the poll.

Paupers supported in a county poorhouse were held to have gained no residence in the town by reason of this enforced stay.

The House has rejected votes of lunatics whose votes had been received by election officers and in whose cases there had been no findings in lunacy.

(2) The majority of the committee found that through the apparently intentional irregularities practiced by one Eisaman, an assessor whose duty it was to furnish the voting list at Youngstown election district, the officers of election used a list which Eisaman had posted in accordance with law, but not the list he was required to furnish for the election. The report says:

The assessor assessed persons who made no personal application to him, contrary to the law; the names of the persons so assessed he did not enter upon the list in his possession, as required by law, but upon a separate piece of paper, which was not a legal assessment; nor did he furnish any copy of this to the county commissioners at any time before the election, nor to the inspectors of elections on or before 8 o'clock on the forenoon of the day of election, as required by law. All these provisions of law are not directory merely, but mandatory, and enforced by severe penalties. (Election Laws, p. 42, sec. 85.)

But whether the assessment made by Eisaman was a legal assessment or not (and we think no legal assessment was shown to have been made), the failure of Eisaman to furnish to the inspectors a copy of the list had the same effect, so far as that election was concerned, as though no assessment whatever had been made.

The law of Pennsylvania is explicit that when the name of the person coming to vote is not found on the list furnished by the commissioners or assessors the board must examine him under oath as to his qualifications, and he must prove by at least one witness, who must be a qualified elector, that he has resided in the district at least ten days next immediately preceding the election. (Election Laws, 33, sec. 42, 2 par., 553, 580–581.) That law further provides that if any inspector or judge shall receive the name of any person whose name shall not be returned on the list furnished by the commissioners or assessor without first requiring the evidence directed by the act, the person offending shall, on conviction, be fined not less than $50 nor more than $200. (Election Laws, 41, sec. 81.)

The assessor having failed to furnish the inspectors with any copy of the list of taxables, the board could legally receive no vote at that election, except by requiring him to be examined as to his qualifications under oath, and to furnish the further evidence required by the act. Nothing of this kind was done; but, instead, the votes of persons were rejected because their names were not found on this paper taken from the tavern wall, and they were permitted to vote because their names were found thereon. This alone we think sufficient to invalidate the election in that district.

But the conduct of the election board was equally blameworthy with that of the assessor. From the report which had gone out that an unusually large number had been assessed at the monastery, and from the gathering of strangers there, it was believed that improper votes would be attempted to be polled, and a purpose seems to have been formed to prevent these votes being received, except upon proper examination. But from the commencement of the election until about 11 o'clock, during which time the greater part of these votes were polled, challenges were entirely disregarded.

In addition, the paper used by the election officers disappeared after the election, and there was no means of determining as to its value. Also all the election officers were of Mr. Foster's party.

Therefore the majority recommend the rejection of the entire vote of Youngstown as returned.

The minority find that the assessor performed properly all the duties in relation to the lists, except one:

But the last requirement—i. e., to make out duplicates of these lists and file one in the county commissioner's office and hand the other to one of the inspectors of the election before 8 o'clock on the morning of said election—was neglected to be done by the assessor. And because of the neglect of this one, and not the most material requirement, having fulfilled every other duty incumbent on him, and in so doing acting under the sanctity of his official oath, the majority ask now to reject this entire poll.

If there had been no official act whatever performed by the assessor necessary to the proper conduct of this election, then the committee might, with some propriety, ask for the rejection of this poll. In performing none of his duties, the officers of the election would have been compelled to close the polls or to have proceeded without official knowledge as to who were the taxables and voters of the district; even then we hold that it would have been competent for the officers of the election to have received the votes of all persons offering to vote, who, upon examination under oath, were found to have the constitutional qualifications of voters. But they were placed in no such position by the neglect of this assessor. They were not without a proper guide for the conduct of the election.

(3) It was shown that in South Union certain inmates of the local poorhouse, who were sent there from other townships, had voted for Mr. Foster. The same thing occurred at Hemphill Township. The majority of the committee conclude:

The testimony further shows (Zundell, 191) that none of these persons were assessed upon personal application, and also that none of them paid the tax upon which they were permitted to vote (192, 273), but that their names were handed to the assessor and their taxes paid by an official who understood that they would vote, and for the purpose of enabling them to vote a particular ticket, both assessment and payment of tax being illegal as against the express letter of the election laws of Pennsylvania. (Election Laws, 24, sec. 13; 40, sec. 75.) But did these persons acquire a residence in the election district where the county-house was situated, within the meaning of the law of Pennsylvania, which requires that the voter shall have resided at least ten days immediately preceding the election in the district where he offers to vote? We think not. Their residence at this place was not their own voluntary act, but the act of the public authorities, who, for reasons of economy and convenience, sent them here that they might be supported at the public expense.

The court, in Murray *v.* McCarty (2 Mun., 397), says, that to divest a person of the character of citizen of a particular place, "there must be a removal with *an intention to lay aside that character,* and he must *actually join himself to some other community.*" The italics are those of the original report.

So Burrill (Law Dic., tit. Residence) defines residence as "the place which one has made his seat, abode, or dwelling." The derivation, as well as the ordinary acceptation of the term, denotes the place where the party has seated himself, and his own choice or free will in the matter is assumed. We think this the legal as well as the ordinary meaning of the term, and that accordingly the soldier who occupies a place at the command of his military superiors, the criminal who does the same thing while in custody in the hands of the criminal authorities, and the pauper who is placed and supported in the county poorhouse at the public expense, gains no residence in the town by his enforced stay. We think, therefore, that these fifteen votes should be deducted from the vote for Mr. Foster.

The minority decline to sanction the deduction of the poorhouse vote, quoting the case of Koontz *v.* Coffroth.

(4) The majority rejected the votes of certain lunatics, saying:

As to lunacy, it was held by the court in Thompson *v.* Ewing (1 Brewster, Rep., 104), that it was proper to show in a contested-election case that a voter was non compos mentis, and that without a finding in lunacy.

The minority say:

As to the lunacy vote—four in number—we desire to say that the constitutional requirements do not set up any prohibition as against simple-minded men or lunatics. The extent of the mental imbecility would seem, therefore, to have been left to the officers of the election to determine, and upon such extent of weak intellect admit or reject the vote when offered.

562. The case of Covode v. Foster, continued.

The House rejected a vote found by the judges in an irregular place and counted in spite of the fact that it caused an excess in the poll.

The House may count votes improperly rejected by election officers.

The House may count votes not cast because of intimidation practiced in presence of the election officers and which it was their duty to prevent.

(5) Certain other votes the majority reject:

To these should be added 1 vote for Foster for Congress found in the State box in Sewickly Township and counted to him, although thereby the number of votes for Congress was made one greater than the number of names on the list (377).

Also, 1 vote for Foster in South Huntingdon Township, found upon the floor at the close of the counting, a considerable crowd standing around, and counted to Foster, although thereby the number of votes for Congress was made one more than the number of names on the list of voters.

The minority say:

How such conclusion can be reached passes our comprehension. If anyone can determine that the vote in excess may not have just as likely been cast for Mr. Covode as for Mr. Foster, he will have succeeded better than can be determined by those who sign this report. So, also, with regard to one vote in South Huntingdon Township, which was found on the floor, and counted for Mr. Foster.

In the debate the majority retorted that the votes found not in the ballot box but in an irregular place was certainly the one to be deducted.

(6) The majority also counted certain votes not cast. There were votes improperly rejected, and one vote prevented by threats of violence made in the presence of the election officers, and against which it was the duty of the election officers to protect the voter.

The majority of the committee found Mr. Covode elected by 402 majority, and reported the following resolutions:

Resolved, That Henry D. Foster is not entitled to a seat in this House as Representative from the Twenty-first Congressional district of Pennsylvania.

Resolved, That John Covode was duly elected Representative in Congress from the Twenty-first Congressional district of Pennsylvania at the election held therein on the 13th day of October, 1868, and that he is entitled to a seat in this House as such Representative.

The report was debated at length on February 8 and 9,[1] and on the latter day a resolution offered as a substitteu declaring Mr. Foster entitled to the seat was disagreed to—yeas 49, nays 122.

The first resolution of the majority was agreed to without division. The second resolution was then agreed to—yeas 121, nays 45.

Mr. Covode was then sworn in.

[1] Globe, pp. 1114, 1121, 1149, 1154–1160; Journal, p. 291.

563. The Senate election case of Henry A. Du Pont, of Delaware, in the Fifty-fourth Congress.

A claimant to a seat in the Senate, in a case where there was no contestant and no credentials, petitioned for the seat, exhibiting evidence in support of his claim.

A Senate discussion as to incompatible offices and as to cases wherein the acceptance of one creates a vacancy in another.

A Senate committee concluded that the Journal entries of a legislative body were conclusive as to all the proceedings had and might not be contradicted by ex parte evidence.

The senate of a State having failed to adjudge a participating Member disqualified, the United States Senate, in a close decision, declined to reject the vote of the said Member for Senator.

On December 4, 1895,[1] in the Senate, Mr. John H. Mitchell, of Oregon, presented the following:

To the Senate of the United States:

The undersigned hereby claims the right to be admitted as a Senator from the State of Delaware under an election by the legislature of said State on the 9th day of May, A. D. 1895, to fill the term of six years, commencing on the 4th day of March, A. D. 1895, and herewith presents evidence in support of his claim.

H. A. DU PONT.

This paper, which was treated and described as a petition, was accompanied by a certificate of the speaker of the Delaware house of representatives, attested by the clerk of the said house, setting forth the proceedings by which it was claimed that Mr. Du Pont had been elected, and the particular question wherein a doubt as to his election was involved.

These papers, as well as others filed at a later date, were referred to the Committee on Privileges and Elections.

No request was made that Mr. Du Pont should be sworn in; but he was accorded the privileges of the floor of the Senate.

On February 18, 1896,[2] Mr. Mitchell presented the report of the committee, which was concurred in by Messrs. George F. Hoar, of Massachusetts; William E. Chandler, of New Hampshire; Julius C. Burrows, of Michigan; and J. C. Pritchard, of North Carolina. The minority dissented and filed views which were signed by Messrs. David Turpie, of Indiana; James L. Pugh, of Alabama; George Gray, of Delaware, and John M. Palmer, of Illinois.

As to the facts, the report says:

The legislature of the State of Delaware consists of a senate, composed of 9 senators, 3 of whom are elected from each of the three counties of the State, and a house of representatives of 21 members, 7 of whom are elected from each of the three counties of the State. When there are no vacancies in the membership, and all are present in joint assembly of the two houses for the purpose of electing a United States Senator, such joint assembly is composed of 30 members, thus requiring the votes of 16 members to elect.

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[1] First session Fifty-fourth Congress, Record, pp. 29, 30.

[2] Record, pp. 1827–1861. The report, with minority views and exhibits, is printed in full in the Record.

In the event of one vacancy caused either by death, resignation, inability to act, or for any other reason, then the joint assembly, all others being present, would be composed of 29 members, in which event the votes of 15 members would be sufficient to elect.

At the meeting of the joint assembly of the legislature of Delaware on the 9th day of May, 1895, which assembly, it is conceded, was in all respects regularly called and held in pursuance of law, the final vote was as follows:

Joint meeting proceeded to another ballot, which resulted as follows:

* * * * * * *

H. A. Du Pont had	15
Ed. Ridgley had	10
J. Edward Addicks had	4
Ebe W. Tunnell had	1

There being present in such joint assembly, and each casting a vote, 30 persons, each claiming to be a member of the legislature of the State of Delaware and entitled to vote for United States Senator.

It is conceded by Mr. Du Pont and by your committee that if this contention is true—that is, if each of the 30 persons so present in such joint assembly and each of whom cast a vote for Senator was a duly qualified member of the legislature of the State of Delaware and under no disability as such which would deprive him of his right to a seat in such assembly and to cast a vote for Senator—then Mr. Du Pont was not elected Senator and is not entitled to a seat in the Senate.

It is admitted upon the part of Mr. Du Pont, and such is the fact, that of the 30 persons so present and claiming a right to vote as aforesaid, 29 of them were so qualified. It is contended, however, that 1 of the 30, namely, William T. Watson, claiming to be a senator from the county of Kent, and claiming to be the speaker of the senate, and claiming the right, as such senator, to be present and participate in the proceedings of such joint assembly, and to cast his vote for Senator, was not entitled under the constitution of the State of Delaware and the laws of the land, to be present in such joint assembly, had no right to be counted therein in making up the number present, and had no right to cast his vote in such assembly for any person for Senator.

If this contention upon the part of Mr. Du Pont is correct, then it is conceded, provided the right to inquire into Watson's qualifications to vote in such assembly now exists, that, inasmuch as in that event there were but 29 members of the legislature of the State of Delaware present entitled to vote, and as it is conceded Mr. Du Pont received the votes of 15 of such members, no one of which was that of Mr. Watson, thus receiving a clear majority of all the votes cast, entitled to be cast, he was duly elected Senator, and is entitled to his seat.

The whole question involved, then, in this case is as to the right of Watson to be present in such joint assembly, and to be counted therein in making up the number present, so as to require the votes of 16 members to make an election.

The ground upon which it is claimed upon the part of Mr. Du Pont that Mr. Watson was ineligible to a seat in such joint assembly, and should not have been counted therein in making up the number constituting the same, is based on the fact that, although he had been duly elected a senator from the county of Kent, and from the commencement of the session in January, 1895, until April 9 of that year, had held and occupied a seat in the senate and had been elected speaker thereof, and served in that capacity, he had, on the 9th day of April, 1895, the governor of the State of Delaware, Joshua H. Marvil, having died the day previous, succeeded to the governorship of the State in virtue of a provision of the constitution of that State, and from that date until the 9th day of May following had continued to exercise the functions and duties of executive of the State, and has ever since and still continues to exercise the office of governor of said State, and that, therefore, on that date, May 9, 1895, he, then holding the office of and being the governor of the State of Delaware, was ineligible to a seat in said joint assembly, and had no right whatever, under the provisions of the constitution of the State and of the laws of the land, to be present, either to participate by his vote or otherwise, or to be counted therein.

Your committee hold that this contention on the part of Mr. Du Pont is well founded.

The clause in the Delaware constitution in pursuance of which Mr. Watson, as speaker of the senate became governor on April 9, 1895, and which will be commented on later in this report, is found in section 14 of Article III, and is as follows:

"Upon any vacancy happening in the office of governor by his death, removal, resignation, or inability, the speaker of the senate shall exercise the office until a governor elected by the people shall be duly qualified."

It is conceded a vacancy in the office of governor occurred on April 8, 1895, by the death of the then governor of the State, Joshua H. Marvil; also that Senator Watson was then and on April 9, 1895, speaker of the senate, and that on this latter date he took the required oaths, was inaugurated, and entered upon the exercise of the office of governor, and has continued to hold and exercise such office ever since.

PROCEEDINGS OF THE LEGISLATURE.

The legislature of the State of Delaware met in biennial session on the first Tuesday of January, 1895, and on that day organized by the election of speakers and other officers for the senate and house of representatives. There were at that time 9 members of the senate and 21 members of the house of representatives, 3 senators and 7 representatives having been chosen from each of the three counties in the State. At the organization of the senate William T. Watson was duly elected speaker and continued in the discharge of his official duties as speaker of the senate, save during occasional absences, until the 9th day of April, 1895, the day following that on which Joshua H. Marvil, governor of the State of Delaware, died.

This legislature being charged with the duty of electing a Senator of the United States for the constitutional term of six years commencing on the 4th day of March, 1895, and having failed to elect such Senator on the second Tuesday after the meeting and organization of such legislature, convened in joint assembly on the next day, being the 16th day of January, pursuant to the provisions of the act of Congress entitled "An act to regulate the times and manner of holding elections for Senators in Congress," approved July 25, 1866, and proceeded to vote for a United States Senator.

No one having been elected to that office on that day, the legislature, pursuant to the provisions of said act, convened in joint assembly on the following and succeeding days, Sundays excepted, until and including Thursday, the 9th day of May, 1895. No one was elected United States Senator prior to the day last named. On the 9th day of April aforesaid, immediately after the joint assembly of the two houses had separated, Senator William T. Watson, who at the time of the death of Governor Marvil, which occurred on the preceding day, had been speaker of the senate, took the official oaths prescribed for-the governor of the State of Delaware, and forthwith entered upon the exercise of that office.

It is conceded that from the commencement of the voting for a United States Senator until and including the 9th day of April, Senator William T. Watson took part in such voting except during occasional absences.

Furthermore, it is a conceded fact, and if not conceded, fully borne out by the journal entries and other testimony, that from the time he took the oaths of office and assumed the functions of governor in the exercise of such office until the final joint assembly of the two houses on the 9th day of May, Governor Watson did not upon any occasion take any part either in the proceedings of the senate or of the joint assembly.

And, further, it is clear to your committee from the record and other evidence submitted that from the hour of his inauguration as governor, by taking the constitutional oaths required of a governor, his name was dropped from the roll call of the senate and was never once called, either as of speaker or as of a senator, on any roll call had on any bill, resolution, or motion until the final adjournment of the senate. Senator Alrichs, in his affidavit of date January 28, 1986 (Doc. 9, part 6, p. 1), shows this conclusively, and it is not contradicted by any affidavit filed in the case.

* * * * * * *

It is conceded, however, that Governor Watson did, on the 9th day of May aforesaid, enter the final joint assembly and assume the right to be counted as a member of such assembly, and the right to vote therein for a United States Senator. During this final assembly 28 ballots were had for United States Senator. The vote upon each ballot as shown by the record of such assembly was as follows:

	Votes.
Henry A. Du Pont	15
Ed. Ridgely	10
J. E. Addicks	4
E. W. Tunnell	1

William T. Watson, then governor of the State of Delaware, as aforesaid, cast his vote each time for Ed. Ridgely.

It will be seen, therefore, the whole question of the right of Mr. Du Pont to a seat in the Senate, as claimed, turns upon the single question: Had William T. Watson, then holding and exercising the office of governor of the State of Delaware, a right under the constitution of that State and the laws of the land, to exercise the office of State senator, and as such to sit in the joint assembly on May 9, 1895, to be counted therein in making up the number constituting such joint assembly, and to vote therein for a United States Senator? Your committee are clearly of the opinion he had not.

PROPOSITIONS INVOLVED.

In determining this question three different propositions are presented for our consideration:

First. Did the offices of senator and speaker of the senate, held by William T. Watson from the commencement of the session of the Delaware legislature in January, 1895, until April 9, 1895, become absolutely vacant on the inauguration of said William T. Watson as governor of the State by taking the oaths of office required of a person entering upon the exercise of that office? Or,

Second. If such offices of senator and speaker of the senate did not become absolutely vacant upon such inauguration as governor, was the right of Watson to exercise the functions of both speaker of the senate and senator held in abeyance and suspended for and during the time he should continue to hold and exercise the office of governor? Or,

Third. While holding and exercising the office of governor did said William T. Watson not only continue to hold the offices of senator and speaker of the senate, but did his right to exercise all the functions of such senator and speaker of the senate while holding and exercising the office of governor continue to exist?

The answer to either or both of the first two propositions in the affirmative settles the question in favor of the right of Mr. Du Pont to a seat, while an affirmative answer to the third proposition, which of course negatives the other two, would be a denial of his right to a seat.

The report discusses at great length the various questions involved in the case, and arrives at the following conclusions of law and fact:

(1) It is a well-settled rule of the common law that the same person shall not exercise simultaneously two incompatible offices; and further, the acceptance of one is ipso facto a resignation of the other.

(2) Under the American system executive and legislative offices are incompatible, and the same person can not exercise both simultaneously in the absence of either express or clearly implied statutory or constitutional authority; and the acceptance of the second is ipso facto a resignation of the first.

(3) There is no express or implied authority in the constitution of the State of Delaware for the simultaneous exercise by the same person of the offices of governor and senator; on the contrary, such constitution expressly interdicts such exercise of those two offices.

(4) Whether or not the offices of State senator and speaker of the senate became absolutely vacant when Speaker Watson took the oath of office, was inaugurated governor of the State, and entered upon the exercise of that office, there can be no doubt, on a fair construction of the several constitutional provisions of the State of Delaware, that his right to exercise the office of senator or speaker of the senate, or any of the functions connected therewith while he continued to hold and exercise the office of governor, was held in abeyance and absolutely suspended.

(5) The theory that Mr. Watson can exercise the office of governor of the State and State senator simultaneously, involves innumerable constitutional repugnancies, perplexing difficulties, and endless absurdities; while the opposite theory reconciles and harmonizes all the provisions of the Delaware constitution relating to the subject under consideration.

(6) That Governor Watson's exercise of the office of senator in the joint assembly on the 9th day of May, 1895, and of the office of president of such joint assembly was illegal, and his vote therein for United States Senator a nullity.

In determining the above propositions your committee reach the further following conclusions:

(7) In determining the question as to whether the Delaware senate on May 9, 1895, acted upon or judged, either actually or constructively, the qualifications of Governor Watson to a seat in the senate, the journal entries of the proceedings of the Delaware senate of that date are conclusive as to the number

and names of senators present, the motions submitted, the votes cast, and of all the proceedings had, and can not be contradicted by ex parte affidavits.

(8) The right which undoubtedly belongs exclusively to the Delaware senate to judge of the elections, returns, and qualifications of members, does not vest in such senate any exclusive right as would conclude the Senate of the United States to determine by construction whether the constitution of the State of Delaware does or does not recognize a certain seat in the senate as subject to occupation—nor does it include the power to admit members to seats not recognized by the constitution of the State as subject to occupation, or, if subject to occupation, to fill them in a manner or by a person which the State constitution forbids.

(9) Your committee, applying these rules, find as a matter of fact the Delaware senate never judged of the qualifications of Governor Watson to a seat in the senate, either on the 9th day of May, 1895, or at any other time subsequent to the date of his inauguration as governor.

(10) That on May 9, 1895, the date on which Mr. Du Pont claims to have been elected, the legislature of the State of Delaware consisted of but 29 members; there were in the joint assembly on that date but 29 members of such legislature entitled to seats in such joint assembly and entitled to be counted and vote therein. As Mr. Du Pont received 15 votes, being a majority of the whole number entitled to be cast in such joint assembly, and a majority of all the legal votes cast therein, he was legally elected Senator from the State of Delaware for the full term commencing March 4, 1895, and is entitled to be seated.

(11) The fact that such election is not certified by the governor of the State in pursuance of the statute on that subject does not invalidate such election in any respect.

Your committee, therefore, report to the Senate the following resolution and recommend its adoption:

Resolved, That Henry A. Du Pont is entitled to a seat in the Senate from the State of Delaware for the full term commencing March 4, 1895.

The minority held that because of the peculiar provisions of the constitution of Delaware the common law as to incompatibility would not apply.

The constitution of Delaware does not provide that the speaker of the senate, on the death of the governor, shall either be or become governor, but only that such speaker "shall exercise the office of governor." It does not provide that he shall, in such an event, cease to be speaker, or cease to be senator, or that a vacancy exists in either position; and we do not think that we can amend. the constitution of a State by the process of an argument in a contested seat here.

Not only is no vacancy created in such instance by the devolution of "the exercise of the office of governor" upon the speaker of the senate, but the constitution of the State expressly provides that I "each house, whose speaker shall exercise the office of governor, may choose a speaker pro tempore"—that is, a temporary speaker to preside in the room of the permanent speaker when he may be absent, thus plainly implying that there is no vacancy in the office of speaker, and that there is no vacancy in the office of senator or representative (as no one could be speaker except a member of one of the houses) by this devolution of the exercise of the office of governor.

In section 14 of the constitution, where it is provided that the speaker of the house "shall exercise the office of governor "if there be no speaker of the senate, the distinction between the speaker of either house exercising the office of governor, and the governor as such, is very clearly implied in the phrase, "until a governor elected by the people shall be duly qualified." And in the same section, afterwards, the person elected governor is distinguished from the temporary occupant exercising the office of governor by the recurrence three times of the phrase, "the person who exercises the office of governor." And when the contingency arises of a vacancy in the office of governor, and there be no other person who can exercise the office of governor within the provisions of the constitution, the general assembly shall proceed to elect "a person to exercise the office of governor until a governor elected by the people shall be qualified."

This person so chosen is not called governor, but a "person to exercise the office of governor."

And when, in the case of a contested election, someone is to be designated to perform gubernatorial duties, it is provided "that the speaker of the senate or the speaker of the house who may then be in the exercise of executive authority" shall continue therein until a determination of the contest. It is manifestly expressed that the person exercising the executive authority is not the governor, but

that he is, and remains, and must continue to be speaker of the senate, or speaker of the house, notwithstanding the fact that the "exercise of the office of governor" may for the time being devolve upon him.

If this interpretation of the constitution of the State were at all doubtful, it is abundantly sustained by practical, contemporaneous, and continuous construction in the actual administration of the government of Delaware. Three persons, upon each of whom at different times devolved, under this clause, the exercise of the office of governor (John Sykes, Jacob Stout, and Caleb Rodney), speakers of the senate, who temporarily exercised the executive authority as such speakers, after they had exercised the office of governor ad interim, returned to the senate and served out the terms for which they had been elected as senators in the senate. No suggestion was made that they had vacated their office as senators or had become governors of the State of Delaware by reason of the temporary exercise of executive duties imposed upon them by section 14, article 3, of the constitution.

Furthermore, the minority contended:

The senate of the State of Delaware is made by law the judge of the elections, returns, and qualifications of its own members. In the case presented by Mr. Du Pont against the legality of the vote of Mr. Speaker Watson as a member of the joint convention, no question is made as to the election and return of Mr. Watson as a senator. The whole case rests upon the question of his qualifications. And even upon the subject of qualification, it is not denied that at the time he took his seat in the senate, he was fully and legally qualified to act and vote therein, but it is earnestly insisted that after he bad taken his seat he did and performed certain acts and duties which deprived him of his legal qualifications, and had rendered him unqualified, disqualified, and incompetent to vote or act as a member of the senate or of the joint convention.

This position of the claimant, Mr. Du Pont, raises the most serious question in this case, which is, as to who can lawfully decide and determine as to whether or not the acts of Mr. Speaker Watson referred to destroyed or suspended his qualifications as a senator, and by consequence as a member of the joint convention.

We think that the senate of the State of Delaware, whereof he was a member, is the sole tribunal which could either hear or determine lawfully these objections to the qualifications of Senator Watson.

It is charged that he was absent from the senate from the 9th day of April, 1895, until the day of the joint convention. If he were absent in discharge of any duties, executive or official by the law of Delaware, incompatible with the office of senator, or if his absence was contumacious and perverse, this might have constituted a cause for the judgment of the State senate for his ouster from the senate, his suspension as a senator, or the vacation of his seat. If, whether present or absent, during his term, he had committed any act in violation of the laws and constitution of his State, or of the United States, this might have constituted a cause for the judgment of the State senate against him for his suspension or for his expulsion; the vacation of his seat and office, and for the issuing of a writ of election for the choice of his successor as senator from the county of Kent.

Causes for judgment of suspension, ouster, vacation, or expulsion against a sitting member or senator are not, however well founded, judgments. They have legally none of the force or effect of judgments or adjudications. There is no judgment or adjudication shown in the record or journal of the senate of Delaware on any of these objections to the qualifications of Mr. Watson as a member of that body.

If these charges or objections to his qualifications had been presented and heard in the State senate, and judgment of suspension, ouster, and vacation had been rendered against him, the case of Mr. Du Pont might have been fully made out. This Senate and court of the United States would have been bound thereby. If such a hearing had terminated in his favor, the same result would have followed. The judgment of the State senate is a finality.

As there was no hearing or judgment in respect to such charges in the State senate, the seat and office of Senator Watson remains undisturbed and unaffected thereby.

Because the State senate did not pass upon these charges or objections to the qualifications of their fellow-member, we in this body are not by law in anyway authorized to take jurisdiction. We have no authority to originate, hear, or determine any objections to the qualifications of those who acted and voted as members of the senate of the State, or to revise or review their action or non action in the premises

These considerations rest upon the great doctrine of the due distribution of powers, and of

the distinctive provinces of independent powers, to which the claimant in this case has so strongly appealed, and which we now justly invoke as showing the error of his position.

The constitution of Delaware, like that of the other States, and of the United States, declares that "each house shall judge of the elections, returns, and qualifications of its own members."

Each House of Congress is a court in such cases for the judgment of its own members, but neither is a court or can be in any form a tribunal to judge of the qualifications of any member of the State legislature.

The minority discuss in this connection the cases of Sykes *v.* Spencer, Turpie and Clark and Maginnis *v.* Sanders and Power. Therefore the minority concluded:

First. That if there be any questions as to the lawful qualifications of William T. Watson to act and vote as a senator, and, by consequence, as a member of the joint convention, this is not the place, the time, or the tribunal to either hear or determine such questions.

Second. The senate of the State of Delaware had paramount and exclusive jurisdiction to adjudge such questions, and, whether they exercised such jurisdiction or not, the Senate of the United States has no jurisdiction in the premises.

Third. That Mr. Watson having acted and voted as a senator and as a member of the joint convention at the time when the vote was taken under which Mr. Du Pont claims his election to a seat in this body, he is to be counted as a member of the legislature of Delaware in joint convention assembled; that the whole number of members voting, being the whole number of members of both houses, was 30; that Mr. Du Pont did not receive a majority of this whole number; that we can not make his vote of 15 a majority of such whole number by subtracting therefrom the vote of one whose right and title to vote is not shown by the record to have been adjudged against by the body of which he acted as a member.

The report was debated at length in the Senate on March 5, 9–12, 18, 20, 31, April 1, 2, 13–16, May 4, 14, 15.[1]

On May 15,[4] the question was taken on the motion of Mr. Turpie to insert the word "not" before the word "entitled" in the resolution proposed by the majority. This amendment was agreed to—yeas 31, nays 30. So it was—

Resolved, That Henry A. Du Pont is not entitled to a seat in the Senate from the State of Delaware.

564. The case of Henry A. Du Pont, continued.

The Senate has decided that, while discovery of new evidence might cause review of a decision in an election case, it should not for other reasons change a judgment once made.

On January 12, 1897,[2] at the next session of the Congress, Mr. Chandler presented a memorial from Henry A. Du Pont alleging that he is justly entitled to a seat in the Senate from the State of Delaware, and that under the circumstances the question of the validity of his election should again be investigated and acted upon, and that he hopes and expects to show on another consideration of the subject that he is entitled to such seat, and praying the Senate to reconsider the case and seat the petitioner.

The memorial was received and referred to the Committee on Privileges and Elections.

At later dates various petitions and memorials on the same subject were presented and referred.

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[1] Record, pp. 2419, 2477, 2595, 2639, 2684, 2728, 2921, 3004, 3378, 3423, 3469, 3898, 3943, 3981, 4031, 4768, 5226, 5286.

[2] Second session Fifty-fourth Congress, Record, p. 706.

On March 1[1] Mr. George F. Hoar, of Massachusetts, presented the unanimous report of the Committee, as follows:

Mr. Du Pont presented to the Senate, December 4, 1895, a petition for admission as Senator from the State of Delaware for what then remained unexpired of the term beginning March 4, 1895.

It appeared that at a joint convention of the two houses of the legislature of the State of Delaware, duly held on the 9th day of May, 1895, 15 votes were cast for Mr. Du Pont and 15 votes for other candidates. One of the votes cast for other candidates was the vote of the acting governor of the State of Delaware, who had succeeded to the executive chair on the death of the governor. He was a senator and the speaker of the Delaware senate at the time of the alleged election, the term of office for which he had been elected for senator and speaker having not expired. If he were entitled to vote, Mr. Du Pont was not lawfully elected. If he were not so entitled, Mr. Du Pont had a majority of 1 vote. The question of his right to vote depended upon the question whether his accession to the executive chair by virtue of the constitution of the State should deprive him of his title to vote as a senator.

That question was the only one raised in the discussion of Mr. Du Pont's title to a seat in the Senate. The Committee on Privileges and Elections reported in his favor and there was a full discussion of the question.

On the 15th day of May, 1896, the Senate passed the following resolution by a majority of 1 vote:

"Resolved, That Henry A. Du Pont is not entitled to a seat in the Senate from the State of Delaware for the full term commencing March 4, 1895."

Mr. Du Pont now prays to have this question reopened. The grounds of his application, as stated in his petition and by his eminent counsel in an argument addressed to the committee, are:

First. That there was a mistake in the pairs as announced when the vote on this resolution was taken, so that a senator who was in favor of Mr. Du Pont was paired against him. On investigation we find that no such mistake occurred, and that every Senator who desired to vote who was in favor of Mr. Du Pont either voted for him or was paired in his favor.

Second. That the petitioner expects to satisfy the Senate that it was wrong in its construction of the constitution of Delaware when it held that the vote of the acting governor for another candidate than Mr. Du Pont was lawful.

New Senators have entered the Chamber since the resolution just cited was adopted. Nothing else has changed. The case then stated and acted upon is the case now stated. The simple question is: Whether the Senate, notwithstanding its decision of May 15, 1896, will now admit Mr. Du Pont to a seat?

The majority of your committee now, as then, are of the opinion that this decision of the Senate was wrong; but the Senate is made by the Constitution, the judge of the elections, qualifications, and returns of its Members, and its judgment is just as binding in law, in all constitutional vigor and potency when it is rendered by one majority as when it is unanimous.

It is clear that the word "judge" in the Constitution was used advisedly. The Senate in the case provided for is to declare a result depending upon the application of law to existing facts, and is not to be affected in its action by the desire of its members or by their opinions as to public policies or public interest. Its action determines great constitutional rights—the title of an individual citizen to a high office and the title of a sovereign State to be represented in the Senate by the person of its choice. We can not doubt that this declaration of the Senate is a judgment in the sense in which that word is used by judicial tribunals. We can conceive of no case which can arise in human affairs where it is more important that a judgment of any court should be respected and should stand unaffected by caprice or anything likely to excite passion or to tempt virtue. Then the Senate decided the question it was sitting as a high constitutional court. In its action we think it ought to respect the principles, in giving effect to its own decision, which have been established in other judicial tribunals in like cases and which the experience of mankind has found safe and salutary.

We do not doubt that the Senate, like other courts, may review its own judgments where new evidence has been discovered, or where by reason of fraud or accident it appears that the judgment ought to be reviewed. The remedy which in other courts may be given by writs of review or error or bills of review may doubtless be given here by a simple vote reversing the first adjudication. We have

[1] Record, pp. 2524, 2525.

no doubt that a legal doctrine involved in a former judgment of the Senate may be overruled in later cases. But there is no case known in other judicial tribunals in which a final judgment in the same case can be rescinded or reversed merely because the composition of the court has changed or because the members of the court who originally decided it have changed their mind as to the law or fact which is involved.

It seems to us very important to the preservation of constitutional government, very important to the dignity and authority of the Senate, very important to the peace of the country, that we should abide by this principle. There are few greater temptations which affect the conduct of men than the temptation to seize upon political power without regard to the obligation of law. To act upon the doctrine upon which this petition rests would expose the Senate to the temptation to reverse its own judgments and to vacate or to award seats in this Chamber according as the changing majorities should make possible. If such practice should be admitted it would, in our opinion, go far to weaken the respect due to this body and the respect due to constitutional authority.

No further action was taken on this report, but at once the Senate acted on the conclusions by admitting Mr. Richard W. Kenney to fill the seat in question.

565. The Maryland election case of Gabriel Duvall in the Third Congress.

The House declined to seat a person bearing credentials regular in form until it had ascertained whether or not the seat was vacant.

The resignation of a Member appears satisfactorily from his letter directed to the governor of his State.

In its early years the House referred credentials for examination of prima facie right after the bearer had been seated.

On March 24, 1794,[1] Mr. John Francis Mercer, of Maryland, appeared, produced his credentials, and took his seat, the oath being administered by the Speaker.

As subsequently appears, Mr. Mercer, on April 13, 1794, by letter transmitted to the governor of Maryland his resignation. He did not at that time, and apparently did not at any other time, inform the House of his resignation.

On May 31, 1794,[2] the Speaker laid before the House a letter from the governor of Maryland, inclosing a return of the election of Gabriel Duvall, in place of Mr. Mercer.

At the beginning of the next session, on November 7, 1794,[3] these papers were referred to the Committee on Elections, who reported on November 11,[4] as follows:

That it appears from a certificate signed by the governor of the State of Maryland, in council, and under the seal of the said State, that Gabriel Duvall was duly elected to serve in the House of Representatives of the United States, in the place of John Francis Mercer, who resigned his seat.

That the resignation of the said John Francis Mercer appears from his letter, dated the 13th of April, 1794, directed to the governor of Maryland.

Resolved, That, in the opinion of the committee, Gabriel Duvall is entitled to take a seat in the House, as one of the Representatives for the State of Maryland, in the stead of John Francis Mercer.

The resolution was agreed to, and Mr. Duvall took the oath.

566. On December 4, 1798,[5] on the second day of the third session of the Congress, a new Member, Robert Brown, returned to serve in the House as a Mem-

[1] First session Third Congress, Journal p. 100 (Gales and Seaton, ed.).

[2] Journal, p. 192; Annals, p. 742.

[3] Journal, p. 225, Annals, p. 871, second session, Third Congress.

[4] Journal, p. 225; Annals, pp. 873, 874.

[5] Third session Fifth Congress, Journal, p. 400.

ber from Pennsylvania, in the room of Samuel Sitgreaves, appointed a commissioner of the United States under the treaty with Great Britain, appeared and took his seat in the House.

Although the Journal does not so state specifically, it is evident that he must have taken the oath, since on December 14 [1] he appears as voting.

On January 13, 1799,[2] Mr. Joseph B. Varnum, of Massachusetts, from the Committee on Elections, "to whom was referred the certificates and other credentials of the Members returned to serve in this House," made a further report, as follows:

That it appears from a letter of the governor of Pennsylvania to the Speaker of the House of Representatives, bearing date the 29th day of December, 1798, and a return of the judge of election * * * that Robert Brown has been duly elected as a Member of this House for the said district, in the place of Samuel Sitgreaves, who has resigned his seat.

That the resignation of the said Samuel Sitgreaves satisfactorily appears from his letter to the governor of Pennsylvania, bearing date the 29th day of August, 1798 (in the recess of Congress).

Your committee are therefore of opinion that Robert Brown is entitled to a seat in this House as one of the Representatives for Pennsylvania, in the room of Samuel Sitgreaves.

567. The election case of Benjamin Edwards, of Maryland, in the Third Congress.

The House declined to seat a Member-elect on presentation of a letter of a State official showing that credentials had been forwarded to the Speaker.

The House declined to seat a person bearing credentials regular in form until it had ascertained whether or not the seat was vacant.

A letter from a Member stating that his resignation has been forwarded to the governor of his State is satisfactory evidence of his resignation.

On January 1, 1795,[3] the Speaker presented to the House a letter from Mr. Uriah Forrest, of Maryland, dated December 24, stating that Benjamin Edwards had been elected in his place, he having resigned to the executive of the State of Maryland. The Speaker also presented another letter from John Kilty, clerk of the council of Maryland, dated December 27, addressed to Benjamin Edwards, informing him that an attested certificate of his election as a Representative for the said State in place of Uriah Forrest had, by order of the council of the State, been transmitted to the Speaker of the House of Representatives.

The House disregarded a suggestion that Mr. Edwards be admitted at once to a seat, and referred the letters to the Committee of Elections.

On the same day the committee reported—

That it appears from a letter of the 27th of December, written by direction of the council of Maryland, signed by John Kilty, clerk of the council, and directed to Benjamin Edwards, that an attested certificate of the election of the said Benjamin Edwards, as a Representative in the room of Uriah Forrest, had, on that day, been transmitted to the Speaker of the House of Representatives.

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[1] Journal, p. 408.

[2] Journal, p. 433.

[3] Second session Third Congress, Contested Elections in Congress from 1789 to 1834, p. 92; Journal, pp. 279, 280; Annals, p. 1041.

That the resignation of the said Uriah Forrest satisfactorily appears from his letter of the 24th of December directed to the Speaker of the House of Representatives.

Resolved, That, in the opinion of the committee, the letters aforesaid are insufficient to establish the right of Benjamin Edwards to a seat in the House as one of the Representatives for the State.

On January 2 the Speaker informed the House that he had received from the governor of Maryland the certificate of Mr. Edwards. As the report of the committee had not been acted on, the certificate was referred to the committee, who made an additional report.

568. A Member-elect producing credentials showing his election to fill the vacancy caused by the decease of his predecessor, is sworn in at once, although no other notice of the decease may have been given to the House.

In the early practice it was the duty of the Committee of Elections to examine and report on the credentials of all the Members.

On January 29, 1795,[1] Mr. Aaron Kitchell returned from New Jersey in place of Abraham Clark, deceased, appeared, produced his credentials, and having taken the oath took his seat in the House.

In a similar manner, on February 9, Robert Goodloe Harper, of South Carolina, was seated in place of Alexander Gillon, deceased.

Messrs. Clark and Gillon were present at the preceding session, answering to their names on the roll call.[2] No notice of their deaths seems to have been given the House until the credentials of their successors were produced.

On February 14,[3] the Committee of Elections, to whom the credentials were referred,[4] although the Members were sworn in, reported that it appeared that each was duly elected, in place of his deceased predecessor, and presented a resolution:

Resolved, As the opinion of the committee, that Aaron Kitchell is entitled to a seat in this House, as one of the Representatives for the State of New Jersey, in the room of Abraham Clark, deceased.

This, and a similar resolution in the case of Mr. Harper, were agreed to by the House.

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[1] Second session Third Congress, Journal, p. 308 (Gales & Seaton ed.).

[2] First session Third Congress, Journal, pp. 198, 210 (Gales & Seaton ed.).

[3] Second session Third Congress, Journal, p. 328.

[4] On November 7, 1794 (Journal, second session Third Congress, p. 224 (Gales and Seaton ed.)), the House had: "*Resolved*, That a standing committee of elections be appointed, whose duty it shall be to examine and report upon the certificates of election, or other credentials of the Members returned to serve in this House; and to take into their consideration all such matters as shall or may come in question, and be referred to them by the House, touching returns and elections, and to report their proceedings, with their opinion thereupon, to the House." This became a standing rule of the House defining the duty of the Committee of Elections (see Journal, first session Seventh Congress, p. 40 (Gales & Seaton ed.)), and remained a rule until the revision of 1880.

This examination of credentials of all Members, irrespective of whether or not any question had been raised, was a function of the Elections Committee from the very first. Thus, on April 18, 1789 (Journal, first session First Congress, p. 16 (Gales & Seaton ed.)), the committee reported on the credentials of all the Members who had appeared. The same course was pursued at the beginning of the Second and Third Congresses, although the form of the above resolution, specifically stating the duties of the Elections Committee, dates from the first session of the Third Congress. (Journal, first session Third Congress, p. 5 (Gales & Seaton).) The oath was administered, in ordinary cases, without waiting for the committee's report. The custom existed as late as January 3, 1820. (Journal, first session Sixteenth Congress, p. 96.)

569. The prima facie election case of Doty and Jones, from Wisconsin Territory, in the Twenty-fifth Congress.

A person appearing with credentials intended to entitle him to a seat already occupied, the House declined to seat him at once and referred the credentials.

On December 3, 1838,[1] at the beginning of the third session of the Congress, the Delegate from Wisconsin, "George W. Jones, appeared and took his seat," in the language of the Journal. Mr. Jones had also been in attendance and held the position of Delegate from Wisconsin at the preceding session.

After the roll had been called by States to ascertain the presence of a quorum, and after the new Members had been sworn in, Mr. Isaac E. Crary, of Michigan, informed the House that James Duane Doty was in attendance, and claimed to be sworn in as the Delegate in this House from the Territory of Wisconsin. At the same time Mr. Crary presented the credentials of Mr. Doty, which were read at the Clerk's table. And thereupon Mr. Crary moved that the said James D. Doty be qualified accordingly.

Objection being made by Mr. George W. Jones, who claimed to be the sitting Delegate from the Territory of Wisconsin, a motion was made by Mr. Charles F. Mercer, of Virginia, that the subject of the right to a seat in this House as the Delegate from the Territory of Wisconsin be postponed until Thursday next. This motion was agreed to.

On December 10 the subject was referred to the Committee of Elections.

570. A claimant presenting credentials for a seat occupied by a Member already sworn in, they were referred to a committee but were not acted on.

On December 3, 1872,[2] Mr. Samuel J. Randall, of Pennsylvania, presented credentials of Mr. Aleck Boarman as Representative-elect from the Fourth district of Louisiana, to fill a vacancy caused by the death of Mr. James McCleary. The credentials being in regular form, and there being no objection, Mr. Boarman was sworn in.

On December 4[3] the Speaker announced that he had what purported to be credentials of Mr. Harry Lott for the seat. The paper was referred to the Committee of Elections.

On December 19[4] other credentials for Mr. Lott were similarly referred.

Mr. Lott's case did not come to a decision.[5]

571. The prima facie election case of Samuel Dibble, of South Carolina, in the Forty-seventh Congress.

The House gave prima facie effect to regular credentials, although a contestant claimed the seat made vacant by death of the bearer's predecessor.

Form of credentials given to a Member-elect chosen to fill a vacancy caused by death.

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[1] Third session Twenty-fifth Congress, Journal, pp. 7, 46; Globe, p. 1.

[2] Third session Forty-second Congress; Globe, p. 14.

[3] Globe, p. 26.

[4] Globe, p. 315.

[5] Globe, p. 1646.

On December 5, 1881,[1] at the time of the organization of the House, and while the Speaker was administering the oath to the Members-elect, Mr. Samuel Dibble, of South Carolina, was challenged and stood aside. After the unchallenged Members had taken the oath Mr. Dibble's certificate was presented, as follows:

The State of South Carolina, by His Excellency Johnson Hagood, the governor of the State of South Carolina, to the honorable the House of Representatives of the United States of America, Forty-seventh Congress:

Whereas a vacancy in the representation from the State of South Carolina of the Second Congressional district thereof, composed of the counties of Charleston, Clarendon, and Orangeburgh, happened by the death, on April 26, A. D. 1881, of Michael P. O'Connor, who, at the general election held November 2, A. D. 1880, was chosen a Member of the said House of Representatives for said Congressional district; and

Whereas, in accordance with the Constitution of the United States, I, on May 23, A. D. 1881, issued a writ of election appointing an election to be holden on June 9, A. D. 1881, to fill such vacancy; and

Whereas the returns show that such election was duly holden, and that at said election Samuel Dibble received the greatest number of votes given at said election:

Now, therefore, I do hereby certify that the said Samuel Dibble has been duly elected a Member of the House of Representatives of the United States of America, Forty-seventh Congress, for the Second Congressional district of the State of South Carolina, composed of the counties of Charleston, Clarendon, and Orangeburgh, to fill the vacancy in the representation from said State of South Carolina of the Second Congressional district thereof, occasioned by the death of said Michael P. O'Connor.

Given under my hand and the great seal of the State of South Carolina, in Columbia, this twenty-second day of June, in the year of our Lord 1881, and in the one hundredth and fifth year of the sovereignty and independence of the United States of America.

[SEAL.]

JOHNSON HAGOOD, *Governor.*

By the governor:

R. M. SIMS, *Secretary of State.*

Mr. William H. Calkins, of Indiana, after stating that there had been a contest over the seat of Mr. O'Connor, of which as a court the House were bound to take notice, and which contest had not been disposed of, raised a question as to the right of Mr. Dibble to be sworn in on his prima facie case, the said question being stated in the following preamble and resolution:

Whereas on the 2d day of November, 1880, in conformity to law, an election was held in the Second Congressional district of the State of South Carolina for Representative in the Forty-seventh Congress of the United States, at which election there were two candidates, namely, Hon. M. P. O'Connor and Ron. E. W. M. Mackey, voted for; that as a result of said election a certificate was issued to Hon. M. P. O'Connor by the secretary of state, bearing the seal of said State, and which is now on file with the clerk of this House; and

Whereas Hon. E. W. M. Mackey, in conformity with law, served upon Ron. M. P. O'Connor notice of contest, to which the said O'Connor filed his answer; and in pursuance thereof testimony was taken and filed with the Clerk of this House, which still remains in his custody; that during the pendency of said contest, and before this House could determine it, on the 26th day of April, 1881, Ron. M. P. O'Connor died, and on the 23d day of May, 1881, the governor of the State of South Carolina issued his writ of election to fill the supposed vacancy caused by the death of Hon. M. P. O'Connor; that as a result of said special election the governor and secretary of state of said State issued to Hon. Samuel Dibble a certificate of election to fill said vacancy, under which he now claims a seat on this floor: Now, therefore,

Be it resolved, That the certificate of election presented by the Hon. Samuel Dibble, together with the memorial and protest and all other papers and testimony taken in the case of the contest of E. W. M. Mackey against M. P. O'Connor now on file with the Clerk of this House, be, and the same hereby are, referred to the Committee on Elections, when appointed, with instructions to report it at as early a day as practicable, either as to the prima facie right or the final right of said claimants to the seat as the committee shall deem proper, and that neither claimant shall be sworn in till the committee report.

[1] First session Forty-seventh Congress, Journal, p. 12; Record, pp. 14, 15.

After debate, the House voted, without division, to lay the preamble and resolution on the table.

Mr. Dibble thereupon appeared and took the oath.

572. The prima facie election case relating to Newton and Yell, of Arkansas, in the Twenty-ninth Congress.

The House seated a person bearing regular credentials on ascertaining that his predecessor in the same Congress had accepted a military office.

On February 6, 1847,[1] Thomas W. Newton appeared at the bar of the House, presented his credentials as a Representative in the Twenty-ninth Congress from the State of Arkansas, in place of Archibald Yell, and asked that the oath to support the Constitution of the United States might be administered to him and he be permitted to take his seat in the House.

Mr. George W. Jones, of Tennessee, having asked if there was any evidence before the House that Mr. Yell had resigned his seat, and none being produced, offered this resolution:

Resolved, That Thomas W. Newton, having presented credentials of his election as a Member of this House from the State of Arkansas, and the House having received no information of the death, resignation, or disqualification of Archibald Yell, heretofore elected and qualified a Member of the Twenty-ninth Congress, the said credentials be referred to the Committee of Elections, and that the said committee report thereon at the earliest practicable day.

Mr. William P. Thomasson, of Kentucky, moved the following amendment in the nature of a substitute:

That Thomas W. Newton, who now presents his credentials of election as a Member of Congress from the State of Arkansas, be sworn as a Member and take his seat; and that the credentials of his election be referred to the Committee of Elections.

In the course of the debate it was shown that the certificate of election simply showed that Mr. Newton had been chosen to fill the unexpired term of Mr. Yell. It also appeared, from an official communication to the House from the War Department, that Archibald Yell had received a commission and been mustered into the service of the United States.

The amendment proposed by Mr. Thomasson was agreed to, and the resolution as amended was also agreed to.

573. The Senate election case of Shoup and McConnell, from Idaho, in the Fifty-first Congress.

There being a question as to the vacancy to be filled, the Senate examined the case before administering the oath to a bearer of regular credentials.

Credentials signed by a governor certifying to his own election as Senator were received by the Senate without question.

A question in the Senate as to whether or not credentials should set forth at length the proceedings of the electing legislature.

On December 29, 1890,[2] the Vice-President laid before the Senate a communi-

[1] Second session Twenty-ninth Congress, Journal, pp. 305, 306; Globe, pp. 339–341.

[2] Second session Fifty-first Congress, Record, pp. 843–848.

cation from the governor of Idaho, transmitting a certified copy of the proceedings of the joint session of the legislature of Idaho for the election of United States Senators, at Boise City, Idaho, December 18, 1890.

Ordered, That it lie on the table.

The Vice-President laid before the Senate the credentials of George L. Shoup and the credentials of William J. McConnell, elected Senators by the legislature of the State of Idaho; which were read.

These credentials were regular in form; but there was one peculiarity. The credentials of George L. Shoup as Senator were signed by "George L. Shoup, governor." No question was raised, however, as to the right of a governor to certify to his own election as Senator. Some question arose as to the failure of the credentials to set forth at length the procedure of the legislature in joint convention; but it was acknowledged that in many credentials this recitation at length was admitted. Moreover, in this case a certified transcript had been sent as a separate paper.

Mr. Shoup was sworn in without objection.

Then Mr. Z. B. Vance, of North Carolina, moved to refer the credentials to the Committee on Privileges and Elections.

The debate showed that the State of Idaho had been recently admitted to the Senate, and that three Senators had been elected, one to take the vacancy that seemed inevitable after March 3, 1891, under the Constitution and the practice of the Senate as to assignment of Senators to classes.

Mr. McConnell, whose credentials had been presented this day, had been chosen for the immediate vacancy, however, and it was urged that his right to be sworn in, had he been present, was perfect.

On the other hand, it was argued that the State of Idaho could not assume what action the Senate would take as to its classes. Therefore the motion to refer was justified.

A motion by Mr. George F. Hoar, of Massachusetts, that the motion to refer lie on the table, developed yeas 22, nays 15—not a quorum.

Later, a quorum being present, Mr. Hoar withdrew his motion and the credentials were referred.

On January 5 [1] Mr. Hoar, from the committee, submitted this report:

That the said credentials constitute a sufficient certificate of the executive of the State under the seal thereof, properly countersigned by the secretary of said State, and certifying the election of Mr. Shoup and Mr. McConnell, respectively, as Senators from that State. Mr. Shoup has already been admitted to take the oath and has taken his seat.

The committee therefore are of the opinion that Mr. McConnell should likewise be admitted to take the oath as Senator, and that said credentials should be placed on file.

The credentials were accordingly placed on file, when Mr. McConnell appeared, and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

574. The New York election case of Noyes v. Rockwell in the Fifty-second Congress.

The Elections Committee having ascertained that contestant rightfully was entitled to prima facie title, the burden of proof was shifted to sitting Member.

[1] Record, p. 906; Senate Report No. 1904.

Decision of highest court of a State on construction of a State statute should be binding on the House.

A State court decision that the formal returns of election officers should prevail over accompanying memoranda on sample ballots transmitted in accordance with law.

On April 2, 1892,[1] Mr. Charles T. O'Ferrall, of Virginia, from the Committee on Elections, presented the report of the majority of the committee[2] in the New York case of Noyes v. Rockwell.[3] At the outset the committee considered a question as to the prima facie right, although sitting Member had the State certificate and had taken the seat. This question is explained in the report:

The election statute of New York provides that immediately after the closing of the polls the inspectors of election shall count the ballots and publicly proclaim the result of their count before they adjourn. They shall also make three written statements showing the result, and these statements they must complete and sign immediately after announcing the result.

"The policy of the law is to make final the action of the board at its meeting immediately following the closing of the polls. (34 N. Y. State Rep., 127.)

"The law contemplates that the duties of inspectors shall in these respects be as promptly performed as possible; for this purpose, among others, that the result may be determined and declared without any bias arising from the knowledge of its effect upon the aggregate result or from exposure to subsequent influences. (46 Hun, 390.)"

The statute also requires the inspectors of election to attach to these statements already mentioned sample copies of the various ballots cast and to write upon each the number received, like the sample. One copy of these statements the inspectors are directed to hand to the supervisor, or town or ward official, who is ex officio a member of the county board of canvassers; to file another with the county clerk of the county, who is ex officio secretary of the county board aforesaid, and to file the third copy with the town or city clerk, as a local record of the election.

When the county board of canvassers of the county of Chemung convened they found a discrepancy between the statements made in accordance with the result publicly proclaimed, completed, and signed on the night of the election and the writing or indorsements on the sample ballots attached in six districts of four wards in the city of Elmira, in the county of Chemung.

The statements indicated the following result: Noyes, 488 votes; Rockwell, 458 votes; majority for Noyes, 30 votes.

The writing or indorsements on the sample ballots gave Noyes 466 votes, Rockwell 481; majority for Rockwell, 15 votes.

A discrepancy between the statements and sample-ballots indorsements, it will be observed, of 45 votes.

The manner in which this discrepancy occurred will be shown hereafter under the heading of "Recount." Suffice it to say here that the board of county canvassers of Chemung County discarded the statements completed and signed on the night of the election, which corresponded with the publicly declared result, which gave Noyes 30 majority, and adopted the figures as shown by the indorsements on the sample ballots attached, which gave Rockwell 15 majority, and certified the same to the board of State canvassers.

On application of Mr. Noyes, Justice Smith, of the supreme court, issued a peremptory mandamus directing the board of canvassers of Chemung County to recanvass the returns. and base the new canvass on the face of the returns instead

[1] First session Fifty-second Congress, House Report No. 968; Rowell's Digest, p. 474; Stofer's Digest, p. 25; Journal, pp. 152, 154–156; Record, pp. 3421, 3448, 3489, 3536–3541, Appendix, pp. 234, 244.

[2] The minority views were signed by Messrs. James E. Cobb, of Alabama, and E. P. Gillespie, of Pennsylvania.

[3] It may be observed that the sitting Member belonged to the majority party in the House, and the Committee on Elections proposed to unseat him and seat a Member of the minority party.

of on the ballots. This mandamus was issued December 2, 1890, the election having been held on the 4th of the preceding November. An appeal was had to a general term of the supreme court, and on February 3, 1891, that court affirmed and sustained the order of Judge Smith.

Thereupon Mr. Rockwell appealed to the court of appeals, the highest judicial tribunal in the State. On June 5, 1891, the court of appeals affirmed the decision of the lower court. The report of the committee says in regard to this decision and its consequences:

Justice O'Brien, of this court, in delivering the opinion of the court, concurred in by the other eight justices, except Ruger, chief justice, who did not vote, and Earl, who dissented, used this language:

"The words written into the paper by the inspectors must be deemed to express the actual and correct result of their count. They are precise and certain, and to the effect that a certain number of votes were given for a person therein named for a designated office. Not so with the writing on the ballot. That imports simply that a certain number of tickets of each variety were voted, from which and from an inspection of the sample ballots themselves the actual vote for any given candidate may or may not be accurately ascertained. * * * The act of the inspectors in stating the vote in the body of the paper, the certificate that the same is correct, and the signature of each of them to the certificate, is, so far as the county canvassers are concerned, fundamental, jurisdictional, and controlling, while the words on the ballot are subordinate and incidental, and the duty of the inspectors in respect to the same is probably directory merely." (Record, 181.)

Pending these proceedings in the courts, but after the decision of the supreme court in special session, to wit, on the 5th day of December, 1890, the State board of canvassers met, counted the figures as indorsed on the sample ballots, and not as shown by the statements of the officers of election, and awarded the certificate of election to Rockwell, and under and by virtue of it he now holds his seat.

Your committee are of the opinion that the decision of the court of last resort of a State upon the construction of a statute of that State, and in a matter before them involving the construction of a statute of that State, should be binding upon them, and therefore they held that under the decision of the said, court of appeals, affirming the lower court, Noyes was prima facie elected and was entitled to and ought to have been awarded the certificate of election, and that the burden of proof was shifted from Noyes to Rockwell, and it was incumbent upon him (Rockwell) to establish his title to the seat upon the full merits of the case.

The minority do not appear to have dissented from this conclusion, and both in their report and in the debate the differences of opinion were as to the final and not the prima facie right.

575. The case of Noyes v. Rockwell, continued.

Discussion of validity of a recount after the time when, by the terms of the law, the ballots should have been destroyed.

Registry of voters being required, the vote of a person not registered or on the registry list was rejected by the House.

The votes of persons proven to have been corrupted by bribery are rejected by the House.

A ballot accidentally placed in the wrong box should be counted.

Errors in initials or spelling of a candidate's name do not ordinarily justify rejection of the votes.

As to the final right, the majority consider—

1. The effect of a recount of the ballots in the six districts of Elmira, saying:

The statute of the State of New York does not provide for or authorize a recount of ballots in any election, but in terms renders a recount in law impossible by requiring all the ballots except those

attached as sample copies to be destroyed immediately after the completion of the count by the inspectors; and the ballots in these districts, in the language of the court of appeals, were, in contemplation of law, destroyed. They had no legal existence after the board of inspectors dissolved, the night of the election, and the board itself was functus officio; there was no legal custodian nor depository of the ballots; they were worthless as evidence.

But the ballots were not in fact destroyed, and a recount in whole or part was afterwards made by a portion of the election officers only, and a gain was found for sitting Member. But the majority find from the evidence that the ballots had not been safely kept.

There was no safeguard whatever thrown around them; they were in the custody of no one upon whom any responsibility rested; there was no care taken of them with a view to a possible recount; they were left exposed in every instance so that they could have been despoiled by the unscrupulous without fear of punishment, for they were in law as mere worthless paper. Full and ample opportunity was given to tamper with them and to change them.

Therefore, even if a recount were legal, no confidence could be placed in this recount, as there were abundant authorities to prove—

To recognize this recount would be in direct violation of every rule and precedent and convert a serious matter into a most ridiculous burlesque. It would, if the precedent should be followed, throw down the bars in every close contest, lead to frauds innumerable, and invite attacks without number upon the official returns of sworn officers of the law, and by boards composed of friends of each of the competing candidates, and destroy the verity of official returns.

The minority in their report ignore this recount, and in the debate Mr. Cobb declined to lay any stress on it, and although he intimated that he thought it more reliable than the first count,[1] it can hardly be said that the minority antagonized this position of the majority.

2. As to an unregistered vote the majority say:

We find that 1 vote was cast for Noyes by a party (Lewis Beach) who was not registered and whose name was not upon the registry list of voters in the district in which he voted, as required by law.

We think this vote should be deducted from Noyes.

The minority concur in this.

3. As to bribed voters:

We find two parties, Sheridan and Green, who voted for Noyes, were each paid $2 to vote the Republican ticket.

These votes should be taken from Noyes.

The minority concur in this, and would add one other to the number rejected. Mr. Nils P. Haugen, of Wisconsin, who concurred generally with the majority, dissented, holding that nothing in the evidence showed that either Sheridan or Green voted for Noyes or the Republican ticket.

4. As to a ballot in the wrong box:

It is claimed that Rockwell lost 1 vote, cast by Patrick McDermott, by the ballot being put accidentally in the wrong box by the inspector of election who received it.

The evidence is conflicting, but we think the vote should be added to Rockwell's column.

The minority concur in this.

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[1] Appendix, p. 245.

5. As to ballots improperly rejected:

In Chemung County there were 3 ballots cast for Hosea Rockwell, 4 for H. H. Rockwell, 1 for Hosey Rockwell, and 1 for H. Rockwell, making 9, which were rejected by the canvassing board; we think they should be counted for the contestee.

In the same county there was I ballot cast for H. Noyes and 1 for Henry T. Nois, and in Tomkins County 1 for Henry Noyes, making 3 which were rejected by the canvassing board. We think they should be counted for the contestant.

The minority concur in this.

576. The case of Noyes v. Rockwell, continued.

Where the law prescribes a penalty for putting a distinguishing mark on a ballot, but does not require rejection, should the ballot be rejected?

One of a series of ballots with similar distinguishing marks being shown to be corrupt, the House, overruling its committee, inferred corruption as to all.

The law forbidding a voter to reenter the polling booth, may one who failed in attempting to vote, return to effect the object?

Instance wherein the Elections Committee recommended seating of a contestant of minority party; but were overruled by the House.

6. The real turning point of the case, as appears evident from the debate,[1] was as to an alleged conspiracy to bribe, thus set forth in the minority views:

But the chief contention in this case is in regard to what are known as Doyle ballots. These were sixteen in number, and were Republican pasters containing the name of the contestant for Congress.

At the election under examination Hon. Robert Earl was the candidate for judge of the court of appeals. His name was on all the printed tickets of the Democratic and Republican parties, and was the first name on each ticket.

On the sixteen tickets above mentioned the name of Robert Earl was erased and the name of Doyle was substituted in this manner: On one ticket was the name A. Doyle; on another ticket B. Doyle; on another, C. Doyle, and so on through the series. No two tickets contained the same initial letter, except the name L. Doyle, which appeared on one ballot at two separate voting places. These several names, A. Doyle, B. Doyle, etc., were all written in pencil, and were all written, as the evidence clearly shows, by one Duncan McArthur. They were cast in the fourth and fifth districts of Waterloo. It is in proof that Duncan McArthur was an active worker for the contestant, and the proof tends to show that he was operating on the day of election with one Andrew Harmon and one B. H. Mongin. The three are shown to have been engaged in bribing voters. It is further shown by the evidence of one man who voted a Doyle paster that he was bribed.

It is contended that the taint of fraud can not attach to the whole Doyle series of votes without more convincing evidence than is to be found in the record.

Let it be remembered that fraud can rarely, if ever, be proved by direct evidence, and that the rule is that whenever a sufficient number of independent circumstances which point to its existence are clearly established, a prima facie case of its existence is made, and that if this case is not met by explanation or contradiction it becomes conclusive.

The circumstances, then, which are established in this contest and which strongly point to the guilt of the whole sixteen voters using the Doyle ballots are:

(1) The Doyle ballots were pasters which had been written on. This is contrary to law. (See section 676, Election Code of New York).

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[1] Mr. Cobb in debate set up an independent line of argument, which he did not mention in his report, wherein he claimed that the testimony showed the election of sitting Member irrespective of the so-called Doyle ballots. This argument, which will be considered, hardly displaced the Doyle ballots as the main issue.

(2) They were so marked as to be identified. This was contrary to law, and such marking subjected the persons engaged therein to punishment on conviction. (Sec. 686, ib.)

(3) The ballots were prepared, all of them, by Duncan McArthur before they were given to the voters, and Duncan McArthur was a briber of voters.

(4) One voter at least, and, as we believe, two, Ferris and Green, were bribed to cast Doyle ballots.

(5) The name Doyle was fictitious.

These facts we believe to be clearly proven.

From them it is clear that McArthur and his abettors were guilty of gross fraud. Did the sixteen voters participate in the fraud?

If not, why did they vote for a fictitious person for judge of the court of appeals? What explanation can be given for the use of a series of fictitious names—no two of them alike?

How is it that these ballots were so marked as to be identified easily? Was it a coincidence merely? If so, it could have been explained. It seems to us that these circumstances connect the whole series of Doyle ballots and make a prima facie case at the least. Explanations were in order. It was imperatively demanded of the parties implicated. They were accessible; they were not called.

The minority further contended that the ballots might be excluded if the marks were put on for purpose of identification, since the law of New York forbade the voter, under penalty of punishment, to put on his ballot a mark by which it could be identified. "It is a familiar principle of law," says the minority, "that when a person does an act for the doing of which he may be punished, the act is void whether it is in terms declared so or not."

The majority of the committee do not consider the evidence strong enough to establish the fact that even one voter was bribed to throw a Doyle ticket, although the testimony of Ollie Ferris might raise a suspicion as to himself. Assuming that Ferris's testimony did show that he was bribed, the majority do not admit any significance as to others:

The syllogism is this: A voted a Doyle ballot and admits he was bribed; B, C, D, and others voted Doyle ballots; therefore they were bribed.

Everything must be presumed against innocence. All these men must be presumed to be guilty because one man who voted the same ballot they did says he was bribed, and the curse of bribery must rest on them.

If it should be insisted that McArthur and Harmon were engaged in the business of bribing voters, and that this one man (Ferris), who voted one of the Doyle series of ballots, was bribed, therefore all that voted that series were bribed, why not carry the reasoning further and say that McArthur and Harmon were engaged in the business of buying votes, and that two men, Sheridan and Green, voted Republican ballots and were bribed; therefore all that voted the Republican series of ballots were bribed? There is as much reason, it seems to us, in one position as the other.

Suppose it was ascertained that E F voted one of these sixteen Doyle ballots, would any intelligent man hold that he could be indicted and put upon his trial for bribery upon the facts developed in this case? Would any man with ordinary powers to discriminate between right and wrong hold that a grand jury could find an indictment against E F for bribery upon the evidence in the record of this case? Would he even hold that any justice of the peace could be found who would send E F on to answer an indictment, on probable cause to charge him with bribery, under the facts we have stated?

We have reached our conclusion in regard to these Doyle ballots from the testimony in the record, and not upon presumptions or suspicions which may come to any imaginative mind; but if we were to enter the realm of presumptions we would prefer to presume that men are honest until the contrary is proved; that they are innocent of crime until they are proved to be guilty; if in a criminal case, to the exclusion of every reasonable doubt; if in a civil case, at least by the preponderance of evidence.

"Where the facts of a case are consistent both with honesty and dishonesty a judicial tribunal will adopt the construction in favor of innocence." (Lawson on Presumptive Evidence, 438.)

We hold that there is nothing to impeach these sixteen Doyle ballots except the one cast by Ferris, and as to that we are in doubt whether it should be excluded; but as it is not material it makes no difference.

The committee cite a decision, referred to as the Dutchess County case, rendered by the New York court, in support of this doctrine.

In debate[1] the majority combated vigorously the proposition laid down in the minority views that a ballot marked by the voter by a distinguishing mark was thereby rendered void, Mr. O'Ferrall citing a decision in New York State to the effect that while the statute forbade the voter to put a distinguishing mark on it, the law did not go to the extent of rendering the ballot void if he did.

7. A question also arose as to certain other ballots described in the report.

In this connection we deem it proper to state that there were 28 ballots cast for Rockwell in the second district of the Fifth Ward of Elmira, upon which there was a check mark on one corner and a figure 5 on some and a figure 8 on others in the corner "diagonally opposite" the corner in which the check mark appeared. It was claimed by Noyes that these marked ballots were open to as much suspicion as the Doyle ballots. Several witnesses introduced by Noyes to testify in regard to them declined to answer the questions propounded under the advice of the attorney for Rockwell, upon the ground that this was evidence which should have been introduced in chief, and that as it was introduced in the time for testimony in rebuttal it was not admissible.

A motion was made by the attorney for Rockwell to strike out this evidence upon the grounds stated, but the committee took no direct action upon the motion.

The minority urged that no effect should be given to these ballots, because evidence as to them was taken in rebuttal, because no attempt was made to show why the marks were put on them, and because no reference was made to them in the notice of contest.

8. As a part of his argument before the House,[2] but not as a part of his minority views, Mr. Cobb urged that the record of testimony showed the election of sitting Member independently of the Doyle ballots:

(*a*) Because three voters who had left the polling place after trying in vain to mail their ballots had returned and been denied an opportunity to try again. The law provided that no one who had voted should be permitted to reenter the booth; but Mr. Cobb contended that this did not apply to one who had left the booth without voting. In opposition it was contended that by leaving the booth they surrendered the right to vote. The law provided that the voter should "vote in the manner provided by law, forthwith, before leaving the enclosed space."

(*b*) Because in a precinct in the city of Elmira, where the certificate of the election officers differed from the figures on the ballot, and where there had been no recount, it was in evidence that the figures on the ballots were the true count, thereby giving sitting Member sufficient gain to secure his election. The majority did not deem the evidence strong enough or the circumstances certain enough to justify this conclusion.

The report was debated at length from the 19th to the 22nd of April, 1892. On the latter day a resolution proposed by the minority, declaring contestant not elected, was agreed to as an amendment—yeas 140, nays 98. Then a resolution declaring sitting Member elected was similarly adopted—yeas 128, nays 106. Then the proposition of the majority as amended was stated to the House, and a motion to recommit the case, with directions to take testimony as to the Doyle ballots and the 28 Rockwell ballots irregularly marked, was made and decided in the negative—yeas

[1] Appendix, p. 238, Remarks of Mr. O'Ferrall.

[2] Appendix, p. 247.

110, nays 124. The resolutions of the majority as amended were then agreed to without division.

So the contention of the majority of the committee was defeated, and the sitting Member retained the seat.

577. The Maryland election case of Mudd v. Compton in the Fifty-first Congress.

The acts of county canvassing officers being impeached, their returns must be disregarded and the precinct returns should be consulted in awarding prima facie title.

A county canvassing board having ministerial duties only are presumed to act correctly, but this presumption may be rebutted at any time by reference to precinct returns.

Ballots bearing only the last name of a candidate, or incorrect initials, should be counted when it is shown that no other person of the name is a candidate.

Under the old ballot laws the appearance of a candidate's name twice on the ballot did not prevent counting it as one vote.

It was held under the old ballot laws that a State statute as to form of ballot should not be considered mandatory so as to cause rejection of a vote wherein the intention of the voter is manifest.

A question as to how far the House, in counting votes, is bound by the requirements of the State law.

It was held under the old ballot laws that a "paster" which covered the designation of the office should not work rejection of the vote, although a State law so provided.

On February 27, 1890,[1] Mr. William C. Cooper, of Ohio, submitted the report of the majority of the Committee on Elections in the Maryland case of Mudd v. Compton.

The sitting Member had been returned by an official majority of 29 votes, which contestant assailed on the ground of irregularities and intimidation.

The examination of this case is naturally divided into three branches:

(1) As to the prima facie right.

The majority report quotes from the law of Maryland to show how the votes were canvassed and the returns made up. The canvassing board of each county made two certificates, one "to be delivered to the clerk of the county court for the county and the other to be mailed to the governor." The governor then issues a certificate to the person who, from the returns so sent to him, appears to have been elected. The report then says:

> According to the law of Maryland, the duties of the presiding judges when assembled at the county seat are purely ministerial. They are to add up the votes of the precinct returns on the books of the polls and to certify the results of this addition to the governor. They can neither throw out votes certified by the precinct judges nor return votes not certified by the precinct judges. It is presumed, of course, that the presiding judges will do their work accurately, and that their returns to the governor will contain a correct summary of the votes in their county. This presumption is, however, merely a prima facie one, and can be rebutted at any time by showing that these returns were, in fact, not a correct summary of the pre

[1] First session Fifty-first Congress, House Report No. 488; Rowell, p. 149.

cinct returns; and when this is done the returns to the governor must be disregarded and resort had to the primary evidence of the result of the election; that is, to the precinct returns themselves.

In this case the returns forwarded to the governor footed up for Barnes Compton 16,000 votes; for Compton, 1 vote; for Sydney E. Mudd, 15,819 votes; for S. N. Mudd, 1 vote. The contestant denies the accuracy of said returns to the governor, and files duly certified copies of the precinct returns from every precinct in the Congressional district (record, pp. 712 to 779), which show that the vote in the district for the contestant and the contestee was as follows:

For Sydney E. Mudd	516,279
For S. N. Mudd	1
For S. E. Mudd	1
For Mudd	1
"One ticket upon which Sydney E. Mudd's name appeared twice and Mudd's name was not counted in the above returns"	1
Total	16,283
For Barnes Compton	16,280
Plurality for Sydney E. Mudd	3

Comparing these precinct returns with the returns made to the governor, it is found:

(1) That the returns to the governor from the counties of Howard, Anne Arundel, and Baltimore, and from the city of Baltimore, were accurate summaries of the precinct returns and were correct.

(2) That in the third district of St. Marys County there were returned by the precinct judges 1 vote for "S. E. Mudd," and 1 vote for "Mudd," but the presiding judges did not include these votes in their return to the governor.

(3) That the returns from the fifth and ninth districts of Charles County were not included in their returns to the governor, because at the time the presiding judges made up their returns the returns from these precincts were sealed up in the boxes which the presiding judges had no authority to open.[1] These boxes were afterwards opened by an order of court, and certified copies of the returns found in them have been filed, which show that the contestant received in these districts 432 votes and the contestee 280 votes.

(4) That the face of the precinct returns from the sixth district of Charles County shows:

"There was one ticket upon which Sydney E. Mudd's name appeared twice and Mudd's name was not counted in the above returns."

(5) That in Calvert County the returns to the governor allow the contestant 1,138 votes, whereas the actual vote cast and counted in this county, and shown by the certified copies of the precinct returns (record, pp. 746 to 749), was 1,166. Mr. Mudd called the return judges of every precinct in the county (record, pp. 271–275), and proved by them that the returns then on file in the clerk's office were the very returns which they made and were in no way altered. He proved by the editor of the Democratic paper in the county town that on the day the returns were made up he copied them for his paper and that they gave the contestant 1,166 votes. He proved by the clerk of the court that immediately upon seeing it stated in the newspapers that the return to the governor gave the contestant only 1,138 he wrote to the governor stating that a mistake had been made and asking permission to correct it. The deputy clerk of the court who made up the returns to the governor swears himself that these returns so sent on by him were erroneous and that those in the clerk's office were correct (see record, pp. 271–275). If the precinct returns of any precinct had been altered the contestee could have offered some evidence to show that such alterations had taken place, but he did not, in fact, take any testimony whatever upon the subject. The committee believe that the contestee is simply trying to raise a technical point of evidence to defeat the contestant's claim to 28 votes, which no one can seriously doubt the contestant received, and that the contestant's vote in Calvert County was 1,166.

(6) That in the precinct returns from Prince George County (record, pp. 762–772) there was no mention of a vote for "Compton," which the presiding judges in their return to the governor say was cast in the tenth district of the county, and consequently the presiding judges had no right to include

[1] These returns were put into the ballot box by mistake; when once sealed the box might not be opened legally by the election officers.

it in their return to the governor. The contestant has, however, attempted to show that he was entitled to the vote, by offering in evidence a certificate of the clerk of the court of the county (record, p. 610), that on one of the tally lists of the district there appears, "one ticket for Compton,' not counted for Barnes Compton;" on the other of said tally sheets, "one ticket for Compton, torn, not counted for Barnes Compton." There is no other evidence concerning this vote. The tally lists are not a part of the certificate or statement from which the law requires the presiding judges to make up their return; and if they were, their contents are not sufficiently proved by a certificate of the clerk that such and such a thing appears upon them. Public officers prove public records, not by statements as to what their contents are, but by certified copies of the documents themselves. Moreover, it would seem, from statements quoted from one of the tally lists referred to that the judges may have decided that the voter intended to cancel his ticket as to candidate for Congress by tearing it.

For these reasons the committee does not think it clear that the contestee is by the evidence entitled to this vote, but thinking it likely that such a vote may have been cast has concluded to allow it. Upon the face of the returns the committee, therefore, finds that the vote stood:

For Sydney E. Mudd		16,279
For S. E. Mudd		1
For S. N. Mudd		1
For Mudd		1
One ticket on which Mudd's name appeared twice, not counted for Mudd		1
		16,283
For Barnes Compton	16,280	
For Compton	1	
		16,281
Plurality for Sydney E. Mudd		2

There were no persons by the name of Mudd and Compton other than the contestant and the contestee candidates for Congress at this election; and, therefore, under the well-established rule of the House, the vote for "Compton," if counted at all, should be counted for the contestee, and the votes for "S. E. Mudd," for "Mudd," and for "S. N. Mudd," for the contestant. It is well settled by the authorities that the fact that the same candidate's name is on the same ticket more than once is no reason why that ticket should not be counted as one vote for that candidate. It would therefore follow that the contestant is entitled to the one vote not counted for him, because his name is on the ticket twice. The contestee has, however, offered evidence that this ticket was not counted for the contestant, not because the name was on the ticket twice, but because the paster (upon which his name was printed) was pasted on the regular Republican ticket so as to cover up the designation of the office for which he was a candidate. If this be granted, it still remains true that whenever the intention of the voter is clear and unmistakable, effect should be given to it; and no one can have any doubt that the voter of this ticket—a straight Republican ticket-intended to vote for Mr. Mudd for the only office for which he was a candidate. No provision of a statute regulating the form of ballots will be held, or was ever intended to be held, as mandatory in contravention of such a plain and manifest intent. The committee is therefore of the opinion that contestant is entitled to this vote, and will count it.

The minority [1] say on this point:

A paster was pasted over the words "for Congress." The testimony of the judges, Sasscer and Cox, clearly shows this (record, pp. 456–457). Article 33, section 65, Statutes of Maryland (record, p. 639), required the ticket should be thrown out.

In the debate it was asserted by Mr. John F. Lacey, of Iowa, that although there might be a law of the State of Maryland, yet the House was judge of the elections of its own Members, and the House had always held that in such a case the vote should be counted.[2] It was replied by Mr. Moore that the law of Maryland was mandatory and that the position of the majority was unprecedented.[3]

[1] Minority views presented by Mr. L. W. Moore, of Texas.

[2] Record, p. 2394.

[3] Record, p. 2408.

578. The case of Mudd v. Compton, continued.

An instance wherein an Elections Committee, in a sustained case, ascertained prima facie title after the sitting Member had taken the seat.

The Elections Committee having ascertained that prima facie title should have been awarded to contestant, the burden of proof was shifted to sitting member.

The majority conclude on this branch of the case:

The face of the returns, then, in the opinion of the committee, show that the contestant was entitled to 16,283 votes and the contestee to 16,281 votes, giving the contestant a plurality of 2 votes. Such being the case, the burden of showing that these returns (the primary evidence of the result of the election) were not correct is thrown on the contestee.

579. The case of Mudd v. Compton, continued.

Qualified voters being denied the right to vote because other persons had voted on their names, the House counted the votes for the candidate for whom they were offered without deducting the illegal votes.

The House, relying somewhat on a Federal statute, counted ballots of voters whose names after registration were omitted from the poll list, that list being conclusive on the election officers.

While notice of contest should state specifically the points on which testimony is adduced, yet the committee sometimes waives the strict requirement of the rule.

Criticism of evidence introduced in rebuttal.

(2) As to certain disputed votes, questions arose:

(*a*) Six persons offered their votes for contestant and were refused the right to vote by the judges, for the alleged reason that in each case some one else had previously voted on the name. The majority ruled that these votes should be cast for contestant, saying:

It is bad enough that a person who has no right to vote gets his vote in; it would be worse if by getting his vote in he kept an honest man's vote out.

The minority objected to this ruling, but the majority defended it in the debate,[1] where the subject was examined fully. It did not appear that there was any evidence as to who voted wrongfully on the names or for whom the illegal votes were cast. There would be a presumption, of course, that they were cast for the candidate for whom the six real voters would not have voted. But the majority of the committee simply contented themselves with counting the six legal votes offered and rejected.

(*b*) An important class of disputed votes is thus referred to by the majority report:

A large number of votes on both sides were rejected because the voters who had duly applied for registration and been registered found their names omitted from or inaccurately copied on the poll books. It is urged by the contestee that the law of Maryland makes the poll book conclusive evidence of the right of a man to vote, and that these votes can not be counted. The committee can not assent to this proposition.

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[1] Record, p. 2395.

The law simply lays down a rule of evidence for the judges of election, and is intended to reduce to a minimum their judicial functions. Into the qualification of voters they can not inquire. All they have the right to pass upon is the question whether or not a person offering to vote is the person whose name is on the poll book. This limitation is imposed upon them because, in the view of the Maryland law, a polling window on election day is not a proper place to investigate questions of qualification. A simple rule is laid down for the guidance of the judges, and any injustice which may be done by the application of this rule can, if necessary, be corrected by the tribunal before which the contest is made. The class of cases about which we have been speaking, together with another class represented by a vote on each side in which the voter was improperly refused registration, are the very sort of cases to provide clearly for which the third section of the act of Congress of May 31, 1870, was enacted, which section reads as follows:

"That whenever, by or under the authority of the constitution or laws of any State or the laws of any Territory, any act is, or shall be, required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance or offer to perform or acting thereon, be deemed and held as a performance in law of such act, and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had performed such act."

The admission of such votes is in accord with the unvarying practice of Congress and the almost uniform decisions of the courts, and the committee will count all such votes properly proved on both sides.

The minority say:

The constitution of the State (article 1, section 1) prescribes the qualifications of all voters. Section 5 of the same article provides that the general assembly shall provide for a general registration of all persons possessing the qualifications prescribed by the constitution that the registration shall be conclusive evidence to the judges of the right of the person to vote, and that no person shall vote whose name does not so appear.

The legislature, in accordance with these provisions, have provided for registration, and since the adoption of the constitution of 1864, in which the same provisions appear, all elections have been held under registration laws.

The judges of election are required to take an oath to "permit all persons to vote whose names shall appear on the registry or list of voters furnished to him according to law," and that he "will not permit anyone to vote whose name shall not be found upon said registry or list of voters." (Record, pp. 6, 36, sec. 48.)

The contestant in his brief relies upon the act of Congress of May 31, 1870. This act was declared unconstitutional by the Supreme Court. (United States *v.* Reese, 92 U. S. Rep., p. 214.)

Over this point much discussion occurred in the House.[1] On behalf of the majority it was asserted that the law had been changed since the decision of United States *v.* Reese, and that the constitutionality of the law quoted in behalf of contestant was fully sustained by the decision in United States *v.* Mumford (16 Federal Reporter). Also the case of the United States *v.* Siebold was quoted.

(*c*) A question as to pleading is disposed of as follows by the majority:

The contestee has offered to prove a number of votes lost by him because of inaccuracies on the poll books, not otherwise referred to in his answer than by an allegation that in a very large number of other election districts he lost votes from this cause, and more votes from such cause than the contestant.

The contestant objects to the admission of this testimony on the ground that this general allegation does not, in the language of the statute governing contested elections, state "specifically the other grounds" upon which the sitting Member rests the validity of his election; and the committee is inclined to agree with the contestant, but as the committee in this case has no doubt that the contestee was really

[1] Record, pp. 2396, 2409, speeches of Messrs. Lacey and Dalzell.

entitled to some of the votes of this class which he has proved, the contestee will be allowed the votes he has proved he lost from inaccuracies of the poll books, whether the loss of these votes was or was not specifically alleged. The committee, however, on the same principle, will allow the contestant the votes he proved in rebuttal of the contestee's allegation in paragraph 9 of his answer, that the contestee lost more votes than the contestant because of inaccuracies on the poll books. In most cases the contestant proved how the person, whose vote he claimed to have lost in this way, would have voted had his vote been received, by the testimony of the voter himself.

The minority object, saying:

Not only did he not claim them in his notice, but he attempted in violation of every principle of law to offer his testimony in the time allowed him for rebuttal only.

This testimony was in each case specifically excepted to. (Pp. 493, 494, 556, 557.)

The attempt to make this claim in rebuttal comes directly within the case of Lynch *v.* Vandiver (Mobley, p. 659), in which the committee say that "testimony offered in rebuttal which seeks to establish facts not entered into in the direct examination, is in violation of every known principle of the laws of evidence, and will not be considered."

The contestee had no opportunity to show that these parties had not tendered their votes, or any other evidence tending to deny the claim made by contestant.

580. The case of Mudd v. Compton, continued.

Votes proven by merely showing the party affiliation of the voter have been counted by the Elections Committee.

Discussion of the degree of intimidation justifying the House in counting votes of persons prevented from reaching the ballot box.

The presence of armed and threatening persons at the polls, some personating officers of the law, was held to constitute intimidation justifying revision of the returns.

(*d*) As to determining how certain persons voted:

The contestee, in a much larger proportion of the votes he proved, showed how they would have voted * * * by merely proving that the voter was or had been a Democrat. The contestant objects to votes proved in this last-mentioned way being counted, on the ground that as he received a great many Democratic votes in the district, there is no certainty that these voters wanted to vote for contestee. The committee, however, has decided to allow the contestee these votes.

(*e*) The majority decide to recognize the validity of a recount in certain precincts, by which sitting Member gained 19 votes, although there seemed to be suspicious circumstances connected therewith.

(3) The majority of the committee decided as follows in regard to charges of intimidation:

The committee finds that the votes of the first precinct of the third district of Anne Arundel County should be thrown out. The vote, as returned in this precinct, was 168 for the contestee and 32 for the contestant. The undisputed facts concerning this precinct are that there were registered therein 475 persons, 252 of whom were white and 223 colored; that of these 475 only 206 voted, and of those who voted 191 were white men, and 15 were colored; that when the polls opened 4 white men voted, then 15 colored men, and then 187 white men. The contestant has examined 175 colored voters of this district who did not vote; of these 175, 161 were on the polling ground; many of these walked or rode many miles to the polls, and some who were temporarily away from home returned from Baltimore, Annapolis, Steelton, and other places to vote. All of these men swear that they wanted to vote (and most of them were at the polls with their tickets in their hands for the purpose of voting) for the contestant; 14 others swear that they started from their homes and walked a greater or less distance toward the polls and then turned back in consequence of what they heard as to the proceedings at the polls.

There is no dispute that there were present at the polling place, from before the opening of the polls at 8 o'clock in the morning until late in the afternoon, a number of persons who were not residents

of the precinct; that those of them who were identified were residents and registered voters of Baltimore City, and that they drove down from Baltimore, reaching the polls before any of the voters, and drove back in the late afternoon; that those men, or some of them, wore badges with the words "U. S. deputy marshal" upon them, and claimed to be such; that this claim was altogether false; that these men were axmed with pistols, which at certain periods of the day they were firing within the hearing of the polling place; that there were a number of guns in a wagon which brought them from Baltimore; that before the polls opened they placed themselves within a few feet of the window at which the citizens were to vote, and that in a very few minutes after the polls opened they seized and dragged from the line two or more colored voters (among them a man of some 70 years of age, a large property owner and tax payer, a resident of the district for twenty-five years, and a universally respected citizen) and told them that they could not vote. The person just referred to (who from age and standing was evidently the most influential colored man present) asked if the colored people were not to be allowed to vote, when the crowd from Baltimore answered, "Not a damn nigger shall vote unless he votes for Cleveland." The old colored leader then told the other colored men not to make a fuss, but as they could not vote to go away peaceably. A number of them did, but the larger number remained about the polling place for some time longer and occasionally one of them would attempt to reach the polling place.

In every such instance they were met by some one of the strangers or by one of the well-known Democratic leaders of the precinct and told that they could not vote; and when they still pressed on, they were struck at and compelled to fall back. A number of colored voters still remained in the neighborhood of the polls, and, in order to get them away, the leader of the Baltimore gang—a man whom the witnesses all call "Tip Wells," but whose real name is proved to be John H. Wills—told a man named Ed. Pumphrey, a resident of the neighborhood, to go among the negroes, tell them that there was a gang of roughs from Baltimore there, that they had guns, and that more were coming down from Baltimore in the next train, and that they would have to fight these armed men if they wanted to vote. Pumphrey went down to where the negroes were, moved around among them, telling them what Wells directed him to tell, and adding that he was a deputy sheriff, that he could not protect them, and if they took his advice they would go home. He then came back and reported to those who sent him what he had done. Fifty or more of the colored voters testified that they heard Pumphrey telling them to go home; that there was a wagon load of roughs there with guns, and that more were coming, etc.

After commenting on the fact that the leaders in the intimidation were not called to rebut the charges, the majority say:

The contestee claims that if this were all so, the negroes had physical force enough to have voted if they had persisted in doing so. The committee holds that a citizen has a right to a free and unmolested approach to the ballot box and is not bound to fight his way to a polling window, especially when to do so he must come into conflict with persons who claim to be officers of the law, the truthfulness of which claims he has no means of negativing, and that a candidate, whose supporters have done all in their power to make voters believe that they would suffer injury if they attempted to vote, can not be heard to say that the intimidated voters should not have believed the threats made to them. * * * The contestant proves that he lost at least 175 votes as a result of this intimidation.

The minority, after examining the testimony, concluded that the disorder was not sufficient to have intimidated a man of ordinary firmness.

As a result of their reasoning the majority found a plurality of 154 votes for the contestant, and recommended the following:

Resolved, That Barnes Compton was not elected as a Representative to the Fifty-first Congress from the Fifth district of Maryland and is not entitled to the seat.

Resolved, That Sydney E. Mudd was duly elected as a Representative for the Fifth Congressional district of Maryland to the Fifty-first Congress and is entitled to his seat as such.

The minority dissented from this conclusion and recommended:

Resolved, That S. E. Mudd was not elected as a Representative to the Fifty-first Congress from the Fifth Congressional district of Maryland.

Resolved, That Barnes Compton was duly elected and is entitled to retain his seat.

The report was debated at length on March 19 and 20, 1890;[1] and on the latter day the question was taken on a motion to substitute the minority for the majority resolutions. This motion was disagreed to, yeas 145, nays 155. Then the resolutions of the majority were agreed to, yeas 159, nays; 145. Thereupon Mr. Mudd appeared and took the oath.

581. The West Virginia election case of Smith v. Jackson in the Fifty-first Congress.

A board of county canvassers, legally competent to recount, may make such recount even after it has certified and forwarded the result of the first count.

A county court charged by law with the duty of canvassing precinct returns may correct its returns by a supplemental certificate, which should be taken into account by the governor in issuing credentials.

On January 23, 1890,[2] Mr. John Dalzell, of Pennsylvania, presented the report of the majority of the Committee on Elections in the West Virginia case of Smith v. Jackson.

The governor had issued a certificate to sitting Member on finding a plurality for him of 3 votes. Contestant claimed that the true vote as shown by the returns of highest authority gave to himself a plurality of 12 votes.

Two questions therefore arose: One as to the prima facie right and another as to the final right.

(1) As to the prima facie right. Two leading questions were discussed in this branch of the case.

(a) The report says:

> Under the laws of West Virginia (Code, sec. 22, ch. 3) it is made the duty of the commissioners of the county courts in each Congressional district to transmit to the governor a certificate of the result of the election within their respective counties, "and in the said certificate shall be set forth, according to the truth, the full name of every person voted for, and in words at length the number of votes he received for any office."

The commissioners of Ritchie County sent two certificates, the first giving Smith a majority of 567 votes, and the second giving Smith a majority of 570 votes, a difference of 3 votes favorable to contestant. The report says:

> The second certificate correctly represented the result of a recount of the votes, made at the instance of the contestee. The governor accepted the first and rejected the second certificate, and thus took away from Smith 1 vote a-ad added to Jackson 2 votes.
>
> The law of West Virginia with respect to a count and recount of returns is as follows (Code, sec. 21, ch. 3):
>
> "The commissioners of the county court shall convene in special session at the court-house on the fifth day (Sundays excepted) after every election held in their county, or in any district thereof, and the officers in whose custody the ballots, poll books, and certificates have been placed shall lay the same before them for examination. They may, if deemed necessary, require the attendance of any of the commioners or canvassers, or other officers or persons present at the election, to answer questions under oath respecting the same, and may make such other orders as shall seem proper to procure correct returns and ascertain the true result of the said election in their county. They may adjourn from time to time, and when a majority of the commissioners is not present their meeting shall stand adjourned

[1] Record, pp. 2392, 2440–2449; Journal, pp. 364, 365.

[2] First session Fifty-first Congress, House Report No. 19; Rowell, p. 13; Rowell's Digest, p. 436.

till the next clay, and so from day to day till a quorum be present. They shall, upon the demand of any candidate voted for at such election, open and examine any one or more of the sealed packages of ballots and recount the same, but in such case they shall seal up the same again, etc."

After quoting the second certificate the report says:

This certificate the governor ignored altogether, and the contestee now seeks to justify his action by saying that upon the making of the original certificate the county court was functus officio, powerless even to correct an error; and that a recount can be had only when the demand therefor is made prior to the issue of a certificate. This contention is directly in the teeth of the contestee's own action in demanding the recount, and is not in the judgment of your committee tenable on any ground.

The mamifest purpose of the law in providing for a recount is that errors may be corrected. There can be no recount until there has been a perfected count. Whether a recount shall be necessary can not be determined till the first count is finished. No provision is made in the law as to the time when the recount must be demanded. There is no statute of limitations on the subject. To hold that a recount must be demanded on the day of the original count leads to the manifest absurdity of requiring the candidate to be present, in person or by proxy, in as many different places as there are county courts in his district at one and the same time. In the district in question there are twelve counties. If the recount was lawful, as undoubtedly it was, so then was the certificate of its result, and the governor exceeded his powers in accepting the first and ignoring the second certificate from Ritchie County.

In a similar way the governor rejected a second certificate from Calhoun, thereby taking 2 votes from contestant. This second certificate was made, not in response to a demand for a recount, but to correct an error. The certificate itself shows:

At a regular session of the county court of Calhoun County, held at the court-house of said county on Monday, the 7th day of January, 1889, on motion of A. J. Barr, it is ordered by this court that the returns of the election held in this county on the 6th day of November, 1888, as certified by the county court, held on the 12th day of November, 1888, be corrected, it appearing to the court that there is a clerical error in the returns as certified, to wit: That the record of the result of said election for a Representative in the Congress of the United States shows that Charles B. Smith received 630 votes, which should have been C. B. Smith received 632 votes.

It is therefore ordered by this court that the record of this count be corrected so as to show that C. B. Smith received, etc.

The report says of the governor's rejection of the second certificate:

He assigned no reason for his action, but counsel for contestee now seek to justify it on the grounds here in before stated—that upon the making of the first certificate the county court was functus officio, and had no power to correct an error, however plain and palpable, after the certificate had been issued.

It has been held that where the judges of election discover a mistake upon a recount of the ballots their supplemental return is entitled to be received (Archer v. Allen, Thirty-fourth Congress); and that errors, whether fraudulent or accidental, may be corrected at any time, even after certificate of election issued by the governor. (Butler v. Lahman, Thirty-seventh Congress—Morton v. Daily, Thirty-seventh Congress.)

It is believed that there is inherent in every body charged with the ascertainment of the popular will, whether its functions be judicial or ministerial, the power to correct an error when discovered and to make its conclusions express the true will of the people as disclosed by their suffrages. And it is especially to be noted that there is no suggestion from any quarter that the certificates from Ritchie and Calhoun counties, ignored by the governor, did not accurately show the exact number of votes legally cast for the respective candidates, while on the contrary it expressly appears that they did so show.

582. The case of Smith v. Jackson, continued.

A person having been seated on credentials regular in form but improperly issued, the Elections Committee in a sustained case, ascertained prima facie right in favor of contestant.

The Elections Committee, in a sustained case, shifted the burden of proof to sitting Member on ascertaining that contestant had been entitled to the credentials.

The law requiring a return to "set forth in words at length" the number of votes, the governor, in awarding certificate of prima facie right, should construe an obscure word as a word in full, not an abbreviation.

In ascertaining prima facie title the governor should make intelligible an obscure return from the records of a returning board when said board has the functions of a court of record.

(*b*) The remaining question arising as to prima facie right is set forth in the following statement made by the governor of West Virginia:

The commissioners of Pleasants County certify as to J. M. Jackson's vote as follows: "S. M. Jackson received eight hundred and two votes." The words and letters are too plain for any mistake. For the reasons heretofore given there is no authority to go behind the returns. The vote certified must be counted if enough appears to ascertain the meaning. In an action upon a note it was held: "There was no error in admitting the note sued on in evidence, because the amount thereof is written four *hund* and two and 50–100 dollars." (Glenn *v.* Porter, 72 Ind., p. 525.)

So it has been held that the abbreviation in a declaration, "Damages one *thous* dollars" is not error. (1 W. L. J., Mich., 395.)

If enough appear to make the return intelligible, it should be made so.

This can not be done without striking out one letter and inserting another, or by supplying the seemingly omitted letters. Acting upon the face of the paper the latter appears more in consonance with adjudged cases. The least number would give to said Jackson 812 votes. It will be so entered.

As to this the report holds:

The governor knew—could not help knowing—even if a poor penman omitted to close his "o" so that the word looked like t-w-e, instead of t-w-o, that the word intended was *two.* Upon general principles he was bound to presume that the three letters expressed the whole word, but he was especially bound to so assume in this case, because the law, of which he pretended to be so tender, required that "the certificate shall set forth, according to the truth, the full name of every person voted for, and in words at length the number of votes he received for any office."

The law, therefore, told him that the word about which he pretended to doubt was not an abbreviation but a number written in words at length. He gratuitously assumed the violation of this law by the county court making the certificate, as well as did violence to the commonest kind of common sense when he tortured these three letters into the word "twelve."

He knew furthermore that "twe "is not now, never was, and probably never will be amongst sane men an abbreviation of twelve, or of twenty, or of any number known to an American. And he knew again that the letters were intended to express a number, and that there is no number known to the English language written with three letters, the first of which is "t "and the second "w "except the single number two.

But even if it were conceded that there could possibly have been a doubt as to what the word meant, then it was a patent ambiguity, which any law student could have told the governor it was his duty to explain by evidence. This he was bound to do, and could very readily have done, as will clearly appear hereafter. Had it been impossible for him to do so, the only legal alternative remaining was to strike out the word altogether as insensible, and read the return 800.

Neither process would have given the certificate to the contestee. The governor therefore guessed enough to give to that gentleman 3 of a majority.

The true vote in Pleasants County for Jackson was 802, and not 812. Nobody now claims, nor did anybody ever claim, that it was in fact anything else.

Counsel for contestee, however, without attempting to defend a trick indefensible, ingeniously argued before the committee that the governor had no legal standard by which to explain the so-called

doubtful word, and that no competent legal evidence has been produced by the contestant to show that the true vote in Pleasants County was other than as counted by the governor.

The argument is that under the laws of West Virginia the commissioners of the county court do not constitute in any proper sense a court of record, but are merely a returning board, having no judicial functions,. except when making a recount, and no authority to evidence their action except by the issue of a single certificate, which is to be sent to and deposited with the governor.

Upon the faith of this proposition it is contended that the only legal record evidence of the vote in Pleasants County, as ascertained by the county court, is the certificate sent to the governor, and that the certificates procured by the contestant from the clerks of the county courts and offered in evidence, showing the results of the elections in the several counties, are not competent evidence.

These certificates, it is contended, were made without authority of law and at the instance of a court having no right to make a record.

The report next discusses the case of Brazie *v.* the Commissioners of Fayette County (25 W. Va., 213) and finds that it does not sustain the contention of counsel for sitting Member.

Aside from general principles, the report finds from West Virginia statutes that the county court is more than a mere returning board; for it is intrusted with the duty of fixing voting places; of naming election commissioners. Moreover, to it are returned certificates from the district canvassers, the ballots cast, and one set of poll books. Its clerk is by law the custodian of these records. It convenes in special session to pass on election returns, has power to summon witnessess, administer oaths, and "make such orders as shall seem proper to procure correct returns, and ascertain the true result" of the election. The fact that this court meets in "special session" indicates to the committee that it is more than a mere returning board. The report further finds:

Provision is expressly made by section 46, Acts 1881, chapter 5, for a complete record of all the proceedings of the county court, both those which relate to its general jurisdiction, exercised at its ordinary sessions, and those which relate to its exceptional jurisdiction, exercised at its special sessions.

But, in addition to the record thus provided for, there are other provisions of the law with which the position assumed by contestee's counsel and now under discussion are inconsistent.

By section 22 it is prescribed that when an election is held in a county or district for any or all of some twenty-two different officers—State, county, and Federal—"the commissioners of the county court, or a majority of them, * * * shall carefully and impartially ascertain the result of the election in their county, and in each district thereof, and make out and sign as many certificates thereof as may be necessaxy. * * * The said commissioners shall sign separate certificates of the result of the election within their county for each of the offices specified in this section which is to be filled;" that is, separate certificates for each of the twenty different offices, State, county, and Federal.

Section 23, still preserving the plural number and speaking of certificates, makes provision for the disposition of these certificates. As to certain offices, one of the certificates is to go to the governor; as to certain other offices, one is to go to the secretary of state; as to certain offices, one is to go to some designated public officer; the other to the candidate elected.

In all cases, with respect to every office, it is the duty of the court to sign separate certificates. As, of the separate certificates directed to be made in the case of a candidate for Congress, one only is to go to the governor, and, as no provision is made for the giving of the other to the candidate or to any public officer, it necessarily remain with the clerk of the court.

By section 5 of chapter 130 (code of West Virginia)—

"A copy of any record or paper in the clerk's office of any court, or in the office of the secretary of state, treasurer, or auditor, or in the office of surveyor of lands of any county attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original."

* * * * * * *

Your committee are therefore clearly of the opinion that, under the laws of West Virginia, it was competent for the governor and it was his duty to make intelligible if unintelligible the certificate

as to the vote in Pleasant County, by consulting the certificate and record of that vote on file in the clerk's office of that county, and that in default of his having done so it is competent for them and is their duty now to do it.

It is conceded that ever since the passage of the West Virginia act of 1882, which we have been discussing, it has been the custom of the county court to keep on file a duplicate certificate showing its conclusions with respect to the election of a Representative to Congress.

(2) In accordance with their reasoning as to the prima facie case the majority of the committee say:

And they are of the opinion that, on the face of the returns, the contestant was elected by a majority of 12, and was entitled to the governor's certificate of election. Such being the case, the contestant is now to be treated as if he had received the certificate, and the onus is cast on the contestee to show that the returns, if truly made, would elect him. (Wallace *v.* McKinley.)

The minority of the committee, in views presented by Mr. Charles F. Crisp, of Georgia, defend the action of the governor of West Virginia, but do not dissent from the propositions of law laid down in any branch of the case.

583. The case of Smith v. Jackson, continued.

When irregularity of a jurat works rejection of a poll unless canvassing officers are satisfled that the oath was taken, the counting of the poll is conclusive offset to a faulty jurat.

A slight technical error in a jurat, omitting that which may be made certain, should not cause rejection of a poll, even when the law makes rejection the penalty of improper certification of the oath.

Failure of election officers to include in their returns votes for a certain office as required by law, when said votes have been counted and tallied, does not justify rejection of the poll.

As to the final right to the seat, two classes of questions arose, first as to the effect of certain alleged irregularities in the conduct of the election; and second as to the qualifications of certain voters.

First, as to the alleged irregularities.

(*a*) Sitting Member asked that the poll of Ebenezer precinct be rejected because it did not appear that the commissioners who conducted the election were sworn. The report says:

The record shows that on the poll book returned to the county clerk's office the oath appeared at length and in the form prescribed by law, subscribed by each and all the commissioners, but the jurat is irregular and indefinite. It reads as follows:

"Subscribed and sworn to before me as one of the commissioners, L. F. Law, this —— day of November, 1888.

"PETER CONLEY."

Both Law and Conley were commissioners, and either had the power to swear all the rest. It is very clear, even from the imperfect record, that all took the oath by subscribing to it, and that as to two at least the certificate is conclusive. Where part of the officers are sworn, others not, the election is valid. (Fuller *v.* Davison, 2 Bart., 126.) Two things are to be noted in this connection, first, that sworn or unsworn, all the commissioners were de facto election officers, and, second, that no harm resulted to anyone, either the public or an individual voter, from their failure to be regularly sworn. All authorities agree that the acts of de facto officers are to be accepted and treated as valid so far as the public and the candidates are concerned. (Paine on Elections, sec. 373, and cases cited.) It is a well-settled principle of law, and a very ancient one, "that the act of an officer de facto, where it is for his own benefit, is void * * * but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good." (Cro Eliz, 699.)

It has been repeatedly held that a certificate of unsworn officers even is prima facie, and the burden is on the contestant to show that the errors committed affected the result or rendered it uncertain. (Taylor *v.* Taylor, 10 Min., 107 Whipley *v.* McCune, 10 Cal., 352.)

It is contended however, that this principle does not apply in this case because the law of West Virginia provides:

"The said oath shall appear properly certified on one of the poll books of every election, and in no case shall the vote taken at any place of voting be counted unless said oath so appears, or unless it be proved to the satisfaction of the commissioners of the county court, convened at the court-house, as hereinafter required, that the oath was taken before said commissioners, canvassers, and clerks entered upon the discharge of their duties."

But the contention must fail and the argument be against the contestee for the manifest reason that unless the oath had been taken the votes at this precinct could not have been counted. The taking of the oath was to be made to appear either upon the poll books or by proof to the satisfaction of the county commissioners. These commissioners had power, "if deemed necessary, to require the attendance of any of the commissioners or canvassers, or other officers or persons present at the election, to answer questions under oath respecting the same, and to make such other orders as shall seem proper to procure correct returns and ascertain the true result of the said election in their county."

The commissioners of the county court must be presumed to have done all things within their power necessary to be done in the performance of their duty in accordance with law. They can not be presumed to have done anything unlawful. The votes could not have been lawfully counted unless the election officers appear to have been sworn, either by the evidence of the poll book or by other evidence satisfactory to the commissioners. The votes were counted, and if it be true, that the swearing of the officers is not proven by the poll book, it must have been otherwise proven to the satisfaction of the commissioners.

No reason, therefore, has been shown why your committee should disfranchise the voters of this district.

The majority also discuss two other precincts:

The objection made to the vote of the Murphys Mill precinct is of such a frivolous character as to merit but little discussion. It is, that the oath of the precinct commissioner does not appear properly certified on the poll book. It was not properly certified because Marion J. Bickle, a justice of the peace, who administered it, signed the jurat "Marion J. Bickle, in and for Clay district, Wood County, W. Va.," omitting the words "justice of the peace" after his name.

He was, in point of fact, a justice of the peace, as the evidence shows. The less comment made on this objection the better, one would think, for the contestee.

The next objection is like unto the last, and relates to Wadesville precinct, Wood County. The objection here again relates to an alleged irregularity in the jurat. The oath was administered by T. J. Sands, one of the commissioners of election, but he omitted to sign with his official title.

That the oath was administered by him, that he was a commissioner and by law authorized to administer it, are facts not capable of being called in question.

The matter does not seem to merit discussion.

(*b*) The sitting Member asked for the rejection of Kentuck precinct on the ground that no vote was returned on the poll books by the precinct commissioners nor any certificate in the case of the candidates for Congress. The law of West Virginia, after providing for the count at the close of the polls, has this requirement:

The contents of the ballots as they are read shall be entered by the clerks under the supervision of the commissioners on tally papers for the purpose by suitable marks made opposite to or under the name of each person for any office to be filled.

As soon as the results are ascertained, the commissioners or a majority of them * * * at each place of voting shall make out and sign two certificates thereof [according to a prescribed form] and transmit one to the clerk of the county court. They shall also seal up the ballots and send them with one set of the poll books to the said clerk.

The report says:

A reference to the certificate will show that the certificates were made and signed by the commissioners holding the election, and returned to the clerks of the county and circuit court, as required by law, but that the names of contestant and contestee did not appear in said certificate, nor the office for which they were candidates and received votes. But their names were on the ballots cast at said precinct for said office, and the ballots were counted by the commissioners of election, and their names were written down by them on the tally sheets opposite or under the designation of the office for which they received votes, and the number of votes which each received was designated on said tally sheets, to wit, 152 for contestant and 72 for contestee, in the same manner as was done with respect to the names of all other candidates voted for at said election, and the tally sheets were returned with the certificates and the ballots to the clerk of the county court. The aggregate votes appearing thereby to have been cast for contestant and contestee were one less than the highest number appearing to have been cast for any other two opposing candidates. When these papers reached the commissioners of the county court, counsel for contestee demanded a recount of the votes for Jackson County, as to Representative in Congress, as he had the lawful right to do. Under this demand the commissioners of the county court recounted all the ballots cast for Representative in Congress in that county, and upon that recount the number of votes appearing to have been cast for the contestant and contestee were the same as appeared upon said tally sheets, and including these votes, the result in the county was, for contestant, 2,272 votes, and for contestee, 1,886 votes. And this result was certified to the governor.

The only irregularity here seems to have been a clerical error, in the failure of the election commissioners to insert in the certificate the result of the election at that precinct as to Representative in Congress. They did ascertain the result and wrote it correctly on the tally sheets, and when the county commissioners counted the ballots at the demand of contestee's counsel, they obtained the same result, and the ballots were there and inspected by the commissioners, and presumably by the contestee's attorney, who made the demand for recount.

But this failure of the commissioners of election to make return of the votes at this precinct could not have the effect to disfranchise the persons who voted there, and the law of West Virginia especially provides for such a case. In declaring the powers and duties of the county commissioners in ascertaining and declaring the result of the election in their respective counties, the following language is used:

"They may, if deemed necessary, require the attendance of any of the commissioners or canvassers or other officers or persons present at the election, to answer questions under oath respecting the same, and may make such other orders as shall seem proper to procure correct returns and ascertain the true result of the said election in their county."

The presumption as well as the proof is that the county commissioners ascertained, by the exercise of their powers of examination, the true result of the election, and certified accordingly. There is no pretense that they did not.

Counsel for contestee say that he, the contestee, made no demand for a recount of the vote at this precinct, and argue that the fact of such demand should appear of record. There is no law requiring the demand to be made matter of record. There is no record of demand made in any precinct, though contestee admits having made such demand in some. There is affirmative proof (Record, p. 724) that demand was made for a recount in this precinct by contestee's attorney, and neither the attorney nor the contestant was called to rebut this evidence.

The matter does not seem material nor to merit discussion, since there is no pretense that the commissioners in the exercise of their legitimate functions did not ascertain the true vote in this precinct; no pretense that it was not truly declared; no pretense that any voter suffered anything by the alleged irregularity; in fact, nothing to take this case out of the ordinary rule of law, that statutes directing the mode of proceeding of public officers are directory merely, unless there is something in the statute itself which plainly shows a different intent.

584. The case of Smith v. Jackson, continued.

No fraud being shown and no specific fraudulent act being alleged, the House declined to reject a poll because unsworn persons assisted in the count.

The holding of an election in a place other than the legal place does

not cause rejection of the poll when evidence shows that no voter was deprived of his rights thereby.

A mere technical violation of the law as to custody of ballot box, no injury being shown to anyone, does not justify rejection of the poll.

(*c*) Sitting Member alleged that the poll of Pine Log precinct should be excluded because of "misconduct and fraudulent acts" on the part of the election officers. It appeared from the testimony that in the night during the counting of the vote one of the three commissioners went to sleep, while another sat smoking, leaving the third commissioner to do the counting, assisted by the son of the sleeping commissioner and a man named Davis. Both the son and Davis belonged to sitting Member's party. It appeared by reference that Commissioner Rorden, who did the counting, was a Republican, while the commissioner who smoked was McKown, a Democrat. The report says:

The evidence does not show that the ballot box was in the custody of any one of the commissioners so as to require it to be sealed. Even if it was out of the custody of Dernberger, from the fact that he was asleep, it was not out of that of McKown, who was present in the room, and the counting proceeded under his observation, and his place was filled in the operation of counting by a Democrat. There is not the slightest evidence tending to show that there was any tampering with the ballot or returns, or any fraud of any character. Ala that was done was in the presence of at least two of the commissioners who were awake.

It appears from the evidence of Lemley (pp. 724–725) that the return from this precinct did not show any votes for contestee, but 139 votes for contestant, a mere clerical error in failing to write into the return contestee's vote, but, under the recount which was demanded by contestee the votes for him at this precinct were counted by the commissioners of the county court, and the number of them, 93, included in their return to the governor.

It is to be observed that no allegation of any specific act of fraud is alleged. Your committee are asked to presume that fraud was committed because it might have been committed, and this in the absence of any pretense that a single legal vote was excluded from, or a single illegal vote was included in, the result announced.

Your committee do not know of any principle of law that would justify them in so finding. They understand the law to be as declared in Mann *v.* Cassidy (1 Brewster, Penna., 60): "An allegation of fraud committed by election officers is immaterial unless it be also stated that the result has been affected."

(*d*) Sitting Member charged that in Boyer preemet the voting place was at Isaac Branch's schoolhouse, one-half to three-quarters of a mile distant from McGill's post-office, which the county court had established as the legal voting place.

The report says.

The evidence tends to prove the above statement, but it is not claimed, nor does the evidence tend to show, that any person was deceived or prevented from voting thereby. Two witnesses only are examined by contestee in relation to this precinct, and one of them (Fowler, pp. 408–409) says that it was his understanding from the time he knew of the election that it was to be held at the Isaacs Branch schoolhouse, and that every voter in the precinct voted at said voting place at said election except one, and he was too sick to go to the polls. The other witness (Dunlap, p. 410), corroborates Fowler generally, and, in addition, says that the school election in 1887 was held at the same place. So that contestee by his own witnesses proves that no voter was wronged out of his vote, and that he was not injured by this change of voting places.

This case calls for the application of the rule which protects the voter against disfranchisement from the default of a public officer when such default has resulted in no injury to anyone. (Farrington *v.* Turner, 53 Mich., 27; People *v.* Simonson, 5 N. Y., 22; Steele *v.* Calhoun., 61 Miss., 556.)

The same principle was applied to several other precincts where like irregularities occurred.

(*e*) The report thus states another objection:

In Walton precinct, Roane County, the contestee claims that the ballot box was in the custody of one of the commissioners of election alone, in violation of law, and that the vote at this precinct, where contestant had 131 plurality, should be rejected for this reason.

The section of the law relating to this subject is as follows (Code, ch. 3, see. 14):

"The ballot box shall have an aperture in the lid or top thereof to receive the ballots of voters. While the polls are open it shall be kept where it may be seen by the voters, and after the polls are closed, and until the votes are counted and the certificates of the result are signed, shall remain in the immediate custody of the commissioner, or anyone of them, with the consent of the others. But it shall not be opened unless two of them at least be present, and if left at any time in the custody of one of the number, shall be carefully sealed so that it can not be opened or any ballot taken therefrom or entered therein without breaking the seal, and the others shall write their names across the place or places where it is sealed."

It was in proof that at the dinner hour on election day the ballot box was sealed, and was for about five minutes in the exclusive custody of one commissioner. During the counting, while they were resting, a Republican commissioner, Garvin, and a Republican clerk, Summers, were for a short time alone with the box, the others having stepped out. The witness Walker said, according to the report:

Walker testifies for contestee that he saw nothing in the conduct of Garvin or Summers which led him to suppose that there had been any tampering with the ballot box, and that there was nothing to indicate that there had been; that he knew Garvin well, and did not believe he did or would tamper with the ballot box, or permit it to be done; that the result of the election was about as usual at that precinct, and nothing in it to indicate that there was any tampering, and that the number of ballots tallied with the number of names on the poll books. There is a total absence of evidence tending to show any fraud or improper practices on the part of anyone in conducting the election.

The evidence fails to show that the box was "left at any time in the custody of one of the number" in contemplation of the law. While they were at dinner it was as much in the custody of the one who did not have manual possession as it was in his who did. Besides, at that time it was sealed. On the other occasion it was not left in Garvin's custody in contemplation of law or in fact. The others stepped out only momentarily. The sealing was to be done only when the two turned it over to the third, thereby expressly charging him with the custody.

Besides, if there was any violation of law it was only technical, and did not tend to the injury or prejudice of the contestee, and can not deprive the voters of the right of having their votes counted as cast.

586. The case of Smith v. Jackson, continued.

A clear preponderance of competent evidence is required to overthrow the prima facie legality of a ballot received by the election officers.

Testimony quoting statements of the voter after election as to how he voted or as to his qualifications is inadmissible to prove illegality of a ballot, being hearsay.

In absence of direct proof of how he voted, evidence as to the voter's party, his advocacy of candidates, or the friends who sustained his right to vote is admissible.

One who has knowingly cast an illegal vote should not be relied on to prove how he voted; but it is otherwise in case of honest mistake.

The minority of the committee did not dissent from the above conclusions of law; but joined issue on the facts (not the law) involved in the examination of

the second branch of the inquiry as to final right. The majority thus stated the principles of law by which it would be governed in determining the qualfications, of voters:

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

By competent evidence we mean such evidence as would be admitted on the trial of the issue before a judicial tribunal, except where a relaxation of the rule is made necessary by the nature of the issue.

(*b*) No provision is made by the statutes of West Virginia to ascertain what particular ballot any voter has deposited after it has been once placed in the ballot box. Therefore in this case it becomes necessary to ascertain for which candidate a vote was given by other means than the ticket itself.

It seems to have been taken for granted by both parties that the voters themselves could not be compelled to disclose how they voted. It may be remarked in this connection that one who would knowingly cast an illegal vote ought not to be regarded as the most reliable witness. On the other hand, when he has been honestly mistaken, we can see no reason why such voter ought not to be trusted as a witness.

In order, then, to prevent illegal voting with impunity, it becomes necessary to determine what kind of testimony shall be received in ascertaining which candidate got the benefit of the illegal vote. The committee have followed the rule which appears to them to be the most reasonable, as well as the best sustained by authority.

In the absence of direct proof, evidence showing to what political party the voter belonged, whose election he advocated, whose friends maintained his right to vote, and kindred testimony has been held admissible. Of course what the voter said at the time of voting is admissible as a part of the res gesta.

But what a voter said after the day of the election, either as to his qualifications, or how he voted, or whether he voted, the committee hold to be inadmissible in the absence of other testimony on the point. If such testimony can be admitted at all, which we do not concede, it certainly ought not to be received when the statement of the voter is made after the legality of his vote has been called in question. To admit this kind of testimony is to place it in the power of one not entitled to vote to have his illegal vote counted twice against the party he desires to defeat, without subjecting himself to cross-examination and without even the formality of testifying under oath.

Again, one legally qualified may, by statements after he has voted, make himself out to be disqualified without incurring any penalty, and in that way have his legal vote given to one party counted as illegal against another party. One who has not voted at all may in the same way be proved to have voted. In a close contest, with party feeling running high—perhaps party control involved—the admission of this kind of testimony would be doubly dangerous. It has nothing to commend it except a class of decisions whose authority has been weakened, if not destroyed, by later and better considered adjudications. The committee reject all such testimony as being mere hearsay of the most dangerous kind when standing alone. When the only evidence of how a man voted, or whether he was a legal voter, is the unsworn statement of the voter after the election, we have let the vote stand.

586. The case of Smith v. Jackson, continued.

A voter capable of making a valid will or contract or of being criminally responsible for his act, may not be disqualified as of unsound mind.

Nonprofessional evidence that a voter is an "idiot" may be given weight as a statement of fact rather than of opinion.

Nonprofessional testimony as to a voter's "unsound mind" should be accompanied by careful definition to be of weight.

A voter ordinarily self-supporting is not to be held as a pauper because of receiving public aid temporarily.

(*c*) In regard to what constitutes a person of unsound mind, we have adopted the rules substantially as laid down by American courts and text-book writers, and hold that a person having sufficient intelligence to make a valid will, or to bind himself by ordinary contracts, or to be criminally responsible for his acts, is a person of sound mind. One whose will would be held invalid for no other reason than mental incapacity is a person of unsound mind.

In the record we find the oft-recurring question, "Was the voter, in your opinion, a man of unsound mind?" put to a nonprofessional witness without any attempt to define what was meant by unsoundness of mind. To the answer to such question, unaccompanied by any explanation of what the witness understood by the term, we attach very little weight.

The condition of the voter, his acts and speech, how he is regarded by those who know him, as to his competency to contract, judicial determinations, and the like evidence has been given due weight. The term "idiot" is so well understood that the statement of a witness that a person is an idiot is given more weight, as being the statement of a fact within the knowledge of the witness and not a mere opinion.

(*d*) Upon the question of what constitutes a pauper there is some disagreement in the authorities, but we think the following may be taken as a fair definition: A pauper is one who is continuously supported, in whole or in part, out of funds provided by the public authorities for that purpose. One who has been a public charge and afterwards became self-supporting for a sufficient time before the election to show that his ability to support himself is not a mere temporary condition may legally vote. One who, under temporary misfortune or sickness, receives public aid, but is ordinarily self-supporting, is not a pauper.

587. The case of Smith v. Jackson, continued.

A new residence may not be established by intention without an actual removal to the new place.

Residence may not be retained by a simple statement of intention when actual residence has been taken up elsewhere.

Votes of persons otherwise qualified and cast in good faith, in accordance with previous habit, should not be rejected because of disputed boundary of precinct.

(*e*) The law which determines the question of residence is so well settled that it does not need a restatement by the committee; the difficulty is in the application of the law to the evidence.

Absence from the place claimed as a residence, for temporary purposes, does not work abandonment; but in this case some of the witnesses and some of the commissioners of election seem to have had the view that a voting residence might be retained by the simple statement of intention to retain a certain place as a voting residence, although an actual residence had been taken up elsewhere, with no fixed intention of ever again actually living at the place where the right to vote is claimed. Others seem to think that they can establish a new residence by intention before actually and in fact moving to the new place.

We do not concur in these views. It takes both act and intention to establish a residence, and an intention to retain a residence which has been left must be an intention actually to return to it and reside in it.

(*f*) Some votes in this record are questioned on account of disputed or doubtful boundary lines. The committee have not thought it their duty to go into an investigation of disputed boundaries, but have counted all votes as legal when the voters were otherwise qualified and voted in good faith in the district where they believed that they had their residence, and where they had been in the habit of voting.

588. The case of Smith v. Jackson, continued.

The fact that laborers are employed in a moving gang by a corporation does not destroy the presumption that they are entitled to vote at the place of headquarters.

A vote challenged in notice of contest by either party is a proper subject of investigation.

When both sides have without objection investigated an alleged illegal vote, failure to specify it in notice of contest may not be urged.

Admission by contestant that his evidence is of doubtful sufficiency is held to amount to waiver of the allegation.

(*g*) In the examination of the qualifications of individual voters the majority found

Fourteen other votes, laborers on a railroad, are attacked on the ground that they had not lived in West Virginia for a year, were not residents of the district where they voted, and were employees of a corporation.

As to some of them it clearly appears that they had lived in the State a sufficient time to entitle them to vote. As to none of them is it shown by competent testimony that they had not been so resident, and the presumption is in their favor.

They belonged to a construction gang which had its headquarters where they voted; to this point they constantly returned; received their mail there; had their washing done there, and had a right to fix their residence there. Their employment by a corporation did not give them a residence, but it did not prevent them from acquiring one. Some had voted there a year before. We think the presumption of legality is in no way overcome by the evidence.

The report also disposes of two questions of practice:

(*a*) Two or three of these votes contestee insists should not be charged against him, because not named in contestant's notice of contest.

One of them, Michael Hobart, was challenged by contestee in his reply. The vote was illegal and cast for contestee. The committee think that a vote challenged in the notice by either party is a proper subject of investigation.

Two others were not named in either notice. The pleadings in this case are more specific than the practice before the committee requires. As a general rule, parties ought to be bound by their pleadings, but where neither party has been taken by surprise, and both have entered into the investigation, the rule should be relaxed in the interest of justice.

The evidence in regard to these voters was taken a month before contestee commenced examining his witnesses, the witnesses impeaching the votes were cross-examined on this branch of their testimony, and the contestee should be held to have waived his objections.

(*b*) In a final summary of his claims contestant has conceded that he has failed to establish his charges with reference to a number of named voters, and that the evidence in regard to others places them in the doubtful list. As to all such we have not felt it our duty to examine the evidence, as we take the admission to amount to a waiver, although as to some of them it may be said it takes all the benefit of presumptions to hold them valid.

As a result of their investigations of the alleged illegal votes, the majority reports finds an actual plurality of 39 for contestant, and recommends the following:

Resolved, That James M. Jackson was not elected as a Representative to the Fifty-first Congress from the Fourth Congressional district of West Virginia, and is not entitled to the seat.

Resolved, That Charles B. Smith was duly elected as a Representative from the Fourth Congressional district of West Virginia to the Fifty-first Congress, and is entitled to his seat as such.

The minority, after an examination of the alleged illegal votes, concluded that there was a majority of 23 for sitting Member, and recommended the following:

Resolved, That C. B. Smith was not elected a Representative in Congress from the Fourth district of West Virginia, and is not entitled to a seat therein.

Resolved, That James M. Jackson was duly elected a Representative in Congress from the Fourth district of West Virginia, and is entitled to retain his seat therein.

The report was debated at length on January 31 and February 1 and 3, 1890,[1] and on the latter day the question was first taken on substituting the first resolution of the minority for the first resolution of the majority, and it was decided in the negative—yeas, 135, nays 165. The question next recurred on substituting the second resolution of the minority for the second resolution of the majority, and was decided in the negative—yeas 137, nays 164.

The question recurring on the adoption of the resolutions reported by the majority, the first resolution was agreed to—yeas 166, nays 0; and the second by yeas 166, nays 0.[2]

Mr. Smith then appeared and took the oath.

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[1] Record, pp. 1001, 1010, 1025–1043; Journal, pp. 187–190.

[2] The rulings of Mr. Speaker Reed as to the counting of a quorum was made in connection with the consideration of this case.

Chapter XIX.

IRREGULAR CREDENTIALS.

1. **House exercises discretion in case of informality. Sections 589–598.**[1]
2. **Impeached by evidence in their own terms. Sections 599–611.**[2]

589. The House has declined to admit on prima facie showing persons whose elections and credentials appeared defective.

The House has declined to permit the oath to be taken by persons whose credentials had procured their enrollment by the Clerk.

On December 7, 1863,[3] at the organization of the House, during the administration of the oath to the Members, the names of A. P. Field, Thomas Cottman, and Joshua Baker, of Louisiana, were called.

Mr. Thaddeus Stevens, of Pennsylvania, objected to the swearing in of these Members, on the ground that their certificates and election were both defective.[4]

In the course of the debate Mr. Stevens said that where it was believed from the face of the documents read that they were in truth no credentials, as in this instance, where the papers were signed by a man whom nobody in the United States ever heard of as governor, and with his private seal attached, and where, as he was assured, no pretense of an election had ever been held, it had not been customary to swear in members until it had been determined that they were entitled to seats. A large amount of mileage and salary was involved.

After debate the motion of Mr. Stevens that the credentials be referred to the Committee on Elections, and that the administering of the oath be postponed until after that committee should have reported, was put to the House, and decided in the affirmative—yeas, 100; nays, 71.

590. An instance wherein the House gave prima facie effect to papers not in form of credentials, and which raised a technical question as to the election.—On December 6, 1875,[5] after the organization of the House by the election of a Speaker, a duly authenticated certificate of the State board of canvassers

[1] House sometimes enrolls where the Clerk may not. Section 328 of this volume.

Oath sometimes administered before the arrival of credentials. Sections 162–168 of this volume.

See also case of Gunter *v.* Wilshire (sec. 37 of this volume) and Grafton *v.* Connor (sec. 465); also the Senate cases of Revels (sec. 430) and Ames (sec. 438).

[2] See also case of the West Virginia Members (see. 522 of this volume) and the Colorado case (sec. 523).

[3] First session Thirty-eighth Congress, Journal, pp. 11, 12; Globe, pp. 7, 8.

[4] Both Field and Cottman were on the Clerk's roll and responded to the call, and voted for Speaker. See also the case of Roberts in the Fifty-sixth Congress, sections 474–480 of this volume.

[5] First session Forty-fourth Congress, Journal, p. 13; Record, pp. 172, 173.

of New York was presented showing the election of Nelson I. Norton from the Thirty-third district. This certificate showed that a portion of the votes had been cast for him as "Representative in Congress," and a portion for him as "Member of Congress." The votes cast for him under both designations exceeded the votes for his opponent.

Mr. Samuel S. Cox, of New York, stated that the law of New York required votes to be cast for "Representative in Congress," and therefore he proposed the reference of the credentials to the Committee on Elections.

But there being no opposition, Mr. Norton was permitted to take the oath, after which the credentials were referred.

591. A memorial alleging that credentials were not in accordance with law did not prevent the House from honoring them immediately.—On December 6, 1875,[1] at the organization of the House, during the swearing in of the Members elect, Mr. John Goode, jr., was challenged by Mr. James A. Garfield, of Ohio, and stepped aside until after the organization had been perfected by the election of a Speaker.

Then Mr. Garfield presented a memorial from one J. H. Platt, jr., setting forth particulars in which he alleged that the certificate of Mr. Goode was without authority of law.

It was urged on the other hand that the certificate was exactly in the form of the certificates on which the other Virginia Members had been seated, and was in accordance with the law of Virginia.

The House, without division, voted that the oath be administered to Mr. Goode.

592. The House has given full prima facie effect to credentials signed by a military officer in accordance with the law of reconstruction.

The action of the Clerk in enrolling a Member-elect does not prevent the House from questioning the prima facie force of the credentials.

On March 4, 1871,[2] while the Speaker was administering the oath to the Members-elect at the organization of the House, Mr. Michael C. Kerr, of Indiana, objected to the swearing in of the Mississippi delegation, on the ground that their credentials did not constitute in a just and legal sense prima facie evidence of title to seats on the floor. One of the credentials was read as follows:

HEADQUARTERS FOURTH MILITARY DISTRICT,
DEPARTMENT OF MISSISSIPPI,
Jackson, Miss., January 14, 1870.

I hereby certify that at an election held in the State of Mississippi on the 30th day of November and 1st of December, 1869, for the ratification of the constitution of said State, and for the election of Members of Congress, the said constitution was ratified; that article 12, section 25, of said constitution is as follows:

"Representatives in Congress to fill the existing vacancies shall be elected at the same time the constitution is submitted to the electors of the State for ratification and for the full term next succeeding their election, and thereafter elections for Representatives in Congress shall be held biennially. The first election shall be held on the first Tuesday after the first Monday in November preceding the expiration of said full term."

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[1] First session Forty-fourth Congress, Journal, p. 13; Record, p. 172.

[2] First session Forty-second Congress, Journal, pp. 9, 10; Globe, pp. 9, 10.

And that at said election, under section 25, article 12, of the constitution, Legrand W. Perce was elected a Member of the Forty-second Congress of the United States of America, from the Fifth Congressional district of Mississippi.

[L.S.]

ADELBERT AMES,
Brevet Major-General U. S. A., Commanding.

Attest:

EAMES LYNCH,
Provisional Secretary of State.

On these credentials the Clerk of the House had put the names of the Mississippi Members on the roll, and they had participated in the election of Speaker.

It was argued by Mr. John A. Bingham, of Ohio, that, in the absence of any challenge as to the qualifications of the Mississippi Members, they should be admitted to seats, as having the prima facie evidence that they represented the people of Mississippi. Therefore Mr. Bingham moved that the credentials of the Members-elect from Mississippi be referred to the Committee of Elections, and that they now be sworn in.

This motion being divided, the first portion was put and agreed to, and then on the second portion, "that they now be sworn in," there were yeas 121, nays 81.

Accordingly the oath was administered.[1]

593. Credentials being defective, but no doubt existing as to the election, the oath was administered to the Member-elect by unanimous consent.—On December 5, 1904,[2] the following credentials were laid before the House:

THE STATE OF SOUTH CAROLINA,

By the Secretary of State,

To the honorable the House of Representatives of the United States of America in the ——— Congress:

Whereas in pursuance of the constitution and laws of the State of South Carolina, and the Constitution and laws of the United States of America, an election was duly holden on the 17th day of May, in the year of our Lord 1904, in the said State of South Carolina, in the Second Congressional district thereof, for Representative of the said State of South Carolina, from the said Second Congressional district thereof, in the House of Representatives of the United States of America, in the ——— Congress; and

Whereas upon the examination of the returns of the said election, and by the determination and declaration of the board of State canvassers of the said State, filed and of record in my office, it appears that T. G. Croft was duly elected at the said election by the highest number of votes Representative of the State of South Carolina from the said Second Congressional district thereof, in the House of Representatives of the United States of America, in the ——— Congress:

Now, therefore, I, the secretary of state of the said State of South Carolina, by virtue of the power in me vested by the acts of the general assembly of the said State in such case made and provided, do hereby certify that the said T. G. Croft, at the election aforesaid, was duly elected Representative of the State of South Carolina from the Second Congressional district thereof, in the House of Representatives of the United States of America in the ——— Congress.

Given under my hand and the great seal of the State of South Carolina, in Columbia, this 28th day of May, in the year of our Lord 1904, and in the 128th year of the Independence of the United States of America.

[SEAL.]

J. T. GANTT,
Secretary of State of South Carolina.

The Speaker said—

The Chair desires to call the attention of the gentleman from South Carolina [Mr. Johnson], and also the attention of the House, to the credentials which have just been reported at the Clerk's desk. It seems

[1] The election of which General Ames gave the certificates, was held in pursuance of reconstruction legislation of Congress, providing for such action on the part of the military authorities.

[2] Third session Fifty-eighth Congress, Record, pp. 3, 4.

to the Chair that, taking them altogether, the presumption is that Mr. Croft was elected a Member of the present Congress. But after all in making out the credentials the secretary of state has not filled the blanks which specify the number of the Congress to which Mr. Croft was elected.

Then, on motion of Mr. Sereno E. Payne, of New York, and by unanimous consent, the oath was administered to Mr. Croft.

594. A Senator-elect whose credentials were not in regular form was seated, the irregular portions being considered as surplusage.—On June 14, 1906,[1] in the Senate, Mt. Chester I. Long, of Kansas, presented the following credentials:

HON. CHARLES WARREN FAIRBANKS,

Vice-President of the United States and ex officio President of the Senate of the United States, Washington, D.C.:

Know ye that I, E. W. Hoch, governor of the State of Kansas, reposing special trust and confidence in the integrity, patriotism, and abilities of Alfred Washburn Benson, on behalf and in the name of the State, do hereby appoint and commission him a Senator in the Congress of the United States, from the State of Kansas, to fill vacancy caused by the resignation of Hon. Joseph R. Burton until the next meeting of the legislature of this State, and until a successor has been elected and qualified, and empower him to discharge the duties of said office according to law.

In testimony whereof I have hereunto subscribed my name and caused to be affixed the great seal of the State.

Done at Topeka, Kans., this 11th day of June, A. D. 1906.

E. W. HOCH, *Governor.*

By the governor:

[SEAL.]

J. R. BURROW, *Secretary of State.*

Mr. Julius C. Burrows, of Michigan, chairman of the Committee on Privileges and Elections, said:

Mr. President, it will be observed that the certificate is not in proper form. I call attention to the fact that by it the governor appoints not only to the vacancy until the next meeting of the legislature, but until the legislature shall elect. Under that certificate, if valid, and the legislature should fail to elect, Mr. Benson might hold for life. But the certificate, nevertheless, I think, is sufficient, as that portion of it which assumes to supply the vacancy "until the legislature shall elect" can be regarded as surplusage.

Mr. Benson then appeared and took the oath.

595. A Senator-elect was permitted to take the oath, although his credentials were irregular in minor particulars.—On December 21, 1905,[1] in the Senate, John.M. Gearin appeared with credentials as follows:

STATE OF OREGON, *Executive Department.*

SALEM, *December 18, 1905.*

The Governor of Oregon to John M. Gearin, of the City of Portland, State of Oregon:

Whereas on the 8th day of December, 1905, the seat of the Hon. John H. Mitchell, one of the Senators of the United States from the State of Oregon, became vacant by reason of his death; and

Whereas there has been no session of the legislature of this State at which such vacancy could be filled by the election of a Senator to succeed the said John H. Mitchell; and

Whereas it is of vital importance to the interests of the State and nation that such vacancy be filled:

Now, therefore, be it known that, reposing special trust and confidence in the capacity, integrity, and fidelity of John M. Gearin, a citizen of the State of Oregon, I, George E. Chamberlain, governor of the State of Oregon, do in the name and by the authority of said State, by these presents appoint

[1] First session Fifty-ninth Congress, Record, p. 8453.

[2] First session Fifty-ninth Congress, Record, pp. 667, 668.

and commission him, the said John M. Gearin, to be a United States Senator to fill the place made vacant by the death of the said John H. Mitchell and to occupy the same until a successor shall be duly elected.

In testimony whereof I have hereunto set my hand and caused the seal of the State to be affixed, at the city of Salem, on this 13th day of December, 1905.

GEO. E. CHAMBERLAIN, *Governor.*

By the governor:
[SEAL.]

F. I. DUNBAR, *Secretary of State.*

The credentials having been read, Mr. Julius C. Burrows, of Michigan, said:

I would suggest to the Senator that the certificate, as I understood from its reading at the desk, is defective, in that it provides that Mr. Gearin is appointed until his successor is elected. The governor has no power to make such an appointment. * * * I think under the circumstances I should object to the oath of office being administered because of the defect in the certificate. A certificate appointing a person a Senator until his successor is elected seems to me to be defective.

Mr. John C. Spooner, of Wisconsin, said:

I am very clearly of the opinion, in concurrence with the Senator from Michigan, that the last clause of this commission, "and to occupy the same until a successor shall be duly elected," is in excess of constitutional authority. It is, however, mere surplusage, for the Constitution provides how long a Senator appointed by the governor to fill a vacancy may hold the appointment. If the appointment in itself to fill a vacancy is complete and in accordance with the constitutional provision, whatever is added going to the duration of the term is utterly unnecessary, and if in violation of it is a mere matter of surplusage, not going to the validity, it seems to me, of the appointment.

We have had, I think, a similar case within my recollection. There was a vacancy—that is not disputed—occasioned by the death of Senator Mitchell, which is sought in this amendment to be filled. It is recited that the vacancy happened in a vacation while the legislature was not in session, and the governor says:

"Now, therefore, be it known that, reposing special trust and confidence in the capacity, integrity, and fidelity of John M. Gearin, a citizen of the State of Oregon, I, George E. Chamberlain, governor of the State of Oregon, do, in the name and by the authority of said State, by these presents appoint and commission him, the said John M. Gearin, to be a United States Senator to fill the place made vacant by the death of the said John H. Mitchell."

If the last clause, following that I have just read, were omitted, that, I submit to the Senator from Michigan, is a complete and valid evidence of the appointment of Mr. Gearin by the governor of Oregon, and I think that the Senate ought to disregard entirely the unnecessary and now altogether impotent words which occur at the end of the commission. I make that suggestion to my friend from Michigan.

Mr. Burrows replied:

Mr. President, I only desired to call the attention of the Senate to the defect in the certificate. Of course that portion of the certificate which declares that Mr. Gearin is appointed to fill the vacancy until his successor is elected may be regarded as surplusage, if the certificate in other particulars clearly shows that the executive of the State had the power to make the appointment.

The certificate is defective in another particular. The governor says that he appoints the person named to "fill the vacancy." He has no power to do that. The Constitution provides that the executive of the State, in such a case as the present, "may make a temporary appointment until the next meeting of the legislature, which shall then fill the vacancy." But I do not care to be hypercritical about it at all. I simply call the attention of the Senate to the defects in the certificate.

There being no further objection, Mr. Gearin was permitted to take the oath.

596. The credentials of a Member-elect indicating that he had been elected before the resignation of his predecessor took effect, objection was made and the oath was not administered until new credentials were pro-

duced.—On December 3, 1900,[1] the first day of the session, the following credentials were presented to the House:

THE STATE OF IOWA, *ss:*
TO HON. ALEXANDER MCDOWELL,

Clerk of the Howe of Representatives:

This is to certify that at an election holden on Tuesday, November 6, A. D. 1900, the following-named persons were duly elected Representatives in Congress, to represent the Congressional districts of said State herein set forth, to fill vacancies, to wit:

Walter I. Smith, of Council Bluffs, in the county of Pottawattamie, to succeed Smith McPherson, resigned on the 6th day of June, A. D. 1900.

James P. Conner, of Denison, in the county of Crawford, to succeed Jonathan P. Dolliver, resigned, to take effect on the first Monday of December, A. D. 1900.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Iowa, this 28th day of November, A. D. 1900.

LESLIE M. SHAW.

By the governor:

G. L. DOBSON, *Secretary of State.*

Mr. Joseph W. Bailey, of Texas, raised the question that so much of the credential as related to Mr. Conner's election showed that the election was held before the vacancy actually existed.

The Speaker[2] said:

This objection being made, Mr. Conner will step aside until the other gentlemen whose credentials have been read are sworn

On the succeeding day[3] Mr. William P. Hepburn, of Iowa, having called the case up, Mr. Bailey said that he would not object to the swearing in of Mr. Conner if new and proper credentials could be substituted for those presented the preceding day.

Thereupon the following was presented

UNITED STATES OF AMERICA,
STATE OF IOWA, EXECUTIVE DEPARTMENT.

TO HON. JAMES P. CONNER, greeting:

It is hereby certified that at an election holden on the 6th day of November, 1900, you were elected to the office of Representative in Congress from the Tenth Congressional district of said State for the residue of the term ending the 3d day of March, 1901.

Given at the seat of government this 27th day of November, A. D. 1900.

[SEAL.]

LESLIE M. SHAW.

By the governor:

G. L. DOBSON, *Secretary of State.*

Mr. Bailey called attention to the fact that the credential was addressed to Mr. Conner instead of to an official of the House, but stated that he would not object to this informality. The existence of the vacancy was the vital point.

Mr. Hepburn having stated that Mr. Dolliver, as soon as he had given his written resignation, had accepted another office, that of Senator, incompatible with that of Representative, Mr. Bailey declared this satisfactory evidence that a vacancy existed

[1] Second session Fifty-sixth Congress; Journal, p. 5; Record, p. 15.

[2] David B. Henderson, of Iowa, Speaker.

[3] Journal, p. 20; Record, p. 46.

for which the governor of Iowa could issue a writ of election, and with this as part of the record had no further objection.

Mr. Conner was thereupon sworn.

597. The New York election case of Williamson v. Sickles in the Thirty-sixth Congress.

In 1859 the Clerk enrolled a Member-elect who had no regular certificate, but who presented an official statement from the State authorities showing his election.

A question as to what constitutes a "determination of the result" of an election under the terms of the law of 1851 relating to notice of contest.

The law of 1851 regulating the conduct of contests in election cases is not of absolute binding force on the House, but rather a wholesome rule not to be departed from except for cause.

When the House of Representatives met to organize on December 5, 1859, the name of Mr. Daniel E. Sickles, of New York, was among the names of the Members-elect on the Clerk's roll.

Mr. Sickles did not, however, have a regular certificate of election. The county canvassers had returned the votes in Mr. Sickles's district, as well as in two other districts as cast for "Member of Congress." It appeared that the ballots actually cast were for "Representatives in Congress." The board of State canvassers issued a statement [1] of the votes returned, which showed the election of Mr. Sickles, and declared:

> And we further certify that inasmuch as said office was not legally designated in the returns of the county canvassers of the said county of New York made to this board, we can not certify to the election of any person to the office of Representative in Congress in the said respective districts.

Mr. Sickles presented, in lieu of regular credentials, a certified copy of this statement.

Mr. Sickles's prima facie right to the seat was not challenged, either on December 5, 1859,[2] when the House assembled, or on February 1, 1860,[3] when the oath was administered to the Members-elect by the Speaker.

Mr. Sickles's final right to the seat was contested. The merits of this contest do not appear, since on January 31, 1861,[4] the Committee on Elections simply reported that the contestant had not shown sufficient grounds for disturbing the sitting Member.

But an important preliminary question arose, on which careful reports and a well-considered opinion of the House resulted.

The law of 1851 [5] provided that the contestant should, "within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice in writing" of

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[1] First session Thirty-sixth Congress, House Report No. 80, page 23.

[2] Journal, p. 4.

[3] Journal, p. 165.

[4] Second session Thirty-sixth Congress, Journal, p. 250; House Report No. 61.

[5] 9 Stat. L., p. 568.

his intention to contest. The contestant, Mr. Amor J. Williamson, did not proceed under this law, the explanation of his course being included in the following from the report of the committee:

While the votes were before the State canvassers, and before their action became known, Mr. Williamson made preparations to contest the seat in the mode pointed out in the statute of 1851. He employed counsel for that purpose, and prepared, in part, the notice of contest required by that statute. But when those canvassers published their action he was advised by his counsel that there had been no such "determination of the result of said election" as is contemplated in said act, and that until such determination was made he could not under said law serve notice upon Mr. Sickles more than Mr. Sickles upon him, for both were equally without evidence of his right to the seat from the constituted authorities of New York, and that he could not, by the authority of said act, obtain compulsory process for the attendance of witnesses, or compel them to attend and testify under the pains and penalties of perjury. He therefore abandoned further proceedings under said act, and appealed to the House at the earliest practicable moment after the organization for a commission to take testimony, believing this to be his only mode of obtaining any evidence beyond voluntary testimony. The answer of Mr. Sickles to the petition and to this application to take testimony, and also his brief in its support, are appended to this report, as is the brief of the petitioner in reply thereto.

The committee do not consider the law of 1851 as of absolute, binding force upon this House, for by the Constitution "each House shall be the judge of the elections, returns, and qualifications of its own members," and no previous House and Senate can judge for them. The committee, however, consider that act as a wholesome rule, not to be departed from except for cause. But the conclusion to which they have arrived upon this application renders it unnecessary for them to settle the question whether the action of the State canvassers was such a "determination of the result of said election" as is contemplated in that statute, so as to bring the case within its provisions. There obviously can arise cases not within the provisions of that act in which the parties must apply to the House itself for authority to take any other than voluntary testimony.

The majority of the committee therefore reported the following resolution:

Resolved, That A. J. Williamson, contesting the right of Hon. D. E. Sickles to a seat in this House as a Representative from the Third district of the State of New York, be, and he is hereby, required to serve upon the said Sickles, within ten days after the passage of this resolution, a particular statement of the grounds of said contest, and that the said Sickles be, and he is hereby, required to serve upon the said Williamson his answer thereto in twenty days thereafter; and that both parties be allowed sixty days next after the service of said answer to take testimony in support of their several allegations and denials before some justice of the supreme court of the State of New York, residing in the city of New York, but in all other respects in the manner prescribed in the act of February 19, 1851.

The minority of the committee contended that the contestant might have proceeded under the law of 1851, or the usages of parliamentary assemblies, and that the course now proposed was "illegal and unprecedented." Therefore they opposed the proposed action on four grounds:

First. That the committee is bound, by the action of the House upon the subject matter, to presume that the sitting Member had a prima facie title to a seat.

Second. That Mr. Williamson, making no objection by way of protest or otherwise to the occupancy of the seat by Mr. Sickles, or to his being sworn in, is estopped from maintaining as a reason for not giving notice of contest and proceeding with the case in obedience to the law of 1851, that the sitting Member had "no prima facie right or title to a seat," and therefore was not entitled to notice.

Third. That having entirely failed to comply with the law of Congress prescribing the necessary steps to be taken by contestants, the petitioner is, by his own default, without remedy.

Fourth. That it is not competent for the committee to recommend any action to the House which involves a violation of the law of 1851, because as a law of Congress it is obligatory alike upon the House, the committee, and the contestant; that the act relating exclusively to the initiation of the proceedings, the taking of testimony, and the preparation of the case for the decision of the House, does not infringe upon the constitutional prerogative of the House to judge of the election, return, and qualifications of its Members."

On March 20 and 21 [1] the report was debated at length in the House, the history and intent of the law of 1851 being fully considered. The fourth ground of the minority was especially combated on the ground that the constitutional power, to judge implied also the right to investigate when and how the House should please, untrammeled by law of a former Congress.

The resolution proposed by the majority was agreed to—yeas 80, nays 64.

598. The case of Williamson v. Sickles, continued.

Form of resolution providing for serving notice and taking testimony in an election case conducted in disregard of the terms of the law.

The House by resolution may delegate the appointment of a commissioner to take testimony in an election case and may prescribe the course of procedure of said commissioner.

Instance wherein witnesses in a contested election case were to be summoned by subpoenas issued by the Speaker.

On May 17, 1860,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, reported the following resolution, which was agreed to without division, although one Member protested that it was a violation of the law of 1851:

Resolved, That the judges of the superior court of the State of New York, residing in the city of New York, be, and they are hereby, authorized and requested to appoint and select a commissioner of the degree of counselor at law, whose duty it shall be to take the testimony in the matter of Amor J. Williamson, contesting the seat now held by Hon. Daniel E. Sickles, from the Third Congressional district of the State of New York, as provided and directed by the resolution passed by the House of Representatives on the 21st of March, 1860. It shall be the duty of the said commissioner so appointed to enter upon his duties immediately after his appointment, and, after giving five days' notice to the parties to this contest, to proceed from day to day with the examination of such witnesses as may be brought before him in support of the allegations of the contestant and certain allegations of the sitting Member until the case is closed; provided such exmaination does not extend beyond sixty days from the time of commencing the taking of such testimony. It shall be the duty of the commissioner appointed under this resolution to provide the attorneys of the parties to this action with such number of subpoenas, issued by the Speaker of this House, as they may require for the witnesses they desire to call. The said commissioner is hereby directed to take up the case from the point which it had reached at the time it was brought before the superior court on the 16th of May, 1860; and all notices given on either side are hereby declared good without further action. All witnesses must be sworn by some officer authorized by the laws of the State of New York to administer oaths. On the conclusion of the case, it shall be the duty of the commissioner hereby provided for to transmit a correct copy of the evidence, pleadings, etc., under oath, to the House of Representatives. And each party is hereby authorized to take the testimony of any witnesses resident in the State of New Jersey, before any judge of a court of

[1] First session Thirty-sixth Congress, Globe, pp. 1255, 1278–1289; Journal, p. 563; 1 Bartlett, p. 288; Rowell's Digest, p. 163.

[2] Journal, p. 850; Globe, p. 2157.

record or magistrate authorized to take depositions, resident in the State of New Jersey; and said judge or magistrate is hereby authorized to do each and all things in the premises which the commissioner hereinbefore mentioned is by this resolution authorized to do. The time for the taking of testimony under this resolution is not to commence till the day of the adjournment of the first session of this Congress, and is to extend sixty days thereafter, with the exception of such witnesses not resident of, or living in, or being about to leave, the State of New York, as the contestant may desire to subpoena and examine before said adjournment; and as to such witnesses, the commissioner or judge aforesaid, or either of them, is hereby authorized in manner aforesaid to take and forward their depositions at any time after the passage of this resolution and before the expiration of said sixty days, when application shall be made to him for that purpose by the contestant.

599. The Colorado election case of Hunt and Chilcott in the Fortieth Congress.

A governor having issued credentials in violation of law, the House honored later credentials issued by his successor.

Credentials issued by the proper officer, but defective in form and impeached by evidence, were overthrown by later credentials.

Credentials issued in violation of law to reverse the facts of the canvass of votes do not give prima facie right, although issued by the lawful officer.

Credentials should show on their face specifically that they are given to the person entitled by law to have them.

The House may give to its Elections Committee discretion to regulate the serving of notice and taking of testimony in an election case.

Form of resolution for instituting a contest to determine final right after a determination of prima facie right.

On March 5, 1867,[1] at the time of the organization of the House, conflicting credentials were presented from the Territory of Colorado, and the House referred them to the Committee on Elections, with instructions to report "at an early day as to the prima facie right to a seat."

On March 14, 1867, Mr. Glenni W. Scofield, of Pennsylvania, submitted the report of the majority of the committee.[2] The report gives the certificate of the governor of the Territory, as follows:

EXECUTIVE DEPARTMENT, COLORADO TERRITORY,
Denver, September 5, 1866.

Sir: This is to certify that at an election held August 7, 1866, in accordance with the laws of Congress and of the Territory of Colorado, for Delegate to represent said Territory in the Fortieth Congress of the United States, you were duly elected such Delegate.

In testimony whereof I have hereunto set my hand and caused the seal of the Territory of Colorado to be affixed. Done at Denver, this 5th day of September, A. D. 1866.

[SEAL.]

ALEXANDER CUMMINGS,
Govemor of Colorado Territory.

Attest:

FRANK HALL,
Secretary of Colorado Territory.

HON. A. C. HUNT,
Denver, Colorado Territory.

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[1] First session Fortieth Congress, Journal, p. 11; Globe, p. 8; 2 Bartlett, p. 164; Rowell's Digest, p. 212.

[2] Report No. 3. The views of the minority were presented by Mr. Michael C. Kerr, of Indiana.

The report goes on:

The election laws of the Territory provide that "the secretary of the Territory, auditor, treasurer, or any two of them, in the presence of the governor, shall proceed * * * to canvass the votes given for all Territorial officers, and the governor shall give a certificate of election to the person having the highest number of votes for each office."

The certificate of the governor in favor of Mr. Hunt makes no allusion to this canvass, nor does it give any data upon which the conclusion is based. This omission, although noticeable, would not of itself have been considered by a majority of the committee fatal to the validity of the certificate. But Mr. Hunt did not rest his case upon that paper alone. He introduced Governor Cummings in its support. The governor informed the committee that on the 5th day of September a canvass of the votes cast for Delegate was had in his presence by the board of canvassers; that two of said board found that a majority of all the votes had been cast for George M. Chilcott, and that one of said board dissented from this conclusion, and that he (the governor), considering himself one of the board, agreed with the dissenting member, making a tie, whereupon he determined the election himself, and made a certificate in opposition to the conclusion of two members of the board. In addition to the governor's statement, among the papers submitted by the House is a report of the board of canvassers, signed by Frank Hall, secretary of the Territory, and Richard E. Whitsitt, auditor of the Territory, and addressed to the governor, in which they state that at the canvass held in his presence, according to law, they find that Mr. Chilcott had 3,529 votes and A. C. Hunt had 3,421 votes, by which it would appear that Mr. Chilcott was elected Delegate by 108 majority. The certificate of the governor thus appears to have been issued in violation of the laws of the Territory, in order to reverse the facts of the canvass. Under this state of facts the committee do not feel authorized to report that Mr. Hunt is entitled prima facie to a seat as Delegate.

The certificate of election presented by Mr. Chilcott is based upon the report of the board of canvassers, and is signed by Frank Hall, acting governor of the Territory; but it bears date February 5, 1867, five months subsequent to the action of Governor Cummings in the same case. The committee are of the opinion, as held in the case of Todd and Jayne, that this power, having been once exercised by the proper officer, can not be again exercised by his successor, and that therefore Mr. Chilcott was not entitled prima facie to a seat as Delegate.

The majority therefore recommended that the case be referred to the Committee on Elections, with instructions to ascertain the final right to the seat.

The minority, in their views, denied outright that Governor Cummings made the statement attributed to him in the majority report, and say that the committee could not, under the resolution of reference, have considered parol evidence. The minority argue on the issue presented:

We submit, therefore, that the prima facie title is in A. C. Hunt. The certificate held by him is executed in the usual form by the only officer having authority to issue the same, and is attested by the proper officer. It alleges in comprehensive but apt and proper words the existence of every material fact necessary to sustain such a certificate. Its language does not admit of any other construction without a tortuous disregard of the most common and accepted meaning of words and of established rules of interpretation.

To have been "duly elected" "in accordance with the laws of Congress and of the Territory of Colorado" certainly excludes the conclusion that the recipient of such a certificate could have received less than "the highest number of votes." It is alike demanded by reason and authority that the words used shall be taken in their most common and recognized acceptation, and that every fair and reasonable inference shall be made in favor of the prima facie sufficiency of the paper, and even if the terms used were ambiguous, that such a meaning should be affixed to them as would be most suitable to the subject-matter and purpose of the certificate. Applying these rules to the case in hand, the right to the seat would seem to be very clearly in Mr. Hunt, until the contest shall have been examined on its merits.

The certificate awarded to Mr. Hunt by the governor in this case is almost identical in form with those generally given by governors of States to Representatives-elect to Congress which have always been holden to be sufficient prima facie.

It can not with legal force or propriety be insisted that such a certificate, when executed by the governor of a Territory, should contain any more extensive recitals of facts than when executed by the governor of a State. In either case its substantial and reasonable purpose is attained if it states that the holder of it is duly elected according to law. Such a certificate constitutes sufficient evidence of a valid election prima facie, at first impression, and without submitting evidence of complete title as against all men.

But it is claimed that this apparent title in Hunt is overcome by the certificate or paper already referred to, which was executed and delivered to Mr. Chilcott five months afterwards by Frank Hall, "secretary and acting governor of the Territory." How Mr. Hall, at the date of his paper, came to be acting governor does not appear. Why he, five months before, as secretary, attested the certificate and proclamation in favor of Mr. Hunt is entirely unexplained. The value of the paper must be determined by mere inspection and by comparison of it with those presented by Mr. Hunt. Thus tested it is certainly defective as evidence of title in anyone. It is issued five months after the first and is attested by no one. It is issued by the same officer who attested the first, but the inconsistency of his connection with the two acts is not explained. It is executed solely by a person or officer of whose right to assume the character of "acting governor of the Territory" this House can not take judicial notice. At the time it was executed the authority to issue a certificate of election had been formally exercised by the rightful governor of the Territory. That authority could not be again exercised in reference to the result of the same election by another officer who might, by mere accident, become temporarily entitled to act as governor. If any facts existed or came to the knowledge of the "acting governor" after the execution of the regular certificate by the governor, they may constitute valid ground of contest, and may defeat the prima facie right of Mr. Hunt to the seat, but such facts can not be examined on a mere inquiry as to prima facie title.

On March 20[1] the report was debated at length in the House. It was explained in this debate that the statement of Governor Cummings had been made not as evidence of a witness, but as an admission while he was arguing as counsel, but even on this view of his statement there was not entire unanimity on the part of the committee. It was also stated in debate and not denied that among the papers referred with the credentials was one giving the official returns from the several counties, which sustained the report of the canvassing board and showed the election of Mr. Chilcott on the face of the returns.

In support of the argument that Mr. Chilcott had the prima facie right to the seat it was urged that the certificate should show that the governor had acted in conformity to law in giving it, and the law directed the governor to give the certificate to "the person having the highest number of votes," as found by the board of canvassers. The certificate did not show this. Taken together with the admissions made and the papers filed with it, it was evidently not evidence of prima facie right. If Governor Cummings had given a legal and valid certificate he would have exhausted the function and another might not be issued. But the governor did

[1] Globe, pp. 225–233; Journal, pp. 73, 74.

not give such a certificate, and so the acting governor at a later date might issue a certificate that would entitle Mr. Chilcott to the seat by prima facie right.

Therefore it was moved that the proposition of the committee be amended so as to seat Mr. Chilcott pending examination as to final right. This amendment was agreed to—yeas 91, nays 36. The substitute of the minority was then disagreed to, and then the original resolution as amended was agreed to, and Mr. Chilcott was sworn in.

So it was—

Resolved, That the papers and evidence relating to the right of A. C. Hunt and George M. Chilcott to a seat in the Fortieth Congress as a Delegate from the Territory of Colorado be referred to the Committee of Elections, with instructions to report which, if either, of said claimants is entitled thereto; and that the committee have power to require the service of such notices and grant such time for taking further evidence as they may deem proper.

and that pending the action of the committee and the House thereon, George M. Chilcott be sworn in as the sitting Delegate from the Territory of Colorado.

Evidence was taken in the case,[1] but no report was made on the merits. On July 25, 1868,[2] the House passed a resolution reimbursing contestant for his expenses.

600. The election case of Whitmore v. Herndon, from Texas, in the Forty-second Congress.

A question arising as to the sufficiency of papers purporting to be credentials, the House had the papers examined by a committee before permitting the Member-elect to be sworn.

The House by resolution may modify the law as to the times and places of taking the testimony in contested election cases.

On December 4, 1871,[3] after the roll had been called by States and the presence of a quorum had been ascertained, the credentials of W. S. Herndon, claiming a seat from the State of Texas, were presented, and referred to the Committee of Elections, Mr. Herndon not being sworn in.

On December 12,[4] on report of the committee that he was entitled to the seat on the strength of the documents presented, the House ordered Mr. Herndon to be sworn in, and he accordingly qualified.

On December 18, 1871,[5] Mr. George W. McCrary, of Iowa, submitted from the Committee of Elections a resolution, which was agreed to in the following amended form:

Resolved, That the sixty days which the law allows for taking testimony in the contested election case of G. W. Whitmore *v.* W. S. Herndon, from the first district of Texas, shall commence on the 1st day of January, 1872.

Resolved, That either party to said contest be authorized to take the testimony of any witnesses who may be found in the District of Columbia, at the city of Washington, before any officer authorized by law to take depositions therein, within sixty days after the passage of this resolution, upon three days" notice to the opposing party; no mileage to be allowed to such witnesses.

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[1] See Journal, second session Fortieth Congress, p. 124.

[2] Journal, second session, p 1186; Globe, pp. 1901, 4471.

[3] Second session Forty-second Congress, Journal, p. 8; Globe, p. 9. The questions arising as to these credentials were the same as set forth in the case of W. T. Clark. See section 601 of this work.

[4] Journal p. 61; Globe, p. 70.

[5] Second session Forty-second Congress, Journal, p. 89; Globe, p. 199.

On May 24, 1872,[1] Mr. George F. Hoar, of Massachusetts, from the Committee on Elections, submitted this resolution, which was agreed to without division:

Resolved, That William S. Herndon is entitled to retain the seat he now holds as a Member from the First Congressional district of Texas.

601. The Texas election case of Giddings v. Clarke in the Forty-second Congress.

A person bearing credentials which, on their face, showed that the governor issuing them was doubtful as to who was actually elected, was seated by the House, there being provisions of law to justify the governor's act.

Form of resolution seating a person on prima facie showing without prejudice to the rights of a contestant.

On December 4, 1871,[2] after the roll had been called and the presence of a quorum had been announced, several Members-elect, whose credentials were in regular form, were sworn in. Then Mr. George W. McCrary, of Iowa, presented the credentials of Mr. William T. Clark, of Texas, which he stated were not in regular form, and which were as follows:

GOVERNOR'S OFFICE, *Austin, November 15, 1871.*

This is to certify that, on comparison of the returns of votes cast at an election held in the Third Congressional district of the State of Texas, on the 3d, 4th, 5th, and 6th of October, A. D. 1871, provided for by a joint resolution of the legislature of said State of Texas, approved May 2, 1871, I find that the Hon. W. T. Clarke was duly elected to represent the said Congressional district of the State of Texas in the Congress of the United States for the term commencing on the 4th day of March, A. D. 1871, and ending on March 3, 1873.

In giving this certificate I wish to call attention to the attached certified statement of the vote cast in the Third district as returned, with grounds for rejecting certain returns. This is explanatory of my reasons for giving the foregoing certificate of election. According to my opinion, the numerous irregularities and instances of fraud and violence during the election in the Third district, reported and proved to my satisfaction, would rather warrant a new election than the giving of a certificate to either party. I have felt constrained by my interpretation of the provisions of the State law on the subject of elections to reject many returns, and would have thought it more just to regard the election as a nullity, yet the act of Congress of May 31, 1870,[3] section 22, seems to require that I should give a certificate of election to one of the candidates.

In testimony whereof I have caused the great seal of the State to be affixed, at the city of Austin, the date herein first above written.

[SEAL.]

EDWARD J. DAVIS, *Governor.*

By the governor:

JE. OLDRIGHT,

Acting Secretary of State.

The credentials were referred to the Committee of Elections, and Mr. Clarke was not sworn in.

On December 18, 1871,[4] Mr. George F. Hoar, of Massachusetts, submitted the report of the committee. This report stated the conditions of the law as follows:

It will be seen that the laws of Texas, under which the election for Members of the Forty-second Congress was held, provide that the judges of election at each poll or voting place (see. 33) shall count

[1] Journal, p. 944; Globe, p. 3816.

[2] Second session Forty-second Congress, Journal, p. 8; Globe, p. 9.

[3] 16 Stat. L., pp. 145, 146.

[4] House Report No. 2; Smith, p. 6; Rowell's Digest, p. 263.

the ballots, make a list of the names of persons and officers voted for, the number of votes for each, the number of ballots in the box, the number of ballots rejected, and the reasons therefor. All this is to be done "immediately after the close of the polls." This statement is to be made out in triplicate, signed and sworn to, one copy sent by mail to the secretary of state, another copy sent to the governor, and a third retained by the registrar.

The twenty-first section provides that if there be any disturbance, intimidation, or corruption which prevent or tend to prevent a free and peaceable election, the judges or registrar shall make a statement, under oath, thereof, corroborated by the oaths of three citizens, and transmit the same to the governor. Section 34 requires the secretary of state to make a table containing an alphabetical list of the counties, with columns for the names of candidates and the number of votes; and on the sixteenth day after the close of the election, in the presence of the governor and the attorney-general, to open the returns and enter on the table the number of votes given for the candidates, respectively, and then put the returns back in the envelope, and seal and file them away.

The returning officers are to compile the statements first from all places where there has been a fair, free, and peaceable registration and election. Then if there has been received any statement from any judge or registrar of violence, intimidation, or corruption, as above stated, they are to see whether these, if proved, would affect the result. If they would not, they are to proceed to canvass and compile the returns from such voting place as if no such statement had been made. If they would, the returning officers are to examine further testimony, with power to send for persons and papers, and, whenever such illegalities are shown to have taken place at any voting place so as materially to affect the result, then the said returning officers shall not canvass or compile the statement of the votes at such poll or voting place, but shall exclude it from their returns. The secretary may also employ clerks to compile the returns for a length of time not to exceed twenty days.

The foregoing provisions are all contained in a statute entitled "An act to provide for the mode and manner of conducting elections, making returns, and for the protection and purity of the ballot box." They do not make, in terms, any distinction between different classes of officers or purport to be limited in their application to State officers exclusively, and they are the only provisions for forwarding returns to the secretary of state or for any canvass or compilation which shall ascertain the result. But section 23 provides that—

"As soon as possible after the expiration of the time of taking the returns of the election for Representatives in Congress, a certificate of the returns of the election for such Representatives shall be entered on record by the secretary of state and signed by the governor, and a copy thereof, subscribed by said officers, shall be delivered to the person so elected and another copy transmitted to the House of Representatives of the Congress of the United States."

The minority claimed that this paragraph above quoted was the only law of Texas relating to the duties and power of the governor in regard to election returns for Members of Congress, and that the provision of law relating to rejection of returns by returning officers in case of violence, intimidation, corruption, etc., applied only to returns of election of State officers. On this question of fact the case to a considerable extent hinged. The majority could not say affirmatively that the governor had rejected the returns referred to in the certificate in a legal way after they had been duly certified up; but in the debate a communication from the secretary of state of Texas was presented, showing that whatever rejections were made were in strict conformity to all legal requirements.

The majority of the committee find Mr. Clarke's credentials satisfactory:

It is signed by the governor and secretary, declares Mr. Clarke to be duly elected, states that it is a document on record in the secretary's office, and contains the tabulated statement of returns required by law. It is true it does not state that the attorney-general was present when the local returns were opened, and it is not required to state this by the law. The certificate of the returns is all that is to go on the record. It is true also that it shows that some local returns are rejected; but these are all rejected for reasons which, by the express provisions of law, it was made the duty of these officers to

weigh and act upon, except in the case of Brazos County, which does not affect the result. It is true also that it does not appear that, in investigating the allegations of violence and intimidation, the State officers proceeded in the mode pointed out by the law; but it does not appear that they did not. It is not necessary that they should record or certify how they proceeded. The maxim omnia rite acta esse presumuntur is clearly applicable in a case of this sort. Few, if any, of the credentials of the Members of the House show how the officers who certified them proceeded under the State laws in ascertaining the fact which he declares. It is enough for a prima facie case if the certificate came from the proper officer of the State, and clearly shows that the person claiming under it has been adjudged to be duly elected by the official or board on whom the law of the State has imposed the duty of ascertaining and declaring the result.

We therefore recommend the adoption of the following resolution:

Resolved, That W. T. Clarke has the prima facie right to a seat as Representative from the Third Congressional district of the State of Texas, and is entitled to take the oath of office as a Member of this House, without prejudice to the right of any person claiming to have been elected thereto to contest his right to said seat upon the merits.

The minority views, presented by Mr. E.Y. Rice, of Illinois, thus attacked the credentials:

Upon inspection it also appears that the same contains qualifications and recitals that go very far to lessen its character, if not to destroy its validity altogether as prima facie evidence of title to a seat in this House by W. T. Clarke.

The conclusion reached by Governor Davis, as appears from the closing lines of the certificate in question, was not owing so much to the fact that he believed Mr. Clarke, or any other candidate, to have been duly and legally elected, as to the fact that he was impressed with the belief that he was compelled by the twenty-second section of the act of Congress of May 3, 1870, to give a certificate of election to one of the candidates.

This certificate also refers to (and we hold adopts as a part thereof) a certified statement of the vote cast in the Third district of the State of Texas for Representative in the Forty-second Congress for said district. A copy of said certificate of election, certified statement of the votes returned, and "remarks" showing the rejection of votes returned, and the reasons or grounds of rejection, is herewith submitted as a part of this report.

It appears by the vote returned, as shown by the certified statement referred to and verified by the governor, that if the whole number of votes polled for W. T. Clarke were counted for him, and the whole number polled for D.C. Giddings were counted for him, the majority for Mr. Giddings would be 730 votes.

Mr. Giddings insists that the evidence furnished by the documents or certificates referred to the committee shows that he was in fact duly elected, and that he is entitled to take his seat as a Member of this House for the Third district of the State of Texas. If the votes are to be counted for the respective candidates as they were returned to the secretary of state by the boards of election or registrars, then Mr. Giddings is clearly entitled to the seat for said district. But if, on the contrary, the governor of the State of Texas, after the votes for Member of Congress for said district were returned to him, had lawful power and authority to reject all the votes which he states he did reject, then Mr. Clarke is entitled to be admitted to his seat, if there was in fact a lawful and valid election held in said Third district of the State of Texas at the time stated in said certificate.

This brings us to the question, What is the legal effect of a certificate stating that the party to whom it is given was duly elected to an office, where the certificate recites or adopts by reference a state of facts which shows that the holder was not elected? Clearly the facts must stand, and the conclusions which the facts contradict must fall. If the facts show, as we think they do, that Mr. Giddings was elected, the statement that Mr. Clarke was duly elected can not be accepted. The question arises as to the extent of the authority and power of the governor to reject the returns of the election as made to him or the secretary of state. This is to be ascertained by an examination of the election law of the State of Texas. Upon a careful examination of the same we fail to find, according to our views of correct interpretation, any such power.

The report was debated at length on January 10, 1872,[1] and on that day the question was taken on an amendment proposing to recommit the report, with instruction to report on the merits of the case. This amendment was disagreed to—yeas 81, nays 101.

The resolution of the majority was then agreed to—yeas 102, nays 78.

Thereupon Mr. Clarke appeared and took the oath.

602. The case of Giddings v. Clarke, continued.

The House by resolution sometimes fixes the time of taking testimony, specifies the kind of testimony to be taken, and the places where it may be taken.

The sitting Member should be allowed additional time to take testimony only when the clearest evidence and strongest reasons justify the concession.

In asking for extension of time to take testimony in an election case, affidavits should state facts showing that with proper diligence it has been impossible to take the testimony.

Affidavits filed with a request for time to take additional testimony in an election case must state the names of the witnesses and the particular facts to be proven by them.

On January 12[2] Mr. George W. McCrary, of Iowa, reported from the Committee on Elections, and the House agreed to the following:

Resolved, That in the contested election case of Giddings *v.* Clarke, from the Third Congressional district of Texas, the sixty days allowed by law in which to take testimony shall commence on the 1st day of February next and shall close sixty days thereafter. That the testimony shall be confined to the issues presented by the pleadings, and may be taken before any officer authorized by law to take depositions in the State of Texas. Either party may take testimony in the District of Columbia, before any officer authorized, giving the opposite party or his attorney three days' notice of time and place: *Provided,* No mileage shall be paid any such witnesses.

On May 7, 1872,[3] Mr. McCrary, from the committee, presented the report in the case of Giddings *v.* Clarke. Before proceeding to the merits a preliminary question was disposed of. Under the above-written order, the report says:

The contestant proceeded with diligence to take testimony within the time thus fixed, but the sitting Member has failed to take any testimony in the manner provided by law, and the order of the House to sustain the allegations of the answer or to rebut those of the notice. The time for taking testimony having expired on the Ist day of April, the sitting Member, on the 24th of April, came before your committee with a motion for an extension of time in which to take testimony on his behalf. This motion was based upon the affidavits of the sitting Member and numerous other persons. These affidavits state in substance and in general terms that a combination was formed among the friends of contestant to indict the officers of election in the several counties upon charges of a violation of the election laws, and thus to inaugurate a system of persecution against the sitting Member's friends and witnesses and deter the latter from testifying.

They also state that, in pursuance of this combination, indictments were found against the governor and secretary of the State of Texas, and against some of the election officers and others in the counties of Hill, Navarro, Grimes, Harris, and Washington. It is averred that the finding of these indictments

[1] Journal, p. 135; Globe, pp. 340–349.

[2] Journal, p. 145; Globe, pp. 375, 376.

[3] House Report No. 65; Smith, p. 91; Rowell's Digest, p. 279.

produced such a feeling of alarm and danger in the district that it was impossible to take testimony on behalf of the sitting Member, but no overt act of violence is mentioned. The only specific fact given is the finding of the indictments aforesaid. The affidavits are exceedingly general in their terms, and, instead of stating facts, deal largely in the opinions or conclusions of the affiants.

After hearing arguments of counsel and carefully considering the question, your committee came unanimously to the conclusion that no further time ought to be granted to the sitting Member for taking testimony, and as this decision is important in its bearing upon this case and as a precedent for future cases, some of the principal reasons for it will now be stated.

The first reason given was that, as the one asking the extension was the sitting Member, to grant it would be practically to decide the case in his favor, since it would continue him in the enjoyments and emoluments of the office for the greater portion of the term. The report says:

It does not follow from these considerations that a sitting Member can in no case be allowed an extension after the time allowed by law for taking testimony expires, but your committee think it does follow that no such extension should ever be granted to a sitting Member unless it clearly appears that by the exercise of great diligence he has been unable to procure his testimony, and that he is able, if an extension be granted, to obtain such material evidence as will establish his right to the seat, or that by reason of the fault or misconduct of the contestant he has been unable to prepare his case.

The other reasons related to the sufficiency of sitting Member's affidavits in support of his request. They did not state facts from which it could reasonably be inferred that the sitting Member had been unable with proper diligence to take testimony; and furthermore:

The affidavits relied upon are fatally defective in this, that they do not state the names of the witnesses whose testimony is wanted nor the particular facts which can be proven by their testimony.

603. The case of Giddings v. Clarke, continued.

An election officer who was removed but not notified of the fact, and whose successor failed to qualify, was a de facto officer, and returns signed by him were not properly rejected.

There being testimony showing the vote of a precinct, it is not material whether or not the returns are properly certified.

Where a statute fixes a penalty for marking a ballot and does not require its rejection, the ballot should not be rejected.

As to the case on its merits the report discusses several features of the contest:

1. As to a question of rejecting certain returns because the polls had been presided over by one not legally an election officer, the report says:

The vote of this county was rejected because, as stated in the governor's certificate, "no official returns were received." It is manifest, however, that something in the character of returns must have been received, because the number of votes cast for each candidate is stated in the certificate. Wherein the returns were, in the judgment of the board, fatally defective, does not appear from the certificate. It does appear, however, from the evidence, that John A. Biffle, who was registrar of Bosque County, and who conducted the registration, was removed shortly prior to the election, and one Thomas Ford appointed in his place; but that the former was not notified of his removal, and continued to act, while the latter failed to qualify, and made no attempt to discharge the duties of the office. It seems probable that the only objection to the returns was, that they were certified by Biffle, and not by Ford. If so, the defect was not fatal, because the former was certainly acting as registrar under color of authority, and was at least an officer de facto, whose official acts affecting third parties and the public must be held valid. But, however this may be, the proof shows that the election was legally held, and that contestant received 457 votes, and the sitting Member 77 votes. If the return was uncertified, it is competent to show by other evidence what the vote was.

After quoting what had been said in the report in the case of McKenzie *v.* Braxton, the report continues:

In relation to Bosque County, we have the uncontradicted testimony of the officers who conducted the election, showing what the result in fact was; and it is therefore not material to determine whether the returns were properly and regularly certified or not. The vote of this county must be received.

2. As to certain distinguishing marks on ballots the report says:

The vote of this county was rejected by the board, and the reasons for its rejection are thus stated in the certificate:

"Rejected.—The tickets were marked with numbers, contrary to provisions of section 10, chapter 78, General Laws, fall session twelfth legislature, 1870, thereby operating as a scrutiny upon the votes and a restraint upon the freedom of voters. Further, that 49 persons of foreign birth had been permitted to register and vote without legal proof of naturalization."

By reference to the statute here referred to it will be seen that it is made a misdemeanor for any judge of election to place any number or mark upon the ticket of any voter; but it is not declared that the vote of a legally qualified voter shall be rejected because his ballot is marked by the judges. We should not be inclined to put a construction upon this statute which would enable an officer of election to destroy the effect of a ballot cast in good faith by a legal voter, by placing a number or mark upon it. A ballot may be thus marked or numbered without the knowledge or consent of the voter, and it would be manifestly unjust that he should in this way be deprived of his vote.

We think it plain that inasmuch as the statute affixes a penalty for marking a ballot and does not expressly declare that a marked ballot shall be thrown out, the board erred in rejecting the vote of this county upon this ground.

On this point also the report in the case of McKenzie *v.* Braxton is cited.

604. The case of Giddings v. Clarke, continued.

Although excitement and alarm prevailed in a county with the presence of an armed force in the neighborhood of the polls, the committee did not recommend the rejection or correction of the vote.

Instance wherein the person seated on prima facie showing was unseated on examination of final right.

Instance wherein the House seated a contestant belonging to the minority party, unseating a Member of the majority.

3. As to alleged intimidation, for which the vote of Limestone County had been rejected by the State officials, the report, while not dwelling with care on this point, says:

We are satisfied, however, that a large part of the vote of Limestone County was not cast. The colored voters generally failed to vote, so that only 28 votes were cast for Clarke to 1,153 for Giddings. That a state of excitement and fear existed in this county about the time of the election is clear. A collision occurred between some colored policemen and certain white men, which resulted in the death of one of the latter and the wounding of one of the former. This produced great excitement, and was followed by a general uprising and arming of both whites and blacks. On the day of election the town where the election was held was occupied by an armed force under command of one Captain Richardson. Pickets were stationed on all the roads leading into town, and persons coming in to vote were obliged to obtain a pass from the military authorities. Although the witnesses say that all voters were permitied to come and go in peace, and that the freedmen were urged to vote, yet it is clear that they abstained from doing so for reasons which most men would consider good and sufficient.

4. In Washington County questions arose as to the use of two ballot boxes, but they did not require to be settled, since a decision either to reject or retain the votes of the two boxes would be fatal to the case of sitting Member.

On the whole, as a result of their reasoning, the committee found that contestant was elected, and reported resolutions unseating sitting Member and seating contestant.

The report was debated on May 13,[1] when the resolutions were agreed to without division.

Mr. Giddings thereupon appeared and took the oath.[2]

605. The Arkansas election case of Boles v. Edwards in the Forty-second Congress.

Credentials bearing on their face evidence that they were not issued in accordance with the requirements of law, the Clerk declined to enroll the bearer.

The House sometimes gives prima facie effect to credentials which are so far impeached on their face that the Clerk does not feel authorized, under the law governing his action, to enroll the bearer.

On March 4, 1871,[3] at the organization of the House, the Clerk[4] did not put on the roll of Members-elect any name for the Third district of Arkansas, as the certificate bore upon its face evidence that it was not issued within the time prescribed by law and as there was serious doubt whether the officer who executed it had at that time the right to do so.

On March 7[5] the House agreed to this resolution:

Resolved, That the papers and credentials of Hon. John Edwards and the certified papers and returns presented to the House of Representatives by Hon. Thomas Boles, each claiming to be elected to the Forty-second Congress from the Third district of Arkansas, be referred to the Committee of Elections to be hereafter appointed, with instructions to report to the House which, if either, of said claimants is entitled to a seat in the House of Representatives from the said Third district of Arkansas.

On March 22[6] Mr. Luke P. Poland, of Vermont, from the Committee of Elections, submitted the following resolution, which was agreed to:

Resolved, That John Edwards, holding a regular certificate of election as the Representative from the Third Congressional district of Arkansas, is entitled to be sworn in as the sitting Member from said district, subject to the determination of the contest made against his right thereto by Thomas Boles.

606. The case of Boles v. Edwards, continued.

Parties should be held to a rigid rule of diligence under the law for taking testimony in election cases, and no extension of time should be granted where this rule is violated.

Both parties to an election contest may take their testimony at the same time before different officers.

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[1] Journal, p. 852; Globe, pp. 3384, 3385.

[2] It may be noticed that Mr. Clark, who was unseated, was a member of the majority party in the House, while Mx. Giddings, who was seated, was a member of the party in the minority.

[3] First session Forty-second Congress, Journal, p. 7; Globe, p. 6.

[4] Edward McPherson, of Pennsylvania, Clerk.

[5] Journal, p. 15; Globe, p. 16.

[6] Journal, p. 100; Globe, p. 229.

On December 20, 1871,[1] Mr. G. W. Hazelton, of Wisconsin, presented a report from the Committee of Elections, in response to a request from Mr. Edwards, the sitting Member, that the time for taking testimony be extended:

At the organization of the Forty-second Congress the name of neither of the parties to this contest was entered by the Clerk on the rolls of the House, and the question which of the parties was entitled prima facie to the seat came before the committee at the first session of the present Congress in April last.

After argument and consideration of the question the committee resolved in favor of the respondent, and, their report being adopted by the House, the said respondent was thereupon, and on the 21st day of March, sworn in and took his seat.

On the 17th day of April thereafter the answer of respondent to the notice of contest was served on contestant. The law of 1851, section 22, provides that the testimony taken by the parties, or either of them, shall be confined to the proof or disproof of the facts alleged or denied in the notice and answer, and that the same shall be taken within sixty days from the time of service of the answer, unless the House shall, in its discretion, allow supplementary evidence to be taken after the expiration of said sixty days.

The respondent introduced a resolution in the House on the 5th day of April last, thirteen days before his answer was served and before he could well have known that the time allowed by law for taking testimony would be insufficient, asking that such time be extended sixty days beyond the limit fixed by law. This resolution was referred to the committee, but no action was taken on it. The application is now made by the respondent, which, if granted, extends the time of taking testimony sixty days from the adoption of the resolution by the House.

In his affidavit, upon which he predicates the application, the respondent alleges "that the contestant occupied the whole of the time allowed by law for taking testimony and that he was compelled, in looking after his own interest in the case, to attend the taking of said testimony of the contestant and has had no time or opportunity to take any testimony in his own behalf," and on this ground alone he rests his application.

The affidavits of the contestant and of Joseph Brooks and James L. Hodges, per contra, show that the respondent was not present during the taking of contestant's testimony but once, and then only for a few minutes.

The law, moreover, is well settled that both of the parties may proceed with the taking of their testimony at the same time, before different officers.

Up to this time the sitting Member has not taken any testimony whatever, nor does it appear that he has taken a single step in that direction. It is difficult to see upon what ground the House can grant the respondent's application made under these circumstances.

To say nothing of the terms of the law already quoted touching the extending of the time fixed to allow supplementary evidence, which clearly relates to cases in which the applicant has taken some evidence—that is to say, has made some use of the time given him—the policy of the House has been adverse to granting extensions. Procrastination in these cases diminishes the object of the investigation and cheapens the value of the final decision. The law is intended to furnish ample opportunity for taking testimony. Parties should be held to a rigid rule of diligence under it, and no extension ought to be allowed where there is reason to believe that, had the applicant brought himself within such rule, there would have been no occasion for the application.

The case of Vallandigham *v.* Campbell, in the Thirty-fifth Congress, and the case of Carrigan *v.* Thayer, in the Thirty-eighth Congress, are referred to in support of the action of the committee in this case.

607. The case of Boles v. Edwards, continued.

Instance wherein the House referred to an elections committee considering a particular case a report of a joint committee incidentally referring to said case.

[1] House Report No. 3, second session Forty-second Congress; Smith, p. 18; Rowell's Digest, p. 264.

A joint committee having taken testimony which incidentally related to the right of a Member to his seat, the same was reported to the House.

On January 9, 1872,[1] Mr. Luke P. Poland, of Vermont, from the Joint Select Committee on the Insurrectionary States, submitted a report, in the course of which was given the testimony of one Edward Wheeler, who thus explained the indictment of Governor Clayton, of Arkansas, by a grand jury:

It was claimed that Governor Clayton had violated certain sections of the enforcement act in giving the certificate of election to General Edwards, when the returns, as exhibited to us by the secretary of state, showed that Judge Boles had been elected. General Edwards presented a copy of his certificate of election, and of the proclamation of the governor, stating that, according to the returns on file in the office of the secretary of state, General Edwards had been elected. But the returns, as exhibited to us, showed that Judge Boles was elected by some 2,130 votes, I think it was, on the full vote, counting the votes at both polls. There were allegations of fraud on both sides. But giving the governor the benefit of every doubt, the least majority for Judge Boles, that we could figure out, was some 800 or 900; I forget the exact figures. That was according to the returns shown to us, and upon that showing the indictment was found.

The committee therefore reported the following:

The testimony of these witnesses tends to impeach the official character and conduct of a Member of the United States Senate from the State of Arkansas, and also to affect the right of a Member of the House of Representatives from that State to retain his seat in the House. Other evidence of the same character was offered, and one of the gentlemen affected by this testimony claimed the right to bring witnesses before the committee to contradict or explain the same. The committee, however, upon consideration, decided that the subject-matter to which said testimony related did not come within the limits of the investigation they were directed to make, and therefore declined to prosecute the inquiry any further, discharging a witness who had been subpoenaed and was then awaiting an examination.

The joint select committee, pursuing what they deemed to be the proper parliamentary course, at a meeting on December 21, 1871, adopted the following resolution:

"Resolved, That the committee report the testimony taken before the committee, affecting Senator Clayton and Mr. Edwards, a Representative from Arkansas, to the Senate and House of Representatives, with a recommendation that each House take such action as it may deem proper."

Agreeably to this resolution of said joint select committee, the undersigned, the chairman on the part of the Senate, and the chairman on the part of the House of Representatives, beg leave to submit the testimony hereto annexed, of Edward Wheeler and William G. Whipple, both of the State of Arkansas, said Wheeler and Whipple having been the only witnesses from that State who were examined by the committee, to the Senate and House of Representatives respectively, for such action as each House may deem advisable.

This report was at once referred to the Committee of Elections.[2]

608. The case of Boles v. Edwards, continued.

The Elections Committee declined to consider as evidence certain official documents of a State submitted without authority from the House and not decisions in a proceeding between the parties to the pending contest.

In an election case the decision of a State supreme court in a cause to which the contestants were not parties was not received as evidence.

An opinion of an Elections Committee that the House may not delegate to another tribunal its constitutional duty of judging the elections of its own Members.

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[1] House Report No. 5 Smith, p. 26.

[2] Journal, p. 127; Globe, p. 321.

On January 19,[1] a resolution was presented proposing to allow sitting Member five days in which to introduce as evidence the official proceedings of the legislature, supreme court, and executive of the State of Arkansas. This resolution was antagonized by the members of the Elections Committee, who urged that sitting Member was entitled to no extension, and that the evidence would not be pertinent if presented. An amendment declaring that the sitting Member was not entitled to further time was agreed to—yeas 129, nays, 46. The resolution as amended was then agreed to.

On January 30, 1872,[2] Mr. Hazleton presented the report of the committee on the merits of the case.

No evidence whatever is presented by the respondent as to any irregularities or pretended irregularities outside of Pulaski County; nor were any allegations of such irregularities made by respondent in his oral argument before committee.

The respondent did, however, present to the committee and read in evidence, for what they might be deemed worth, as bearing upon the result of the vote in Pulaski County, a report of a "joint" select committee appointed by the senate and house of representatives of Arkansas to investigate election frauds in Pulaski County; and a decision of the supreme court of Arkansas in a proceeding on the part of Howard et al. *v.* McDiarmid, county clerk of Pulaski County, "praying for a mandamus against said McDiarmid to compel him to certify certain election returns to the secretary of state."

It seems hardly necessary to say that neither of these documents were regarded as evidence by the committee, or entitled to consideration in disposing of the case.

The legislative report is in no sense a judicial determination. It would not be recognized as evidence even in any court of justice. It is simply the views of certain members of the legislature of Arkansas upon the question submitted to them by the legislature.

But even if it were entitled to rank as a judicial determination, it could not be evidence in this case

First. Because it is not a decision in a proceeding between these parties. They had no hand in creating the committee, and can not be affected by its acts; and

Second. The House being made by the Constitution the judge of the election returns and qualifications of its Members, can not delegate its authority to some other tribunal, and discharge by proxy a solemn duty which the Constitution imposes on the House.

For like reasons the decision of the supreme court of Arkansas can not be regarded as evidence.

The case is, therefore, left to stand on the proofs submitted by the contestant.

Outside of Pulaski County the contestant has a majority of 2 over the respondent.

In Pulaski County the majority for contestant is 2,151, making a total majority for contestant in the district of 2,153.

It may not be improper to remark that upon the theory of the respondent, that the documents above mentioned are evidence, and giving him the full benefit of them as testimony, the result is not changed.

It makes no difference whatever to the sitting Member whether the committee take one view or another of the "evidence" submitted by him. The contestant was elected and is entitled to the seat in this House as the Member from the Third district of the State of Arkansas in the Forty-second Congress.

The committee have instructed the undersigned to further say that the testimony taken before the joint committee to investigate the affairs of the South, and referred to this committee on the 9th day of the present month, has been examined, and that in the judgment of the committee it contains nothing reflecting on the character of any Member of the House; and the committee ask to be discharged from the further consideration of such testimony.

The committee ask the adoption of the following resolution:

Resolved, That Thomas Boles is entitled to the seat in the Forty-second Congress as Representative from the Third district of the State of Arkansas now occupied by John Edwards.

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[1] Journal, p. 186; Globe, pp. 471–476.

[2] House Report No. 10; Smith, p. 58.

On February 9[1] the House considered the report, and after debate, which consisted principally of a speech by sitting Member, the resolution reported by the committee was agreed to unanimously.

Mr. Boles was thereupon sworn in.[2]

609. The Indiana election case of Shanks v. Neff in the Forty-third Congress.

Credentials which, on their face, implied that the one having prima facie right did not have the final right were not honored either by the Clerk or the House.

On December 1, 1873,[3] at the organization of the House, the Clerk announced that the paper issued by the governor of Indiana for the Ninth district could not be accepted as a credential within the meaning of the law, and therefore that neither of the claimants was enrolled.

On the same day the paper of the governor was read in the House.[4] It was in due form, certified by the secretary of state under seal, and set forth that the official returns of the several counties showed that John E. Neff had 14 votes more in the district than John P. C. Shanks, and continued:

"Now if, in the judgment of the House of Representatives of the United States the said certificates of election of the said clerks" of the several counties "shall be conclusive evidence of the facts herein stated, so as to preclude either the secretary of state or the governor of Indiana from making inquiry into the truth thereof, then, and in that case, I desire that this instrument shall be considered and taken to be a certificate of the election of the said John E. Neff."

The paper then goes on to state that if the said certificate should not be conclusive evidence so as to preclude the inquiry, then "I desire that this instrument shall be considered or taken to be the certificate of the election of the said John P. C. Shanks to the said office, I being satisfied that the said" Shanks in point of fact received a majority of the votes.

The evidence on which he based this he stated to be "an affidavit of the inspectors, judges, and clerks of the election * * * in and for the township of Wabash * * * that forty-seven ballots were voted at said precinct at said election which, after having been received and placed in the ballot box, upon the counting out of the votes were rejected and not counted in the returns of said election for the reason that said ballots were headed on the top of the face thereof with the words 'Republican ticket,'" and that these tickets contained votes for Mr. Shanks. The governor further expresses the opinion that the rejection was illegal.

Mr. George W. McCrary, of Iowa, proposed this resolution:

Resolved, That the credentials and papers on file in the Clerk's office concerning the election of a Representative in this House from the Ninth Congressional district of Indiana be referred to the Committee of Elections, when appointed, with instructions to report at an early day.

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[1] Journal, p. 314; Globe, pp. 934–938.

[2] Both contestant and sitting Member belonged to the majority party in the House.

[3] First session Forty-third Congress, Record, p. 5.

[4] Record, p. 9.

It was urged that the name of Mr. Neff should be placed on the roll as having the prima facie right to the seat, but the House by a vote of yeas 176, nays 69, agreed to the resolution presented by Mr. McCrary.[1]

On December 3[2] testimony in the case was referred to the committee.

On December 8[3] Mr. H. Boardman Smith, of New York, reported the following resolution:

Resolved, That John P. C. Shanks is entitled to a seat in this House as a Representative in the Forty-third Congress from the Ninth Congressional district of Indiana.

Mr. Smith stated that there had never been any serious question except as to the prima facie right. The resolution of the House referred the case on the merits, and that case was clear to the committee.

The resolution was then agreed to without division.

Mr. Shanks then appeared and took the oath.

610. An instance wherein the House questioned credentials borne by a Delegate-elect who himself had signed them as governor.—On December 11, 1865,[4] Mr. James M. Ashley, of Ohio, presented the petition of Charles D. Poston, asking to be admitted as Delegate from Arizona, which was referred to the Committee of Elections.

On January 17, 1866,[5] Mr. James G. Blaine, of Maine, presented the credentials of John N. Goodwin as Delegate from Arizona. Mr. Goodwin does not appear on the roll with the other Delegates at the time of the organization of the House. It appears from the statement of Mr. Blaine that at first Mr. Goodwin had presented credentials signed "by the governor of the Territory having himself the highest number of votes in the election." There being evidently same question, Mr. Goodwin presented credentials signed by the secretary of the Territory as acting governor. On these credentials Mr. Goodwin was sworn in.

On July 9[6] the Committee on Elections was discharged from consideration of the case, no notice of contest or testimony having been filed before the committee.

611. In the Senate, where credentials have on their face raised a question as to the constitutionality of the appointment, the bearer has not been seated on prima facie showing.—On March 4, 1825,[7] at the special session of the Senate, the credentials of Mr. James Lanman, of Connecticut, were presented. This certificate was issued on February 8, 1825, and proposed to commission Mr. Lanman from March 3, 1825, to the next meeting of the legislature of Connecticut. This was a case where the governor had appointed for a vacancy to occur in the future. The Senate decided not to admit Mr. Lanman on his creden-

[1] Journal, p. 14; Record, p. 9.

[2] Journal, p. 42.

[3] Journal, p. 83; Record, p. 97.

[4] First session Thirty-ninth Congress, Journal, p. 39.

[5] Journal, p. 155; Globe, pp. 275, 276.

[6] Journal, P. 977; Globe, p. 3683.

[7] Second session Eighteenth Congress, Contested Election Cases in Congress from 1789 to 1834, page 871.

tials. The report in this case contains a citation of former decisions in similar cases.[1]

[1] In the Senate, where the credentials have on their face indicated the existence of a question as to the constitutionality of the appointment of a Senator, the Senate has referred the credentials and not allowed the bearer to take the oath. See cases of Kensey Johns, of Delaware; Lee Mantle, of Montana; Asahel C. Beckwith, of Wyoming; John B. Allen, of Washington; Henry W. Corbett, of Oregon; Andrew T. Wood, of Kentucky; John A. Henderson, of Florida; Matthew S. Quay, of Pennsylvania; and Martin Maginnis, of Montana. (See Senate Election Cases, special session Fifty-eighth Congress, Senate Document No. 11, pp. 1, 52, 83, 89, 104, 107, and 143.)

Chapter XX.

CONFLICTING CREDENTIALS.

1. Decisions of the House as to prima facie title. Sections 612–627.[1]
2. Principles deduced from Senate decisions. Sections 628–633.

612. The House has held that credentials regular in form and issued by the proper officers should not be impeached by a certificate issued later by the successors of said officers.—On October 15, 1877,[2] at the organization of the House, while the Members-elect who had been called on the roll of the Clerk were being sworn in, Mr. Joseph H. Rainey, of South Carolina, was challenged and stood aside. On the succeeding day Mr. Samuel S. Cox, of New York, offered the following:

Resolved, That the question of prima facie as well as the final right of J. S. Richardson and Joseph H. Rainey, contestants, respectively, claiming a seat in this House from the First district of South Carolina, be referred to the Committee of Elections, hereafter to be appointed; and until such committee shall have reported in the premises and the House have decided said question neither of said contestants shall be admitted to a seat.

It appeared from the debate, that Mr. Rainey presented a certificate from the secretary of state of South Carolina, who, under the law of the State, had the function of making out the certificate, regular in form and on the strength of which the Clerk had placed his name on the roll. But Mr. Cox presented a certificate from a subsequent secretary of state impeaching the credentials, especially upon the ground that the board of canvassers had certified the returns in contravention of an order of the supreme court of the State and also on the ground that there had been intimidation in the election. Governor Hampton, of South Carolina, while admitting that he could not with propriety express an official opinion, gave a personal indorsement to the impeachment forwarded by the secretary of state.

It was argued in behalf of Mr. Rainey that he had the prima facie right to the seat and should be seated in accordance with the practice of the House in such cases. On the other hand, it was urged that the cases of Dailey and Morton in.

[1] See also the case of Wimpy and Christy. Section 459 of this volume.
[2] First session Forty-fifth Congress, Journal, p. 15; Record, pp. 60–64.

1862, of Hoge and Reed in 1869, and Buttz in the preceding Congress, afforded precedents for sending the case to the Committee of Elections.

Finally Mr. Eugene Hale, of Maine, proposed the following substitute:

Resolved, That Joseph H. Rainey be now sworn in as a Representative in Congress from the First district of the State of North Carolina.

This substitute was agreed to—ayes 175, noes 108.

The resolution as amended was then agreed to and the oath was administered to Mr. Rainey.

613. The Shiel v. Thayer case, from Oregon, in the Thirty-seventh Congress.

Of two claimants, each having credentials in apparently due form, the House directed the administration of the oath to the one whom the Clerk had enrolled.

On July 4, 1861,[1] during the swearing in of Members at the organization of the House, Mr. John A. McClernand, of Illinois, submitted the following:

Resolved, That the question of prima facie as well as the final right of George K. Shiel and A. J. Thayer, contestants, respectively, claiming a seat in this House from the State of Oregon, be referred to the Committee on Elections, hereafter to be appointed, and that until said committee shall have reported in the premises and the House decided said question neither of said contestants shall be admitted to a seat.

In the course of the debate it appeared that under the constitution of Oregon the election for Members of Congress was held in June, 1860, and that in that election Mr. Shiel was elected and the proper certificate was issued to him. At the Presidential election of November, 1860, although there was no law authorizing an election of Congressmen at that time, persons in Oregon voluntarily opened polls at certain places and votes were cast for Mr. Thayer, and Mr. Thayer appears to have received a certificate of election in due form. It also appears that on this certificate Mr. Thayer's name was placed on the Clerk's roll.

The House, without division, laid the resolution on the table and the oath was administered to Mr. Thayer.

614. The Clerk having honored credentials from a de facto governor, the House confirmed the prima facie title, although there was a conflicting certificate from an alleged de jure governor.—On December 6, 1875,[1] during the swearing in of Members-elect, Mr. Fernando Wood, of New York, when the State of Louisiana was reached, challenged the right of Mr. Frank Morey, of that State, to take the oath. Mr. Morey's name had been placed on the roll by the Clerk, and he had participated in the election of Speaker. But there was a question as to the governorship of Louisiana, and Mr. Morey held a credential signed by William Pitt Kellogg, who had been recognized by the House as governor of Louisiana, while another credential, signed by John McEnery as governor, had been presented in behalf of Mr. William B. Spencer.

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[1] First session Thirty-seventh Congress, Journal, p. 14; Globe, pp. 9, 10.

[2] First session Forty-fourth Congress, Journal, pp. 11–13; Record, pp. 168–171.

The Clerk[1] of the House, while placing Mr. Morey on the roll, had brought the other credential to the attention of the House.

Mr. Wood presented a preamble reciting the facts in regard to the two credentials and a resolution, which, after being modified at the suggestion of Mr. L. Q. C. Lamar, of Mississippi, was as follows:

Resolved, That the credentials of Frank Morey from the Fifth district of Louisiana be referred to the Committee on Elections, with instructions to report as soon as possible on his prima facie right to a seat on the floor.

It was urged that the fact that the Clerk had brought the two credentials to the attention of the House made it a case where the proper course would be to refer both credentials to the committee to determine the prima facie right. On the other hand, it was contended that Governor Kellogg was indisputably the govenor de facto, and that this was sufficient to seat the Member, leaving the question of the de jure governorship to be settled by the committee which should examine into the contest.

The resolution of Mr. Wood was disagreed to, and then, on motion of Mr. James G. Blaine, of Maine,

Ordered, That the oath of office be now administered to Mr. Morey.

615. The Nebraska election case of Morton v. Daily in the Thirty-seventh Congress.

There being two conflicting credentials, the second intended to revoke the first, the House declined to reverse the action of the Clerk in enrolling the bearer of the second credentials.

A refusal of the House to strike a Member-elect's name from the Clerk's roll and a decision to administer the oath to him was held to be a final decision of prima facie right.

The House having passed on the prima facie right declined, pending decision as to final right, to reconsider the action, although examination had shown the credentials to be irregular.

On July 4, 1861,[2] at the organization of the House, a question arose on a contest over the seat of the Delegate from Nebraska. On motion of Mr. William A. Richardson, of Illinois, the question of administering the oath to Mr. Samuel G. Daily, who was on the roll of the Clerk as Delegate from the Territory, was deferred until after the organization of the House should be completed.

On July 5, the question coming up, Mr. Richardson moved that the name of Mr. Daily be stricken from the Clerk's roll and that the name of Mr. J. Sterling Morton be substituted.

The debate showed that in this case the governor of Nebraska had issued two certificates, the first to Mr. Morton and the second, intended to revoke the first, to Mr. Daily, the change being in consequence of a recount of the votes.

Mr. Richardson's motion was decided in the negative, 57 yeas and 75 nays, and then it was voted to administer the oath to Mr. Daily.

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[1] Edward McPherson, of Pennsylvania, Clerk.

[2] First session Thirty-seventh Congress, Journal, p. 14; Globe, p. 13.

On July 25, 1861,[1] the House discussed a proposition to determine who should be the sitting Delegate from Nebraska pending the decision as to the final right to the seat. At the first of the session the House had admitted Samuel G. Daily to the seat on prima facie right. Mr. J. Sterling Morton petitioned that he be declared the sitting Member, but the Committee on Elections reported that the House had decided the prima facie question, and the House by laying the subject on the table virtually sustained the report.

On April 14, 1862,[2] the Committee on Elections reported in the case of Morton *v.* Daily, from the Territory of Nebraska.

At the outset the question as to the final right to the seat was complicated by a question as to prima facie right. In accordance with the findings of the board of canvassers the governor had originally issued the certificate of election to Mr. Morton. But seven months after Mr. Morton's certificate was issued, nearly two months after the term of office of Delegate had commenced, but before the session of the Congress had begun, the governor, without concurrence of the board of canvassers, and without publicity, had issued another certificate to Mr. Daily. It appeared that the seal of the new certificate was irregular, also.

The House at the beginning of the Congress had seated Mr. Daily by virtue of this certificate, and the majority of the committee say:

> But the committee were of opinion that they had, in this hearing, nothing to do with the certificates; that the House had considered these certificates in deciding who should be the sitting Delegate pending the contest, and that nothing was left to the committee at this hearing but to go behind all certificates and ascertain who had a majority of the legal votes.

The minority of the committee contended that the second certificate was not only irregular but a forgery, basing their contention on an ex parte affidavit which had not been admitted by the committee as testimony. In the debate on May 6 and 7, 1862,[3] this contention was discussed at length, the minority urging that such irregularities and alleged fraud at the outset should taint the title of the sitting Delegate throughout. The majority of the committee, while admitting in the debate that Mr. Daily's certificate was irregular, though not fraudulent, maintained their contention that the House had already passed on the prima facie case, and that it should not be considered in determining the final right.

616. The case of Morton v. Daily, continued.

A reservation being excluded by law from the limits of a Territory, the votes of persons residing thereon and not within the precinct as required by law were rejected by the committee.

The law requiring the voter to reside in the precinct, the votes of such as did not were rejected by the committee.

Because a county was not legally organized and the election was not held on the legal day and nonresidents voted, the entire vote of the county was rejected by the committee.

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[1] House Report No. 3, first session Thirty-seventh Congress; Journal, p. 144; Globe, p. 265.

[2] House Report No. 69, second session Thirty-seventh Congress; 1 Bartlett, p. 402; Rowell's Digest, p. 178.

[3] Globe, pp. 1973, 1995.

More illegal votes appearing than the total number cast for one candidate, the excess were deducted by the committee from the other candidate, in the absence of identifying evidence.

On the question of the final right the committee examined allegations and answers relating to several kinds of fraud and irregularity:

(*a*) In the northern precinct of L'eau-qui-court County there were cast 122 fraudulent votes, in the opinion of the committee. Both by the United States census and by witnesses this seemed proved to the satisfaction of the committee, and these votes, all of which were for the contestant, were rejected. The contestant did not produce the testimony of witnesses from the place itself to show that the votes were legal, but attempted to shake the credibility of witnesses for sitting Member. The minority of the committee concluded that the witnesses of the sitting Member were successfully impeached, especially as one of them made oath against his own record as an election officer, made under oath.

(*b*) In Monroe precinct the committee deducted 18 votes for contestant and 3 for sitting Member because they were nonresidents or inhabitants of an Indian reservation, which by the law was excluded from the limits of the Territory, and was, moreover, not within the limits of the voting precinct, although the law of the Territory required the voter to be a resident of the precinct.

(*c*) The poll of Buffalo County, 39 votes for the contestant, was rejected by the committee because the county was not legally organized. Moreover, the poll was held open on the day succeeding the appointed day, and several votes appeared to be cast by nonresidents.

(*d*) The sitting Delegate objected to the vote of Rulu precinct on the ground that certain voters were not residents of the precinct, as required by law. The committee sustained this objection, saying:

> While the committee have been at all times disposed, so far as they can, consistently with the provisions of law, to give effect to the will of the voter, expressed in good faith, they do not see how they can count the vote of a nonresident of a precinct any more than they could a nonresident of the county or Territory. The provision of law that a man must vote in the precinct where he resides seems to the committee to be a wise one to prevent double voting, and they know of no way to enforce that wise provision except to insist upon its observance.
>
> It appears that 24 nonresident whites and 5 half-breed Indians voted at this precinct, but it is uncertain for whom they all voted; but as Mr. Daily received but 9 votes in all at this precinct, 20 of them at least at least must have voted for Mr. Morton. The committee therefore reject that number from the count of Mr. Morton.

(*e*) The contestant objected to the poll of Falls City, alleging frauds. The majority of the committee felt that the evidence did not sustain this charge.

617. The case of Morton v. Daily, continued.

No legal notice of election at a certain precinct being given, the poll was rejected by the committee although the day of election was fixed by law.

The returns of a county, stating the actual aggregate vote for each candidate, were not rejected by the committee for defect in form.

(*f*) In the Grand Island precinct of Pawnee County it appeared from the cross-examination of one of Mr. Daily's (sitting Delegate) witnesses—

that no legal notice of this election was given at that precinct, although the vote seems to have been fairly cast; yet the committee deem the notice prescribed by law essential, and do not feel at liberty to say, in the absence of such notice, that all persons had an opportunity to vote. The committee are aware that the time of this election was fixed by law, and that all are presumed to know the law; but in a new country like this, in precincts newly opened and counties sparsely settled, they deem actual notice a safer rule, and therefore reject the 29 votes cast for Mr. Daily at the precinct of Grand Island, in Hall County.

(*g*) In certain counties the contestant objected to the form of the returns, and the minority of the committee contended in support of this objection. The majority held, however—

Mr. Morton claimed that the votes in the counties of Clay, Dodge, Cass, Hall, Johnston, Lancaster, Nemaha, Pawnee, and Washington, although counted by the board of canvassers, should all be rejected for defect in the form of return. It was not claimed by Mr. Morton that these returns were false in fact, but that the law required that "abstracts" of the vote of each county should be returned to the board of territorial canvassers, when in truth the return from each of the above-named counties was the aggregate of the vote for each of the respective candidates for office in that county. Admitting that Mr. Morton has made the true distinction, and that an aggregate of the votes thus cast for each candidate in any given county is not an abstract of such votes, is it the duty of the committee to reject the votes thus returned for that reason? If there had been no return at all of the votes cast in these counties, it would have been plainly the duty of the committee to have ascertained by other testimony, if possible, the actual vote cast in these counties. Now, as it is not denied that the returns from these counties state the actual aggregate vote cast in those counties, the committee take them as evidence of such votes, and count the votes so returned and counted by the Territorial canvassers.

618. The case of Morton v. Daily, continued.

It not being shown that the law required a record of the qualification of an election officer, the committee declined to assume from absence of the record that he was not qualified.

An affidavit taken without notice to opposing candidate and before the result had been determined was rejected as evidence.

The report of an election committee being laid on the table, the sitting Member retains the seat.

(*h*) Contestant objected to certain votes in Pawnee County because—

in the fourth precinct, in said county, where said Daily received 13 votes, and this respondent 7 votes, there was no legally constituted election board; those acting as judges were neither sworn nor qualified, as required by law; therefore the votes of said precinct ought to be rejected.

The committee say:

The only evidence in support of this allegation is that of Newcomb (p. 157), from which it appears that while the county commissioners appointed three persons to serve as judges of election in each of the two precincts of Wyoming and Otoe, the returns from each of those precincts were signed by only one of the persons thus appointed, with two other persons associated with him in each case, and that there is no record on file in the clerk's office of the appointment of these two persons at each precinct to act as judges of the election. The committee understand the law of Nebraska to authorize the appointment and qualification of persons to act as judges of election in the absence of those regularly appointed beforehand by the county commissioners. Mr. Morton does not show that these men thus acting were not duly qualified. He only shows that there is no record of such qualification in the county clerk's office, nor has he shown that the law requires any record thereof to be kept there. In the absence

of any certificate of such qualification, it is always a matter of proof by parole whether such judges were qualified or not. The committee do not assume that they were not qualified. The only evidence offered by Mr. Morton in support of his nineteenth allegation was a joint affidavit (p. 113 of the testimony), signed by three persons, Johnson, Wagner, and Barnard, and sworn to on the day of the election, without notice to Mr. Daily, and before the votes were canvassed, or any notice of contest whatever. The committee for this reason rejected this testimony.

(*i*) Contestant also alleged that Pawnee County was not organized according to law, but failed to satisfy the committee of this in face of the fact that the legislature in 1857–58 had recognized it as a county by making it a representative district.

The above are the essential issues involved in the contest, the committee finding in conclusion a majority of 150 for the sitting Delegate. On May 6 and 7 [1] the report was debated at length. On the latter day the whole subject was laid on the table, yeas 64, nays 38,[2] thus leaving the sitting Delegate in possession of the seat.

619. The election case of Jayne and Todd, from Dakota, in the Thirty-eighth Congress.

In view of the existence of conflicting credentials, the House declined to administer the oath to a person enrolled by the Clerk as a Delegate.

Credentials in due form issued by an officer intrusted by law with that function were held to establish prima facie right against the certificate of another officer showing the actual state of the vote.

A governor empowered by law to issue credentials may certify to his own election to the House.

No law requiring the seal of the Territory to be affixed to credentials of the Delegate, the absence of the seal did not invalidate the credentials.

On December 7, 1863,[3] at the organization, during the swearing in of Members and Delegates, Mr. J. B. S. Todd, who was on the Clerk's roll as Delegate from Dakota, was called.

Mr. Owen Lovejoy, of Illinois, demanded the reading of the credentials of Mr. Todd and at the same time presented the credentials of Mr. William Jayne, claiming a seat as Delegate from the same Territory.

Mr. Lovejoy then moved that the credentials of Mr. Todd be referred to the Committee on Elections. This motion was agreed to, and the oath was not administered to Mr. Todd. Mr. Todd had a credential from John Hutchinson, secretary and acting governor, which merely stated the facts to show that Mr. Todd had more votes than his opponent, William Jayne. There was also a certificate from John Hutchinson, as secretary, that he had not issued a certificate of election to anyone, and also a certified copy of a proclamation wherein John Hutchinson, secretary and acting governor, declared that William Jayne received the majority of the votes, and finally a certificate wherein William Jayne, as governor, certified that William Jayne (himself) had been elected Delegate.

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[1] Globe, pp. 1973, 1995.

[2] Journal, p. 653; Globe, pp. 2009, 2010.

[3] First session Thirty-eighth Congress, Journal, p. 13; Globe, p. 8.

The Committee on Elections reported on January 13, 1864.[1] The committee first describe the credentials. Those of Mr. Jayne consisted of:

First. A proclamation by John Hutchinson, "secretary and acting governor of the Territory of Dakota," dated November 29, 1862, bearing the seal of the Territory, "that at a general election held on the 1st day of September, 1862, in said Territory, William Jayne received a majority of the votes cast for Delegate to Congress, and was therefore duly elected Delegate to the Thirty-eighth Congress of the United States."

Second. A certificate, signed by himself, "William Jayne, governor of Dakota Territory," dated January 5, 1863, and sealed with the seal of the Territory, certifying the same facts set out in the proclamation of date November 29, 1862, signed by John Hutchinson, secretary and acting governor.

Mr. Jayne was absent from the Territory at the time the proclamation was issued, but returned before the issuing of the certificate.

The credentials of Mr. Todd were:

First. A certificate, signed by "John Hutchinson, secretary and acting governor," dated August 15, 1863, and sealed with the seal of the Territory—

that according to the canvass made by the Territorial canvassers, on the 24th day of October, 1862, of the votes for Delegate to Congress, William Jayne had a majority over J. B. L. Todd of 16 votes; and that subsequent to said canvass returns were made to this office, in due form, of votes from Pembina district, as follows: For J. B. L. Todd, 125; for William Jayne, 19, which said votes were not included in the canvass made by the Territorial canvassers, but are now on file in this office.

Second. Another certificate, signed "John Hutchinson, secretary," dated September 26, 1863, with the seal affixed, certifying—

that I have not issued a certificate of election to any person as Delegate to Congress from this Territory, that there is no record in this office of any having been issued by any person, and that I have no official knowledge of the Territorial seal having been affixed to any such certificate.

The committee, in their investigation, confined themselves entirely to the prima facie case, giving no attention to the question of final right.

The report makes the following statement of fact:

The election of Delegate was held, according to law, on the 1st day of September, 1862. The laws of Dakota make it the duty of the secretary of the Territory, if the returns from any county have not been received at his office within forty days after an election, to send a special messenger therefor. No messenger was sent to any county in this case. It is made the duty of the secretary, the chief justice, and the governor "to proceed within fifty days after the election, and sooner, if all the votes be received, to canvass the votes given for Delegate to Congress, and other Territorial officers, and the governor shall grant a certificate of election to the person having the highest number of votes, and shall also issue a proclamation declaring the election of such person. If either of the persons mentioned in this section as canvassers be a candidate for Delegate to Congress, such person shall take no part in the canvass of said votes." By the organic act, in the absence of the governor from the Territory, the secretary shall be acting governor.

On the 24th of October, 1862, the fifty days for the returns to be made having expired, the chief justice and secretary of the Territory, in the absence of the governor, Mr. Jayne, who was one of the candidates, proceeded to canvass the votes for Delegate, and on the 29th of October the secretary of the Territory, as acting governor, the governor being still absent from the Territory, made proclamation of the result, viz, that "William Jayne received a majority of the votes cast for Delegate to Congress, and

[1] House Report No. 1.

was therefore duly elected Delegate to the Thirty-eighth Congress of the United States." A certified copy of this proclamation, under the hand of said secretary, acting governor, sealed with the seal of the Territory, Mr. Jayne presents as his credentials.

The law of the Territory also requires a certificate of the same facts to be issued by the governor to the person so declared elected. Mr. Jayne having returned to the Territory before this certificate was issued, all authority of the secretary, as governor, ceased at once; and if the certificate was to be issued at all, it must be issued by Mr. Jayne himself, he alone being governor. He accordingly, on the 5th of January, 1863, certified to the facts found by the canvassers and proclaimed by the acting governor in his absence. This certificate is also presented here, along with the proclamation of the acting governor.

The committee go on to show that here the official connection of the board of canvassers ceased and that the secretary had no authority nine months after the canvass had been made and the result announced to issue the certificate to Mr. Todd. The statement of the secretary that he had issued to no one a certificate of election and had not affixed the seal of the Territory to any certificate was of no effect, as the law did not authorize him to do either.

The committee "find that the credentials of Mr. Jayne are in strict conformity to the laws of the United States and the Territory declaring him, under the seal of the Territory and the signature of both the acting and actual governor of the Territory, to be duly elected Delegate to the Thirty-eighth Congress." Mr. Todd presented no such paper. Mr. Jayne had also presented a later certificate signed by the present governor.

The committee therefore recommended the adoption of the following:

Resolved, That William Jayne, having presented a certificate in due form of law of his election as Delegate from the Territory of Dakota to the Thirty-eighth Congress, is entitled to take the oath of office and occupy a seat in this House as such Delegate without prejudice to the right of J. B. S. Todd, claiming to be duly elected thereto, to prosecute his contest therefor according to the rules and usages of this House.

On January 15 [1] the report was discussed in the House. It was urged that the certificate was irregular because issued by Governor Jayne to himself without the document being sealed by the secretary. On the other hand, it was argued that the governor might certify to his own election and that no law required the seal.

The question was taken first on an amendment declaring that neither claimant should be admitted to a seat until the final right should be determined. This was decided in the negative—yeas 66, nays 78. The resolution reported by the committee was then agreed to.[2]

Mr. Jayne thereupon appeared and took the oath.

620. The South Carolina election cases of Hoge and Reed and Wallace v. Simpson in the Forty-first Congress.

In case of conflicting credentials, one intended to revoke the other, the Clerk enrolled neither claimant.

In 1869 the House ordered that in all election contests wherein either claimant should be unable to take the oath of loyalty, the investigation of claimant's rights should cease pending order of the House.

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[1] Globe, pp. 234–238.

[2] Journal, p. 148; Globe, p. 238.

After careful reconsideration of the principles of a former action, the House declined to honor credentials doubtful as to legal form and intended to revoke credentials correct in form.

Discussion of the right of certifying officers to revoke credentials already issued and issue others.

On March 4, 1869,[1] when the House was organized, the roll of the Clerk was found not to include the names of Representatives from the Third and Fourth districts of South Carolina.

On March 9[2] the House agreed to the following resolution:

Resolved, That the cases of the claimants to seats in the Forty-first Congress from the Third and Fourth Congressional districts of South Carolina, with all papers relating to the same, be referred to the Committee of Elections, when appointed, with instructions to report as soon as practicable which of the claimants, if either, are entitled to seats.

On March 22, 1869,[3] the House agreed to the following:

Resolved, That in all contested-election cases referred to the Committee of Elections in which it shall be alleged by a party to the case, or a Member of the House, that either claimant is unable to take the oath prescribed in the act approved July 2, 1862, entitled "An act to prescribe an oath of office, and for other purposes," it shall be the duty of the committee to ascertain whether such disability exists; and if such disability shall be found to exist the committee shall so report to the House, and shall not further consider the claim of the person so disqualified without the further order of the House; and no compensation will be allowed by the House to any claimant who shall have been ineligible to the office of Representative to Congress at the time of the election, and whose disability shall not have been removed by act of Congress.

In accordance with this resolution, the committee reported[4] that J. P. Reed, one of the claimants for the seat from the Third district, was unable to take the oath. This disposed of his claim to the seat.

But a question arose as to the prima facie right, and on April 2, after the report as to Mr. Reed's qualification had been presented, the committee reported on the prima facie right.[5] It appeared that there were two certificates, thus described and discussed by the majority of the committee:[6]

One of these certificates was signed by three persons styling themselves canvassers for said State, and certifies that J. P. Reed was duly elected by a majority of votes in said Third district.

The other certificate was signed by four persons styling themselves canvassers for the State (three of the persons signing this being the same who signed the first-named certificate), and certifies that S. L. Hoge was duly elected by a majority of the legal votes in said Third district.

The phraseology of these certificates is somewhat different. In the certificate given to Reed, it is certified that he is duly elected by a majority of votes, while in the other it is certified that S. L. Hoge is duly elected by a majority of the legal votes of said district. It is evident, as will presently appear, that it was the intention of the canvassers to supersede, by the certificate given to Hoge, the one they had already given to Reed, and this accounts, no doubt, for the difference in the language used.

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[1] First session Forty-first Congress, Journal, p. 5.

[2] Journal, p. 22.

[3] Journal, p. 91.

[4] House Report No. 3.

[5] House Report No. 6; 2 Bartlett, p. 540; Rowell's Digest, p. 233.

[6] Report submitted by Mr. John Cessna, of Pennsylvania. The minority views were signed by Messrs. Albert G. Burr, of Illinois, and Samuel J. Randall, of Pennsylvaina.

It appears, also, that one of the canvassers (J. L. Neagle) who signed the certificate of Reed, withdrew his signature to said certificate in the following language:

"I therefore desire that the aforesaid certificate be considered as though my name was not attached and this same certificate to have all the force of a certificate of the election of Hon. S. L. Hoge in full force and effect.

"J. L. NEAGLE,
"Comptroller-General, South Carolina."

This withdrawal leaves but two signatures to the certificate of Reed. This, according to the Statutes at Laxge of the State of South Carolina (vide, sec. 35), invalidates the certificate, three canvassers being required to make a valid certificate. The question then arises, Can the canvassers, after having given one certificate, withdraw their action and give another to a different party? This question was decided in the case of Morton *v.* Daily. (Bartlett's Contested Election Cases, p. 403.)

We think, also, that this decision can be sustained upon principle. The question is entirely within the control of the State canvassers or the governor of the State (as the case may be under the law) until the roll of the House is made up by the Clerk. There is no vested right, under a certificate, that would prevent the canvassers from rectifying any error or mistake that may have occurred in their deliberations or action, until the holder of the same has been awarded his seat by the Clerk of the House.

This principle is illustrated in the case of an attorney in fact; in which case, it is not doubted, the principal can withdraw or annul the power granted at any time before its purpose is executed.

Conceding, as a majority of the committee do, the right of these canvassers to reverse their first action in the premises and give a second certificate to Mr. S. L. Hoge, we do not think it necessary to examine the mass of testimony which seems to have been taken, upon due notice to the opposite party, but we append to this report the reasons given by the State canvassers for their action in this case. (Vide Appendix, marked C.)

The committee therefore recommend the following resolution:

Resolved, That, upon the papers referred to the Committee of Elections in the contested case of S. L. Hoge *v.* J. P. Reed from the Third Congressional district of South Carolina, S. L. Hoge is prima facie entitled to a seat in the House as the Representative of said district, subject to the future action of the House as to the merits of the case.

The minority of the committee dissented, saying at the outset:

although we may not consider his papers in support of his own claim until he shall have been relieved of disabilities, we may and must consider his papers in order to determine whether the papers relied upon by his competitor show upon the face superior title to the seat in dispute.

The minority quote the law of the State constituting the board of canvassers, of which the following is a part:

XXXVII. The board when thus formed shall, upon the certified copies of the statements made by the boards of canvassers, proceed to make a statement of the whole number of votes given at such election for the various offices and each of them voted for, distinguishing the several counties in which they were given. They shall certify such statements to be correct and subscribe the same with their proper names.

XXXVIII. Upon such statements they shall then proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices, or either of them.

The minority present the statement of votes made up by the canvassers in accordance with the law, which gave J. P. Reed 11,774 votes and S. L. Hoge 8,766 votes. To Mr. Reed also was issued the certifacate as to the determination reached by the board as to "what persons have been, by the greatest number of votes, duly elected to such offices." This declaration was duly signed by all the State canvassers. To Mr. Reed also was issued the certificate of the governor under the seal of the State, commissioning him as Representative.

As to the claim of Mr. Hoge, the minority say:

The only papers in support of his prima facie claim are, first, a certificate by the board of State canvassers, purporting to have been executed on the same day as that held by Mr. Reed; and second, a separate "statement of the board of State canvassers of South Carolina in the case of the election of J. P. Reed." Let us consider the certificate first. It differs from that held by Mr. Reed only in three particulars and need not therefore be set out here, except so far as the difference is to be considered. Reed's certificate declares him to "have been duly elected by a majority of votes." Hoge's declares him to "have received a majority of legal votes." The next point of difference is that Hoge's paper bears the signature of Daniel H. Chamberlain, attorney-general, in addition to the names of State canvassers signing Reed's; and last, the paper presented by Hoge bears to the left of the official signatures of the canvassers the words "Robert K. Scott, governor of South Carolina."

Before considering the "statement" let us refer to each of these points of difference in the certificates. The requirement of the law of South Carolina (sec. 38) upon the canvassers is, "shall determine and declare what persons have been, by the greatest number of votes, duly elected." Reed's paper says, "have been duly elected by a majority of votes." Hoge's says, "have received a majority of legal votes." In view of the requirements of this section, Reed's paper is a strict compliance with the statute; Hoge's a departure from the text and lack of compliance with its terms. As to the next point of difference in the fact that the attorney-general signs Hoge's paper and not Reed's, either paper is in that regard a compliance with the law (sec. 35), for by it any three of the canvassers constitute a board. And last, as to the name of Governor Scott appearing on the left of Hoge's paper, as no section of the law requires him to execute or attest such a paper, it is of no effect on the one, nor is its lack in any degree significant in the other. These are all the differences on the faces of the papers so far. Hoge presents no commission by the governor, which Reed does. Hoge shows no published certificate of the result in his favor, as required by section 43, while Reed shows strict compliance with that section.

The minority go on to cite facts which they declare prove that Hoge's certificate of election was made long subsequent to the day appearing on its face as the true date, and thus was impeached.

The minority also show that the "statement" of the canvassers (a document declaring widespread intimidation in the district whereby enough voters to have elected Mr. Hoge were deterred from voting) in its opening sentence admitted that the canvassers had "felt compelled to declare upon prima facie evidence" that J. P. Reed had been elected.

Laying stress on the fact that the "statement" bore no date, the minority say:

But, in addition, even if a public officer or a board of officers may annul an official act and, by subsequent determination, move in a different direction, there must of course be a period of time, or a point in the series of acts dependent upon each other, beyond which no such discretionary power could be exercised. As to time, let it be remembered they commenced their work as a board as early as December 1, for that is the date of their first official paper. How long, then, may they continue to act; or, in other words, what is their official term? Section 40 says:

"The board shall have the power to adjourn from day to day, for a term not exceeding five days."

Then, measured by time, all their official acts must be performed within the term of five days. But as to power, regardless of time, we deem the true rule to be that when an official act is in itself completed, and other subsequent official acts of the same or other officer have been based upon such completed act, it may not be retracted.

Therefore the minority hold that as the affair has proceeded as far as the issue of a certificate by the governor, it was too late for the board to recant.

The minority conclude:

But this statement of the canvassers not only does not assert prima facie right in Hoge, but expressly states that he received a minority of the votes, for in it they base Hoge's ultimate right on

Reed's ineligibility. They do not reverse the final decision as to the prima facie case, but admit and affirm it, declaring, however, their view of final rights or merits as follows:

"The board of State canvassers, while not deeming themselves competent to give final judgment upon the question herein involved, do submit that if such disqualification in fact exists, then the election of the said Reed is wholly illegal and void; and that in consequence thereof, S. L. Hoge, who received the next highest number of votes, is lawfully entitled to the seat as Representative of the Third Congressional district aforesaid."

S. L. Hoge, they say, "received the next highest number of votes." Next to whom? J. P. Reed; and "if Reed is disqualified, then his election is illegal and void"; and, in their judgment, as a result "in consequence thereof, S. L. Hoge, who received the next highest number of votes," ought to be admitted. Suppose Reed were not disqualified? Then his election would not be illegal and void, and Hoge would have no claim, prima facie or otherwise, to a seat here. Now, if the House is ready to adopt this theory, that the disqualification of Reed elects Hoge by a majority vote, so let it be. In so doing it will reverse its own decision in the preceding Congresses, admit its error in the case of Brown and ———, from Kentucky, in the last Congress, place majorities in control of minorities,[1] and in advance sanction party intrigue and official misconduct in suppressing the popular will.

For reasons imperfectly given above we dissent from the majority and offer as a substitute for their resolution the following:

Resolved, That J. P. Reed is not entitled, under resolution of March, 1869, to a seat from the Third district of South Carolina, by reason of ineligibility, and that S. L. Hoge is not entitled to such seat, because he was not "by the greatest number of votes duly elected" by the people of that district.

On April 8,[2] after little debate, the rules were suspended and the resolution of the majority was agreed to—yeas 101, nays 39.

Mr. Hoge thereupon took the oath.

The same state of facts shown in the above case was also developed in the case from the Fourth district of South Carolina, Wallace *v.* Simpson.[3] The report, submitted by Mr. Samuel S. Burdett, of Missouri, discussed the principle involved at greater length than in the case of Hoge *v.* Reed. The report says:

The possession of a certificate of election does not give, create, or add to the right of representing a constituency. It is merely evidence of a fact; it does not make the fact. If, in fact, false in its recitals, as one and all of its signers declare the Simpson certificate to be, it can not create by such a false recital a state of case which exists only in recitals. The anticipated objections, that the board of canvassers, exercising ministerial functions only, could have no right to do any act save to count the returns laid before them and certify that count without question, is sufficiently answered by the case of Butler *v.* Lehman (Contested Cases in Congress, p. 353), and in the case of Morton *v.* Daily, page 403, in both of which cases the certifying officer did go behind the returns furnished him and declared a different result from that appearing on the face of the returns, and in both cases the House sustained the action of the officer. The last-cited case is also clearly decisive of the question of the right of certifying officers to reverse their action, even after the fact accomplished. In that case the governor of Nebraska had issued his certificate to Morton, and, after the lapse of considerable time, on the discovery of apparent fraud, revoked it and gave a second to Daily, and the House sustained his action by seating Daily.

Nor is such action to be looked on as exceptional, or dependent on the particular circumstances of cited cases. On the contrary, the principle on which this action is based is in itself most wise, nec-

[1] This is the wording as printed in the report. The language is susceptible of two meanings; but the intention was evidently to express the idea that majorities would be placed under the control of minorities.

[2] Journal, pp. 194, 195; Globe, p. 631.

[3] House Report No. 7; 2 Bartlett, p. 552; Rowell's Digest, p. 235.

essary, and salutary, and the reason is well expressed in the views of the committee in the cue of Vallandigham, *v.* Campbell (Contested Election Cases, p. 230), in the following language:

"Neither the committee nor the House is bound by these rules (the usual rules and principles of evidence) in their letter and strictness, but should proceed upon more liberal principles in the investigation of truth."—Et seq., and cases cited to page 231.

The objection that justice, clearly demanded by every possible consideration of fair dealing, shall not be done, or shall be delayed, because of the omission, or technical error, or hasty and mistaken action of some intermediate official personage, or because the just end to be reached leads across the line of "nisi prius" practice, or precedent, can not stand. That equity might be done, and done in spite of the strict rules of law, courts of chancery were established, that through them righteous conclusions might be reached for the conclusions' sake. By the Constitution, in all matters pertaining to the election, returns, and qualifications of its Members, the House is made "a law unto itself," and has no other rule forced upon it for the determination of these questions than the sanction of the oath of its Members, and that due regard for the rights of constituencies which the representatives of constituencies, from the nature of their own duties and relations, must have and feel. Not that the technical rules of the law applicable to evidence and weight of evidence, the duties of officers, etc., may not be called in to aid in the proper investigation of a case, but that when called in they shall not be regarded as greater than the rights to be affected by their application.

The case of Wallace v. Simpson on this prima facie question was debated fully on January 25,[1] at the next session of Congress. Mr. Samuel J. Randall, of Pennsylvania, alleged that the secretary of state of South Carolina was ready to appear and testify that the certificates to Hoge and Wallace had been issued informally at a date later than the five days' limit. It was replied that even if this were so the official certificate of the secretary of state to the direct contrary was on file. The report was fully considered in other aspects. The majority had proposed a resolution declaring Mr. Wallace prima facie entitled to the seat.

Mr. Randall moved as a substitute therefor the following:

That W. D. Simpson is not entitled, under resolution of March, 1869, to a seat from the Fourth district of South Carolina, by reason of ineligibility; and that A. S. Wallace is not entitled to such seat because he was not "by the greatest number of votes duly elected "by the people of that district.

This substitute amendment was agreed to, yeas 102, nays 73.[2]

The question recurring on the proposition of the majority as amended by the substitute, Mr. Randall expressed the desire to modify his substitute so that it would bear only upon the prima facie case. He said that his proposition as adopted went further than he had intended.

Objection being made to the modification, a motion to lay the whole proposition on the table was then agreed to without division.

Then a resolution was agreed to—ayes 63, noes 46—referring the claims of both Messrs. Simpson and Wallace to a committee to be examined as to the merits of the case.

621. The election cases of Hoge, Reed, and others, continued.

Form of resolution authorizing notice of contest and taking of testimony in case of a claimant whose opponent had been eliminated by reason of disqualifications.

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[1] Second session Forty-first Congress, Globe, pp. 742–752.

[2] Journal, pp. 201–204.

The candidate having the largest number of votes being notoriously disqualified, the House declined to seat the candidate having the next highest number of votes.

On January 28, 1870,[1] the committee reported that Mr. Simpson was unable to take the oath required by the act of July 2, 1862, and the House discharged the committee from consideration of the case so far as it related to Mr. Simpson.

On February 10[2] the House, on report from the Committee on Elections, agreed to the following resolution:

Resolved, That in the case of A. S. Wallace *v.* W.D. Simpson, the time for taking testimony be extended for forty days from and after the passage of this resolution. Notice shall be given by either party wishing to take testimony, to the opposite party, according to law, ten days before commencing the same. Either party may examine witnesses before any judge, notary public, or other officer authorized to take depositions under the laws of the United States or of the State of South Carolina, at the city of Columbia. Testimony taken by said Wallace shall be confined to evidence tending to establish his claim to the seat; and testimony taken by said Simpson shall be confined to evidence relating to said claim of said Wallace.

On May 18, 1870,[3] the committee having the case in charge—Messrs. John Cessna, of Pennsylvania; Eugene Hale, of Maine; and Samuel J. Randall, of Pennsylvania—submitted the report on the merits of the case. As presented in this report the case divides itself naturally into three branches.

1. The question arose as to whether or not, the candidate having a majority on the face of the returns being disqualified, the candidate being returned with the next highest vote should be seated. Mr. Cessna submitted in the report an argument that the minority candidate should be seated; but it was expressly stated in the debate[4] that neither Mr. Hale nor Mr. Randall concurred in this view. Also, Mr. Henry L. Dawes, of Massachusetts, protested against including this as one of the grounds, and Mr. Halbert E. Paine, of Wisconsin, chairman of the Committee on Elections concurred in this view. Mr. Albert G. Burr, of Illinois, submitted an elaborate argument to show that Mr. Cessna's view was not sustained even by English precedents."

Mr. Cessna, in his report, admitted that there was no precedent in American history, but contended that the case was unique and that English precedents would justify the view for which he contended. He contended that as a question of public policy his view was abundantly justified, since in this case the disqualification was well known and the electors by their act fell under the English rule of "willful obstinacy and misconduct." Mr. Cessna says:

Was Mr. Simpson, who claims to have received a majority of the votes in this district, ineligible at the time he was voted for; and did those who cast their votes for him know the fact? The third section of the fourteenth amendment to the Constitution of the United States provides that "no person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a Member of Congress or as an officer of the United States, or as a member of any State legis-

[1] Globe, p. 854; Journal, p. 223, House Report No. 17.

[2] Journal, p. 295.

[3] House Report No. 71; 2 Bartlett, p. 731; Rowell's Digest, p. 244.

[4] Globe, pp. 3863–3866.

lature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof." Mr. Simpson admits, in his answer to the notice of contestant, that he "was a member of the general assembly of South Carolina in the years 1858, 1859, and 1860; that he took the oath as such to support the Constitution of the United States; that he voted for the call of the convention which passed the ordinance of secession; that he entered the Confederate army and served as major and lieutenant-colonel until the close of the year 1863, when he was elected to the Confederate congress, and that he continued a member of said congress until the close of the war; that he has engaged in open war against the United States, and as a member of the confederate Congress he did all he could in an honorable way to advance the cause in which he was engaged."

The electors in this district were, therefore, thoroughly informed of the ineligibility of Mr. Simpson at the time they voted for him. It is perfectly clear that they had actual notice of his ineligibility. But even without the actual notice to individual voters, they are equally bound, under a state of facts such as here presented. They are presumed to have known of the disqualifying article of the Constitution of the United States. They are presumed to have known that he had been a member of the general assembly of South Carolina. They are presumed to have known that he took an oath to support the Constitution of the United States as said member. They are presumed to have known that he was a member of the Confederate congress. These are presumptions of law, and charge these electors with constructive notice.

"When the ineligibility of a candidate arises from his holding or having held a public office, the people within the jurisdiction of such office are held in law to know, and are chargeable with notice of such ineligibility." (Vide Grant on Corporations, p. 109.)

In this instance there was actual as well as constructive notice of the disqualification of Mr. Simpson. All the witnesses that have been examined state that it was well known throughout the district, and the prominence of Mr. Simpson renders it very certain that this was the case. This case is distinguishable from the case of Smith *v.* John Young Brown, in the Fortieth Congress, from the fact that in that case the disqualification was doubtful, and there was no evidence that the electors knew of the disqualification. He had not served in the Confederate army; he had held no office under the constitution of the Confederacy that could charge those who voted for him with constructive notice; neither were the acts of disloyalty alleged against him of a character so notorious as to raise a presumption of knowledge upon the part of the electors of the district.

It is conceded that in cases heretofore decided by the House the doctrine here maintained has not prevailed; but it is confidently believed that in none of them was the notoriety of ineligibility raised, considered, or decided.

622. The election case of Hoge, Reed, and others, continued.

Six of the nine counties of a district being terrorized, the committee, in a sustained report, held that the three peaceful counties, casting less than half the returned vote, should determine the result.

A question as to whether an estimate of persons kept from the polls by a conspiracy to intimidate should have weight in determining the result.

When the House votes to admit a Member and the motion to reconsider is disposed of, the right to be sworn is complete and not to be deferred, even by a motion to adjourn.

An elections committee having reported as to one feature of a contest, the House discharged the committee from further consideration of that portion of the case.

(2) The registered vote of the entire district was 33,147, of which 23,905 votes were cast. The official returns gave 14,098 votes to Simpson and 9,807 to Wallace. The committee present testimony showing widespread and systematic terrorism in

six of the nine counties. Out of the total district vote of 23,905 the six counties returned 14,553, divided as follows: Simpson 9,933, Wallace 4,620. The three peaceful counties returned a total of 9,352, divided as follows: Simpson 4,165, Wallace 5,187.

The committee show by the vote in prior elections that some cause produced the phenomenon of a surprising reduction in the vote of the party to which Mr. Wallace belonged.

The committee say:

But your committee is satisfied that the elections held in these six counties were mere farces, and are entitled to no consideration as the expressed will of the people; that under no precedent or any principle of law or justice could these elections be considered valid. In the case of Harrison *v.* Davis (Contested Election Cases, vol. 2), which is probably the leading case upon the question, it is ruled "that if so many individuals were excluded by violence and intimidations as would, if allowed to vote, have given the contestant the majority, this would have been in law decisive of the case." This doctrine is conceded in the minority report in the recent case of Hunt *v.* Sheldon. But if we had no precedent, the committee would not hesitate to decide that where there was such violence and bloodshed as would intimidate men of ordinary firmness, and where a sufficient number of voters to have changed the result were kept from the polls by reason of this intimidation, it would be as fatal to the poll as if the election board had been controlled by intimidations. In the recent cases acted on by the House, from Louisiana, it was contended that there was no violence used at the polls, and therefore there was no actual obstruction to a fair election. In this instance, according to the evidence, there was a conspiracy to prevent a free election. Mr. Simpson and his friends had organized secret political clubs in all of those counties, with the avowed design of preventing Republicans from voting. They had procured an abundant supply of firearms, and were ready to make any use of them that the success of their purpose required. Their murders and threats before the election had so far done their work that their appearance at the polls fully armed and equipped was sufficient to intimidate Republican voters, both white and black, who had so recently witnessed the outrages practiced by these desperate men. At most of the polls there was violence used just in proportion to the firmness and determination manifested by the Republican voters. In counties where there were but few white Republicans the Ku-Klux, by traversing the counties for several nights before the election, beating the freedmen, shooting into their houses, and leaving coffins at their doors, so completely terrified them that it required but little effort on the day of election to drive them from the polls.

Did this violence and intimidation deter a sufficient number of voters from voting who, if they had voted, would have elected the contestant? We are clearly of opinion that it did. We think, too, that by the evidence it is fully established that a fair election in these six counties would have largely increased the majority for Mr. Wallace in the district.

The committee further say, in view of the fact that the three peaceful counties cast only 9,352 out of the 23,905 votes returned in the district:

It is sometimes urged that in cases where a fair election has been prevented by fraud and violence only in a part of a district the whole election should be set aside and a new one ordered. When a portion of the people of any district, in a peaceable and orderly manner, and in strict compliance with all the forms of law, manifest their will at the ballot box, we can see no good reason why that will should be disregarded on the ground that there were other people in the district who did not choose to obey the law, nor submit to its requirements. It will be conceded that if 30,000 of the voters of this district had decided to stay at home on the election day, and the other 3,000 had gone to the polls and voted, their choice would have been the legal choice of the whole district. And it would have made no difference whether the entire 3,000 persons who voted lived in one county or in two counties, or in the whole nine counties of the district. We can see no difference between such a case and the one now being considered.

No minority views were presented. Mr. Randall said in debate:

I here express my dissent from the conclusions of the majority of the committee, while, at the same time, I am free to say that this is the strongest case of intimidation which, so far as my knowledge extends, has been presented to this Congress.[1]

(3) In the report it was further contended that in the six counties a large number of persons who would have supported Mr. Wallace were kept from the polls by intimidation, and that this class would have aggregated in the six counties a total of 5,700 votes, enough to have elected Mr. Wallace without rejecting the entire returns of those counties.

In the debate Mr. Henry L. Dawes, of Massachusetts, said he understood by this class to be meant only—

that persons who have come up to the polls and were ready to vote, who they can determine by evidence had a right to vote, were excluded. Upon that consideration * * * I should not find any fault; but on the broad phraseology of the report it is in opposition to the uniform decisions of this House, coming down from the Michigan case nearly thirty years ago.

Mr. Dawes hoped therefore that this feature of the case would be eliminated and not made a precedent.

The resolution declaring Mr. Wallace "duly elected" and entitled to the seat was agreed to without division;[3] but this hardly shows the actual feeling of the, House, since the vote was taken very soon after the reading of the Journal when the House was thin. The debate occurred after this vote, and dissatisfaction was expressed with the action, and a protest was made against swearing in Mr. Wallace.

But the Speaker[4] held:[5]

When the House has voted to admit a Member, the record of the legislative action is not complete until, a motion to reconsider has been made and that motion laid on the table. When the action of the House has thus been consummated, the right of the Member to be sworn in is complete, and it is a right which the Chair is compelled to insist upon against any motion whatever. Under such circumstances the Chair would not entertain even a motion to adjourn.

Mr. Wallace was sworn in.

623. The Louisiana election cases of Sheridan v. Pinchback and Lawrence v. Sypher in the Forty-third Congress.

There being conflicting credentials, issued by different occupants of the gubernatorial chair, the Clerk enrolled neither claimant.

Credentials regular in form, and issued in accordance with law, were honored by the House, although it appeared that the governor issuing them might be merely a de facto officer.

Although apparently satisfied as to prima facie right, the House did not seat an indifferent claimant who had also filed credentials as a Senator-elect.

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[1] Globe, p. 3863.

[2] Globe, p. 3864.

[3] Journal, p. 864; Globe, pp. 3862, 3863.

[4] James G. Blaine, of Maine, Speaker.

[5] Globe, p. 3863.

The House declined to honor credentials regular in form, but issued in disregard of a State law requiring them to be issued after and not before the canvassing officers had made returns.

In determining prima facie right the House may take cognizance of public statutes, proclamations made by public officials under the law, and matters of history.

A pending single resolution providing for seating several claimants, the Speaker ruled that the vote might be taken separately as to each claimant.

A division being demanded on a resolution for seating several claimants, the oath may be administered to each as soon as his case is decided.

On December 1, 1873,[1] at the organization of the House, the Clerk announced that from the State of Louisiana there were unchallenged certificates only from the Third and Fifth districts, therefore he had enrolled only the members-elect from those districts.

On December 2,[2] after the House had organized, Mr. Benjamin F. Butler, of Massachusetts, submitted the following:

Resolved, That J. H. Sypher, of the First district, L. A. Sheldon, of the Second district of Louisiana, and P. B. S. Pinchback, a Representative at large of the same State, having the prima facie evidence of right to seats in this House, be admitted to take the oath of office, respectively.

The credentials in all these cases involved substantially the same question. The election had been held on the first Tuesday of November, 1872. The law of Louisiana provided that the returning officers of election should make their returns within ten days, and that "as soon as possible after the expiration of the time of making the returns" a certificate of the returns should be "entered on record by the secretary of state and signed by the governor," and copies be given to the Members elect and also transmitted to the Clerk of the House of Representatives.

A certificate from the secretary of state of Louisiana (presented by the Clerk of the House with the credentials on the day of organization), showed that no record of the election was entered until the 16th of December, and that the record was officially promulgated on the 17th of December.

But before the entry of this record the governor of Louisiana had given certificates like the following:

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
NEW ORLEANS, DECEMBER 4, 1872.

This is to certify that at a general election held in this State on the 4th day of November, A. D. 1872, George A. Sheridan received 64,016 votes, and P. B. S. Pinchback received 54,402 votes.

I therefore hereby declare George A. Sheridan duly elected to represent the State of Louisiana as Congressman at large in the Forty-third Congress of the United States.

Given under my hand and the seal of the State this 4th day of December, A. D. 1872, and of the independence of the United States the ninety-seventh.

H. C. WARMOTH,
Governor of Louisiana.

JACK WARTON,
Secretary of State.

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[1] First session Forty-third Congress, Record, p. 5.

[2] Record, pp. 19–28, 34; Journal, pp. 17, 19, 39.

On December 8, after the above certificate had been issued but before the record of the election was entered, a legislature met, impeached Governor Warmoth and on December 9 suspended him, Lieutenant-Governor Pinchback becoming acting governor.

After this event, the following certificate was issued:

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
NEW ORLEANS, DECEMBER 30, 1872.

Be it known that, at an election begun and held on the 4th day of November, A.D. 1872, for Member of Congress, Pinckney B. S. Pinchback received 68,947 votes, and George A. Sheridan received 58,700 votes.

Now, therefore, I, P. B. S. Pinchback, acting governor of the State of Louisiana, do hereby certify that Pinckney B. S. Pinchback received a majority of the votes cast at said election, is duly and lawfully elected to represent the State at large, State of Louisiana, in the Forty-third Congress of the United States.

Given under my hand and the seal of State this 30th day of December, A.D. 1872, and of the independence of the United States the ninety-seventh.

P. B. S. PINCHBACK.

By the acting governor:

E. B. MENTZ, *Assistant Secretary of State.*

Mr. Butler admitted the priority of the Warmoth certificates and its correctness in form, but insisted that it was impeached by the record as presented. The Pinchback certificate he maintained was also correct in form, and against it no record evidence could be produced.[1]

In opposition to this view it was argued[2] that the Warmoth certificate was prior in time, that it was regular on its face, and in the identical form used in the preceding Congress. If it was proposed to go outside this piece of paper, then it should be noticed that Pinchback's title to the position of lieutenant-governor was questioned; that the impeachment of Warmoth was charged to be illegal; that the returns were in dispute, several returning boards claiming authority; that there had been two legislatures and two State governments, etc.

In support of the Pinchback credentials it was urged that questions as to the authority of the lieutenant-governor, governor de facto, and as to the returns and returning boards, belonged to the merits of the case and not to the prima facie case; but as part of the prima facie case the House had the right to take cognizance of public statutes, proclamations made by public officials under the law, and of matters of history.

The resolution proposed by Mr. Butler coming to a vote, the Speaker[3] held that the case of each person mentioned therein might be put separately.

Thereupon the question was taken on the proposition to admit Mr. J. H. Sypher to a seat, and it was agreed to, yeas 167, nays 98.

Also the proposition to admit Mr. Sheldon was agreed to.

The question recurring on the proposition to admit Mr. Pinchback, Mr. Butler, as a question of privilege, presented Messrs. Sypher and Sheldon to be sworn in.

[1] Record, p. 20.

[2] Especially by Mr. Clarkson N. Potter, of New York; Record, p. 25.

[3] James G. Blaine, of Maine, Speaker.

The Speaker said:

The Chair feels it to be his duty at once to administer the oath to the two Members whose prima facie right to their seats has just been declared. They are just as much entitled to vote on any question before the House as any other Member on the floor.

On December 3 the question recurred on admitting Mr. Pinchback to a seat, when, on motion of Mr. Butler, that portion of the proposition was laid on the table. It appeared that Mr. Pinchback did not wish a decision, perhaps because he had also presented credentials as a Senator-elect.

On December 3 [1] the credentials of Messrs. Pinchback, Sheridan, Lawrence, and Davidson, all claimants to seats from Louisiana, were referred to the Committee on Elections with instructions to report as early as might be.

624. The election cases of Sheridan, Sypher, and others, continued.

In a case where neither claimant was seated on prima facie showing the House investigated and determined the contest, although one claimant defaulted in answering notice of contest.

Although a State returning board had been declared the legal one by the State supreme court, the House disregarded its canvass, the fact being notorious that it never had possession of the returns.

In determining final right to a seat the House has considered as evidence testimony embodied in a Senate report of the preceding Congress relating generally to the election in question.

The House has authorized a contestant to take ex parte evidence in case an indifferent opponent should neglect to answer notice of contest.

The House, in case there shall be necessity, authorizes a contestant to serve an amended notice of contest.

On May 19, 1874,[2] Mr. H. Boardman Smith, of New York, presented the report of the majority of the committee in the case of Sheridan *v.* Pinchback.

The report presents an additional certificate issued to Mr. Pinchback by "Wm. P. Kellogg, governor of Louisiana," under date of March 11, 1874, and intended to set at rest doubts that had "arisen as to the validity of the credentials of Hon. P.B.S. Pinchback." This certificate declared Mr. Pinchback "duly elected by a majority of the votes cast."

The two certificates constituted the whole of Mr. Pinchback's case as presented to the committee, excepting a report and an affidavit presented in rebuttal, and not objected to by Mr. Sheridan.

Mr. Sheridan in seasonable time served on Mr. Pinchback a notice of contest, as follows:

NEW ORLEANS, LA., *December 30, 1872.*

Hon. P. B. S. PINCHBACK:

I hereby notify you that I shall contest your claim or right to a seat as Congressman at large from the State of Louisiana to the Forty-third Congress for the following reasons:

First. The board which declared you elected was not a legal board.

Second. It was not in possession of the returns of the election of November, 1872, and could not, therefore, legally declare you elected.

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[1] Journal, p. 42; Record, p. 49.

[2] House Report No. 597; Smith, p. 196.

Third. The lawful returns of the election of November, 1872, show my election as Congressman at large by a majority of more than 10,000 votes.

Very respectfully,

GEO. A. SHERIDAN.

To this notice Mr. Pinchback made no answer.

The only testimony presented by Mr. Sheridan consisted of certain testimony taken by the Committee on Privileges and Elections of the United States Senate. A question arose as to the competency of this evidence. The majority of the Committee say:

This volume, which Mr. Sheridan offers in evidence, is Senate Report No. 457, third session Fortysecond Congress.

Neither Mr. Pinchback nor Mr. Sheridan was directly a party to the controversy which was pending in the Senate and in which this investigation was had. Nor was the question as to which of them had been elected Representative at large from the State of Louisiana directly or indirectly before the Senate committee.

Your committee receive the President's message to the last Congress on Louisiana affairs, and the report and accompanying exhibits of the chief supervisors of elections in that State; they also receive this volume of testimony taken by the Senate committee, "for consideration of the nature and degree" of the evidence it contains and "of the subject-matter to which the evidence is to be applied," or, in the phrase of courts, "for what it is worth."

There is not a precinct or parish return in the entire volume, nor is there parol testimony of the vote which either claimant received. Your committee are satisfied, however, that it comprises correct copies of the returns made by the returning boards known as the Lynch and Foreman boards.

In support of this decision the committee cite sections 111, 143, 210, 742, 745, 747–749 of Cushing's Law and Practice of Legislative Assemblies.

The minority views, presented by Mr. L. Q. C. Lamar, of Mississippi, concurs that this was admissible testimony:

The volume from which we have quoted was admitted and considered by the committee as evidence-relating to the rights of the parties in this contest. It is a public document, containing a record of facts and testimony obtained in a proceeding ordered by the Senate, in which Mr. Pinchback was in effect a party, as his seat in the Senate depended upon the result. We consider it not only as admissible evidence, but abundantly sufficient to determine the rights of the parties to this contest.

As applicable to this question, we cite the following authorities:

Mr. Greenleaf, in his work on Evidence, volume 1, section 491, speaking of the admissibility and effect of public documents as instruments of evidence, says:

"To render such documents, when properly authenticated, admissible as evidence, their contents must be pertinent to the issue; it is also necessary that the document be made by the person whose duty it was to make it, and that the matter it contains be such as belonged to his province, or cases within his cognizance and observation. Documents having these requisites are in general admissible to prove, either prima facie or conclusively, the facts they recite."

"Public Statutes," "Public Proclamations," "Legislative Resolutions," "Journals of either House," "Diplomatic Correspondence," "Official Gazette" are mentioned by this author as documents admissible as evidence of the facts which they recite, even in courts of justice; but a broad distinction exists, as is well recognized by the writers upon public law, between the evidence admissible before judicial tribunals and that on which legislative bodies act.

The minority further quote from Lewis's Methods and Reasonings in Politics, especially wherein it is stated that "the process of ascertaining facts for legislative purposes is not, in general, so formal, or subject to such strict rules of evidence as the procedure of executive departments, whether administrative or judicial," etc.

The debate in the House[1] explained more fully than the report the facts out of which the controversy arose. The election law of 1870, under which the election in question was held, provided that the returns from the several counties should be canvassed by the State returning board.

Before the returns of the election in question (that of 1872) had been canvassed there arose factional differences which caused a split in the returning board, one portion of the board acting by itself and being called the Wharton board. The other portion of the board was called the Lynch board. The Lynch board was sustained by the supreme court of the State as the legal board.

There having been intervention by the Federal court (Judge Durell) in support of the Lynch board, Governor Warmouth, on November 20 (after the election had been held on the first Tuesday of the month), signed a new election law passed in the spring of the year and until then not approved. He did this "to escape the clutch of Judge Durell." Under this new law he appointed a returning board called the De Feriet board.

Later, on December 11, the McEnery senate (one of the rival legislative bodies) appointed a returning board called the Foreman board.

Thus there were four returning boards, two of them created under an election law not in force when the election was held.

The supreme court of the State had sustained the Lynch board, and the chairman of the Committee on Elections insisted strongly in debate that the construction given by a local court should be conclusive on the House.

The minority views give an explanation of the situation as follows:

We repeat that it is proven that the election was held in strict conformity with these provisions, and that the governor came into the lawful possession of all the official returns of that election. At this point the contest arose over the question as to who constituted the legal returning board of the State—the one called the Lynch board, or the other, the Warmoth board. Pending that contest, the governor, on the 20th of November, 1872, approved an act passed at the preceding session of the legislature of the State, repealing the act under which the two rival boards were contesting for the returns, and providing "that five persons, to be elected by the senate from all political parties, shall be the returning officers," etc. On the same day he issued a proclamation calling a session of the legislature.

This last-named statute abolished the existing board, and therefore makes it unnecessary here to discuss which of the two was the legal one.

Under the authority vested in him by the constitution of Louisiana to fill vacancies during the vacation of the legislature, the governor proceeded to fill the board provided for by the act approved November 20, 1872, appointing De Feriet and others, known as the "De Feriet board." On the 4th of December the governor submitted the official returns (of which he had retained the custody). That board, on the 4th of December, made the compilation and canvass, declaring McEnery and the candidates on the same ticket elected by 9,000 majority, and declaring, also, who had been elected members of the legislature; which result was proclaimed by the governor and certified to by the secretary of state, in pursuance of the election law of Louisiana.

In consequence of the seizure of the State capitol of Louisiana by a Federal marshal and United States soldiers, in obedience to an order of a Federal district judge, the members and senators returned by the De Feriet board met at the city hall in New Orleans, and on the 9th day of December organized as a legislature, and was so recognized by the governor. On the 11th of December the senate elected a board of returning officers, known as the Foreman board. To this board the official returns were delivered by the secretary of the De Feriet board. This board immediately proceeded to the canvass

[1] See speech of Mr. Smith, chairman of Elections Committee, Appendix of Record, p. 422.

and compilation of these official returns, and made an official report of the result in due form, as required by law. These compiled returns were submitted to the Senate Committee on Privileges and Elections during their investigation into the facts of the election now under consideration. The original returns were also before that committee, and impeached by the parties contesting the results, except a statement by John Ray that in four parishes the names of the commissioners were forged, which fact, if it be a fact, was admitted not to have changed the result.

With the state of facts as thus set forth, the next questions arising relate to the cases of the two claimants.

(1) As to the claim of Mr. Pinchback. The majority of the committee state first that to Mr. Sheridan's notice of contest no answer was made by Mr. Pinchback, and continues:

Is Mr. Pinchback shown entitled upon the merits to this seat?

Your committee think not. Mr. Pinchback's original certificate, it was conceded, and Governor Kellogg's supplemental certificate, it is to be assumed, were issued upon the pretended canvass by the returning board known as the "Lynch board." Assuming that the Lynch board was the legal returning board, and waiving the consideration of the effect of Mr. Pinchback's default in making no response to Mr. Sheridan's notice of contest, your committee are of opinion that the fact that the Lynch board never had possession of the election returns, and therefore never canvassed them, has become a part of the political history of the country. They hold this fact to be so notorious that the House ought to take legislative notice of it in this contest, and may take like notice of it for the purpose of any appropriate legislation. They report, therefore, that upon the case as presented to your committee Mr. Pinchback is not shown to be entitled to a seat in this House.

The minority said in this connection:

According to the sworn admissions of a majority of the men composing this pretended board it is shown that it was never in possession of the lawful returns of the election.

Mr. Webster, in Luther *v.* Borden (7 How. S. C. Rep., p. 30), states briefly the principles of American politics:

"Suffrage is a delegation of political power to some individual. Hence the right must be guarded and protected against force and fraud. Another principle is that the qualification which entitles a man to vote must be prescribed by previous law directing how it is to be exercised; and also that the results must be certified to some central power, so that the vote may tell. We know of no other principle."

To validate an election there must be votes legally deposited by legal voters, and legally counted, and the result legally declared.

In Louisiana there were election laws—there was an election legally held. But in the certification of Mr. Pinchback there was no count of votes by any authority whatever. The legality of the Lynch board is a secondary question, so long as the fact exists that they were entirely without returns. A court legally constituted can not act without a case, without parties, without pleading, without evidence.

The Lynch board have simply appointed a Congressman; not determined who had been legally chosen.

The committee having unanimously reached the conclusion that Mr. Pinchback has not been shown to be elected, the question arises, was his competitor, G. A. Sheridan, elected?

Mr. Sheridan presents a certificate of his election, in due form, signed by Governor Warmoth, and dated December 4, 1872. Though Governor Warmoth was undoubtedly governor of Louisiana at the time, and the legal custodian of the returns, it was admitted in the argument before the committee that the returns had not been counted. This makes it necessary to go behind the certificate of the governor and inquire into the merits of the case as affected by the law and the facts.

(2) As to the claim of Mr. Sheridan.

Mr. Sheridan conceded that when his certificate was issued on December 4 the Congressional vote had not been canvassed by any board whatever. The only

board which returned Mr. Sheridan as elected was the Foreman board, appointed after the election by the McEnery Senate under a law enacted after the election. The majority of the committee thus speak of the Foreman board:

The return by the Foreman board of the Congressional vote was separate from the returns of the vote for other officers.

The inquiry of the Senate committee was directed wholly to the other returns.

There is no proof, and there is no presumption, that the correctness of this return was verified by comparison with the parish returns.

It is uncontroverted that, in violation of the law of Louisiana, which requires them to be opened in presence of the returning board, they were privately opened by Governor Warmoth, or by clerks in his office.

Their whereabouts since that time have not been often known. It is safe to say they have not been in the custody of the law. Some of the returns produced before the Senate committee were forgeries: p. 1095.

What credit they would be entitled to if in evidence need not be discussed, as not one of them was before the committee.

The majority furthermore proceed on questions of fact to impeach the returns of the Foreman board.

The minority, after quoting the return of the Foreman board, say:

We see no sufficient ground for rejecting this conclusion. The original returns are proved to have been received by the governor, proved to have been turned over, partially canvassed and compiled, by the De Feriet board, and proved to have been turned over from them, unaltered, to the Foreman board, which completed the canvass and compilation, and proved and admitted to have been placed in the possession of the committee, and no intimation has ever been hazarded that the official statement, of which the above is a copy, is not correct.

Following out this conclusion, the minority reported resolutions that Mr. Sheridan was entitled to the seat.

The majority did not concur in this view, and concluded their report as follows:

Your committee are now assuming that the Foreman board was the legal returning board; that McEnery, so far as the legal returns show, is the de jure governor of Louisiana, and the McEnery legislature the lawful legislature of that State. They give to the documents and proof, challenging the returns from these parishes, the same consideration, and no other, which they would be compelled to give them if the McEnery government were in office and the legality of the Foreman board unquestioned. They consider the partisan source from which this proof comes and withhold from it their implicit credence. They do not say that the crimes charged by it against the McEnery party are graver or better proven than the crimes charged against the Kellogg party. They perform, in their judgment, a duty imposed upon them by the order referring this case in reporting that these papers give ample warning to the House that the seating of Mr. Sheridan, without further evidence, may possibly cover, and in part consummate, a conspiracy against the liberties of the people of Louisiana, which was a most stupendous crime. They do not feel at liberty to report, upon the evidence before them, that this seat is vacant. The registration, election, and returns were fair and honest, as they believe, in some, if not in a majority, of the parishes of the State. That the political friends of Mr. Pinchback have not before this availed themselves of the opportunity which this contest between candidates on the respective State tickets offered, with process for witnesses and papers, to prove to the country that they carried this election, most seriously challenges the confidence and patience of the public. It is but just to say, however, that the expectation that Mr. Pinchback would be seated in the Senate is, perhaps, the reason that such an effort has not been made.

If this case be remanded for further proof and be fully developed, the result, there is reason to believe, will either demonstrate that the Kellogg government is rightfully in power or will furnish the proof that it is a usurpation.

Your committee recommend the adoption of the accompanying resolutions:

Resolved, That the evidence in this case is not sufficient to establish the right of either P. B. S. Pinchback or George A. Sheridan to a seat in this House as a Representative at large from the State of Louisiana.

Resolved, That Mr. Sheridan have leave to amend his notice of contest, if he shall so elect, serving upon Mr. Pinchback his amended notice within twenty days hereafter; that My. Pinchback have liberty to answer such amended notice within forty days hereafter, and that upon the service of such answer the evidence of the respective parties be taken under the existing laws of Congress in such case made and provided; and that in case of default of an answer to such amended notice, Mr. Sheridan be at liberty to take testimony ex parte; and in case of default to serve an amended notice of contest, Mr. Pinchback may serve a notice of contest, as provided by law, within forty days hereafter, and take testimony in like manner.

On June 8[1] the report was debated, and on June 9[2] a vote was taken, first, on an amendment declaring Mr. Pinchback entitled prima facie to the seat, and the amendment was disagreed to without division. Then the resolution reported by the minority of the committee declaring Mr. Sheridan duly elected was disagreed to—yeas 72, nays 145.

Then the resolutions reported by the majority were agreed to without division.

625. The cases of Sheridan, Sypher, and others, continued.

The original primary returns being inaccessible because of the contention of rival returning boards, the House gave credit to secondary evidence as to what they showed.

Ex parte proof, while not admitted as competent proof of the facts therein recited, was given weight as raising a suspicion of frauds justifying an investigation.

On February 24, 1875,[3] Mr. Horace H. Harrison, of Tennessee, submitted the report of the majority of the committee. Speaking of the resolution under which they acted, the report says that the contestee, Mr. Pinchback, had shown a marked indifference to the contest, and had not attempted to strengthen his original claim that the Lynch board was the valid returning board. Such testimony as he had taken was confined to an attempt to show fraud sufficient in the election to overturn the claim of contestant. The report goes on to argue that the Congressional question was not in its real substance complicated with the controversies over the State government, that the Congressmen were elected under Federal supervision and at regularly conducted polls. The report says:

An election for Congress for the State at large was held under the forms of law and at the time required by law. The returns of the election were made to the governor, who, under the law of that State, was the proper officer to whom the returns were to be made. The election, so far as that of selecting Representatives in Congress was concerned, was conducted, as the proof shows, in the presence and under the supervision of supervisors appointed under the act of Congress. These returns of the election, in the hands or in custody of the governor, were placed in the possession of a returning board, and in the unfortunate conflict which took place as to who constituted the legal returning boards authorized by law to canvass the returns and promulgate the result they passed into the hands of several different returning boards, and are now said to be in the possession of John McEnery, claiming to be governor of Louisiana. If there had been no contest as to what returning board should have canvassed the

[1] Record, p. 4694.

[2] Journal, pp. 1139, 1141; Record, pp. 4733–4734.

[3] Second session Forty-third Congress, House Report No. 263; Smith, p. 322; Rowell's Digest, p. 293.

returns and decided the result, and the returns were before the committee, these returns would constitute the best, the highest evidence of what these returns show, and of the fact of who was elected. These returns, however, not being before the committee, and the contestant in this case having used all due diligence to have them produced, and failing, we think he is entitled to secondary evidence of what these returns show.

There can be no doubt that the original returns of the election of 1872 were in possession of and canvassed by the board known as "the Forman board."

Assuming that the original "primary returns" made to the governor from all the parishes of the State but two were received by him, opened by him in the presence of the Wharton board, delivered by him to the De Ferriet board, and transmitted to the Forman board just as they had been received (and these facts the additional proof shows), we are to look to what these returns show. They show that contestant Sheridan received 65,016 votes and contestee Pinchback 54,402 votes.

As to the correctness of this tabulation we have the sworn testimony of Mitchell, Forman, and Thomas, a majority of the board; and, in addition to this, the admission of the contestee (p. 3 of additional testimony) that it is a compilation of the returns before the Forman board is conclusive.

They show a majority of 10,614 for contestant. The contestee, however, objects to this compilation of the Forman board, first, because six parishes were omitted in the compilation, and, secondly, because of alleged frauds in connection with the election throughout the State, including frauds in the city of New Orleans.

While Mr. Pinchback offers no evidence to show that the six parishes were illegally excluded from the count, still if they were illegally excluded it could not affect the result.

As to the contention that the election was rendered of no avail by reason of fraud, the majority conclude that the proof does not sustain it. The report says:

The affidavits of these parties, taken ex parte, were filed by contestee before the adoption of the resolution by the House at last session, and with the design of impeaching the correctness of the action of the Forman board. They were not received by the committee as competent or conclusive proof of the facts therein recited or the statements therein made, but only as raising a suspicion of fraud, and suggesting the propriety of an investigation * * * before a final determination.

The minority say in their views, submitted by Mr. Smith, of New York:

We would not consider their ex parte affidavits for the benefit of Mr. Pinchback. He should have examined the witnesses upon the stand. The committee said of this evidence in their former report: "It is of such a character, in the judgment of your committee, as to demand a most thorough investigation of its truth or falsity before Mr. Sheridan is seated;" and that "these papers give ample warning to the House that the seating of Mr. Sheridan, without further evidence, may possibly cover, and in part consummate, a conspiracy against the liberties of the people of Louisiana, which was a most stupendous crime."

While the committee would not consider ex parte testimony for the purpose of seating Mr. Pinchback, they can not shut their eyes to it, and to the 1,100 manuscript pages of official reports on file with the Clerk, the President's message, and the Senate testimony, for the purpose of seating Mr. Sheridan, especially after the action of the House in remanding this case, that this matter might be cleared up.

On the question of the alleged frauds the committee divided. The majority concluded:

The Congressional vote, under the supervision of United States supervisors, was at least counted fairly.

The committee have decided unanimously that the contestee, Pinchback, was not elected. The report of the majority of the committee at the last session, prepared by the chairman of the committee, on the point as to the election being a fair one, is as follows:

"They do not feel at liberty to report, upon the evidence before them, that this seat is vacant. The registration, election, and returns were fair and honest, as they believe, in some, if not in a majority, of the parishes of the State."

There is certainly nothing in the additional testimony taken in this case showing that the seat is or should be vacant, and nothing additional challenging the fairness of the election.

We therefore recommend the adoption of the following resolutions:

1. *Resolved,* That P. B. S. Pinchback was not elected a Member of Congress from the State of Louisiana from the State at large in the Forty-third Congress.

2. *Resolved,* That George A. Sheridan was duly elected a Member of Congress (for the State at large) from the State of Louisiana in the Forty-third Congress and is entitled to his seat.

The minority recommended a resolution declaring the seat vacant.

On March 3 [1] the first resolution of the majority was agreed to without division or debate. The second resolution, to seat Mr. Sheridan, was agreed to—ayes 121, noes 29.

Mr. Sheridan was then sworn in.[2]

626. The cases of Sheridan, Sypher, and others, continued.

Forms of resolution for instituting a contest after expiration of the time faxed by law.

The abolition of certain polling places whereby it was rendered impossible for many voters to cast their ballots was held not to justify the addition of votes to the returns of the candidate injured thereby.

On December 8, 1873,[3] the following resolution, reported from the Committee on Elections, was agreed to:

Resolved, That Effingham Lawrence and E. C. Davidson, from the First and Fourth Congressional districts of Louisiana, respectively, be permitted to serve upon J. Hale Sypher and George L. Smith, who are sitting Members of the same districts, respectively, notices of contest within twenty days from the passage of this resolution, and that the said sitting Members be permitted to answer the same within twenty days after the service thereof.

Resolved, That the time for the taking of testimony in each of said contested election cases is hereby extended for ninety days from the time the answer is allowed to be filed to the notice of contest.

Also, on January 13, 1874,[4] the following was agreed to:

Resolved, That J. Hale Sypher, the sitting Member from, etc., * * * be, and he is hereby, permitted to file his answer to the notice of contest served on him by, etc., * * * within the time allowed by the resolution of the House for answer; and that such filing shall be deemed a full compliance with the law governing such matters; a copy of said answer to be forwarded by the Clerk at once to the contestant by mail.

On February 27, 1875,[5] Mr. James B. Robinson, of Ohio, submitted the report of the majority of the committee. The facts as to credentials and returns in this case were the same as in that of Sheridan *v.* Pinchback, and the report is predicated on the result of the canvass by the Forman board. The report finds on the face of the corrected returns a majority of 1,947 votes for Mr. Lawrence, the contestant. The sitting Member contended that frauds sufficient were shown to overcome this majority. As to this question of fraud, two questions appear:

(1) The question of abolition of polling places for fraudulent purposes.

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[1] Journal, pp. 636, 637; Record, p. 2232.

[2] Mr. Pinchback was also seeking a seat in the Senate at the same time.

[3] Journal, p. 83.

[4] Journal, p. 231.

[5] Second session Forty-third Congress, House Report No. 269; Smith, p. 340; Rowell's Digest, p. 300.

The majority say:

The principal ground on which the claim is based is the fact that in Plaquemines Parish the first, second, and third ward voting places were abolished for that election, by means of which a large Republican voting population was left in the upper part of that parish from 25 to 35 miles from the nearest polls. The committee characterize the abolition of these voting places as an outrage, for which there should be some relief. They, however, find that Mr. Lawrence was not a party to this wrong, and, so far as he was able, he caused restitution by tendering to all voters, irrespective of party, the free use of his steamboat, which went down from Orleans and stopped at the several landings and took voters to the polls down the river.

The committee are unable to estimate the number who failed on that account to vote, but think from the evidence, that it could not have exceeded about 350 votes altogether. The Republican vote in that parish was 1,040 in 1872. In 1874 it was 1,417, or 377 increase. As that parish was quiet, the probability is the vote of 1874 would be a fair test, but the vote for Lawrence was also increased several hundred over 1872.

The committee, however, are not able to find any principle of law on which votes could be added for that parish, even granting votes were lost to Mr. Sypher by reason of the failure to establish proper voting places, unless the provisions of the enforcement act were strictly followed, which no one claims was done.

The minority views, presented by Mr. Gerry W. Hazelton, of Wisconsin, say:

As an illustration in point, the parish of Plaquemines, in the south part of the district, is about 130 miles in length, and has always, since 1868, polled a large majority of Republican votes. The bulk of the colored population is in the north portion of the parish. In order to prevent the colored voters from participating in the election, the Democratic managers, immediately prior to the election, changed the polling places of the parish and took up or discontinued those in the portion of the parish where the colored voters resided, so that on the west side of the river no polling place was established for 47 miles from the north boundary of the parish, and on the east side for 38 miles. A more high handed and flagrant attempt to prevent the colored voters, who were known to be Republican, from participating in the election, can not be conceived. It was a wicked and shameless scheme on the part of the contestant's friends to defeat rather than to secure a fair election. It was a base prostitution of the powers emanating from the executive, wielded by or under the dictation of Democratic leaders, to consummate a dishonest and dishonorable purpose. Under the law of Louisiana the registrar, who is appointed and may be removed by the governor of the State, fixes the polling places in his parish, and may determine their number and location according to his own wishes or interests, without consulting the convenience of the voters at all.

This power was exercised in the parish of Plaquemines in such manner as to require colored voters to go as far as from Alexandria and Washington to Baltimore to vote; and to emphasize the outrage the arrangements were consummated so clandestinely that the mass of colored voters knew nothing of the discontinuance of the polling places theretofore established until the very day of the election.

(2) As to other points in the district there was a large amount of evidence of fraud, but the majority of the committee did not conceive it sufficiently shown to be sufficient to overcome Mr. Lawrence's returned majority. Therefore they reported the following:

Resolved, That J. Hale Sypher was not elected a Member of the Forty-third Congress from the First district of Louisiana.

Resolved, That Effingham Lawrence was duly elected a Member of the Forty-third Congress for the First district of Louisiana, and he is entitled to his seat.

The minority say:

Taking this evidence to be substantially true, we submit that it shows this so-called election to have been merely a wicked conspiracy to prevent an election; for there is no just sense in which that which is alleged to have transpired in this district in 1872 can be called an election.

The undersigned can not consent to enter upon the task of framing devices and spelling out methods for affirming the right of a party to a seat in the House of Representatives from the materials here supplied. We can not do it without making ourselves parties to these frauds, and encouraging their repetition.

The testimony shows gross irregularities on the part of the partisans of the contestee, which we are as far from indorsing as those on the other side. They do not seem to have been so general and systematic, and it may be claimed for them, perhaps, that they were resorted to for the purpose of counteracting the schemes and machinations of the contestant's friends, in whose hands all the machinery of the election was placed.

We are not disposed, in the light of all the evidence, to weigh one claim against the other. We think both are so tainted, so mixed with fraud, and so involved in uncertainty, that it is safer and better to refuse to affirm either.

The precedents heretofore established authorize this decision, and we think the case amply justifies us in adopting it.

We therefore recommend the adoption of the following resolution:

Resolved, That neither Effingham Lawrence nor J. Hale Sypher has shown himself entitled to a seat in the Forty-third Congress.

On March 3,[1] the report was debated briefly in the House, and then the question was taken on the proposition of the minority declaring the seat vacant. This was disagreed to—yeas 86, nays 144.

The first resolution of the majority was adopted without division, and then the second resolution was agreed to—yeas 135, nays 86.

Mr. Lawrence then appeared and took the oath.

627. The Rhode Island election case of Asher Robbins, in the Senate, in the Twenty-third Congress.

Conflicting credentials, each regular in form, being presented in the Senate at different times, those first issued and first presented were honored after the circumstances had been examined.

On December 2, 1833,[2] at the opening of the session of the Senate, a question was raised as to the swearing in of Mr. Asher Robbins, from the State of Rhode Island.

On January 19, 1833, in the time and manner fixed for the choice of an United States Senator, the legislature of Rhode Island had chosen Mr. Robbins. And on January 28 the governor had issued his certificate in due form to Mr. Robbins. On February 4, 1833, this certificate was presented in the United States Senate, read and entered on the Journal.

But in October, 1833, before Mr. Robbins had qualified and taken the seat, the Rhode Island legislature, meeting in a new session, adopted a declaration or act that the election of Mr. Robbins was "null and void and of no effect," and the office vacated. Thereupon, on November 1, 1833, the legislature elected Elisha R. Potter, and on the 5th of the month the governor (not the same incumbent who had issued the certificate to Mr. Robbins) issued his certificate to Mr. Potter.

These two certificates came before the Senate on December 2, and a question arose as to the prima facie right to the seat.

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[1] Journal, p. 637–639; Record, pp. 2234–2235.

[2] First session Twenty-third Congress, Contested Elections in Congress, from 1789 to 1834, p. 877.

It was urged that neither should be sworn in until the final right to the seat was decided. But on the other hand, the argument was made that the State was entitled to the representation.

In behalf of Mr. Robbins it was urged that had the Senate been convened any time between March 4 and October, he would have been indisputably entitled to the seat. In electing him the State exercised her function of choosing a Senator, and might not again exercise it until the constitutional period should come again.

Mr. George Poindexter, of Mississippi, moved that Mr. Robbins do take the customary oath.

Mr. William R. King, of Alabama, favored the reference of the question to the Committee on Elections, to determine which should be sworn.

Mr. Henry Clay, of Kentucky, argued that the State was entitled to immediate representation, and that, as Mr. Robbins appeared to have been regularly elected and certified, and bore credentials issued prior to the credentials of Mr. Potter, he should have the seat on prima facie right.

Mr. Thomas H. Benton, of Missouri, declared that he had little regard for precedents; he considered them the bane of this country and England. The Senate should have more information before acting, and he moved reference of the question to a select committee.

After somewhat extended debate, this motion was disagreed to; ayes 15, noes 19.

Then Mr. Poindexter's motion was agreed to, and Mr. Robbins took the oath.

The report of the select committee appointed to investigate the case on its merits, reported the following state of facts, which appear to have been understood to some extent, at least, when the debate was held on the prima facie right:

The select committee to which was referred the credentials of Asher Robbins, chosen a Senator in Congress from the State of Rhode Island for the term of six years, to commence on the 4th day of March, 1833; and also the proceedings of the legislature of said State, convened on the last Monday of October, 1833, declaring the election of the said Asher Robbins void, who thereupon proceeded to elect Elisha R. Potter a Senator in Congress for six years, to commence on the 4th day of March, 1833, instead of said Asher Robbins, whose election to fill said office had been declared void as aforesaid, have had the whole subject so referred to them under their serious and attentive consideration, and submit the following report:

That it appears by the credentials of Asher Robbins and the proceedings of the general assembly of the State of Rhode Island hereto appended, and marked "A," that the senate and house of representatives of said State, then sitting in the city of Providence, met in grand committee in conformity to the usage of the legislature in such cases, for the purpose of choosing a Senator to represent said State in the Congress of the United States; and that, on counting the ballots, it appeared that Mr. Robbins was elected by a majority of four votes, who was thereupon declared to be duly elected a Senator to represent said State in the Congress of the United States for six years from and after the 4th day of March then next following; that, having performed the duty for which the two houses had met, the grand committee was dissolved, and the members of each house repaired to their respective chambers. It further appears to your committee that on the 28th day of the same month of January His Excellency Lemuel H. Arnold, governor of the State of Rhode Island, by commission in due form, bearing his signature, under the great seal of the State, did proclaim and make known the election of the said Asher Robbins as aforesaid, and caused the said commission, signed and sealed as aforesaid, to be delivered to the said Asher Robbins, which was presented to the Senate of the United States in open session on the 4th day of February, 1833, and on motion read and entered on the journals of the Senate. By virtue of the force and effect of the aforesaid commission, the said Asher Robbins, Senator-elect from the State of Rhode Island, appeared in the Senate Chamber on the 2d day of December, 1833, was duly sworn to support the Constitution of the United States, and took his seat as a member of the Senate.

It further appears to your committee that at a subsequent session of the general assembly of Rhode Island, begun and held at the town of South Kingston in said State, on the last Monday of October, 1833, certain proceedings were had relative to the election of the said Asher Robbins as above mentioned, which resulted in the adoption of a declaration or act of the said general assembly, by which the election of Mr. Robbins is declared to be "null and void and of no effect," and the office vacated. Whereupon, at the same session of the general assembly the two houses met in grand committee on the 1st day of November, 1833, and proceeded to elect a Senator to represent the State of Rhode Island in the Congress of the United States for the term of six years, commencing on the 4th day of March preceding, to supply the vacancy created, or supposed to be created, by the act declaring the election of Mr. Robbins null and void; and the majority appearing to be in favor of Elisha R. Potter, the said Potter was thereupon declared to be duly elected a Senator in Congress from the said State for the term aforesaid, when the grand committee was dissolved and the members repaired to their respective chambers. That on the 5th day of the same month of November His Excellency John Brown Francis, governor of the State of Rhode Island, by commission in due form, bearing his signature, under the great seal of the State, did proclaim and make known the election of the said Elisha R. Potter as aforesaid, and cause the said commission, signed and sealed as aforesaid, to be delivered to the said Elisha R. Potter, which was presented to the Senate on the 2d day of December last, and on the 5th day of the same month referred to this committee.

The case was considered fully on its merits, and after an examination of the status of the legislatures of Rhode Island, the Senate, by a vote of yeas 27, nays 16, agreed to the following:

"Resolved, That Asher Robbins, being duly and constitutionally chosen a Senator in Congress from the State of Rhode Island, is entitled to his seat in the Senate."[1]

628. The Senate election case of Corbin v. Butler, from South Carolina, in the Forty-fifth Congress.

Before its committee had reported on conflicting credentials, the Senate took one set of credentials from the committee and seated a claimant whose prima facie and final right and personal conduct were assailed.

On February 13, 1877,[2] in the Senate, Mr. John J. Patterson, of South Carolina, presented the credentials of David T. Corbin as Senator from South Carolina for the term of six years commencing March 4, 1877. On March 2[3] Mr. Matt W. Ransom, of North Carolina, presented the credentials of M. C. Butler, certified by Wade Hampton, as governor of South Carolina, to have been elected for the term commencing March 4, 1877.

On March 7, 1877,[4] on motion of Mr. Patterson, the credentials of Messrs. Corbin and Butler were referred to the Committee on Privileges and Elections.

On November 20,[5] at the regular session, Mr. Allen G. Thurman, of Ohio, submitted for consideration:

Resolved, That the Committee on Privileges and Elections be discharged from the further consideration of the credentials of M. C. Butler, of South Carolina.

This resolution was debated at length on November 21, 22, and 26. Most of this debate was as to the expediency of discharging the committee, and as to the

[1] Senate Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress.

[2] Second session Forty-fourth Congress, Record, p. 1507.

[3] Record, p. 2069.

[4] Special session of the Senate, Forty-fifth Congress, Record, pp. 23, 24.

[5] First session Forty-fifth Congress, Record, p. 556.

reasons why a report had not been made on this case. It appeared that the Louisiana case was before the committee and was receiving prior consideration. It was urged[1] on behalf of the committee that there was in this case a question which of two rival South Carolina legislatures was entitled to recognition, and that time must be given the committee to make the proper examination. On the other hand, it was argued[2] that the briefs of the contestants substantially furnished all the facts needed by the Senate to decide the case without action by the committee.

On November 26,[3] Mr. George F. Edmunds, of Vermont, called attention to a charge that the Senator from South Carolina, Mr. Patterson, had been coerced by threats that he would be confined in the penitentiary of South Carolina, to cooperate with those desiring to seat Mr. Butler. Mr. Edmunds thereupon proposed this amendment:

By striking out all after the word "resolved" and in lieu thereof inserting:

"That the Committee on Privileges and Elections be, and hereby is, instructed to inquire forthwith, and report as soon as may be, whether any threats, promises, or arrangements respecting existing or contemplated accusations or criminal prosecutions against any Senator, or any other corrupt or otherwise unlawful means or influences have been in any manner wed or put in operation, directly or indirectly, by M. C. Butler, one of the claimants to a seat in the Senate from the State of South Carolina, or by any other Senator or other person, for the purpose of influencing the vote of any Senator on the question of discharging said committee from the consideration of said M. C. Butler's credentials or on the other question at the present session of the Senate; and that said committee have power to send for persons and papers, and to sit during the sittings of the Senate."

After debate, this resolution was decided in the negative, yeas 27, nays 30.

On this day also there was debate as to the merits of the case, and the facts relied on by the two contestants were put quite fully before the Senate, especially as to the alleged intimidation of voters in two counties, which had resulted in the exclusion of the representatives of those counties from one of the rival legislatures.

Mr. Samuel J. R. McMillan, of Minnesota, urged[4] that the Senate did not know at this time whether or not there were any issues of fact not settled between the parties to the contest. Therefore he moved to strike out of the pending resolution all after the word "resolved" and insert—

That the Committee on Privileges and Elections be instructed to examine and report what questions of fact, if any, in the Corbin-Butler case are not settled by the admissions of the claimants to the seat now vacant from the State of South Carolina.

This amendment was debated somewhat, and while it was pending the brief of Mr. Corbin, giving a view of the issues in the case, was read. The amendment was disagreed to, yeas 24, nays, 28.

Next there was debate which involved the so-called "Hamburgh massacre," and certain testimony was read tending to show the active participation of one of the contestants (Mr. Butler) in that affair, and it was claimed that the so-called "massacre" was one of the means by which Mr. Butler secured the title to the seat which he now presented to the attention of the Senate. It was urged in behalf of Mr. Butler that the testimony relied on to prove Mr. Butler's participation in the Hamburgh affair was ex parte and unreliable, and that its presentation in this case was

[1] Record, p. 572.
[2] Record, p. 576.
[3] Record, pp. 645–648.
[4] Record, pp. 653–662.

unjust. It was argued, on the other hand, by Mr. Roscoe Conkling, of New York, that this testimony tending to raise a question as to whether Mr. Butler had not actually participated in bringing about the alleged terrorism by which his election was apparently secured, and showed that a committee ought to pass on this question of fact before the Senate should act.

The debate [1] on this point was interspersed with dilatory proceedings incident to a session which lasted all night and consumed twenty-eight consecutive hours. The resolution to discharge the committee was finally agreed to,[2] yeas 29, nays 27.

The credentials of Mr. Butler were then before the Senate, which adjourned at this point.

On November 28 [3] the Senate proceeded to the consideration of a resolution to seat William P. Kellogg as Senator from Louisiana.

Mr. Thurman moved to substitute therefor:

That M. C. Butler be now sworn in as a Senator from the State of South Carolina.

This amendment was rejected, yeas 30, nays 31.

On November 30,[4] after the Senate had determined to admit to a seat Mr. William Pitt Kellogg, of Louisiana, Mr. Thurman moved that M. C. Butler, of South Carolina, be sworn in as a Senator from that State. This motion was agreed to, yeas 29, nays 28.

Thereupon the oath was administered to both Mr. Kellogg and Mr. Butler. The votes on the two eases were taken after an agreement by unanimous consent that the one should follow the other.

629. The case of Corbin v. Butler, continued.

Instance of a contest inaugurated in the Senate by petition, and form of petition.

The majority of the Senate committee contended that the doctrine of res adjudicata did not apply to a decision incident to the credentials and made without full and formal examination of the merits.

At the next session of Congress, on December 13, 1877; [5] Mr. Angus Cameron, of Wisconsin, presented the following petition, which later was referred to the Committee on Privileges and Elections:

To the honorable Senate of the United States:

Your petitioner, David T. Corbin, of the State of South Carolina, shows to your honorable body that he was, on the 12th day of December, A. D. 1876, duly and lawfully elected by the legislature of the State of South Carolina to the office of United States Senator from that State for the term of six years commencing the 4th day of March, A. D. 1877.

That in said election all the provisions of the Constitution and laws of the United States were complied with, and your petitioner was regularly and duly declared elected by the legislature of said State, and duly commissioned accordingly by the governor of said State.

And your petitioner further shows that his credentials were presented to your honorable body before the close of the last regular session, and at the commencement of the extra session in March last said credentials, together with the credentials of M. C. Butler (who claimed to have been elected also Senator from South Carolina), were referred to the Committee on Privileges and Elections of your honorable body.

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[1] Record, pp. 663–712.

[2] Record, p. 712.

[3] Record, p. 730.

[4] Record, pp. 797, 798.

[5] Second session Forty-fifth Congress, Record, p. 166.

And your petitioner shows, on information and belief, that his said credentials have, since said reference of them to said committee, remained in the possession of said committee, and that no action has been taken thereon, either by said committee or the Senate.

And your petitioner now prays that your honorable body will, in justice to your petitioner, and in justice to the legislature of the State of South Carolina that elected and the governor that commissioned him, inquire into, hear, and determine on their merits the claim and right of your petitioner to a seat in your honorable body as Senator from the State of South Carolina.

All of which is respectfully submitted.

DAVID T. CORBIN.

On February 4, 1879,[1] Mr. Cameron presented the report of the committee, which was concurred in by Messrs. Bainbridge Wadleigh, of New Hampshire; John H. Mitchell, of Oregon; S. J. R. McMillan, of Minnesota; George F. Hoar, of Massachusetts, and John J. Ingalls, of Kansas.

Several questions are discussed in this report.

(1) As to the doctrine of res adjudicata as applied to the case, the report says:

On the 26th day of March, 1878, this petition was referred to this committee. At the very outset of the committee's examination of Mr. Corbin's claim they were met with a plea to their jurisdiction, submitted by the counsel of Mr. M. C. Butler, as follows:

"The sitting Member respectfully submits that the Committee on Privileges and Elections can not entertain jurisdiction of the contestant's claim to the seat of a Senator from the State of South Carolina in the Congress of the United States. He bases his denial of the right of the committee to take jurisdiction of the case upon the following grounds:

"1. In the adjudication of a contested election case, under that clause of the Constitution which makes each House 'the judge of the elections, returns, and qualifications of its own Members,' the Senate act as a judicial tribunal. And the general principal that every question in issue settled by the final judgment of a judicial tribunal becomes res adjudicata as between the parties thereto applies to judgments of the Senate in contested election cases.

"2. The contestant's petition, referred to the committee March 26, 1878, suggests no question which was not adjudicated by the Senate in the determination of this cause at the first session of the Forty-fifth Congress; nor was any question involved in the contestant's case as presented to the committee or to the Senate at that session which was not adjudicated in that determination.

"3. Inasmuch as the Senate has no set forms for its judicial decisions, the nature and scope of an adjudication will be determined, not by the mere form of the judgment, but by the whole record of the case.

"4. When the Senate adjudicates a contested election case upon its merits the jurisdiction of the committee over the case ipso facto terminates, whatever formalities may or may not attend the termination of such jurisdiction.

"5. Judicial tribunals of last resort will not rehear a cause after final judgment, on the application of a party, but only on a motion to reconsider made by a member of the tribunal who concurred in the decision; nor even in such a case after the expiration of the term at which the judgment is rendered. And this principle applies to decisions made by the Senate in contested election cases."

An elaborate discussion of the proposition stated in this plea to the jurisdiction is not necessary, as while expressing no opinion on their general soundness, the committee overruled the plea on the ground that the same is not supported by the facts in the case. The claim or right of Mr. Corbin to a seat in the Senate as Senator from the State of South Carolina is not res adjudicata, because in point of fact it has not been passed upon and adjudicated by the Senate.

To ascertain what has and what has not been determined in any given case, reference must be had to the record of the proceedings taken therein.

If the record shows the controversy between the parties determined upon a consideration of the merits, then that determination binds the parties and their privies, and precludes further inquiry.

[1] Senate Report No. 707.

The facts above stated, from the records of the Senate in regard to Mr. Corbin's case, show that his credentials were referred to this committee of the Senate, and that no action of the Senate has been had to withdraw them from the committee. And the fact is that the credentials have been with the committee to the present time by the direct action of the Senate. No case has in any form been made up between Mr. Corbin and Mr. Butler and submitted to the Senate to be passed upon, and no case, as between them, has been passed upon by the Senate.

Mr. Thurman's resolution, that the Committee on Privileges and Elections be discharged from the further consideration of the credentials of M. C. Butler, of South Carolina, meant precisely what it said. Its language is too clear to be misunderstood. It indicates a mere purpose on the part of the mover to dispense with the further service of the Committee on Privileges and Elections in the consideration of Mr. Butler's credentials.

After reviewing the circumstances of the discharge of the committee the report proceeds:

But whatever individual Senators said in the course of the discussion, the action of the Senate is to be looked to finally to ascertain what was determined. When the resolution was adopted its effect was simply to bring before the Senate the credentials of M. C. Butler. It did not bring before the Senate the credentials of D. T. Corbin.

After Mr. Butler's credentials were thus brought before the Senate a motion was made that he be sworn in as Senator from South Carolina, and without debate the vote was taken and the motion adopted. Mr. Butler was then sworn in. Swearing in a Senator on his credentials has always been regarded as admitting him to his seat on the prima facie case made by those credentials. There is no instance in the history of the Senate where a member has been so sworn in and allowed to take his seat as Senator that such admission has been held to preclude investigation into the merits of his title. On the other hand, the precedents are exactly the reverse. The cases of James Shields, of Illinois; James Harlan, of Iowa; Bright and Fitch, of Indiana, and of Mallory, of Florida, reported in Bartlett's Contested Election Cases in Congress, at pages 606, 621, 629, and 608, are examples of this rule.

But the principle of res adjudicata can only apply where parties to the controversy have been before the court or body having jurisdiction thereof and have been heard upon the merits of their respective claims and a decision has been rendered thereon.

In the present case Mr. Corbin has never been a party before the Senate to any controversy with Mr. Butler respecting his rights to a seat as Senator. The Senate, by its action, has not permitted him to be a party to any such controversy, and the merits of his case have never been passed upon by the Senate. Therefore, the doctrine of res adjudicata has no application to the case.

The minority views, signed by Messrs. A. S. Merrimon, of North Carolina, Eli Saulsbury, of Delaware, and Benj. H. Hill, of Georgia, lay stress on the theory that the case should be adjudged res adjudicata:

In considering this petition the facts which have been presented to this committee are precisely the same which were presented on the former consideration of this case. Not a new fact has been presented, nor offered to be presented, and not an old fact has been withdrawn or modified, nor offered to be withdrawn or modified. The arguments now made have been made from the same statements and briefs filed on the former hearing, and not a new question of law has been presented, except the issue of res adjudicata. No charge of fraud has been made against the former decision. No allegation that testimony was before excluded which ought to have been admitted, or that testimony was admitted which ought to have been excluded; no request by either party to produce testimony has been denied, and no pretense that testimony then offered and excluded can now be produced. The jurisdiction is the same; the parties are the same; the subject-matter of contest is the same; the facts are the same, and the questions of law are the same. The petition now before us is a mere, sheer, naked proposition that the Senate at a subsequent session shall revote on the identical questions, facts, and issues on which the Senate voted and decided at a former session.

Without going into a tedious and unnecessary review of the authorities and cases to be found in the books, we deem it sufficient to say that no demand like that contained in the petition of Mr. Corbin was ever granted by this Senate, nor, as we believe, by any legislative body.

In the case of Bright and Fitch, in the Thirty-fifth Congress, the parties to the rehearing asked were new and different, and had not before been heard, and the rehearing itself was asked in a memorial from the legislature of the State of Indiana. But because "all the facts and questions of law involved were as fully known and presented to the Senate" on the former hearing as they were then presented in the memorial of the legislature asking a rehearing, it was held that the judgment first rendered by the Senate "was final, and precluded further inquiry into the subject."

If, on the former hearing, Mr. Corbin had been denied the privilege of introducing material facts which he offered to produce; if he presented material facts now which were then unknown; if all the facts and questions of law now known and presented were not then as fully known and presented, the undersigned will not undertake to say his petition for a rehearing ought not in justice and right to be gravely heard and considered on the merits. But as Mr. Corbin himself has suggested no new facts or questions of law, and as we well know that all the facts and questions of law now known and presented were then quite as well known and presented both to the committee and the Senate, we can not regard his petition for another vote as entitled to further consideration.

630. The case of Corbin v. Butler, continued.

Elaborate discussion by Senate committee of effect of the constitutional provision that "a majority of each House shall constitute a quorum."

Discussion by a Senate committee of the effect in an election case of a decision of a State court construing a provision of the State constitution.

(2) As to the merits of the case, the main question involved was as to what constituted a quorum of the State house of representatives. The majority report thus reviews the case:

A general election was held in that State November 7, 1876, for State and county officers, and for members of the house of representatives of the State legislature, and for a part of the members of the State senate.

The returns of this election were made, first, by the several boards of precinct managers—each board consisting of three members—to the commissioners of election for their respective counties, called in this connection boards of "county canvassers;" second, by the several boards of county canvassers to the board of State canvassers at Columbia, the capital of the State; and, third, by the board of State canvassers, who finally acted upon the returns and determined and declared the results.

The board of State canvassers, on November 22, 1876, completed their canvass of this election and returned as duly elected 16 State senators and 116 members of the house of representatives.

Subsequently, and previous to November 28, 1876, the day of the meeting of the legislature, the secretary of state delivered the official certificate of his election to each person declared elected by the board of State canvassers.

On the 28th day of November, 1876, the newly elected senators, with those holding over from the former election, met and organized as the senate, in the senate chamber in the statehouse. The legality of the senate as a legislative body and the regularity of its organization are not now and never have been questioned.

On the same day 59 of the persons declared elected by the board of State canvassers met in the hall of the house of representatives in the statehouse and organized as the house of representatives, the other 57 members, holding certificates of election from the board of State canvassers, refusing to meet with them. These 57 members met in a private hall in the city of Columbia, and pretended to organize as a house of representatives by the election of William H. Wallace as speaker. The 59 members at the statehouse elected E. W. M. Mackey speaker.

The two bodies organized at the statehouse recognized each other, respectively, as the senate and house of representatives of the State by the interchange of official communications pertaining to legislative business. They also officially recognized Governor Chamberlain as the governor of the State, and were officially recognized by him as the senate and house of representatives, together constituting the legislature of the State.

On November 29, 1876, 5 persons who contested the election of the persons declared elected by the

board of State canvassers as representatives of Barnwell County were declared by this house of representatives at the statehouse to be entitled to seats, and were admitted and sworn in as members.

On December 2, 1876, 5 persons who in like manner contested the election of the persons declared elected by the board of State canvassers as representatives of Abbeville County were declared by this house to be entitled to seats, and were admitted and sworn in as members.

On December 5, 1876, 4 other persons, contestants for seats from Aiken County, were in like manner admitted and sworn in as members.

The members thus admitted, with the original membership of 59, make the whole number of members of this house of representatives (commonly known as the Mackey house) 73.

On December 2, 1876, this house of representatives considered the matter of the election for members of the house of representatives in Edgefield and Laurens counties, and declared that no valid election was held in those counties on the 7th of November, 1876.

On the 12th day of December, 1876, being the second Tuesday after the said 28th day of November, 1876, the two bodies above described proceeded, in the manner prescribed by the statutes of the United States (U.S. Rev. Stat., Tit. II, ch. 1, p. 3), to elect a Senator in Congress.

D. T. Corbin received a majority of all the votes cast in both bodies on December 12, 1876.

On the following day, December 13, 1876, the two bodies convened in joint assembly at 12 o'clock meridian, the journal of each house was read, and, it appearing that D. T. Corbin had received a majority of all the votes in each house, he was declared duly elected Senator.

Mr. Corbin's credentials were signed on December 13, 1876, by Governor Chamberlain, who was, until December 14, 1876, the unquestioned governor of the State, General Hampton not claiming to hold the office until after his inauguration on December 14, 1876.

Upon this general statement of facts arises the question, Was the election of Mr. Corbin valid, and is he now entitled to a seat in this body as a Senator from the State of South Carolina?

It has already been stated that no question has ever been made as to the complete validity, as a legislative body and a constituent house of the general assembly, of the senate which sat in the statehouse and cooperated with the house of representatives, in which Mr. Corbin received a majority of votes. No other body claimed to be the senate.

This senate never in any manner recognized the existence, as a legislative body, of the other assemblage which assumed to be the house of representatives (commonly known as the Wallace house), and which met in a private hall in Columbia.

The action of this senate, therefore, so far as it enters into the title of Mr. Corbin, need not be further discussed. It was valid.

The part performed by the house of representatives which sat in the statehouse in the election of Mr. Corbin presents the most important question which arises in this case.

The validity of this body is called in question. It is claimed, in denial of Mr. Corbin's title, that this body was never a valid legislative body under the constitution and laws of South Carolina; that it never had a quorum of lawfully elected members; that an its acts were null and void.

The facts upon which this question must be decided are these:

The constitution of the State, Article II, section 4, provides as follows:

"The house of representatives shall consist of 124 members, to be apportioned among the several counties according to the number of inhabitants in each."

Article II, section 14, is as follows:

"Each house shall judge of the election returns and qualifications of its own members; and a majority of each house shall constitute a quorum to do business."

At the election of November 7, 1876, 124 persons were to be voted for as members of the house of representatives. Of this number, constituting a full house, the board of State canvassers declared that only 116 were duly elected, and the secretary of state issued certificates of election to only 116, the canvassers at the same time placing upon the records a declaration of their inability, by reason of unlawful influences and practices in the election, to determine that any persons had been duly elected as representatives for the counties of Edgefield and Laurens.

Of the 116 persons thus declared elected by the board of State canvassers, and holding certificates of election from the secretary of state, 59 took part in the organization of the house of representatives in the statehouse on November 28, 1876, being a majority of all the members declared elected by the board of State canvassers and holding certificates of election from the secretary of state.

Was the body thus composed and organized the legal house of representatives of the State?

Attention has been called to the fact that after the organization of the house of representatives which elected Mr. Corbin certain of those who took part in that organization withdrew and acted with another assemblage calling itself the house of representatives, thereby reducing the number of canvassing board members sitting in the Mackey house from 59 to 53, of whom only 44 voted for Mr. Corbin.

There is no force in these suggestions, because the fact is that the number of members who acted with the Mackey house was never reduced below 59. It is true that a few of those who formed part of the original 59 canvassing board members of the Mackey house left their seats in the statehouse and joined the Wallace house; but before a single such person had left the Mackey house had, upon contests duly made, admitted other members in number more than equal to those who afterward left.

If, therefore, the original house of 59 members was a lawful house on the day of its organization, it was a lawful house at all times thereafter till its final adjournment December 22, 1876. If it was a lawful house for any purpose it was a lawful house for the purpose of deciding contested elections of its own members and for admitting those whom it might adjudge to be lawfully elected.

The statement that out of the original 59 who organized the Mackey house only 44 voted for Mr. Corbin has no significance. At the time of his election the inquiry was not how many canvassing board members voted for Mr. Corbin, but how many lawful members voted for him. If the house was lawfully organized on November 28, then the members admitted on the 29th, and subsequently, were lawful members, entitled to all the rights and powers belonging to any members.

But to the point of the legality of the Mackey house.

The constitutional provisions which regulate the matter of a legislative quorum in South Carolina are (1) that "the house shall consist of 124 members" and (2) that "a majority of each house shall constitute a quorum to do business."

Stated in its most condensed form, the inquiry here is, what is the meaning of the phrase "a majority of each house?" Does it mean a majority of 124 or a majority of the members duly elected or qualified?

As an original question it would seem that there are strong reasons why the latter view should be adopted.

If the former view be adopted a contingency may easily occur in which it will be absolutely impossible to organize a lawful house. If under any circumstances there should be a failure to elect a majority of the whole possible representation, the government would be brought at once to a dead stop; nor would there be any power anywhere to remove the obstruction.

In opposition to this view it is said that if it be held that a number less than a majority of the whole possible representation constitute a quorum, then under some circumstances it will be in the power of a small fraction of the whole representation to hold and exercise the powers of the house. This is admitted; but such a danger will not menace the life itself of the State. The government will be able to go on without recourse to extra legal remedies.

All governments aim at self-perpetuation. No element of self-destruction is intentionally admitted into the framework or fundamental law of a State. All constitutional provisions should therefore receive a construction, if possible, which shall be in harmony with this idea of the perpetuity of the government, of its unbroken life and efficiency. If the rule were adopted that a quorum of the house of representatives of South Carolina must consist of at least 63 members, then if from any cause 63 members should not be elected, it would be impossible by any constitutional methods to obtain a house of representatives at least until the next general election.

No speaker could be chosen; no writs of election could be issued. Did the 59 members composing the body at the statehouse constitute a quorum of the house of representatives?

The most controlling decisions upon this question are those of the two Houses of Congress.

The Constitution of the United States and the constitution of South Carolina may be said to contain identical provisions upon this point. The Constitution of the United States provides as follows:

"The Senate of the United States shall be composed of 2 Senators from each State, chosen by the legislature thereof for six years." (Art. I, sec. 3.)

"The number of Representatives shall not exceed 1 for every 30,000, but each State shall have at least 1 Representative." (Art. I, sec. 2.)

The only respect in which these provisions differ from the corresponding provisions of the constitution of South Carolina is that here the numerical aggregate of Senators and Representatives is no

stated. The rule of representation is laid down, and under that rule there is always at any specified point of time a fixed number of Senators and Representatives in Congress, precisely as much so as in South Carolina.

In principle these two constitutional provisions are identical, and it is idle to insist that the mere verbal difference is of the least importance.

The provisions respecting a quorum in the Constitution of the United States and that of South Carolina are identical in terms, namely:

"A majority of each house shall constitute a quorum to do business."

It will be found that in the Senate of the United States prior to 1862 it was held as a matter of parliamentary practice in some instances that a quorum consisted of a majority of the whole possible representation, and in other instances of a majority of Senators elected and qualified.

The question does not appear to have been discussed by the Senate, or to have been maturely considered, until after April 11, 1862. On that day Mr. Sherman, of Ohio, offered a resolution, which was referred to the Committee on the Judiciary, in these words:

"Resolved, That a majority of the Senators duly elected and entitled to seats in this body is a constitutional quorum." (Congressional Globe, April 11, 1862.)

On July 9, 1862, this resolution was debated in the Senate and laid upon the table by a vote of 19 to 18.

On March 7, 1864, Mr. Sherman offered a resolution, which was referred to the Committee on the Judiciary, in these words:

"Resolved, That a quorum of the Senate consists of a majority of the Senators duly chosen or qualified."

On May 3, 1864, the Committee on the Judiciary having been discharged from the further consideration of the resolution, it was taken up and debated. On this and the following day the subject was elaborately discussed, especially by Senators Carlisle and Davis against the resolution, and by Senators Johnson and Sherman in its favor. The words "or qualified" having been struck out, the resolution was adopted by a vote of 26 to 11, May 4, 1864, in these words:

"Resolved, That a quorum of the Senate consists of a majority of the Senators duly chosen." (Congressional Globe, March 7, May 3 and 4, 1864.)

The precedents in the House of Representatives prior to 1861 had been varying, but here, as in the Senate, the subject does not appear to have been maturely considered until 1861. During the first session of the Thirty-seventh Congress, in the House of Representatives, Speaker Grow finally decided that a quorum of the House consisted of a majority of the members chosen, and he was sustained by the House in this decision. (House Journal, first session Thirty-seventh Congress.)

The effort has sometimes been made to disparage this precedent by stating that it was made under the stress of a necessity to secure an organization of the House. This is a mistake. The decision was made fifteen days after the organization of the House, and upon a question which did not involve the question of the validity of the organization.

The resolution adopted by the Senate in 1864 has since been adopted by the Senate as a permanent rule, and now appears in Rule 1.

If, in opposition to these precedents, it is urged that they were made because of special circumstances then existing, or upon certain constitutional theories regarding the status of the States then in rebellion, the answer is that there is no doubt that the peril of an opposite construction did lead to the final reversal of former precedents. And justly so. One of the truest canons of constitutional construction is that which adopts the construction which best effectuates the purpose of the instrument or provision to be construed. A construction which leads directly to the practical paralysis of the legislative power of a State can never be admitted.

Professor Farrar, in his Manual of the Constitution of the United States, page 166, says in relation to the constitutional provision respecting a quorum that "this has been held to be a majority of the Members actually sworn in and entitled to seats at the time, and not a majority of a full delegation from all the States."

Another precedent arose in the Senate of the United States on March 2, 1861, when a proposition to amend the Constitution was on its passage. The Constitution, upon this point, provides that "Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution," etc.

When the vote was taken in the Senate, March 2, 1861, Mr. Trumbull raised the point of order that this provision required two-thirds of all the Senators which all the States were entitled to elect. The Presiding Officer overruled the point of order, and upon appeal the ruling was sustained by a vote of 33 to 1.

Another precedent of considerable force is found in connection with the ratification of the fifteenth amendment to the Constitution. The constitution of Indiana provided that two-thirds of each house should constitute a quorum. In 1867 certain members of the legislature resigned in order to defeat a vote upon the ratification of the amendment. The remaining members thereupon decided that two-thirds of the actual membership constituted a quorum, and proceeded to ratify the amendment. This action was certified in forwarding the vote of the legislature on the ratification of the amendment. No question was raised by Congress in regard to the legality of the vote, and the vote of Indiana, as thus cast, was accepted and counted.

The case of State *v.* Huggins (1 McCord, 139), decided in the court of appeals in South Carolina, is in point. Eighteen managers of election were appointed by the legislature for the district of Georgetown. Two had refused to qualify, one was dead, and one was disqualified, reducing the number to fourteen. It was held by the court that a majority of fourteen properly formed the board of managers for the district to determine the validity of the election of a sheriff, a majority of those qualified to serve, and not a majority of the whole number appointed, being a lawful quorum.

Under the provision of the Constitution of the United States that "each House shall be judge of the elections, returns, and qualifications of its own Members," the Senate is the sole judge of this matter. The action, opinion, or decision of any other body is, therefore, entitled to such weight or respect only as may be due to the reasons which support it.

It is proper to consider the connection of the supreme court of the State of South Carolina with this case. And it may be remarked that this presents the most remarkable and, perhaps, unfortunate feature of the controversy. That court may be said, without injustice, to have taken part in the purely political contests of the State. Instead of leaving such contests to be settled by other departments of the government, where they properly belong, the court engaged in those contests.

The action of that court was taken under these circumstances: After the Mackey house and the Wallace house were each organized, the former with 59 and the latter with 57 members declared elected by the canvassing board, a petition was presented to the supreme court by Mr. Wallace, as speaker of the Wallace house, asking a mandamus to compel the secretary of state and the speaker of the Mackey house to deliver to him the returns of the election for governor and lieutenant-governor.

By Article III, section 4, of the constitution of the State these returns are required to be sent by the managers of the election to the secretary of state, who is required to return them to the speaker of the house of representatives.

By the return of the secretary of state to the rule to show cause, issued by the supreme court upon the petition above stated, it appeared that that officer had delivered the returns to the speaker of the Mackey house.

The return of the speaker of the Mackey house showed that he had received the returns from the secretary of state, and held them by virtue of his office as speaker, and he denied the power and jurisdiction of the court in the matter.

The court thereupon reserved the question as to the secretary of state for further argument and dismissed the petition as to Speaker Mackey.

In coming to this conclusion the court said that "63 members were in their seats when Mr. Wallace was elected. * * * That the house of representatives consisted of 124 members, and 63 were necessary for a quorum to do business. * * * That all the members had certificates from the secretary of state except 8, and the qualification of these 8 was established by the proceedings in this court. * * * That, no matter what was the character of the certificates, they had, the return of the board of State canvassers to the court, showing that they had received the greatest number of votes in their particular counties, entitled them to access to the floor for the purpose of organization."

In taking cognizance of this matter and rendering a decision therein the court plainly transgressed the limits of its judicial powers, and its decision is void and binding on no one.

The constitution of the State, in section 26 of Article I, provides that "in the government of this Commonwealth the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other."

That the due organization of the house of representatives is a legislative power or function, and not a judicial one, seems too clear for argument. Two bodies were claiming each to be the lawful house of representatives. This was a purely political question. It was a question between two sections or parts of one legislative body, each claiming to represent that body. No other questions were involved.

Whether Mackey or Wallace was entitled to have the election returns was a question which directly involved the action of the members of the legislative body, not in its effects upon citizens generally, but in relation to the due organization of that body under powers granted to it alone by the constitution.

The interposition of the court was not only without authority but was also absolutely unnecessary. There was ample power in the lawful house of representatives to afford the necessary remedy in the matter, if any remedy was needed.

The judgment of the court itself shows for another reason its want of jurisdiction over the case. It held that Mackey, not being an official person, could not be reached by mandamus and dismissed the petition. It could grant no relief, accomplish no result, and yet it proceeded to express an opinion. This was extrajudicial. The court must have recognized this dilemma at the outset, namely, if Mackey is speaker, he is the lawful custodian of the returns; if he is not speaker, he is not such an official person as can be reached by mandamus. Hence, in either event, no writ could have been issued, and nothing remained but to dismiss the petition.

Under these circumstances the expression of an opinion that Wallace was the speaker and that 63 members are necessary to form a quorum was utterly uncalled for, a mere empty obiter dictum.

When, therefore, it is claimed that the supreme court of the State is empowered to construe the constitution, and hence to decide upon the question of a quorum, the answer is that this is true only when the court has a proper case before it requiring the decision of such a question.

But, further, it is to be noted that the court in giving this opinion assumed the fact, now denied, that 124 members of the house, instead of 116, had been in fact chosen.

The supreme court gave no reason for the opinion that 63 members were necessary to form a quorum. It was their unsupported opinion, a dictum in every sense, not expressed in the course of reasoning or discussion leading to a judgment, and wholly unsupported by argument.

In Carroll *v.* Lessee of Carroll (16 How., 28) Judge Curtis said: "This court, and other courts organized under the common law, has never held itself bound by any part of an opinion which was not needful to the ascertainment of the right or title in question between the parties. In Cohens *v.* Virginia (6 Wheat., 399) this court was much pressed with some portion of its opinion in the case of Marbury *v.* Madison. And Mr. Chief Justice Marshall said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of ex parte Christy (3 How., 292) and Jenness *v.* Peck (7 How., 612) are an illustration of the rule that any opinion given here or elsewhere can not be relied on as a binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

The conclusion on this point is that the construction of that provision of the Constitution of the United States relative to a quorum given by both Houses of Congress is applicable to a like provision in the constitution of the State of South Carolina.

It is a construction dictated by sound reason and public policy. And if it is a safe and sound construction of the Constitution of the United States, it is equally a safe and sound construction of the constitution of the State of South Carolina.

A quorum, therefore, of either house of the legislature of South Carolina must be held to be a majority of the members chosen.

The minority views hold:

The only real question is whether the house of representatives of the legislature which it is claimed elected Mr. Corbin was a legal house or a legal quorum of a house under the constitution and laws of South Carolina.

By section 4, Article II, of the constitution it is provided that "the house of representatives shall consist of 124 members."

By section 14, Article II, it is provided that "a majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day and may compel the attendance of absent members in such manner and under such penalties as may be provided by law."

It is difficult to see how language could more plainly define what should be a house, or what should be a quorum of a house, or what only a less number than a quorum had power to do. Nor is there anything in law, morals, or party exigency which can justify a resort to construction or sophistry to confuse such plain language. The number of members who assembled in what is called the Mackey house, which pretended to elect Corbin, was 59. Clearly this was neither a house nor the quorum of a house, as plainly defined by the constitution of the State, and this number had no power except to adjourn from day to day and compel the attendance of absent members. But this number proceeded to organize as 9, legal quorum to do business.

The pretext for this extraordinary assumption of power by 59 members was that the board of State canvassers had only issued certificates of election to 116 members, and the claim is that 59 is a majority of 116. But this very statement admits that a quorum of the house was certified as elected. The 59, then, are left without excuse for failing to exercise their only power under the constitution—"to compel the attendance of absent members." But the facts show that the people in fact elected 124 members, a full house. The precinct commissioners and the county commissioners of election, in all the counties, respectively, made out and forwarded the statements required by law showing the votes cast at the election. The board of State canvassers refused to cast up the votes in the counties of Edgefield and Laurens, under the shallow pretext that they were unable to determine whether the elections in those counties were legal. They refused to discharge their plain ministerial duty of casting up the votes and thereby "determine and declare what persons had been by the greatest number of votes duly elected," but excused themselves from this duty by pretending they were not able to determine whether there had been legal elections in those counties. This was a question which, under the constitution, each house alone had authority to determine, and which the board of State canvassers, by plain language of the act creating it, is forbidden to determine.

In due time, also, the house of representatives did determine that there had been elections held in the counties of Edgefield and Laurens, and the returns very plainly showed who had been elected, and, in fact, the full house of 124 members were elected. Both in fact and law, therefore, 59 was not a quorum of the house to do business, and Mr. Corbin was not elected by a legal legislature.

(3) The majority discuss at length the action of the State canvassers in refusing credentials to the persons claiming election from the two disturbed counties, finding that action legal and proper. The minority do not discuss the subject at length, saying merely that their action was "mere trickery" and should not receive the approbation of the Senate.

631. The case of Corbin v. Butler, continued.

A Senate committee's discussion of the functions of credentials in the organization of a legislature.

By a letter presented and read to the Senate a contestant withdrew his claim to a seat after the committee had reported in his favor.

(4) A question as to the organization of the State house of representatives is thus discussed by the majority:

Passing now from questions affecting the legality of the action of the board of canvassers, we come to questions concerning the mode of organizing the Mackey house, and especially the exclusion therefrom of all persons not declared elected by the canvassing board.

The legal and parliamentary principles on which the Mackey house was organized may be stated as follows:

First. That no persons except those declared elected and duly returned by the board of State canvassers and holding certificates of the secretary of state were entitled by law or usage to be placed upon the roll. (Cushing, secs. 229 and 240.)

Second. That the organization of the house must be effected by those persons only whose election had thus been declared by the board of State canvassers and certified by the secretary of state in accordance with the law of the State.

Third. That all other persons claiming to be entitled to seats in the house of representatives must submit their claims to the house after its organization by the members whose seats were undisputed. (Cushing, secs. 229 and 240.)

"It is to be observed in the outset that when a number of persons come together, each claiming to be a member of a legislative body, those persons who hold the usual credentials of membership are alone entitled to participate in the organization." (McCrary's Law of Elections, 377.)

"It is apparent that the case of Sykes *v.* Spencer is not in conflict with the rule that in the organization of legislative bodies persons holding the usual credentials are alone authorized to act." (McCrary's Law of Elections, 392.)

In the well-known case of Kerr *v.* Trego (47 Pa. S. R. —), cited in Brightly's Leading Cues on Elections (p. 632), Chief Justice Lowrie, of the supreme court of Pennsylvania, laid down the following principle:

"On the division of a body that ought to be a unit, the test of which represents the legitimate social succession, is, which of them has maintained the regular forms of organization according to the law and usages of the body, or, in the absence of these, according to the laws, customs, and usages of similar bodies in like cases, or in analogy to them. This is the uniform rule in such cases."

And in the same case, speaking of the custom of the clerk of the former organization taking charge of the organization of the new body, he says (p. 638):

"It has the sanction of the common usage of every public body into which only a portion of new members is annually elected. It is the periodical form of reorganizing the select council and the senate of the State, and also the form of organizing the Senate of the United States on the meeting of a new Congress, when the Vice-President does not appear and the last President pro tempore does; and we understand this custom to be uniform throughout the United States, though this is not very important. And when there is a president whose term as a member has expired, then the functions of the clerks continue, and they in all cases act as the organs of reorganizing the body, and continue to hold office until their successors are chosen and qualified. Our State and Federal Houses of Representatives are illustration enough of this. So universal.is this mode of organizing all sorts of legislative and municipal bodies that, all departures from it can be justified only as founded on special and peculiar usages or on positive legislation. Whenever this form is adhered to, a schism of the body becomes impossible, though the process of organization may be very tardy.

"It is objected that a rule that attributes so much power to the officers of the previous year gives them an advantage which they may use arbitrarily and fraudulently against the new members, so as to secure to themselves an illegitimate majority. No doubt this may be so, but no law can guard against such frauds so as to entirely prevent them, just as it can not entirely prevent stealing and perjury and bribery; the people are liable to such frauds at every step in the processes of an election or organization. But so much more the need for order and law in this part of the process; the law can dictate that, though it can not furnish honesty and sound judgment to the actors in it. That the law and order that we have announced have existed so long and so generally is proof, at least, that they are better than no law at all."

In Wilson's Digest of Parliamentary Law, section 1603, page 221, this author says:

"At the commencement of every regular session the Clerk of the House opens the session by calling the names of Members by States and Territories, if in Congress, and by counties if in State legislative assemblies. If a quorum answer to their names, he will put the following question: 'Is it the pleasure of the House to proceed to the election of a Speaker?' If decided in the affirmative, tellers are generally appointed to conduct the vote."

This seems to be the universal custom in the organization of legislative bodies, and such custom not only prevails in South Carolina, but is specially established by the rules of the house of representatives of this State.

Rule 80 of the rules of the house of representatives of this State is as follows:

"In all cases not determined by these rules, or by the laws, or by the constitution of this State, as ratified on the 14th, 15th, and 16th days of April, 1868, this house shall conform to the parliamentary law which governs the House of Representatives of the United States Congress."

Rule 81 is as follows:

"These rules shall be the rules of the house of representatives of the present and succeeding general assemblies until otherwise ordered."

Turning now to Barclay's Digest (pp. 44 et seq., and 126), we find that the law governing the House of Representatives of the United States Congress requires the Clerk of the last House to make up the roll of the Members of the new House by placing thereon the names of such persons only whose credentials show "that they were regularly elected;" that having ascertained, by a call of this roll, that a quorum is present, the Clerk then proceeds to call the names of the Members for the choice of a Speaker; the Speaker, being chosen, assumes the duties of presiding officer, and, after swearing in the Members, the oath of office being first administered to him, proceeds to complete the organization. Pending the election of a Speaker, the Clerk preserves order and decorum.

Upon the question of the right of the claimants from Edgefield and Laurens counties to be placed upon the roll and to participate in the organization, the following citation from Cushing's Law and Practice of Legislative Assemblies, section 229, page 87, is in point:

"The right to assume the functions of a member, in the first instance, and to participate in the preliminary proceedings and organization, depends wholly and exclusively upon the return or certificate of election, those persons who have been declared elected and are duly returned being considered as members until their election is investigated and set aside and those who are not so returned being excluded from exercising the function of members, even though duly elected, until their election is investigated and their right admitted."

To the same effect is section 141 (p. 52) of the same work, which has already been cited in connection with the action of the Supreme Court.

In section 238 (p. 91) of the same work, in discussing the principles of parliamentary law governing the assembly and organization of legislative bodies, Cushing says:

"Hence it has occurred more than once that struggles for political power have begun among the members of our legislative assemblies, even before their organization; and it has happened, on the one hand, that persons whose rights of membership were in dispute, and who had not the legal and regular evidence of election, have taken upon themselves the functions of members, and, on the other, that persons having the legal evidence of membership have been excluded from participating in the proceedings."

In order to avoid such difficulties, this distinguished writer lays down the following principles in section 240, which are applicable to the question now under consideration:

"That no person who is not duly returned is a member, even though legally elected, until his election is established.

"That those members who are duly returned, and they alone (the members whose rights are to be determined being excluded), constitute a judicial tribunal for the decision of all questions of this nature."

In Kerr *v.* Trego (Brightly's Election Cases, p. 636), already cited, the chief justice said:

"In all bodies that are under law, the law is that where there has been an authorized election for the office in controversy the certificate of election which is sanctioned by law or usage is a prima facie written title to the office, and can be set aside only by a contest in the form prescribed by law. This is not now disputed. No doubt this gives great power to dishonest election officers, but we know no remedy for this but by the choice of honest men."

It is proper here in this connection to again refer to the language already quoted from the same authority (p. 638):

"It is objected that a rule that attributes so much power to the officers of the previous year gives them an advantage which they may use arbitrarily and fraudulently against the new members, so as to secure to themselves an illegitimate majority. No doubt this may be so; but no law can guard against such frauds so as to entirely prevent them, just as it can not entirely prevent stealing and perjury and bribery; the people are liable to such frauds at every step in the processes of an election or organization. But so much the more need for order and law in this part of the process; the law can dictate that, though it can not furnish honesty and sound judgment to the actors in it. That the law and order which we have announced have existed so long and so generally is proof, at least, that they are better than no law at all."

Applying the law as now stated to the facts in the present instance, it is clear, first, that there were no representatives from Edgefield and Laurens counties having certificates of election according to the law and usage of this State, and, second, that under the law, without such certificates, the clerk had no right to place the names of any persons upon the roll of the house as representatives from these counties.

It follows that 59 members of the house of representatives who met in the statehouse at Columbia and organized by the election of E. W. M. Mackey as speaker were lawfully convened, were lawfully organized, and, under the constitution of South Carolina, constituted the lawful house of representatives of that State. Though less than a majority of all the possible members of that body (124), there was a "quorum to do business," which consisted of a "majority of the members chosen"—a majority of all those holding lawful certificates of election.

This house of representatives, in connection with the unquestioned senate, constituting together, as they did, the legislature of the State of South Carolina, proceeded on the 12th day of December, 1876, to the election of a Senator to represent that State in the Senate of the United States for the term of six years, to commence on the 4th of March, 1877. The election was duly held, duly determined and declared, and D. T. Corbin was duly and formally declared elected Senator, and subsequently he was duly commissioned as such by the governor of the State. He is, therefore, entitled, on the merits of his case, to a seat in the Senate as a Senator from South Carolina for the term of six years, commencing on the 4th of March, A. D. 1877.

Finally, after reviewing the circumstances of the election of Mr. Butler by a legislature consisting of one house only, the majority recommended this resolution:

Resolved, That David T. Corbin was, on the 12th day of December, A. D. 1876, duly elected by the legislature of the State of South Carolina a Senator from that State in the Congress of the United States for the term of six years, commencing on the 4th day of March, A. D. 1877, and that, as such, he is entitled to have the oath of office administered to him.

On February 25, 1879,[1] near the end of the Congress, Mr. Cameron moved that the Senate proceed to the consideration of the resolution. This motion was disagreed to—yeas 25, nays 36.

On February 28[2] the Vice-President laid before the Senate a letter from David T. Corbin withdrawing his claim to the seat. He stated that he did not by so doing concede that his claim was not legal, but he believed that it would not be acted on, and a further prosecution in the next Congress would be unavailing.

The letter was laid on the table.

632. The Senate election case of Lucas v. Faulkner, from West Virginia, in the Fiftieth Congress.

There being conflicting credentials arising from a question as to the legality of election, and an allegation of disqualification, the Senate determined final right before either claimant was seated.

In electing a Senator the State legislature acts under authority of the Federal Constitution, and a State constitution and laws conflicting therewith are void.

No State may prescribe qualifications for a United States Senator in addition to those prescribed by the Federal Constitution.

On December 5, 1887,[3] in the Senate, the President pro tempore presented the certificate of the appointment, by the governor of West Virginia, of Daniel B. Lucas as Senator from that State, to hold the office "until the next meeting of the legislature of said State having authority to fill" the vacancy occasioned by the expiration of the term of Johnson N. Camden on March 3, 1887.

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[1] Record, p. 1882.

[2] Record, p. 2028.

[3] First session Fiftieth Congress, Record, pp. 1–4.

Then the President pro tempore laid before the Senate the credentials of Charles J. Faulkner, chosen by the legislature of West Virginia a Senator for the term beginning March 4, 1887. These credentials,[1] signed by the governor and attested by the secretary of state under the seal of the State, not only certified the election in the usual form, but contain a recitation at length of the constitutional conditions under which the legislature acted and of the proceedings of the legislature properly attested.

The President pro tempore also laid before the Senate the protest of Daniel B. Lucas, wherein it was urged that the legislature had no constitutional power to elect at the time it chose Mr. Faulkner, and, further, that Mr. Faulkner was disqualified.

During the swearing in of the Senators-elect Mr. George F. Hoar objected to the administration of the oath to Mr. Faulkner, and the latter stood aside, as it seemed proper that a committee should examine the case before the administration of the oath.

On December 12,[2] on motion of Mr. Hoar, the papers in the case were referred to the Committee on Privileges and Elections.

On December 14[3] Mr. Hoar submitted the report of the committee. This report gave the following statement of facts:

The Constitution of the United States, Article 1, section 3, provides:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; * * * if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

"SEC. 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

The Revised Statutes of the United States, Title II, section 14, provide:

"The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress."

Section 15 prescribes the manner of such election. Section 16 is as follows:

"Whenever, on the meeting of the legislature of any State, a vacancy exists in the representation of such State in the Senate, the legislature shall proceed, on the second Tuesday after the meeting and organization, to elect a person to fill such vacancy, in the manner prescribed in the preceding section for the election of a Senator for a full term."

The Constitution further provides, Article I, section 5:

"Each house shall be the judge of the elections, returns, and qualifications of its own members."

Of course the opinion of any other tribunal can have no weight as an authority in determining any question as to the validity of the election of a Senator. But it may be proper to note that the constitutional authority of Congress to prescribe the time and manner of electing Senators, although it may not exhaust the whole subject, but still leaves in force the regulations of a State, in regard to the same subject, not in conflict with its own, is expressly affirmed by the Supreme Court of the United States in ex parte Seibold (100 U. S., 371).

The constitution of West Virginia provides that—

"The legislature shall assemble at the seat of government biennially, and not oftener, unless convened by the governor. The first session of the legislature, after the adoption of this constitution, shall

[1] For copy of credentials see Record, pp. 1–3.

[2] Record, p. 36.

[3] Record, pp. 53, 54; Senate Report No. 1.

commence on the third Tuesday of November, 1872; and the regular biennial session of the legislature shall commence on the second Wednesday of January, 1875, and every two years thereafter on the same day. (Art. VI, sec. 7.)"

Article VII, section 7, is as follows:

"The governor may, on extraordinary occasions, convene, at his own instance, the legislature; but, when so convened, it shall enter upon no business except that stated in the proclamation by which it was called together."

The term of Mr. Camden as a Senator from West Virginia expired on the 4th day of March, 1887. The regular biennial session of the legislature began on the second Wednesday of January in pursuance of the provisions of the constitution cited.

At that session the legislature proceeded to ballot for a successor to Mr. Camden, but no person obtained a majority of the ballots and it adjourned without making a choice. Thereafter, on the 5th day of March, the governor appointed Mr. Lucas, in the recess of the legislature, and issued to him a certificate declaring his appointment as Senator in the Senate of the United States "until the next meeting of the legislature having authority to fill such vacancy." Mr. Lucas accepted the appointment.

On the same 5th day of March the governor issued the following proclamation:

The report gives this proclamation in full. It summoned the legislature to convene for eight specified objects, no one of which referred to the election of a Senator.

Having set forth the facts the report discusses two questions arising in the case.

(1) As to the action of the legislature:

The legislature met in special session, pursuant to said call, and duly elected Mr. Faulkner to fill the existing vacancy in the Senate of the United States, if it had authority so to do.

The Constitution of the United States is the supreme authority, and all provisions of the constitution or statutes of any State are void and of no effect unless they can be so construed as not to conflict with its provisions.

The Constitution of the United States expressly provides that the vacancy which happens during the recess of the legislature of any State shall be filled by the legislature at its next meeting. The statute of the United States merely prescribes the time and manner in which, at such meeting, the constitutional mandate shall be obeyed. The only question, therefore, which can possibly arise is whether the body which sat in pursuance of the call of the governor was a legislature in the constitutional sense.

It is claimed by Mr. Lucas that, as this body was not permitted to enter upon any legislative business except such as related to the eight matters set forth in the call, it was not a legislature, but was a body deriving its power from the will of the executive, and so was exerting a certain executive or quasi executive function, something like that which is exercised by the Senate in giving its assent to the nominations of public officers.

But it seems to us that this view can not be supported. In the first place, the body is expressly declared by the constitution of West Virginia itself to be a legislature. In the next place, the function which it exercised in making enactments upon the eight great subjects mentioned in the call of the governor is clearly a legislative function. Among them, under Articles I and II, is the making appropriations of public money; under Article III, the regulating of procedure in criminal cases; under Articles V, VI, and VII, would exist the power to declare certain high crimes and misdemeanors; and under Article VIII, to give the assent of the State to the establishment and confirmation of its boundary lines.

It is difficult to conceive of any definition of the word "legislature" which would not include a body capable of passing and actually passing such enactments as these. They can be binding on the people of the Commonwealth only as legislation. They would be subject to be construed and enforced by the courts of that State only in their character as laws.

But it seems to the committee that the construction of the State constitution of West Virginia, upon which the above argument is based, is one which will not bear examination. When that constitution provided that the legislature so convened in extraordinary occasions "should enter upon no business except that stated in the proclamation by which it was called together," the people must be presumed

to have had in mind business to be transacted under authority of the State constitution, and not to have intended to prohibit the performance of duties imposed upon it by the supreme authority of the Constitution of the United States.

If the argument be sound that a legislative body which is prohibited from entering upon certain classes of business, or which is confined to certain classes of business clearly legislative in their character, is no legislature in the constitutional sense, its logic would require us to declare that the legislature of every State whose bill of rights excludes it from large domains of legislation is no legislative body. If, under the same provision of the Constitution of the United States, the act of Congress had fixed a day for holding elections for Representatives to Congress, and the State constitution or laws should prohibit the assembling of the people for such elections on the day so fixed, it would, we suppose, be held clear that the act of the State would be void and the authority of the act of Congress would prevail.

We can not see any difference between such prohibition of a State constitution applicable to the constitutional electors of Senators, who are members of the State legislature, and the constitutional electors of representatives, who are a body of electors authorized to vote for members of the most numerous branch of the State legislature.

We are therefore clearly of opinion that the election of Mr. Faulkner at the special session of the legislature of West Virginia was valid.

(2) As to the qualifications of Mr. Faulkner, the report holds:

It is insisted that Mr. Faulkner was ineligible to the office of Senator by reason of the provision of the constitution of West Virginia:

"No judge during his term of office shall practice the profession of law or hold any other office, appointment, or public trust, under this or any other government, and the acceptance thereof shall vacate his judicial office. Nor shall he, during his continuance therein, be eligible to any political office." (Art. VIII, sec. 16.)

But we are of opinion that no State can prescribe any qualification to the office of United States Senator in addition to those declared in the Constitution of the United States. (See the debates on the case of Mr. Trumbull, supra, p. 148.)

This provision, according to the settled rule of construction, must be so construed as to attribute to it a meaning not inconsistent with the constitution of West Virginia. This can well and properly be done by holding it to mean "eligible to office under the constitution of West Virginia."

Therefore the committee concluded:

We therefore find that Mr. Faulkner has been constitutionally elected to the seat in the Senate made vacant by the expiration of the term of Mr. Camden and that he is entitled to take the oath.

We report the following resolutions:

Resolved, That Daniel B. Lucas is not entitled to a seat in the Senate from the State of West Virginia.

Resolved, That Charles J. Faulkner has been duly elected Senator from the State of West Virginia for the term of six years, commencing on the 4th day of March, 1887, and that he is entitled to a seat in the Senate as such Senator.

The resolutions were agreed to without division.

Thereupon Mr. Faulkner appeared and took the oath.

633. The Senate election case of Addicks v. Kenney, from Delaware, in the Fifty-fourth Congress.

The Senate gave immediate prima facie effect to credentials regular in form, although a contestant presented irregular credentials.

On January 21, 1897,[1] in the Senate, Mr. William E. Chandler, of New Hamp-

[1] Second session Fifty-fourth Congress, Record, p. 1004.

shire, presented the following paper, which was referred to the Committee on Privileges and Elections:

DELAWARE, *ss:*

Be it known that the legislature of the State of Delaware did, on the 20th day of January, in the year of our Lord 1897, at an election in due manner held according to the form of the act of the general assembly of said State in such case made and provided, choose John Edward Addicks to be a Senator from said State in the Senate of the United States for the constitutional term from the 3d day of March, in the year of our Lord 1895.

Given under our hands in obedience to the said act of the general assembly the day and year aforesaid.

ROBERT J. HANBY,
Speaker of the Senate.
THOMAS C. MOORE,
Speaker of the House of Representatives.
GEO. W. ROGERS,
Clerk of the Senate.
CHAS. R. HASTINGS,
Clerk of the House of Representatives.

On February 5[1] Mr. George Gray, of Delaware, presented the credentials of Richard W. Kenney as a Senator from the State of Delaware. The credentials were read, as follows:

STATE OF DELAWARE, EXECUTIVE DEPARTMENT.

To the President of the Senate of the United States:

This is to certify that on the 19th day of January, in the year of our Lord 1897, Richard R. Kenney was duly elected by the legislature, of Delaware a Senator to represent said State in the Senate of the "United States, to fill a vacancy existing in the representation of said State for the term ending the 3d day of March, A. D. 1901.

Witness his excellency, our governor, Ebe W. Tunnell, and our seal hereunto affixed, at Dover, this 21st day of January, in the year of our Lord 1897, and of the Independence of the United States of America the one hundred and twenty-first.

EBE W. TUNNELL.

By the governor:
WM. H. BRYCE, *Secretary of State.*

Mr. Kenney being present, and the oath prescribed by law having been administered to him, he took his seat in the Senate.

Mr. George F. Hoar, of Massachusetts, chairman of the Committee on Privileges and Elections, after referring to the fact that the Senate had declared Henry A. Du Pont not entitled to the seat, and that the Committee on Privileges and Elections had reported against reopening Mr. Du Pont's case, said:

If it be true that Mr. Du Pont was not legally elected, or if it be true that that question has been settled by a judgment of the Senate, it follows that there is a vacancy, and that there was a vacancy at the time of the alleged election of Mr. Kenney, in the office of Senator from the State of Delaware; and there being a vacancy under the Constitution and statute of the United States, the credential in due form, signed by the executive of that State, gives the gentleman who now applies for the seat a prima facie title to the seat, subject, as has been suggested by my honorable friend from New Hampshire, to reexamination on the merits hereafter, if that reexamination shall be desired. I therefore assent to the request of the Senator from Delaware that the oath be administered.

[1] Record, pp. 1559, 1560.

On March 19[1] Mr. Julius C. Burrows, of Michigan, presented the petition of John Edward Addicks, a citizen of the State of Delaware, setting forth that on the 20th day of January, 1897, by a majority of the duly elected and qualified members of the senate and house of representatives of the State of Delaware, he was duly elected a United States Senator to fill the vacancy in the United States Senate occasioned by the expiration of the term of Anthony Higgins, and that he was denied the usual and formal certificate of election to which he was entitled.

The memorial was referred.

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[1] Record, p. 66.

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]

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]

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[1] House 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.)

[2] House 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.)

[3] House 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. 11.) 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).

[4] Senate 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.)

[5] Instance 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).

[6] A 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.)

[7] Constitution, 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 9[2]—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.

[1] First 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-

[1] Journal, pp. 4, 23, 682.

[2] Second 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 18 [1] 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.

[1] Journal, 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

[1] First 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 RAINEY" 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 RAINEY 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 RAINEY" 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 23[1] 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.

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[1] Journal, p. 1143; Record, p. 4076.

[2] Third 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.* Broocks, 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. Broocks, 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. Broocks 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. Broocks."

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. Broocks, 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.

[1] First 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 Howe 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.* Legaréu, 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 tared. 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

[1] First 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. Leverson, 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.

[1] Journal, 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:

	Votes.
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

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

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

	Votes.
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 13[3] 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.

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[1] First session Nineteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 501.
[2] First session Twenty-first Congress, Contested Elections in Congress from 1789 to 1834, p. 518.
[3] Journal, 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 stiting 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 9[4] 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

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[1] Journal, p. 394.

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

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

[4] Journal, 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:

"Memorial[2] 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 comer 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 numerously 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.

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

[2] This memorial had been referred in the regular course.

[3] In 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 Speaker[2] 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 negativing 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-

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

[2] Third session Fortieth Congress, Journal, p. 181.

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

[4] First session Eighth Congress, Journal, pp. 609, 615.

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

[6] First 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.

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[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 chairman[4] 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.

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

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

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

[4] Mr. George McDuffie, of South Carolina.

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

[6] A 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.

[7] First 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."

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[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 Bonynge *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 Speaker[4] 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 Speaker[6] 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.

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[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 statutes [1] 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 fund [2] or otherwise to either party to a contested election case for expenses incurred in prosecuting or defending the same.[3]

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[1] 20 Stat. L., p. 400.

[2] On 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.)

[3] Revised Statutes, sec. 130.

Chapter XXII.

PLEADINGS IN CONTESTED ELECTIONS.

1. **Provision of statute as to notice and answer. Section 678.[1]**
2. **Attitude of House as to informalities in. Sections 679–687.**
3. **Foundation required for Senate investigations as to bribery, etc. Sections 688–696.**

678. A person proposing to contest the election of a Member serves notice within thirty days after determination of the result.

A Member on whom has been served a notice of contest shall answer within thirty days of such service.

Both the notice of contest and answer are required to present particular specifications.

The statutes provide.

Whenever any person intends to contest an election of any Member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been

[1] As to time of serving notice. Section 38 of this volume.

Instances of notices served too late. Sections 901, 1052 of Volume II.

Extension of time for serving notice. Sections 436, 621.

Committee given discretion to regulate serving of. Section 599.

Manner of serving (section 337 of this volume and sections 862 and 984 of Volume II) and proof of service. Section 862 of Volume II.

Waiver of informality in serving notice. Sections 852, 1057 of Volume II.

More than one notice may be served (section 839), but each must be within the required time. Section 855 of Volume II.

House may disregard law as to notice where its observance has been impracticable. Sections 327, 599.

As to the determination of result of election, on which the issuance of the notice is predicated. Sections 425, 527 of this volume and 862, 884, 992 of Volume II.

Construction of words "specify particularly" in law as to notice. Section 337 of this volume, and sections 821, 824, 830, 835, 848, 864, 905, 909, 917, 942, 972, 1064, 1074, 1075, 1171 of Volume II.

House sometimes proceeds with contest although notice or answer may be vague and indefinite. Section 778 of this volume, and sections 850, 859, 949 and 1107 of Volume II.

Instance of notice by telegraph. Section 467.

Amended notice admitted. Sections 452, 624.

Waiver as to sufficiency of notice. Sections 855, 864.

Notice and answer should be free from personalities (sections 938, 1125 of Volume II) and trivial and irrelevant matter. Sections 1103, 1126 of Volume II.

Before the enactment of the law, contests were instituted by memorial. Sections 322, 362, 370, 434, 435, 525, 547, 647, 708, 729 756, 758, 760, 763, 806, 815, 820 of this volume; and 986 of Volume II. Instance also after the enactment of the law. Section 825 of this volume.

determined by the officer or board of canvassers authorized by law to determine the same, give notice in writing, to the Member whose seat he designs to contest, of his intention to contest the same, and in such notice shall specify particularly the grounds upon which he relies in the contest.[1]

Any Member upon whom the notice mentioned in the preceding section may be served shall, within thirty days after the service thereof, answer such notice, admitting or denying the facts alleged therein, and stating specifically any other grounds upon which he rests the validity of his election; and shall serve a copy of his answer upon the contestant.[2]

679. The House decided in 1806 that a petition instituting an election contest should state the grounds with reasonable certainty.

The House decided that in an election case introduced by petition, the petitioner should not give evidence of any fact not alleged in the petition.

On January 3, 1806,[3] the House concurred in the action of the Committee on Elections giving Michael Leib, of Pennsylvania, leave to withdraw his petition. The committee expressed the grounds for this conclusion as follows:

A petition against the election of any person returned as a Member of the House of Representatives ought to state the ground on which the election is contested with such certainty as to give reasonable notice thereof to the sitting Member, and to enable the House to judge whether the same be verified by the proof, and, if proved, whether it be sufficient to vacate the seat; and the petitioner ought not to be permitted to give evidence of any fact not substantially alleged in his petition.

680. The Tennessee election case of Thomas v. Arnell, in the Thirty-ninth Congress.

The parties to an election case may not by mutual consent waive the requirements that an issue shall be made up by the pleadings of notice and answer.

For exceptional reasons the House may authorize an election case to be made up as to notice and answer after the time prescribed by law.

Form of resolution providing for notice and answer in election case after expiration of time prescribed by law.

On January 21, 1867,[4] the Committee on Elections, through Mr. Henry L. Dawes, of Massachusetts, reported in the case of Thomas *v.* Arnell, of Tennessee. The report states the facts and conclusions as follows:

That the election here contested was held on the first Thursday in August, 1865, and the certificate of election was given by the governor of the State to Mr. Arnell, under which, at the commencement of the present session, Mr. Arnell appeared, was qualified, and still holds the seat.

The statute of February 19, 1851, provides that the contestant shall serve notice of contest upon the sitting Member within thirty days after the result of said election shall have been determined by the officer or board of commissioners authorized by law to determine the same, and the sitting Member shall answer the same within thirty days, and all testimony shall be taken within sixty days thereafter. In the present case the statute has not been complied with; neither notice of contest nor answer have been served. At the hearing before the committee the contestant claimed the right to be heard upon the allegations in his petition without further pleadings, for the reasons set forth in the same, and the sitting Member contended that the case should be dismissed for want of a compliance with the requirements of said statute.

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[1] Revised Statutes, sec. 105. The present system of making up contested election cases dates from 1851. Before that, except for a brief period in the early years of the House, there had been no statute governing the procedure, and contests had been instituted by memorial.

[2] Revised Statutes, sec. 106.

[3] First session Ninth Congress, Contested Election Cases in Congress, 1789 to 1834, p. 165.

[4] Second session Thirty-ninth Congress, 2 Bartlett, p. 162; Rowell's Digest, p. 211.

The following letter from the sitting Member was submitted by the contestant as evidence that he had waived a notice of contest, and there was no other evidence upon this point:

"THIRTY-NINTH CONGRESS OF THE UNITED STATES,

"Washington, D.C., December 4, 1866.

"MY DEAR SIR: Yours of the 3d instant has been received. The following statement contains the substantial facts, so far as I remember them: In the house of representatives at Nashville, Tenn., after learning that Governor Brownlow had given to me the certificate of election for the Sixth Congressional district of Tennessee to the Thirty-ninth Congress, you remarked to me that you intended to contest the election. I replied, 'Very well; I expect you to do so.' After some other conversation of a mutually friendly character, on your turning away, I volunteered the information that it was necessary to give me notice, which you seemed not to have thought of. I further remarked that I desired to throw no obstacles in the way, and would acknowledge notice. You then called up several witnesses and the matter was verbally understood.

"Hoping that this will be satisfactory, I am, very respectfully, yours,

"SAMUEL M. ARNELL.

"Hon. D. B. Thomas."

Without critically examining this note for the purpose of ascertaining whether it sustained the position of the contestant, that it waived all notice whatever, or, as contended by the sitting Member, was merely evidence of an agreement on his part to acknowledge the service of legal notice whenever the same should be made, the committee were of opinion that it was not competent for the parties to entirely waive the requirements of the statute of 1951; that said statute was enacted not only to aid the parties in the preparation of their case, but also to secure a record and a distinct and well-defined issue, upon which the committee and the House were to pass. To this end the statute requires the notice to be in writing, and to specify in such writing particularly the grounds upon which he relies in the contest, and the answer to admit or deny the facts alleged in the notice, and to state specifically any other grounds upon which he rests the validity of his election. To the issue thus distinctly defined the statute and the uniform decisions of the House confine all testimony to be taken. It must be evident to every one that it is impossible for the committee or the House to hear and determine a case without an issue joined. Besides, no testimony could be taken by either party without such issue, previously framed. The statute requires testimony to be taken in a manner therein prescribed, before a time therein fixed, and in support of an issue previously made up. It is perfectly absurd to suppose it possible for either party to take testimony in support of his own allegations, or in contravention of those of the other party, before either have been made, or for the committee to hear the parties upon an issue reserved.

The committee were, therefore, of opinion that this case could not be heard by them in its present position, and that it must be dismissed unless the House should authorize the parties to make up an issue and submit the same, with such evidence as each may be able to produce in relation to the same, to the committee or the House. It was thereupon claimed by the contestant that he has been led into this noncompliance with the statute by the agreement of the sitting Member to acknowledge notice heretofore alluded to, and also by the peculiar condition of the State of Tennessee in reference to representation in this House. All representation from that State had been refused admission into Congress till near the close of the first session, and it was not known till then, long after the time prescribed by the statute for serving notice had elapsed, that a contest would be of any avail.

The committee heard both parties upon the question of recommending to the House that the authority prayed for be given. This authority was given in the case of Williamson *v.* Sickles (Bart., 288) for the special reasons existing in that case, and in the opinion of the committee there are peculiar reasons existing in the present case, not likely again to occur, which will justify the House in authorizing the making up of a record as nearly in conformity with the requirements of the statute as the circumstances of the case will permit. They therefore recommend the adoption of the following resolution:

Resolved, That Dorsey B. Thomas, contesting the right of the Hon. Samuel M. Arnell to a seat in this House as a Representative from the Sixth Congressional district of Tennessee be, and he is hereby, required to serve upon the said Arnell, within eight days after the passage of this resolution, a particular statement of the grounds of said contest, and that said Arnell be, and he is hereby, required to serve upon said Thomas his answer thereto in eight days thereafter, and that both parties be allowed eighteen

days next after the service of said answer to take testimony in support of their several allegations and denials in all other respects in conformity to the requirements of the act of February 19, 1851, except that not more than four days' notice shall be required for the taking of any deposition under this resolution.

On January 23, 1867,[1] the House agreed to the resolution proposed by the committee; but no conclusion was ever reached on the merits of the case, and on March 2[2] the House discharged the Elections Committee from the consideration of the subject.

681. The Virginia election case of Stovell v. Cabell in the Forty-seventh Congress.

Although there may be irregularities in pleadings and in taking of testimony, the committee sometimes examines an election case on the merits.

Where no law requires the use of only one ballot box at a voting precinct, the use of two does not justify rejection of the return.

On July 18, 1882,[3] Mr. Gibson Atherton, of Ohio, from the Committee on Elections, submitted the report of that committee in the Virginia case of Stovell *v.* Cabell. The official returns gave sitting Member a majority of 859 votes.

The committee say:

The contestant does not claim in his notice of contest that he was elected a Representative to the Forty-seventh Congress, but that he would have been elected but for certain wrongs of which he complains. To all of contestant's allegations the contestee interposed a general as well as a specific and particular denial, and challenged the proof.

The contestant has not attempted to substantiate by proof any of the grounds of contest specified in his notice, except such as relate to the precincts of Danville, Cascade, Brosville, Hall's Crossroads, and Ringgold, in the county of Pittsylvania; Charity and Gates's Store, in Patrick County; and Hillsville and Dalton's Store, in the county of Carroll.

He has offered some testimony, which has been duly considered, relating to the precinct of Phillips's Store, Nester's, Fancy Gap, and Smith's Mill, in Carroll County. But these precincts are not mentioned in the notice of contest, and the depositions relating to them were objected to for that reason by the contestee, and are inadmissible. Besides, the depositions were, in disregard of the contestant's objections, taken in Carroll County by a Pittsylvania, County notary, who had no authority, under State or Federal law, to take them.

If all the demands made by the contestant in his notice of contest respecting the precincts to which his proofs relate be conceded, the result will be as follows: Cabell, 10,225; Stovell, 9,844; a majority of 381 for sitting Member.

The committee examined the testimony of contestant, however, but find it inconclusive.

It was shown that at Hall's Crossroads separate ballot boxes were used to receive the votes of white and colored voters. The report says of this:

The testimony shows that two boxes had been used since the period of reconstruction, without objection from any source.

There is no statute which expressly, or by necessary implication, forbids the use of two boxes in that way. The only question is whether their use interfered with the purity, freedom, or convenience of the election. That it did not is incontestably proven by the testimony.

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[1] Journal, p. 250.

[2] Journal, pp. 559, 560.

[3] First session Forty-seventh Congress, House Report No. 1696; 2 Ellsworth, p. 667.

As to Charity precinct, the report says:

The contestant, in his notice of contest, asserts that the county canvassers of Patrick County illegally rejected the returns of Charity precinct, and demands that the returned vote of this precinct be counted.

But his own proof shows that the only return made by the judges of election of the precinct was a return of the vote for electors of President and Vice-President, which return wholly omits the votes cast for the Republican electoral candidates. It shows that the judges of election made no return at all of the vote for Representative in Congress. The omission of the county canvassers to canvass votes not returned was not illegal. On the contrary, the canvass of votes not returned would have been a lawless proceeding.

If it were true, as the contestant asserts in his brief, that 51 votes were cast for the contestant, and only 20 for the contestee, at this precinct, the contestant might have availed himself of the net result by proper averments in his notice, duly supported by legal proof. But he made no such averments. His only averment was that the county canvassers illegally rejected the return; and that averment was not true. Nor is the testimony taken on the subject before the county clerk admissible.

In accordance with their views the committee reported resolutions confirming the title of sitting Member to the seat.

These resolutions were agreed to by the House without division or debate.[1]

682. The Pennsylvania election case of Reynolds v. Shonk, in the Fifty-second Congress.

The notice of contest in an election case must be specific in its allegations.

A notice of contest condemned in an election case as inadequate.

The Committee on Elections sometimes hears a contest on its merits, although the notice may fail in definiteness.

On January 17, 1893,[2] Mr. Littleton W. Moore, of Texas, from the Committee on Elections, submitted the report in the Pennsylvania case of Reynolds *v.* Shonk. The contestant had served on sitting Member the following notice of contest:

Hon. GEO. W. SHONK.

SIR: This is to notify you that I design and intend to contest your election and your seat in the Fifty-second House of Representatives of the United States, and I specify particularly the grounds upon which I rely.

First. Fraud in the election, and bribery, intimidation, and corruption of voters. (*a*) In the use of money with election officials and Democratic poll men. (*b*) In the purchase of voters to vote for you, especially well-known Democratic voters, by the payment of sums of money of various amounts; in the employment of large numbers of men by you, at various prices, each to attend the polls, and by intimidation and numbers compel Democratic voters to vote for you; by bargaining with and paying to leaders and influential men of foreign nationality large sums of money, who agreed to and did, by various devices and tricks, by influence and violence, compel or influence their countrymen to vote for you; by the use of the regular Democratic ticket, with your name inserted as the candidate for Congress and my name excluded, and the employment and purchase, with money, of Democrats and others to induce voters to vote the same, by representing this fraudulent ticket to be the straight Democratic ticket; by this and other practices of deception and guile deceiving large numbers of voters; by promise of patronage of office; by agreement to nominate or procure the nomination of individuals to certain offices of our State and the United States; and by engagements to procure executive clemency or immunity from punishment for violation of the election laws, voters were induced to cast their votes for you in every election district of the Twelfth Congressional district of Pennsylvania.

Respectfully, yours,

JOHN B. REYNOLDS.

WILKES-BARRE, PA., *December 2, 1890.*

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[1] Record, p. 6174; Journal, p. 1664.

[2] Second session Fifty-second Congress, House Report No. 2268; Rowell's Digest, p. 477; Stofer's Digest, p. 47; Journal, p. 94.

Sitting Member filed exceptions to this notice, on the ground that it was too informally drawn and too vague, not stating in what district the election was held, or who were the candidates, or what votes they received, or that the certified result of the election was not correct; and that it did not give specific instances of wrongdoing, particularizing as to locality, method or form of the alleged unlawful acts.

The committee, after citing the law of Congress as to notices of contest, say:

It will be observed that the contestant nowhere claims that he was elected, but seeks only to impeach the title of the contestee to the office. The committee took no formal action upon the exceptions filed to the notice of contest nor pronounced their decision upon it. But we are of opinion that the notice of contest in its various charges upon which there was any testimony is too vague and indefinite and does not conform to the act of Congress referred.

In Blomberg *v.* Haralson (Smith's Report of Election Cases, p. 355) the committee say:

"The statute requires that the contestant in his notice shall 'specify particularly the grounds upon which he relies in his contest.' It is impossible to conceive of a specification of the grounds of contest broader or more general in its terms. It fixes no place where the act complained of occurred. It embraces the whole district in one sweeping charge. The specifications embrace three general grounds of complaint, not one of which possesses that particularity essential to good pleading."

The committee, however, heard the case on its merits, but found no evidence sufficient to assail successfully the 1,484 plurality returned for sitting Member. Sitting Member admitted that he spent $9,550 in the canvass, but explained to the satisfaction of the committee that the expenditure was for legitimate purposes. Therefore resolutions confirming the title of sitting Member to the seat were recommended, and on February 16, 1893, were agreed to by the House without debate or division.

683. Instances wherein the House permitted amended notices of contest to be filed, with right to file amended answers.

The House denied the petition of certain electors in a district asking leave to take testimony in an election case.

On March 14, 1871,[1] Mr. George W. McCrary, of Iowa, submitted from the Committee of Elections the following resolutions, which was agreed to without debate or division:

Resolved, That James H. Harris, contesting the claim of Hon. Sion H. Rogers to a seat in this House as the Representative of the Fourth district of North Carolina, shall be permitted to serve upon said Rogers an amended notice of contest within ten days from and after the passage of this resolution, and that said Rogers be permitted to answer the same within thirty days after the service thereof, and the time for taking testimony under the law is extended sixty days from the date of the service of the answer to said amended notice.

On April 13,[2] also, a similar resolution in the case of Schenck *v.* Campbell provided that the notice of contest might be amended "by adding thereto an allegation charging fraud in the election in the second ward of the city of Hamilton, Ohio, which amendment shall be served on or before," etc. On April 10, 1872,[3] Mr. George W. McCrary, of Iowa, from the Committee of Elections, reported adversely petition of certain electors of the district asking leave to take testimony in the case. The petition was laid on the table.

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[1] First session Forty-second Congress, Journal, p. 57; Globe, p. 101.

[2] Journal, p. 150; Globe, p. 627.

[3] Second session Forty-second Congress, Journal, p. 666; Globe, p. 2342.

684. The Texas election case of Rosenthal v. Crowley in the Fifty-fourth Congress.

An instance wherein, after an amended notice of contest had been authorized, the House heard the election case as if it had actually been made.

On January 21, 1896,[1] Mr. Samuel M. Stephenson, of Michigan, introduced the following resolution, which was referred to Committee of Elections No. 3:

Resolved, That the contestant, A. J. Rosenthal, be, and he is hereby, authorized to so amend his notice of contest in the case of A. J. Rosenthal *v.* Miles Crowley, Tenth Congressional district, State of Texas, by adding thereto the following, to wit: "That there were unlawfully counted in making up the returns from said district divers precincts in Galveston County." [Here follow specifications and numbers of the precincts.]

The committee, in hearing the case, heard it as if the amendment had actually been made, and it being evident that, even if all should be proved as claimed, the contestant could not make out his case, recommended the resolution adversely and on January 31[2] the House laid it on the table.

As to the merits of the case the committee reported on January 30,[3] confirming the title of the sitting Member to the seat, and on January 31[4] the House agreed to the report.

The sitting Member had been returned by a plurality of 1,303 votes. Contestant asked that votes be excluded in one county because returns received by the county commissioners' court after the limit prescribed by law had been forwarded to the secretary of state; and in another county where such belated returns had not been forwarded by the county commissioners the contestant asked that they be counted. The committee believed that there was no reason shown why one rule shall not be applied to both cases, and such being the case the plurality of sitting Member could not be attacked successfully.

685. The Missouri election case of Reynolds v. Butler in the Fifty-eighth Congress.

Question as to the serving of amended notices of contest in election cases.

Sundays and legal holidays are not excluded in computing the forty days allowed for taking testimony in an election case.

In an election case testimony taken ex parte, in another case involving only a portion of the district, was not admitted.

On December 15, 1904,[5] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, presented the report of the committee in the Missouri election case of Reynolds *v.* Butler.

The report states the case as follows:

At the regular Congressional election in 1900, James J. Butler was returned as elected to a seat in the Fifty-seventh Congress. His election was contested by William M. Horton. The Committee on

[1] First session Fifty-fourth Congress, Journal, p. 134; House Report No. 197; Rowell's Digest, p. 529.

[2] Journal, p. 166.

[3] House Report No. 177.

[4] Journal, p. 166.

[5] Third session Fifty-eighth Congress, Record, pp. 313–317; House Report No. 3129.

Elections No. 1, to which the contest was referred, reported that, "fraud so permeated the conduct of the election in a large part of the district as to prevent a full, free, and fair expression of the public desire in respect to the election of a Representative in Congress," and the House, on the 28th of June, 1902, adopted a resolution declaring the seat vacant.

The governor of Missouri thereupon ordered a special election. Mr. Butler was again a candidate and returned as elected to fill the vacancy caused by his own unseating. His opponent in that election was Mr. George C. R. Wagoner, who contested his seat in the second session of the Fifty-seventh Congress, which assembled on the first Monday of December, 1902.

As the time fixed by statute for the taking of testimony would have carried the case beyond the expiration of the term for which Wagoner claimed to have been elected, he presented a memorial to the House, which, on the 11th day of December, 1902, adopted a resolution specifying a certain time within which the contestant might take testimony, a certain time for the contestee, and again a certain time for the contestant in rebuttal, and required the Committee on Elections No. 2 to consider and report upon the case so that it might be disposed of during the life of that Congress. That committee reported that by reason of gross frauds, clearly shown, making it impossible to ascertain the legal votes cast, the returns from certain precincts must, in accordance with the well-established precedent of the House and the rule laid down by courts and learned authors, be entirely rejected, and that Wagoner had been duly elected and was entitled to his seat. Resolutions to that effect were adopted by the House, and Wagoner seated February—, 1903.

November 4, 1902, the day fixed by the governor for holding the special election for filling the vacancy in the Fifty-seventh Congress, was also the day fixed by law for the general election, at whicn there was to be chosen a Representative in this the Fifty-eighth Congress. Mr. Butler was a candidate for that seat also and was opposed by Mr. George D. Reynolds, the present contestant.

The Missouri legislature had by act of March 16, 1901, redistricted the State, so that the district in which Reynolds competed with Butler for a seat in the Fifty-eighth Congress was not identical with the district in which Wagoner, upon the same day, competed with Butler for a seat in the Fifty-seventh Congress. Although the district, which is within the city of St. Louis, is still known as the Twelfth, at least one-half of it, territorially speaking (and being the one-half in which Wagoner received his majority), had been cut off from the district, while some new territory had been added. To be explicit, precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of the Twenty-fourth Ward; precincts 1 and 2 of the Twenty-eighth Ward; precinct 11 of the Twelfth Ward; precinct 12 of the Seventh Ward; precinct I of the Twentieth Ward, and precincts I and 2 of the Twenty-first Ward, which formed part of the district in which Wagoner ran against Butler for a seat in the Fifty-seventh Congress, were not in the district in which Reynolds ran against Butler for a seat in the Fifty-eighth Congress, while precincts 7, 8, 9, 10, 11, 12, and 13 of the Twenty-fifth Ward, and precincts 2, 3, and 4 of the Fifteenth Ward, which never had been in the district in which Wagoner ran against Butler, are in the district in which Reynolds ran against Butler. All of the Fourth, Fifth, Sixth, Thirteenth, Fourteenth, and Twenty-third wards and parts of the Fifteenth, Twenty-second, and Twenty-fifth wards were in both districts.

Differently stated, the old district in which Wagoner ran against Butler for the Fifty-seventh Congress, contained 20 election precincts which are not in the present district in which Reynolds ran against Butler for a seat in the Fifty-eighth Congress, and 10 precincts in the present district in which Reynolds ran were not in the district in which Wagoner ran.

The returns of the election for the Fifty-eighth Congress showed Butler to have received 15,316 votes and Reynolds 8,698, an apparent majority of 6,618 for Butler, who was sworn in at the beginning of the present Congress and now occupies the seat which Reynolds contests.

In his notice of contest, in more or less general terms, he charges frauds of various kinds, and in the ninth paragraph thereof specifically charges that in sundry precincts, therein set forth, there were frauds so gross and extensive that it was impossible to ascertain the actual and legal votes, and that the returns should therefore be rejected altogether.

The contestant was not diligent in prosecuting his contest. Provision for the taking of testimony in such cases is found in section 107, United States Revised Statutes, which reads thus:

"Time for taking testimony: In all contested election cases the time allowed for taking testimony shall be ninety days, and the testimony shall be taken in the following order: The contestant shall take

testimony during the first forty days, the returned Member during, the succeeding forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period."

The act of March 2, 1875, chapter 119, section 2, declares:

"That section 107 of the Revised Statutes of the United States shall be construed as requiring all testimony in cases of contested election to be taken within ninety days from the day on which the answer of the returned Member is served upon the contestant."

In this case the notice of contest was dated December 20, 1902. Mr. Butler's answer was served December 22, 1902. Contestant thereupon served an additional or supplemental notice of contest, to which the contestee made reply December 24. The statute makes no provision for the service of additional grounds of contest, and these amended specifications must be considered, if received at all, as served in the original notice of contest. (McDuffy v. Torpin, Stofer, 355; McCrary on Elections, 448.) Certainly after answer filed, a supplemental notice of contest can not be held to extend the time for the taking of testimony. Contestee's answer having been served December 22, 1902, the forty calendar days expired with the 31st day of January, 1903. Within those forty days contestant called no witnesses and took no testimony whatever. On the forty-second day (February 2), contestant proposing to take testimony, and having himself been sworn, counsel for contestee objected to the taking of any testimony whatever, and in his statement of objections said, inter alia:

"George D. Reynolds has slept on his rights, and the forty days during which Congress says testimony for contestee shall be taken have expired without his having taken any testimony whatsoever, and George D. Reynolds has, to all intents and purposes, abandoned his contest, and can not now revive the same in the time allotted to contestee in which to take testimony had he obeyed the mandatory provision of the law."

This and other objections were spread at length upon the record. Contestant was then himself examined, but testified simply to the service of notice of contest and of the additional grounds of contest. Two other witnesses testified also as to the service of these papers, and the papers themselves were put in evidence as exhibits, whereupon the further taking of testimony was adjourned until February 3. This was the forty-first calendar day after the service of the answer to the additional notice of contest and the forty-third after the service of the answer to the original notice. One witness was examined and an adjournment had to February 4 (the forty-fourth day). Two witnesses were then examined and an adjournment had to February 5 (the forty-fifth day). Depositions were also taken on the 6th, 7th, 9th, 10th, and 11th of February (the forty-sixth, forty-seventh, forty-ninth, fiftieth, and fifty-first days). No testimony was at any time taken by contestee and none by contestant between February 11 and March 31. Upon the latter date (the one hundredth day) certain testimony was taken by contestant. Also upon the 1st, 2d, 3d, 6th, 7th, and 10th of April (the one hundred and first, one hundred and second, one hundred and third, one hundred and sixth, one hundred and seventh, and one hundred and tenth days).

Contestant insists that in computing the time under the statute, Sundays and legal holidays must be excluded so as to leave forty working days. It has never been so considered and we can not take that view. Section 108 of the Revised Statutes, being part of the same act, referring to notice of intention to take depositions, requires that it "shall be served so as to allow the opposite party sufficient time by the usual route of travel to attend and one day for preparation, exclusive of Sundays and the day of service." The exclusion of Sundays in one section and not in the other is very significant. In section 1007 it is provided that in order to make a writ of error a supersedeas it must be served upon the adverse party "within sixty days, Sundays exclusive," and generally where Congress has intended to exclude Sundays it has so stated.

"Sundays are included in computations of time, except when the time is limited to twenty-four hours, in which case the following day is allowed." (Endich on Statutes, sec. 393.)

"In the computation of statute time an intervening Sunday is to be counted, unless expressly excluded by the statute." (King *v.* Dowdall, 2 Sand., 131 N. Y.)

Mr. Justice Brown, in Monroe Cattle Co. *v.* Becker (147 U. S., 55) states the general rule to be "that when an act is to be performed within a certain number of days and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation."

Subject to that rule we hold that the statute means calendar days. The contestant took no testimony whatever within the time prescribed by the statute, and some upon which he relies was taken many days after the statutory period, even if construed as he desires.

It is quite true that the statute providing and limiting the time for the taking of testimony is not binding upon this House, which under the Constitution is the only and absolute judge of the qualifications and elections of its Members. But, as has frequently been held, it furnishes a wise and wholesome rule of action and ought not to be departed from except for sufficient cause shown, or where the interests of justice clearly require. It would seem that contestant might have commenced and concluded his testimony in this case within forty days. Certainly he might have commenced. No reason whatever appears upon the record why he could not, or did not, but upon the argument before your committee it was stated that counsel for the present contestant were also counsel for Wagoner in his contest, and that some or all of them were engaged upon that case most of the time. There must, however, have been other counsel in St. Louis quite capable of taking such testimony as was taken in this case.

The report then goes on to cite testimony to show the character of the evidence produced. The contestant called the notaries public before whom testimony was taken in the case of Wagoner *v.* Butler, and by them proved carbon copies of the depositions taken in that case. The report says as to this procedure:

Mr. Butler was not present, either in person or by counsel, at this hearing, having previously given notice that he would not attend any hearing, as he protested against the right of contestant to take any testimony at all after the expiration of forty calendar days. Neither of the witnesses Moore and Halter were examined at all touching the case of Reynolds against Butler. They were called for the single purpose of introducing in that way the testimony of witnesses examined before them, as notaries public, in the Wagoner case. No notice was given Butler that the testimony of the witnesses in the Wagoner case was thus to be introduced, and the notice served upon him of contestant's intention to take testimony did not include even the names of Moore and Halter. Several other notaries before whom depositions were taken in the Wagoner case were also called, and in like manner there were introduced carbon copies of the depositions taken before them in the Wagoner case. The testimony of 21 witnesses in the Wagoner case was thus introduced April 10, 1903 (the one hundred and tenth day). These witnesses were examined in the Wagoner case between December 19 and December 27, 1902, and the only reason given for delay in introducing copies of their depositions in the Reynolds case was that the notary would not surrender carbon copies until his fees were paid.

It is not pretended that the testimony taken directly in this contest makes out a case against the sitting Member, but contestant relies upon the testimony taken in the Wagoner case and proved, or attempted to be proved, by the notaxies public in the manner above indicated. For the competency of this evidence his counsel rely upon Greenleaf on Evidence, section 553, which they cite in their brief as follows:

"In regard to the admissibility of a former judgment in evidence, it is generally necessary that there be a perfect mutuality between the parties, neither being concluded unless both are alike bound. But with respect to depositions, though this rule is admitted in its general principle, yet it is applied with more latitude of discretion; and complete mutuality is not required. It is generally deemed sufficient, if the matters in issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness."

That is not a fair citation, as it omits more than half of the section, particularly the following:

"If the power of cross-examination was more limited in the former suit in regard to the matters in controversy in the latter, it would seem that the testimony ought to be excluded."

Furthermore, it omits the fact, manifest from a reading of the entire section, and particularly in connection with section 163, that the learned author referred, in any event, only to cases in which the witnesses were dead or for some other reason not compellable to testify in person.

The matter in issue in the Wagoner case was the right to a seat in the Fifty-seventh Congress from the old district. The matter in issue in this controversy is the right to a seat in the Fifty-eighth Congress from the new district. The matters in issue are therefore not identical. The parties are not the same, except that Mr. Butler, the contestee here, was also the contestee in the Wagoner case. He certainly did not, in the Wagoner ease, have "full power to cross-examine" the witnesses touching the Reynolds case. His "power of cross-examination was more limited in the former suit, in regard to the matters in controversy, than in the latter." Indeed, in the Wagoner case, which related solely to a seat in the Fifty-seventh Congress, he had no opportunity to cross-examine witnesses at all concerning his controversy

with Reynolds for a seat in the Fifty-eighth. No questions concerning the Reynolds contest were asked in direct examination of the witnesses, and cross-examination concerning it would not have been in order. As a matter of fact, he did not cross-examine them at all in the Wagoner case. Doubtless he had his own reasons for not doing so. He may have thought it useless to make much of a fight in that district, and yet he might have been very anxious to cross-examine them touching the present contest, involving an election from a changed district more favorable to his party because of the elimination of sundry Republican precincts which had been in the old district. He was certainly under no obligation to cross-examine them in the Wagoner case, and the fact that he did not is no bar to his right to cross-examine them in this entirely different controversy.

It is asserted in contestant's brief that the elections were held by the same officers and by the use of the same official ballots, but he has failed to show even that fact by any evidence offered in the case. It is not claimed that the witnesses, whose testimony in the Wagoner case contestant seeks to introduce, are dead or were for any other reason beyond the reach of service of subpoena. So far as we are advised their presence could readily have been secured, and failure to call them was based purely on reasons of convenience and expense. Under such circumstances, copies of their depositions would not be admissible in a court of justice.

But there is a further objection. Section 108 of the Revised Statutes requires that the party desiring to take depositions in a contested election case "shall give the opposite party notice, in writing, of the time and place when and where the same will be taken, of the names of the witnesses to be examined and their places of residence." Mr. Butler was not given the names of the witnesses whose testimony, in the Wagoner case, it was proposed to introduce in this contest, and in at least one important instance the notice to him did not even give the names of the notaries public who were called as witnesses in this contest for the purpose of proving the depositions of numerous witnesses in the Wagoner case.

But, even if all the testimony offered by contestant were to be received and given its full effect, it is deficient in at least one very important particular. In the notice of contest it is alleged that over 10,000 illegal ballots were received and counted by the judges of election, and that "the parties so voting were not legally registered voters and were not entitled to vote at said election." We find upon examination. of the published report of the committee which passed upon the Wagoner case in the Fifty-seventh Congress that the result in that case was largely based upon the reception of illegal ballots from persons whose names did not appear upon the official printed registry sheets." We find in the record in this pending controversy, commencing at page 666, a paper entitled "Contestant's Exhibit No. 14 of February 4, 1903—James D. Halter, notary public, city of St. Louis, Mo." This exhibit purports to contain the depositions of 90 witnesses examined before J. T. Sanders, notary public, in the Wagoner case, between December 13, 1902, and January 3, 1903.

It does not appear from the record that Sanders, before whom the depositions were taken, was called as a witness, or that Halter, as notary public, took any depositions at all in this, the Reynolds case. We are therefore at a loss to account for the appearance in this record of these 90 depositions—We were inclined to think that Sanders, the notary public before whom depositions were taken in the Wagoner case, was called as a witness in this case before Halter, acting as notary public, and handed in carbon copies of the depositions of these witnesses, and that the contestant, while sending Exhibit No. 14, failed to return the deposition of Sanders showing the offering of the exhibit. A letter from contestant's counsel shows this to have been the case.

However that may be, we find among these 90 depositions, constituting the so-called Exhibit No. 14, that of Louis P. Aloe, who, in the Wagoner case, produced a book, concerning which he said:

"This is the complete printed register of the qualified voters of the Twelfth Congressional district for the election of November 4 and thereafter, 1902—that is, the official list."

It appears from the testimony that that book was marked "Exhibit C" in the Wagoner case. It was not printed with the testimony in that case. But it was undoubtedly submitted to and used by the committee in preparing its report. It was not, however, sent by contestant Reynolds to the Clerk of the House with the testimony in this case, nor produced before your committee, and therefore, although we find in the testimony what purport to be lists of the names of the persons who voted, showing also whether they voted for Butler or for Reynolds, we are utterly unable to tell who of said voters were registered and who were not, or to what extent such persons as were unregistered voted, either for Butler or for Reynolds.

Our conclusions are more succintly stated in the following

SUMMARY.

1. No part of contestant's testimony was taken within the forty days allowed by statute for that purpose, and some of it was taken as late as the one hundred and tenth day after answer filed. No good and sufficient reason has been shown for the delay.

2. The witnesses upon whose testimony contestant relies were not called and examined in this case, but he has introduced caxbon copies of their depositions, taken by a different contestant in a former case, concerning a seat in a different Congress, and from a different district. The present contestee was contestee also in the eaxlier case, but did not then have full power of cross-examination of said witnesses touching the present contest.

3. The contestee was not given the names of the witnesses in the former case whose depositions contestant proposed to introduce in this case, nor of his intention to introduce such testimony, and in some instances was not given in advance, as the statute requires, the names of the witnesses who were called in this case and by whom the depositions of the witnesses in the former case were proved or attempted to be proved.

4. There is no evidence that all or any of the witnesses, carbon copies of whose depositions in the Wagoner case have been introduced in this case, are dead or were for any other reason not compellable to attend and testify in this contest.

5. Neither the original nor any copies of the official registry lists having been furnished, it is impossible to determine what votes were illegal by reason of having been cast by unregistered persons as charged.

Upon the whole case your committee recommends the adoption of the following resolution, viz:

"Resolved, That Committee on Elections No. 2 shall be, and is hereby, discharged from further consideration of the contested election case of George D. Reynolds *v.* James J. Butler from the Twelfth Congressional district of Missouri."

After brief debate, from which it appeared that the report of the committee was practically unanimous, the resolution proposed by the committee was agreed to without division.

686. The Virginia election case of Beach v. Upton in the Thirty-seventh Congress.

Rule prescribed by the House for serving notice and taking testimony in a delayed election case.

Instance in 1861 of an election contest instituted by memorial.

In 1861, at the extraordinary session of the Thirty-seventh Congress, Mr. Charles H. Upton, of the Seventh Congressional district of Virginia, had been allowed the prima facie title to the seat, the House laying on the table a motion to refer his credentials to the Committee on Elections. Mr. Upton's credentials purported to show that he had been elected on May 23, 1861.

On December 6, 1861,[1] when the second or regular session of the Congress opened, there was presented a memorial of Mr. S. Ferguson Beach, denying the authority of Mr. Upton to hold his seat, and claiming that he had, himself, been elected Representative of the district on October 24, 1861.

On December 9, 1861,[2] Mr. Henry L. Dawes, of Massachusetts, reported from the Committee on Elections the following resolution, which was agreed to without debate:

Resolved, That S. F. Beach, contesting the right of Hon. Charles H. Upton to a seat in this House as a Representative from the Seventh district of the State of Virginia, be, and he is hereby, required

[1] Second session Thirty-seventh Congress, Journal, p. 7; House Report No. 42.

[2] Journal, p. 47.

to serve upon the said Upton, within six days after the passage of this resolution, a particular statement of the grounds of said contest; and that the said Upton be, and he is hereby, required to serve upon the said Beach his answer thereto in six days thereafter; and that both parties be allowed twenty days next after the service of said answer to take testimony in support of their several allegations and denials before some person residing in said district, or the District of Columbia, authorized by the laws of Virginia or of the United States to take depositions, but in all other respects in the manner prescribed in the act of February 19, 1851.

On February 3, 1862,[1] Mr. Upton presented as a question of privilege a resolution directing the Committee on Elections to summon before them certain of the election officers at one of the precincts of the district.

This resolution was laid on the table, the chairman of the Committee on Elections stating that the committee had all the testimony it required.

687. The election case of Morton and Daily from the Territory of Nebraska in the Thirty-seventh Congress.

The revocation of credentials having reversed the position of the parties, the House by resolution authorized investigation without regard to notice.

On July 8, 1861,[2] the House, without debate or division, agreed to the following:

Resolved, That the papers in the case of the contested seat for Delegate from the Territory of Nebraska be referred to the Committee on Elections, and that they be authorized to investigate and report on the same without regard to notice.

This was a case where Mr. Samuel G. Daily, who had taken testimony under the law of 1851 as contestant, had by reason of the revocation of the certificate of his opponent, become the sitting Member. And Mr. J. Sterling Morton, who had acted under the law as sitting Delegate, had become contestant.

688. The Senate election case relating to Simon Cameron, from Pennsylvania, in the Thirty-fourth Congress.

The Senate declined, on vague and indefinite charges of corruption, to investigate the election of a duly returned Member.

On March 11 and 13, 1857,[3] the Senate considered a report of the Committee on the Judiciary, which was as follows in regard to a protest signed by members of the house of representatives of Pennsylvania:

It is a general allegation "that the election of the said Simon Cameron was procured, as they are informed and believe, by corrupt and unlawful means, influencing the action and votes of certain members of the house of representatives," and the Senate of the United States is asked to investigate the charge.

The committee can not recommend that this prayer be granted. The allegation is entirely too vague and indefinite to justify such a recommendation. Not a single fact or circumstance is detailed as a basis for the general charge. Neither the nature of the means alleged to be corrupt and unlawful, nor the time, place, or manner of using them, is set forth, nor is it even alleged that the sitting Member participated in the use of such corrupt means, or, indeed, had any knowledge of their existence. Under no state of facts could your committee deem it consistent with propriety, or with the dignity of this body, to send out a roving commission in search of proofs of fraud in order to deprive one of its Members of a seat to which he is, prima facie, entitled; still less can they recommend such a course when the parties alleging the fraud and corruption are themselves armed with ample powers for investigation. If it be, indeed, true that members of the house of representatives of Pennsylvania have been influenced by

[1] Journal, p. 262; Globe, p. 608.

[2] First session Thirty-seventh Congress, Journal, p. 51; Globe, p. 26.

[3] Third session Thirty-fourth Congress, Appendix of Globe, pp. 387, 391; 1 Bartlett, p. 627.

corrupt considerations or unlawful appliances, the means of investigation and redress are in the power of the very parties who seek the aid of the Senate of the United States. Let their complaint be made to the house of which they are members, and which is the tribunal peculiarly appropriate for conducting the desired investigation. That their complaint will meet the respectful consideration of that house your committee are not permitted to doubt. If upon such investigation the facts charged are proven, and if they, in any manner, involve the character of the recently-elected Member of this body from the State of Pennsylvania, the Constitution of the United States has not left the Senate without ample means for protecting itself against the presence of unworthy Members in its midst.

There was debate and some dissent; but a resolution discharging the committee from further consideration, as requested by the committee, was agreed to without division.

689. The Senate election case relating to S. C. Pomeroy, of Kansas, in the Forty-second Congress.

The evidence being insufficient to show that the election of a Senator was effected by corrupt means, the Judiciary Committee asked to be discharged from consideration of the case.

On June 3, 1872,[1] in the Senate, Mr. John A. Logan, of Illinois, submitted the following report:

The Committee on Privileges and Elections, to whom was referred a certified copy of the report of the joint committee of investigation appointed by the Kansas legislature of 1872 to investigate all charges of bribery and corruption connected with the Senatorial elections of 1867 and 1871, met on the 20th of April, 1872, and directed the clerk of said committee to prepare an abstract of the evidence furnished by the said report of the legislature of Kansas. On the 23d of April your committee met and adjourned over until the 24th, when, on account of sickness in the family of Senator Thurman, the case was postponed until he should return from a visit home.

On May the 11th your committee met and adopted the following resolution:

"Resolved, That the chairman of the committee do ask the Senate for leave to send for persons and papers in reference to the elections of both 1867 and 1871, and that the committee have leave to sit in the vacation and to take testimony by either the whole committee or a subcommittee, at Washington or elsewhere; that, in asking for authority as aforesaid, the chairman be requested to state that the committee express no opinion upon the subject."

On the same day the Senate, in response to the request of the committee, adopted the following resolution:

IN THE SENATE OF THE UNITED STATES, *May 11, 1872.*

Resolved, That the Committee on Privileges and Elections be authorized to investigate the election of Senator S. C. Pomeroy, by the legislature of Kansas, in 1867, and the election of Senator Alexander Caldwell in 1871; that the committee have power to send for persons and papers; that the chairman, or acting chairman, of said committee, or any subcommittee thereof, have power to administer oaths, and that the committee be authorized to sit in Washington, or elsewhere, during the session of Congress and in vacation.

Attest:

GEO. C. GORHAM, *Secretary.*
By W. J. MCDONALD, *Chief Clerk.*

On the 13th of May your committee met, and, in accordance with the authority conferred upon them by the resolution of the Senate, directed all witnesses in reference to the charges against S. C. Pomeroy, Senator from the State of Kansas, to be summoned to, appear forthwith and testify in reference to said charges, and also the clerk of the committee was directed to make inquiry who is the present custodian of the books and papers of the late Perry Fuller, of Washington, D.C.; and, if such information can be had, that the party having possession of his account books, check books,

[1] Second session Forty-second Congress, Senate Report No. 224; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 426.

and bank books, for the time between December 1, 1866, and February 1, 1867, be summoned to appear with them.

On motion, the committee adjourned subject to the call of the chairman.

On the 21st day of May your committee was called together for the purpose of proceeding with the examination, a portion of the witnesses having arrived.

Senator Caldwell, of Kansas, appeared and urged an early examination and disposition of the question in reference to his election in 1871. Your committee, however, considering the time too short during the sitting of Congress to thoroughly investigate both Senatorial elections, concluded to proceed only with the investigation of the election of Mr. Pomeroy in 1867, leaving the case of Mr. Caldwell to be examined during the vacation of Congress, or at such time as may be agreed upon by your committee.

The examination of the witnesses in the case of Mr. Pomeroy was then proceeded with, and continued from day to day until the case was closed.

Your committee respectfully submit all the testimony, and report as follows:

1. That it appears from the evidence that two United States Senators were elected by the Kansas legislature in 1867, Mr. S. C. Pomeroy for a full term of six years, and Mr. Ross for an unexpired term of four years from the 4th day of March, 1867; that the candidacy of Mr. Pomeroy was generally understood by the people of Km3sas during the election of members of the legislature who were to elect Senators for the State of Kansas, and that the election of Mr. Pomeroy as one of those Senators was generally conceded; that all candidates against Mr. Pomeroy for the long term withdrew from the contest, save Mr. A. L. Lee. Mr. Pomeroy, in joint convention of the two houses of the legislature, received 84 votes; Mr. Lee received 25 votes; the disparity of votes being so great as to preclude of itself the idea that the election of Mr. Pomeroy, against the will of the constituents of those who voted for him, was procured by corrupt means.

2. There is no evidence that Mr. Pomeroy, or anyone for him, used any money or other valuable thing to influence any vote in his favor, or in any manner to bring about his election, except hearsay, and this is plainly contradicted by the direct testimony of the parties either to whom or by whom it is alleged such considerations were given.

3. The evidence that Mr. Pomeroy's canvass for Senator cost him considerable money is clearly shown to be the expenses paid by him for himself and friends during the Senatorial canvass, for hotel accommodations, disconnected entirely with the vote of any member, either for or against him.

4. The evidence shows that some of the friends of Mr. Pomeroy have been appointed to office under the Government of the United States, but fails to show that they were appointed in consideration of any vote or any influence used by them in procuring the election of Mr. Pomeroy, and your committee beg leave to say that they can find no fault with Mr. Pomeroy or anyone else (when they recommend for appointment to office) that they recommend their friends instead of their enemies.

5. It appears from the evidence that Mr. Pomeroy engaged, for a compensation to be made, the services of the Lawrence State Journal to advance the interests of the Republican candidates and of the Republican party in the State of Kansas in the year 1866, but it also appears that said journal broke its engagement, and supported the Conservative or Democratic ticket.

Your committee therefore, after maturely considering the testimony adduced before them, are clearly of the opinion that the charges of bribery and corruption against S. C. Pomeroy, connected with his Senatorial election by the Kansas legislature in 1867, totally fail to be sustained by any competent proof, but seem to have been urged for some purpose, unknown to your committee, beyond that of correcting existing evils. Your committee therefore beg to be discharged from the further consideration of the same.

O. P. MORTON,
B. F. RICE,
JOHN A. LOGAN,
H. B. ANTHONY,
MATT. H. CARPENTER,
Committee.

We concur with the other members of the committee in the finding that there is not evidence before us sufficient to show that Mr. Pomeroy's election was procured by the use of corrupt means; and having no definite, reliable information leading to the conclusion that further investigation would

develop such evidence, we concur in the recommendation that the committee be discharged from the further consideration of the subject. Here we think that our duty ends. We do not think it proper to impugn the motives of those who urged this investigation. The subject was brought to the notice of the Senate by the general assembly of Kansas, and, as it seems to us, a proper respect for that body precludes an imputation of improper motives.

We can not, therefore, concur in the last paragraph of the report, and there are other passages that do not meet our approval. For these reasons we have preferred to state our views in our own language.

A. G. THURMAN.
JOSHUA HILL.

In 1873,[1] at the third session of the Congress, another investigation was ordered on the motion of Mr. Pomeroy; and on March 3, the last day of the Congress, and the last day of Mr. Pomeroy's Senatorial term, a report was submitted discussing the testimony favorably to Mr. Pomeroy, but with minority views expressing the opinion that the charges were sustained.

690. The Senate election case of John T. Ingalls, from Kansas, in the Forty-sixth Congress.

The Senate decided to investigate the election of one of its Members on the strength of a memorial formulating specific charges, and accompanied by evidence relating thereto.

Bribery enough to affect the result not being shown, and the Member not being personally implicated, the Senate did not disturb his tenure.

An election inquiry instituted in the Senate by memorial.

On March 18, 1879,[2] at the beginning of the Congress, Mr. John J. Ingalls was sworn in as Senator from Kansas.

On March 19[3] the Vice-President presented the memorial of certain members of the. legislature of Kansas in relation to the election of Mr. Ingalls. This memorial was referred to the Committee on Privileges and Elections.

On March 27[4] the Vice-President laid before the Senate the authenticated report of a committee of the Kansas house of representatives which had investigated the election of Mr. Ingalls. This was referred to the Committee on Privileges and Elections.

The memorial[5] was addressed to the Senate, and signed by members of the legislature, who represented "that they have good reason to believe that" Mr. Ingalls "secured his election by acts of bribery and corruption." The memorial proceeds with ten specifications, naming instances of bribery or attempted bribery, as well as other matters tending to cast suspicion on the election. The charges as to bribery were specific, naming persons and sums of money.

The committee, on January 20,[6] reported a resolution authorizing it to investigate the charges and statements contained in the memorials, with power to compel testimony, etc., and on June 21 the resolution was agreed to without debate.

[1] Senate Document No. 11, special session Fifty-eighth Congress, p. 434.
[2] First session Forty-sixth Congress, Record, p. 1.
[3] Record, p. 15.
[4] Record, p. 75.
[5] Second session Forty-sixth Congress, Senate Report No. 277, pp. 2–4.
[6] First session Forty-sixth Congress, Record, pp. 2196, 2257.

On February 17, 1880,[1] the committee reported, embodying their conclusions in this resolution:

Resolved, That the testimony taken by the committee proves that bribery and other corrupt means were employed by persons favoring the election of Hon. John J. Ingalls to the Senate to obtain for him the votes of members of the legislature of Kansas in the Senatorial election in that State. But it is not proved by the testimony that enough votes were secured by such means to determine the result of the election in his favor. Nor is it shown that Senator Ingalls authorized acts of bribery to secure his election.

Three members of the committee presented views concurring in the main conclusion, but calling attention to the fact that persons opposing Mr. Ingalls's election had also resorted to bribery.

It does not appear that this resolution was acted on, Mr. Ingalls retaining his seat as a matter of course.

691. The Senate election case of Henry B. Payne, from Ohio, in the Forty-ninth Congress.

On the ground that the memorials and accompanying papers presented no allegations that proof existed to support the charges, the Senate declined to investigate the election of a Senator.

Discussion as to the extent to which probable cause should be shown to justify the Senate in investigating charges that an election had been procured by bribery.

Charges made by the bodies of a State legislature were not considered sufficient ground to justify the Senate in investigating the election of one of its Members.

No personal participation in bribery being shown, a Senator should be unseated only on proof that enough votes for him had been influenced corruptly to decide the election.

On March 4, 1885,[2] at the special session of the Senate, during the swearing in of the Senators-elect, the oath was administered to Mr. Henry B. Payne, of Ohio.

On April 27, 1886,[3] the President pro tempore laid before the Senate a letter from the clerk of the house of representatives of the State of Ohio transmitting testimony taken by a select committee of the house of representatives of Ohio, and the report of the committee as to charges against the official integrity and character of certain members of said house of representatives in connection with the election of Hon. Henry B. Payne as a United States Senator.

After a statement by Mr. Payne the papers were referred to the Committee on Privileges and Elections.

On May 4[4] Mr. George F. Hoar, of Massachusetts, presented a letter from the secretary of the committee of the Ohio house calling attention to interpolations in the document as printed by the Senate. The letter was referred to the Committee on Privileges and Elections, and the document as printed was recalled.

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[1] Second session Forty-sixth Congress, Senate Report No. 277.

[2] First session Forty-ninth Congress, Record, p. 1.

[3] Record, p. 3861.

[4] Record, p. 4118.

On May 11[1] Mr. Hoar presented a memorial of the Republican State committee of Ohio requesting the Senate to investigate charges of corruption in connection with the election of Mr. Payne. This memorial, as well as other papers of a similar tenor, including resolutions of both branches of the legislature of Ohio, presented at a later date, was referred to the Committee on Privileges and Elections.

On July 15[2] Mr. James L. Pugh, of Alabama, in behalf of a majority of the committee, including besides himself Messrs. Eli Saulsbury, of Delaware, Z. B. Vance, of North Carolina, and J. B. Eustis, of Louisiana, submitted a report asking that the committee be discharged and that the whole matter be postponed. Mr. William M. Evarts, of New York, in behalf of himself and Messrs. Henry M. Teller, of Colorado, and John A. Logan, of Illinois, submitted minority views concurring in the recommendation of the majority, but discussing the case somewhat differently. Mr. George F. Hoar, of Massachusetts, with Mr. William P. Frye, of Maine, submitted other minority views recommending an investigation.

The views submitted by Mr. Evarts embody fully the position of the majority of the committee and the issues of the case:

Upon undisputed facts it appears that of the general assembly of Ohio, as in session and constituted in January, 1884, each house contained a majority of members of the Democratic party; that at a joint caucus of that party held on Tuesday, January 8, upon the first ballot, votes were cast—for Mr. Booth, 1 vote; for Mr. Pendleton, 15 votes; for Mr. Ward, 17 votes; and for Mr. Payne, 46 votes; thus showing a majority in the caucus of 13 for Mr. Payne over the united vote of all the other candidates. In regular conduct of the election of Senator by the legislature Mr. Payne was elected, and his credentials were received by the Senate of the United States at the session of March, 1885, and Mr. Payne since then has held, and now holds, a seat as Senator from Ohio in this body. No action was taken by or before the legislature which elected Mr. Payne calling in question the validity of his election or the conduct of the same in the canvass, the caucus, or the legislature itself.

A new legislature, as in session and constituted in January in the present year, showed a majority of the general assembly of the Republican party, and on the 13th day of January the house of representatives adopetcl the following resolution:

"Whereas the Cincinnati Commercial-Gazette of January 12, 1886, contains a printed statement, on the authority of S. K. Donavin, alleging grave charges against the official integrity and characters of members of this house, namely, Hon. D. Baker, Hon. P. Hunt, Hon. W. A. Schultz, and Hon. Mr. Ziegler, so definite and precise in statements as to call for immediate action in order to vindicate the reputation of members of this house: Therefore,

"Resolved, That a select committee of five be appointed to inquire into all the facts of the charges so alleged, and report their conclusions to this house at as early a date as possible; and in the prosecution of this inquiry said select committee are empowered to send for persons and papers and to examine witnesses under oath."

The select committee commenced the taking of testimony under this inquiry on the 20th January, and concluded the same on the 6th April last. Two reports were made to the house, one presented by a majority of three, and the other by the minority of two. On April 16 the house adopted the following resolution:

"Resolved by the home of representatives of the sixty-seventh general assembly of the State of Ohio, That the clerk of the house be, and he is hereby, directed to transmit a copy, duly authenticated, of the testimony taken by the select committee appointed in pursuance of house resolution No. 28, and the report of said committee, to the President of the United States Senate, to be by him presented to that body."

The President pro tempore of the Senate laid before the Senate the testimony and reports, and the same were referred to the Committee on Privileges and Elections.

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[1] Record, p. 4344.

[2] Record, p. 6948 Senate Report No. 1490.

The majority report of the committee of the Ohio house presented as their "conclusion" the following statement:

"Although, as stated in the outset, the testimony developed nothing of an inculpating character concerning the members of this house named in the resolution of inquiry, we believe that circumstances, surrounding the election of Henry B. Payne as one of the Senators to represent the State of Ohio in the Congress of the United States, as presented by the testimony, are such as to warrant us in recommending that an authenticated copy of the testimony and report be transmitted to the President of the United States Senate for the information of the body of which Senator Payne is a member, and for such action as it may deem advisable."

The minority report presented as their conclusion the following statement:

"The minority of your committee, therefore, find, in conclusion, that there has been no testimony going to show that any unusual or improper methods were resorted to by any person with any member of the sixty-sixth general assembly to induce them to support, or that any member was unduly influenced to support, Hon. Henry B. Payne for either his nomination or election to the United States Senate."

It appears that when the select committee of the Ohio house of representatives was entering upon the inquiry before them the following correspondence took place between Mr. Payne and Mr. Cowgill, the chairman of the select committee, and that Mr. Payne was never advised by the committee that "any testimony tending to inculpate him in any degree with any questionable transaction" had been received, or any opportunity was afforded him of appearing before the committee:

"UNITED STATES SENATE,

Washington, D. C., January 22, 1886.

"HON. THOMAS A. COWGILL,

"Chairman, Columbus, Ohio.

"SIR: As one branch of the general assembly has appointed a special committee, of which you are the chairman, to investigate the conduct of the Democratic caucus which, in January, 1884, nominated a candidate for United States Senator, and as the matter is thus raised to the plane of respectability and placed in charge of intelligent and honorable gentlemen, I propose to give it appropriate attention. For myself, I invite and challenge the most thorough and rigid scrutiny. My private correspondence and books of account will be cheerfully submitted to your inspection if you desire it. I only insist, in case any testimony is given which in the slightest degree inculpates me, I may be afforded an opportunity of appearing before the committee.

"I am, very respectfully, your obedient servant,

H. B. PAYNE."

"COLUMBUS, OHIO, *Jauuary 25, 1886.*

"HON. H. B. PAYNE,

"United States Senate, Washington, D. C.:

"SIR: I acknowledge the receipt of your favor of the 22d instant, wherein you note the fact that a special committee of the Ohio house of representatives has been appointed to investigate the conduct of the Democratic caucus, which, in January, 1884, nominated a candidate for United States Senator, and you also declare that you propose to give the investigation appropriate attention.

"In reply, I have to say that the resolution to which you refer recites the fact that allegations of bribery, published on authority of S. K. Donavin, are of so grave and positive character as to call immediate action in order to vindicate the reputation of members of the present general assembly. It directs the special committee to 'inquire into all the facts of the alleged bribery, and report their conclusions thereon to the house.'

"If in the prosecution of this inquiry any testimony tending to inculpate you in any degree with any questionable transaction be received, I assure you that your request to appear before the committee in such event will be most cordially and fully acceded to.

"Very respectfully,

THOMAS A. COWGILL, *Chairman.*"

Instead of attempting a selection or summary of the testimony transmitted to the Senate by the Ohio house of representatives, for the illustration or support of our views and conclusions as to the proper

disposition of the matter referred to the Committee on Privileges and Elections, we have thought it eminently just to accept as the basis of our observations the two careful and intelligent presentations of the testimony to the Ohio house of representatives by the majority and minority reports of the select committee.

Your committee were addressed by two honorable Members of the House of Representatives from Ohio, Mr. Little and Mr. Butterworth, in exposition and enforcement of the testimony and of the just rules and principles which should govern your committee in their disposition of the matter before them. Subsequently, and while the committee was deliberating upon the case as submitted to them, these honorable gentlemen placed before your committee certain suggestions in the nature of corroborative or cumulative evidence, which we append, with the majority and minority reports to which we have referred, to accompany our report. These supplementary suggestions we have justly given this prominence to, as indicating in nature, if not in substance, what might be shown in testimony if an investigation should be entered upon by the Senate.

The only constitutional rights, powers, and duties which can sustain, or properly induce, an investigation such as is presented for the consideration of the Senate by the honorable house of representatives of the State of Ohio, arise from two separate and independent clauses of the Constitution:

By the first clause of section 5 of Article I of the Constitution each House of Congress is made "the judge of the elections, returns, and qualifications of its own Members."

By the second clause of the same section each House may, "with the concurrence of two-thirds, expel a Member."

As these two ends alone limit the basis and object of any investigation proposed, either for invalidating the election of a Senator or expelling from the Senate a duly elected and qualified member of it, a scrutiny of the grounds, in fact, upon which such action is demanded in any case arising from the Senate requires an ascertainment whether the scope of the proposition and the testimony presented, or reasonably assured, would justify the ultimate action of the Senate under one or the other of these clauses of the Constitution. We do not understand that the house of representatives of Ohio presents any case upon the testimony taken or imagined to be accessible to any investigation by the Senate, or upon any allegation of the existence of facts suspected, though not probable, as would affect Mr. Payne with such personal delinquency or turpitude as would invite or tolerate his expulsion from the Senate for his participation in the transaction which resulted in his election. The examination of the testimony suggests no support for such an imputation, and the course of the select committee in not giving Mr. Payne an opportunity to be heard before them precludes any intimation that such a notion was entertained for a moment by that committee or the Ohio house of representatives.

We do not understand that any member of the Committee on Privileges and Elections has harbored or expressed the idea that the testimony taken, or suggested as accessible or possible, touches the subject of this personal inculpation of Mr. Payne. We shall therefore confine our further discussion of the matter, as presented for the investigation or action of the Senate, to the question arising upon the validity of Mr. Payne's election and the declaration of his seat in the Senate vacant for such cause.

It is no doubt supposable that an election may be vitiated by fraud, corruption, and bribery without the Member unseated being accused even of personal participation in the fraud, corruption, or bribery by which his election was compassed. If the election is thus vitiated, the Member's seat can not be saved by his personal exculpation and vindication. The integrity of the election, and not of the Member, is in question under this clause of the Constitution.

But, on the same reason, the investigation, which now deals with the election as vitiated and not the Member as innocent, must reach the proof that the fraud, corruption, or bribery embraces enough in number of the voting electors to have changed, by these methods, the result of the election. If these corrupted votes gave the innocent Member his seat, the deprivation of these corrupted votes vacates his seat, however innocent he is. But, if the uncorrupted votes were adequate to his election, and he is purged from complicity in the fraud, corruption, or bribery, his seat is not exposed to any question of validity in the election.

Upon a reference to the testimony presented by the Ohio house of representatives, and sifted and emphasized by the select committee's majority and minority reports, we are able to ascertain the number of members of the general assembly of Ohio that have been brought into inculpation, the degree and weight of evidence affecting each of them, and the conclusions of these two committees as to what had been proved, or could be expected to be proved, as bearing upon each of these members.

As to four members, viz, Messrs. Baker, Hunt, Schultz, and Ziegler, being the members of the house of representatives of 1886 upon charges against whom the general investigations were set on foot, we find the committee, by the majority report, declare that "the testimony developed nothing of an inculpating character concerning the members of this house named in the resolution of inquiry." The minority report express their conclusions to the same effect, as follows:

"That there has been absolutely nothing found in any way compromising the four members charged, and they are wholly exonerated from the charges made, and stand to-day without the shadow of a suspicion attaching to them in regard to conduct unbecoming members of this house."

As to two members of the house, viz, Mr. Kahle and Mr. Hull, the majority report names them as "two instances in which attempted bribery in the Senatorial canvass was reported by members of the Sixty-sixth general assembly," and sets forth, as the report expresses it, "the testimony taken as to what those members reported" "in brief." Both Mr. Kahle and Mr. Hull were active and earnest supporters of Mr. Pendleton in the canvass and so continued to the end, voting for Mr. Pendleton in the caucus and in the legislature. The evidence respecting these two members, as given or commented upon by the majority and minority reports, we refer to, conformably to our declared purpose, without attempting any observations of our own upon the testimony. For the immediate consideration now presented it is sufficient to say that no diversion from Mr. Pendleton's support to Mr. Payne's was effected as to these two electors.

The select committee names in the majority report two senators and two representatives and speaks of them as follows:

"Rumors as to suspected bribery with which were connected the names of Messrs. Mooney and Roche, members of the house, and Messrs. White and Ramey, members of the senate, of the Sixty-sixth general assembly, all of whom voted in caucus for Henry B. Payne for United States Senator, were traced by the committee until developments which were regarded as important were reached, as follows"—

giving the testimony bearing upon each, as viewed by the majority of the committee. The minority report takes up the case of each of these members and comments upon the evidence which it adduces from the testimony, and declares as to each of them that the testimony justifies no imputation upon any one of them. We again, without any observations of our own on the evidence, refer to the majority and minority reports on this topic.

It is proper that we should call the attention of the Senate to the very explicit and candid statement of the majority report as to the reach and scope which were given to the investigation and of the distinction drawn between the testimony at large and the report itself, as the latter containing "no facts" "which are not sustained by testimony upon which a legislative body might base further action." This report says:

"Whenever our attention was called to anything which indicated the probable employment of improper means to gain support, we followed the clews presented, on the theory that we were not only authorized, but in duty bound, to pursue any matter that promised, even remotely, to show the use of such means in connection with the election, because the discovery of one important fact, although having no immediate bearing upon the charge against the persons named in the resolution, might lead to the discovery of facts having such bearing. And furthermore, and upon the same theory, our inquiries were not confined to the technical rules of legal proof, but the committee availed itself of any source of information—admitted hearsay statements and even the opinions of witnesses. But we consider that in making this report no facts should be stated which are not sustained by testimony upon which a legislative body might base further action."

The minority report thus speaks of the completeness of the investigation instituted by the committee:

"Your committee, in its anxiety that nothing, however trivial and remote, that might have, either directly or indirectly, any possible bearing on the matter under consideration, have exercised the greatest liberality possible in the taking of testimony, which has extended the scope of its inquiry far beyond the limits that could be given the most liberal construction of the resolution."

As the result of this wide investigation it does not appear that the select committee recommended any action by the legislature looking to a further investigation, or to the incrimination or punishment in the courts of law of any persons named in the report, nor that the legislature itself has proposed any

action in such directions, or either of them. Indeed, the whole recommendation of the committee to the house of representatives is in these words:

"That an authenticated copy of the testimony and report be transmitted to the President of the United States Senate for the information of the body of which Senator Payne is a member and for such action as it may deem advisable."

In pursuance of this recommendation the house of representatives communicated to the senate the testimony taken and the reports of the committee, which are before the Committee on Privileges and Elections. The only action taken by either house of the general assembly of Ohio since that has been brought to the attention of the Senate or of its committee is shown in a resolution of the senate of Ohio and one of the house of representatives, as follows:

"Senatorial election in Ohio.

"[Senate resolution—Mr. Hardacre—No. 58.]

"Whereas by common report, suggested and corroborated by the public press of the State without respect to party, and by a recent investigation of the house of representatives, the title of Henry B. Payne to a seat in the United States Senate is vitiated by corrupt practices and the corrupt use of money in procuring his election; and

"Whereas it is deemed expedient, in order to secure a thorough investigation of his said election as Senator by the United States Senate, that the belief of the general assembly in this regard be formulated in a specific charge: Therefore, be it

"Resolved, That in the opinion of the general assembly, and it so charges, the election of Henry B. Payne as Senator of the United States from Ohio, in January, 1884, was procured and brought about by the corrupt use of money, paid to or for the benefit of divers and sundry members of the Sixty-sixth general assembly of Ohio, and by other corrupt means and practices, a more particular statement of which can not now be given.

"Resolved, That the Senate of the United States be, and the same is hereby, requested to make a full investigation into the facts of such election so far as pertains to corrupt means used in that behalf.

Resolved, That the governor be, and is hereby, requested to forward a copy thereof to the President of the Senate of the 'United States.

"I hereby certify that the foregoing is a true and correct copy of said resolution, as the same appears upon the senate journal of Friday, May 14, 1886, after being changed from a "joint" to a "senate resolution, and adopted by the senate.

"C. N. VALLANDIGHAM, *Clerk Ohio Senate."*

[H. R. No. 89—Mr. Brumback.]

"Whereas it is the precedent in the United States Senate that charges of bribery must be directly made to warrant a committee of said body in proceeding to investigate the title of any United States Senator to his seat: Therefore,

"Be it resolved by the house of representatives of Ohio, That in the investigation made under house resolution No. 28, ample testimony was adduced to warrant the belief that the charges heretofore made by the Democratic press of Ohio are true, to wit: That the seat of Henry B. Payne in the United States Senate was purchased by the corrupt use of money; and

"Further resolved, That the honor of Ohio demands, and this house of representatives requests, that the said title of Henry B. Payne to a seat in the United States Senate be rigidly investigated by said Senate; and

"Further resolved, That the governor of Ohio be requested to forward a copy of this resolution to the President of the United States Senate.

"IN HOUSE OF REPRESENTATIVES.

"Adopted May 18, 1886.

"Attest:

"DAVID LANNING, *Clerk*."

Upon the whole matter as presented, in evidence and argument, to the Committee on Privileges and Elections, we are of opinion that there is no evidence which purports to prove that fraud, corruption, or bribery was employed in the election of Mr. Payne affecting the votes, given either in the caucus or

in the legislature, whereby the election was carried by corrupt votes to the effect of his election. Nor, in our opinion, is there any allegation that proof exists or would be forthcoming to the extent that would vitiate the election of Mr. Payne by reason of the necessary votes, in caucus or in the legislature, for his election having been obtained by fraud, corruption or bribery.

We are of opinion, therefore, that under the first clause of the fifth section of Article I of the Constitution the testimony and other considerations placed before the Senate do not warrant the Senate in instituting by itself an investigation looking to the unseating of Mr. Payne as a member of the Senate.

We have in our conclusions made no distinction between the use of fraud, corruption, or bribery in a caucus vote or in the legislative vote for a Senator. Although a caucus, or what proceeds in it, has no constitutional or legal relation to the election of a Senator, yet, by the habit of political parties, the stage of determination as to who is to be elected Senator, and the influences, proper or improper, that produce that determination, is that which precedes and is concluded in the caucus. So far as the question of personal delinquency or turpitude is concerned, no moral distinction should be taken between corrupt proceedings in caucus and those in the legislature. How far any such distinction would need to be insisted upon in any case, on the question of unseating a Senator, where he himself was not affected with any personal misconduct or complicity with the misconduct of others, we have no occasion, in the immediate case or attitude of the subject, to consider or suggest.

At the outset of our observations we stated the limits which properly should control the action of the Senate under the applicable clauses of the Constitution, and by the same reason the ends which should be proposed in its investigations and to which they should be confined. It is obvious that the province and duty of a State in its investigations of fraud, corruption, and bribery in an election of Senator are much more extensive. A State is not confined at all to the question whether the actual election brought in question involves the Senator personally in misconduct, or whether enough votes for him were effected by fraud, corruption, or bribery that would require his seat to be vacated, although himself free from imputation.

The State should execute its laws respecting the purity of Senatorial elections by the indictment and conviction of a single person who bribes or is bribed, whether the election is affected or not. The State should investigate as well to the end of better laws and surer execution of the laws. The State, too, is charged with the maintenance of "the honor of Ohio," and its vindication rests with its own legislation, its own judiciary, and its own people; but it can not demand this vindication at the hands of the United States Senate, except as that may flow from investigations by that body within the limits of its constitutional powers and duties.

That State has conducted and concluded its investigations into the election of Mr. Payne, and has placed the result before the Senate of the United States. It has attempted no further investigations either by the plenary power of its legislature or through the functions of the courts of law. If, upon further examinations made by the State, through its legislature or its courts, a case should be presented for renewed consideration by the Senate, within the rules and principles we have stated as governing the action of the Senate, the further action of the Senate will be governed by what may then appear. As the whole matter now stands before the committee, we concur in its judgment that an investigation should not be instituted by the Senate, and the committee be discharged from the further consideration of the subject, and for the reasons which we have thus given.

The views submitted by Mr. Hoar take issue with the position of the majority:

The senate and house of representatives of the State of Ohio, and the Republican State committee, representing the political party which for much the larger portion of the last thirty years has contained a majority of the voters of that State, have each addressed a memorial to the Senate charging that the election of the sitting member was procured by bribery and corruption, and praying the Senate to cause an investigation into said charges. Two gentlemen of high character and position, Messrs. Little and Butterworth, both now Members of the other House from the State of Ohio, the former lately attorney general of that State, appeared before the committee, declared their personal belief in the truth of the charge, asserted that in their opinion the belief is entertained by a large majority of the people of Ohio of both political parties, and asked to be permitted to lay before the committee evidence to support it. Besides Messrs. Little and Butterworth eight of the Ohio delegation in the House add their earnest request

to the same effect, affirm that the investigation is demanded by a large majority in number and influence of the press of the State, say that additional testimony is in the possession of Messrs. Little and Butterworth, and express their belief that "if opportunity is offered, the charges of the Ohio senate will be sustained by testimony to your full satisfaction."

Before the memorials above referred to were presented there had been presented to the Senate for its information the evidence taken by a committee of the house of representatives of Ohio, who were directed to investigate charges of corruption in said election against four members of the present house of representatives of Ohio, being the only members of the legislature who made the election against whom allegations of bribery were made who have been continued in the public service, and the conclusions of the committee upon said evidence. Messrs. Little and Butterworth also produced certain affidavits and letters stating confessions of persons implicated, and pointing out other sources where evidence would probably be obtained if lawful authority should be given by the Senate to procure it.

We think this presents a case where it is the duty of the Senate to permit the petitioners to present their evidence and to authorize the issue of proper process to aid them in procuring the attendance of witnesses.

The Constitution declares that "each House shall be the judge of the elections, returns, and qualifications of its own Members." The Senate is the only court which has, or under the Constitution possibly can have, jurisdiction of this question. There can be no trial, inquiry, or adjudication anywhere else to which this inquiry is not totally foreign and immaterial. The courts in Ohio may exercise jurisdiction of the offense of bribery of or by an individual. But the question whether the result of an election of Senator was thereby changed can never be before those courts. Either house of the legislature may inquire as to the personal turpitude of its own members. But the action which may result from such investigation must be precisely the same, whether other persons also were or were not corrupted and whether the choice of Senator were or were not affected.

As the Senate is the only court that can properly try this question, so the charge is made, if not in the only way it can be made, yet certainly in the way beyond all others in which it can be made with most authority. The legislature of Ohio is the representative of the dignity, interest, and honor of the State. It appoints the Senators of the United States, and if a vacancy in the office exist it must fill it. It is supported in this charge by the committee who are, under our political customs, the organ of more than half the voters of the State concerned.

For the Senate to refuse to listen to this complaint, so made, would, it seems to us, be, and be everywhere taken to be, a declaration that it is indifferent to the question whether its seats are to be in the future the subject of bargain and sale, or may be presented by a few millionaires as a compliment to a friend. No more fatal blow can be struck at the Senate or at the purity and permanence of republican government itself than the establishment of this precedent.

But the case does not rest alone upon the charge and character of the parties who make it and who ask to be permitted to produce evidence in its support. If it did, it, in our judgment, would be enough. It is surely a strange answer to be given by a court to a suitor to say that it has already considered the question and decided the case before it is presented.

But the petitioners adduce strong reasons to show probable cause that they can establish their case. The testimony taken by the committee in Ohio has been referred to us. Our attention has also been called to evidence pointing to a large mass of additional testimony. The committee of the Ohio house has power only to inquire into the conduct of four members of that body. They report that—

"A number of clews furnished were not followed, because we were convinced that they could lead only to points at which further pursuit would become necessary, but which could not be passed without authority to reach beyond the limits of the State for witnesses, and much anonymous information was ignored by the committee chiefly for the same reason."

We have examined the evidence taken by that committee. It does not support the charges as to the four members implicated; it does not connect Mr. Payne with the transactions; it does not show that the result was changed or effected by corrupt means. But it does show that Mr. Payne's name was not publicly suggested as a candidate for Senator until after the State election; that it was not very prominently suggested until shortly before his election in January; that many persons who had been supposed to favor Pendleton voted for Payne; that there was a widespread belief that corrupt means were

used to procure the result; that one member was offered a large sum of money by another member to vote for Payne; that there were hearsay statements charging corruption as to several others; that two members of the legislature received large sums of money about the time of the election, of which they, being called as witnesses, gave no satisfactory account; that the prominent managers of Mr. Payne's canvas, viz, Paige, McLean, Huntington, and Oliver H. Payne, did not testify before the committee. There was no evidence tending to show the bribery of any particular member, except as above stated.

When we say it was not shown that the result was changed or effected by corrupt means, we are speaking of direct testimony. But the consideration should not be forgotten that where persons familiar with the whole case would be quite sure to know whether such means were needful to change the result, or whether their candidates would be elected without it, if they are found expending large sum of money corruptly the fact alone affords strong reason for the inference that the result was thereby controlled. But the result of the investigation in Ohio seems to the undersigned absolutely unimportant. That committee, while they took a wider range of inquiry than the matter committed to them, neither had, nor conceived they had, any power to inquire into Mr. Payne's title to his seat. They issued no process extending beyond the limits of Ohio. They report no conclusion, except as to the four members. When witnesses refused to answer, they did not press them. They went beyond the scope of the resolution appointing them only, as they say, "to gain something like a comprehensive view of the situation."

The Ohio senate of 1883–84 contained 33 members. Of these, 22 were Democrats and 11 Republicans. The house contained 105 members, of which 60 were Democrats and 45 Republicans. The members entitled to vote on joint ballot were 138 in all, 82 Democrats and 56 Republicans. Eighty-two persons were entitled to vote in the Democratic caucus, of whom 42 were a majority. Seventy-nine persons actually attended that caucus, of whom 40 were a majority. Is there fair reason for instituting an inquiry whether the result of the election was procured by bribery? We think that the character of the persons making the charge is of itself sufficient to require the Senate to listen to it. But they produce a great body of evidence, all pointing in the same direction.

We are not now to consider whether the case is proved, or even whether there be a prima facie case. There has as yet been no evidence laid before us addressed to either of these considerations. That can not be done without the issue of process for the attendance of witnesses. Messrs. Little and Butterworth now offer, on their personal responsibility, to establish to the satisfaction of the Senate, largely by witnesses who were not within the reach of the Ohio committee, and partly by evidence which strengthens, supplements, and confirms that which was before that committee, the following among other propositions:

First. That of the Democratic members elected to the sixty-sixth general assembly more than three-fourths were positively pledged to Mr. Pendleton and General Ward, and more than a majority pledged to Mr. Pendleton. This they offer to prove by Mr. Pendleton himself, by Col. W. A. Taylor, and others.

Second. That in these pledges these members represented the opinion and desire of their constituents.

Third. That Mr. Payne was nowhere spoken of or known as a candidate during the popular election, or until a very short time before the appointment of Senator.

Fourth. That just before the legislative caucus, where the nomination was made, which was one week before the election, large sums of money were placed by Mr. Payne's son and other near friends of his at the control of the active managers of his canvass in Columbus. This they allege can be shown by the books of one or more banks.

Fifth. Mr. Payne's near friends declared that his election had cost very large sums.

A gentleman whose name is offered to be given will testify that David R. Paige declared to him that he had handled $65,000.

Oliver B. Payne stated to the same person that it had cost him $100,000 to elect his father.

Sixth. That the members of the legislature who changed from Pendleton to Payne did so after secret and confidential interviews with the agents who had the disbursement of these moneys.

Seventh. That members of the legislature who so suddenly changed their attitude can be proved to have, at about the time of the change, acquired large sums of money, of which they give no satisfactory account.

Eighth. Respectable Ohio Democrats affirm that just before the caucus the room of Mr. Payne's manager, Paige, "was like a banking house;" that the "evidence of large sums of money there was

abundant and conclusive;" that Paige's clerk declared in the presence of a gentleman of integrity that "he had never seen so much money handled in his life."

Ninth. That the public belief that the choice of Senator was procured by the corrupt use of money prevails almost universally in Ohio among persons of both parties, which finds very general expression in the press.

Tenth. That there is specific proof leading with great force to the conclusion that each of 10 members will be shown to have changed their votes corruptly, and thereby that the result was changed.

The Senate has also recently referred to the committee certain resolutions adopted by a convention of the Republican editors of Ohio, held at Columbus, July 8, 1886, praying the Senate to investigate these charges. The newspaper reports of the convention show that the governor of the State was present at the convention, and declared his concurrence in said prayer. There have also been communicated to us extracts from the Democratic newspapers of Ohio, showing that a majority of those papers have declared their opinion that the election was procured by corruption. Copies of these extracts are appended.

What is the effect upon an election of Senator of bribery of voters in a caucus of the legislators who are to make the choice is a question upon which we prefer not to form an opinion until the evidence is before us. The members of a caucus ordinarily deem themselves bound in honor to vote in the election for the person whom it nominates by the vote of a majority, on condition that such person belong to their party and is fit for the office in point of character and ability. Bribery, therefore, which changes the result in the caucus would ordinarily determine the election.

If B, C, and D have promised to vote as A shall vote, if A be corrupted four votes are gained by the process, although B, C, and D be innocent. In looking, therefore, to see whether an election by the legislature was procured or effected by bribery, it may be very important to discover whether that bribery procured the nomination of a caucus whose action a majority of the legislature were bound in honor to support. Seventy-nine persons attended the Senatorial caucus and voted on the first ballot. Of these Mr. Payne had the votes of 46, Ward 17, Pendleton 15, Booth 1. If 6 only of Mr. Payne's votes in the caucus were procured by bribery, the result of the election of Senator was clearly brought about by that means. Now, Messrs. Little and Butterworth tender specific proof, part of which was before the Ohio committee and part here offered for the first time, directly and very strongly tending to create the belief as to each of 10 of the members of the Ohio legislature that his vote for Mr. Payne was purchased and that proper process and inquiry will establish the fact by competent and sufficient evidence.

One member after the caucus deposited $2,500 in two amounts, and being charged that it was the price of his vote, did not persist in a denial.

Another, who changed to Payne, just before the caucus stated to a colleague that he was offered $5,000 to vote for Payne, and intended to accept it, and tried to induce his colleague to do the same. That person's wife just afterwards deposited $2,500 in a bank in Toledo, took a certificate therefor, which she transferred to her husband.

Another who is claimed to have changed suddenly from Pendleton to Payne is found making, soon after, expenditures amounting to $1,600 with his own money on land, the title to which was taken in the name of his father, who paid $2,000 for it about the same time. The father and son lived together in the same house. The son testified that he did not know where the father got the money to pay the $2,000. The father refused to state where he got his $2,000, and said he did not know where the son got the $1,600, and if he did he would not tell. The same member also made other large payments of money about the same time.

Another, who had to borrow money when he went to Columbus, and changed suddenly from Pendleton to Payne, was shown just after the election to be in possession of money to purchase property, refurnish his house, etc. He was denounced by another member as having sold his vote. He turned exceedingly sick, made no denial, and was taken away. Two others, elected as antimonopolists, became supporters of Mr. Payne and were heard discussing together the amount of money each had received. Another, who had before been for another candidate, but voted for Mr. Payne, received from Oliver B. Payne $3,500, which he said was a loan. Another, according to affidavits produced by Mr. Little, was declared by a fellow member to be claiming $3,500 for his vote. Another, who had been very earnest in support of Pendleton, visited the room of Mr. Payne's managers, where the large sums of money are alleged to have been seen, and immediately afterwards voted for Mr. Payne.

The committee received this communication from Messrs. Little and Butterworth in addition to the statements made by them at the hearing:

"HON. GEORGE, F. HOAR,

"CHAIRMAN OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, UNITED STATES SENATE:

"DEAR SIR: Since our appearance before your committee the last time we have received information, deemed by us important, bearing upon the question of investigation, and desire to indicate its general character.

"First. We have information, regarded as trustworthy, that a member of the sixty-sixth general assembly, one of the sudden converts to Payne, with meager means and without financial credit prior to January, 1884, was able to and did deposit in bank to his own credit shortly after the election, to wit, February 13, 1884, $1,350, besides showing other signs of prosperity not accountable for in ordinary ways.

"Second. We can show by witnesses, whose credibility will not be questioned, that just prior to the meeting of the caucus at which Mr. Payne was nominated he (witness) was, in the interest of Payne, summoned by telegraph to Columbus. He went, and was asked by Payne's managers what sum of money would be required to withdraw the vote of the representative of his (witness's) county from Pendleton and give it to Payne. The question was squarely and seriously addressed to witness: 'How much money does he (the representative) want?'

"Third. We have from reliable sources additional information of a convincing nature pointing to bribery, consisting of conversation, statements, and admissions of implicated members and others, which we are not at liberty to state more explicitly in this communication, owing to the conditions under which the information is imparted, but which, with the other matters referred to, we can verbally communicate to you in more particular form if desired.

"In the line of matter heretofore submitted we deem it worth while to give this additional instance:

"Fourth. We quote from a letter in our possession from a responsible person in Ohio, omitting names:

"'Our representative, ———, had been elected as a Pendleton man and had agreed ——— to support Pendleton. A few days before the caucus it was whispered that "——— had been seen" and that he would vote for Payne. A telegram was at once sent from hereto ——— (the member) by leading Democrats, warning him against such a course, and ——— and others at once went to Columbus and saw the member. He hooted at the idea that he would vote for Payne. ——— assured Pendleton that the member would support him. ——— then came home feeling confident that the member would not disappoint him.'

"This member was interviewed in the presence of a friend of Mr. Pendleton and asserted his devotion to him, but was suspected and watched. As the hour of the caucus approached it was noticed that he was not present. The friend of Mr. Pendleton went to his room for him. We quote further:

"'He found him in company with one of the men who handled the "boodle," and he was much embarrassed by ———'s presence. But he went to the caucus with ———, and on the way again asserted his allegiance to Pendleton. If I remember correctly, ——— said they had printed ballots for both candidates and that he gave ——— (the member) a Pendleton ticket. But when the vote was taken, ——— (Pendleton's friend) observed that ——— (the member) wrote something on a piece of legal cap and then tore it off. He afterwards discovered that ——— (the member) put in the hat the same piece of paper, and then ——— (Pendleton's friend) went to ———'s (the member's) desk and tore off a piece of the legal cap large enough to include the small piece torn off by ——— (the member). I think ——— (Pendleton's friend) was one of the tellers. At any rate, he got the ballot which fitted the piece of legal cap, and which ——— had voted, and found that Payne's name was on the ballot.'

"This member was thereupon charged by the Democratic county paper of his county with betrayal, etc.

"We do not question that the facts can be shown substantially as indicated with respect to the member referred to.

"Should this information not be used, names and means of identity placed on record would or might lead to annoyances for no purpose. They are, therefore, not here given.

"Your committee, we will venture to add in conclusion, will not overlook the fact that our showing,

made in the face of a most persistent and powerful opposition, of unlimited means and expedients, has been one for an investigation, and not final action following an investigation.

"Very respectfully,

"JOHN LITTLE,
"BENJ. BUTTERWORTH."

It is said that much of this is hearsay and that taken together it is insufficient to establish a case which will overcome the presumption arising from the certificate of election. We are not now dealing with that question. The Senate is to determine whether there is probable cause for an inquiry. Any man who lays a claim to any property, real or personal, may institute his process at pleasure, and compel the courts to hear and try the case. Even a criminal accusation requires only the oath of the accuser, who is justified, if he has probable cause.

It will not be questioned that in every one of these cases there is abundant probable cause which would justify a complaint and compel a grand jury or magistrate to issue process and make an investigation. Is the Senate to deny to the people of a great State, speaking through their legislature and their representative citizens, the only opportunity for a hearing of this momentous case which can exist under the Constitution? We have not prejudged the case, nor do we mean to prejudge it. We sincerely trust that the investigation, which is as much demanded for the honor of the sitting Member as for that of the Senate or the State of Ohio, may result in vindicating his title to his seat and the good name of the legislature that elected him.

But we can not consent to be accomplices in denying justice to either. We do not believe the American people will be satisfied that the Senate should refuse to hear this case either on the ground that some other tribunal has tried some other case, or on the ground that it has already been decided without hearing or evidence, or on the ground that a bribe paid for a vote in a legislative caucus is not understood by both parties to include a vote in the legislature for the candidate of that caucus.

How can a question of bribery ever be raised or ever be investigated if the arguments against this investigation prevail? You do not suppose that the men who bribe or the men who are bribed will volunteer to furnish evidence against themselves? You do not expect that impartial and, unimpeachable witnesses will be present at the transaction. Ordinarily, of course, if a claim like this be brought to the attention of the Senate from a respectable quarter that a title to a seat here was obtained by corrupt means the Senator concerned will hasten to demand an investigation. But that is wholly within his own discretion, and does not affect the due mode of procedure by the Senate. From the nature of the case the process of the Senate must compel the persons who conducted the canvass and the persons who made the election to appear and disclose what they know; and until that process issue you must act upon such information only as is enough to cause inquiry in the ordinary affairs of life.

The question now is not whether the case is proved—it is only whether it shall be inquired into. That has never yet been done. It can not be done until the Senate issues its process. No unwilling witness has ever yet been compelled to testify; no process has gone out which could cross State lines. The Senate is now to determine, as the law of the present case and as the precedent for all future cases, as to the great crime of bribery—a crime which poisons the waters of republican liberty in the fountain—that the circumstances which here appear are not enough to demand its attention.

It will hardly be doubted that cases of purchase of seats in the Senate will multiply rapidly under the decision proposed by the majority of the committee. The first great precedent to constitute the rule under this branch of law is to be this:

Held, by the Senate of the United States, that a charge made by the legislature of a State, and by the committee of the political party to which the larger number of its citizens belong, and by 10 of its Representatives in Congress, that an election of Senator was procured by bribery, accompanied by the offer to prove the fact, does not deserve the attention of the Senate, and this, although it also appear—

That there is a general and widespread public belief in the truth of the charge; that there was a sudden and unexpected and unaccounted for change to the sitting member from another candidate, to whom a majority of the electing body had been previously pledged; that large sums of money were brought to the place of election just before the choice by the managers of the canvass for the person elected; that there is evidence tending to show the bribery of several members, and the acquisition by others, who so changed their support, of considerable sums of money, immediately after such change, affect at least 10 members of said legislature; that a change by corrupt means of the votes of 6 persons

would have changed the result in a legislative caucus, and thereby bound and committed the vote in the legislature of 82 persons, who were a large majority of such legislature;

Provided it also appear that one branch of a subsequent legislature of the same State have, in investigating changes against four of their members, incidentally inquired into charges against other persons, so far as they could without compelling unwilling witnesses to answer, without use of process extending beyond their State, and "without following out many clues, which they did not follow because they were convinced that they would lead only to points of which further pursuit would become necessary."

We recommend the adoption of the accompanying resolution:

Resolved, That the Committee on Privileges and Elections, or any subcommittee thereof, be authorized to investigate the charges affecting the title to the seat of the Hon. Henry B. Payne, and to send for persons and papers, administer oaths, and employ a clerk and stenographer, and to sit during the recess of the Senate; and that the expenses of the investigation be paid out of the contingent fund of the Senate.

On the issues thus joined, the case was debated at length in the Senate on July 21, 22, and 23,[1] and on the latter day the resolution proposed in the views submitted by Mr. Hoar was disagreed to, yeas 17, nays 44. Then the proposition of the majority was agreed to, yeas 44, nays 17.[2]

692. The Senate election case of William A. Clark, from Montana, in the Fifty-sixth Congress.

A Senator-elect took the oath on his prima facie right without challenge, although charges of bribery in his election were presented immediately thereafter.

A memorial having set forth specifically charges of bribery, and specified evidence in support thereof, the Senate decided to examine a Senator's title to his seat.

Instance of a Senate election case instituted by a memorial.

On December 4, 1899,[3] in the Senate William A. Clark, whose credentials were on file as Senator from Montana, took the oath of office without objection.

Very soon thereafter, on that day, Mr. Thomas H. Carter, of Montana, presented the memorial of Henry C. Stiff, speaker of the house of representatives of Montana, and 26 members of the legislative assembly of that State, protesting against the validity of Mr. Clark's election. Mr. Carter also presented a petition signed by the governor of Montana and other State officers, by the Member of Congress from that State, and an ex-Member, praying for an early hearing on the

[1] Record, pp. 7251, 7308, 7350–7361.

[2] In 1898 the Senate considered the case of Marcus A. Hanna, Senator from Ohio. (Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 878.) Mr. Hanna was chosen by the legislature of the State of Ohio a Senator from that State for the remaining portion of the term ending March 3, 1899. Mr. Hanna appeared January 17, 1898, and took his seat in the Senate without objection. Subsequently, and on the 28th day of May, 1898, a certified copy of the report of the committee appointed by the senate of the State of Ohio to investigate charges of bribery in the election of Mr. Hanna to the Senate of the United States was filed and referred to the Committee on Privileges and Elections. On the 28th day of February, 1899, the committee submitted a report asking to be discharged from further consideration of the report of the State senate of Ohio. A minority of the committee submitted a minority report recommending further inquiry and investigation. One member of the committee did not join in either the majority or the minority report, but submitted a separate report for himself. No further action was taken by the Senate in the case.

[3] First session Fifty-sixth Congress, Record, pp. 1, 2.

protest. The memorial and petition were referred to the Committee on Privileges and Elections.

On December 6[1] Mr. William E. Chandler, of New Hampshire, presented certain exhibits to accompany the memorial already presented.

On December 7[2] Mr. Chandler reported from the Committee on Privileges and Elections the following resolution, which was agreed to on December 12 without debate:

Resolved, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate the right and title of William A. Clark to a seat as Senator from the State of Montana, and said committee is authorized to sit during the sessions of the Senate, to employ a stenographer, to send for persons and papers, and to administer oaths, and that the expense of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

This decision of the Senate, made without question or debate, was evidently based on the full showing made in the memorial presented by Mr. Carter. This memorial,[3] addressed "To the honorable Senate of the United States," set forth:

1. That the petitioners were citizens of the United States and of the State of Montana, and that they were such long prior to the meeting of the sixth legislative assembly, which convened on the first Monday of January, 1899.

2. That the legislature as organized consisted of certain persons, whose names, politics, and districts are set down.

3. That it was the duty of the said legislature to elect a United States Senator, and that William A. Clark was a member.

4. That the said William A. Clark entered into a conspiracy with certain others to influence the action of the legislature in the choice of a Senator, and that in pursuance of that conspiracy money was paid to divers persons to influence corruptly the choice of Senator. The memorial sets forth the names of the persons thus corruptly in receipt of money and the sum received by each, and also other persons mentioned by name to whom stated sums were offered to cause them as members of the said legislature to vote for the said W. A. Clark for Senator.

5. That the aforesaid corrupt offers were made with the full knowledge and authorization of the said W. A. Clark.

6. That by the aid of these corrupt expenditures of money W. A. Clark received a majority of the votes of the legislative assembly for Senator, and that without such corrupt expenditure he would not have received such majority.

7. That various investigations had been made in Montana by the legislature and by the grand-jury system, and a large amount of testimony taken, whereof transcripts were sent as a part of the memorial.

The memorial concludes as follows:

Wherefore, your petitioners pray your honorable body at the earliest practicable moment to set a time and place for hearing this protest and the evidence in support thereof before the Committee on Privileges and Elections of your honorable body, to the end that substantial justice may be done to the people of the State of Montana and all others concerned in the matters set forth herein, and that pending

[1] Record, p. 85.

[2] Record, pp. 132, 231.

[3] First session Fifty-sixth Congress, Senate Report No. 1052, Part I, Document No. 3.

such investigation the said William A. Clark be denied the privileges of participation in the duties and business of the Senate as a Member thereof.

On information and belief I sign the foregoing statement and charges.

The signatures of the petitioners follow.

The Senate having admitted Mr. Clark on his prima facie showing, no steps were taken to grant the request of the petitioners that he be denied participation in the proceedings of the Senate.

693. The case of William A. Clark, continued.

The committee recommended that a Senator's election be declared void, enough bribery being shown to have affected the result.

A Senator threatened with loss of his seat for bribery having resigned, the proceedings abated.

Criticism and discussion as to latitude of inquiry permitted in a committee's investigation of the right of a Senator to his seat.

On April 23[1] Mr. Chandler reported from the Committee on Privileges and Elections this resolution:

Resolved, That William A. Clark was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Montana.

This resolution was the result of the unanimous action of the committee. With the resolution was a written report[1] going over the evidence at length, discussing the individual cases of bribery, and summarizing the law and the facts, as follows:

In justifying the finding of the committee it is not necessary to discuss any doubtful questions of law.

(1) It is clear that if by bribery or corrupt practices on the part of the friends of a candidate who are conducting his canvass votes are obtained for him without which he would not have had a majority, his election should be annulled, although proof is lacking that he knew of the bribery or corrupt practices. (Pomeroy's case, Taft Election Cases, 330; Caldwell's case, 334; Clayton's case, 348; Ingall's case, 596; Payne's case, 604, 609, 610; Minority report, 616.)

(2) It seems to have been admitted that if the person elected clearly participated in any one act of bribery or attempted bribery he should be deprived of his office, although the result of the election was not thereby changed. (Pomeroy's case, Taft Election Cases, 330, where Mr. Pomeroy had 84 votes against 25.)

According to the law, as understood by the committee, Senator Clark can not be permitted to retain his seat. He received 54 votes and there were 39 against him, leaving him an apparent majority of 15. If he obtained through illegal and corrupt practices 8 votes which would otherwise have been cast against him, he was not legally elected. More than this number of votes, the committee find from all the evidence, was thus obtained.

It is also a reasonable conclusion upon the whole case that Senator Clark is fairly to be charged with knowledge of the acts done in his behalf by his committee and his agents conducting his canvass. He arrived in Helena from Butte on January 4 and remained there until after his election on January 28, and was in constant conference with his committee and agents.

Two members of the committee, Messrs. E. W. Pettus, of Alabama, and W. A. Harris, of Kansas, while agreeing to the resolution, offered minority views which, besides discussing the evidence, criticised the method of taking it.

It was our misfortune not to agree with a majority of the committee in the general conduct of the investigation of this case. We believed that in this important inquiry the committee was bound by, and ought to act on, the ordinary rules of evidence.

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[1] Senate Report No. 1052, Record, pp. 3429.

And in this contention we merely followed another member of the committee who is one of our great lawyers and who is fresh from a long service as a nisi prius judge under Federal authority. That great lawyer, in gentle but forceful language, admonished us of the great danger of disregarding the common rules of evidence established by great judges through the centuries and known to all lawyers. But it was said the committee was not a court and had a right to receive "hearsay" evidence in order to get on the track of better evidence. And we did receive it constantly, and in great volumes.

We tried merely to discharge our duties as members of this committee and as judges in this most important cause. The chairman, however, left the committee little to do. The committee made an order at the beginning appointing the chairman and another member to determine what witnesses should be summoned, and the two did determine that matter at first, but the chairman kindly relieved the other members of that labor and determined that matter for the committee.

This report of the chairman declares that, as to many matters stated separately, some members of the committee think or believe one way and some think or believe another way. So we preferred to state our individual findings for ourselves.

It is our opinion from the evidence that the friends of Senator Clark illegally and improperly used large amounts of money and thereby caused the election, and that this election is not valid, but under the law of the land is void, and therefore we agreed to the resolution reported by the chairman.

* * * * * * *

A large part of the evidence taken by the committee and submitted to the Senate is irrelevant to the matter of inquiry. Take as a sample the matter of what is called the attempt to bribe the supreme court and the attorney-general. This transaction, so far as we are informed, occurred six or seven months after the senatorial election; no fact proved connects Mr. Clark with any part of that transaction. Doctor Treacy had no sort of connection, directly or indirctely, with Mr. Clark; and if he had there was no connection between the election in January and the supreme judges in the fall of that year.

You can not lawfully charge a man with one crime and prove that he committed that crime by proving that he did commit another crime. The Constitution provides that the accused must "be informed of the nature and cause of the accusation." No mention of the judges of the supreme court of Montana was made in the charges against Mr. Clark. All of that evidence was nothing more than what lawyers call "coloring matter." And it was admitted against the protest of the Senator from Maryland and others.

And in the conduct of this case much other mere "coloring matter" was received as evidence.

In the report made for the committee there are several curious statements of a part of the evidence as to the thing stated. For example, it is stated that Senator Clark, in June, 1899, destroyed the checks which he had drawn on his bank. But the report fails to state that for years past it was his habit to destroy his checks when his account was rendered by the bank and examined. And the report failed to state that the committee had the bank account of Mr. Clark during all the time in which it was charged that money had been illegally used.

And there is another feature of that report which should be noticed. Statements are made as facts which are based only on the testimony of a witness of doubtful credit, and that testimony plainly contradicted.

The only proposition for which we contend is, that this is a judicial case, and a committee of the Senate ought to consider and report it as judges.

On May 3[1] the consideration of the resolution was postponed until May 15. On the latter day,[2] Mr. Clark, rising to a question of personal privilege, and after reviewing the evidence and criticising the methods by which the evidence had been taken, submitted a copy of a letter addressed by him on May 11 to the governor of Montana, in which he resigned his seat in the Senate.

Mr. Chandler thereupon asked that the resolution might go over to the next day. On that day[3] it was further postponed to enable the Committee on Privileges and Elections to determine what further action should be taken. On June 5,[4] near the

[1] Record, pp. 5021, 5022.

[2] Record, pp. 5531–5536.

[3] Record, p. 5584.

[4] Record, p. 6698.

close of the session, Mr. Chandler submitted a supplemental report in which the majority of the committee justified their method of conducting the investigation, and replied to the criticisms made by Mr. Clark:

The distinct criticisms made by Mr. Clark on May 15 of the report of the committee are not serious in their character, and it is fortunate that they were made, because they may be taken as being all the criticisms which the party most at interest can claim can justly be made. The correctness of all other statements made by the committee not criticised by Senator Clark may be taken to be admitted by him. All his statements will not be now reviewed, but some of them should be noticed by the committee.

He complains that the method of procedure of the committee was unfair and nonjudicial, and that testimony was received contrary to the established rules of evidence, hearsay and irrelevant testimony; and that the case was like the Dreyfus case, where there was a constant presumption of guilt instead of innocence.

The answers to this complaint are simple.

(1) That no such testimony was received except after deliberate decision by the committee for the purpose of ascertaining what additional witnesses it might be necessary to summon, as stated by the chairman on page 432 of the testimony, as follows:

"The CHAIRMAN. It would only be admissible as laying the foundation for sending for other witnesses."

(2) That no single finding of the committee has been based upon hearsay testimony.

The finding of the whole committee that the election was null and void was based upon the admitted or undisputed facts with their attendant circumstances, and no facts are recited in the report of the committee beyond the admitted and undisputed facts except in those cases where any denial of those facts is distinctly recited.

The methods of procedure were in no case unfair, but were such as ordinarily prevail in investigations like this.

The presumption of innocence was at no time disregarded, and findings unfavorable to Mr. Clark were made as a court or jury would have made them upon a full and fair consideration of all the facts in the case.

He denies the conclusion of the committee that a sufficient number of legislators were corrupted to change the result of the election.

This criticism is merely the complaint that the committee differed in opinion from him and his eminent counsel and made findings contrary to their desires.

The report then discusses the evidence more at length.

694. The case of William A. Clark, continued.

A Senator having resigned apparently to escape being unseated for bribery, was not readmitted on credentials showing appointment by an acting governor.

On May 22,[1] Mr. Carter presented to the Senate the following credentials:

STATE OF MONTANA, EXECUTIVE CHAMBER,
Helena, Mont., May 15, 1900.

Whereas a vacancy has occurred in the representation of the State of Montana in the Senate of the United States, caused by the resignation of Senator William A. Clark; and

Whereas the legislature of said State is not in session, but in recess:

Therefore be it known that, pursuant to the power vested in me by the Constitution of the United States, I, A. E. Spriggs, the lieutenant-governor and acting governor of the said State, do hereby appoint William Andrews Clark, a citizen and inhabitant of said State, to be a member of the Senate of the United States, to fill the vacancy so caused and existing as aforesaid, to have and to hold the said office and membership until the next meeting of the legislature of this State.

[1] Record, p. 5850.

In witness whereof I have hereunto set my hand and affixed the great seal of said State, at the city of Helena, in said State, this 15th day of May, A. D. 1900.

[SEAL.]

A. E. SPRIGGS, *Acting Governor.*

By his excellency the acting governor:

T. S. HOGAN, *Secretary of State.*

The credentials were, at Mr. Carter's suggestion, laid on the table, no proposition being made to administer the oath to Mr. Clark.

On May 25[1] Mr. Carter presented similar credentials, in due form, but signed by Robert B. Smith, the governor of Montana, certifying that he had appointed Martin Maginnis to fill the vacancy caused by Mr. Clark's resignation. These credentials also were laid on the table.

Mr. Chandler presented a resolution referring the two credentials to the Committee on Privileges and Elections, with instructions to inquire which of the two claimants was entitled to the seat. This resolution was also laid on the table.

On June 5,[2] very near the end of the session of Congress, Mr. Chandler submitted a resolution providing for a more general investigation of the subject, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

On December 4, 1900,[3] at the beginning of the next session of Congress, Mr. Carter called up for consideration the resolution proposed by Mr. Chandler on May 25, providing for an investigation of the rival claims of Messrs. Clark and Maginnis. On December 11[4] the resolution was considered by the Senate and debated somewhat. Mr. Carter, in the course of the debate, stated that the lieutenant-governor of Montana, in the absence of the governor, had appointed Mr. Clark. The governor, on his return, had attempted to revoke that appointment and had then appointed Mr. Maginnis. Mr. John C. Spooner, of Wisconsin, suggested that it might appear that under the decisions of the Senate it might be shown that the governor had no right to appoint at all.

The resolution was then agreed to.

Mr. Chandler next asked that the resolution declaring William A. Clark not duly elected, which had remained as unfinished business since the resignation of Mr. Clark, be recommitted to the Committee on Privileges and Elections. This request led to a debate as to the status of Mr. Clark in the Senate before his resignation and as to the nature of the vacancy in view of the power of the governor to appoint. The matter went over without action.

On March 2[5] Mr. Chandler presented a memorial of Henry R. Knapp and others, of Helena, Mont., remonstrating against seating Mr. Clark.

On the same day[6] (March 2, 1901) Mr. Chandler called up the resolution declaring William A. Clark not duly elected and proposed an amendment substituting a declaration that Mr. Clark was personally responsible for the offenses disclosed by the examination of his alleged election. Mr. Chandler addressed the Senate, but did not press the amendment to a vote.

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[1] Record, p. 6017.

[2] Record, p. 6693.

[3] Second session Fifty-sixth Congress, Record, p. 29.

[4] Record, pp. 216–219.

[5] Record, p. 3389.

[6] Record, p. 3421.

695. The case of William A. Clark, continued.

The Senate seated a Senator-elect on prima facie showing of his election by a legislature, although his election for a prior term had been found by a committee invalid because of bribery.

At the conclusion of Mr. Chandler's speech, on the same day (March 2, 1901), Mr. James K. Jones, of Arkansas, presented these credentials: [1]

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF MONTANA.

To the President of the Senate of the United States:

This is to certify that on the 16th day of January, 1901, William Andrews Clark was duly chosen and elected by the legislature of the State of Montana a Senator from said State to represent said State in the Senate of the United States for the term of six years, beginning on the 4th day of March, 1901.

In testimony whereof I have hereunto subscribed my name and caused the great seal of the State of Montana to be affixed at my office, at Helena, the 24th day of January, in the year of our Lord 1901, and the one hundred and twenty-fifth year of the independence of the United States of America.

[SEAL.] JOSEPH K. TOOLE, *Governor.*

By the Governor:

GEORGE M. HAYS, *Secretary of State.*

These credentials were placed on file in accordance with the custom of the Senate, to await the meeting of the next Congress.

Soon thereafter the Congress ended.

On March 4, 1901,[2] at the special session of the Senate in the new Congress Mr. Clark appeared and was sworn in on the strength of the credentials, without challenge.

696. The Senate election case of Lewis V. Bogy, from Missouri, in the Forty-second Congress.

A memorial to justify an investigation of the title of a Senator to his seat should state the charges and indicate with certainty the character of the evidence.

In 1873 [3] the Senate considered the case of Lewis V. Bogy. March 4, 1873, Mr. Bogy took his seat, having been elected for the term of six years from that date. March 17 the Vice-President laid before the Senate a memorial of members of the legislature, accompanied by a report of a select committee of the legislature appointed to investigate charges of bribery and corruption in the Senatorial election, praying for an investigation by the Senate of said charges. The memorial was referred to the Committee on Privileges and Elections.

The report of the committee, submitted on March 25, 1873, by Mr. Oliver P. Morton, of Indiana, was as follows:

The Committee on Privileges and Elections, to whom was referred the memorial of thirty-seven members of the legislature of Missouri in regard to the election of Lewis V. Bogy to the Senate of the United States from that State, have had the same under consideration and submit the following report:

The memorial sets forth that the recent examination by a committee appointed by the house of representatives of the legislature of Missouri, touching the corrupt use of money in the election of Mr. Bogy, was imperfect; that it was not full and fair, and in the opinion of the memorialists, if the investigation had been conducted with more vigor and with a purpose of revealing the real facts of the case,

[1] Record, p. 3436.

[2] First session Fifty-seventh Congress, Record, p. 1.

[3] Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 609.

other and more important evidence would have been produced showing that there was corruption in Mr. Bogy's election.

The memorial, however, does not state what additional facts can be proven, nor indicate with any certainty the character of the new evidence that may be produced.

The committee understand that the only duty which they have upon this reference is to report to the Senate whether the memorial presents such facts as would justify the Senate in instituting an examination in regard to the election of Mr. Bogy and are of the opinion that it does not. Such a proceeding is of a grave character and should not be set on foot without such a statement of the evidence that could probably be produced as would appear to make it the duty of the Senate to proceed to an investigation.

The evidence taken by the committee of the legislature of Missouri also accompanies the memorial and has been examined by the committee. It is not the province of the committee upon this reference to inquire whether the judgment pronounced by the house of representatives of the Missouri legislature upon this evidence was correct; but they express the opinion that the evidence is not of a character to require of the Senate an investigation.

The committee therefore ask to be discharged from the further consideration of the memorial and the evidence touching the election of Lewis V. Bogy to the Senate of the United States.

The recommendation of the committee was agreed to by the Senate.

Chapter XXIII.

TESTIMONY IN CONTESTED ELECTIONS.

1. **Provisions of the statutes. Sections 697–706.**[1]
2. **Rules of Elections Committee. Section 707.**
3. **Early method of taking evidence. Sections 708, 709.**[2]
4. **Special authorizations to take evidence. Sections 710–718.**[3]
5. **Questions as to evidence improperly taken. Sections 719, 721.**[4]
6. **Extension of time for taking. Sections 722–728.**[5]
7. **Evidence taken ex parte. Sections 729, 730.**[6]
8. **Production of ballots. Sections 731–733.**

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[1] As to the signing of depositions, section 54 of this volume.

Informalities in depositions, section 736.

Number of places in which testimony may be taken contemporaneously not limited, section 1112 of Volume II.

Both parties may take testimony at the same time, section 606.

As to the officer before whom testimony is taken, sections 857, 1049, 1064, 1070, and 1086 of Volume II.

Law as to transmittal held to be directory, section 736.

As to whether or not House and its committee are bound by legal rules of evidence, sections 960 and 1046 of Volume II.

Incompetent testimony and statements by counsel not to be included in record of case, section 1127 of Volume II.

Testimony should be confined to the pleadings (secs. 640 of this volume and 855, 880, 1015, and 1107 of Vol. II); but irrelevant testimony has been admitted (secs. 643 of this volume and 850 and 1052 of Vol. II).

As to consideration of public documents, sections 353 and 608.

Certified transcripts of records, section 322.

Records of election returns, sections 472, 835, and 839 of this volume and 1013, 1014, 1022, and 1100 of Volume II.

Historic and other knowledge in lieu of, sections 924, 965, 969, 984, 1016, 1017, 1030, 1034, and 1104 of Volume II.

[2] House appoints committee to hear testimony, section 756.

[3] House modifies requirements of the law, sections 449 and 600 of this volume and 1122 of Volume II. Forms of resolutions therefor, sections 814 and 815.

Evidence taken under House's general power of investigation, sections 764, 793, and 803 of this volume and 1018 of Volume II.

[4] Admission of testimony taken improperly, sections 326, 525, and 780 of this volume and 920, 1012, and 1029 of Volume II. Rejection of such testimony, sections 831 of this volume and 1116 of Volume II

Admission of testimony taken after the expiration of the legal time, sections 977 and 1003 of Volume II. Rejection of such testimony, sections 900, 901, 905, and 936 of Volume II.

Testimony taken in another-cause admitted by the House, sections 607 and 624. Rejected by the House, section 685 of this volume and section 913 of Volume II. Considered by the Senate, sections 348 and 356.

Motions to suppress testimony, section 425.

[5] Interpretation of law limiting time of taking, section 936 of Volume II.

House permits taking of testimony after expiration of the legal limit, sections 505, 824, and 830 of this volume and sections 869, 875, 890, 956, 1062, and 1095 of Volume II. But this privilege is not granted where diligence has not been shown, sections 606 and 837 of this volume and 898, 1006, 1063, and 1100 of Volume II. Privilege also granted where returns were rejected, section 1019 of Volume II.

[6] Instances of admission of ex parte evidence, sections 423, 624, 625, 646, 736, and 812 of this volume and 1004, 1006, and 1024 of Volume II. Instances of rejection, sections 321, 685, 834, and 843 of this volume and 872, 927, 930, 1057, 1039, and 1125 of Volume II.

697. Ninety days are allowed for taking testimony in an election case, divided between the parties.

Testimony in an election case must be taken within ninety days from the service of the answer of the returned Member.

The law governing the service of notice by the party desiring to take a deposition in an election case.

Testimony in an election case may be taken at two or more places at the same time.

The statutes provide:

In all contested election cases the time allowed for taking testimony shall be ninety days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first forty days, the returned Member during the succeeding forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period.[1]

By the act of March 2, 1875, it is provided that "section 107, Revised Statutes, shall be construed as requiring all testimony in cases of contested election to be taken within ninety days from the day on which the answer of the returned Member is served upon the contestant."[2]

The party desiring to take a deposition under the provisions of this chapter shall give the opposite party notice, in writing, of the time and place when and where the same will be taken, of the names of the witnesses to be examined, and their places of residence, and of the name of any officer before whom the same will be taken. The notice shall be personally served upon the opposite party, or upon any agent or attorney authorized by him to take testimony or cross-examine witnesses in the matter of such contest, if, by the use of reasonable diligence, such personal service can be made; but if, by the use of such diligence, personal service can not be made, the service may be made by leaving a duplicate of the notice at the usual place of abode of the opposite party. The notice shall be served so as to allow the opposite party sufficient time by the usual route of travel to attend and one day for preparation, exclusive of Sundays and the day of service. Testimony in rebuttal may be taken on five days' notice.[3]

Testimony in contested election cases may be taken at two or more places at the same time.[3]

698. The law governing the application for issuing of subpoenas for witnesses in an election case.—The statutes provide:

When any contestant or returned Member is desirous of obtaining testimony respecting a contested election he may apply for a subpoena to either of the following officers who may reside within the Congressional district in which the election to be contested was held:

First. Any judge of any court of the United States.

Second. Any chancellor, judge, or justice of a court of record of any State.

Third. Any mayor, recorder, or intendant of any town or city.

Fourth. Any register in bankruptcy or notary public.[4]

The officer to whom the application authorized by the preceding section is made shall thereupon issue his writ of subpoena, directed to all such witnesses as shall be named to him, requiring their attendance before him at such time and place named in the subpoena in order to be examined respecting the contested election.[5]

In case none of the officers mentioned in section 110 are residing in the Congressional district from which the election is proposed to be contested, the application thereby authorized may be made to any two justices of the peace residing within the district, and they may receive such application and jointly proceed upon it.[6]

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[1] R. S., sec. 107.

[2] 18 Stat. L., p. 338.

[3] R. S., sec. 109.

[4] R. S., sec. 110.

[5] R. S., sec. 111.

[6] R. S., sec. 112.

699. The law allowing the parties in an election case, by consent in writing, to waive certain formalities in taking testimony.—The statutes provide:

It shall be competent for the parties, their agents, or attorneys authorized to act in the premises, by consent in writing, to take depositions without notice; also, by such written consent, to take depositions (whether upon or without notice) before any officer or officers authorized to take depositions in common law, or civil actions, or in chancery, by either the laws of the United States or of the State in which the same may be taken, and to waive proof of the official character of such officer or officers. Any written consent given as aforesaid shall be returned with the depositions.[1]

700. The law for summoning and examining witnesses in an election case.

The law relating to the taking and certification of depositions in an election case.

The statutes provide:

Each witness shall be duly served with a subpoena by a copy thereof delivered to him or left at his usual place of abode at least five days before the day on which the attendance of the witness is required.[2]

No witness shall be required to attend an examination out of the county in which he may reside or be served with a subpoena.[3]

Any person who, having been summoned in the manner above directed, refuses or neglects to attend and testify, unless prevented by sickness or unavoidable necessity, shall forfeit the sum of twenty dollars, to be recovered with costs of suit by the party at whose instance the subpoena was issued, and for his use, by an action of debt, in any court of the United States, and shall also be liable to an indictment for a misdemeanor and punished by a fine and imprisonment.[4]

Depositions of witnesses residing outside of the district and beyond the reach of a subpoena may be taken before any officer authorized by law to take testimony in contested election cases in the district in which the witness to be examined may reside.[5]

The party notified as aforesaid, his agent or attorney, may, if he sees fit, select an officer (having authority to take depositions in such cases) to officiate with the officer named in the notice in the taking of the depositions; and if both such officers attend, the depositions shall be taken before them both, sitting together, and be certified by them both. But if any one of such officers attend, the deposition may be taken before and certified by him alone.[6]

At the taking of any depositions under this chapter either party may appear and act in person or by agent or attorney.[7]

All witnesses who attend in obedience to a subpoena or who attend voluntarily at the time and place appointed, of whose examination notice has been given, as provided by this chapter, shall then and there be examined, on oath, by the officer who issued the subpoena, or, in case of his absence, by any other officer who is authorized to issue such subpoena, or by the officer before whom the depositions are to be taken by written consent, or before whom the depositions of witnesses residing outside the district are to be taken, as the case may be, touching all such matters respecting the election about to be contested as shall be proposed by either of the parties or their agents.[8]

701. The law relating to the pertinency of testimony in an election case.—The statutes provide:

The testimony to be taken by either party to the contest shall be confined to the proof or disproof of the facts alleged or denied in the notice and answer mentioned in sections one hundred and five and one hundred and six.[9]

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[1] R. S., sec. 113.
[2] R. S., sec. 114.
[3] R. S., sec. 115.
[4] R. S., sec. 116.
[5] R. S., sec. 117.
[6] R. S., sec. 118.
[7] R. S., sec. 119.
[8] R. S., sec. 120.
[9] R. S., sec. 121.

702. The law for the transcribing and attestation of testimony in an election case.—The statutes provide:

The officer shall cause the testimony of the witnesses, together with the questions proposed by the parties or their agents, to be reduced to writing in his presence, and in the presence of the parties or their agents, if attending, and to be duly attested by the witnesses respectively.[1]

703. The officer presiding at the taking of testimony in an election case has the power to require the production of papers.

The law requires the testimony taken in an election case to be transmitted to the Clerk of the House by the officer before whom it was taken.

The statutes provide:

The officer shall have power to require the production of papers; or on the refusal or neglect of any person to produce and deliver up any paper or papers in his possession pertaining to the election, or to produce and deliver up certified or sworn copies of the same in case they may be official papers, such persons shall be liable to all the penalties prescribed in section one hundred and sixteen. All papers thus produced, and all certified or sworn copies of official papers, shall be transmitted by the officer, with the testimony of the witnesses, to the Clerk of the House of Representatives.[2]

704. The taking of testimony in an election case may be adjourned from day to day.

The notice to take depositions and a copy of the subpoena are attached to the depositions in an election case.

A copy of the notice of contest and the answer in an election case are sent to the Clerk of the House with the testimony.

The statutes provide:

The taking of the testimony may, if so stated in the notice, be adjourned from day to day.[3]

The notice to take depositions, with the proof or acknowledgment of the service thereof, and a copy of the supoena, where any has been served, shall be attached to the depositions when completed.[4]

A copy of the notice of contest, and of the answer of the returned Member, shall be prefixed to the depositions taken, and transmitted with them to the Clerk of the House of Representatives.[5]

705. The law prescribing the method of forwarding to the Clerk of the House the testimony in an election case.

Law governing the duty of the Clerk of the House as to the printing of testimony in an election case.

The law governing the filing of contestant's and contestee's briefs in an election case, and the printing thereof.

The statutes provide:

All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward the game, by mail or by express, addressed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia; and shall also indorse upon an envelope containing such deposition or testimony the name of the case in which it is taken, together with the name of the party in whose behalf it is taken, and shall subscribe such indorsement.

The Clerk of the House of Representatives, upon the receipt of such deposition or testimony, shall notify the contestant and the contestee, by registered letter through the mails, to appear before him at the

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[1] R. S., sec. 122.

[2] R. S., sec. 123.

[3] R. S., sec. 124.

[4] R. S., sec. 125.

[5] R. S., sec. 126.

Capitol, in person or by attorney, at a reasonable time to be named, not exceeding twenty days from the mailing of such letter, for the purpose of being present at the opening of the sealed packages of testimony and of agreeing upon the parts thereof to be printed. Upon the day appointed for such meeting the said Clerk shall proceed to open all the packages of testimony in the case, in the presence of the parties or their attorneys, and such portions of the testimony as the parties may agree to have printed shall be printed by the Public Printer, under the direction of the said Clerk; and in case of disagreement between the parties as to the printing of any portion of the testimony, the said Clerk shall determine whether such portion of the testimony shall be printed; and the said Clerk shall prepare a suitable index to be printed with the record. And the notice of contest and the answer of the sitting Member shall also be printed with the record.[1]

If either party, after having been duly notified, should fail to attend by himself or by an attorney, the Clerk shall proceed to open the packages, and shall cause such portions of the testimony to be printed as he shall determine.

He shall carefully seal up and preserve the portions of the testimony not printed, as well as the other portions when returned from the Public Printer, and lay the same before the Committee on Elections at the earliest opportunity. As soon as the testimony in any case is printed the Clerk shall forward by mail, if desired, two copies thereof to the contestant and the same number to the contestee; and shall notify the contestant to file with the Clerk, within thirty days, a brief of the facts and the authorities relied on to establish his case. The Clerk shall forward by mail two copies of the contestant's brief to the contestee, with like notice.

Upon receipt of the contestee's brief the Clerk shall forward two copies thereof to the contestant, who may, if he desires, reply to new matter in the contestee's brief within like time. All briefs shall be printed at the expense of the parties, respectively, and shall be of like folio as the printed record; and sixty copies thereof shall be filed with the Clerk for the use of the Committee on Elections.[2]

706. The law regulating the fees of witnesses and officers in the preparation of an election case.—The statutes provide:

Every witness attending by virtue of any subpcena herein directed to be issued shall be entitled to receive the sum of seventy-five cents for each day's attendance, and the further sum of five cents for every mile necessarily traveled in going and returning. Such allowance shall be ascertained and certified by the officer taking the examination, and shall be paid by the party at whose instance such witness was summoned.[3]

Each judge, justice, chancellor, chief executive officer of a town or city, register in bankruptcy, notary public, and justice of the peace, who shall be necessarily employed pursuant to the provisions of this chapter, and all sheriffs, constables, or other officers who may be employed to serve any subpoena or notice herein authorized, shall be entitled to receive from the party at whose instance the service shall have been performed such fees as are allowed for similar services in the State wherein such service may be rendered.[4]

707. Rules of the Elections Committees for hearing a contested election case.—Committees on Elections in the House of Representatives have adopted rules to govern the hearing of a contested case:

1. All proceedings of the Committee on Elections shall be recorded in the journal, which shall be signed daily by the clerk.

2. No paper shall be removed from the committee room without the permission of the committee, except for the purpose of being printed or used in the House.

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[1] In the case of Arnold *v.* Lea in 1830, the House by resolution prescribed a similar method of deciding what portions of the testimony in the pending case should be printed for the information of the House during the discussion. (First session Twenty-first Congress, pp. 119, 125. Contested Elections (Clarke), pp. 606, 607.)

[2] Act approved March 2, 1887. 24 Stat. L., p. 445.

[3] R. S., sec. 128.

[4] R. S., sec. 129.

3. Oral arguments may be heard for such time as the committee may allow, not exceeding one hour and a half on each side, unless otherwise ordered

4. After any contested-election case, or any question pertaining thereto, has been argued and submitted to the committee and the committee is ready to proceed with the case there shall be allowed to the members thereof three hours for debate, at the expiration of which time a vote shall be taken upon the pending proposition, unless otherwise ordered. The time allowed for debate in the committee shall be divided as follows: Those favoring the proposition shall open in one hour; those opposing shall follow in one hour and a half; and the former shall close in a half hour, unless otherwise ordered.

When the debate has been closed and the committee is ready to decide, the chairman shall take the opinion of each member of the committee separately. Each member of the committee, when thus called upon, shall announce his opinion.

5. No person shall be present during any consultation of the committee except the members and clerk.

6. All papers referred to the committee shall be entered on the docket by the House docket clerk according to the number of the packages, and they shall be identified upon the docket.

7. Nothing contained in these rules shall prevent the committee, when Congress is in session, from ordering briefs to be filed and a case to be heard at any time the committee may determine.

8. The foregoing rules shall not be altered or amended except by a vote of a majority of all the members of the committee.

708. The Georgia election case of Jackson v. Wayne in the Second Congress.

Instance of an early election case instituted by petition.

Form of petition instituting an early election case.

In 1791 the House, by resolution, adopted a method of taking evidence in contested-election cases.

Reference to the early law for taking evidence in election cases (footnote).

On November 1, 1791,[1] Mr. Anthony Wayne appeared, produced his credentials as a Member-elect from Georgia, and took his seat.

On November 14, 1791,[2] the following petition was presented to the House on behalf of James Jackson:

That at the late election for Members to represent the State of Georgia in your honorable House, for the present Congress, General Anthony Wayne and your petitioner were candidates for the lower or eastern district of said State. That an improper and undue return has been made to your House of the said election; for that the county election of Effingham, in favor of the said Anthony Wayne, was illegal, there being nine more votes at the same than there were voters, and two of the persons presiding thereat were not qualified magistrates; for that the return of Glynn County, in favor of your petitioner, was suppressed; for that a false return was made to the executive of the State for the county of Camden, exceeding the numbers of the legal poll, which amounted to 25 votes, by the number of 64 votes, all of which were in favor of the said Anthony Wayne, and added together with the legal poll very far exceeds the whole number of male inhabitants entitled to vote therein; and for that an illegal or pretended poll was held after the legal poll was closed, and on which illegal poll the aforesaid false return was founded, and the legal return, after being duly certified by the proper officer, was either suppressed or destroyed.

On October 31[3] it was;

Resolved, That a committee be appointed to report a regular and uniform mode of proceeding in cases of contested elections of Members of this House.

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[1] First session Second Congress, Journal, p. 445.

[2] First session Second Congress, Contested Elections in Congress from 1789 to 1834, pp. 47–68; House Journal, p. 452.

[3] Journal, p. 444.

Messrs. Fisher Ames, of Massachusetts, Jonathan Dayton, of New Jersey, John Brown, of Virginia, Thomas Fitzsimons, of Pennsylvania, and Thomas Tudor Tucker, of South Carolina, were appointed of this committee.

On November 16,[1] the petition of Mr. Jackson was referred to this committee, and on November 18 that committee reported.

On November 25[2] the report, after consideration, was agreed to as follows:

Resolved, That the first Monday of February next be assigned for the trial of the articles alleged in the said petition, against the said return.

Resolved, That the evidence which may be offered, on the part of the petitioner, shall be confined to the proof of the articles of charge exhibited in the said petition against the validity of the return of the said election.

Resolved, That, on the trial, the deposition of a witness shall be received, which shall have been taken more than twenty-five days prior to the day assigned for the trial, before any justice or judge of the courts of the United States, or before any chancelor, justice, or judge, of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court, or court of common pleas of any of the United States, not being of counsel or attorney to either the said Anthony Wayne or the petitioner.

Provided, That a notification from the magistrate, before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall have been first made out and served on the adverse party, or his attorney especially authorized for the purpose as either may be nearest, if either is within 100 miles of the place of such caption, allowing time for their attendance, after notified, not less than at the rate of one day, Sundays exclusive, for every 20 miles travel. And every person deposing shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken, together with a certificate of the notice, if any, given to the adverse party, or his attorney, shall be sealed up by the said magistrate, and directed to the Speaker;

Provided, nevertheless, That no ex parte deposition shall be used on the trial of the said petition, which shall have been taken at any time before the 26th day of December next;

Provided, also, That evidence taken in any other manner than is hereinbefore directed, and not objected to by the parties, may with the approbation of the House, be produced on the trial.[3]

709. The case of Jackson v. Wayne, continued.

In 1791 the House admitted the contestant and his counsel to the bar to produce testimony in an election case.

The House declined to admit as evidence in an election case the decision of a State impeachment court on a related subject.

In 1791 the House declined to admit as evidence in an election case official State papers under seal.

In an early election case the House, having ascertained great irregularities, unseated the returned Member, but did not seat contestant.

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[1] Journal, p. 455, 457.

[2] Journal, p. 463.

[3] On December 6, 1797 (Contested Election Cases, Clarke, p. 12), the House discussed a series of resolutions providing a rule for taking testimony in election cases. In 1798 (1 Stat. L., p. 537) a law was passed providing a method of proceeding, but also providing that it should be in force no longer than the end of the first session of the Sixth Congress. In 1800 (2 Stat. L., p. 39) this law was continued for four years longer. At various later dates, up to 1830, the revival of this or a similar law was attempted, but failed. (Contested Election Cases, Clarke, pp. 16, 17.) The present system of law dates from 1851.

A seat being declared vacant, the Speaker was directed to inform the executive of the State.

On November 18 [1] Mr. Ames submitted the report of the committee.

On February 6, 1792,[2] a petition was presented from James Jackson, praying that the trial of the case be postponed "for twenty days, in conformity to the tenor of an agreement entered into between the attorneys of the said Anthony Wayne and the petitioner," and the House postponed the trial for twenty days, it to take place at the end of that time "in the manner prescribed by the resolution of this House of the 25th of November last."

On February 27,[3] the day assigned for the trial, the petitioner, on his application, was admitted to the bar of the House, and an application was made on the part of the sitting Member to postpone the trial further. Both the sitting Member and the petitioner were fully heard, and then the House voted that the case be postponed until the second Monday in March.

On March 12,[4] the case being taken up, the sitting Member with his counsel, and the petitioner were present within the bar of the House. Application was made by the counsel for sitting Member for a further postponement, which the House denied. The petitioner then proceeded to exhibit and read his proofs in support of the allegations of his petition, so far as respected the first article therein contained. This presentation of petitioner's case continued on March 13 and 14. On the latter day [5] an application in writing was made by the petitioner as follows:

> That the decision of the senate of the State of Georgia, on the impeachment of Judge Osborne, so far as respects the Camden return for a Member to represent the State of Georgia, on the 3d day of January, 1791, he received as evidence in the present trial of that election, to establish the corruption of Judge Osborne.

It was alleged [6] by the petitioner that Judge Osborne had been presiding officer at Camden, and at the close of the poll, had been instrumental in a manipulation of the returns, and in the suppression of the return of Glynn County. In offering the decision of the Georgia senate the petitioner declared that "the point at issue [in the impeachment and in the pending case] was the same, whether corruption had or had not taken place at this election." It is to be inferred from the debate, although it does not positively appear, that Judge Osborne's conduct at Camden was one of the grounds of the impeachment.

The counsel for the sitting Member objected to the decision as unconnected with this case, and ex parte.

The question being taken on admitting the decision, the House decided not to admit it—yeas 20; nays 41.

The petitioner having concluded with his exhibits and proof, the sitting Member by his counsel entered into the defense, producing exhibits and proofs in opposition. On March 15,[7] the sitting Member having concluded, the petitioner was heard in reply. After this the parties retired from the bar.

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[1] Journal, p. 457.

[2] Journal, p. 502.

[3] Journal, pp. 521, 522.

[4] Journal, pp. 534, 535.

[5] Journal, p. 535.

[6] Annals, pp. 463–467.

[7] Journal, p. 536.

A motion was then made and seconded:

That certain proceedings of the house of representatives of the State of Georgia, accompanied with other papers, transmitted agreeable to their resolution, under the signature of the governor and the seal of the State, relative to the election of a Member to represent the eastern district of the said State in this House be received.

As to this motion the Journal has the entry that it was lost through a negativing of the previous question. By the usage of that time such a decision defeated the motion.

On March 16[1] the House gave decision. The grounds of the contest and the attitude of the House as to the various specifications do not appear with much certainty; but by a unanimous vote the House agreed to the following resolution, great irregularities being shown:

Resolved, That Anthony Wayne was not duly elected a Member of this House.

It was then moved:

That the Speaker do transmit a copy of the said vote to the executive of the State of Georgia.

On March 19[2] this resolution was proposed:

Resolved, That the petitioner, James Jackson, is entitled to a seat in this House as a Member for the lower district of the State of Georgia; and that the right of petitioning against the election of the said James Jackson be reserved to all persons at any time during the term for which he was elected.

This resolution was debated at length on March 20 and March 21.[3] It was urged that the petition had related only to the right of Mr. Wayne, and that on the case so far as made up the House was authorized only in finding that Mr. Wayne was not elected. It was not for the House to decide as to the election of Mr. Jackson, who did not appear with any credentials from the State of Georgia. On the other hand, it was urged that the one having the greater number of sound votes was entitled to the seat, and that, as there were only two candidates, Mr. Jackson should be seated to fill the vacancy.

The question being taken,[4] there appeared in favor of the resolution to seat Mr. Jackson—yeas 29, and against, nays 29. The Speaker declared himself with the nays.

It was then—

Resolved, That the seat of Anthony Wayne, as a Member of this House, is, and the same is declared to be, vacant.

Resolved, That the Speaker transmit a copy of the preceding resolution, and of this order, to the executive of the State of Georgia, to the-end that the said executive may issue writs of election to fill the said vacancy.

710. The House has issued a subpoena duces tecum in order to procure election returns to be used in determining election cases.—On June 20, 1874,[5] on motion of Mr. L. Q. C. Lamar, of Mississippi, by direction of the Committee on Elections, the House,agreed to the following:

Whereas it is necessary to a proper determination of the several contests from the Congressional districts of Louisiana, now pending in the House, that the Committee on Elections should be in possession

[1] Journal, p. 536.

[2] Journal, p. 540.

[3] Annals, pp. 475–479.

[4] Journal, pp. 542, 543.

[5] First session Forty-third Congress, Journal, p. 1263; Record, p. 5316.

of the original election returns of the general election held in that State on the 4th day of November, 1872; and whereas those returns are said to be in the possession of John McEnery, and said McEnery being unwilling to produce said returns except upon order of said committee: Therefore,

Be it resolved by this House, That a subpoena duces tecum be issued to said McEnery, requiring him to produce in person before said committee said election returns on or before the first Monday in December, 1874; and also that subpoenas be issued to Archibald Mitchell and William Wareper, of New Orleans, requiring them to be and appear before said Committee on Elections on the first Monday in December, A. D. 1874.

711. The Maryland election case of Jackson v. Smith in the Fifty-ninth Congress.

The evidence in an election case conducted according to law being insufficient, the House authorized its committee to take additional testimony.

On June 28, 1906,[1] Mr. James M. Miller, of Kansas, from the Committee on Elections No. 2, submitted the following resolution, which was agreed to by the House:

Whereas the contested-election case of William H. Jackson *v.* Thomas A. Smith, from the First Congressional district of Maryland, was referred to the Committee on Elections No. 2, and the said committee, after careful consideration of the record therein, finds that the evidence already taken is not sufficient upon which to base a conclusion as to the proper determination of said contest: Now, therefore, be it

Resolved by the House of Representatives, That the Committee on Elections No. 2 shall be, and is hereby, authorized and empowered to take such testimony as it shall deem necessary to the determination of the questions of fact in the contested case of Jackson *v.* Smith, from the First Congressional district of Maryland, and shall have power to send for all such persons and papers as it may find necessary for the proper determination of said controversy, and determine the time, place, and manner of taking said testimony, which may be taken before the said committee, or any subcommittee, or any person selected by said committee for such purpose, and that the expenses incurred in taking said testimony shall be paid from the contingent fund of the House upon the order of said Committee on Elections No. 2.

712. The Pennsylvania election case of Carrigan v. Thayer, in the Thirty-eighth Congress.

A contestant having neglected to take the strictly legal means provided for taking testimony, the House denied his application for new authority to compel testimony.

On June 22, 1864,[2] the Committee on Elections reported in the case of Carrigan *v.* Thayer, of Pennsylvania. The contestant in this case had made application to the committee for authority from the House to summon the mayor and recorder of Philadelphia, the legal custodians of the ballot boxes of a portion of this district, to bring with them these ballot boxes for examination either before the committee or some competent magistrate.

The reason for this request was the allegation that those witnesses had failed to obey a subpoena duces tecum issued by two justices of the peace during the time prescribed by the statute of 1851 for taking testimony, requiring them to appear and produce the said ballot boxes for examination.

The statute of 1851 named as the officers authorized to issue suboenas and examine witnesses "any judge of any court of the United States, or any chancellor,

[1] First session Fifty-ninth Congress.

[2] First session Thirty-eighth Congress, House Report No. 126; 1 Bartlett, p. 576; Rowell's Digest, p. 196.

judge, or justice of a court of record of any State, or any mayor, recorder, or intendant of any town or city, which said officer shall reside within the Congressional district in which said contested election was held."

There was a further provision of this act, which, with the construction put upon it, is thus stated by the committee:

By the ninth section of the same act it is provided that "when no such magistrate as is by the third section of this act authorized to take depositions shall reside in the Congressional district from which the election is proposed to be contested, it shall be lawful for either party to make application to any two justices of the peace residing within the said district, who are hereby authorized to receive such application and jointly to proceed upon it in the manner hereinbefore directed.

It will be seen that two justices of the peace have jurisdiction and authority only when there are none of the magistrates mentioned in the third section resident in the district. When any one of those magistrates resides in the district the two justices can do nothing. Now it appeared that there were resident in this district, during the whole time fixed by the statute for taking testimony in this case, three judges of the court of common pleas of the State of Pennsylvania, a court of record. The two justices of the peace had therefore no jurisdiction or authority in the premises, and their subpoena was therefore only so much blank paper, which no one was bound to obey.

It follows that the contestant had taken no legal steps to procure this testimony within the time fixed by law. The contestant showed no good reason for this omission, and while some of the committee were of opinion, for the reasons stated in the report in the case of Kline *v.* Myers, that the contestant was not entitled to this testimony without first showing some ground of suspicion that the return was not correct, all of the committee were of opinion that, for the reason heretofore stated, the contestant having taken no legal steps to procure this testimony, and showing no good reason for the omission, he is not entitled to the relief prayed for. The application was therefore denied.

Therefore the committee reported a resolution declaring the sitting Member entitled to the seat, and Mr. Carrigan not entitled to it.

On June 24[1] the report was considered by the House, a protest by the contestant against the technical rule which excluded his evidence being the only debate. The resolutions proposed by the committee were agreed to without division.

713. The Missouri election case of Wagoner v. Butler in the Fifty-seventh Congress.

The House, in a case wherein the terms of the law would prevent taking testimony in an election case in time for decision, provided a method by resolution.

Discussion of the principle that the House is not bound by any statute in exercising its prerogative of judging the elections of its Members.

On December 6, 1902, Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted a report[2] on the memorial of George C. R. Wagoner, who contested the seat of James J. Butler, of Missouri. At the first session of this Congress Mr. Butler had been unseated, and at a subsequent election had been again returned. The preamble and resolutions as submitted by Mr. Olmsted in a supplemental report[3] state the facts of the case:

Whereas James J. Butler having been returned as elected to membership in this Congress from the Twelfth district of Missouri, his right to such membership was contested on the ground of gross frauds in his election, and having heard said contest this House, on the 28th day of June, 1902, declared said Butler not to have been elected; and

[1] Journal, p. 892; Globe, p. 3243.

[2] Second session Fifty-seventh Congress, House Report No. 2780.

[3] Supplemental Report No. 3857.

Whereas an election having been held November 4, 1902, to fill the vacancy resulting from the said action of this House, the said Butler was again returned as elected from the said district, took the oath of office December 1, 1902, and now occupies a seat in this House, and George C. R. Wagoner has, through a Member of the House, presented a memorial or petition claiming that he, and not the said Butler, was duly elected, alleging gross frauds in the election and showing that he has served upon said Butler a notice of contest; and

Whereas the full time allowed by statute for the taking of testimony, filing of briefs, etc., in such cases would extend beyond the term of the present House, thus preventing it from judging of the merits of the said contest, and the said Wagoner in his petition prays that by appropriate action such time shall be so shortened as that the controversy may be determined before the expiration of the Fifty-seventh Congress; and

Whereas Committee on Elections No. 2, to which said petition was referred, has reported that it awarded a hearing to both parties and that the said Wagoner declares his ability to take the testimony upon his side in fifteen days, and the said Butler making no estimate of the time that will be required by him, and denies the power of this House to shorten the time as fixed by the act of 1851, and other statutes; and

Whereas it is the sense of the House that this contest should be heard and decided at this session: Therefore

Resolved, That in the contested election case of George C. R. Wagoner *v.* James J. Butler, from the Twelfth Congressional district of Missouri, the contestee shall be required to serve upon contestant his answer to notice of contest on or before December 20, 1902, and that the time for taking and completing testimony in such case shall be limited as follows: The contestant shall be allowed from December 15, 1902, until and including January 3, 1903, in which to take testimony; the contestee shall be allowed from January 3, 1903, until and including January 27, 1903, for the taking of his testimony, and the contestant shall be allowed from January 27, 1903, until and including February 1, 1903, for the taking of testimony in rebuttal. As soon as the testimony shall have been received by the Clerk of this House it shall at once be referred to the Committee on Elections No. 2, and the said committee shall proceed to the consideration of the case; and, having first afforded to the parties an opportunity to be heard as to the merits of the same, shall report to this House its conclusions with respect to such case in time to afford to the House an opportunity to pass upon the same during the present session of Congress. Except so far as herein otherwise provided, this case shall be governed by the ordinary rules of procedure in contested Congressional election cases.

The committee had concluded, from the showing made by the contestant, that his contest was not frivolous and not without reasonable grounds.

As to the right of the House to depart from the terms of the act of 1851, a right which sitting Member denied, the committee in their first report cite the precedent of Benoit *v.* Boatner; and in their supplemental report say:

We have no hesitation in saying that there is no statute which can fetter this House in the exercise of the high privilege and important duty devolved upon it by the constitutional declaration that "each House shall be the judge of the elections, returns, and qualifications of its own members."

The first legislative action upon the subject was taken in the Fifth Congress, and resulted in the act which was approved by the President January 23, 1798. That bill was reported to the House by Mr. Harper, of South Carolina, from a select committee of five appointed for the purpose. In their report the committee unanimously conceded that the provisions of such a statute could not be enforced on any future House of Representatives, and that its only proper and necessary function would be to provide the mode in which testimony should be taken and grant the powers for the compelling of attending of witnesses, leaving it for each House to determine when testimony thus taken should be presented, whether it would receive it or not, "while the constitutional rights of each House would be saved by its power to adopt or reject the rule for the admission of the testimony."

In the Senate, however, an amendment was inserted as the result of which the act expired at the end of the first session of the Sixth, or next, Congress. Two or three subsequent attempts were made to enact legislation upon the subject, but the majority of the House seemed to have considered that such legislation would be wholly unconstitutional, and from that time until 1851 there was no method of taking testimony until the first session of the Congress to which the opposing parties claimed to have been elected, thus in ordinary cases deferring for more than a year even the commencement of a contest.

To remedy this difficulty Mr. William Strong, of Pennsylvania, afterwards a justice of the supreme court of that State and later of the Supreme Court of the United States, prepared and championed to its passage the act of 1851. To the argument that it was wholly unconstitutional because infringing upon the privileges of the House, he made much such reply as was embraced in the report made by Mr. Harper's committee to the Fifth Congress, contending that the act, as framed, would not and could not interfere with the constitutional rights of any subsequent House, because, as he said, "there is no provision restraining the power of the House to proceed in another manner." (Congressional Globe, p. 109.)

In the Thirty-fifth Congress, in the case of Brooks *v.* Davis, the House having been asked to depart from the provisions of the act of 1851, a minority of the committee filed a report in favor of granting the request. In said report they said:

"If it is claimed that the act of 1851 prevents the House of Representatives from pursuing an investigation in any other manner than prescribed by that act, it would then be wholly inoperative, coming into conflict with the fifth section of the first article of the Constitution of the United States, which provides 'each House shall be the judge of the elections, returns, and qualifications of its own members.' No prior House of Representatives can prescribe rules on this subject of binding force upon its successor, nor can the Senate interfere to direct the mode of proceeding; the House of Representatives is not a continuing body, each body of Representatives having an independent and limited existence, and having the clear right to determine, in its own way, upon 'the elections, returns, and qualifications of its own members.' A like authority is given, and in similar terms, to each House to 'determine the rules of its proceedings, punish its members for disorderly behavior,' etc.; and no member will pretend that a general law, passed in such terms as the act of 1851, would restrain any House from acting on these subjects independently of the law."

That report was signed by four noted lawyers, among them Mr. L. Q. C. Lamar, of Mississippi, afterwards Attorney-General under President Cleveland and by him appointed a justice of the Supreme Court of the United States.

See also the decision in United States *v.* Ballin (141 U. S., 1), unanimous opinion of the court written by Mr. Justice Brewer, Mr. Lamar being at that time a member of the court.

The majority report, presented by Mr. Boyce, of South Carolina, agreed with the minority as to the powers of the House, but held that in that particular case it was inexpedient to depart from the provisions of the statute until the contestant had first exercised all his rights thereunder.

In Williamson *v.* Sickles (1 Bart., 288) Mr. Dawes, of Massachusetts, presented the report of the committee, holding that the act of 1851 had no binding force upon the House. The minority report raised the direct issue by declaring "that it is not competent for the committee to recommend any action to the House which involves a violation of the law of 1851, because as a law of Congress it is obligatory alike upon the House, the committee, and the contestant." The resolution reported by the majority was adopted by the House, yeas 80, nays 64.

Other cases upon the subject in addition to Benoit *v.* Boatner in the Fifty-fourth Congress, are Reeder *v.* Whitfield, Dailey *v.* Morton, Coffroth *v.* Koontz.

The Kentucky cases in the Fortieth Congress, Congressional Globe, first session, p. 546: Bisbee *v.* Finley, 2 Ells., 172; Jones *v.* Shelly, 2 Ells., 681; Rowell's Digest, 394; Fuller v. Dawson, 2 Bart., 126; McGrorty *v.* Hooper, 2 Bart., 211; Thomas *v.* Arnell, 2 Bart., 162; Hunt *v.* Sheldon, 2 Bart., 530; Sheafe *v.* Tillman, 2 Bart., 907; Kline *v.* Verree, 1 Bart., 574; Chapman *v.* Ferguson, 1 Bart., 267; Howard *v.* Cooper, 1 Bart., 275; Vallandingham. *v.* Campbell, 1 Bart., 223; Ben *v.* Snyder, Smith, 247. See also Paine on Elections, sections 996 and 1003.

The resolution and preamble were considered in the House on December 11, 1902,[1] and debated at length. The legal proposition of the committee was not seriously disputed, however. An amendment extending for five days the time within which sitting Member should file his answer to the notice was agreed to without objection. A substitute proposed by the minority was disagreed to, and then the resolution was agreed to, yeas 155, nays 117.

[1] Journal, pp. 39, 40; Record, pp. 231–245.

714. The Alabama election case of Jones v. Shelley, in the Forty-seventh Congress.

Instance wherein the Elections Committee, on the strength of a memorial from contestant and general knowledge, recommended taking testimony more expeditiously than provided by law.

On January 23, 1883,[1] Mr. A. A. Ranney, of Massachusetts, from the Committee on Elections, submitted the report of the majority in the Alabama case of Jones *v.* Shelley, in the matter of the memorial of John W. Jones, the contestant. The report thus states the case:

The committee have heard the parties more directly interested, examined the memorial, and inquired into the facts, so far as is deemed necessary for present purposes. The House is asked by the petitioner, in a pending contest for the seat as Representative from the Fourth Congressional district of Alabama, to fill a vacancy, to prescribe another and more summary mode of procedure than that provided for by the acts of Congress relating to contested elections. The reason is that the time allowed the parties under such acts is such that the present term of Congress will have expired long before the contest can in regular course be concluded. It is perfectly apparent that unless the House does what is asked the contest will prove futile. That the House has authority to do what is requested does not admit of a doubt. The only question is whether there is time now before the end of the session to accomplish the desired purpose, or whether any other mode of procedure which is reasonable and practicable can avail anything. The memorial sets forth with great clearness and completeness a state of facts which calls loudly for such action, if it is likely to be of any use commensurate with the attendant labor and expense thereof.

The sitting Member, after having been once unseated at the present Congress, has been again returned with a new certificate in hand to fill the vacancy. He was unseated because the certificate before was the result of frauds at the polls, and the fruits of illegal and evil practices on the part of his partisan friends. His present certificate is alleged to have been induced and procured by the same methods in repetition, with perhaps some variations and aggravations.

If this is so, it would seem that there is, as charged, a settled determination on the part of the evil-disposed persons therein that no candidate of the dominant party in the district in question shall be counted in and get the certificate in any event.

A brief statement of some of the main facts alleged will suffice:

A contest was regularly instituted under the said acts of Congress, and the sitting Member has served an answer to the same, so that the contest is now pending. The ninety days allowed for the taking of the evidence will extend beyond the 4th day of March next.

The sitting Member was declared elected on the strength of a vote returned of only 6,752, whereas the claim is that he did not in truth and in fact get over about 5,000 votes. Contestant was declared and returned to the State board of canvassers as having received only 4,811, whereas he in truth and in fact received over 15,000 votes, which were legally cast, counted, and returned to the boards of county canvassers, but 10,000 of which were there counted out either for no assignable reason or because of certain pretended informalities in the returns and upon frivolous objections which were resorted to only as pretexts in an earnest search for some real or plausible excuse. There are other charges of fraud of a more heinous character, which deprived contestant of many votes in the original returns; but laying those aside and taking the returns as made from the voting precincts to the county boards the contestant is said to have been elected by about 6,000 majority; the reports of the United States supervisors give him about that majority, as would appear by certified-copies furnished the committee. It will appear that the vote of the sitting Member (6,752) is less than one-third of the votes cast for both candidates according to the precinct returns. It is less than one-third of the votes cast in prior elections in the same district for Members of Congress, as appears by the history of those elections as read from the records of this House. It is less than one-fourth of the voting population of the district, as appears by the last census, and as shown in the last prior contest alluded to.

[1] Second session Forty-seventh Congress, House Report No. 1886; 2 Ellsworth, p. 681.

The committee refer to what was proven in the prior contest for this seat, and conclude that it is due to the honest electors of the country to expedite the hearing. Accordingly the majority recommended the following resolution:

Whereas John W. Jones claims to have been elected as Representative from the Fourth Congressional district of Alabama, to fill a vacancy, and has instituted proceedings for a contest under the provisions of the acts of Congress relating to contested elections; and whereas there is not sufficient time to prosecute and conclude said contest under the provisions of said acts and in course before the expiration of the present term of Congress, and the contest must be abandoned unless some other more speedy mode of procedure be prescribed: Therefore,

Resolved, That a special committee, composed of three Members of the Committee on Elections, be appointed, with authority, and whose duty it shall be to proceed, without unnecessary delay, to the Fourth Congressional district of Alabama, and there take the evidence which may be adduced by either party in the matter of the pending contest, and report the same to the House as soon as may be. That the committee appointed is empowered to send for persons and papers and administer oaths, and also to employ stenographers, messengers, and a sufficient clerical force, at the usual compensation, the expenses to be paid out of the contingent funds of the House, upon the approval of the chairman of said committee.

The minority views, presented by Mr. F. E. Beltzhoover, of Pennsylvania, contended that the contestant, by beginning his testimony thirty days earlier, might have expedited his case; that the committee would not have time to take the evidence satisfactorily; that contestant's party had manipulated the returns fraudulently, and concluded that the ordinary modes should not be departed from on such insufficient cause shown. They say:

The report of the majority of the Committee on Elections recommending that a special committee be created with indefinite and arbitrary powers is as positive and dogmatic in its findings as if they were sustained by facts. The report rests solely on the mere ex parte statement, not under oath, of the memorialist, whom the contestee contradicts in every material allegation. What evidence is there in this memorial which any court would regard of the slightest weight? No chancellor would grant any relief on it without some verification of its allegations. No Committee of Elections or House of Representatives on such statements alone have ever characterized the citizens and sworn officers of any Congressional district as "evil-disposed persons," etc. No committee has ever based a finding on the fact that the returned candidate had received less than one-third of the votes cast at the previous elections or less than the voting population of the district. This kind of evidence, which is always incompetent, is still more unreliable when it is remembered that in this instance the election was to fill a vacancy of only a few months, and there was no general interest taken in the result, and no reason for a full vote being cast. But in order to support their report, the majority resort to "all advices which they get from reputable and honorable men of the district and who appear to be cognizant of the facts." What are these "advices?" Who are they from? Is Congress to solemnly adjudicate upon the right of a Member to a seat on the hearsay and rumor which Members gather in their private communications with persons unknown and unsworn and of whom and of which there is no public or verified knowledge?

The majority of the Committee on Elections further bolster their remarkable report by saying "that the facts alleged in the memorial, confirmed and rendered highly probable as they are by other well-known facts and from other sources outside, entitle the contestant to the relief which he asks," etc.

On January 25[1] the minority obtained leave to withdraw their views in order to make some additions to it.

Thereafter the subject does not seem to have again been taken up by the House.

[1] Record, p. 1580; Journal, p. 305.

715. The Missouri election case of Coudrey v. Wood, in the Fifty-ninth Congress.

Testimony in an election case being impeached by ex parte affidavits, the House gave the Elections Committee authority to send for persons and papers in order to investigate as to the integrity of the record.

On February 1, 1906,[1] Mr. Marlin E. Olmsted, of Pennsylvania, presented, as a privileged matter, the following resolution reported from the Committee on Elections No. 2:

Whereas in the contested election case of Coudrey *v.* Wood, from the Twelfth Congressional district of Missouri, which was referred to the Committee on Elections No. 2, a motion has been made to suppress the testimony of contestant on the ground, among others, that as forwarded to the Clerk of the House and printed it is not the testimony as given by the witnesses, but has been materially altered by leaving out certain parts thereof and by adding to and changing other parts so as to completely destroy the integrity of said testimony; and

Whereas, owing to the conflicting statements contained in ex parte affidavits filed in support of and in opposition to said motion, it is impossible to ascertain the truth of the matter: Therefore, be it

Resolved by the House of Representatives, That Committee on Elections No. 2 shall be, and is hereby, authorized and empowered to take such testimony as it shall deem necessary to the determination of questions of fact in the contested election case of Coudrey *v.* Wood, from the Twelfth district of Missouri, and shall have power to send for all such persons and papers as it may find necessary for the proper determination of said controversy and determine the time, place, and manner of taking said testimony, which may be taken before the said committee or any subcommittee or any person selected by said committee for such purpose, and that the expenses incurred in taking said testimony shall be paid from the contingent fund of the House upon the order of said Committee on Elections No. 2.

The resolution was agreed to without division.

In explanation, Mr. Olmsted said:

Mr. Speaker, the testimony in this case, as printed in a volume of 1,409 pages, has been submitted by the Clerk of the House to the committee, and also the originals from which the said publication was made. Upon the face of these papers the testimony appears to have been regularly taken, signed by the witnesses, and certified by the notaries public before whom it was taken, and to be regular in every respect. But the contestee has submitted a motion to suppress all the contestant's testimony for various reasons, most of which are technical, but one of which seems to the committee to be of importance, namely: That the testimony as returned to Washington and printed by the Clerk is not the testimony given by the witnesses, but that the same has been altered, some parts omitted, some things added, and some portions changed. There have been submitted ex parte affidavits of two stenographers who took the testimony, who state that under instructions of a certain gentleman they changed certain portions of the testimony. That gentleman makes affidavit denying their statements. The affidavits of ten witnesses were filed to the effect that when upon the witness stand they were cross-examined, but no cross-examination appears in the report of their testimony. Against that there is the affidavit of a female stenographer, who says that under the direction of the contestee she prepared a uniform style of affidavit—blank forms—in which these ten are all made, and that the persons who made them received small sums of money for making these affidavits.

That is denied in another affidavit on behalf of the contestee. Other ex parte affidavits of stenographers have been submitted to the effect that the contestee offered the affiants money to make false affidavits to the effect that the testimony as taken down by them had been changed. On the other hand, there are affidavits to the effect that the stenographers who made those affidavits offered to make affidavits on behalf of contestee, but demanded money for so doing. There is some testimony tending to

[1] First session Fifty-ninth Congress, Record, pp. 1891, 1892.

show that the contestee brought suit against certain persons for the purpose of coercing them and getting them to make affidavits; and one lady says, to use her own language, "He frightened me to death," after which she made an affidavit. There is also the testimony of one stenographer that under instructions he changed in various respects answers from "no" to "yes" in material parts of the testimony.

To make a long story short, these ex parte affidavits are so utterly conflicting in their character that it is impossible for them to ascertain the truth of the matter, and, believing it important that the question of the integrity of this testimony shall at the outset be determined, the committee has unanimously agreed to recommend the adoption of the resolution which has been read from the Clerk's desk.

On June 23, 1906,[1] Mr. Olmsted presented the report of the committee, which, without assigning reasons, recommended the following resolutions, which were agreed to by the House without debate or division:

Resolved, That Ernest E. Wood was not elected to membership in the House of Representatives of the United States in the Fifty-ninth Congress and is not entitled to a seat therein.

Resolved, That Harry M. Coudrey was elected to membership in the House of Representatives of the United States in the Fifty-ninth Congress and is entitled to a seat therein.

716. The Missouri election case of Knox v. Blair, in the Thirty-eighth Congress.

Instance wherein the returned Member presented evidence taken after the time prescribed by law and asked the House to consider it.

The House received but prevented the use of testimony taken in an election case in disregard of the law.

On March 11, 1864,[2] Mr. F. P. Blair, jr., of Missouri, as a question of privilege, presented testimony taken by himself, after the time limited by law, in the case of Samuel Knox, contestant, to the right of Mr. Blair to his seat; and Mr. Blair further moved that the evidence be referred to the Committee of Elections, to be considered by the committee with other evidence before the committee taken after the time provided by law.

It was stated that the testimony in question was not strictly ex parte, as the contestant had been notified so that he might be present, but it was taken without authority of law.

After debate the House, on motion of Mr. Thaddeus Stevens, of Pennsylvania, amended the motion by adding:

Provided, That this resolution shall refer only to affidavits or depositions, and that all such illegally taken shall not be considered by the committee.

The motion as amended was then agreed to.

On May 5, when the committee reported,[3] they stated that they had not considered the testimony referred on motion of Mr. Blair, as the terms of the reference precluded such consideration.

717. The first rule for the examination of an election contest before the Elections Committee.

The right of contestee to cross-examine and present testimony was conceded in the first election case.

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[1] Record, p. 9036; House Report No. 4999.

[2] First session Thirty-eighth Congress, Journal, p. 372; Globe, p. 1058.

[3] House Report No. 66, pp. 3 and 4.

In the first contested election case decided in the House, that of David Ramsay *v.* William Smith, of South Carolina, the Committee on Elections reported and the House adopted a resolution directing the course of procedure before the committee. This resolution, reported April 18, 1789,[1] provided that the committee take proofs, and that "Mr. Smith be permitted to be present, from time to time, when such proofs are taken, to examine the witnesses, and to offer counter proofs, which shall also be received by the committee, and reported to the House."

718. Illustration of a rule prescribed by the House for taking testimony in an election case before the enactment of a law prescribing a method.— On January 23, 1850,[2] on report from the Committee on Elections, the House agreed to the following:

Resolved, That the parties to the contested election from the First Congressional district of the State of Iowa be, and they are hereby, authorized to take the testimony of such witnesses as either of them may require, by depositions in conformity with the laws of the State of Iowa in force at the time of taking the testimony, before any judge of the supreme court or of the district courts of said State, who are hereby empowered to take depositions in any part of said State, or before a clerk or clerks of any of the district courts, or before any notary public, or before any justice of the peace of the said State within the county in which such clerk, or notary public, or justice of the peace may reside: *Providing,* That notice of the time and place of taking the depositions shall be given by the party taking the same to the opposing party, or his attorney, at least ten days prior to taking the same, and one day in addition for every thirty miles' travel from the place of taking the depositions to the place of residence of the person receiving the notice, or to the place where he may be when notice shall be received by him, if not received at his place of residence: *Provided, also,* That the parties may, by agreement in writing, regulate the mode of giving notice: *Provided, also,* That when such depositions shall have been taken they shall, together with the agreements and notice aforesaid, be sealed up by the officer taking the same and be directed to the Speaker of the House: *And provided further,* That all the testimony in the case, to be taken or presented by either party, shall be returned to this House within one hundred days from the passage of this resolution.

On January 29[3] the House agreed to a similar but not identical resolution prescribing the method of taking testimony in the Pennsylvania contested-election case.

At the next session of this Congress[4] a law was enacted prescribing the mode of taking testimony, one object being to prevent delay in the presentation of cases.[5]

719. The South Carolina election case of Stolbrand *v.* Aiken in the Forty-seventh Congress.

Instance wherein the House dismissed an election case because the testimony was taken before an officer not specified by law.

While not bound by the law governing procedure in election cases, the House does not unnecessarily disregard them.

On April 6, 1882,[6] Mr. G. W. Jones, of Texas, from the Committee on Elections, submitted the following report in the South Carolina case of Stolbrand *v.* Aiken:

All the testimony in the case was taken in behalf of the contestant before E. W. Stoeber, United States commissioner. The contestee, at the threshold, excepted to the competency of the officer.

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[1] First session First Congress, Contested Elections in Congress from 1789 to 1834, pp. 23, 24.

[2] First session Thirty-first Congress, Journal, pp. 393. 394.

[3] Journal, p. 426.

[4] Second session Thirty-first Congress, Journal, p. 324; Globe, p. 110.

[5] This law, known as the law of 1851, is the foundation of the present system as to election contests.

[6] First session Forty-seventh Congress, House Report No. 932; 2 Ellsworth, p. 603.

The following are the statutory provisions applicable to the question raised by the exception.

Revised Statutes, page 19:

"Sec. 110. When any contestant or returned Member is desirous of obtaining testimony respecting a contested election, he may apply for a subpoena to either of the following officers who may reside within the Congressional district in which the election to be contested was held:

"First. Any judge of any court of the United States.

"Second. Any chancellor, judge, or justice of a court of record in the United States.

"Third. Any mayor, recorder, or intendent of any town or city.

"Fourth. Any register in bankruptcy or notary public.

"Sec. 111. The officer to whom the application authorized by the preceding section is made shall thereupon issue his writ of subpoena, directed to all such witnesses as shall be named to him, requiring their attendance before him at some time and place named in the subpoena, in order to be examined respecting the contested election.

"Sec. 112. In case none of the officers mentioned in section one hundred and ten are residing in the Congressional district from which the election is proposed to be contested, the application thereby authorized may be made to any two justices of the peace residing within the district; and they may receive such application and jointly proceed upon it.

"Sec. 113. It shall be competent for the parties, their agents or attorneys authorized to act in the premises, by consent in writing, to take depositions without notice; also, by such written consent, to take depositions (whether upon or without notice) before any officer or officers authorized to take depositions in common law, or civil actions, or in chancery, by either the laws of the United States or of the State in which the same may be taken, and to waive proof of the official character of such officer or officers. Any written consent given as aforesaid shall be returned with the depositions."

The officers authorized to take testimony are specially designated. It is, however, specially provided that "by written consent" testimony may be taken before certain other officers mentioned. United States commissioners are not mentioned in the fast class, and, if included in the latter, can not act without the written consent of the parties.

It is apparent that the exception is well taken and must be sustained.

It is insisted that the House of Representatives, in judging of the elections, qualifications, and returns of its Members, is not bound by the rigid rules of judicial procedure. This is true, but applies, only to exceptional cases, not provided for by the "rules prescribed." It would be worse than idle to, prescribe rules if they may be willfully and unnecessarily disregarded.

This view is decisive of the case and renders unnecessary further statement of it.

We recommend the adoption of the following resolution:

Resolved, That C. J. Stolbrand have leave to withdraw his papers.

The resolution was agreed to without division or debate.[1]

720. The Alabama election case of Goodwyn v. Cobb in the Fifty-fourth Congress.

A question as to the validity in an election case of testimony taken before a notary public outside the county in which he was empowered to act.

A question as to the introduction during an election case of evidence in chief during time of rebuttal.

The official certificate of a State officer giving the returns may be introduced at any stage of the proof in an election case.

A question as to whether certain copies of election papers certified to by public officers were actually evidence or not.

Discussion as to the effect of an alleged unconstitutional registration law in an election case.

[1] Journal, P. 989.

On April 4,1896,[1] the Committee on Elections No. 1 reported in the case of Goodwyn *v.* Cobb, from Alabama. This case involved, besides the merits, certain preliminary questions:

(1) The sitting Member, sustained by the minority of the committee, urged that a notary public might not take testimony in a county other than that in which he was empowered to act by the law of the State. The majority of the committee overruled the objections on the same grounds that were adduced in the case of Aldrich v. Robbins.

(2) The sitting Member, sustained by the minority of the committee, objected that important testimony was taken in Montgomery County before a notary public who resided in another Congressional district, whereas the laws of the United States confined the power to take testimony to an officer who resides in the district of the witness. The majority of the committee admit:

> The notary should not have taken evidence beyond the limits of the * * * district without consent. But as to the five witnesses whose testimony was taken in Montgomery County, the objection of want of authority was only made to the witness Lynch, and his evidence has not been considered on this occasion. As to the others, the absence of objection warrants the inference of consent, and their evidence is legally before the House.

(3) It was objected on the part of the sitting Member that during the time allowed the contestant under the law for rebuttal only he had introduced evidence in chief. The minority of the committee contended that this evidence, alleged to be introduced improperly, was of great importance, and that the case of the contestant depended on it. The majority of the committee overruled this objection for reasons as follows:

(a) A portion of this evidence in question was introduced to show that persons whose names were on the poll list did not in fact vote. The minority objected that this constituted a case where the trial court made up its judgment on rebuttal evidence, entirely cutting off from hearing the party against whom the judgment was rendered. The majority of the committee, on the other hand, declare that "similar proof had been previously taken, and there can be no reason for supposing that the contestee, Mr. Cobb, was specially prejudiced by the order of this evidence, for it seems to have been beyond his power of contradiction." In debate it was further explained that he could have rebutted it only by the election officials and the returns, which were already discredited.[2]

(b) A second portion of this evidence in chief taken during the time for rebuttal testimony only was the certificate of the secretary of state as to the officially returned vote of the district. The minority objected that this was a vital part of the case, and that it was improperly presented at this time. The majority of the committee insisted[3] that where papers of this kind were introduced it was a matter of no consequence where they were introduced as to the order of proof, quoting in support of this principle the case of Vallandigham *v.* Campbell.

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[1] First session Fifty-fourth Congress, House Report No. 1122.

[2] Record, p. 4239.

[3] Record, p. 4237.

(4) The contestant had introduced as evidence the copies of the registration lists and the poll lists certified by the judges of probate of the respective counties. The sitting Member objected that the registration copies were no more than copies of copies, and that the probate judges had no power to certify the copies of registration and poll lists so as to make them evidence. The law of Alabama required the registrars to forward true copies of their lists to the judge of probate of the county, who, from such lists, was required to make a correct alphabetical list of the voters so registered, by precincts and wards, and certify copies of these alphabetical lists to the precinct inspectors for use on election day. The majority of the committee find that when the judge of probate "certified to a copy of that registration list it was to a copy of his own list, which remains in his office as a part of its permanent papers or records." The committee quote the law of Alabama which make "presumptive evidence in any civil cause" of bonds, instruments, or papers "required to be kept by any sworn officer of the State." The sitting Member denied the pertinency of this section because the law had not declared that the list should be kept in the office of the judge of probate. But the committee ruled that an express direction to that effect was not necessary, it being sufficient that the statute by implication contemplated that one of the lists should remain in the office. For the law provided for the probate judge to deliver to the inspectors one of the lists made by him, and as no other disposition had been made of the other, it must remain where it was found, and that was in the custody and office of the probate judge as one of the public papers or records. The inspectors of election were also required to send the poll list of the election to the judge of probate, for the obvious reason that it was to be the basis of the final and official canvass of the votes; and that in like manner became a paper, in the language of the statute, to be kept in his office, and a copy of which he could make presumptive evidence by his official certificate.

(5) A certified statement of the secretary of state as to the final result of the canvass was objected to for the same reason, that the secretary of state was without authority to make the certificate evidence. The committee, however, overrule this objection on the ground that "it is the manifest purpose of the law that all these returns [which are forwarded to the secretary of state in requirement of law] shall become records in these public offices, to be preserved and maintained as evidence of the titles of the various officers found to be elected; and as such the certificate of the custodian thereof that it is a true copy of the original has the same legal effect as if the original were produced and proved."

(6) It was urged by the sitting Member that the secretary of state's certificate was formally defective, and that, after the committee had caused the contestant to procure certain transcripts from the secretary of state, the fact was made apparent that the vote of one whole county should have been disregarded because the returns were not signed by all the board of supervising canvassers. Therefore the minority of the committee held that the sitting Member should have been allowed to go into an examination of the votes behind this county return, if the whole return was not to be excluded. The majority of the committee held that the objection to the original certificate did not require its exclusion; and that, being record evidence, it was competent for the committee to have produced further and more formal statements to correct informalities in the proof previously made. The committee further

found that the county returns which were not signed by all the board of canvassers, were yet sufficient, since they were signed by a majority.

(7) The sitting Member objected that the registration law of Alabama was unconstitutional, and therefore that the evidence touching the registration, on which contestant much relied, should be suppressed. While the majority of the committee do not in express terms admit the unconstitutionality of the law, yet it seems evident that the registration law required the completion of the lists of each precinct about five months before election day, whereas the constitution provided that the legislature should not require a residence of longer than three months in the precinct. The law prohibited the voting of any person not registered, unless he should become 21 years of age after the completion of the registration. The committee make the point that the prohibition could therefore affect only persons becoming residents after the close of the registration and before the beginning of the three months before election; and that the testimony failed to show any such persons as affected. In the debate[1] it was urged that the constitutional question was of no effect, since the only use of the lists was to determine who were legal and honest voters, and for this purpose it was not essential to determine the constitutionality of the law.

(8) An objection by the minority of the committee that certain testimony came before the committee without proper certificate of the notary public before whom it was taken, was in the debate,[1] shown to be based on a mistaken reading of the record of the case. Such certificate did in fact exist.

721. Election case of Goodwin v. Cobb, continued.

The returns of a county being wholly unreliable, and the conduct of the election unfair, the returns were rejected.

Certain votes in a county being evidently cast, were counted according to the known opinions to the voters, although there was evidence generally of great frauds.

Unfair representation on the election board of a precinct and disorder at the polls were held not to justify rejection of the return of the precinct.

Passing from the preliminary questions to the merits of the case, it appeared that the corrected official returns gave to the sitting Member a majority of 508 votes. The majority of the committee held—though not with the assent of the minority—that three of the nine counties of the district were distinctively "black" counties, inhabited largely by colored voters, and that the remaining six counties were distinctively "white" counties. The returns from the so-called white counties gave contestant a majority of 3,612 votes, while the majority for sitting Member in the three "black" counties was sufficient to overcome the majority for contestant in the "white" counties and give to sitting Member a majority of 508 in the district.

The contestant attached the returns of twelve precincts in the "black" counties, claiming that they were false and fraudulent, and that they returned a much larger number of fraudulent votes than the majority reported for the contestee.

The majority of the committee, as the result of their examination of the testimony relating to the twelve precincts, rejected entirely the polls of five of them, reduced the return for the sitting Member in six of them, and in one precinct allowed the return to stand as made.

[1] Record, p. 4219.

(1) As to the five rejected polls, it appeared to the committee that the returns were so false and unreliable that there was no way of determining the actual vote. In three of these precincts the contestant had no representatives at all on the boards of election officers, and in the others his representatives were incompetent. The poll lists showed many more voters than were seen to go to the voting places; in one precinct names had been added to the registration lists to an extent manifestly absurd; men appeared as voters whose names were not known in the precinct, and who could not be found by an officer with a subpoena; others appeared as voting who testified that they did not vote; and some men who appeared as voting were shown to be dead.

(2) In six precincts there was evidence generally of great frauds, but the testimony in most of them indicated that a certain number of men, generally known to be Democrats, had actually voted. Therefore the majority of the committee assumed that these had voted for the sitting Member and allowed them on his poll, striking off the fraudulent surplus.

(3) In one precinct, Day's Beat No. 5, the contestant had no representative on the election board and the proceedings were disorderly in the extreme. "But these facts," say the committee, "alone will not justify a reduction in the vote, although there is a probability that it was not genuine."

In all these precincts the minority denied the sufficiency of the testimony to produce the results reached by the majority.

On April 21 and 22[1] the resolutions of the committee, unseating the sitting Member and seating the contestant, were debated and a decision was reached. By a vote of ayes 47, noes 109, the proposition of the minority to confirm the title of the sitting Member was disagreed to. Then by a vote of yeas 60, noes 131, the House disagreed to a motion to recommit the report with instructions to the Committee on Elections "to report a resolution authorizing the contestee to take further testimony in rebuttal of evidence in the record taken by contestant, which is evidence in chief, during the last period of ten days in which testimony was taken."

The resolution declaring sitting Member not entitled to his seat was agreed to without division.

Then, on April 22, the resolution seating the contestant was agreed to—yeas 145, nays 55. The oath was then administered to Mr. Goodwyn.

722. The Pennsylvania election case of Hudson v. McAleer in the Fifty-fifth Congress.

A contestant may not be granted more time to take testimony on the mere declaration, without proof, that he has been impeded by violence from procuring evidence.

To procure an extension of time for taking testimony a contestant should show that the testimony is newly discovered.

On February 5, 1898,[2] Mr. Lemuel W. Royse, of Indiana, from the Committee on Elections No. 2 presented a report in the Pennsylvania case of Hudson *v.*

[1] Journal, pp. 413, 414, 417; Record, pp. 4217–4243, 4271.

[2] Second session Fifty-fifth Congress, House Report No. 354; Rowell's Digest, p. 558; Journal, p. 173.

McAleer. The contestant had received a small minority of the votes cast at the election, according to the official returns. The committee summarize the question presented to the House as follows:

On the 3d of December, 1896, contestant served upon contestee his notice of contest, and on the 31st of the same month contestee served on the contestant his answer to said notice.

On the 19th and 20th of January, 1897, testimony was taken on behalf of contestant, when the taking of further testimony was abandoned on the grounds, as alleged by the contestant, that he was prevented from proceeding further because of the riotous and violent conduct of certain citizens of the district.

Contestant comes before your committee and asks for further time in which to take testimony in support of his notice of contest, and that a subcommittee be sent to said district for the purpose of procuring said further testimony. In support of said motion he files with us his own affidavit, in which he sets forth various irregularities and frauds in the holding of said election, and in counting the votes, and in making returns thereof, and that witnesses and other evidence can be procured which sustain all these charges.

It is nowhere averred in the affidavit that these facts and the evidence to sustain them have been discovered since the time provided by the statute for taking testimony has expired. On the contrary, the affidavit carries upon its face a very strong inference that all these facts were known to the contestant at the time he filed his notice of contest, and that all his evidence tending to support the same was then known and accessible to him.

As we understand contestant's application, it is not based upon the ground that the evidence he now desires leave to take has been discovered since the time expired, but upon the reason that he made every possible effort to procure it, but was prevented by the riotous and violent behavior of certain citizens of the district at the place where he was compelled to take the same.

If such a case were made out, we would have no hesitancy in recommending that contestant's application be granted. The honest election of each Member of this House is a matter of the highest importance, both to this body and to the people at large. When a question is raised as to the election of one of its Members, this House should stand ready to make a thorough investigation, and promptly expel the Member whose seat was obtained by fraudulent or dishonest methods. No one should be permitted to prevent or impede such investigation. Any attempt of this kind should be promptly and vigorously rebuked. It can not be assumed that such an investigation has been hindered or prevented. Until the contrary appears, it must be presumed that the authority of Congress and the agencies provided to make such inquiry have been respected and obeyed.

If contestant has been prevented by riot and violence from procuring his testimony, such fact should be shown in some satisfactory way, and that contestant was in no way to blame for it. Upon this subject the affidavit is entirely silent. We are furnished no proof of this but the unsworn statement of contestant's counsel, which is denied by counsel for contestee; and we do not feel that this is sufficient. We therefore recommend that the application to take further testimony be denied. Contestant admitted before the committee that he was not elected to the Fifty-fifth Congress from this district. The utmost of his contention was that contestee also was not elected. It is not insisted by contestant that this is shown by the evidence already taken; and even if it were we could not agree with him.

The committee therefore recommended resolutions declaring the sitting Member elected and entitled to his seat, and the same were agreed to by the House without debate or division.

723. The Pennsylvania election case of Kline v. Myers in the Thirty-eighth Congress.

It was held in 1864, although by a divided committee, that a contestant must show probable fraud in order to have the House order a recount of votes.

On June 22, 1864,[1] the Committee on Elections reported in the case of Kline *v.* Myers, of Pennsylvania. The committee recommended resolutions declaring contestant not entitled to the seat and declaring Mr. Myers entitled to the seat.

The committee make this statement of facts and reasons—

The contestant, by his own acknowledgment, has failed to substantiate the specifications or charges contained in his notice of contest by any evidence he has been able to lay before the committee, and it is therefore unnecessary to make any statement of the facts in the case. He, however, furnishes satisfactory evidence that he had made an unsuccessful effort to procure a recount of the ballots within the sixty days allowed for the taking of depositions, and before the officers selected for that purpose. And upon his showing this fact, and upon his further suggestion that the result of a recount might possibly differ from the first, he bases an application for an order from this House to send for the boxes and recount the votes.

The committee were of the opinion that such an application should be founded upon some proof, sufficient, at least, to raise a presumption of mistake, irregularity, or fraud in the original count, and ought not to be granted upon the mere suggestion of possible error. The contestant failed to furnish such proof. On the contrary, so far as appeared by the evidence presented to the committee, the election was conducted with perfect good order and fairness throughout the day, and at the close the votes were carefully and accurately counted, the officers participating therein being nearly equally divided in their political alliances. The list of voters, tally papers, and returns were properly made out and disposed of according to law. There is nowhere in the evidence a reasonable suspicion of wrong. To adopt a rule that the ballot boxes should be opened upon the mere request of the defeated candidate would occasion more fraud than it could possibly expose.

* * * * * * * *

It should be remembered that the fact sought is not what the ballot boxes contain six months or a year after the election, but what they did contain after the last vote was deposited on the day of election. Certainly an impartial, accurate, and public count, then, by the sworn officers of the law, would be better evidence of that fact than any subsequent count not more impartial and not presumed to be more accurate than the first, and after boxes had been long exposed to the tampering of dishonest partisans. The adoption of such a practice would be equivalent to setting aside the first count altogether, and it ought on that principle to be dispensed with, and the ballots sent to this house instead of certificates.

The rule adopted by the committee is in accordance with the universal practice of courts of justice, where a new trial or a rehearing is never granted except upon proof of probable error in the first, in accordance with the rulings in several contested election cases decided in the courts of the State from which this contest comes, and believed not to be in conflict with any precedent of this House.

Messrs. Henry L. Dawes, of Massachusetts, and Charles Upson, of Michigan, at the time the report was made[2] announced that they did not concur with the majority of the committee in the ruling by which the contestant was denied process to summon witnesses to prove certain allegations, but that they were of opinion that when a party had confined his allegations to the statute he was entitled, as of right, to the production of any legal testimony that would tend to prove such allegations. Neither the law nor the usage of the House required him to first show probable cause to believe that his allegations were true.

On June 24, 1864,[3] the House considered the report and agreed to it without division, although in debate there was dissent from the decision of the committee denying the contestant the right to have the boxes opened, the only means whereby fraud could be proven.

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[1] First session Thirty-eighth Congress, House Report No. 127; 1 Bartlett, p. 574; Rowell's Digest, p. 196.

[2] Globe, p. 3179.

[3] Journal, p. 891; Globe, p. 3242.

724. The Virginia election case of Hoge v. Otey in the Fifty-fourth Congress.

No sufficient reasons being shown, the House declined to reopen an election case for the taking of further testimony.

On April 29, 1896,[1] Mr. David A. De Armond, of Missouri, from the Committee on Elections No. 3, submitted the following report in the case of Hoge *v.* Otey, from Virginia:

According to the returns, contestee received 2,346 more votes than contestant.

The record contains but a few pages of testimony, and it would be impossible to give to such testimony any effect by which the seat in controversy could be awarded to the contestant or could be taken from the contestee.

Contestant has asked that the case be opened for the taking of further testimony, but he has failed to show any sufficient reason for such course. Not only is there no apparent reason for making an exception in this case to a fair and long-established statutory rule fixing the time for the taking of testimony in contested election cases, but, from contestant's own showing, it appears that if the case were opened the result of the contest would not be different.

Accordingly, the usual resolutions confirming sitting Member's title to the seat were presented, and, on May 15,[2] were agreed to by the House.

725. The Alabama election case of Mabson v. Oates in the Forty-seventh Congress.

The appeal of a contestant for extension of time to take testimony should show that all diligence has already been used in the quest.

Review of the precedents governing the granting of extension of time to the parties to collect evidence in an election case.

An application for extension of time to take testimony in an election case should be accompanied by an affidavit specifying as to the testimony.

The Elections Committee declined in 1882 to reopen a case to enable a contestant to correct his procedure.

On April 7, 1882,[3] Mr. William H. Calkins, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Alabama case of Mabson *v.* Oates.

This case was examined first by a subcommittee, and the report of this subcommittee, which was presented to the full committee by Mr. Gibson Atherton, of Ohio, narrated the steps taken by contestant to get evidence and the reasons given by him for asking an extension of time; and then gives reasons for not granting the extension:

The first question presented for consideration is the preliminary one of granting time to the contestant to take further testimony, or of appointing a commission to take the same.

Touching the first proposition, has the contestant shown such degree of diligence as to induce the House, under well-established precedents, to grant an extension of time; or has he been guilty of such want of diligence that his application should be denied? In the report of the contested election case of Boles *v.* Edwards, prepared by Mr. Hazelton, it is said:

"To say nothing of the terms of the law * * * touching the extending of the time fixed to allow supplementary evidence, which clearly relates to cases in which the applicant has taken some evidence—that is to say, has made some use of the time given him—the policy of the House has been

[1] First session Fifty-fourth Congress, House Report No. 1530; Rowell's Digest, p. 537.

[2] Journal, p. 494.

[3] First session Forty-seventh Congress, House Report No. 938; 2 Ellsworth, p. 8.

adverse to granting extensions. Procrastination in these cases diminishes the object of investigation and cheapens the value of the final decision. The law is intended to furnish ample opportunity for taking testimony. Parties should be held to a rigid rule of diligence under it, and no extension ought to be allowed where there is reason to believe that had the applicant brought himself within such rule there would have been no occasion for the application." (Smith's Cont. El. Cas., 18.)

In Giddings *v.* Clark the Committee on Elections, in a report prepared by Mr. McCrary (among other things), say:

"That no such extension should ever be granted to a sitting Member unless it appears that by the exercise of great diligence he has been unable to procure his testimony, and that he is able, if an extension be granted, to obtain such material evidence as will establish his right to the seat, or that by reason of the fault or misconduct of the contestant he has been unable to prepare his case." (Smith's Cont. El. Cas., 92–93.)

In the contested election case of Vallandigham *v.* Campbell it was held:

"That the fact that the sitting Member was a Member of the previous Congress, and attended to his duties as such during a part of the time when by law the testimony should be taken, furnishes no reason why further time should be granted." (1 Bartlett, p. 223.)

As to rule that great diligence is required to be proved to entitle the party to an extension of time, see the case of Howard *v.* Cooper (1 Bartlett, p. 275).

Is diligence, within the rule, shown by contestant? He allowed almost a month to elapse after the answer was served before he took any depositions. He applied to an officer or two to take his deposition, who refused to act, and he neither tried to procure others nor to have an officer of his own political party appointed by Federal authority. He went away from Washington to attend to affairs not so important as his contest, and left the same for a considerable time, without giving attention thereto. Were it necessary to put the refusal to grant an extension on that ground, the committee believe that the contestant has been guilty of such laches as to preclude him from the right to take further testimony.

But in order to entitle himself to an extension of time after taking testimony, the contestant must state what witnesses he desires to examine, give their names, their residence, and what they will swear to, or a sufficient reason why the same is not done. In the language of the able report in Giddings *v.* Clark (1 Bartlett, 91–94):

"The affidavits relied on are fatally defective in this, that they do not state the names of the witnesses whose testimony is wanted, nor the particular facts which can be proved by their testimony."

It is also laid down as a rule, in the same case, that an applicant "should produce the affidavit of some of the witnesses themselves * * * stating what facts are within their own knowledge." (Same, p. 93.)

But in this case the affiant makes general statements, alleges facts not within his personal knowledge, does not state the names of witnesses, their residence, or what particular facts he proposes to prove by any of them. He alleges fraud and unfairness in general terms, and does not pretend it is the same fraud alleged in his notice of contest, and the committee think that the affidavit is fatally defective, and no extension should be granted by reason of anything therein stated.

The report of the Senate Committee on Privileges and Elections in the Forty-third Congress is not evidence. It relates to a period long anterior to 1880.

It is not a judicial determination, and is not to be considered in determining the application.

In Boles *v.* Edwards (Smith El. Cas., 58), the contestee submitted in evidence the report of a joint select committee, appointed by the senate and house of representatives of Arkansas to investigate election frauds, and it was rejected as simply "views of certain members of the legislature of Arkansas." So this report, if it related to the very election in question, would be simply the views of certain Members of the Senate of the United States, and could not bind the House or furnish evidence for its consideration. It would be to us simply hearsay and inadmissible, as laid down in the report of Speaker Keifer in the case of Donnelly *v.* Washburn, in the Forty-sixth Congress.

The committee concede the right of the House to investigate the title of Oates to a seat, even if Mabson has been guilty of such negligence and laches as to preclude him from contesting for the seat, as a party and litigant. But does his affidavit make a case calling on the House to institute an inquiry and investigation for its own vindication, or to purge itself of a Member unelected, in fact?

The charges of fraud and illegality are general. At what precincts committed, or in what counties even, is not alleged. Of what particular acts they consisted is not stated. No witness is named who will furnish testimony of particular acts. In fact, no witnesses are named at all.

The committee are not put in possession of a single fact of fraud or illegality or furnished with the medium of evidence by which the same may even seem susceptible of proof. No case is therefore made for invoking the jurisdiction of the House to investigate in order to protect its own rights and dignity.

After this report had been submitted to the hill committee, the contestant filed a supplemental affidavit covering some of the objections pointed out in the report to his former application and asking for further time to take testimony in the district. The report thus deals with this application:

The affidavit having been read to the full committee, it was held by a majority thereof that the application came too late; that it would be dangerous to establish a precedent allowing a contestant or contestee, after finally submitting their cases, to ascertain from the report of the committee the grounds upon which he had been overruled, and to then supplement his application by a new affidavit, avoiding the decision, and thus open up the case again. Such a practice your committee think would lead to interminable delays, and would transform the committee into mere advisers of the parties. The committee are of opinion that parties should be bound by a reasonable degree of diligence, and that there should be a time fixed beyond which the doors for the reception of ex parte affidavits or evidence should be shut. Inasmuch as there was no application to file additional affidavits before the subcommittee until after its report was made, the committee are of opinion the last affidavit came too late, and should not be considered.

The minority of the committee held that contestant had used due diligence in endeavoring to procure testimony, and that justice demanded that he be given further time to pursue an investigation, and recommended a resolution granting an extention of time for not over forty days.

The majority of the committee, in accordance with their conclusions, but with some doubts as to the form of resolution, recommended the following:

Resolved, That the contestant, A. A. Mabson, have leave to withdraw his papers without prejudice.

On May 6 [1] this resolution was agreed to, without debate or division.

726. The Ohio election case of Vallandigham v. Campbell in the Thirty-fifth Congress.

The returned Member was denied an extension of time to take testimony, although he pleaded that he had been detained by his duties in the House.

The law for taking testimony in an election case does not preclude both parties from proceeding at the same time.

A discussion as to the power of the House to disregard the provisions of the law governing election contests.

On January 27, 1858,[2] the Committee on Elections reported on the application of the sitting Member for leave to take further testimony in the contested election case of Vallandigham *v.* Campbell, from Ohio. This application, made under a section of the act of 1851, involved also a construction of the terms of that act. The majority of the committee reported a resolution declaring it inexpedient to grant the request of the sitting Member, saying:

The grounds upon which the sitting Member seems to rest his application for leave to take supplemental testimony seem to reduce themselves to two, viz:

1. That the sitting Member, having been a Member of the last Congress during a part of the time, when by law the testimony should have been taken, and having been attending to his duties as such

[1] Journal, p. 1200; Record, p. 3687.

[2] First session Thirty-fifth Congress, 1 Bartlett, p. 223; Rowell's Digest, p. 151; House Report No. 5 Globe, p. 452.

Member, he should be exempted from the operation of the law so far as to allow him time for taking supplemental testimony.

2. That the contestant, by notices served upon the sitting Member, occupied, or proposed to occupy, the entire sixty days after the answer of the sitting Member to the notice of contest was served, and that he is therefore entitled to a period of time outside of the sixty days to complete his taking of testimony.

Upon the first point your committee are clear that the fact of one of the parties being a Member of Congress for the time being can in nowise affect his obligations to comply with the law. In all the relations of life, both private and public, circumstances are constantly occurring which are quite as imperative in their operation as those connected with a seat in Congress; and were this to be deemed a sufficient reason for a noncompliance with the law it would at once take from its operation one-half the cases which arise. The fact that the law expressly provides for taking testimony by the parties or "their agents" It excludes the construction that it was intended to apply only when the parties could attend in person.

Upon the second ground your committee are equally clear, that however extensive the time covered by one party in proposing to take testimony, it in nowise precludes the opposite party from proceeding at the same time to take it in his own behalf. There is no limitation to this power by the act of 1851, except "that neither party shall give notice of taking testimony in different places at the same time, or without allowing an interval of at least five days between the close of taking testimony at one place and its commencement at another." Under this provision, your committee believe full power is given to each one of the contesting parties to proceed with taking testimony, but limits each to one place at a time.

Your committee are of opinion that if either party to a case of contested election should desire further time, and Congress should not be then in session, he should give notice to the opposite party and proceed in taking testimony, and present the same and ask that it be received, and, upon good reason being shown, it doubtless would be allowed; but it seems too much to grant, in this case, for either of the reasons stated. It is now upward of fifteen months since the election, and nearly one-half of the term of service has elapsed, and it is due to every interest concerned that the rights in dispute should be settled.

The minority argued in favor of granting the request of the sitting Member, alleging that the contestant had violated the law in taking testimony at different places at the same time, and also had declined to make a mutual agreement for taking testimony after the time allotted by law. It was further charged, but denied by contestant, that the latter had declined to attend the taking of testimony by sitting Member, alleging that the dates conflicted with his own appointments.

The report was debated on February 3, 4, and 5.[1] In the course of this debate[2] Mr. Israel Washburn, jr., of Maine, said:

Sir, I do not believe in the binding authority of the law of 1851 upon this House in all cases. I believe, sir, that it is directory, and not absolutely binding. I do not believe that the Senate of the United States, in conjunction with the House of Representatives in one Congress, can make a law which is to bind future Houses of Representatives. Not so. By the Constitution of the United States, each House is made the judge of the returns, qualifications, and elections of its own Members, and each House can and must judge for itself upon those questions. The law of Congress of 1851 is nothing but the advice or suggestion of reasonable and intelligent and just men, as to the proper course to be taken-advice given when no particular case was before them, and which may be presumed to be good and sound advice and counsel in reference to the matter. It is nothing more. The law is not binding upon us; and if in any case it is oppressive, and there is reason for stepping outside of it, I hold that we have a right to do it.

On May 5[3] an amendment, proposed by the minority, to allow both parties to take supplementary evidence was disagreed to, yeas 100, nays 113.

Then the resolution declaring it inexpedient to allow further evidence to be taken was agreed to, yeas 113, nays 101.

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[1] Globe, pp. 558, 585, 591.

[2] Globe, p. 562.

[3] Journal, pp. 302, 303.

727. The Pennsylvania election case of Kline *v.* Verree in the Thirty-seventh Congress.

Instance wherein an extension of time was granted for taking rebutting evidence in an election case.

On December 3, 1861,[1] the House, by resolution, allowed to the sitting Member in the contested case of Kline v. Verree, from Pennsylvania, twenty days' additional time to take rebutting testimony, and "that said testimony be taken before the recorder of the city of Philadelphia, and that the sitting Member give ten days' notice to the contestant of the time and place of taking said testimony and the names of witnesses to be examined."

The above permission was given because the contestant had occupied nearly the whole time allowed by law for taking testimony.

On December 4 a further time of ten days was granted the contestant after the expiration of the additional time allowed sitting Member, "said testimony to be confined to such as may rebut the testimony taken under said resolution, and to be taken before the same magistrate and in all respects in the manner provided by said resolution."

Both resolutions were recommended by the Committee on Elections.

728. The election case of Gallegos v. Perea, from the Territory of New Mexico, in the Thirty-eighth Congress.

A contestant having neglected to appear during the taking of testimony, the House declined to grant an extension of opportunity.

On April 6, 1864,[2] the Committee on Elections reported in the case of Gallegos v. Perea, from the Territory of New Mexico. This case involved a question as to extension of time for taking testimony. The contestant, in his notice, stated he would take the testimony of witnesses before Hon. Kirby Benedict, chief justice of the supreme court of New Mexico, or, in the event of his absence, before Miguel E. Pino, probate judge of the county of Santa Fe. To this notice of contest the sitting Delegate replied, and, after notice to that effect, proceeded to take testimony. The contestant omitted to take any evidence, but in lien thereof petitioned the House for a further time to examine witnesses. He alleged, as a reason for his failure to take testimony, that Judge Benedict was a violent political opponent. The other judge of the district or supreme court, Joseph G. Knapp, resided in a part of the Territory inconvenient because of distance and hostile Indians. No reason was alleged why the contestant might not have proceeded before the judge of probate named in his notice. The contestant also had failed to appear before the committee, either in person or by attorney. The committee therefore recommended that further time be not granted to Mr. Gallegos to take testimony.

On April 6 the House, without debate or division, agreed to the report.[3]

729. The Ohio election case of William Allen in the Twenty-third Congress.

Testimony having been taken ex parte, the Elections Committee concluded that it should not have weight and reported that the sitting Member should not be disturbed therefor.

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[1] Second session Thirty-seventh Congress, Journal, pp. 27, 28, 31.

[2] First session Thirty-eighth Congress, 1 Bartlett, p. 482; Rowell's Digest, p. 188.

[3] Journal, p. 494; Globe, p. 1453.

Notices of taking testimony in an election case having specified such times and places as to make it impossible for the returned Member to attend, the Elections Committee held the testimony taken to be ex parte.

Instance wherein an election contest was instituted by various citizens of a district, presentation to the House being by memorial.

On December 11, 1833,[1] the Speaker presented a memorial of Abraham Hegler and John Mace, on behalf of themselves and others, residents of the Seventh Congressional district, in the State of Ohio, complaining of illegality in the election and return of William Allen as a Member for said district; and declaring that Duncan McArthur received a majority of the legal votes in said district, and praying that said Duncan McArthur may be declared entitled to the seat now held by said William Allen. This memorial was referred to the Elections Committee.

On December 31,[2] Mr. Nathaniel H. Claiborne, of Virginia, submitted the report of the committee, which found that the returns of the election in question had been examined as required by law, that William Allen had been declared elected by a majority of 1 vote, and that a certificate had been issued to him. The report then continues:

> It appears to your committee that, on the 26th day of October, 1832, a notice was served on said William Allen that, "in the event he should be declared elected," his election would be contested, on grounds specifically set forth in said notice, and that depositions to establish the objections to his election would be taken.

The notice further specified the times and places for taking the depositions. This notice was served by Charles Martin, who also served other notices, and proceeded to take testimony.

William Allen, the sitting Member, did not appear in person or by attorney in response to any of these notices. In reference to this the report says:

> It could not escape the notice of the committee that the taking of the depositions spoken of in the notices was dependent upon a contingency, to wit, the declaration of the election of said Allen by the functionary whose duty it is bylaw to examine and count the votes and give a proper certificate to him who is elected; and it struck the committee as being both novel and irregular to notify a candidate that in the event of his future election his right to a seat will be contested, and that depositions will be taken before all the votes have been counted and the result of the election officially proclaimed. Yet the committee would have proceeded to the examination of the testimony had it not appeared to their entire satisfaction that the objects of requiring notice to be given were totally defeated by the course pursued by those citizens who contested the return of Mr. Allen. The notices aforesaid set forth sufficiently the grounds of objection, but the periods of time and the distance of places from each other, selected at which the testimony was taken on notices signed by different persons, were so arranged as to render it morally and utterly impossible for Allen to attend and cross-examine the witnesses however disposed so to do.

Therefore the committee concluded the testimony offered as ex parte, and agreed unanimously to these resolutions:

> *Resolved,* That the memorial * * * is not sustained, and that the testimony they have exhibited can not be admitted, because it was taken under such circumstances as to make it ex parte and of no effect, as it was impossible for Allen to have attended and cross-examined the witnesses.
>
> *Resolved,* That William Allen has been returned a Member to the House of Representatives of the United States, in the manner and form prescribed by law and is entitled to his seat, unless it should hereafter be shown by competent testimony that he has not received the majority of qualified votes.

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[1] First session Twenty-third Congress, Journal, p. 49.

[2] Journal, p. 146; House Report No. 110.

The report was ordered printed and laid on the table. It does not appear that it was acted on, Mr. Allen of course retaining his seat.[1]

730. The North Carolina election case of O'Hara v. Kitchin in the Forty-sixth Congress.

Testimony of contestant being taken after the legal time and against contestee's protest, the committee reported that it should not be considered and that sitting Member's title should be confirmed.

A condemnation by the Elections Committee of oral arrangements between parties to an election case for taking testimony out of time.

All agreements by parties to an election case in contravention of the provisions of law should be in writing, properly signed, and made a part of the record.

On February 17, 1881,[2] Mr. Walbridge A. Field, of Massachusetts, from the Committee on Elections, submitted the report of the committee in the North Carolina contested election case of O'Hara *v.* Kitchin.

In the record of the case there appeared no return of the service of notice of contestant, but the sitting Member, in April, 1879, served his answer wherein he objected that he ought not to be called upon to answer, because no lawful or sufficient notice had been served upon him. The contestant stated orally to the committee that he sent seasonably a notice, and was informed by the messenger that he had left the same at the place of business of the contestee, but no affidavit or deposition of the messenger was presented to the committee. The law provided that a contestant should serve his notice within thirty days after the determination of the result. There was no evidence before the committee to enable them to determine when the result of the election was determined. Certain legal proceedings in the. State courts relative to the election (O'Hara *v.* Powell, 80 N. C., 103) had been brought to the attention of the committee, and made uncertain the date from which the thirty days should be computed. The committee say:

The contestant, therefore, has not proved that he served his notice of contest within thirty days after the result of the election was determined, or that he ever served it at all.

A copy of the answer of the contestee was served upon the contestant on the 29th day of April, 1879.

Section 107 of the Revised Statutes is as follows:

"In all contested-election cases the time allowed for taking testimony shall be ninety days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first forty days, the returned Member during the succeeding forty days, and the contestant may take testimony in rebuttal during the remaining ten days of said period."

Section 2, chapter 119, of the statutes of 1875 is as follows:

"That section 107 of the Revised Statutes of the United States shall be construed as requiring all testimony in cases of contested election to be taken within ninety days from the day on which the answer of the returned Member is served upon the contestant."

In this case the earliest testimony taken by the contestant was taken on the 7th day of November, 1879, which was one hundred and ninety-four days from the day on which the answer of the returned Member was served upon the contestant; and-the contestee objects now, as he objected through his counsel at the time the testimony was taken, that the ninety days for taking testimony had expired before the testimony was taken.

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[1] This case was before the enactment of the law which now prescribes the method of taking testimony in election cases.

[2] Third session Forty-sixth Congress, House Report No. 263; 1 Ellsworth, p. 378.

The contestant sets up an oral argument, as he alleges, to the effect that within the ninety days prescribed by law, the exact time of which he does not fix, he and the contestee agreed—

"That as to the matter alleged in contestant's complaint as to the votes thrown out and not counted for contestant in the counties of Edgecomb and Craven, it would not be necessary to take evidence, as he, said Kitchin, agreed to make a case without taking testimony."

And on the 23d day of April, 1880, he filed an affidavit to that effect, as a foundation for a motion that the time for taking testimony be extended. The contestee denies that any such oral agreement was made, and filed his affidavit on the 26th day of May, 1880.

The committee had taken no action to extend the time; and the report condemns the practice of permitting parties by agreement among themselves to extend the time of taking testimony without previous authority of the House of Representatives. "It may happen, indeed," says the report, "that from unforeseen causes an extension of time may be necessary, and the House of Representatives may not be in session, and therefore no previous application can be made to it, but in such cases, if the parties agree to an extension of time, the agreement should be in writing, signed by the parties, or their attorneys, and application should be at once made to the House of Representatives, when in session, for a ratification of such agreement." The report, continuing on this subject, says:

In any case, if such agreements are to be regarded, they should be in writing, and signed by the parties or their attorneys. This is the practice of courts generally, and is founded on sound reasons. If oral agreements are recognized, then if they are denied by either of the parties at the hearing, testimony must be taken, and this collateral issue be first determined, and as the decision may be such as one of the parties did not expect, he may be put to the greatest disadvantage after the testimony on the merits of the case has been all taken. The misunderstandings that often honestly arise from oral agreements are alone sufficient to justify courts in insisting that none but written agreements will, if questioned, be recognized. We think it of great importance in election cases that parties should understand absolutely that all agreements in contravention of the statutes of the United States, in regard to the taking of testimony, to be considered at all, should be in writing, properly signed, and made a part of the record itself. Even then the policy of the law requires that they should not be regarded unless it appears that they were bona fide entered into for an adequate and reasonable cause to be determined by the House of Representatives, either before or at the time of deciding the election case.

On this ground the committee decline to determine on the affidavits the question whether or not any such oral agreement as the contestant sets up was ever made, and consider the case as if there was no such agreement. The committee might, indeed, in a case where testimony had been taken out of time, but with full opportunity to the other party to cross-examine the witnesses and exhibit evidence in reply, and where it was evident that this had been fully done, recommend to the House, if they find sufficient reason therefor, that the testimony be considered as if taken in time; but such is not this case, and the only alleged ground for the delay in this case is that the dwelling house of Mr. O'Hara was destroyed by fire, as well as all memoranda, facts, and information in writing that he had procured necessary to be used in the contest. The time when the dwelling house was destroyed by fire is not stated in any of the papers, but it is said to have happened in March, 1879, and before the answer of the contestee was served on the contestant. This does not seem to the committee a sufficient ground for admitting testimony taken one hundred and ninety-four days after the service of the answer.

The committee, therefore, are of opinion that this contest should be dismissed, on the ground that the testimony was not taken in time.

The committee say, however; that, even if considered, the testimony was insufficient to establish contestant's case, and conclude:

It has been stated that the number of votes received by Mr. Kitchin and Mr. O'Hara, as canvassed by the State canvassing board, is not in evidence. In the Congressional Directory, which is not evidence, Mr. Kitchin is put down as having received 10,804 votes, against 9,662 votes for Mr. O'Hara. If this statement be true as a statement of the votes as canvassed by the State board of North Carolina, it

will be seen that Mr. Kitchin's plurality is 1,142, which is greater than the plurality of 925 received by Mr. O'Hara in the precincts mentioned in Edgecombe County, which were not counted by the county canvassing board. So that if these were all admitted, upon which, for the reasons given in the case of Yeates *v.* Martin, the committee do not agree, there is no reason to suppose that Mr. O'Hara would be elected; certainly there is no evidence that he would be. The burden of proof is on the contestant, and if all the testimony he has taken were admitted and considered it is not sufficient to enable the committee to determine that he was elected Representative.

No testimony has been taken by Mr. Kitchin whatever. He relied on his objection that the time for taking testimony had expired when Mr. O'Hara began to take testimony. He had a right to rely on this objection at that time, and even if the House should determine to consider testimony in this case it would be unfair to Mr. Kitchin to do so until after an opportunity were given him to take his testimony.

It is manifest from the notice of the contest and the answer that there were very grave and important questions in dispute in this election, and that the matters in dispute concerned a far greater number of votes than the plurality of the sitting Member, as given in the Congressional Directory; but on most of these questions there is no testimony whatever, one way or the other, and the little testimony that has been taken either has no significance at all, by reason of a want of testimony to connect it in any intelligent manner with the questions at issue or from some other cause, or the testimony taken which is intelligible and can be applied to the case does not establish the case of the contestant. The committee repeat that in their opinion the evidence in this case should not be considered.

Therefore the committee reported resolutions confirming the title of sitting Member to the seat.

On February 17 the report was presented to the House for printing.[1] It does not appear that it was acted on by the House.

731. The California election case of Kahn v. Livernash in the Fifty-eighth Congress.

Instance wherein the House directed the issue of a subpoena duces tecum to procure the ballots for examination in an election case.

Instance wherein the House authorized a subpoena duces tecum. by registered letter.

Instance wherein the House authorized the Elections Committee to send for persons and papers in an election case already made up.

Form of resolution authorizing the Elections Committee to procure ballots and other evidence.

Discussion as to what constitutes a distinguishing mark on an Australian ballot.

Discussion of the doctrine that the House should follow decisions of the State courts construing the election laws of a State.

On December 18, 1903,[2] Mr. Joseph H. Gaines, of West Virginia, from the Committee on Elections No. 1, submitted the following report with a resolution, which was agreed to by the House:

The Committee on Elections No. 1, to which was referred the contested election case of Julius Kahn, contestant, against Edward J. Livernash, contestee, from the Fourth Congressional district of California, respectfully reports to the House the following resolution, approved by said committee, for approval and adoption by the House, with the recommendation that it do pass:

Resolved, That Thomas J. Walsh, registrar of voters for the city and county of San Francisco, or any successor of his in said office, be, and he is hereby, ordered to be and appear before Elections Committee No. 1 of the House of Representatives forthwith, then and there to testify before said com-

[1] Record, p. 1754.

[2] Second session Fifty-eighth Congress, Record, p. 389.

mittee or such commission as shall be appointed touching such matters then to be inquired of by said committee in the contested election case of Julius Kahn *v.* Edward J. Livernash, now before said committee for investigation and report; and that the registrar of voters for the city and county of San Francisco bring with him all the ballots and packages of ballots cast in every precinct in the said Fourth Congressional district of California at the general election held in said district on the 4th day of November, 1902; that said ballots be brought in the packages in which the same now are; that said ballots be examined and counted by or under the authority of such Committee on Elections in said case; and to that end, that proper subpoena be issued to the Sergeant-at-Arms of this House, commanding him to summons said registrar or his successor in office, if any, to appear with such ballots as a witness in said case; that service of said subpoena shall be deemed sufficient, if made by registered letter, and such service shall be so made unless otherwise directed by said Committee on Elections No. 1; and that the expenses of said witness and all other expenses under this resolution be paid out of the contingent fund of the House; and that said committee be, and hereby is, empowered to send for all other persons and papers as it may find necessary for the proper determination of said controversy; and also be, and it is, empowered to select a subcommittee to take the evidence and count said ballots or votes, and report same to the Committee on Elections No. 1 under such regulations as shall be prescribed for that purpose; and that the aforesaid expenses be paid on the requisition of the chairman of said committee after the auditing and allowance thereof by said Elections Committee No. 1.

On March 18, 1904,[1] Mr. James R. Mann, of Illinois, on behalf of Mr. Joseph H. Gaines, of West Virginia, presented from the Committee on Elections No. 1 a report in the California election case of Kahn *v.* Livernash. This report, which was concurred in by the entire committee, was as follows:

At the last general election the official returns show that in the Fourth Congressional district of California Edward J. Livernash received a plurality of 146 votes. The total number of votes returned for Livernash was 16,146, and there were returned for Julius Kahn, the contestant, 16,005 votes.

There is no allegation of fraud in the case, or of illegal voting. The whole claim of contestant is that a large number of ballots were illegally marked and improperly counted under the California laws and decisions. Contestant concedes that of the 16,146 votes returned for Livernash 13,809 were properly returned, but claims that 2,337 votes were improperly counted and returned for contestee.

The contestee, in his turn, objected to a large number of votes returned for contestant. The case of both contestant and contestee is exceedingly technical, both sides having been induced thereto by the unusual and peculiar strictness with which the supreme court of California has, in the language, at least, of the decisions, held that all provisions relating to the marking of a ballot by the voter must be complied with.

The case involves only the question what ballots were lawfully marked and should be counted, and what ballots were not lawfully marked and should not be counted, under the laws of California.

The laws of California provide for an official ballot, upon which are printed the various tickets, with squares after the names of the candidates whose names are printed on it. There is also a special blank column, with a space in which to write the name of any person for any office, when the name of such person is not printed on the ticket. There were also at this election in California several constitutional amendments submitted for the vote of the people; and there were squares for ratification and squares for rejection opposite every such amendment. The method prescribed by statute for the voter to designate his choice is to place a cross (X) in the square immediately following the name of each candidate for whom he wishes to vote. If he desires to vote for some one for an office whose name is not printed upon the ballot as a candidate for that office, the voter must write the name of such person in the space on the blank column immediately above the title of that office as printed in the blank form. In voting upon the constitutional amendments the method prescribed is to place a cross (X) in one of the two squares following the amendment, according as he desires to vote for or against the amendment.

[1] Second session Fifty-eighth Congress, House Report No. 1739; Record, p. 3430.

Section 1205 of the California Code prescribes the method in which the voter shall prepare his ballot. It is as follows:

"He shall prepare his ballot by marking a cross after the name of the person or persons for whom he intends to vote, or by writing a name or names in the 'blank column,' and in case of a constitutional amendment or other questions submitted to the vote of the people, by marking in the opposite margin a cross (X) against the answer which he intends to give. Such marking shall be done only with a stamp, which, with the necessary pads and ink, shall be provided by the officers."

Section 1211 declares that certain ballots shall not be counted, and is in the following language:

"1. In canvassing the votes any ballot which is not made as provided in this act shall be void and shall not be counted. 2. If a voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office."

Section 1215 relates to identification, and is as follows:

"No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him."

The California statute also provides that a candidate's name shall be printed but once upon the ballot, and that where a candidate is nominated by more than one party he must make his election under which party designation his name shall appear upon the ticket, or, if he fails to elect, his name shall be printed thereon as of that party which has first certified his nomination; and, further, that on the ticket of any other party by which such candidate is nominated there shall be printed in the space for that office the words "No nomination."

But the contestee having been nominated by the Union Labor party and by the Democratic party also, this last provision was held by the supreme court of California, in the case of Murphy *v.* Curry (137 Cal., 479), to be invalid, and by mandamus the proper officers were directed to print the name of Edward J. Livernash as a candidate upon the ballot in the Democratic column and also in the Union Labor column, and the ballots were so made up.

This was the first time the same name had appeared twice on a ballot in California. Thereupon on October 28, 1902, the board of election commissioners met in the office of Thomas J. Walsh, registrar of voters of the city and county of San Francisco, and took the following action, as appears from the minutes of the meeting:

The matter of the instructions of the election officers in relation to the counting of ballots where candidates' names appear more than once on the ballot came up for discussion.

T. D. Riordan, esq., and Charles Gildea, esq., appeared before the board.

After deliberation Commissioner Deasey moved that where crosses were marked after the name of the same candidate for the same office in two different columns upon a ballot it shall be counted as one vote for such candidate, and that the election officers be so instructed.

Adopted by the following vote: Commissioner Boyle, aye; Voorsanger, aye; Deasey, aye; Everett, aye; Kellogg, aye.

This action of the commissioners was widely published in the district.

Attorneys for contestant and contestee relied solely upon the defects in marking the ballots. Their plan of procedure in making up the case for consideration of the committee was to offer the ballots themselves in evidence, the attorney offering each ballot stating at the time of the offer that it was marked in such a way that it should not have been counted. The attorney on the other side denied that the ballot was marked in any such way. No testimony whatever was taken as to the condition of the ballots. The validity of the marking of the ballots being the only question, your committee were compelled either to send for the ballots or not to try the case at all. The committee entertained great doubts as to the propriety of sending for the ballots, but because some of the objections made might well have brought the ballots to which they related within the operation of the peculiar and unusual strictness of the California decision and were such that they could not have been determined without a personal inspection of the ballots, the committee decided to send for all the ballots. Having obtained them, your committee examined every one of the ballots objected to by both sides, amounting in all to—ballots.

Examination disclosed the fact that there were 752 ballots which had been voted for Livernash by placing a cross (X) in the square after the name of Livernash printed in the Democratic column, and also a cross (X) in the square after the name of Livernash printed in the Union Labor column. This objection to the ballots was the one principally relied on by counsel for the contestant, and one which could not be met by similar objections on behalf of the contestee to any ballots voted and counted for contestant.

To sustain this objection the case of the People ex rel. Bledsoe *v.* Campbell was relied on. In that case the ballot had a candidate's name printed in a party column. The voter had marked a cross (X) in the voting square after the name, and had written the same candidate's name for the same office in the blank column. The supreme court of California held that this unnecessary writing of the candidate's name in the blank column was an identifying mark not authorized. The California statute says:

"No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him."

We are asked to say that where the election officers, by direction of the supreme court of the State, printed the candidate's name in two columns, and the voter placed a cross (X) after his name in both columns, and after general notification from the election officers that ballots so marked would be counted, a case is presented on all-fours with one where the voter marked a cross in the voting square after the candidate's name and also, in the voter's handwriting, wrote the candidate's name in the blank column. This view has been, perhaps, induced by the distinction made by the supreme court of California between identification in law and identification in fact.

Your committee recognizes no such distinction. Either marks on a ballot identify it as the one voted by a particular voter or they do not. Your committee are aware that all identifying marks do not invalidate a ballot, as, for instance, where the voter writes in his own handwriting the name of a candidate not printed on any ticket. Where this is done in good faith it is an identifying mark, but it is one authorized by law and does not invalidate the ballot. Whether such writing on the ballot not done in good faith would invalidate the ballot, and how far speculation upon good faith may be indulged in in such cases, are questions which do not arise.

An actual examination of these 752 ballots shows that as a matter of fact this manner of marking did not and could not identify the ballots. They were honestly cast, so far as any evidence in this case disclosed. They were honestly cast by qualified electors and honestly counted by the returning officer for the contestee. And your committee is of the opinion they were properly counted for the contestee.

If your committee were disposed to follow in all their apparent technicality the California decisions, it would even then see no reason for rejecting these ballots. In the case of Lynch *v.* Chalmers, decided in the Forty-seventh Congress (Rowell, p. 376), the committee, while upholding the undoubtedly safe general doctrine that decisions of the highest courts in a State, interpreting the statutes of that State, when well considered and long acquiesced in, should be followed, uses the following language:

"Where decisions have been made for a sufficient length of time by State tribunals construing election laws, so that it may be presumed that the people of the State knew what such interpretations were, would furnish another good reason why Congress should adopt them in Congressional election cases. But this reason would be of little weight when the election had been held in good faith before such judicial construction had been made, and where there was a conflict of opinion respecting the true interpretation of a statute for the first time on trial."

In regard to these 752 ballots marked with a cross after the name of Livernash in the Democratic column and also in the Union Labor column the supreme court of California had recently by mandamus directed the election officers to make up the ballot by printing the name of Livernash in both columns, and the election officers themselves had given the widest publicity to their official action, declaring that ballots marked for Livernash in both columns should be counted. The action of the supreme court itself, supplemented by the action of the board of election commissioners, might well have induced this number of persons to believe that marking a cross after the name of Livernash in both columns was a permissible way to mark the ballot, and even that it was the necessary way to insure the counting of their ballot for Livernash for Congress.

It was claimed that 285 ballots should be rejected which had been counted for the contestant because there were more than two cross marks in the square opposite his name; and it was claimed that 1,555 votes which were counted for contestant should have been rejected for the same reason. An inspection of these ballots satisfied the committee that the objections taken were not well founded, but were trivial and supertechnical in the extreme.

The committee reserved for personal inspection 294 ballots voted and counted for Livernash and 558 voted and counted for Kahn.

Personal inspection of all the ballots heretofore mentioned convinced your committee that the manner in which they were marked did not identify and could not identify the ballots.

In addition to the 3,444 ballots already mentioned there were laid aside—which both sides agreed should be rejected under the California decisions. Those so agreed by the parties to be rejected, which had been counted for Livernash, exceeded those counted for Kahn by 49. If all these votes should be rejected, it would still leave a majority for Livernash of 97.

It has been already stated that the language of the decisions of the supreme court of California was extremely technical and insisted upon a very strict compliance by the voter with the provisions of the statutes of California relative to the preparation of his ballot. It does not appear, however, that the supreme court of California, in the application of the law to the facts before it, has rejected ballots in a wholesale manner in which this committee has been urged to reject ballots in this case, nor can it be said that such strictness of construction as the supreme court of California has adopted in language or in fact has been so acquiesced in as to become a settled rule of law in that State. The committee can not possibly know all the circumstances of the cases before the California court. It has not been made positively to appear to the committee that the supreme court of California, applying its own rules, would have rejected such a vast number of ballots. The apprehension caused in the State of California by the language of the decisions of their highest court has led, since the last election, to a modification of the California statute with respect to the marking of ballots.

Your committee therefore recommends the adoption of the following resolutions:

Resolved, That Julius Kahn was not elected a Member of the Fifty-eighth Congress from the Fourth Congressional district of California, and is not entitled to a seat therein.

Resolved, That Edward J. Livernash was elected a Member of the Fifty-eighth Congress from the Fourth Congressional district of California, and is entitled to retain his seat therein.

The House agreed to these resolutions without debate or division.

732. The election case of Cross v. McGuire, from the Territory of Oklahoma, in the Fifty-eighth Congress.

Instance wherein the Elections Committee declined to order the production of ballots and decided the case as made up under the general law.

On April 1, 1904,[1] Mr. Michael E. Driscoll, of New York, presented the report of Elections Committee No. 3 in the election case of Cross *v.* McGuire, from the Territory of Oklahoma.

The report is as follows:

The said election took place on the 4th day of November, 1902. Thereafter the votes cast at said election for the office of Delegate in Congress from the Territory of Oklahoma were counted and canvassed, and as a result of said count and canvass Hon. Bird S. McGuire, the contestee, was declared to have received 45,803 votes, and in like manner the Hon. William M. Cross, the contestant, was declared to have received 45,409 votes; and in pursuance of said count and canvass Hon. Bird S. McGuire received his certificate of election by a plurality of 394 votes.

A notice of contest was served by the contestant on the contestee within the time specified by law, and sets forth the charges and allegations on which this contest is based, and which, very briefly stated, are substantially as follows:

That gross frauds, errors, and mistakes were made in the manner and conduct of holding said election; that illegal votes to the number of about 1,100 were cast for the contestee by various persons who were not naturalized citizens of the United States; that legal votes to the number of about 3,958 which were cast for the contestant were thrown out as mutilated ballots, and that gross frauds were perpetrated in voting precincts of the Territory of Oklahoma by various election officials thereof, in that the tally sheets and abstracts of the votes cast in said various election precincts were fraudulently duplicated, changed, altered, and falsified, so that said tally sheets and abstracts were fraudulent

[1] Second session Fifty-eighth Congress, Record, p. 4130; House Report No. 2094.

and contained false and fraudulent reports of the votes cast at said election. The notice concludes with a prayer, that—

"If the evidence hereafter to be taken supports the allegations contained in the foregoing specifications, then the House of Representatives of the Congress of the United States shall award to him the right to a seat as the Delegate from said Oklahoma Territory."

In due time the contestee filed an answer to the notice of contest, which contains a general denial of the material allegations in the notice and several countercharges of bribery, corruption, etc., in the interest of the contestant.

At the first hearing before your committee the contestant filed a notice of motion for an order and proper process, requiring the county clerks of certain counties in Oklahoma Territory to deliver up packages of so-called mutilated ballots and to produce the same before the committee for examination as part of the evidence and record in this case, to the end that it may be determined whether the contestant or the contestee was elected to the office of Delegate to Congress from said Territory of Oklahoma by the legal voters participating in said election. That notice of motion was not accompanied or supported by any affidavits.

The motion was denied by your committee, Mr. Frank A. McLain, Mr. C. B. Randell, and Mr. Joseph T. Johnson, dissenting.

Your committee unanimously find that the record before it fails to establish the allegations contained in the notice of contest, and recommends the adoption of the following resolutions:

Resolved, That Hon. William M. Cross was not elected Delegate to the Fifty-eighth Congress from the Territory of Oklahoma.

Resolved, That Hon. Bird S. McGuire was duly elected Delegate to the Fifty-eighth Congress from the Territory of Oklahoma and is entitled to a seat therein:

The resolutions were agreed to without debate or division.

733. Form of resolution returning to State authorities ballots that had been examined in an election case.—On April 20, 1904,[1] Mr. Frank D. Currier, of New Hampshire, from the Committee on Elections No. 2, submitted a report on the resolution of the House No. 306, which provided for returning to Colorado the ballots in the case of Bonynge *v.* Shafroth. The report says:

The law of Colorado requires that each voter desiring to vote a straight party ticket shall, upon receiving from the proper election officer an official ballot, retire to the booth and there in his own proper handwriting insert in the blank space at the head of the ballot the name of the political party whose straight ticket he desires to vote.

A few of the packages were opened in the presence of this committee, and it became at once apparent that the party designation upon many of the different ballots was in the handwriting of the same person. As the ballots from the 29 precincts numbered over 8,000, it was found impossible for the whole committee to examine them, and thereupon, by vote of the committee, a subcommittee was appointed for that purpose, said subcommittee consisting of Messrs. Miller, of Kansas; Currier, of New Hampshire, and Sullivan, of Massachusetts. Subsequently, in pursuance of authority conferred by resolution adopted by the House, Mr. David N. Carvalho, a noted expert in handwriting, was employed to examine and report upon the handwriting upon all the ballots and in all the poll books.

The respective reports of the subcommittee and of the expert are appended and made part hereof. From them it appears that the greater number of the ballots from the 29 precincts are in the handwriting of some eight or ten different persons, and that some of the poll books were filled out, not by the election officers, as the law required, but by outside parties.

After considering these reports and a personal investigation of some or all of the ballots and poll books by himself and counsel, the contestee, while disclaiming any participation in or knowledge prior to the institution of the contest of the frauds committed in connection with the ballots and Poll books, frankly acknowledged that their extent was such as to show the contestant entitled to his seat, from which he, the contestee, voluntarily retired without any action whatever by the committee.

[1] Second session Fifty-eighth Congress, House Report No. 2705.

Your committee is advised by the author of this resolution that one of the judges of the second judicial district of Colorado, embracing the city of Denver, has summoned a special grand jury, and directed, inter alia, an inquiry into the frauds perpetrated in connection with this election, and that the presence of the ballots and poll books are desirable and necessary for the purposes of such inquiry.

These ballots and poll books are in the possession and custody of the Clerk of the House. There is no occasion for retaining them here and there can be no objection to their being returned to Colorado for such use as the interests of justice may require. It seems that under the law of Colorado ballots are required to be preserved for one year only from the date of the election, and that, more than that period having elapsed since the Congressional election of 1902, there is no designated officer whose duty it would be to preserve these ballots and poll books intact should they be returned direct to them.

Your committee thinks it would be proper for the Clerk of the House to hold them subject to the order of the prosecuting attorney or judges of the court, and to notify them promptly that they are at their service.

The committee also submitted in this connection the report of the subcommittee who examined the election case and the conclusions of the expert who examined the ballots.

The resolution was reported amended to read as follows:

Whereas in the contested election case of Bonynge against Shafroth from the First Congressional district of the State of Colorado certain ballots and poll books purporting to have been cast and used, respectively, at the election held in said district on November 4, 1902, were under stipulation of the parties to said contested election case, submitted to the Committee on Elections No. 2 of the House of Representatives as part of the record in said case and for the purpose of examination and inspection by said committee; and

Whereas the examination of the said ballots and poll books by a subcommittee of said Elections Committee and by an expert in handwriting, employed under authority of a resolution of this House, established the fact that gross frauds and crimes were committed at and in relation to the said election and in connection with the said ballots and poll books; and

Whereas the said ballots and poll books are now in possession of the Clerk of this House; and

Whereas the House is informed that one of the judges of the second judicial district of Colorado has directed a grand jury to inquire into frauds committed at and in relation to said election, in the prosecution of which inquiry the presence of the said ballots and poll books may be necessary; and

Whereas the said ballots and poll books are no longer necessary for the use of the said Elections Committee or of this House: Now, therefore, be it

Resolved, That the Clerk of the House be, and he hereby is, authorized and directed to hold the said ballots and poll books subject to the order of the district attorney of the second judicial district of Colorado, or any of the judges of the court of the said district, to promptly notify the said district attorney and judges that he does so hold the said ballots and poll books, and upon receipt of a request to that effect from the said district attorney or any of the said judges to forward the said ballots and poll books by express in a sealed package or in sealed packages to the said district attorney or judges, as the case may be.

On April 21[1] the resolution was called up in the House by Mr. Martin E. Olmsted, of Pennsylvania, as a matter of privilege.

After debate had proceeded, Mr. John S. Williams, of Mississippi, made the point of order that the resolution was not privileged.

The Speaker[2] held that the point of order came too late.

After debate the resolution was agreed to.

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[1] Record, pp. 5277–5281.

[2] Joseph G. Cannon, of Illinois, Speaker.

Chapter XXIV.

ABATEMENT OF ELECTION CONTESTS.

1. House decides as to. Sections 731–738.
2. Various conditions of. Sections 739–755.[1]

734. The Tennessee election case of Kelly v. Harris in the Thirteenth Congress.

Although a contestant declined to prosecute further, the House declined to let the case abate and concluded the inquiry.

On May 31, 1813,[2] the Committee on Elections reported in the contested-election case, of Kelly *v.* Harris, from Tennessee, and the House, acting on the suggestion of the committee, gave the sitting Member three months in which to procure testimony.

On December 2, the contestant having declined to reappear to contest the case, the House determined not to abate the inquiry into the alleged illegality and recommitted the report of May 31, with such new evidence as might be offered, to the Committee of Elections.

On January 3, 1814, the committee made a report which, after quoting the constitution of Tennessee in respect to the qualifications of voters, decided that a certain vote had been given the petitioner in violation of this constitution, and therefore deducted the said vote. This, with the deduction of a vote given by a minor, led the committee to the conclusion that the sitting Member was entitled to his seat.

On March 10, 1814, the House concurred in this report.

735. The South Carolina election case of Mackey v. O'Connor in the Forty-seventh Congress.

The returned Member having died before the taking of testimony in a contest was completed, the House held that the contest did not therefore abate.

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[1] By resignation of sitting Member. Section 805 of this volume. Contest not abated by death of contestant. Section 1019 of Volume II.

Contestant's acceptance of State office made incompatible by State constitution does not cause to abate. Section 1013 of Volume II.

Form of resolution permitting contestant to withdraw. Section 967 of Volume II.

[2] First session Thirteenth Congress, Contested Elections in Congress, from 1788 to 1834, p. 260.

A vacancy in a contested seat being filled by a special election, the House seated the new Member on his credentials, but held that his final right must depend on the issue of the contest.

On April 10, 1882,[1] Mr. Samuel H. Miller, of Pennsylvania, from the Committee on Elections, submitted the report of the majority of the committee in the South Carolina case of Mackey *v.* O'Connor.

The minority views, presented by Mr. Samuel W. Moulton, of Illinois, give the following statement of the preliminary facts:

In November, 1880, E. W. M. Mackey and M. P. O'Connor were opposing candidates for Congress in the Second Congressional district of South Carolina, and as the result of the election then held M. P. O'Connor was declared elected by the State board of canvassers, and received the usual certificate of such election, which was duly filed with the Clerk of the House of Representatives. Mr. Mackey contested the election of Mr. O'Connor in the usual form, and in the taking of testimony in such contest, by an agreement of which both parties availed themselves, all limitations as to time were expressly waived, so that the taking of the testimony was protracted over a much longer period than the term allowed by the statute, and before the taking of Mr. O'Connor's testimony was completed he died, on April 26, 1881.

The majority report says:

After the testimony in chief of Mr. Mackey, and that in reply of Mr. O'Connor had been taken, Mr. O'Connor died.

This slight difference between the two statements was noticed in the debate, but did not figure importantly.

The minority statement of fact goes on—

On May 23, 1881, the governor of South Carolina, in accordance with the provisions of the Constitution of the United States, issued his writ of election to fill the vacancy in the representation in Congress; and at the election held thereunder, on June 9, 1881, Samuel Dibble was elected, receiving his credentials June 22, 1881, and the same being filed with the Clerk of the House of Representatives on June 25, 1881.

Mr. Mackey, the contestant of the late Mr. O'Connor, did not serve any notice of contest of Mr. Dibble's election; but proceeded after the death of Mr. O'Connor, and before the election of Mr. Dibble, in taking testimony in the case of Mackey *v.* O'Connor; and the record as now filed and printed embraces testimony on both sides so taken after Mr. O'Connor's death and before Mr. Dibble's election.

On December 5, 1881, the House met, and Mr. Dibble, on the call of the roll, presented himself to be sworn. Objection was made by a Member of the House, who stated to the House the general circumstances of the case, and after calling the attention of the House to the fact that Mr. Mackey had served no notice of contest upon Mr. Dibble, offered the following resolution, viz:

"Resolved, That the certificate of election presented by the Hon. Samuel Dibble, together with the memorial and protest and all other papers and testimony taken in the case of the contest of E. W. M. Mackey *v.* M. P. O'Connor, now on file with the Clerk of this House, be, and the same are hereby, referred to the Committee on Elections, when appointed, with instructions to report at as early a day as practicable whether any vacancy as alleged in the certificate existed, and as to the prima facie right or the final right of said claimants to the seat as the committee shall deem proper; and neither claimant shall be sworn until the committee report."

Whereupon the House, after discussion, laid the resolution on the table; and also laid on the table a motion to reconsider its vote thereon.

Mr. Dibble then presented himself at the bar of the House, and was sworn, without further objection, and from that time until December 21, 1881, occupied his seat as a Member of the House without challenge or dispute.

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[1] First session Forty-seventh Congress, House Report, No. 989; 2 Ellsworth, p. 561.

Two preliminary questions, of so much importance as to obscure largely the merits of the election itself, arose in considering this case—

(1) The majority report so states the first question, relating to the validity of the contest itself—

At the commencement of the hearing, the sitting Member protested against the committee taking any action whatever upon the case, on the ground that the contest of Mackey *v.* O'Connor abated on the death of Mr. O'Connor, and that the House had no longer jurisdiction of that case. He contended that inasmuch as he was not a party to the pleadings or proofs, he should not be bound or affected by either; that the only way the title to his seat could be assailed was by commencing proceedings de novo and permitting him to defend Mr. O'Connor's claim.

In the opinion of the committee this position is utterly untenable. The contestant, Mr. Mackey, bases his claim upon the ground that he, and not Mr. O'Connor, received the greatest number of legal votes at the general election held November 2, 1880. To establish his claim, the provisions of the statute regulating the mode and manner of contesting an election were invoked and complied with. Notice of contest was duly served upon Mr. O'Connor, who, in turn, put in an answer thereto, and upon the issue thus made up a large mass of testimony, as heretofore stated, was taken.

The right of the contestant, as also of the people of that Congressional district, who, after all, are the real parties in interest, to have the facts of that election inquired into and adjudicated by the House, can not be changed by the fact of the death of the contestee. If the contestant really received at that election, as he claims, the largest number of legal votes, it is his right and the right of the people of that district that he be awarded the seat he was chosen to fill. The committee, however, are of opinion that Mr. Dibble, if elected to any position, was elected to fill the vacancy created by the death of Mr. O'Connor, and for his unexpired term.

This conclusion is emphasized by the significant language used in the proclamation of the governor ordering the special election by virtue of which Mr. Dibble claims the seat. It is as follows:

"STATE OF SOUTH CAROLINA, EXECUTIVE CHAMBER,

"*Columbia, S. C., May 23, 1881.*

"*To the commissioners of election and the managers of election for the counties of Charleston, Orangeburg, and Clarendon, composing the Second Congressional district of the State of South Carolina:*

"Whereas a vacancy in the representation of the said Second Congressional district in the House of Representatives of the United States of America has happened by the death of Michael P. O'Connor, who, at the general election held November 2, A. D. 1880, was chosen a Member of said House of Representatives for said Congressional district for the term of two years from March 4, A. D. 1881; and whereas the Constitution of the said United States in such cases requires the executive authority of the State to issue a writ of election to fill such vacancy:

"Now, therefore, you and each of you are hereby required to hold an election in accordance with the laws for holding general elections for a Member of the said House of Representatives for the said Congressional district, to serve for the remainder of the term for which the said Michael P. O'Connor was elected; the polls to be opened at the various places of election in the said counties on Thursday, the 9th day of June, A. D. 1881, by the various sets of managers for those places, respectively.

"Given under my hand and the seal of the State of South Carolina, this 23d day of May, in the year of our Lord one thousand eight hundred and eighty-one.

"JOHNSON HAGOOD, *Governor.*

"R. M. SIMS, *Secretary of State.*"

The right of Mr. Dibble to a seat in the House depends upon the title of Mr. O'Connor. By the very language of the proclamation he was a candidate "to serve for the remainder of the term for which the said Michael P. O'Connor was elected;" and if it appears from the proofs that Mr. O'Connor was not elected, then there was no vacancy created by his death, no remainder of a term to be filled, and Mr. Dibble could have no rights to be prejudiced by any pleadings or agreements made by Mr. O'Connor. In consenting to be a candidate to serve for the remainder of the term, for which Mr. O'Connor claimed to have been elected, Mr. Dibble rested his title to the seat in dispute upon the title of his predecessor, and he must be bound by the pleadings, proofs, and decree growing out legitimately of that contest. To insist that Mr. Mackey should abandon the testimony taken in the case prior to the death of Mr.

O'Connor—and all of it was taken prior thereto except the evidence of contestant in rebuttal, and which is not material so far as the true issue is concerned—and commence anew a contest with Mr. Dibble, involving the same specifications of contest, is, in the opinion of the committee, not only vain but in conflict with every principle of law and equity.

It was claimed by the counsel of Mr. Dibble in argument that if, after the testimony had been taken Mr. O'Connor had resigned, an election ordered by the governor to fill the assumed vacancy, and a successor elected, the contest between the original parties would abate as fully as if the contestee had died. These propositions must both stand or fall together. If such was the law, there would be nothing to prevent a contestee from abating a contest at any time at his own volition. If, after the testimony had been taken, the contestee should be forced to conclude that his case was hopeless, it would only be necessary for him to resign, have the governor order a new election, again be a candidate, with a hope that under circumstances more favorable to him and his party he might succeed. Assured that his former certificate was proven worthless he would have nothing to lose, and if successful in receiving a majority at the second election he would be enabled thereby, by his voluntary resignation, to escape the effect of the frauds perpetrated by him or his partisan supporters at the first election. It is only necessary to state the proposition to make manifest its fallacy.

The minority argued at length against the conclusion of the majority—

But, as we have already said, we think Mr. Dibble's rights are not to be affected in any way by this record in the case of Mackey *v.* O'Connor. We have already given an outline of the facts connected with Mr. Dibble's admission to his seat, and have quoted the words of the resolution referring the credentials of Dibble and the record of the case of Mackey *v.* O'Connor to the Committee on Elections, which was laid upon the table by the House, and have also shown that the House laid on the table the motion to reconsider the vote on that resolution.

Let us apply to these facts the principles of statute and parliamentary law which appear to us to be applicable thereto. And in this connection let us cite from our own recognized parliamentary compilation as to the effect of the motion to reconsider and lay on the table. Smith's Digest, page 292, concerning the motion "to lay on the table," contains this language:

"In the House of Representatives it is usually made for the purpose of giving a proposition or bill its 'death-blow;' and when it prevails, the measure is rarely ever taken up again during the session. If the motion to 'reconsider and lie' follow this motion, and be carried, it can only be taken from the table by the unanimous consent of the House."

And again (ibid., p. 293):

"If a motion to reconsider be laid on the table, the latter vote can not be reconsidered. (Journals, 3, 27, p. 334; 1, 33, p. 357.)"

Mr. Cushing, in his "Law and Practice of Legislative Assemblies," after showing the distinction between the English and American laws on the subject of legislative vacancies, proceeds as follows:

"If it [i. e., a vacancy] occurs before the sitting or in a recess, and the new election takes place without the previous authority of the assembly, the existence of a vacancy must be determined upon when the Member elected presents himself to take his seat."

In the history of vacancies in Congress, there is one case which in many respects resembles the present. In May, 1867, George D. Blakey and Elijah Hise were opposing candidates for Congress in the Third Congressional district of Kentucky, and four days after the election Mr. Hise died. Mr. Blakey appeared before the State canvassing board and claimed to have been elected. The board decided that Mr. Hise had been elected. Congress assembled thereafter on July 3, 1867; and on July 5, 1867, a memorial of Mr. Blakey was presented to the House, asking admission as a Member from the said Congressional district, and the memorial and accompanying papers were referred to the Committee on Elections, who were instructed by the House, July 11, 1867, in relation to taking evidence in regard to the same.

On July 20, 1867, Congress adjourned until November 21, 1867. During this interval, and while the Committee on Elections had under consideration the claim of Mr. Blakey to the seat, a special election was held in the Third Congressional district of Kentucky, under writs of election issued by the governor of Kentucky, to fill the vacancy occasioned by the death of Mr. Hise; and at such special election, held August 5, 1867, Mr. Golladay was elected, and on November 25, 1867, presented his credentials to the House.

An extended discussion followed. The distinguished chairman of the Committee on Elections, Mr. Dawes, after conceding the ordinary rule to be that charges touching "the legality of an election are matters which pertain to a contest in the ordinary way, and should not prevent a person holding the regular certificate from holding his seat," said:

"I do not see how it is possible to apply the rules laid down there to this case, without foreclosing Doctor Blakey from any further investigation of the question of a vacancy existing at that time." (Congressional Globe, 1, 40, p. 783.)

Other Members of the House took the position that Mr. Golladay should be seated prima facie, and that Mr. Blakey should be allowed to contest with him the right to his seat.

The House adopted the view of Mr. Dawes, and, instead of allowing Mr. Golladay to be sworn, referred his credentials to the Committee on Elections. Eight days afterwards Mr. Dawes presented the unanimous report of the Committee on Elections declaring that Mr. Golladay was entitled to the seat. (Congressional Globe, 2, 40, pp. 3, 56.) This report was adopted by the House, and necessarily recognized that the writs of election issued by the governor of Kentucky for the special election, were valid, even though the House had under consideration the question of the existence of a vacancy at the time. For had the writ of election of the governor of Kentucky been prematurely issued, the election would have been without legal sanction, and therefore invalid. And this decision of the House was not inadvertently rendered, for Mr. Blakey not only mentions in his memorial to the House that he had protested before the State authorities against the holding of the special election, but, in addition, reiterates it in his remarks before the House. But the House refused to recommit the report of the committee, ordered the previous question by a vote of 102 to 22, and adopted the recommendation of the committee without a division. (Congressional Globe, 2, 40, pp. 57, 61.)

Now, to recapitulate. What principles are involved in this decision? The main doctrine is, that the right and duty of the executive of a State to issue writs of election to fill vacancies in the House, derived from article 1, section 2, of the Constitution of the United States, in advance of any adjudication by Congress on the question of vacancy occasioned by death, is to be exercised in contested cases as well as in ordinary cases, thus applying to such cases the same principles so early settled in the cases of Edwards (Clark & Hall, 92), Hoge (Clark & Hall, 136), and Mercer (Clark & Hall, 44). And while as to the matter of practice in the case of Golladay there was a difference of opinion as to whether the credentials ought to be referred to the Committee on Elections, in order to determine finally as to the existence of a vacancy before seating Mr. Golladay, who held the certificate, or whether Mr. Golladay should be sworn and the right reserved to Mr. Blakey to contest his seat, there was no dissent from the proposition of Mr. Dawes, that if Mr. Golladay were sworn in without such reservation, Mr. Blakey would be foreclosed "from any further investigation of the question of a vacancy existing at that time."

Now, in the present case, not only was there no reservation of the right to contest Mr. Dibble's seat when he was sworn in, but the House, by a very decided vote, tabled a motion to refer the credentials of Mr. Dibble and the papers in Mackey *v.* O'Connor to the Committee on Elections, and tabled a motion to reconsider its vote thereon.

We do not mean to say, nor have we ever understood Mr. Dibble to contend, that it is beyond the power of the House to make inquiry into his right to his seat by such means at it may see fit to adopt in an investigation de novo. Such an investigation would give to the sitting Member the opportunity, which he has never enjoyed, of defending his seat by pleadings of his own and such proofs as he may be disposed to offer in his cause. It must be borne in mind that by the action of the House itself Mr. Dibble was placed in full possession and enjoyment of the office of Member, on December 5, 1881. This possession was clear from any qualification, reservation, or condition; it was as absolute as the possession of any Member on the floor. Can it be said a contest was pending in the case of Mackey *v.* O'Connor? The answer is that the House had decisively given "its deathblow" to the motion to make Mr. Dibble a party to that contest before he was sworn in.

It is premature to discuss and to pass judgment upon the effect of the election of November, 1880, upon the special election of June, 1881, because it is a mere speculative inquiry, until by some order of the House, which order has never yet been made, the sitting Member is placed in the position of a party to a contest, either under the statute or under a special order of the House adopted for the specific case.

If we look at the statute, we find the following language:

"SEC. 105. Whenever any person intends to contest an election of any Member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall

have been determined by the officers or board of canvassers authorized by law to determine the same, give notice, in writing, to the Member whose seat he designs to contest of his intention to contest the same, and in such notice shall specify particularly the grounds upon which he relies in the contest."

Section 106 provides for an answer by the Member thus served with notice. Section 107 provides for the taking of testimony, and incidentally, but without doubt, defines the term "Member" to mean "returned Member."

Now, there is nothing in the statute to limit its application to general in contradistinction to special elections. "To contest an election of any Member" is broad and comprehensive; and in this category Mr. Dibble, as a "returned Member," certainly may be embraced. Mr. Dibble was certainly elected at an election regularly held according to law. The cases of Hoge (Clark & Hall, 136), Edwards (Clark & Hall, 92), and Mercer (Clark & Hall, 44) and the case of Blakey *v.* Golladay settle that. The action of the House in seating Mr. Dibble recognizes the fact and puts it beyond dispute. It is unnecessary to cite authorities to show that questions concerning the legality of an election are proper matters of contest under the statute; they have been so treated in numerous cases.

And when we consider that Mr. O'Connor, the "returned Member" of the November election, had a right to a seat only so long as he lived, and had no inheritable or transmissible interest to be affected after his death, it is enough to state that a contest for his seat after his death is a contest for something that had ceased to exist. The only relation that could exist between himself and anyone that succeeded him was a relation of time, not a relation of privity. It can not be said that because Mr. O'Connor was elected for a term of two years he had a right in himself and his privies for two years, whether he lived or died. He only had a right for two years, provided he should live; the very fact of his death creating a vacancy shows that his right was absolutely gone at his death. And for anyone else to have or claim a right the original granting power—i.e., the people—had to be invoked, and they alone had the right to bestow the remainder of the term. In law the case of a suit against a life tenant is analogous. Can anyone claim that where one of two litigants of a close—the one in possession—dies, and another person enters into possession of the disputed territory under a fresh grant from the sovereign, the tenant thus entering can be ousted upon the proceedings had against his predecessor, such predecessor being neither his ancestor nor grantor, but simply a life tenant? And shall the right of a Member of this House to his seat, a right held to be a right of property, be decided on principles antagonistic to those which govern the decisions of other rights of property? We think not.

Recurring to the statute, we think it a reasonable construction of the same when we come to the conclusion that Mr. Dibble, as the returned Member of the House, was entitled to the notice required thereunder, in like manner as a Member elected and returned at a general election. One thing is certain that it was in the power of Mr. Mackey to serve such notice and to state as his grounds the same reasons he now advances for contesting the election of Mr. Dibble; and if the evidence taken in the previous contest of Mackey *v.* O'Connor were competent in the new case, he had the opportunity of submitting it on notice, as evidence in a contest against Mr. Dibble thus inaugurated, and we fail to find any statutory means by which Mr. Dibble, after his election, could, by any act of his, become a party to the case of Mackey *v.* O'Connor.

This being the case, and the House having seated Mr. Dibble, is there any precedent in law or in the decisions of this House in contested cases whereby the party in possession of his seat should go out to hunt an adversary? Is he to be the actor in any way? We fail to find any such precedent, and can only come to the conclusion that Mr. Mackey, having neglected to avail himself of the opportunity afforded him by the terms of the statute, whereby he could have inaugurated a contest in the usual form, in the first instance either willfully or mistakenly prevented Mr. Dibble from being a party to the issues he is now trying to force upon him.

Failing to find in the statute any mode whereby Mr. Dibble could be made a party to the case of Mackey *v.* O'Connor, and finding in it a mode whereby Mr. Mackey might have made the issues with Mr. Dibble on which he nows invokes the judgment of the House, but did not so take issue with Mr. Dibble, we can not come to the conclusion that the usual resolution of reference to the Committee on Elections of contested cases, adopted December 21, 1881, operated to revive the case of Mackey *v.* O'Connor, which had received "its deathblow" by the action of the House itself over two weeks previously to that time. Such resolution certainly did not make Mr. Dibble a party to the case of Mackey *v.* O'Connor, and we fail to find any action of the House which at any time had that effect. It therefore seems to us that if the case is within the statute, then Mr. Mackey has neglected to give the notice prescribed

by the statute to be given to the Member whose "election" is to be contested; and, on the other hand, if the case be outside of the statute, the House has never taken any order for proceedings in the matter against Mr. Dibble, the sitting Member, and without such order the committee are without jurisdiction to act concerning Mr. Dibble in the premises, having neither the statute nor any precedents of the House on which to support such claim for jurisdiction.

Under that provision of the Constitution which makes the House of Representatives the judge of the election, returns, and qualifications of its Members, the House may adjudicate the question of right to a seat in either of the four following cases: (1) In the case of a contest between a contestant and a returned Member of the House, instituted in accordance with the provisions of title 2, chapter 8, of the Revised Statutes; (2) in the case of a protest by an elector of the district concerned; (3) in the case of a protest by any other person, and (4) on the motion of a Member of the House. The proceeding in the first of these cases is, by the Revised Statutes, made a proceeding inter partea—a suit or action in which the contestant is plaintiff and the returned Representative defendant.

A case adjudicated by the House on the protest of an elector, or other person, or on the motion of a Representative, is not an action inter partes. It is a proceeding under the Constitution, and not under the statute.

The action inter partes provided for by the Revised Statutes abates on the death of either party. While the power of the House to adjudicate any question of title involved in that action survives, the action itself abates upon the death of either party thereto.

It follows that the contest of Mackey *v.* O'Connor abated on the death of Mr. O'Connor. That contest was an action inter partes. It was the technical action specially provided for in the Revised Statutes.

If the House shall hereafter adjudicate any of these questions, in a proceeding against Mr. Dibble, it will have the power, under the Constitution, to provide the rules for such adjudication.

When the House undertakes the adjudication of the right of a Member to his seat on the protest of an elector or other person, or on the motion of a Representative, it does not look to the statutes for its rules of procedure; it prescribes its own rules, in the exercise of its unquestionable constitutional power. If it finds any of the rules prescribed by law for technical contests available and useful in the case, it adopts them. Such rules then have force, not because found in the statutes, but because adopted by the House. But this constitutional power of the House to prescribe the rules for such adjudications is not an absolute or undefined power to be arbitrarily exercised by the House. Like every other constitutional power of the House it is to be exercised in subordination to those principles of justice which lie at the root of the Constitution and send their influences through all its provisions. For an adjudication made on the protest of an elector or other person, or on motion of a Representative, the House has no constitutional right to prescribe any rules which shall bind the sitting Member by pleadings or averments which he never made, by the testimony of witnesses whom he never had an opportunity to examine or cross-examine, by stipulations or admissions, or waivers which he never made, or by laches which he never incurred. The House has no right to make the title of a Representative to his seat subject to the acts or omissions, the diligence or laches, the wisdom or folly, of another man.

But if it were conceivable that the contest, which is by the Revised Statutes so clearly made a proceeding inter partes, could survive one of the parties, it would, nevertheless, be certain that when the House seated Mr. Dibble on his credentials that contest was dismissed and passed from the jurisdiction of the House. From the time when Mr. Dibble took his seat, in pursuance of the resolution of the House, it was his right to that seat which was to be assailed by any contestant, or claimant, or protestant. Since that time Mr. O'Connor's right has been a question for the adjudication of the House, not because it was once involved in the contest of Mackey *v.* O'Connor, but because it is now involved in the question of Mr. Dibble's right to the seat which he occupies. When the House admitted Mr. Dibble to the seat without condition or reservation, it invested him with the right which belongs to other sitting Members under the Constitution and the law to receive due notice of any proposed contest, to have the opportunity to answer, to examine his own witnesses, to cross-examine those of his opponents, and to be concluded by no acts, omissions, stipulations, laches, or waivers except his own.

It may, perhaps, be suggested that the contest of Mackey *v.* O'Connor was revived and referred to the committee by the resolution which was adopted December 22, 1881, in the following words:

"Resolved, That all of the testimony and all other papers relating to the rights of Members to hold seats on this floor in contested cases now on file with the Clerk of this House or in his possession, and all memorials, petitions, and other papers now in the possession of this House, or under its control,

relating to the same subject not otherwise referred, be, and the same hereby are, referred to the Committee on Elections, and ordered to be printed."

But the answer is obvious. The resolution did not refer to the committee papers which related to abated contests, but only those which related to pending contests. It did not revive dead suits. It only referred to the committee papers which related to existing suits. An order of reference places a paper before the committee for what it is worth. It imparts no new legal character or quality to the paper. It does not transform an answer in the case of Mackey *v.* O'Connor into an answer in the case of Mackey *v.* Dibble. It does not transform illegal evidence into legal evidence. It does not transform a witness for or against Mr. O'Connor into a witness for or against Mr. Dibble. It does not transform an admission, stipulation, or waiver by Mr. O'Connor into an admission, stipulation, or waiver by Mr. Dibble. It does not transform a dead suit, to which the papers relate, into a revived and pending action.

The first and only notice of contest of his seat ever served on the sitting Member, Mr. Dibble, by Mr. Mackey, was not served until January 4, 1882. Thereupon Mr. Dibble filed with the committee a protest against the committee's proceeding to consider and act upon the case of Mackey *v.* O'Connor, because it was evident from the notice served by Mr. Mackey that it was the intention of the contestant to assail his right to his seat by means of a case to which he was not a party. But a majority of the committee decided to proceed with the case, and overruled the protest of the sitting Member. For the reasons already set forth, we are of the opinion that the protest should have been sustained.

We can not concur in establishing as a precedent that a Member of this House, duly admitted to his seat, can be rightfully removed therefrom without any opportunity of defending his title thereto, either by pleading his defense, or by introducing evidence in his behalf. Nor can we subscribe to the opinion that the Committee on Elections, under its ordinary powers, can summon a Member of this House to defend a cause in which he is not the contestee, in which he is in no way named as a party, and in which the House has not only not required him to appeal, but has by its action declined to make him a party. If such a precedent is to be established, it will be giving to the Committee on Elections jurisdiction to act outside of the statute, and to inquire as to the seat of any Member on the floor at its discretion, and without the order of the House.

736. The case of Mackey v. O'Connor, continued.

Discussion as to informalities in the preparation of depositions in an election case.

The law governing the method of transmitting the testimony in an election case to the Clerk of the House was held to be directory merely.

Instance wherein ex parte affidavits were received as to a secondary question arising in an election case.

The House rejected a return of State election officers on the evidence of the returns of United States supervisors of elections.

(2) As to the validity of the testimony.

The testimony was taken by E. W. Hogarth, notary public and stenographer, and sitting Member produced before the committee an ex parte affidavit of Hogarth setting forth the following facts:

That he was employed by E. W. M. Mackey, esq., as stenographer and notary public in the contest between E. W. M. Mackey and M. P. O'Connor for a seat in the Forty-seventh Congress of the United States, and that deponent acted as stenographer, and sometimes notary public, in Orangeburg County on behalf of the Hon. M. P. O'Connor. That deponent took the testimony on the part of E. W. M. Mackey, esq., in the counties of Charleston, Orangeburg, and Clarendon, with the exception of one or two depositions. That all of the testimony so taken by deponent as stenographer was transcribed from his stenographic notes in deponent's own handwriting, and testimony taken on behalf of E. W. M. Mackey, esq., was turned over to him in deponent's own handwriting, and such taken on behalf of the Hon. M. P. O'Connor was turned over, in deponent's own handwriting, to Robert Chisolm, jr., esq. This ended his (deponent's) connection with said testimony, except that afterwards, at various times, he (deponent) signed certificates which were tendered to deponent by E. W. M. Mackey, esq., and

also jurats at the foot of depositions; these deponent signed without comparison with his said stenographic notes, taking it for granted that said testimony was the same as furnished by deponent to said E. W. M. Mackey, esq. That the said certificates were often presented to deponent for signature by said E. W. M. Mackey, esq., when deponent was otherwise employed, and that deponent did not have his stenographic notes at hand when he so certified said testimony.

That deponent also certified the testimony taken on behalf of Hon. M. P. O'Connor in instances where deponent acted as notary public.

That deponent did not forward any of said testimony to the Clerk of the House of Representatives, but turned same over to the respective parties named above, and deponent knows nothing of his personal knowledge concerning the forwarding of the same.

Sitting Member also produced the affidavit, also ex parte, of one C. Smith, who swore that he was employed by contestant to write out the testimony taken in his behalf, and that in writing it out made material changes, destroying the originals (i. e., the copy furnished by the stenographer, but not the stenographer's notes, which were retained by Hogarth).

Several other ex parte affidavits were produced by sitting Member tending to confirm this testimony as to the alteration of the affidavits.

It also appeared in the record of the case[1] that in a similar manner the testimony taken by Mr. O'Connor was delivered to the latter's son, who, assisted by Mr. Mackey, went over it to make corrections.

It also appeared that there had subsisted between the original parties to the contest an agreement, signed by Mr. Mackey and by the attorney of Mr. O'Connor, providing, among other things, that in all cases where "a deposition is not subscribed to by the party making the same the signature of such witness is hereby waived."[2]

The law of the United States in regard to the duties of the officer taking testimony in a contested election case provided:

Sec. 122. The officer shall cause the testimony of the witnesses, together with the questions proposed by the parties or their agents, to be reduced to writing in his presence and in the presence of the parties or their agents, if attending, and to be duly attested by the witnesses respectively.

Sec. 127. All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward the same by mail addressed to the Clerk of the House of Representatives of the United States, Washington, D. C.

It appeared that the evidence was, moreover, transmitted to the House by express, and not by mail.[3]

The minority attacked the depositions and demanded their suppression on two grounds:

(*a*) Because the depositions were not reduced to writing in the presence of the notary.

Quoting the judiciary act of 1789—

And every person deposing as aforesaid shall be carefully examined and cautioned and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together

[1] Record, Appendix, p. 359.

[2] See Record, p. 4372.

[3] Record, p. 4346.

with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any, given to the adverse party, be by him, the said magistrate, sealed up and directed to such court and remain under his seal until opened in court—

the minority contended that it was analogous to the law governing taking testimony in contested election cases, and that the decisions in relation to it sustained their contention. They quoted at length from Bell *v.* Morrison (1 Peters, 351), United States *v.* Smith (4 Day, 121), Edmonston *v.* Barrett (2 Cranch C. C., 228), and other decisions to show that a deposition was not admissible if it was not shown that it was reduced to writing in the presence of the magistrate. The minority conclude:

But it is argued that the original stenographic notes were written out in the presence of the notary public, and that this was a compliance with the statute. The authorities already cited are not consistent with this position. The object is the authentication of the testimony now on file with the Clerk of the House. And the agreement of the parties only extended to the substitution of the longhand transcript of the stenographic notes, and did not waive anything but the signatures of the witnesses thereto. The parties made no agreement that the depositions in longhand should be afterwards recopied by the contestant and his agents out of the presence of the notary, and that these papers should be forwarded, and the longhand depositions made by the notary should be destroyed. The part of the agreement bearing upon this matter is as follows:

"Fourth. That inasmuch as both parties intend to have the depositions of many of the witnesses taken in shorthand by a stenographer, which will render it impossible for such witnesses to subscribe to their depositions until the same shall be written out, which, in many instances, can not be done for some time after such depositions shall have been taken; and inasmuch as the signatures of the witnesses in such cases could only be procured by requiring a second attendance of such witnesses at considerable inconvenience and expense to all parties interested; therefore, in all cases where a deposition is not subscribed to by the party making the same the signature of such witness is hereby waived."

The contestant, Mr. Mackey, states that this rewriting of the depositions was done, not by agreement of the parties, but by agreement between the notary, Hogarth, and himself. But to our minds this conduct of a public officer was a violation of his plain duty under the statute, to retain the testimony in his own custody until forwarded, and this was aggravated, not excused, by collusion between the officer and one of the parties without the knowledge or consent of the other party.

We think, therefore, that the depositions substituted by the contestant and his agents for the originals written by Hogarth should be suppressed.

The majority, who denied, as a matter of fact, that the affidavits had been materially or harmfully altered, and who insisted that fourteen affidavits on which the decision of the case turned could not be impeached successfully, say:

It was further charged that the technical requirements of the statute in reference to taking testimony in contested elections had not been complied with, either in the transcribing of the depositions in their attestation or in the manner of their being forwarded to the Clerk of the House. To meet the first and really only serious charge the contestant filed the affidavits of 83 of the 94 witnesses examined by him, each of whom deposed that he had carefully read his deposition, as contained in the printed record, and that the same was in every particular the deposition made by him before the notary public, and that there had been no garbling or alteration in or addition thereto, and they each again made oath to the truth of the matters and things therein contained. The notary who, by agreement of Mr. Mackey and Mr. O'Connor, took the testimony stenographically, also made oath that in the limited time given him he had compared with his stenographic notes the depositions of 14 witnesses as printed in the record, and that the depositions as printed correspond in every particular with the original stenographic notes of such depositions.

The majority further say:

The affidavits submitted by the contestant in answer to Mr. Dibble's protest are uncontradicted by any affidavit filed by the latter, and they establish the fact that the testimony, as found in the printed

record, is in every particular the testimony actually given by the witnesses, and taken stenographically by the notary, and afterwards transcribed by his direction. It is not controverted that the evidence was, by the agreement of Mr. Mackey and Mr. O'Connor, taken stenographically by the notary. These stenographic notes are the original evidence of what the witnesses deposed. They were taken necessarily in the notary's presence, who was also the stenographer. They were really the depositions in the cause. By the stipulations it was agreed that these stenographic notes should be afterwards transcribed. The manner in which they were transcribed, and by whom transcribed, is a matter of no importance, providing they were transcribed correctly, since the notary public accepted the work as performed by the copyists, and certified to the same as being the depositions taken by him. The fact that the contestant assisted in making transcripts of this evidence does not detract from its correctness.

(b) The minority insisted that the evidence should have been transmitted to the House by the notary, and until so transmitted must remain in his custody.

The majority say:

The provisions of the statute in regard to the form and manner of taking and forwarding testimony in contested election cases are merely directory, and therefore the only question which the committee has deemed it necessary to consider upon this point has been whether the essential provisions of the law had been complied with; that is, had the testimony of the witnesses been correctly reported by the notary and stenographer, and had that testimony been forwarded to the House. If Mr. Dibble had shown by the proper evidence that the depositions before the committee were not the depositions of the witnesses (and he could have done this by the ex parte affidavit of the stenographer, if such was the case) he would have disclosed a matter fatal to their consideration.

This question as to the validity of the affidavits received the most attention during the debate, and was the point on which the minority apparently rested their defense with most confidence.

(3) As to the merits of the case.

The majority report says:

Under the election laws of South Carolina the governor of the State, prior to each general election, appoints for each county in the State three commissioners of elections. These commissioners of elections appoint for each poll in their respective counties three managers of elections. (Rev. Stat., Title II, chap. viii, sec. 2.) By the managers so appointed the election at each poll is conducted, and at its close the votes counted and a return thereof made to the commissioners of elections (15 Stat., 171), who, on the Tuesday next following the election, meet and organize as a board of county canvassers, and from the returns made to them by the managers they count or canvass the votes of the county and make such statements thereof to the State board of canvassers as the nature of the election requires, making for Representative in Congress "separate statements of the whole number of votes given in such county." (Rev. Stat., Title II, chap. viii, secs. 15–18.) From these statements of votes made by the county canvasser the board of State canvassers determine and certify the number of votes cast for the different candidates for the various offices voted for and declare what persons have been by the greatest number of votes duly elected to such offices. (Ibid., secs. 24–26.)

Acting upon the returns made by the county canvassers of Charleston, Orangeburg, and Clarendon, the counties composing the Second Congressional district of South Carolina, the State board of canvassers certified and declared that at the election held November 2, 1880, the vote cast for Representative in Congress from the said district was as follows (Rec., p. 11):

	M. P. O'Connor.	E. W. M. Mackey.
Charleston	11,429	8,112
Orangeburg	3,627	2,712
Clarendon	2,513	1,473
Total	17,569	12,297
	12,297	
Majority for O'Connor	5,272	

Although the vote certified by the State board of canvassers is a correct aggregate of the vote returned to it by the county boards of canvassers, it is not a true statement of the result of the election, because the returns made to the State board of canvassers by the county canvassers of Charleston and Orangeburg, upon which the State board acted, were not full and correct statements of the vote cast in those counties. Had the county canvassers in the three counties in the district counted the vote as returned to them by the managers of the election of the several precincts in the several counties, the result would have been a majority of 879 for Mr. Mackey. These managers in every instance and at every poll in the district were of the same political faith, and were the partisan supporters of Mr. O'Connor. The majority certified for Mr. O'Connor by the county board of canvassers, all of whom were Democrats, was obtained by entirely reversing the vote of one, Haut Gap, and leaving out in the final count seven precincts in Charleston County, to wit, Black Oak, Strawberry, Calamus Pond, Biggin Church, Brick Church, Ten Mile Hill, and Enterprise, and four in Orangeburg County, to wit, Fogles, Fort Motte, Lewisville, and Bookhardts.

The majority discuss the twelve precincts briefly and show that the actual vote cast at them is proven by the testimony of United States supervisors, sometimes corroborated by testimony of the State election officers.

The minority objected to the returns of the United States supervisors as evidence and discussed their status somewhat.

The minority did not concede that the majority for O'Connor was destroyed.

The majority, after arguing that there were great frauds in the district beyond what they had thought it necessary to show, recommended the following resolutions:

Resolved, That the Hon. Samuel Dibble is not entitled to hold the seat now occupied by him in this House as a Representative from the Second district of South Carolina in the Forty-seventh Congress.

Resolved, That the Hon. E. W. M. Mackey was duly elected as a Representative from the Second Congressional district of South Carolina in the Forty-seventh Congress, and is entitled to a seat in this House.

The report was debated at length from May 29 to May 31,[1] and on the latter day the resolutions of the majority were agreed to, yeas 150, nays 3, the minority refraining from voting.

Mr. Mackey then appeared and took the oath.

737. The Virginia election case of Walker v. Rhea, of Virginia, in the Fifty-seventh Congress.

The death of the contestant after the beginning of an election case did not prevent the continuation of the case to a decision.

A ballot complicated and unfair but not shown to be issued in pursuance of any conspiracy was not considered as a reason for discarding the return.

The fact that fewer votes were returned for contestant than for the head of his party ticket was held not to justify a conclusion of fraud.

On April 8, 1902,[2] Mr. Edgar Weeks, of Michigan, from the Committee on Elections No. 3, reported in the case of Walker *v.* Rhea, of Virginia. On the face of the returns the returned member received a majority of 1,751 votes. After the contest was begun the contestant died, but this did not prevent the further progress of the case.

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[1] Record, pp. 4329, 4334, 4372–4398, Appendix, p. 357; Journal, pp. 1377–1380.

[2] First session Fifty-seventh Congress, House Report No. 1504.

The contest was based substantially on the following allegations and charges, viz:

First. That the official ballots printed and used in several of the counties were so complicated and unfair that it was very difficult, if not impossible, for voters to read, mark, and prepare them within the time of two and one-half minutes allowed by law for that purpose; that many of the electors who intended and tried to vote for contestant were disfranchised by reason of said unfair ballots, and that such ballots were so arranged and printed by the political friends of contestee with a fraudulent intent, and were calculated to deceive and mislead.

Second. That the returned member's majority over contestant of 1,751, while McKinley's majority over Bryan was 1,509 in the same district, is conclusive proof that the returns on their face were not an honest expression of the will of the voters at that election and that the contestant was defrauded and cheated.

Third. That the electoral boards and other election officers were guilty of fraud and dishonest practices in the interest of contestee, which accomplished contestant's apparent defeat.

Those charges and allegations were severally denied by the returned member and other pleas and explanations were interposed in his behalf.

The committee criticise the election laws of Virginia as conducive to fraud; but their conclusions as to the merits of contest were as follows:

The Virginia election law provides that the official ballot shall be a white paper ticket containing the names of persons who have complied with the provisions of that act and the titles of the offices for which they are candidates, printed in plain roman type not smaller than that known as "pica." While the letter of the statute may have been complied with, several of the ballots, notably that in Scott County, if legal, were very unfair. On those ballots were the names of six candidates for President and Vice-President, the names of the electors for each, their residences, and the names of the contestant and contestee, with the titles of the offices for which they were candidates. No regard for order was observed in the form of the ballot or the arrangement of that matter, and the names of the Congressional candidates especially appear in unexpected and unlooked-for positions. They were necessarily very misleading and confusing.

To say that the elector of ordinary intelligence and education would find it very difficult to examine, mark, and prepare that ballot in the two and one-half minutes allowed by law is a mild expression of a manifest truth. Under the law those official ballots, not only throughout the district, but throughout the whole State, could and should have been uniform and so arranged and printed as to assist rather than confuse. And if the object in preparing them were not to take unfair advantage, then the printers and members of the electoral boards who supervised the work were guilty of gross negligence or incompetency. However, your committee is not disposed to predicate its judgment on suspicion merely, or on facts or circumstances from which contrary inferences may be fairly drawn. It is not convinced that those unfair ballots were the result of a common purpose, or that they emanated from a common source, or that the contestee advised or approved of the use of such ballots, but, on the contrary, suggested that the ballots be made as plain as possible. Therefore this charge is dismissed.

The fact that on the face of the returns contestee received 1,751 more votes than contestant and McKinley 1,509 more than Bryan is not, in the judgment of your committee, sufficient reason to justify the conclusion that such result was accomplished by fraud. After a careful examination of the record your committee does not find such affirmative and positive evidence of fraud or mistakes on the part of the election officers as will overcome contestee's certified majority or justify it in setting aside the election.

Therefore the committee reported that the contestant was not elected, and that the sitting Member was entitled to the seat.

On May 21[1] the House, without division, concurred in the report of the committee.

[1] Record. p. 5756.

738. The North Carolina election case of Moody v. Gudger in the Fifty-eighth Congress.

An election contest does not necessarily abate by reason of the death of contestant during the taking of testimony.

Hearsay evidence as to declarations of voter as to how he had voted or would vote was held incompetent.

Evidence as to the party affiliations of voters is inconclusive as proof of how they cast their ballots.

Hearsay evidence as to declarations of voters that they had been bribed is unsatisfactory and dangerous evidence.

On March 18, 1904,[1] Mr. H. O. Young, of Michigan, from the Committee on Elections No. 1, submitted the report of the committee in the North Carolina election case of Moody *v.* Gudger.

At the outset of this case the committee dispose of a preliminary question as follows:

After the pleadings had been completed and a part of the testimony had been taken the contestant, Maj. James M. Moody, died, and it is strongly urged by contestee that the proceedings were thereby abated. He says, however:

"The constitutional right of the House of Representatives to inquire into and pass upon the title of any Member to the seat occupied by him is not questioned. The Constitution, Article I, section 5, plainly makes the House the sole judge of the election returns and qualifications of its Members. Its jurisdiction and power under this section is sole and supreme. In such manner as it may deem advisable it may exercise this constitutional prerogative and no one may question its action, but the exercise of this power must originate with the House. By resolution or other original affirmative action it must declare its purpose to investigate and adjudge."

Your committee are of the opinion that when the House of Representatives referred this contest to your committee it took such affirmative action and clothed your committee with jurisdiction to hear and report upon the case. This doctrine is not without precedent. In the case of Mackey *v.* O'Connor, decided in the Forty-seventh Congress, an abstract of which appears upon page 387 of Rowell's Digest, the contestee died during the pendency of the proceedings. It was there contended by the attorney for Mr. Dibble, who had been elected to the vacancy caused by Mr. O'Connor's death, that the contest had abated and that it would be necessary for contestant to begin a new contest against the then sitting Member, but the majority of the committee thought otherwise. They said:

"The right of contestant, as also of the people of that Congressional district, who, after all, are the real parties in interest, to have the facts of that election inquired into and adjudicated by the House can not be changed by the fact of the death of the contestee."

The minority of the committee dissented, but the House agreed with the majority of the committee, and. being satisfied that upon the merits of the case contestant was duly elected, he was seated. The exercise of this power did not originate with the House, but with the contestant, and the House took no other affirmative action to declare its purpose to investigate and adjudge than the reference of the contest to the Committee on Elections.

In the later case of Dantzler *v.* Stokes, from South Carolina, in the Fifty-seventh Congress, Stokes having died, Mr. Lever, who had been elected to fill the vacancy thus caused, was permitted to defend the contest, and the case proceeded, though no final action was taken thereon by the House.

Contestee attempts to draw a distinction between the case of the death of contestant and that of contestee, but your committee is satisfied that such distinction is not well founded. The original jurisdiction of Congress is as perfect in one case as in the other. The people of the Congressional district, as was said in the case of Mackey *v.* O'Connor, "are the real parties in interest," and are as much concerned in not being misrepresented by a man they have defeated at the polls as they are in being represented by a man they have elected. If an election contest be regarded merely as a personal action it will abate by the death of either party. It is only because it is not merely a

[1] Second session Fifty-eighth Congress, House Report No. 1738; Record, p. 5430.

personal action but one in which the people of the Congressional district are interested, and because the House has a right of its own motion to investigate the election of its own Members, that the contest may proceed after the death of either party. Congress can not be ousted of its jurisdiction to turn from its doors an interloper by the fact that the person really elected has died.

As to the merits of the case, the committee found:

Upon the face of the returns contestee received 12,700 votes and contestant received 12,517 votes, giving contestee an apparent majority of 183 votes. Contestant in his notice of contest alleges that this apparent majority was obtained by bribery and fraud in South Waynesville precinct of Haywood County, and by misconduct of the registration and election boards in Tryon and Shields precincts of Polk County, where duly qualified electors were denied the right to vote, and large numbers of illegal votes were received in gross violation of law. He asks that the returns from these precincts be rejected. He also alleges similar frauds and misconduct in other precincts of said district, but he has offered no proof thereof, and your committee therefore disregards said allegations. He also alleges specifically that large numbers of illegal votes were cast, counted, and returned for contestee, naming the precincts in which they were thus cast and the number of said votes cast in each precinct. These aggregate nearly 900 votes. He also alleges in the same specific manner that about 60 legal votes were attempted to be cast for contestant and they were arbitrarily and illegally rejected by the registration and election boards.

Contestee in reply denies all the allegations of contestant above set forth, and further answering alleges in the same specific manner pursued by contestant that some 1,500 illegal votes were cast, counted, and returned for contestant.

It was conceded upon the argument by the attorneys for both parties that the individual votes cast, counted, and returned for contestant and those which were cast, counted, and returned for contestee that were proven to be illegal would substantially balance each other and would in no way affect the result. The committee, being satisfied that this is a fact, enters into no discussion of the nearly 2,400 separate and distinct issues raised by these individual cases and agrees with the attorneys in the case that the case must be determined by the final disposition to be made of the votes returned from the precincts of South Waynesville, Tryon, and Shields, and from the county of Buncombe. In these the vote was as follows:

	Gudger.	Moody.	Majority for Gudger.
Buncombe	3,029	2,690	339
Shields	150	60	90
Tryon	119	49	70
South Waynesville	266	147	119
Total	3,564	2,946	618

It will be readily seen that if the county of Buncombe be thrown out the result of the election would be changed; the same result would follow if the precinct of South Waynesville and either of the precincts of Tryon or Shields should be discarded; but the rejection of the two precincts of Tryon and Shields alone, or the rejection of South Waynesville, would still leave contestee a majority.

BUNCOMBE COUNTY.

The contestant in his notice of contest only asked for the rejection of certain votes in the county of Buncombe, but the attorney for contestant in his brief and in his oral argument before the committee demands the rejection of the entire vote of the county. Contestee objects that this contention is not open to contestant as it is not contained in his notice of contest. Your committee expresses no opinion upon this question, as their conclusion upon an examination of the facts renders a decision unnecessary.

The constitution of North Carolina provides that only legally registered voters shall be permitted to vote, and then follows this section:

"Every person presenting himself for registration shall be able to read and write any section of the constitution in the English language, and before he shall be entitled to vote he shall have paid, on

or before the 1st day of May in the year he proposes to vote, his poll tax for the previous year, as prescribed by article 5 of the constitution, section 1." (Constitution of North Carolina, art. 6, see. 4.)

The statute of North Carolina based upon this constitutional provision provides that—

"Every person liable for such poll tax shall, before being allowed to vote, exhibit to the registrar his poll-tax receipt for the previous year, issued under the hand of the sheriff or tax collector of the county or township where he then resided, and unless such poll-tax receipt shall bear date on or before the 1st day of May of the year in which he offers to vote such person shall not be allowed to vote: *Provided,* That in lieu of such poll-tax receipt it shall be competent for the registrar and judges of election to allow such person to vote upon his taking and subscribing to the following oath: 'I do solemnly swear (or affirm) that on or before the 1st day of May of this year I paid my poll tax for the previous year, as required by article 6, section 4, of the constitution of North Carolina.' " (Record, p. 5.)

It is made the duty of the sheriff to file a list of all persons who have paid their poll tax in time to qualify them as voters. Under the laws of North Carolina, however, all male persons over 50 years of age are exempt from the payment of the poll tax, and all male citizens who are under 21 years of age on June 1 of the year previous to that in which the election was held would owe no poll tax on the May I next preceding the election, and so could have no receipt and would not appear upon the sheriff's list of those who had paid their poll tax. No claim was made that any of these statutes or constitutional provisions are invalid. Contestant shows that some 500 men voted in Buncombe County whose names are not on the sheriff's list of those who had paid their poll tax in time to qualify them as voters. He claims that this was owing to a conspiracy to issue fraudulent tax receipts and exemptions after the time fixed by law for said purpose, and that said conspiracy was so largely carried out as to throw doubt and discredit on the entire vote of the county and render it impossible to determine how the honest vote of the county was cast.

Your committee finds the evidence of this conspiracy inconclusive. If it existed at all it was abortive of results, for the testimony clearly shows that the list of those who voted without being on the sheriff's list is largely made up of those who were too old or too young to be liable for the poll tax, and of those who were not conclusively shown to have been entitled to vote, at least as many were shown to have voted for contestant as for contestee. The committee desires to call attention to the incompetent and inconclusive character of much of the testimony as to how individuals voted. This consisted in a very large number of cases of the statement of some third party that the voter, who was not himself called as a witness, had said that he should vote or had voted for contestant or contestee, as the case might be. It is needless to say that this is hearsay.

Another class of testimony relied on was that certain voters were Republicans or Democrats, from which the inference was sought to be drawn that they had voted their party ticket for Member of Congress. That such testimony, if admissible at all, is inconclusive and of little weight will be conceded by every lawyer. But whether you allow to this testimony all the force that is sought to be given it by either of the parties or reject it altogether, the result is the same. In either case contestant has received at least as many illegal votes as contestee. Your committee therefore can not find any valid reason for rejecting the vote of Buncombe County.

SHIELDS PRECINCT, POLK COUNTY.

The contestant alleges that legal voters were denied registration in Shields precinct of Polk County, and that the ballot box was stuffed with illegal ballots. The evidence to sustain the latter charge is too puerile for consideration. There is no evidence tending to prove that more than one legal voter was denied registration, and there is other evidence just as credible tending to show that this one legal voter did not apply for registration at all, and so could not have been rejected. The vote of this precinct also, in the opinion of your committee, should be counted as cast and returned.

TRYON PRECINCT, POLK COUNTY.

The contestant claims that the votes of Tryon precinct, in Polk County, should be rejected because of the refusal of the registration officers to register a large number of qualified voters. Your committee can find no evidence tending to show that more than one legal voter was refused registration. A few illegal votes seem to have been cast, but this, in the opinion of your committee, was the result of accident rather than design, and the illegal votes are easily eliminated and do not affect the result. In the opinion of your committee the vote of this precinct should not be rejected.

This disposes of the case, as the precinct of South Waynesville, in Haywood County, even if rejected, would not alter the result, but as much stress has been laid upon this precinct in the argument of counsel your committee thinks best to report the facts relative to the election therein as it finds them.

SOUTH WAYNESVILLE PRECINCT, HAYWOOD COUNTY.

All the testimony tends to show that this precinct was normally Democratic from 200 to 250 majority. At the election in question it was carried by nearly all the Democratic candidates by majorities of over 200. It was the home, however, of contestant. He was popular there. Two years before he had carried the precinct by a majority of 26 against the Democratic candidate, Mr. Crawford. At that time there was disaffection in the Democratic ranks, and some of the most prominent Democratic workers were supporting contestant. These same men in 1902 were supporting contestee. The result of that election was a majority of 119 for contestee, who ran fully 100 behind the average of his ticket. Contestant claims that this result was brought about by wholesale bribery of voters by contestee, without which contestant would have carried the district by as large a majority as he had done two years previously.

It is evident, however, that the conditions had materially changed. In 1900 contestant was opposed by a divided Democratic party; in 1902 by a united Democratic party. There is considerable testimony to the effect that it was "common talk," "generally understood," "whispered about," and "a matter of common knowledge" that money was being used by the friends of both contestant and contestee for the purpose of influencing voters. There is also some testimony that a few men who had voted at the election told the witness that they had been offered money and in some cases that they had received money for their votes. Testimony of this kind is sometimes received in election cases from the difficulty of obtaining direct evidence of bribery, but at its best it is inconclusive, unsatisfactory, and dangerous. It is a most significant fact, however, that nearly all the active workers for both contestant and contestee were witnesses in the case, and each, while disclaiming any knowledge of the improper use of money by persons other than himself, when asked as to his own conduct, put himself upon his constitutional right and refused to answer questions which might criminate himself. The above is a fair statement of all the testimony tending to show the improper use of money by the supporters of the contestee.

There is no evidence to show that contestee used any money himself or was cognizant of the use of any money by his supporters in this precinct in his behalf, properly or improperly. On the contrary, there is strong direct testimony of the most positive nature, from those in a position to know, that he contributed no money whatever to be used in aid of his election in this precinct. No single voter is pointed out who was bribed to vote for contestee. For these reasons your committee think the vote of South Waynesville precinct should not be rejected.

It follows from these conclusions that in the opinion of your committee the contestant has not made out his case, and they therefore recommend the adoption of the following resolution:

"Resolved, That James M. Moody was not elected a Member of the Fifty-eighth Congress from the Tenth district of North Carolina.

"Resolved, That James M. Gudger, jr., was elected a Member of the Fifty-eighth Congress from the Tenth district of North Carolina, and is entitled to retain his seat therein."

The House agreed to the resolutions without debate or division.

739. The Maryland election case of Stewart v. Phelps in the Fortieth Congress.

Instance of the withdrawal of an election contest by letter from the contestant.

On July 5, 1867,[1] Mr. Charles E. Phelps, of Maryland, whose seat had been contested by Charles J. Stewart, presented a communication from Mr. Stewart, addressed to the House, in which he stated that he had proceeded to take testimony in support of the allegations in his notice of contest; but, finding the testimony insufficient to entitle him to the seat, he hereby withdrew his claim. This communication with accompanying papers was referred to the Committee on Elections.

[1] First session Fortieth Congress, Journal, p. 165; Globe, p. 500.

740. The Illinois election case of Durborow v. Lorimer, in the Fifty-eighth Congress.

Instance of abandonment of a contest by notification from contestant to the committee.

On April 20, 1904,[1] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, presented the following report:

At the regular Congressional election in 1902 the returns showed William Lorimer, Republican, to have received 16,540 votes; Allan C. Durborow, Democrat, 15,555 votes; H. P. Kuesch, Socialist, 536, and Eugene W. Chapin, Prohibitionist, 667. Mr. Lorimer, having an apparent plurality of 985, received the usual certificate of election and is the present sitting Member from that district. Within the statutory period, however, Mr. Durborow served a notice of contest, claiming to have been rightfully elected to the said seat.

The contest seems to have been conducted mostly in the circuit court of Cook County, Ill., upon questions arising over the right to have the ballots produced and recounted. This privilege having been finally granted by the court and the ballots investigated and recounted, it developed that there had been cast for Mr. Lorimer 16,495 votes and for Mr. Durborow 15,501, the recount thus increasing Mr. Lorimer's plurality 9 votes.

From that point Mr. Durborow appears to have abandoned the contest. Neither printed record nor brief has been submitted to the committee, and the opportunity afforded for oral argument was not embraced. Mr. Durborow, however, has said to the chairman of the committee that, although he commenced the contest in good faith, he does not care to proceed with it further, and is willing that appropriate resolutions shall be adopted sustaining Mr. Lorimer's title to the seat. Your committee therefore recommends the adoption of the following resolutions:

"Resolved, That Allan C. Durborow was not elected to membership in the House of Representatives of the United States in the Fifty-eighth Congress and is not entitled to a seat therein.

"Resolved, That William Lorimer was duly elected to membership in the House of Representatives of the United States in the Fifty-eighth Congress and is entitled to a seat therein."

The resolutions were agreed to without division.

741. The Kentucky election cases of Edwards v. Hunter and White v. Hunter, in the Fifty-eighth Congress.—On December 6, 1904,[2] the Speaker laid before the House the following communication; which was referred to the Committee on Elections No. 2:

CLERK'S OFFICE, HOUSE OF REPRESENTATIVES,

Washington, D. C., December 6, 1904.

Sir: I have the honor to lay before the House of Representatives the contested-election cases of Edwards *v.* Hunter and White *v.* Hunter, of the Eleventh Congressional district of Kentucky, notices of which have been filed with the Clerk of the House, and transmit herewith all original testimony, papers, and documents relating thereto.

On June 24, 1904, copies of the printed record were sent to the contestants, with notices to file brief of the facts and authorities relied on to establish their case. August 24, 1904, D. C. Edwards, one of the contestants, filed his brief, copies of which were sent to W. Godfrey Hunter, contestee, and to John D. White, contestant, with notice to file reply brief, but no reply brief has been received to date.

Very respectfully,

A. MCDOWELL,
Clerk House of Representatives.

Hon. JOSEPH G. CANNON,
Speaker House of Representatives.

This case was heard by the committee, but no report was made to the House, and Mr. Hunter retained the seat.

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[1] Second session Fifty-eighth Congress, House Report No. 2687; Record, p. 5186.

[2] Third session Fifty-eighth Congress, Record, p. 38.

742. The Colorado election case of Bonynge v. Shafroth in the Fifty-eighth Congress.

Instance wherein returned Member, while a contest was pending in committee, stated to the House that he was not elected.

Returned Member having acknowledged to the House, before the decision of the committee, that contestant was elected, the House preferred to adopt the usual resolutions before seating contestant.

Resolutions to seat a contestant are privileged, even though the case may still be pending in committee.

On February 15, 1904,[1] Mr. John F. Shafroth, claiming the floor for a question of privilege, said:

Mr. Speaker, in the contested election case of Robert W. Bonynge against John F. Shafroth it was stipulated and agreed by contestant and contestee that the ballots cast at that election in the twenty-nine contested precincts should be brought before the Committee on Elections of this House and opened for the first time in the presence of its Members. The ballots were those cast at the general election in 1902 for State officers and Representative in Congress. The object was that the original arrangement, form, and condition of the ballots should first be seen by the committee. The ballots were shipped to the Clerk of the House of Representatives at the joint expense of contestant and contestee.

At the first meeting of the committee for the hearing of this case the ballots were presented for inspection. A subcommittee was appointed to ascertain how many illegal ballots were contained therein. It was agreed that in order to facilitate their work their sessions should be secret. The subcommittee opened the ballots from three precincts, and finding that it took one week to examine them, asked the House for authority to employ an expert, which was granted. Since that time the expert has been examining the ballots, and on Thursday last made his report to the committee. The committee then ordered that each of the parties should have one week's time in which to examine the ballots, and if then either of us desired to send for the expert for the purpose of examining him that we should have that privilege. After that the case was to be set for argument before the committee.

On Thursday afternoon I commenced examining the ballots, and continued doing so during Thursday, Friday, and Saturday. I do not believe that 2,792 illegal votes were cast (that being my majority as returned), yet my examination disclosed the fact that the assurances which I had received as to the regularity of the votes in many of the precincts were not true, and that there were illegal votes therein which tainted the polls, and the polls so tainted gave me a greater plurality than my returned majority in the district.

The fact was a bitter disappointment to me, but nevertheless true.

The law is that when a poll is tainted by fraud and it is impossible to purge the poll of the fraudulent votes, the vote of the entire precinct, legal and illegal, must be thrown out.

The committee has given me every opportunity to ascertain the illegal vote so as to save the valid vote in those precincts. Until I saw the ballots last Thursday, I thought the illegal vote could be detected and separated from the legal vote, but I must confess that my inspection has convinced me that it is impossible to do so in this case.

The law being as I have stated and the number of precincts tainted containing majorities for me greater than my returned majority, I must say that if I were a judge upon the bench considering this case I would be compelled to find against myself, and as the vote in the contested precincts aggregates less than one-tenth of the vote in the Congressional district, I would be compelled to find that according to law Mr. Bonynge is entitled to the seat. [Applause.]

I did my best to have an honest election. My law partner, with my approval, organized a citizens' committee composed of both Republicans and Democrats who desired a fair election. The headquarters of that committee, as shown by the evidence in this case, were in the law offices of Rogers, Shafroth & Gregg, Denver, Colo.

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[1] Second session Fifty-eighth Congress, Record, pp. 1986, 1988.

I have always been in favor of pure politics, and when the test is applied to an election at which I was voted for as one of the candidates upon the ticket I should not shirk my duty or change my convictions concerning honest elections.

I therefore will say to the Committee on Elections No. 2 and to the Members of this House that they can seat Mr. Bonynge at their earliest convenience.

As this is the last time I will have the opportunity of addressing the House, I want to thank the Committee on Elections No. 2, and particularly the chairman, Mr. Olmsted, and the subcommittee, Mr. Miller, Mr. Currier, and Mr. Sullivan, for the fair and impartial manner in which they proceeded to investigate this case. Every suggestion which I made as to the investigation was readily concurred in.

I wish also to say that I appreciate the repeated declarations of Mr. Bonynge in the record that I was not a party to or in any manner connected with any of the frauds or irregularities charged. I also desire to thank the Members of this House for the uniform courtesy and evidences of respect which I have received during the eight years of my service in Congress. I have formed friendships here upon both sides of the Chamber which I shall cherish through life. I fully appreciate the high character of the men who compose this body, but it is only when I am about to leave that I fully realize the distinguished honor it is to serve as a Member in the greatest legislative body on the face of the globe. Wishing you all a happy and prosperous future, I will say good-bye. [Loud applause.]

Mr. Speaker, I will ask the chairman of the committee, if he is ready, to present the usual resolutions in a case of this kind.

Mr. Marlin E. Olmsted, of Pennsylvania, chairman of Elections Committee No. 2, asked unanimous consent that Mr. Bonynge, the contestant, be sworn in.

Mr. Sereno E. Payne, of New York, objected that this should not be done without a resolution from the committee. [The committee had not reported on the case.]

Later Mr. Olmsted asked unanimous consent for the consideration of the following resolutions:

Whereas John F. Shafroth, a Member of this House returned as elected from the first district of Colorado, and whose seat is contested by Robert W. Bonynge, has this day in a frank and honorable manner, very creditable to himself, informed the House that after a consideration and examination of the ballots he is convinced that Robert W. Bonynge is entitled to the seat: Therefore

Resolved, That John F. Shafroth was not duly elected and is not entitled to a seat in this House.

Resolved, That Robert W. Bonynge was duly elected and is entitled to a seat in this House.

The Speaker[1] said:

In the opinion of the Chair the resolution is privileged.

Thereupon the resolution was agreed to.

743. The New York election case of Chesebrough v. McClellan, from New York, in the Fifty-fourth Congress.

It being demonstrated to the Elections Committee that contestant had withdrawn, the House confirmed the title of sitting Member.

On January 15, 1896,[2] the Committee on Elections No. 2 reported in the case of Chesebrough *v.* McClellan, from New York. The contestant, in his notice of contest, had alleged as his grounds the casting of illegal votes at the election; and that during the political canvass preceding the election, the sitting Member had instigated the issue of a circular falsely charging him with opposing the passage of a State law for the benefit of cyclers; and that because of that circular many electors were

[1] Joseph G. Cannon, of Illinois, Speaker.

[2] First session Fifty-fourth Congress, House Report No. 48; Rowell's Digest, p. 513.

prejudiced to vote against contestant. The sitting Member replied to the notice of contestant, denying the casting and counting of illegal votes, denying that he had instigated the issuing or circulation of the circular, but alleging it to be a fact that the contestant had in fact signed his name to a petition in May, 1887, remonstrating against the legislation in question.

After serving the notice of contest the contestant had addressed to sitting Member a letter agreeing to withdraw from the contest if the sitting Member would exhibit to him the petition in question. The petition was duly exhibited; and later contestant notified sitting Member that he withdrew from the contest, and requested the return of the notice of contest.

Afterwards, in February, 1895, the notice of contest and answer were filed with the Clerk of the House, together with the affidavit of contestee that no evidence had been taken in the case. The committee examined these, as well as the letters of the contestant, found that no testimony had been taken in the case, and reported that the contestant had withdrawn from the contest.

Therefore they reported resolutions declaring the contestant not elected and the sitting Member entitled to his seat.

On January 15 [1] the House agreed to the resolutions without division.

744. The Illinois election case of Belknap v. McGann in the Fifty-fourth Congress.

Instance wherein the sitting Member appeared before the Elections Committee and orally conceded the election of contestant.

The sitting Member having announced that he conceded the election of contestant, the House passed the usual resolutions for seating the contestant.

On December 27, 1895,[2] the Committee on Elections No. 1 reported in the case of Belknap *v.* McGann, of Illinois, that the sitting Member had appeared before the committee and orally conceded the election of the contestant. The committee complimented the action of Mr. McGann, and the House agreed to the usual resolutions declaring Mr. McGann not elected and Mr. Belknap elected and entitled to the seat. Mr. Belknap was thereupon sworn in.

745. The Alabama election case of Comer v. Clayton in the Fifty-fifth Congress.

Instance wherein, during the taking of testimony, a contestant put in an attested notice of his withdrawal.

The contestant having withdrawn, the House passed a resolution confirming the title of sitting Member.

On January 19, 1898,[3] Mr. Romulus Z. Linney, of North Carolina, from the Committee on Elections No. 1, submitted a report in the case of Comer *v.* Clayton, from Alabama. The committee state that the contestant formerly withdrew after the taking of testimony had proceeded for some time, and consequently the testimony had not been printed or opened by the committee. As part of their report the committee present contestant's notice of withdrawal, which was duly attested.

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[1] Journal, p. 117.

[2] First session Fifty-fourth Congress, House Report No. 5; Journal, pp. 79, 80.

[3] Second session Fifty-fifth Congress, House Report No. 195; Rowell's Digest, p. 554; Journal, p. 113.

The committee presented resolutions confirming the title of contestee to the seat, which were agreed to by the House without debate or division.

746. The Kentucky case of Hunter v. Rhea in the Fifty-fifth Congress.

A contestant having withdrawn his contest and accepted an office incompatible with membership, the House confirmed the title of sitting Member.

Instance wherein a contestant went before the Elections Committee and announced his withdrawal from the contest.

The Elections Committee asserted that it might proceed with an election case after the withdrawal of the contestant.

On May 17, 1898,[1] Mr. S. A. Davenport, of Pennsylvania, from the Committee on Elections No. 1, submitted a report in the case of Hunter *v.* Rhea, from Kentucky, as follows:

By the official returns the contestee was given a majority of 337; the contestant claimed, on his theory of the case, to be elected by a majority of 468.

The issues relate chiefly to questions involving the qualifications of certain voters, upon which differences of opinion naturally arise among honest judges of election and good lawyers.

The testimony in the case was printed and briefs were filed with the committee. Before the case was set for hearing the contestant appeared before the committee and declared that he no longer desired to prosecute his contest; that since he began the same he had been appointed by the President minister of the United States to Guatemala. He has entered upon and is now discharging the duties of that office.

Your committee is of opinion that it does not lose jurisdiction of the case by reason of this announced purpose of contestant to desist from the contest, but can proceed, if it so desires, to hear and report upon it as in other cases.

But in the absence of any suggestion of collusion between the parties, in view of the character of the issues raised, and aided by the facts already recited, we do not deem it necessary to examine in detail the voluminous record in the case, and deem it our duty to confirm contestee's title to the seat he now holds.

In accordance with these conclusions the committee reported a resolution confirming the title of sitting Member to the seat, and the same was agreed to by the House without debate or division.

747. The Alabama election case of Clark v. Stallings in the Fifty-fifth Congress.

Instance wherein a contestant appeared before the Elections Committee and withdrew his case.

On January 18, 1898,[2] Mr. R. W. Tayler, of Ohio, from the Committee on Elections No. 1, submitted a report in the case of Clark *v.* Stallings, from Alabama, which was merely an announcement that the contestant took no steps after filing his notice of contest, and appeared before the committee on January 14, 1898, and stated that he had no desire to further press his contest. The committee therefore presented resolutions confirming the title of the sitting Member to his seat, and the House agreed to the same without debate or division.

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[1] Second session Fifty-fifth Congress, House Report No. 1356; Rowell's Digest, p. 557; Journal, p. 565.

[2] Second session Fifty-fifth Congress, House Report No. 188; Rowell's Digest, p. 554; Journal, p. 108.

748. The Delaware election case of Willis v. Handy in the Fifty-fifth Congress.

The contestant having announced to the committee his abandonment of the contest, the House confirmed the title of sitting Member.

On April 30, 1898,[1] Mr. R. W. Tayler, of Ohio, from the Committee on Elections No. 1, submitted a report in the Delaware case of Willis *v.* Handy, saying:

The contestee, by the official returns, received 15,407 votes and the contestant 11,159. A notice of contest was served on the contestee, but the contestant took no further formal action. He appeared before your committee and declared his opinion that the contestee's seat could not be successfully attacked and that he had abandoned the contest.

Therefore the committee recommended resolutions confirming the sitting Member in his seat, which were agreed to by the House without debate or division.

749. The election case of Lyon v. Bates, from Arkansas Territory, in the Seventeenth Congress.

A contestant having procured no testimony in support of his petition, the Elections Committee recommended his withdrawal.

On December 19, 1821,[2] in the contested election case of Lyon *v.* Bates, from Arkansas Territory, the Committee on Elections recommended that the petitioner have leave to withdraw, since he had produced no testimony in support of his allegations that the returns on which the sitting Member obtained the seat were to a fatal extent improper and illegal.

750. The Louisiana election case of Smith v. Robertson in the Forty-seventh Congress.

A contestant having failed to prosecute his case according to law or to take testimony, the House dismissed the contest.

On March 4, 1882,[3] Mr. Samuel H. Miller, of Pennsylvania, from the Committee on Elections, presented this report:

That after hearing argument, and after a full examination of the papers, it was unanimously agreed by the subcommittee having the case in charge that the contestant had not prosecuted his case according to law; that he failed to take evidence to substantiate his charges of contest; and therefore recommend that the contest be dismissed; which the full committee, upon due consideration, concluded to recommend. The committee therefore report the following:

Resolved, That the contest of Alexander Smith *v.* E. W. Robertson, in Sixth Louisiana district, be dismissed without prejudice.

The House agreed to the resolution without debate or division.[4]

751. The Louisiana election case of Merchant and Herbert v. Acklen in the Forty-sixth Congress.

A contestant having failed to file the brief required by law, the Elections Committee notified him to appear and show cause why his case should not be dismissed.

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[1] Second session Fifty-fifth Congress, House Report No. 1239; Rowell's Digest, p. 557; Journal, p. 519.

[2] First session Seventeenth Congress, Contested Elections in Congress from 1789 to 1834, p. 372.

[3] First session Forty-seventh Congress, House Report No. 631; 2 Ellsworth, p. 284.

[4] Journal, p. 728; Record, p. 1610.

The contestant having failed to respond to a notice to appear, the House dismissed the case.

On March 7, 1881,[1] Mr. William M. Springer, of Illinois, from the Committee on Elections, submitted the report of the committee in the cases of Merchant and Herbert *v.* Acklen, from Louisiana. The report was as follows:

That the notices of contest and answers thereto were referred to the Committee on Elections and filed with the clerk of said committee on the 13th day of April, 1879. Evidence taken in the above cases was printed on the 15th day of January, 1880, and copies of the same were sent to the contestants, as required by the rules of the committee, by the clerk of said committee, with an official notice to prepare briefs within twenty days from the 25th day of January, 1880, to which no attention was given by said contestants.

On the 21st day of May, 1880, the clerk of the committee was directed by resolution to telegraph to Messrs. Merchant and Herbert to appear before the committee either in person or by attorney on the 29th day of May, 1880, and show cause why their cases should not be dismissed on account of the failure to file briefs as directed. No attention was given to these dispatches, and the parties neither appeared in person nor by attorneys, as notified. The said contestants were again notified by registered letters, on the 22d day of December, 1880, to appear before the Committee on Elections on the 11th day of January, 1881, and show cause why the cases should not be dismissed, and to this no reply was made.

We therefore respectfully recommend the adoption of the following resolution:

Resolved, That Joseph H. Acklen was duly elected and is entitled to a seat in this House as a Representative in the Forty-sixth Congress from the Third Congressional district of the State of Louisiana.

Resolved, That Robert O. Herbert and W. B. Merchant have leave to withdraw their papers of contest in this case.

The House agreed to the resolutions at once, without debate or division.[2]

752. The Indiana election case of McCabe v. Orth in the Forty-sixth Congress.

A contestant having failed, through a series of adverse incidents, to produce testimony, the House, on account of the lateness of the session, gave him leave to withdraw and confirmed the title of sitting Member.

A contestant having by affidavit given his reasons for asking further time to take testimony, the Elections Committee framed a resolution allowing the time.

On February 15, 1881,[3] Mr. William H. Calkins, of Indiana, from the Committee on Elections, submitted the report of the committee on the Indiana election case of McCabe *v.* Orth.

The sitting Member had been returned by an official majority of 98 votes.

The report states the preliminary facts:

On the 1st day of November, 1878, Mr. Orth received his certificate in due form from Hon. James D. Williams, then governor of Indiana. Within thirty days thereafter, and on the 12th day of November, 1878, Mr. McCabe served notice of contest upon Mr. Orth, specifying, as is alleged, the grounds of contest particularly, therein. This notice never came into the possession of your committee.

On the 5th day of December thereafter it is alleged that Mr. Orth fully answered each ground and specification of contest and served the same on that day on Mr. McCabe.

It is alleged by Mr. McCabe in a memorial presented to your committee, duly verified by him, that he did not take any testimony to support the several allegations in his notice of contest during the

[1] Third session Forty-sixth Congress, House Report No. 382; 1 Ellsworth, p. 345.

[2] Record, p. 2286.

[3] Third session Forty-sixth Congress, House Report No. 260: 1 Ellsworth, p. 320.

time allowed by law, for the reason, among others, that there was a contest pending between other contestants, which was in process of trial before the proper tribunal in the county of Montgomery, which would, and which did, develop substantially the evidence relied upon by him to overturn the declared result.

Contestant further urged illness in his family as a reason for not taking testimony within the time prescribed by law.

He further alleged that as early as February, 1879, he discovered evidence tending to support an allegation of bribery, which, if sustained, would destroy the official majority of sitting Member.

Of this memorial the report says:

This petition or memorial was presented to your committee on the 10th day of June, 1879. There were two other affidavits subsequently filed by Mr. McCabe, signed by Mr. Dobblebower and Mr. Paterson, in which affidavits each of the affiants testified that, on information and belief, facts tending to establish the bribery aforesaid might be elicited if time were given to take depositions.

In answer to this memorial supported by the affidavits of Mr. McCabe and the two witnesses aforesaid, Mr. Orth promptly filed his own affidavit with your committee, denying generally the specifications in Mr. McCabe's memorial and affidavit so far as it affected his right to a seat in Congress, and specifically denying any connection with or knowledge of the bribery alleged by Mr. McCabe. Numerous affidavits are also filed in support of Mr. Orth's claim.

An issue being thus made, your committee were called upon to decide whether under the circumstances additional time should be given the contestant to take testimony, and the contestee to rebut, when it was decided on the 23d day of March, 1880, to grant time, and the following resolution was adopted:

"*Resolved,* That James McCabe, contesting the right of the Hon. Godlove S. Orth to a seat in this House as a Representative from the Ninth Congressional district of the State of Indiana, be, and he is hereby, authorized to serve upon the said Orth within ten days after the passage of this resolution a particular statement of the grounds of said contest, and that the said Orth be, and he is hereby, required to serve upon the said McCabe his answer thereto in twenty days thereafter, and that both parties be authorized and required to proceed within ten days after the adjournment of this session of Congress to take evidence in the case, in the manner and subject to all provisions of law now in force applicable to the taking of evidence in contested election cases, the same as if the contestant had heretofore proceeded in time to take evidence in support of his claim to the seat."

By some inadvertence this resolution was never reported to the House, and the House consequently never acted upon it.

No testimony having been taken during the time allowed by law, and the resolution not having reached the House, whereby testimony might be taken under the order of the House, the case again came up at a meeting of the committee at this session of Congress, during last December. Your committee took the case up for consideration, and it being deemed unnecessary to report the aforesaid resolution to the House for action, because there did not remain sufficient time for the taking and certifying of testimony, or for the action of the committee of the House during the remaining time of this Congress, your committee reconsidered its former action, and on the 11th day of January, 1881, passed the following resolution:

"*Resolved,* That in view of the short time remaining before the adjournment, and the improbability of taking evidence under the statute, the resolution heretofore passed March 23, 1880, in reference to the contest in the case of McCabe *v.* Orth, be, and is hereby, rescinded, and the contest be, and is hereby, discontinued."

In view, therefore, of all the circumstances, your committee recommend the passage of the following resolution:

"*Resolved,* That the contestant, James McCabe, contesting the right of the Hon. Godlove S. Orth, from the Ninth Congressional district of Indiana, to a seat in the Forty-sixth Congress, have leave to withdraw his papers in said contest, and that the Hon. Godlove S. Orth's title to his seat in the said Congress be, and the same hereby is, confirmed."

On February 15, 1881,[1] the House agreed to the resolution without debate or division.

753. The Florida election case of Witherspoon v. Davidson in the Forty-seventh Congress.

A contestant having failed to make up his case legally, filed an affidavit explaining his failure and asked a special investigation by the House.

A contestant being apparently unable to perfect his case, the committee recommended that he have leave to withdraw his contest without prejudice.

On June 6, 1882,[2] Mr. A. A. Ranney, of Massachusetts, from the Committee on Elections, submitted the report of the committee in the Florida case of Witherspoon *v.* Davidson.

This was a case where no notice of contest, no answer, and no legally taken evidence came before the committee. Contestant appeared and produced an affidavit charging gross irregularities and frauds in the election, stating that he caused notice to be duly served of a contest, and further setting forth—

That he employed as his attorney T. W. Brevard, esq., and paid him $125 as a retaining fee to prosecute his case against his opponent, the said Davidson, and that the said Brevard utterly failed to do so, and betrayed him and sacrificed all his interests in the contest, and your deponent has reason to believe and does believe that the said Brevard entered into collusion with and conspired with Davidson for the purpose of defeating him, deponent, in his contest. He took from him, and declined and refused to return to your deponent, his notice of contest, the answer thereto, and other valuable papers and evidences essential to the successful prosecution of the case.

He further deposes and says that his witnesses were intimidated and prevented from appearing to testify in his behalf by threats of violence, and of being discharged from labor, and of being ejected from rented lands and houses, and by refusals of stock and implements to cultivate and gather their crops, and other threats of persecution and proscription if they should attempt to testify in behalf of your deponent.

In proof of these facts your deponent cites particularly a riot instigated in Madison County by the supporters and partisans of the Democratic party for the purpose of intimidating witnesses, at which riot one Patterson was killed, on account of which many arrests were made and the parties cast into jail, which had the effect of intimidating a large number of deponent's witnesses to an extent which made it impossible to induce them to testify in his behalf.

He further deposes and says that in some cases (that of Christie particularly), the officers of the law before whom appointments were made to take testimony, and where witnesses had been secured at great trouble and expense, the officer failed or refused to attend and hear testimony taken. By these and other methods only known to the lawless and mob-ridden communities of the South your deponent was defrauded out of his election and denied the right of exposing and proving the fraud, under the act of Congress made and provided in such cases. Therefore he prays that a committee be appointed with authority to proceed to Congressional district aforesaid and make a thorough investigation and report on the conduct and result of said election, with the view of ascertaining and determining who was lawfully elected as Representative in the Forty-seventh Congress of the United States from said first district of the State of Florida.

Sitting Member filed a counter affidavit denying the charges. The report says:

The committee caused a notice to be sent and delivered to the counsel named in contestant's affidavit, asking him to produce the papers in his hands, but he has omitted and declined to do so, he having taken no notice of the letter sent him, * * * save to acknowledge the receipt of same.

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[1] Record, p. 1604.

[2] First session Forty-seventh Congress, House Report No. 1278; 2 Ellsworth, p. 163.

Contestee exhibited to the committee the copies of the notice of contest served upon him and his answer thereto, together with a replication and amended notice, copies of which are annexed (Exhibits A, B, C), and moved to dismiss the proceedings. It was claimed and it appears that the notice of contest was insufficient and inadequate. It alleges certain frauds very generally, but does not set up or allege that contestant was elected. The replication enlarges the notice, however, and obviates some if not all of the objections.

The committee are of the opinion that contestant's failure to prosecute his contest arose from the causes which he sets forth in his affidavit. But they see no way of procuring the papers, or of investigating the case further, unless the House take the matter in hand and do it in their own way, either by sending a special committee to Florida to take the evidence or otherwise.

There is nothing which implicates contestee in any of the wrongful proceedings referred to.

The committee report the facts, and recommend that the contestant have leave to withdraw his contest without prejudice.

This report was submitted to the House on June 6.[1] It was stated that a member of the committee would file minority views, but this does not appear to have been done. Neither does it appear that the report was ever acted on by the House.

754. The Mississippi election cases of Newman v. Spencer, Ratcliff v. Williams, and Brown v. Allen, in the Fifty-fourth Congress.

Contestant not having filed any testimony, the House confirmed the title of sitting Member.

The Elections Committee declined to consider an a1legation that an election, otherwise unimpeached, was invalid because the constitution of the State was void.

On April 30, 1896,[2] Mr. Samuel W. McCall, of Massachusetts, from the Committee on Elections No. 3, submitted reports in the Mississippi cases of Newman *v.* Spencer, Ratcliff *v.* Williams, and Brown *v.* Allen. These cases involved a single question, and the reports are very nearly identical. The first report presents the whole of each case:

In this case no testimony has been presented to the committee. It is alleged that some was taken, but nothing has been filed with the Clerk of the House. The contestant, however, contends that section 241 of article 12 of the constitution of the State of Mississippi, adopted in 1892, is in contravention of the Constitution of the United States and of the act of Congress of February 23, 1870, entitled "An act to admit Mississippi to representation in the Congress of the United States," and has filed a brief in support of his contention. He claims that the above-named section of the State constitution is void, and that therefore no valid election was, or could be, held in the Seventh Congressional district of the State of Mississippi.

As the committee is of the opinion that a decision that the constitution of the State of Mississippi was invalid would not necessarily deprive the State of representation in Congress, it does not attempt to decide that question, and in absence of any testimony on behalf of the contestant it recommends the adoption of the following resolutions: [Here followed resolutions in the usual form.]

The resolutions, which confirmed the titles of the sitting Members to the seats, were agreed to by the House on the same day the reports were presented.

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[1] Journal, p. 1420; Record, p. 4577.

[2] First session Fifty-fourth Congress, House Reports Nos. 1536, 1537, and 1538; Rowell's Digest, p. 541; Journal, p. 440.

755. The Texas election case of Davis v. Culberson in the Fifty-fourth Congress.

A contestant having failed to produce testimony or respond to notification from the Elections Committee, the House confirmed the title of the returned Member.

On January 30, 1896,[1] Mr. Samuel W. McCall, of Massachusetts, from the Committee on Elections No. 3, submitted a report in the case of Davis *v.* Culberson, of Texas. The report says:

> The record in this case consists of the notice of contest, the answer, and an affidavit of David B. Culberson, all of which were filed by the contestee. Since the filing of the notice of contest the contestant appears to have done nothing in prosecuting his claim to the seat. He has not produced any testimony, and, although twice notified by letter, directed to his place of residence, he has not appeared before the committee.

In view of these facts, the committee did not believe the right of sitting Member to his seat should longer remain in question and so recommended resolutions confirming his title.

These resolutions were agreed to on the same day.

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[1] First session Fifty-fourth Congress, House Report No. 180; Journal, p. 163; Rowell's Digest, p. 529.

Chapter XXV.

GENERAL ELECTION CASES, 1789 TO 1840.

1. **Cases in the First, Third, and Fourth Congresses. Sections 756–764.**[1]
2. **Cases in the Eighth, Eleventh, Thirteenth, and Fourteenth Congresses. Sections 765–773.**[2]
3. **Cases from the Sixteenth to the Nineteenth Congresses. Sections 774–777.**[3]
4. **Cases in the Twenty-first, Twenty-second, and Twenty-fourth Congresses. Sections 778–786.**[4]
5. **The Senate cases of Smith, Winthrop, Phelps, and Cass. Sections 787–790.**

756. The election case of the New Jersey Members in the First Congress.

In the First Congress an inquiry as to an election was instituted on a memorial of citizens of the State.

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[1] Additional cases in this period, classified in different chapters, are:
First Congress: Smith, of South Carolina. (Sec. 420.)
Second Congress: Jackson *v.* Wayne, Georgia. (Sec. 708.)
Third Congress: White, Southwest Territory. (Sec. 400.)
Third Congress: Duvall, Maryland. (Sec. 565.)
Third Congress: Edwards, Maryland. (Sec. 567.)
Fourth Congress: Morris *v.* Richards, Pennsylvania. (Sec. 554.)
Seventh Congress: Hunter, Mississippi. (Sec. 401.)
Seventh Congress: Fearing, Northwest Territory. (Sec. 402.)
Seventh Congress: Van Ness. (See. 486.)

[2] Additional cases:
Eighth Congress: McFarland *v.* Purviance. (Sec. 320.)
Eighth Congress: Hoge, Pennsylvania. (Sec. 517.)
Ninth Congress: Spaulding *v.* Mead, Georgia. (Sec. 637.)
Tenth Congress: Key, Maryland. (Secs. 432, 441.)
Tenth Congress: McFarland *v.* Culpepper. (Sec. 321.)
Tenth Congress: McCreery, Maryland. (Sec. 414.)
Eleventh Congress: Turner *v.* Baylies, Massachusetts. (See. 646.)
Thirteenth Congress: Williams, jr., *v.* Bowers, New York. (Sec. 647.)
Thirteenth Congress: Kelly *v.* Harris, Tennessee. (Sec. 734.)
Fourteenth Congress: Willoughby *v.* Smith, New York. (Sec. 648.)
Fourteenth Congress: Root *v.* Adams, New York. (Sec. 650.)
Fifteenth Congress: Mumford, North Carolina. (See. 497.)
Fifteenth Congress: Earle, South Carolina. (See. 498.)
Fifteenth Congress: Hammond *v.* Herrick, Ohio. (Sec. 499.)

(See page 979 for notes 3 and 4.)

In the First Congress the House required its Elections Committee to hear testimony and arguments on both sides of the case, and to report facts only to the House.

On March 23, April 1 and 13, 1789,[1] the Members-elect from New Jersey appeared and took their seats. On April 8[2] all the Members of the House who had so far attended, including all but one of the New Jersey delegation, took the oath prescribed by a rule which had, with other rules, been adopted for governing the proceedings of this, the first House of Representatives.[3] No objection was made to swearing in the New Jersey Members-elect.

On April 28[4] the Speaker laid before the House a letter from Matthias Ogden, referring to sundry petitions annexed thereto, from a number of citizens of New Jersey, complaining of illegality in the late election of Representatives for that State. Other petitions of a similar purport were presented at various times. These petitions were referred on May 14 to the Committee on Elections, with instructions to examine the matter thereof, and report the same with their opinion thereupon to the House.

On May 25[5] the committee reported "that it will be proper to appoint a committee, before whom the petitioners are to appear, and who shall receive such proofs and allegations as the petitioners shall judge proper to offer in support of their said petition, and who shall, in like manner, receive all proofs and allegations from persons who may be desirous to appear and be heard in opposition to the said petition, and to report to the House all such facts as shall arise from the proofs and allegations of the respective parties."

The House agreed to this report and referred the matter to the Committee on Elections.

On August 18[6] Mr. George Clymer, of Pennsylvania, from the Committee on Elections, reported six facts which they had ascertained from the proofs. It

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(See p. 978 for references to notes 3 and 4.)

[3] Additional cases:

Sixteenth Congress: Guyon, jr., *v.* Sage, New York. (Sec. 649.)

Seventeenth Congress: Colden *v.* Sharpe, New York. (Sec. 638.)

Seventeenth Congress: Lyon *v.* Bates, Arkansas. (Sec. 749.)

Eighteenth Congress: Bailey, Massachusetts. (Sec. 434.)

Eighteenth Congress: Forsyth, Georgia. (Sec. 433.)

Eighteenth Congress: Biddle *v.* Richard, Michigan. (Sec. 421.)

Nineteenth Congress: Sergeant, Pennsylvania. (Sec. 555.)

[4] Additional cases:

Twenty-first Congress: Wright, jr., *v.* Fisher. (Sec. 650.)

Twenty-third Congress: Letcher *v.* Moore, Kentucky. (Sec. 53.)

Twenty-third Congress: Allen, Ohio. (Sec. 729.)

Twenty-fifth Congress: Doty *v.* Moore, Wisconsin, as to prima facie right, section 569; as to final right, section 403.

[1] First session, First Congress, Journal, pp. 5, 6, 12.

[2] Journal, p. 11.

[3] The House adopted rules, chose officers, and participated in the count of the electoral vote before the Members were sworn, Journal, pp. 6–10.

[4] Journal, pp 23, 33, 35.

[5] Journal, p. 41.

[6] Journal, p. 83.

appeared from these findings that the returns of the election were canvassed by the governor and council, a majority of whom decided to certify the election of the Members-elect already seated. Three members of the council protested against this act, offering their protest in writing. The grounds of this protest did not appear in the report, nor did the Committee on Elections make any recommendation or depart in any way from a statement of facts.

On July 14[1] the committee made a further report stating that certain allegations in the petitions required the testimony of some witnesses which the committee did not consider themselves authorized to collect; and that they requested the direction of the House in the manner of proceeding with respect to that testimony, and also with respect to the request of the petitioners that they might be heard by counsel on the floor of the House.

757. Case of the New Jersey Members, continued.

In the First Congress the House, after a committee had reported the facts, decided an election case without further hearing on the floor.

In the First Congress the House did not think it necessary to hear petitioners in an election case on the floor by counsel.

A returned Member, whose seat was contested in the First Congress, debated the question as a matter of right.

Reference to the force which should be given to the law of Parliament by the House of Representatives.

On July 15[2] the report was argued on the floor of the House. Mr. Elias Boudinot, one of the sitting Members from New Jersey, taking the floor without objection as to his right so to do, submitted that the certificate of the executive of New Jersey was not the best evidence that the nature of the case required, and that it would be unnecessary to send a commission to New Jersey to take testimony, which would have to be ex parte because of the inconvenience of having the opposite party attend to cross-examine. Furthermore the precedent would be dangerous because if followed as to more remote States,[3] like Georgia, commissions would have to be sent there, and the House would be precluded from viva voce testimony, which was the most satisfactory. It seemed that the evidence already before the House, and such as might be further advanced by the petitioners by viva voce evidence, would be sufficient for a decision.

Mr. Richard Bland Lee, of Virginia, urged that the report should be recommitted and that the committee be authorized to send for evidence, papers, and records, and report a special state of facts. He said it was the custom of the British House of Commons, upon similar occasions, to leave the whole business to a committee; and Mr. Lee further observed[4] that the experience of so old and experienced a legislative body could be followed with safety and propriety. On the other hand, Mr. Samuel Livermore, of New Hampshire, urged that the committee be discharged and that a day be appointed to hear the parties.

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[1] Journal, p. 60; Annals, p. 637.

[2] Journal, p. 61; Annals, pp. 638–642.

[3] The Congress at this time was sitting in New York City.

[4] Annals, p. 641.

A motion was made that the parties be permitted to be heard by counsel and was favored generally by those who favored a trial before the House. Mr. James Madison, of Virginia, favored the admission of counsel; but the motion was withdrawn without decision.

The report was considered again on September 1 and 2,[1] and on the latter day, without having heard counsel or taken other evidence, the House agreed to this resolution:

Resolved, That it appears to the House, upon full and mature consideration, that James Schureman, Lambert Cadwalader, Elias Boudinot, and Thomas Sinnickson were duly elected and returned to serve as Representatives for the State of New Jersey in the present Congress of the United States.

758. The Delaware election case of Latimer v. Patton in the Third Congress.

The State law having prescribed a form of ballot and voting, the House rejected ballots cast in different form.

The returned Member being unseated by rejection of informal ballots, the House seated the contestant.

Discussion in 1793 as to propriety of seating a petitioner after the unseating of the returned Member.

An early election case instituted by petition and tried before the House.

On December 4,1793,[2] the petition of Henry Latimer, of the State of Delaware, was presented to the House and read, complaining of an undue election and return of John Patton, to serve as a Member of the House from Delaware. This was later referred to the Committee on Elections.

On December 13[3] Mr. Patton appeared and took the oath.

On February 10, 1794,[4] the committee reported. It appeared from this report that the law of Delaware provided "that every person coming to vote for a Representative, agreeably to the direction of the said act, shall deliver, in writing, on one ticket, or piece of paper, the names of two persons, inhabitants of the State, one of whom, at least, shall not be an inhabitant of the same county with himself, to be voted for as Representative."

The returns of the election gave John Patton 2,273 votes and Henry Latimer 2,243 votes, a majority of 30 votes for Patton.

It appeared from the evidence taken by the committee that in some voting places double votes were rejected, and in others single votes were received, which led the committee to this conclusion:

That, agreeably to the election law of Delaware, the 4 votes in Kent County containing the names of Henry Latimer and George Truit which were rejected ought to have been received and counted for Henry Latimer; and the 68 single votes in Sussex County which were received and counted for the said John Patton ought to have been rejected; that if the aforesaid 4 votes in Kent County had been received, and the aforesaid 68 votes in Sussex County had been rejected, as was required by law, the said Henry

[1] Journal, p. 95; Annals, pp. 834, 835.

[2] First session Third Congress, Journal, p. 9.

[3] Journal, p. 15.

[4] Journal, p. 59; Contested Election Cases (Clarke), p. 69.

Latimer would have had, after deducting the 9 single votes received and counted for him in Sussex County, a majority of 33 votes. The committee are, therefore, of opinion that John Patton is not entitled to a seat in this House; they are also of opinion that Henry Latimer is entitled to a seat in this House as a Representative of the State of Delaware.

This report, accompanied by certain written observations thereon by the sitting Member, tending to controvert the reasoning and conclusions of the report, was referred to the Committee of the Whole House, where it was considered on February 13,[1] after which the House agreed to the following:

Resolved, That the Committee of the Whole House be discharged from proceeding thereon, and that the hearing on the trial of the said contested election be now proceeded on in the House, Mr. Speaker in the chair.

The House then proceeded to hear the depositions and other exhibits, as well as the written observations of the sitting Member.

On February 14[2] the reading of the depositions was concluded, and the parties retired from the bar.

Thereupon the House agreed to this resolution, apparently without division:

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

The following resolution was then proposed:

Resolved, That Henry Latimer is entitled to a seat in this House as the Representative of the State of Delaware.

Mr. John Page, of Virginia, antagonized this resolution.[3] He said that in the case of Jackson *v.* Wayne, where corruption was shown, he had favored the seating of the contestant, who had a majority of sound voters, but the House had decided to keep itself free from partiality and had declined to admit the petitioner. In this case no corruption was alleged. If the 68 freemen of Sussex had violated the law, he nevertheless did not think that the violation was of such a nature as to deprive them of the right of suffrage. There was no doubt that the majority voted for Mr. Patton, and he should not vote to force on the electors a Representative for whom a majority did not vote. Hence he should oppose the pending resolution.

The resolution was agreed to, yeas 57, nays 31.

Mr. Latimer thereupon appeared and took the oath.

759. The New York election case of Van Rensselaer v. Van Allen in the Third Congress.

The major part of the votes in a district being honestly given and duly canvassed, the person having a plurality of such major part was held to be elected.

An early decision that corruption in a small fraction of the votes should not vitiate an election.

No fraud being shown, votes were counted, although the box was for a time irregularly in the custody of sitting Member.

A question as to whether the House should reject votes for irregularities not sufficient to cause their rejection under State law.

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[1] Journal, p. 62.

[2] Journal, p. 63.

[3] Annals, p. 454.

The committee in 1793 declined to permit a ballot to be impeached by the testimony of the voter after the act of voting.

On December 6, 1793,[1] a petition was presented to the House on the part of Henry K. Van Rensselaer, complaining of the undue election and return of John E., Van Allen, as a Member from the State of New York, and giving the following grounds therefor:

1. That in Stephentown, which is comprehended within the election district from which the said John E. Van Allen is returned, there were more votes actually given for the petitioner than appear, from the return of the committee who were appointed by law to canvass and estimate the votes, to have been canvassed and counted.

2. That in the town of Hosack, also included in the said district, the ballot box was not locked agreeably to law, but was only tied with tape.

3. That, at the time of the election, the said John E. Van Allen, who was not an inspector of the election, had in his possession the ballot box of the town of Rensselaerwick, which is also comprehended in the said district.

On December 9 and 18[2] the Committee on Elections reported the following:

It appears to your committee that the allegations in regard to Stephentown, viz, "that the petitioner had a greater number of votes in the said town than was returned to be estimated and canvassed," even if proved, would not, consistently with the law of the State of New York, be sufficient to set aside the votes given at the election in the said town; that even should the irregularities complained of with respect to the elections of the towns of Hosack and Rensselaerwick, be sufficient to set aside the votes given in the said towns, still it appears that the said John E. Van Allen has a majority of the remaining votes of the district composed of the counties of Rensselaer and Clinton.

On December 20,[3] Mr. Richard Bland Lee, of Virginia, speaking for the Elections Committee, stated the following summary of the questions arising:

1. Whether irregularities not deemed by the law of New York sufficient to nullify the votes given shall be regarded by the House of Representatives as having that effect? None of the irregularities were regarded by the law of New York as sufficient to vitiate the returns of votes made by the inspectors, who are sworn officers, and subject to pains and penalties for failure of duty. If the law of New York is to be observed as a sovereign rule on this occasion, the allegations do not state any facts so material as to require the interference of the House of Representatives.

2. Whether, setting aside this first principle, mere irregularities not alleged to have proceeded from corruption shall nullify the return of sworn officers; and whether the House of Representatives ought to countenance and inquire into the mere implications of such serious crimes as perjury and corruption, or should require such charges to be expressly and specifically made?

3. Whether it is or not an indispensable requisite to the existence of a representative government that at every election a choice should be made?

4. Whether, to insure such choice, it is not necessary that this principle should be established: That a majority of legal votes, legally given, should decide the issue of an election?

5. Whether, therefore, partial corruption should be deemed sufficient to nullify an election, or only sufficient to vitiate the votes given under such corruption, leaving the election to be decided by the sound votes, however few?

6. Whether, if partial corruption should [not] be deemed sufficient to nullify an election, such corruption should not extend to the major part of the votes given, and if the major part of the votes be deemed sound, the fate of the election should not depend on the plurality of votes in such major part?

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[1] First session Third Congress, Contested Elections in Congress, from 1789 to 1834, p. 73 Journal, p. 13.

[2] Journal, pp. 14, 17.

[3] Annals, p. 146.

Mr. Lee declared that the last was the opinion of the committee, and finding a major part of the votes duly given and canvassed, and that Mr. Van Allen had a plurality of such major part, they had determined that he was duly returned.

Objection was made that the House possessed the exclusive right to judge of the elections and returns of its own Members, and that the law of New York should not operate to exclude from the knowledge of the House the full amount of the number of votes given. The House should ascertain with precision the actual state of the polls. If the votes of citizens could, under any pretext, be suppressed the essential rights of suffrage were at an end.

On behalf of the committee it was stated that the action of the returning officers of towns in rejecting some votes given in for petitioners was in accordance with the law of New York. The petitioner stated that numbers of persons had sworn that they had voted for petitioner, although it appeared that their votes were not counted. The committee did not consider this allegation proper to engage their attention, and it was presumed that the House of Representatives would never institute an inquiry into such a species of evidence. It was extremely difficult for a man to swear that he had positively voted by ballot for a particular candidate, since it was well known that persons sometimes became confused and cast the wrong ballot. The law of New York justifying the rejection of the votes had been passed under the sanction of the Constitution.

It was also urged against the report that corruption should not be considered by weight and measure, and that admitted irregularities should vitiate an election.

The committee felt that, in a district of ten towns, irregularities in two towns should not vitiate the election, when the voters in those two towns did not amount to a majority of the whole number of votes in the district.

With respect to the deposit of a box containing a part of the votes in the house of sitting Member, the committee did not give it weight, since it had not been shown that the votes were tampered with, and the petitioner had not charged that sitting Member was accessory to any unfair practices.

On December 24,[1] the House refused to recommit the report, and then agreed to the following:

Resolved, That the allegations of the petition do not state corruption nor irregularities of sufficient magnitude, under the law of New York, to invalidate the election and return of John E. Van Allen to serve as a Member in this House, and that therefore the said John E. Van Allen is duly elected.

760. The Virginia election case of Trigg v. Preston in the Third Congress.

The House, overruling its committee, declined to invalidate a close election because of an interference, not shown definitely to have been effective, by a body of United States troops.

The negativing of a resolution declaring a sitting Member not elected left him undisturbed in his seat.

An early election case instituted by petition and tried before the House.

[1] Journal, p. 20.

In 1794[1] the seat of Francis Preston, of Virginia, was contested by Abraham Trigg, whose petition was presented December 26, 1793,[2] and referred to the Committee on Elections.

The committee's examination of the case showed that the sheriff holding the election in one county had exercised a discretionary power, given him by the law of Virginia, of closing the poll at any time of day, after three proclamations and no voters appearing. In another county the sheriff exercised the same discretionary power, vested in him by the law of the State, to adjourn the election in consequence of rain.

These facts, which militated in favor of the sitting Member, were not, however, the portion of the case most in controversy. In Montgomery County the election had been disturbed by a body of United States troops, not shown to have been under arms, but marched about under command of Capt. William Preston, their officer and brother and election agent of the sitting Member, and who was armed with sword and dagger. The committee were unable to ascertain, from the conflicting testimony, that any voter was actually prevented from voting, yet there was reasonable ground to believe that some were, and that the election was unduly biased by the soldiers. As the petitioner lost his election by only 10 votes, the committee concluded that the result had been changed, and that Mr. Preston was not entitled to his seat. The committee stated that the soldiers were not disfranchised of the right of voting, but that their votes, which were for the sitting Member, were kept separately and afterwards were rejected by the returning officers.

After debate the House, without division, decided in the negative this resolution:

Resolved, That Francis Preston is not duly elected a Member of this House.

This decision confirmed the sitting Member, no question apparently being made as to the effect of the vote.[3]

This election case was tried before the House after the forms in the cases of Jackson *v.* Wayne and Latimer *v.* Patton.[4]

761. The Vermont election case of Lyon v. Smith in the Fourth Congress.

Notices of election having failed to reach two towns in a district, and no votes being cast in those towns, the House declined to affirm sitting Member's title without direct evidence as to the numbers of voters in the towns.

The House declined to reverse a return on the possibility, but not the probability, that the voters of two towns accidentally not included in the notice of election might have changed the result had they voted.

On December 8, 1795,[5] a petition was presented to the House from Matthew Lyon, complaining of an undue election and return of Israel Smith, to serve as a

[1] First session Third Congress, Contested Elections in Congress, from 1789 to 1834, p. 78.

[2] Journal, p. 21.

[3] Journal, p. 134; Annals, p. 613.

[4] Journal, pp. 133, 134.

[5] First session Fourth Congress, Journal, p. 369.

Member from the State of Vermont. This petition was referred to the Committee on Elections. On December 25[1] the Speaker laid before the House a letter from Matthew Lyon transmitting further testimony, which was referred to the Committee on Elections.

On January 27, 1796,[2] Mr. Abraham Venable, of Virginia, submitted the report of the committee, which showed that the first election in the district in question did not result in a choice. Thereupon a new election was ordered, and warrants were issued for a new election. The sheriff of the county of Addison failed to deliver the warrants to the towns of Kingston and Hancock, which in the first election had given votes as follows: Kingston, 12 for Israel Smith; Hancock, 3 for Matthew Lyon. At the second election in the district the vote returned was: For Israel Smith, 1,804; Matthew Lyon, 1,783. Therefore the committee concluded:

> That as it does not appear to the satisfaction of the committee that there was a sufficient number of freemen in those two towns to have altered the state of the election, fifteen only having voted on the first occasion, they are of opinion that Israel Smith is entitled to take his seat in this House.

On February 4[3] Mr. Uriah Tracy, of Connecticut, moved that the report be recommitted in order that the petitioner might have the opportunity to bring forward legal testimony. It appeared that all of petitioner's testimony had been taken ex parte, and therefore had not been considered by the committee, which had based its conclusions on the returned votes of the two towns at the preceding election.

On February 11, 12, and 15[4] the motion to recommit was debated at length. It was urged that the petitioner should have sent competent testimony, and that it was not the business of the House to hunt up evidence. On the other hand, it was urged that the House had adopted no regulations concerning the taking of testimony, and the petitioner had no power to take anything but ex parte testimony. It was also intimated that the sheriff acted with fraudulent intent. The consideration of the subject was finally postponed until March 29.

On February 16,[5] however, Mr. James Hillhouse, of Connecticut, proposed a rule for taking testimony in election cases, with a view to its applicability to the pending contest, but the matter was postponed.

On February 17[6] the House reconsidered its decision to postpone the case of the petitioner, and recommitted the report.

On March 29[7] the petitions of sundry electors and citizens of the towns of Kingston and Hancock, stating that they had been deprived of their right of voting, etc., were received and referred to the Committee on Elections.

On May 13[8] Mr. Venable submitted the second report of the Committee on Elections. This report was as follows:

> That it appears by the deposition of the town clerk of Hancock that there were 17 persons in the said town who were entitled to vote; 12 of whom are stated to have been admitted in that town and 5 in other towns
>
> That, by a like deposition of the clerk of Kingston, it appears that there were in that town 19 persons, 17 of whom had been qualified in that town, and 2 in other towns.

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[1] Journal, p. 386.

[2] Journal, p. 429; Contested Election Cases, Clarke, p. 102.

[3] Annals, p. 295.

[4] Annals, pp. 315–328.

[5] Journal, p. 444; Annals, p. 331.

[6] Journal, p. 446; Annals, p. 338.

[7] Journal, p. 486.

[8] Journal, pp. 555, 597; Annals, p. 1497.

That it does not appear that the warrants were withheld from the said towns by the sheriff from any fraudulent intention, but the failure was accidental as to the town of Kingston, and the warrant was not sent to the town of Hancock because the sheriff believed they had not voted at the first meeting.

On May 31 [1] the following resolution was proposed:

Resolved, That as there appears to have been a sufficient number of qualified voters in the towns of Kingston and Hancock to have changed the state of the election, Israel Smith was not duly elected.

This was advocated on the grounds that there were voters enough in the two towns to have changed the election, and also because the principle should be established that every town should have notice of election.

On the other hand, the possibility, but not the probability, that the 36 voters in the two towns would have changed the election, was admitted. Against his, however, was balanced the vote in the previous election, and the fact that Mr. Lyon could only bring twenty to declare that they would vote for him. Had those twenty voted for him, and none for Mr. Smith, the latter would have a majority of one vote. But seven had made affidavit that they would have voted for Mr. Smith.

The House disagreed to the resolution, yeas 28, nays 41. Then it was:

Resolved, That Israel Smith is entitled to a seat in this House as one of the Representatives from the State of Vermont.

762. The Virginia election case of Bassett v. Clopton in the Fourth Congress.

The House having deducted from the returns the number of votes cast by disqualified persons, awarded the seat to the candidate receiving the highest number of votes cast by qualified voters.

On January 18, 1796,[2] the Committee on Elections reported as follows in the Virginia contested election case of Bassett *v.* Clopton, holding:

That, upon an estimate of all the polls taken at the several elections, John Clopton had 432 votes, and Burwell Bassett 422.

That, out of the number of persons who voted for John Clopton, 37 were unqualified to vote; and of those who voted for Burwell Bassett, 33 were also unqualified to vote.

Whereupon, your committee are of opinion that John Clopton, who has the highest number of votes, after deducting the before-mentioned defective votes from the respective polls, is entitled to a seat in this House.

In this report the House concurred.

763. The Massachusetts election case of Joseph Bradley Varnum in the Fourth Congress.

Instance of an election case instituted by memorial from sundry citizens and electors of the district.

In an election case where it is alleged that votes have been cast by persons not qualified, the names of such persons should be given in the notice of contest.

In an election case an allegation that a certain number of votes were

[1] Journal, p. 597; Annals, p. 1497.

[2] First session Fourth Congress, Contested Elections in Congress, from 1789 to 1834, p. 101.

cast by proxy was conceded sufficiently certain without specification of the names.

The House declined to assist sundry petitioners in a district to collect testimony in proof that the seat of a returned Member should be declared vacant.

Certain petitioners against the right of a returned Member to his seat having impugned his personal conduct in the election, the House rendered a decision thereon.

On February 25 and 26, 1796,[1] memorials were presented from sundry citizens and electors of the Second middle district in Massachusetts, whose names were thereunto subscribed, complaining of an undue election and return of Joseph Bradley Varnum, returned as a Member of the House from the said district, and praying, for certain reasons stated in the memorials, that the seat be declared vacant. These memorials were referred to the Committee on Elections. On March 9,[2] Mr. Theodore Sedgwick, of Massachusetts, presented certain testimony in the case, which was also referred.

On March 15[3] Mr. Abraham Venable, of Virginia, submitted the report of the committee. The report stated that Aaron Brown, a petitioner, had filed a paper making the following specifications:

1. That 185 votes were returned by the selectmen of Dracut, and counted by the governor and council.

2. That, of those, 60 were illegal and bad, 55 ballots or votes being received and certified by the selectmen or presiding officers, of whom Joseph Bradley Varnum, esq., was one, which were given by proxy; that is, from persons who were not present at the meeting, but from other persons who pretended to act for them; and 5 votes were received and certified by the said presiding officers, which were given by persons by law not qualified to vote at said meeting.

3. If Mr. Varnum does propose to examine the proceedings at the meetings of any other towns in the district, the petitioners wish to reserve liberty of showing that votes given for Mr. Varnum, in any other town in the district were illegal.

The petitioners expect to prove that the above 60 illegal votes were received by the selectmen, by showing that the whole number of legal voters was not more than 225, of which number 100 did not attend the meeting on the 23d day of March last; and a part of those who did attend and vote were not legally qualified to vote.

The committee also reported that there was a requisition of the sitting Member that the petitioners be held to a specification of the names of the persons objected to, and the objection to each, and a notification thereof to the sitting Member before he should be compelled to take evidence concerning the matters alleged, or make any answer thereto. Therefore, the committee asked the instructions of the House as to the kind of specifications to be demanded of the petitioners, and the manner in which the evidence should be taken.

This report was debated at length in Committee of the Whole. It was urged that as Mr. Varnum, had a majority of only 11 votes, the election would be invalidated if 23 of the 60 votes charged to be illegal were really proven to be so. It had been impossible to get the names of the illegal voters in Dracut, as the town clerk had

[1] First session Fourth Congress, Journal, pp. 450, 451.

[2] Journal, p. 468.

[3] Journal, pp. 471, 472; Contested Election Cases, Clarke, p. 112; Annals, p. 823.

refused to give certified copies of his records, and the inhabitants of the town would not give information against Mr. Varnum.

On the other hand it was argued that to give the power to take testimony would be to make the House a party to a search for testimony, a practice which would result in harassment to Members.

Mr. Varnum was heard as a matter of course during the debate.

The Committee of the Whole agreed to and reported the following resolutions, which were agreed to by the House on that day: [1]

Resolved, That the allegation of Aaron Brown, agent of the petitioners, as to 55 votes given by proxy is sufficiently certain.

Resolved, That the allegations of said Aaron Brown, as to persons not qualified to vote, is not sufficiently certain; and that the names of the persons objected to for want of sufficient qualifications, ought to be set forth, prior to the taking of testimony.

Mr. Sedgwick had proposed in Committee of the Whole a resolution providing that the Committee on Elections should prescribe a method of taking testimony in this case, but it was not acted on.[2]

On January 19, 1797,[3] at the next session, the committee reported:

That none of the petitioners or their agents have appeared at the present session to prosecute, nor have they transmitted any evidence to support their allegations.

That the sitting Member has produced evidence to show that the election in the town of Dracut, where the irregularities were suggested to have been committed, was conducted with the utmost fairness and propriety, especially as it relates to his conduct. That, although some little irregularity was practiced, it was in other towns, in favor of another candidate, and chiefly by those persons who have since been the active agents of the petitioners.

Your committee are therefore of opinion that Joseph Bradley Varnum was duly elected, and that the attempt to deprive him of his seat was rather the effect of malevolence than a desire to promote the public good.

On January 25,[4] by a vote of yeas 44, nays 28, the last clause of the last paragraph, characterizing the attempt as the effect of malevolence, was stricken out and the following inserted:

and that the charges contained in the said petitions against the sitting Member are wholly unfounded, and that the conduct of the sitting Member appears to have been fair and unexceptionable throughout the whole transaction.

On January 26 [5] the report as amended was agreed to.

764. The Pennsylvania election case of David Bard in the Fourth Congress.

A failure of the canvassing board to meet within the time required by law being satisfactorily explained, was held by the House not to affect the Member's title.

Instance of an inquiry into a Member's title to his seat by the Elections Committee under authority of general investigations.

In the earlier practice the credentials of Members were passed on by the Elections Committee (footnote).

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[1] Journal, p. 487.

[2] Annals, p. 823.

[3] Second session Fourth Congress, Journal, p. 650.

[4] Journal, pp. 659, 660.

[5] Journal, p. 661.

On March 18, 1796,[1] the Committee on Elections, who had investigated ex officio the credentials[2] of David Bard, of Pennsylvania, found that the Member's title was not invalidated by reason that the county judges, who were required by State law to meet November 15 to canvass the vote, had actually not met until May 1 following. This informality was occasioned by the delay of a return of the soldier votes of one county and by failure of one county judge to be informed as to a change of the law providing for the meeting of the judges. The committee sent for and canvassed the county returns on which the district return had been based, and reported to the House the result, showing the election of Mr. Bard.

The House agreed to the report, confirming the title of Mr. Bard.

765. The Virginia election case of Moore v. Lewis in the Eighth Congress.

The House having deducted from the returns the number of votes cast by disqualified persons, awarded the seat to the candidate receiving the highest number of votes cast by qualified voters.

The House in 1803 permitted a contestant in an election case to be heard by counsel at the bar of the House.

On February 24, 1803,[3] on the subject of the contested election of Moore *v.* Lewis, from Virginia, the Committee on Elections made a report containing the following summary:

> That all the persons who voted for Thomas Lewis in the several counties aforesaid, which compose the western district of the State of Virginia, were 1,004, and that all the persons who voted for Andrew Moore in the said counties were 832.
>
> It further appears, on a deliberate scrutiny, that of the above votes 355 persons voted for Thomas Lewis who were unqualified to vote and that 124 voted for Andrew Moore who were unqualified to vote; and that, by deducting the unqualified votes from the votes given for each of the parties at the elections, Thomas Lewis has 649 good votes and Andrew Moore has 708 good votes, being 59 votes more than Thomas Lewis.

Therefore the committee were of the opinion that Thomas Lewis was not elected and not entitled to his seat, and that Andrew Moore, who had the highest number of votes after deducting the unqualified votes, was duly elected and entitled to the seat.

The House on March 1 confirmed the first proposition of the committee by a vote of yeas 68, nays 39. The second proposition was also agreed to; yeas 64, nays 41.

Mr. Moore thereupon took his seat.[4]

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[1] First session Fourth Congress, Contested Elections in Congress from 1789 to 1834, p. 116; Journal, pp. 474, 475.

[2] The credentials of Members were referred and examined at this time by the Elections Committee under authority of a resolution usually adopted at the first of each Congress, and for this Congress in form as follows:

Resolved, That a standing Committee on Elections be appointed, whose duty it shall be to examine and report upon the certificates of election or other credentials of the Members returned to serve in this House, etc. (First session Fourth Congress, Journal, p. 366.)

[3] First session Eighth Congress, Contested Elections in Congress from 1789 to 1834, p. 128.

[4] Leave was granted to the memorialist and sitting Member to be heard by counsel at the bar of the House. (Journal, pp. 609, 615.)

766. The election case of Randolph v. Jennings, from Indiana Territory, in the Eleventh Congress.

The House, overruling its committee, declined to unseat a returned Delegate because in calling the election the governor had exercised doubtful authority.

On January 12, 1810,[1] the House came to a decision in the contested election case of Randolph *v.* Jennings, from the Territory of Indiana.

It was alleged in this case that there were informalities in the return of the vote, that two districts, by fault of a sheriff, did not vote, and finally that the authority under which the election was called by the governor was defective. The committee reported only on the last objection, which they conceived to be fundamental, and they found that, by reason of defective legislation of Congress, the governor did not have full authority to do what he had assumed to do. The committee state the case thus:

> If the governor of the Indiana Territory, instead of exercising the legislative authority of Congress on what he supposed a liberal construction of the law, had represented the case to Congress at the last session the defect would have been supplied and the Territory now legally represented in Congress. It can not be admitted that the governor of a Territory may, by his own authority, supply a want or defect of a law of Congress on his own opinion of a liberal construction, expediency, or necessity. To sanction such an assumption of power by a vote of this House would set a dangerous precedent. On this view of the subject the committee submit the following resolution:
>
> *Resolved,* That the election held for a Delegate to Congress for the Indiana Territory, on the 22d of May, 1809, being without authority of law, is void, and consequently the seat of Jonathan Jennings, as a Delegate for that Territory, hereby declared to be vacant.

A motion in the House to strike out the words "being without authority of law," was negatived, 51 to 45.

The House, after debate, nonconcurred in the report of the committee, by a vote of 83 to 30.

A resolution was then proposed declaring Mr. Jennings entitled to his seat. The motion was withdrawn after debate.

Mr. Jennings therefore retained the seat.

767. The first election case of Taliaferro v. Hungerford, from Virginia, in the Twelfth Congress.

The House, overruling its committee, concluded to decide an election case as made up without giving sitting Member time for further investigation.

The House, having corrected the returns by an ascertainment of the qualifications of certain voters, seated the contestant in accordance with the findings.

On November 21, 1811,[2] the Committee on Elections reported on the Virginia contested election case of Taliaferro *v.* Hungerford. The committee found that according to the laws of Virginia the land list of the year prior to the election was prima facie evidence of all the freeholders in the county. A correction of the poll in accordance with the land list was made by the committee, and resulted in such

[1] Second session Eleventh Congress, Contested Elections in Congress from 1789 to 1834, p. 240; Journal, pp. 171, 172; Annals, p. 1199.

[2] First session Twelfth Congress, Contested Election Cases in Congress, from 1789 to 1834, p. 246.

changes that in the district the majority of six votes for the sitting Member was changed to a majority of 121 for Mr. Taliaferro.

The committee, however, conceived that a longer time should be given the sitting Member to investigate the facts, the land-list test not being considered conclusive. The contestant had filed notice of contest in ample time; but his purpose to follow up the notice with actual steps to contest had not, the committee thought, been developed in time to allow the sitting Member to complete his case.

The House, by a vote of 46 to 65, disagreed to the recommendation of the committee.

Then, by a vote of 67 to 29, Mr. Hungerford was declared not entitled to the seat; and by a vote of 66 to 19, Mr. Taliaferro was declared entitled to the seat. Mr. Taliaferro, thereupon appeared and qualified.

768. The second election case of Taliaferro v. Hungerford, from Virginia, in the Thirteenth Congress.

The House, overruling its committee, declined to reject returns because of irregular making up of poll books and returns, no fraud being charged.

On June 10, 1813,[1] the Committee on Elections reported in the second contest of Taliaferro *v.* Hungerford, from Virginia. The committee in this report found that the election was illegal and John P. Hungerford was not entitled to the seat, because of neglect on the part of certain election officers to comply with the law of Virginia, which directed that "the clerks of the polls shall enter in distinct columns, under the name of the person voted for, the name of each elector voting for such person." The law further directed that "the clerks of the polls having first signed the same and made oath to the truth thereof, a certificate of which oath, under the hand of the magistrate of the county, shall be subjoined to each poll, shall deliver the same to the sheriff," etc.

The committee found numerous deviations from this law, in one county the names of the voters being all entered in one column, while figures were placed under the names of the candidates to show for whom each person's vote was given. In another county the names of the voters were entered in the same way, straight marks instead of figures being carried into the columns under the names of the candidates. In other counties, four in all, no certificate was found of any oath administered to the clerks of the polls. In one county the Christian name of the candidate was not written on the poll, the initial only being given.

The sitting Member contended that these deviations were sanctioned by long practice.

The committee, however, were sensible that trivial errors of officers conducting elections should not deprive any class of citizens of representation. But "to preserve the elective franchise pure and unimpaired, the positive commands and requirements of the law, in respect to the time, place, and manner of holding elections, ought to be observed. To enter the names of the voters promiscuously in one margin of the poll book, when the law positively directs them to be 'entered in distinct columns' and 'under the name of the candidate voted for,' is as manifest a

[1] First session Thirteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 250.

departure from the law as the selection of another time or another place than that mentioned in the law. Nor can the committee conceive that the prefixing the initial only of the Christian name to that of the family or surname of the voter is a fair compliance with the spirit and intent of the law."

The House, by a vote of 78 to 82, refused to agree to the recommendation of the committee, and on June 16, the report was recommitted.

On June 28 the committee again reported, in this case their report dealing with the comparison of the poll with the land list; but the committee concluded that this land list was not a conclusive test of the legality of the poll under the Virginia law, and that testimony might be admitted to impeach it. Therefore they held that in this respect the petitioner had not sustained his contention.

On July 31, 1813, the case was postponed until the next session of Congress, when it was again referred to the Committee on Elections. On January 10, 1814, the committee reported that after mature consideration they had come to the conclusion—

> That this election is void, and ought to be set aside, because it was conducted in an irregular manner, contrary to the law of Virginia prescribing the manner of conducting such elections, as is more particularly set forth in the first report.

The committee therefore proposed that the "said election was illegal and ought to be set aside;" and "that John P. Hungerford is not entitled to a seat in this House."

On February 1, 1814, the Committee of the Whole reported their disagreement to these propositions, and on February 17 the House concurred with the Committee of the Whole. So Mr. Hungerford retained the seat.

769. The Virginia election case of Bassett v. Bayley in the Thirteenth Congress.

Form of resolution confirming the title of sitting Member to his seat.

A sheriff having adjourned an election for a reason not specified as a cause of adjournment, the Elections Committee rejected votes cast after such adjournment.

On February 11, 1814,[1] the House, in the contested election case of Bassett *v.* Bayley, of Virginia, agreed to the following resolution, reported from the Committee on Elections on February 2:

> *Resolved,* That the sitting Member is entitled to his seat.

The committee arrived at this result by deducting from the vote as originally returned those votes illegally given, a process which still showed a majority for the sitting Member.

The largest deduction was one of 53 votes from the total of the sitting Member. This deduction represented the votes cast on the second and third days of the election in Accomac County. The law of Virginia allowed the continuance of a poll by the officer in charge beyond the first days in cases where a rain had fallen, where there had been a rise of the water courses, or where more electors attended than could vote in one day. The committee found that none of these conditions

[1] First session Thirteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 254.

prevailed and that the action of the sheriff was illegal. Therefore they recommended the deduction of the votes cast on the second and third days. But such deduction was not sufficient to destroy the majority of the sitting Member.

This case had first been reported June 3, 1813, when a further examination of evidence was recommended. The House recommitted the report, with the result that the subject went over to the next session.

770. The Virginia election case of Porterfield v. McCoy in the Fourteenth Congress.

Having deducted from the poll all the votes illegally given, the House confirmed the title of sitting Member, who had a majority of legal votes.

In a report sustained by the House, the Elections Committee declined to reject testimony not taken according to the practice established by State laws.

No fraud or injury being alleged, the Elections Committee declined to reject a poll because of neglect of the election officers to take the required oath.

The Elections Committee, in a sustained case, declined to reject a poll because of informalities, in the poll books and return.

On February 19, 1816,[1] the Committee on Elections, to whom was referred the Virginia contested election case of Porterfield *v.* McCoy, reported that after deducting from the poll on both sides the votes illegally given, they found that the sitting Member had a majority of 75 over the petitioner.

In the determination of this case the committee made certain rulings, which they reported to the House.

The sitting Member had objected to the testimony of the petitioner on the ground that it had not been taken within the period limited for that purpose in contested elections for members of the Virginia legislature, and because the petitioner had made the unreasonable delay of four months in commencing investigation. The committee overruled these objections and admitted the testimony.

The petitioner objected that the clerks appointed by the sheriff to keep the poll were not sworn previous to the commencement of the voting, but on the next day examined and subscribed the poll and made affidavit to its truth and correctness. The committee overruled this objection, the testimony showing that the clerks conducted the election under the impression that they would be sworn at the close, in accordance with the custom of the county.

The petitioner further objected that the names of the voters were not written under the names of the candidates, but in a single column, with the votes carried forward and marked under the names of the candidates. The committee overruled this on the ground of prevailing custom.

771. The case of Porterfleld v. McCoy, continued.

An agreement of parties, as to the admissibility of votes was overruled by the Elections Committee on the ground that the elective franchise might not be qualified by such agreement.

The Elections Committee, in a sustained case, ruled that all votes

[1] First session Fourteenth Congress, Contested Elections (Clarke), p. 267.

recorded on the poll lists should be presumed good unless impeached by evidence.

In a sustained case, the Elections Committee admitted as proof of his title to vote the voter's properly taken affidavit.

The committee also overruled the request of the sitting Member that he be allowed to avail himself of an agreement entered into with the petitioner as to the admissibility of certain votes, the committee being of opinion that an agreement of parties could not diminish or enlarge the elective franchise.

The committee further decided—

1. That all votes recorded on the poll lists should be presumed good unless impeached by evidence.
2. That certified copies of the commissioner's books or land lists should be read in evidence, and deemed satisfactory as to the qualification or disqualification of voters, unless corrected by other evidence; and
3. That the affidavit of the voter taken before competent authority in pursuance of regular and sufficient notice, should be read in evidence to prove his title to vote.

The committee reported these rules to the House with the case.

On April 19 the House confirmed Mr. McCoy in his seat.

772. The election case of Easton v. Scott, from the Territory of Missouri, in the Fourteenth Congress.

The House in 1817 held that it was competent to examine the qualifications of voters, although they had voted by a secret ballot and might be compelled to disclose their votes.

The House may investigate a contested election of a Delegate as of a Member.

The Elections Committee declined to favor giving a petitioner prima facie title to a seat because a partial investigation showed a majority for him.

In 1816 and 1817 the House considered at length the contested election case of Easton *v.* Scott from the Territory of Missouri, on which the Committee on Elections reported in favor of seating the petitioner. The charges of irregularities were numerous, and although the report of the committee was once recommitted, the House did not arrive at any conclusion as to the merits of the case as between the contestant and contestee; but adopted, on January 12, 1817,[1] a resolution that the election had been illegally conducted, and that the seat of the Delegate from the Territory was vacated.

During the examination of the case certain principles of procedure were discussed and determined, some by the committee alone and some by the committee and House.

The law of the Territory requiring "that, in all elections to be held in pursuance of this act, the electors shall vote by ballot" the committee held that a secret ballot was intended, and that there existed no authority to compel a voter to disclose for whom he voted. Therefore it would be impossible to inquire into the qualifications of electors with a view to purge the polls. But on January 3, 1817,[2] when the

[1] Second session Fourteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 272.
[2] Annals, pp. 414, 418.

report was considered in the House, Mr. Daniel Webster made the criticism that qualifications of the voters had not been considered, and moved that the report be recommitted to the Committee of Elections with instructions "to receive evidence that persons voting for either candidate were not entitled to vote on the election." On this motion a wide debate took place as to whether or not votes given by ballot, and of course secretly, could be afterwards ascertained, or the voter be required to declare for whom he voted. Other points were also touched on in this debate, which resulted, on January 4, in an affirmative action on the motion to recommit with the instructions, by a vote of 86 yeas to 50 nays.

On January 4,[1] also, the question was raised on the floor of the House that Delegates could not be considered Members of the House, and therefore, that the House could not be the judge of their election and return. Mr. Samuel R. Betts, of New York, who raised this point, moved, therefore, that the subject be indefinitely postponed. In opposition to this it was argued that in 1809 the House had considered such a case, and the people of the Territories were authorized under the law to have Delegates, and therefore had a right to be represented correctly. If the House could not examine in such a case, the returning officer became absolute judge; and the returning officer might return two Delegates. What would the House do then? The motion to postpone indefinitely was decided in the negative by a large majority.

In their first report the committee rejected the votes in the township of Cote Sans Dessein for a variety of reasons, including the fact that the result of the voting was sent to the governor in an irregular manner. The rejection of this township—which, however, was only one of many places yet to be examined where irregularities were charged—left a majority of 7 votes for the petitioner. Therefore Mr. Easton claimed that the rejection of the irregular return of Cote Saris Dessein would change the figures on which the governor's return had been made so as to require, under the law, the issuance of a certificate to himself instead of Mr. Scott. Thus he claimed that the decision of the committee showed that the prima facie right to the seat belonged to him rather than to Mr. Scott; and, citing the parliamentary law of England in support of his contention, asked that he be made the sitting Member, and that Mr. Scott be put in the place of contestant. The committee decided that this request should not be granted, and proceeded with the investigation.

773. The case of Easton v. Scott, continued.

When the law requires a vote by ballot, an election viva voce is not permissible and is a reason for rejection of the returns.

Where electors are objected to for want of qualifications, their names should be set forth in the notice of contest.

A requirement of law that the number of votes given shall be "set down in writing" I on the poll book is fulfilled by the use of numerals.

There being no time to collect the evidence needed to determine the right to a seat, the House, on a showing unfavorable to sitting Delegate, declared the seat vacant.

The seat of a Delegate being declared vacant, the Speaker was directed to inform the governor of a Territory.

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[1] Annals, pp. 415–417.

The committee, in rejecting the votes of Cote Sans Dessein, did so for a variety of causes, as: The election was held viva voce, when the law prescribed ballot; neither the judges (two where three were required) nor clerk were sworn as required by law.

The committee also ruled that a requirement of the law that "the number of votes given to each person shall be set down in writing at the foot of the poll book" was sufficiently complied with by the following entry: "For Rufus Easton, 16—For John Scott, 1072."

The committee also established the rule, taking for precedent the case of Joseph B. Varnum in the Fourth Congress, that the names of the electors objected to for want of sufficient qualifications ought to be set forth prior to the taking of testimony. The committee said in reference to this decision:

> If the House concur with the committee in this opinion, it follows that no evidence has been submitted by either party enabling the committee to investigate the qualifications of the electors. The committee are further of opinion that evidence can not be procured in season to enable the committee to investigate the qualifications of the electors during the present Congress.

Therefore they asked to be discharged from the consideration of the subject of qualifications.

On January 12, 1817, the House rejected an amendment declaring Mr. Easton entitled to the seat; and finally agreed to the following:

> *Resolved,* That the election in the Territory of Missouri has been illegally conducted and the seat of the Delegate from that Territory is vacant; that the Speaker inform the governor of that Territory of the decision of this House, that a new election may be ordered.

774. The Vermont election case of Mallary v. Merrill in the Sixteenth Congress.

The House is not confined to the conclusions of returns made up in strict conformity to State law, but may examine the votes and correct the returns.

No fraud being alleged, the House counted returns transmitted in an unsealed package, although the State law required the package to be sealed.

The House counted votes rejected by a State canvassing board because returned by error for persons not candidates for Congress.

The House counted votes duly certified but not delivered to the State canvassers because of negligence of a messenger.

On January 5, 1820,[1] the Committee on Elections, who had been considering the case of Mallary *v.* Merrill, of Vermont, reported that in their opinion Orsamus C. Merrill was not entitled to the seat, and that Rollin C. Mallary was entitled to it.

Under the law of Vermont the returns of the towns were transmitted to a canvassing committee chosen by the general assembly, and in accordance with the findings of that committee the governor of the State, in accordance with the law, executed credentials to Mr. Merrill.

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[1] First session Sixteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 328.

But the Committee on Elections, going behind the governor's certificate and the result ascertained by the canvassing committee, found the following facts:

That the canvassing committee had rejected the legally given votes of the town of Fairhaven because the election officers of that town had transmitted the certificate of votes to the canvassing committee in an unsealed packet, while the law required the packet to be sealed. The committee, holding that the House of Representatives had not been accustomed to allow votes legally given to be defeated by the mistake or negligence of a returning officer, were of the opinion that the votes of Fairhaven should be allowed to the contestant.

That the canvassing committee had rejected the legally given votes of the town of Plymouth because the certificate of the presiding officer, while complete and definite, was not in the exact form prescribed by the statute of the State. The Committee on Elections were of the opinion that the prescribed form had been substantially adhered to and that the votes should be counted.

That the canvassing committee had rejected the return of the town of Woodbury because the votes actually given for Congressmen had, through the mistake of the presiding officer, been returned for certain gentlemen who were candidates for State councilors, and in whose favor not one vote was given for Representatives in Congress. The record made in the town clerk's office, in accordance with law, showed the correct result. The Committee on Elections concluded that this error should be corrected and the legally given votes be recorded.

That the legally given votes of the town of Goshen were certified in due form, but the messenger provided by law to deliver the votes to the canvassing committee failed to do so. The Committee on Elections considered that this failure should not be allowed to keep from the poll the votes of the town.

These corrections gave a majority to the petitioner, Mr. Mallary.

The arguments of contestant and sitting Member, which were submitted in writing to the committee and published as part of the report, practically assumed the correctness of the committee's deductions, but joined issue as to the right of the House to go behind the determination of result arrived at by State authority.

The contestant argued that, as the House was the judge of the election of its own Members, State authority might not create an intervening obstacle. It would be unreasonable to say that the House should be bound by laws never intended to operate on its privileges, and if intended so to operate must be nugatory. It could not be inferred, because the canvassing committee were required to receive the certificate of a town clerk or constable as evidence, the Congress was to receive no other. The precedents of the House showed that the qualifications of the electors had been frequently examined by the House. In the Georgia case of 1804 the House had gone behind the State return.

The sitting Member contended that the settled order of business prescribed by the election law of a State was binding on the House regarding the election of its Members unless "the Congress, by law, have altered such regulations." If State laws were agreeable to the Constitution and the requisites of the laws were regarded, the proceedings of the freemen and the decisions of the State tribunes were in good faith to be recognized and accredited. While the Congress might modify a State law on this subject, the House alone could hardly assume to do so. The pro-

ceedings in a State, done conformably to law, were of more than prima facie effect. "I strenuously and boldly urge," he said, "that the power of the House of Representatives, and its committee, as judges of the election, returns, and qualification of its Members are limited to the law of the State and the Constitution; they are to inquire and decide whether either have been infringed, and whether all proceedings have been done in good faith. They are not authorized to step behind a constitutional statute, except to see whether its provisions have been regarded. The statute is the act of the freemen and is the expression of their will, and it is as vitally important to them as the deposit of their ballots. The House of Representatives, without the cooperation of the other branch of Congress, can not pass behind the law of Vermont, to alter or contradict it, without the exercise of unconstitutional and dangerous power."

The report of the committee was debated in the House on January 11, especially with reference to the issue joined in the arguments of the parties, and on January 13, by a vote of 116 to 47, Mr. Mallary was declared to be entitled to the seat.

775. The Maryland election case of Reed v. Causden, in the Seventeenth Congress.

The Constitution requires election of Representatives by the people, and State authorities may not determine a tie by lot.

The decision of elections officers that ballots were fraudulently folded was reviewed and reversed by the House.

The House reviewed and reversed the decision of elections officers in admitting a ballot not conforming to the State law.

Opinions of the Elections Committee as to investigating qualifications of voters who have voted by secret ballot.

The House, overruling its Speaker, held that a negative decision on a resolution declaring a contestant not elected was not equivalent to affirmative affirmation.

The Committee on Elections, on March 11, 1822,[1] reported in the contested election case of Reed *v.* Causden. This case involved both a question of the constitutionality of the act of the governor and council of Maryland, and a question of fact as to the votes actually given.

The returns of the election, as made to the governor and council, showed that the contestant and sitting Member had an equal number of votes, and that neither had the "greatest number of votes" as by the constitution of the State was required to constitute an election. In this situation, the governor and council of Maryland, acting under the State law of 1790, proceeded by lot to decide between the two candidates, and decided in favor of Jeremiah Causden. The Committee on Elections expressed the belief that the law of 1790 had been repealed by a subsequent law; but dismissed this point as unessential in view of the constitutional question involved. The Constitution of the United States provided that "the House of Representatives shall be composed of Members chosen every second year by the people of the several States," and that "each House shall be the judge of the elections, returns, and

[1] First session Seventeenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 353; House Report No. 64.

qualifications of its own Members." If the people of Maryland failed to make a choice, no other authority of the State could make good this defect. If the electors had failed to attend the election it would not be contended that the State executive authority could appoint a Representative in Congress for the district.

In relation to the question of fact the committee, after examination of testimony, concluded that two votes given for the contestant in one of the districts of Kent County, and rejected because folded together in contravention of law had been improperly rejected by the judges, and that a vote allowed to him in Cecil County should be deducted, as being illegal in form. These additions and the deduction left a majority of one vote for the contestant.

The law of Maryland provided:

> If upon opening any of the said ballots there be found any more names written or printed on any of them than there ought to be, or if any two or more of such ballots or papers be deceitfully folded together, or if the purpose for which the vote is given is not plainly designated as within directed, such ballots shall be rejected and not counted.

The report of the committee indicated a belief that the two ballots rejected because folded together were not "deceitfully folded together," evidence being quoted to show that the footing of the poll lists indicated this.

The illegal vote in Cecil County contained the name of the memorialist, together with the names of five other persons, without any other designation than the words for "Congress." The law of Maryland provided:

> Every voter shall deliver to the judge or judges * * * a ballot, on which shall be written or printed the name or names of the person or persons voted for, and the purpose for which the vote is given plainly designated.

Therefore the committee considered that the sitting Member could not, under the Constitution, retain his seat, and that the contestant was elected. The committee embodied their views in these resolutions:

> *Resolved,* That Jeremiah Causden is not entitled to a seat in this House.
> *Resolved,* That Philip Reed is entitled to a seat in this House.

On March 15 and 19[1] the report was considered in Committee of the Whole and the House.

The resolution that Jeremiah Causden was not entitled to the seat was agreed.

But over the second resolution there was a contest. The Committee of the Whole amended it by inserting the word "not" so as to provide that Philip Reed was not entitled to the seat. This amendment was concurred in by the House by a vote of 73 to 71. A motion to reconsider failed, as did also a motion to amend by inserting the explanatory words so the resolution would read:

> *Resolved,* That Jeremiah Causden and Philip Reed having an equal number of votes, Philip Reed is not entitled to a seat in this House.

The question recurring on agreeing to the second resolution as amended by inserting "not," there appeared yeas 75, nays 75. So the resolution was determined in the negative. The Speaker (Mr. Barbour) was one of those voting in the affirmative.

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[1] Journal, pp. 367–371.

The Speaker[1] decided[2] that, as the House had negatived a motion declaring Philip Reed not entitled to a seat, the converse of the proposition was affirmed, and that Philip Reed was entitled to a seat.

An appeal having been taken, the House overruled this decision.

Thereupon the following resolution was offered and agreed to—yeas 82, nays 72:

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

Mr. Reed thereupon qualified and took his seat.

The committee also comment on certain charges that illegal votes were given by certain named persons. The inference is that the votes were objected to because of alleged disqualifications of the persons casting them. "On the propriety of entering into an investigation of this kind, when elections are by ballot, the committee entertains serious doubt." The committee refers to the case of Easton and Scott, but doubts whether it should be viewed as establishing a precedent.

776. The New York election case of Adams v. Wilson in the Eighteenth Congress.

Instance wherein the House seated a contestant shown to be elected by a plurality of one vote.

Being unable to inspect a ballot the committee and House accepted the judgment of the election judges that it was intended for a blank.

The House followed a State law in rejecting ballots folded together; but considered evidence tending to show fraud before doing so.

On December 30, 1823,[3] the Committee on Elections reported in the New York contested election case of Adams *v.* Wilson, in which the face of the returns showed the following result: Isaac Wilson had 2,093 votes; Parmenio Adams had 2,077 votes.

The committee found from the testimony that in the town of China 22 more votes were returned for the sitting Member than he actually received.

They also found that in the town of Attica 5 votes were returned for the contestant more than he actually received.

These deductions being made the poll stood: For Isaac Wilson, 2,071 votes; for Parmenio Adams, 2,072 votes.

The sitting Member claimed further, however, that in the town of Middleboro the local inspectors had improperly rejected as a blank ballot a ballot whereon the name of the sitting Member had been impressed, but had been defaced by one stroke of a pen over the name without, however, affecting the distinctness and legibility of the letters. The committee reported that all the inspectors of election agreed in the opinion that it had been the intention of the elector who presented it to have it considered a blank. The Committee on Elections announce the conclusion that they could not with safety judge of the ballot from the description of it, and that the judgment of the board of inspectors—whom the law of the State constituted judges—should not be questioned.

The committee also disregarded the claim of the sitting Member that certain votes be counted for him in the town of Stafford. The law of the State provided

[1] Philip P. Barbour, of Virginia, Speaker.

[2] Journal, p. 369, Annals, p. 1322.

[3] First session Eighteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 373.

that "if any two or more ballots are found folded or rolled up together, none of the ballots so folded or rolled shall be estimated." The votes in question were folded together, and a reference to the poll lists showed that more ballots were received than there were names on the list.

The committee commended the honesty of the inspectors in the district so far as the inquiries extended, and expressed the opinion that their testimony was competent and ought to be received to correct any mistakes in the return.

On January 6, 1824, the House, concurred with the Committee on Elections, in adopting a resolution declaring Mr. Wilson not entitled to the seat.

To the other resolution, declaring Mr. Adams entitled to the seat, an amendment was offered declaring the seat vacant because of the doubt as to who should have been returned. This amendment was in form as follows:

It is doubtful, from the evidence, who ought to have been returned the Member to the present Congress from the Twenty-ninth Congressional district in the State of New York; and believing that no man ought to exercise the high and honorable station of Representative of the people by virtue of a vote short of a clear majority of those given at the polls; and believing also that the people of that district are competent and ought of right to judge of and correct the return, therefore—

Resolved, That the seat of Isaac Wilson, who was returned as the Member from the Twenty-ninth Congressional district of New York, is vacant.

Resolved, That a writ of election do forthwith issue to supply the aforesaid vacancy, occasioned by the improper return of Isaac Wilson to a seat in this House.

This proposition was decided in the negative, as was also an amendment to insert the word "not," so as to provide a declaration that Mr. Adams was not entitled to the seat.

The House then, by a vote of 116 yeas to 85 nays, agreed:

Resolved, That Parmenio Adams is entitled to a seat in this House.

Thereupon Mr. Adams took his seat.

777. The election case of Biddle and Richard v. Wing, from Michigan Territory, in the Nineteenth Congress.

A board of Territorial canvassers having heard evidence on the merits, the Elections Committee decided that neither party should be prejudiced thereby.

The Elections Committee declined to consider intimidation at a poll unless it seemed to have destroyed the fairness of the whole proceeding.

Where the election had been by ballot, the Elections Committee declined to investigate qualifications of voters to the extent of violating the secrecy of the ballot.

Instance wherein, without violating the secrecy of the ballot, the Elections Committee by computation rectified a poll.

On February 13, 1826,[1] the Committee on Elections reported in the contested election case of Biddle and Richard *v.* Wing the following resolution:

Resolved, That Austin E. Wing is entitled to a seat in this House as a Delegate from the Territory of Michigan.

[1] First session Nineteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 504; Journal, p. 368.

On March 20 the report was considered in Committee of the Whole, but not concluded. It does not appear to have been taken up again, and Mr. Wing continued in his seat. Therefore the reasoning of the committee did not receive the positive approval of the House, although a negative approval may be inferred.

The returns of the local inspectors of the Territory showed the following summary of results in the various polling places:

	Votes.
John Biddle	731
Austin E. Wing	724
Gabriel Richard	710

But the Territorial canvassing board, having met under the law to ascertain the aggregate of votes and determine the person elected, decided to hear evidence as to alleged corruption at Sault Ste. Marie, where the returns showed 3 votes cast for Austin E. Wing and 58 votes for John Biddle.

As a result of that investigation, and the return made by the canvassers to the governor, the certificate of election was issued to Mr. Wing, he having the greatest number of votes as required by the law for an election.

The committee expressed the opinion that the board of canvassers in holding this investigation exceeded the authority given them by law, and that neither party should be prejudiced thereby in an investigation by the committee of the original and intrinsic merits of the case. An illegal assumption of power by one description of officers could not justify an illegal assumption by another description. The testimony before the canvassers was ex parte, but the committee conceive that, as ex parte testimony was admitted in rebuttal also, no well-founded objection could be made by contestant.

Mr. Richard rested his claim on the charge that his vote had been affected by intimidation practiced by sheriffs at Detroit, but the committee conceive that they can not enter into an examination of such charges, especially when the return shows that Mr. Richard's friends were most numerous at Detroit, except the corruption appears sufficient to destroy all confidence in the purity and fairness of the whole proceeding. The inspectors being judges of election, the committee feel that they were required to do no more than examine who had the greatest number of legal votes actually given.

Mr. Richard's claim being thus dismissed, by the unanimous opinion of the committee, the committee proceeded to test the case between Messrs. Biddle and Wing. In this aspect of the case the committee reached a conclusion, although not with unanimity.

After examining the inspector's returns, and after adding to Mr. Wing's poll 4 votes which the committee considered wrongfully rejected, the poll stood:

	Votes.
For John Biddle	732
For Austin E. Wing	728

The committee refer to the fact that when an election turns on the reception of illegal votes given by ballot much difficulty exists, it not being proper to discover who threw the ballots by an investigation which would violate the secrecy of the ballot.

But in this case it was possible to reach a result, because the question turned on the poll at Sault de Ste. Marie, where the poll stood:

	Votes.
For Austin E. Wing	3
For John Biddle	58

The committee found the proceedings at Sault de Ste. Marie defective under the law. Thus, four persons, not qualified electors, presided as inspectors. Of the 61 votes cast 51 must be considered illegal by reason of nonpayment of required taxes; in addition to which 12 of the number were discharged soldiers (not citizens), 3 aliens, and 3 nonresidents. Without setting aside the whole election, the committee deduct from Mr. Biddle's poll the 12 soldiers, 3 aliens, and 3 nonresidents, 18 in all, leaving him 714 votes. They also deduct all of Mr. Wing's 3 votes on the supposition that they may have been illegal. This still left Mr. Wing 11 plurality on the poll.

Thus the committee arrived at their conclusion that Mr. Wing was elected.

778. The Tennessee election case of Arnold v. Lea in the Twenty-first Congress.

Although the allegations of the petitioner in an election case were vague and indefinite, the Elections Committee proceeded to examination.

Form of a petition in an election case deemed too general and indefinite in its charges.

No fraud being shown, irregularities in the receiving and custody of ballots were not held sufficient to justify the rejection of the returns.

Failure of election officers to be sworn, no fraud damaging to the petitioner being shown, was apparently considered not sufficient to justify rejection of the returns.

Participation of relatives of a contestant as election officers was not held fatal to the return, although the State constitution might seem to imply a prohibition of such participation.

Where the electors comply with the statutes the House should not reject their votes because returning officers have not been equally careful.

On December 29, 1829,[1] the Committee on Elections reported in the contest of Arnold *v.* Lea, from Tennessee. The contestant had petitioned, alleging:

> That perjury and subornation of perjury were resorted to; that bribery, direct and indirect, was resorted to; and, in short, to insure the defeat of your memorialist, the laws of Tennessee, which prescribe in a special manner the mode of holding elections, were completely prostituted and trampled under foot by the official authorities who conducted the election, and their own partial, prejudiced, and malignant passions substituted in place of the laws of the land.

Although the general and indefinite character of these allegations were objected to by the sitting Member, the committee decided to proceed to an examination.

They found no evidence of perjury or subornation of perjury, or bribery or corruption, so that part of the petition hardly figures in the case, except in so far as the proceedings had failed to comply with the law.

[1] First session Twenty-first Congress, Contested Elections in Congress from 1789 to 1834, p. 601.

No return of the votes in the district was made to the committee, the petitioner showing no evidence to impeach particular votes. The sitting Member's majority appeared to be 217.

The decision of the case turns on the question whether or not the conduct of the election was fatally at variance with the following provisions of the constitution and law of Tennessee:

No judge shall sit in the trial of any cause where the parties shall be connected with him by affinity or consangunity, except by consent of parties. (Sec. 8 of constitution.)

That the sheriffs or returning officers shall, on the day and at the place for holding each respective election, be provided with one box for receiving the ballots for governor and members of the general assembly; the returning officer, or his deputy, shall receive the tickets in presence of the inspectors, and put each into the box, which box shall be locked, or otherwise well secured, until the election shall be finished. The returning officer shall, at sunset of the first day, and in the presence of the inspectors, put his seal on the place to be made for the reception of the tickets, which shall continue until the election shall be renewed the succeeding day; and it shall be the duty of the said inspectors to take charge of the box until the poll is opened the next day, and shall then be taken off in the presence of the inspectors.

That the inspectors and clerks of every such election, as aforesaid, shall, in the court-house, before they proceed to business, swear (or affirm, as the case may be) faithfully to perform their respective duties at such election, agreeably to the constitution and laws of this State.

It appeared from the testimony that at Tazewell the inspectors, clerks, and sheriff were in favor of the election of Mr. Lea, and that some of them had made bets on the result; that on the evening of the first day the sealed ballot box was put in custody of the sheriff and not kept by the inspectors, as required by law, and under direction of the sheriff was locked up in a storehouse owned, the petitioner charged, by an enemy of himself. The friends of the petitioner complained at this conduct, and on the second day another box was used, the first remaining sealed until the count. Then it was found that the box contained the exact number of votes it should contain according to the poll lists. Petitioner objected that this did not prove that some tickets cast for himself might not have been abstracted and replaced by an equal number for sitting Member, the situation of the box rendering such a fraud practicable. But no proof was adduced to show this, and the committee decided, although it was in evidence that the sheriff had been anxious to have the custody of the box, that there was no evidence to prove fraud, especially as the persons concerned in the conduct of the election were men of high character.

At Knoxville there was testimony, which the committee consider far from conclusive, that one man had been bribed to vote for sitting Member and that another who had voted for the same candidate was a minor.

At one precinct in Granger County it appeared neither the inspectors nor the clerks were sworn. One of the three inspectors was a friend of the petitioner, and the votes returned for petitioner outnumbered those returned for the sitting Member. Certain illegal votes, not over eight in number, were deducted at this place, a greater number being taken from the vote of the sitting Member than from the vote of petitioner.

At one precinct of the county of Jefferson, a cousin of the sitting Member was one of the inspectors, and with the approval of the other inspectors, this cousin, with the sheriff, took custody of the ballot box after the first day's voting.

At a precinct of Blount County one of the three inspectors was a justice of the peace, and swore himself, the two other inspectors, and the clerk. After the first day's election the inspectors delivered the ballot box to the custody of an uncle of the deputy sheriff. A minor, whose vote was rejected in this county, loaned a horse of the petitioner and went to another polling place, where he voted. It appeared to the committee that the petitioner was privy to this violation of law.

The committee conclude that these irregularities are not fatal. In the precinct where the inspectors and clerk were not sworn a deduction of the votes cast would, if made, increase rather than diminish the majority of the sitting Member, and even if the whole vote taken should be given to the petitioner the sitting Member would still have a majority.

The committee therefore recommended unanimously the following:

Resolved, That Pryor Lea is entitled to retain his seat in the Twenty-first Congress of the United States as the Representative of the Second Congressional district of the State of Tennessee.

On January 12, 1830, an amendment declaring the seat vacant was offered and debated.

In the course of the debate Mr. William W. Ellsworth, of Connecticut, said:

The merits of the case are involved in two questions, and only two, viz, how the electors of this Congressional district complied with the requisitions of the statute law of Tennessee; and if they have, what is the result of their vote? A close adherence to these questions will strip this matter of much that is collateral and immaterial. As to the first question (the difficulty being that the ballot box has not been taken care of by the supervisors of the election), I observe that the States may prescribe the time, place, and manner of the election, and beyond that it is the ultimate province of this House to ascertain the result of the election. We only want to know what the electors have said by their votes. There may be some difficulty in ascertaining this fact where the supervisors of the balloting are irregular as to their duty; but if the electors have done all the State law requires of them, and all they can do legally to express their wishes, this is enough for us, if we can but satisfy ourselves of the result. If we can not, by reason of the conduct of the supervisors, ascertain what was the true state of the ballot box when the electors had deposited their votes, we must pronounce the election to be void. * * * We are to inquire after the voice of the electors, legally expressed; and if the agents who take and declare the votes do wrong, let them be prosecuted, but not punish the electors by rejecting their Representative. * * * The case stated from Missouri fully illustrates my views (Easton *v.* Scott). There the statute required the electors to vote by ballot; they voted, however, vive voce; but they could not so vote. The electors did not do their duty; they did not comply with the law as to the manner of election. So, too, the case of Allen *v.* Van Rensselaer, from New York, illustrates the distinction. The law of New York requires the ballot box to be locked; it was only tied with a string. In this case Congress decided the election to be good; the electors did all their duty, and Congress were satisfied as to the contents of the ballot box.

This amendment declaring the seat vacant was, according to the rule then prevailing, set aside by the previous question. The House then agreed to the resolution declaring the returned Member entitled to the seat by a vote of yeas 149, nays 20.[1]

779. The Maine election case of Washburn v. Ripley in the Twenty-first Congress.

Where a second and effective election was had because of apparent failure to choose at the first the House declined to be estopped from investigating the first.

The acceptance after election of a State office which was resigned

[1] Journal, pp. 159–161.

before the meeting of Congress was held not to destroy whatever rights a contestant might have.

Where ballots for different offices are cast in different boxes the intention of the voter is to be ascertained alone from the box in which the ticket is deposited.

Election officers are justified in refusing to count for a candidate for Congress ballots cast in a box other than the Congressional box.

Election officers should return all votes cast in the Congressional box, even though for persons not qualified.

On January 18, 1830,[1] the Committee on Elections reported in the contested election case of Washburn *v.* Ripley from Maine. The facts appeared as follows:

Under the laws of Maine the election was by ballot, a majority being required to elect, and the ballots for Congressman were deposited in a box by themselves at each polling place. The result of the poll was as follows:

Whole number of votes given	4,994
Necessary for an election	2,498
Ruel Washburn had	2,495
James W. Ripley had	2,180
Eleven men known and admitted to be candidates for the legislature at the same election had in the Congressional boxes a total of.	24
Three men known and admitted to be candidates for county treasurers had in the Congressional boxes a total of.	6
Enoch Lincoln, candidate for governor, in the same way had	2
Three candidates for State senator had a total of	3
A single ticket having on it the names of two candidates for State senate was found in the Congressional box and counted as one vote for each, making.	2
Scattering vote	282

The governor and council, acting under the law, found from this return that a majority of the whole number of votes was not given to any one candidate, and ordered a new election, which was held December 22, 1828, and at which James W. Ripley received a majority and took his seat in the House.

The sitting Member made the point that, as the governor and council had again referred the matter to the people, and as the people had determined the election on the second ballot, it was not competent for the House to go beyond the second election. The majority of the Committee of Elections, however, decided that they might examine the first election, and did so.

The sitting Member further contended that the said Washburn had waived whatever right he might have had to a seat in the House by accepting, after the date of the second election, the State office of councilor, an office incompatible, as the constitution of Maine disqualified a Member of Congress from being councilor. A majority of the committee concluded that the rights of Mr. Washburn, if he acquired any by the election of September, would not in this way be destroyed. Mr. Washburn had resigned the councilorship before the time of meeting of the Congress to which he claimed an election.

The case therefore proceeded to examination on its merits.

[1] First session Twenty-first Congress, Contested Elections in Congress from 1789 to 1834, p. 679; House Report No. 88.

It was proven that several of the persons for whom votes were found in the Congressional box were not residents of the Congressional district, as required by law; that at least one vote intended for petitioner was put in the State senatorial box and counted as a vote for State senator and not for Congressman. It was evident and not seriously contested that the votes for State officers found in the Congressional box were deposited there by mistake.

One such ballot cast in the town of Canton contained two names, and was counted as one vote for each name. The committee found that this should have been counted as only one vote, and therefore deducted one from the total.

There was also a question whether or not in the town of Bridgton a single ballot containing three names had not been counted as three votes, and the committee, while not considering it proven, also suggested that two votes be deducted in Bridgton. These deductions, one in Canton and two in Bridgton, reduced the number necessary to a choice to 2,496, or one more than the votes received by Mr. Washburn.

It appeared that the voter who cast the double ballot in Canton discovered his mistake soon after and asked leave to rectify the error, but was refused by the selectmen. The minority of the committee believed that two votes should be deducted in Canton and three in Bridgton—a total of five—which would reduce the number needed for a choice to 2,495, the exact number received by Mr. Washburn.

The sitting Member professed ability to prove that illegal votes were given for the contestant; but the committee considered the evidence before them sufficient to settle the case, in accordance with the following rule, which they enumerated in their report:

> The committee are unanimously of opinion that when the votes are taken by ballot, and separate boxes used, after they are deposited in the box it is not competent or proper for the voter or selectmen to alter or change the ballot as delivered into the boxes, and that the intention of the voter is to be ascertained alone from the box in which his ticket is deposited, and that the selectmen conducting the elections at the places above specified acted correctly in making out their return to the governor and council of all the ballots they found in the box which was used for the reception of tickets for a Member of Congress, and in refusing to count the votes they found in other boxes with the name of Washburn on it and adding them to his list of votes given for him as a Member of Congress. The adoption of any other rule would be fraught with danger to the purity of the elective franchise.
>
> The committee are further of opinion that votes given for persons not residing within the district of Oxford ought to have been added to the number of votes given for a Member of Congress, as they were done by the selectmen.

Therefore the committee recommended the adoption of the following resolution:

> *Resolved,* That James W. Ripley is entitled to a seat in the Twenty-first Congress of the United States as the Representative of the Oxford district in the State of Maine.

On February 2, after a long debate, the House concurred in this report, yeas 111, nays 79, Mr. Ripley being thus confirmed in the seat.[1]

780. The Virginia election case of Loyall v. Newton in the Twenty-first Congress.

The House in an election case received testimony taken before an informal commission, the individuals of which were competent, and due notice being given.

[1] Journal, pp. 195, 209, 215, 224, 225, 230, 247, 249.

Instance of the methods of taking testimony in election cases before the enactment of the law.

Voting being viva voce, the testimony of the voter was admitted to prove his qualifications.

All votes recorded on the poll lists are good unless impeached by evidence.

Reference to rules governing counting of votes where freehold qualifications prevailed.

Instance wherein the Elections Committee waived the strict rules of law in receiving testimony.

Form of resolution seating a contestant without in terms unseating the sitting Member.

On February 19, 1830,[1] the Committee on Elections reported, in the contested election case of Loyall *v.* Newton, from Virginia, the following resolution:

Resolved, That George Loyall is entitled to a seat in the Twenty-first Congress of the United States as the Representative from the district in Virginia composed of the counties of Norfolk, Nansemond, Elizabeth City, Princess Ann, and the borough of Norfolk.

This case divides itself into three general branches:

1. The admissibility of testimony taken before a commission alleged to have been appointed without authority of law.

2. The legality of the action of the mayor of Norfolk under the law of Virginia in adjourning the poll after the first day.

3. The legality of certain votes under the law of Virginia, some cast for the contestant and some for the sitting Member.

In regard to the first branch, there was no law of the United States or of Virginia providing for taking testimony in contested election cases of Members of Congress. In contests for members of the Virginia legislature the law of that State provided for the appointment by local judges of commissioners to take testimony. Following this analogy, the petitioner had appointed by the judge of the Norfolk court commissioners to take testimony. The sitting Member objected to depositions so taken for the reason that there was no law authorizing their appointment or providing the pains of perjury for those swearing falsely before such commissioners. The committee found, however, that the commissioners, previous to their appointment as such and during the time in which the depositions were taken, were justices of the peace or notaries public, authorized under the laws of Virginia to administer oaths. So their capability in this respect was not dependent on the appointment as commissioners, and the committee allowed the testimony taken before them, as it did also testimony taken before justices of the peace authorized to administer oaths in behalf of the sitting Member.

As to the second branch of the inquiry, the legality of the action of the mayor of Norfolk in adjourning the poll depended on the construction of the language of the Virginia statute, and the committee decided that the language gave him such authority; also that the contingency requiring such adjournment existed.

[1] First session Twenty-first Congress, Contested Elections in Congress, from 1789 to 1834, p. 520.

The third branch of the case involved an examination of the qualifications of electors under the law of Virginia, which provided various qualifications, especially of property. Under the law of Virginia voting was viva voce, so the committee admitted the testimony of the voter himself to prove himself a freeholder in cases where the land books—also admitted in evidence—did not show the possession of the freehold. The testimony of other persons was admitted to prove the qualification of the voters in this respect. To the examination of the votes the committee applied the following rules, used also in the case of Porterfield and McCoy:

That all votes recorded on the poll lists should be good unless impeached by evidence.

That all votes not given in the county where the freehold lies be rejected.

That the votes of freeholders residing out of the district, but having competent freehold estates within the district, be held legal.

Acting under these rules and principles the committee found and reported a majority of 30 votes for George Loyall.

The committee further state that had the parties been confined to the strict rule of the law in requiring of them the best evidence the nature of the case admitted and by refusing to receive parol evidence as to the freehold qualifications of the voters, the majority of George Loyall would have been greatly increased.

On March 8,[1] after lengthy debate, a motion was made that "the said report be recommitted to the Committee of Elections, with instructions to report to the House the names of the voters which they find illegal, with a summary of the evidence upon which they found their decision."

This motion was removed from before the House by a motion that the main question be put. This motion for the previous question was agreed to without division.

Then the question was taken on the resolution reported from the committee:

Resolved, That George Loyall is entitled to a seat in the Twenty-first Congress of the United States as a Representative from the district in Virginia composed of the counties of Norfolk, etc.

And the resolution was agreed to—yeas 97, nays 84.

On March 9 Mr. Loyall took the oath.

It will be observed that no resolution specifically declaring Thomas Newton, the returned Member, not entitled to the seat was thought necessary. Mr. Newton had occupied the seat since the meeting of Congress.

781. The Virginia election case of Draper v. Johnson in the Twenty-second Congress.

Where payment of a tax is a qualification of the voter the tax may be paid by another than the voter.

A vote being given viva voce at an election for Congressman, the voter may not afterwards change it or vote for additional officers.

An election is not vitiated by failure to observe a directory law that the ballots shall be returned within a given time.

On April 13, 1832,[2] the Committee on Elections, through Mr. John A. Collier,

[1] Journal, pp. 386–388.

[2] First session Twenty-second Congress, Contested Elections in Congress, from 1789 to 1834, p. 702; House Report No. 444; House Journal, pp. 586, 807.

of New York, reported in the case of Draper *v.* Johnson, from Virginia. The contestant alleged that the election had not been conducted according to certain specified laws of Virginia, and that by reasons of these departures from the law he was deprived of the election to which he was entitled by receiving the greater number of votes given by voters legally qualified. The committee in their consideration of the case adopted certain principles of action which seem to have been approved by the whole committee.

The test principles laid down by the committee related in large part to the construction of the peculiar law of Virginia relating to the freehold qualifications of the voter. Some, however, of these principles are of less ephemeral interest, as the following:

That where a revenue tax is duly assessed, and the sheriff has paid the tax himself, and has not returned the party delinquent, as he has the right to do if he is insolvent, or the sheriff is not able to collect the tax, that this is to be deemed a payment by the party, so as to entitle him to a vote.

That where a voter is first polled, and his vote recorded for one candidate (the voting being viva voce), he is not at liberty afterwards to change it and have his vote transferred to another candidate; nor, if he first votes for the State officers only, has a right to come forward afterwards to vote for a Representative in Congress.

That the neglect to return the votes to the clerk's office within the time required after the canvass, the provisions being merely directory, will not vitiate the election, it appearing that the polls were afterwards returned and filed.

782. The case of Draper v. Johnson, continued.

The neglect of the officer conducting the poll to take the required oath is ground for rejecting the poll.

An election officer being presumed to do his duty, is presumed to have taken a required oath, and the burden of proving otherwise in on the objecting party.

Failure to file a required certificate that an election officer took the oath is sufficient to throw the burden of proof on the party claiming the votes received by the officer.

The law requiring two officers to officiate at a poll, votes taken by one officer acting in the capacity of the two required, were rejected.

An election officer having acted colore officii, without objection from any claimant, the Elections Committee declined to inquire if he had been appointed properly.

Early instance wherein the Elections Committee heard arguments of the parties on the evidence.

The committee also laid down additional test principles, as follows:

That the neglect of the sheriff or other officer conducting the election, to take the oath required by law, vitiates the poll for the particular precinct or county, and the whole votes of such precinct or county are to be rejected.

That the legal presumption is, that the oath required has been taken, every officer being presumed to have done his duty, and that the onus is thrown upon the party taking the objection to show the neglect or omission; but as the law of Virginia requires that the oath shall be returned and filed in the clerk's office, a certificate from the clerk that no such vote is filed will be sufficient prima facie (notice of the objection being previously served upon the opposite party) to throw the burden of proof on the party claiming the vote.

That the sheriff, or other officer conducting the election, and particularly at the court-house, where no other superintendents are associated with him, must appoint one or more "writers" to take the polls; and that the sheriff can not act solely, and in the double capacity of superintendent and clerk; and that the votes recorded by him, without the presence or aid of such clerk or writer, are to be rejected.

That the superintendent of a separate election, having been appointed by a court or other tribunal having the general appointing power for that purpose, which superintendents act as such, colore officii, no other person appearing or acting as conflicting claimants for the office, the committee will not inquire whether they were appointed at the particular term of the court contemplated by the act, or whether there was a "vacancy" within the meaning of the law.

783. The case of Draper v. Johnson, continued.

Votes cast at an election adjourned beyond the times permitted by law were rejected.

A vote received by election officers is prima facie good, and the burden of proof should be on the party objecting thereto.

The House does not permit an agreement of parties that votes are inadmissible to preclude examination.

An investigation showing for sitting Member a majority, the House declined to vacate the seat because certain irregularities (not frauds) suggested that further inquiry might change the result.

Instance in 1832 wherein a minority dissent was voiced in the report of the majority and not in separate "views."

An early instance wherein the House overruled the report of the majority of the Elections Committee.

The committee also decided that where the law of Virginia permitted the poll to be continued three days, that a continuance during the fourth day was not justified by the terms of the law and rejected the votes cast on the said fourth day, although it does not appear from the report that the votes given on the fourth day were otherwise than legal.

The committee note also in their report that they not only examined the documentary testimony produced, but heard the parties, who personally appeared before the committee.

A correction of the returns in accordance with the principles laid down by the committee would give to the sitting Member, Mr. Johnston, a majority of 123 votes.

But the committee found a further complication, set forth as follows:

As to the qualifications of the voters, the parties, in the outset, assumed a principle by which they have been governed throughout, different from what would have been adopted by the committee, and which has occasioned great trouble and delay. It was assumed that if a vote was objected to upon the ground that it was not by a person duly qualified, the party claiming the vote must take the burden of proving, affirmatively, that the voter possessed the required qualifications. This erroneous principle, as the committee deem it to be (for they would have taken a vote received by the board of inspectors as prima facie good), might and would have been reversed and corrected, were it not that the parties, acting upon this basis, proceeded to stipulate, in writing, that the votes thus objected to, and not, therefore, proved to be good, were to be deemed and considered bad, reserving, however, in the counties of Wythe and Grayson, the right to the party claiming the vote to prove it to be given by a person duly qualified; and in the other counties in the district * * * the written stipulation reserved no right to prove the votes to be good; but the specified votes were admitted, unconditionally, to be bad. The committee, however, were of opinion that, although there was no express reservation in the other coun-

ties, "yet, if affirmative and satisfactory proof should be offered, showing that the votes objected to were, in point of fact, given by persons duly qualified to vote, that the parties would have no right to stipulate that such votes should be disregarded; and that the stipulations would only be received as prima facie evidence of the want of the necessary qualifications of the voters."

Therefore the committee gave additional time to take testimony; but the new testimony did not cover all the votes, and the report says:

It will be perceived that from the erroneous principle assumed by the parties in the outset, disranchising by stipulation upward of 600 voters in a closely contested, election, many of whom are now proved to be duly qualified, and a majority of whom may have been, and by reason of the technical objections by which 185 votes have been rejected, exclusive of the votes polled on the fourth day in Washington County, giving the seat to either of the candidates might be doing injustice to the electors of the district, for it is impossible to determine which of the candidates did, in fact, receive a majority of the legal votes.

A majority of the committee have therefore come to the conclusion that it would be doing better justice to the parties, and to the electors of the district, to give them another opportunity of expressing their opinions upon the subject by a new election.

A minority of the committee,[1] while they are free to confess that, under the peculiar circumstances of this case, they would not only be reconciled to, but better satisfied with, such a result, if they could have felt themselves at liberty to unite in it, are nevertheless of opinion that the sitting Member, having received a majority of the legal votes, upon the principles assumed, is entitled to the seat, and are therefore constrained to dissent from the resolution proposed by the majority.

The resolution submitted by the majority was as follows:

Resolved, That the seat of Charles C. Johnson, the sitting Member from, etc. * * * be vacated, for irregularities in the election, and that the Speaker of the House transmit to the executive of Virginia a copy of this resolution, to the end that a new election may be ordered.

On May 26, 1832, when the resolution was considered in the House, and by a vote of 85 to 35,[2] all after the word resolved was stricken out, and the following was inserted: "That Charles C. Johnson, the sitting Member, is entitled to his seat." The amended resolution being agreed to, the majority of the committee were overruled, and the title of sitting Member was confirmed.

784. The North Carolina election case of Newland v. Graham in the Twenty-fourth Congress.

The State law preventing voters from testifying as to the ballots cast by them, the Elections Committee did not admit declarations as next best evidence.

A question as to the correction of the mistake when ballots for Congressmen are deposited in the wrong ballot box.

On February 24, 1836,[3] the Committee on Elections reported in the case of Newland *v.* Graham, from North Carolina. In this case the sitting Member was returned by a majority of seven votes, and the contest was based on the charge that illegal and unqualified votes had been given for the sitting Member, and that legal and qualified votes offered for the contestant had been rejected.

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[1] It is to be observed that the minority dissent is voiced in the report, and not presented separately as "minority views."

[2] The Journal does not show any division. The figures of the vote are given on p. 714 of Contested Elections (Clarke).

[3] First session Twenty-fourth Congress, Contested Elections (1 Bartlett), p. 5; Contested Elections (Rowell), p. 105; House Report No. 378.

In the first place the committee declined to accept as evidence declarations not made under oath of certain persons, alleged to be disqualified for voting, who declared after the election that they had voted for the sitting Member. The election was by ballot, and the State law provided that voters should not be compelled to give evidence for whom they voted. Hence the contestant urged that the declarations were the best evidence obtainable by him. The committee refused leave to admit the declarations.

The committee then proceeded to consideration of bad or illegal votes proven by other evidence than the declaration of voters. In this rectification of the vote the committee reversed the action of the election judges at Asheville, who struck from the poll three votes allowed by the judges at Henderson. The law of the State gave the judges at one place of election no such power to alter the return of judges at another place. The committee also passed upon certain votes legally offered at the election and illegally refused.

The result of the examination by the committee reversed the majority, and showed the election of the contestant.

The committee furthermore found a condition which they did not attempt to pass on. There were used separate ballot boxes, and in some cases ballots intended for the Congressional box were put into the legislative box, and vice versa. The judges, who seem generally to have received the ballots from the voters and put them in the boxes, corrected these errors. The committee did not ascertain the number of such corrections, and left the question to the House, saying:

> The committee found, on reference to the case of Washburn and Ripley, that the House had refused to interfere with a decision of the judges of election in that case, who declined correcting the mistakes made in that election by depositing the ballots in the wrong boxes. The judges of this election in Maine, it seems from this case, did not consider it to be in their power to correct such a mistake. They may have considered that they had no means of ascertaining whether it was a mistake or not. It appears, from that case, that the ballots were put into the boxes by the voters themselves, and it would seem, from several of the depositions in this case, that the ballots were usually handed to one of the judges or inspectors of the election, and by him deposited in the ballot box, as the law of North Carolina requires. In this case, then, the mistake having been made by one of the judges, and not by the voter, who had done' everything in his power toward the fair exercise of his privilege, the judges have considered it their duty to correct their own mistakes and give the voter his vote; and as they considered that they had the means of fairly correcting the mistake, they did so openly, and without objection of the friends of either candidate. Under such circumstances the committee leave it to the House to say whether their proceedings should not be respected.

The minority views called attention to the fact that after the correction by the judges the number of votes in the Congressional box exceeded the names on the poll list by five, and held that, irrespective of precedent, the five votes should be deducted from contestant.

785. The case of Newland v. Graham, continued.

Discussion as to the sufficiency of a notice of contest which did not give particular specifications.

Discussion as to the admissibility of testimony taken when one of the parties considered himself unable to attend.

A question as to whether the duties of sitting Member to the House excuse him for neglecting to attend on taking of testimony in an election case.

Without very strong reasons showing the necessity, the Elections Committee does not extend the time of taking testimony.

Under the old practice of the House testimony in election cases was taken according to State law.

The proceedings in taking testimony were conducted in accordance with the law of North Carolina, but the sitting Member having objected to the reception of the depositions, the committee decided that they had been taken conformably to the laws of North Carolina on the subject, and the usage being well established to allow depositions to be read which had been taken and sworn to according to the laws of the State, and it appearing reasonable that depositions thus taken on similar notices from both parties, and in the presence (with one exception) of both parties or their agents, decided that they were sufficient and should be received.

The minority views, presented by Mr. Nathaniel H. Claiborne, of Virginia, and signed by three other members of the committee (the report itself was presented by Mr. Linn Boyd, of Kentucky, and signed by four other members of the committee) went into this subject rather more fully. It seems that the sitting Member had at the outset objected to the reception of the depositions for the reason that the notices to take them, served on him, did not state the subject-matter about which the witnesses were to be examined, nor the names or residence either of the witnesses or of the persons whose votes were to be impeached. And for the further reason that a sufficient time was not allowed him to attend in person at the several places where depositions were to be taken.

In reply to this Mr. Boyd, chairman of the committee, said in debate[1] that the majority of the committee had decided in favor of the sufficiency of the notice. It was not so specific as the law of Virginia required in such cases, but was as specific as had been required by the practice of the committee. These were points the decision of which would affect the competency of all the testimony having an injurious bearing on the interests of the sitting Member. If decided in his favor it would obviate the necessity of any farther action on the subject. The minority further say that the committee, without deciding as to this objection, "provisionally adopted the rules of evidence which obtain in courts of justice. Subjected to these tests, much the greater portion of the depositions were rejected as illegal, as coming under the denomination of hearsay testimony." * * *As to the testimony taken in one instance, "the sitting Member was not present either in person or by counsel, or, in other words, that the depositions are ex parte. The sitting Member acknowledges that notice was served on him, but he alleges that a moral obligation, growing out of the relations in which he stood to his constituents, called him to Washington * * * and that a friend on whom he relied to act * * * for him was unavoidably absent. * * * The consequence of the nonattendance of his agent was that no cross-examination was had." The minority contend that as it was impossible for the sitting Member to be both in Washington and at the place of taking evidence, and as the option of attending in person or by attorney was virtually denied him, there was no just cause to impute laches to the sitting Member, and therefore the depositions in question should be rejected. In support of this view they cite the case of William Allen

[1] Globe, p. 231.

in the Twenty-third Congress. The minority recommend that if the House do not concur in this view further time should be permitted the sitting Member to take testimony.

The House debated at length the question whether or not the sitting Member could reasonably have been expected to be in attendance in person or by attorney at this place of taking testimony.[1]

The sitting Member then asked for a longer time to collect evidence. The committee decided that without very strong reasons to show the necessity of further proof (which the committee did not see in this case) they considered that the right of contesting a seat in Congress would be useless and nugatory, if such postponements and protracted appointments for taking additional evidence after the meeting of Congress should be allowed when the parties had already had the same time, and as it appeared a sufficient time to take testimony. The committee further say that "they could find no precedent in which an application of a similar kind, even if made at an earlier period, had been granted, but several in which, notwithstanding the existence of more favorable circumstances, such applications had been rejected, both by committees of election and by the House."

786. The case of Newland v. Graham, continued.

Evidence taken after the Committee on Elections had reported was not formally considered by the House in deciding the contest.

The committee having reported a conclusion in an election case, the House declined to pass judgment on the propositions leading to the conclusion.

The sitting Member, after this decision of the committee, went to North Carolina and took additional testimony. The petitioner, as appears from the debates, declined to appear and cross-examine. The depositions so taken were presented to the House after the report of the committee had been made.

The case coming up for debate in the House, a motion was made by the sitting Member on March 24[2] that these depositions which were on the Speaker's table be taken into consideration by the House in considering the report. Much of the debate in the case was on this motion. Mr. Henry A. Wise, of Virginia, contended that the practice of law and equity courts showed that this testimony should be considered. On the other hand, it was pointed out that it was unprecedented to consider testimony taken after the case was made up. The petitioner stated that he had declined to cross-examine during the taking of this testimony, believing the procedure to be unwarranted. Mr. Levi Lincoln, of Massachusetts, arguing in favor of the motion to consider the testimony, held that an election case was constitutionally a proceeding before the House, and that the House and not the committee were the triers.

The motion to consider the evidence on the table was made as an amendment to the resolutions reported by the committee, and on March 26 the sitting Member withdrew it.[3] But immediately Mr. Abraham Rencher offered the same proposition in connection with other propositions relating to details of evidence. This proposi-

[1] Globe, pp. 231, 240, etc.

[2] Globe, pp. 258, 259, 262.

[3] Journal, p. 566.

tion of Mr. Rencher was, after further consideration, set aside by the ordering of the previous question on the resolutions of the committee.[1]

The committee reported two resolutions:

Resolved, That James Graham is not entitled to a seat in this House.
Resolved, That David Newland is entitled to a seat in this House.

The report was the subject of long debate on questions relating to the appearance of sitting Member by counsel and a proposition to consider testimony presented to the House after the report was made; and then, on March 26,[2] Mr. Abraham Rencher, of North Carolina, moved to substitute for the resolutions reported from the committee a series of resolutions expressing the opinion of the House as to the various questions involved in the case, leaving the final result to be determined by the result of the decisions on the minor questions.

It was at once objected[3] that for the House to attempt to pass on these details would be to experience the perplexities caused by a similar procedure in the case of Moore v. Letcher.

On March 29[4] the previous question was ordered on the resolutions reported by the committee, Mr. Rencher's proposition being thereby set aside according to the practice at that time. The previous question was ordered by a vote of yeas 111, nays 88.

Then the resolution declaring Mr. Graham not entitled to a seat was agreed to—yeas 114, nays 87.

The resolution declaring David Newland entitled to a seat was disagreed to—yeas 99, nays 100.

Thereupon the following resolution was agreed to:

Resolved, That the election held in North Carolina in last August, for a Representative of the Twelfth Congressional district of that State in the House of Representatives of the United States, be set aside; and the seat of such Representative is hereby declared vacant; and that the Speaker of this House inform the governor of North Carolina of the fact.

In the course of the debate on this case the charge was made that party considerations were influencing the decision, as it was charged that they had in the case of Moore and Letcher.[5]

787. The Senate election cases of Smith, Winthrop, Phelps, and Cass. The question as to when the term of service of a Senator appointed by a State executive to fill a vacancy ceases.

Samuel Smith was Senator from Maryland from March 4, 1803, and on the expiration of his first term, viz, March 3, 1809, the legislature of Maryland not having elected his successor, and not then being in session, he was appointed by the governor on March 4 to fill the vacancy until the next meeting of the legislature, which would take place on the 5th of June next. Thereupon Mr. Smith addressed a letter to the Senate, setting forth these facts, and submitting to its determination the question whether the appointment would or would not cease on the first day of the meeting of the legislature. It was determined that he was entitled to hold his

[1] Journal, p. 595.
[2] Journal, p. 566.
[3] Globe, p. 263.
[4] Journal, pp. 595–598.
[5] Globe, p. 262.

seat in the Senate during the session of the legislature, unless the legislature should fill such vacancy by the appointment of a Senator, and the Senate be officially informed thereof. Under these credentials Air. Smith held his seat during the special session of the Senate March 4–7, 1809, and during the first session of the Eleventh Congress (May 22 to June 28, 1809). On the 16th of November following he was elected by the legislature, and on December 4, in the next session of Congress, he produced his credentials of election and the oath was administered.[1]

788. Robert C. Winthrop was appointed Senator from Massachusetts July 27, 1850, to fill a vacancy happening in the Senate by the resignation of Daniel Webster. February 1, 1851, Robert Rantoul was elected by the legislature to fill the unexpired term. February 4, Mr. Rantoul not having appeared to take the seat, Mr. Winthrop offered a resolution, which was agreed to, "that the Committee on the Judiciary inquire and report to the Senate, as early as practicable, at what period the term of service of a Senator appointed by the executive of a State during the recess of the legislature thereof rightfully expires." The committee reported that a person so appointed had a right to the seat until the legislature, at its next meeting, should elect a person to a the unexpired term, and the person elected should accept, and his acceptance appear to the Senate; that presentation of credentials implied acceptance; that these views were sustained by precedents. The report was debated, but no action taken, the whole subject being laid on the table. Mr. Winthrop vacated the seat February 7, 1851, when Mr. Rantoul's credentials were presented.[2]

789. On May 29, 1848,[3] Mr. Lewis Cass resigned his seat as a Senator from Michigan and on June 20, 1848, Mr. Thomas Fitzgerald, appointed by the governor of Michigan to fill the vacancy, appeared with his credentials and took his seat. The Michigan Manual[4] shows that Lewis Cass was elected Senator from Michigan on January 20, 1849; but Mr. Fitzgerald continued to serve until March 3, 1849, the last day of the Congress, as is shown by the fact that on that date he presented the credentials of Mr. Cass, who thereupon took the oath and his seat.[5]

790. Samuel S. Phelps,[6] Senator from Vermont, was appointed by the governor of Vermont January 17, 1853, during the recess of the legislature, to fill a vacancy in the Senate happening by the death of William Upham. His credentials were presented and he took his seat January 19. The legislature met in October and adjourned in December without electing a Senator to fill the unexpired term. Aft. Phelps had held the seat during the remainder of the second session of the Thirty-second Congress, ending March 3, and during the special session of the Senate March 4 to April 11. December 29 he again attended. January 4, 1854, the Senate resolved that the Committee on the Judiciary inquire whether he was entitled to retain his seat. January 16 the committee reported the resolution, "that the Hon. Samuel S. Phelps is entitled to his seat in the Senate of the United States." It was

[1] First session Eleventh Congress, Annals, pp. 15–25.

[2] Second session Thirty-first Congress, Globe, pp. 425, 437, 459, 477, 478; Senate Report No. 269.

[3] First session Thirtieth Congress, Globe, p. 792.

[4] 1905, p. 218.

[5] Second session Thirtieth Congress, Globe, p. 681.

[6] First session Thirty-third Congress, Senate Report No. 34.

accompanied by a minority report adverse to the right of Mr. Phelps to a seat. March 16 the resolution reported by the committee was rejected by a vote of 12 yeas to 26 nays, and it was "*Resolved,* That the Hon. Samuel S. Phelps is not entitled to retain his seat in the Senate of the United States." [1]

[1] The power of the executives of States to fill vacancies in the offices of United States Senators, and the status and terms of service of Senators thus appointed, has been passed on many times by the Senate. See cues of Kensey Johns, Uriah Tracy, Samuel Smith, Ambrose H. Sevier, Robert C. Winthrop, Samuel S. Phelps, Charles H. Bell, Henry W. Blair, Horace Chilton, Lee Mantle, Ansel C. Beckwith, John B. Allen, Henry W. Corbett, Andrew T. Wood, John A. Henderson, Matthew S. Quay, and Martin Maginnis. (Senate Election Cases, special session Fifty-eighth Congress, Senate Document No. 11, pp. 1, 3, 4, 7, 10, 16, 26, 36, 48, 52, 85, 89, 103, 105, 107.)

Chapter XXVI.

GENERAL ELECTION CASES, 1840 TO 1850.

1. The "Broad seal case" in the Twenty-sixth Congress. Sections 791–802.
2. Cases from the Twenty-sixth to the Thirty-first Congresses. Sections 803–820.[1]

791. The election case of the New Jersey Members in the Twenty-sixth Congress, called the "Broad seal case."

An instance wherein the House, at the time of organization, declined to give prima facie effect to credentials in due form, but impeached by documents relating to the fact of election.

The House having historic knowledge of an election contest, referred the subject to the committee with instructions, although neither party was petitioning.

The House having, of its own motion, decided to examine an election, a copy of the resolution was served on the parties.

On December 2, 1839, when the House met to organize for the Twenty-sixth Congress, a question arose as to the right to seats of five persons claiming seats from New Jersey by virtue of the certificate which each bore from the governor of the State. These credentials were in due form and under the seal of the State, whence arose the designation of the resulting proceedings as the "Broad seal case." In opposition to the claim of the duly certified claimants there appeared five other claimants, with documents tending to show their actual election. After a long struggle, in the course of which the five certified claimants were not permitted to vote for Speaker, the House was organized[2] and proceeded to business, five of the New Jersey seats remaining vacant, and there being ten claimants thereto.

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[1] Additional cases in this period, classified in different chapters, are:

Twenty-eighth Congress, cases of New Hampshire, Georgia, Mississippi, and Missouri Members. Section 309.

Twenty-ninth Congress, Newton, Arkansas. Sections 489, 572.

Twenty-ninth Congress, Baker and Yell. Sections 488, 572.

Thirtieth Congress, Sibley, Wisconsin. Section 404.

Thirty-first Congress, Gilbert and Wright, California. Section 520.

Thirty-first Congress, Babbitt, Deseret, Section 407.

Thirty-first Congress, Smith and Meservey, New Mexico. Section 405.

Thirty-first Congress, Perkins and Morrison, New Hampshire. Section 311.

[2] See section 103 of this work for a more detailed account of the proceedings in organization.

On January 7, 1840,[1] Mr. John Campbell, of South Carolina, who was chairman of the Committee on Elections, offered under suspension of the rules the following resolutions:

Resolved, That all papers or other testimony in possession of or within the control of this House in relation to the late election in New Jersey for Representatives in the Twenty-sixth Congress of the United States be referred to the Committee of Elections, with instructions to inquire and report who are entitled to occupy, as members of this House, the five contested seats from that State.

Resolved, That a copy of this resolution be served on [naming the ten claimants], all citizens of New Jersey, claiming to be Representatives from that State in this Congress; and that the service be made upon each gentleman personally or by leaving a copy at his usual residence.

The rules being suspended and the resolution admitted for consideration, Mr. John Bell, of Tennessee, proposed a substitute amendment as follows:

That Philemon Dickerson, Peter D. Vroom, William R. Cooper, Daniel B. Ryall, and Joseph Kille, who are in attendance claiming to be admitted to sit and vote in this House as Representatives from the State of New Jersey, are not, and can not be, legally and constitutionally, Members of this body, until the regular returns or certificates of election granted to five other duly qualified persons by the governor and council of said State, in the exercise of the authority vested in them by the laws of said State, passed in conformity with the Constitution of the United States, shall have been set aside, or adjudged void, upon due investigation had, in the form and manner prescribed by the usages of the House.

Resolved, That the House having decided that John B. Aycrigg, William Halsted, John P. B. Maxwell, Charles C. Stratton, and Thomas Jones Yorke, the persons having the regular and legal certificates of election, shall not be admitted to sit in this House and vote as other Members until it shall have been established, by sufficient proof, that there was no fraud, mistake of the law, or other error, made or committed by the governor and council of New Jersey in the returns or certificates of election granted as aforesaid; and said decision being contrary to the usual practice of the House in such cases, the Speaker be directed to notify the governor and council of New Jersey that the commissions issued by him, according to the laws of said State, to John B. Aycrigg, John P.B. Maxwell, William Halsted, Charles C. Stratton, and Thomas Jones Yorke have not been deemed sufficient by the House to authorize those holding the same to be sworn in as Members of this House; also the proceedings of the House in the premises, to the end that the people of said State may be duly informed of the causes which have for the present deprived them of the services of five of the Representatives to which they are entitled by the law and Constitution.

Resolved, That the returns and all other papers or testimony in possession of the House relating to the five vacant seats in the New Jersey delegation be referred to the Committee of Elections; that said committee proceed to examine the returns and all other testimony which may be submitted to them, according to the rules and orders of the House, and that said committee first decide and report to the House who are entitled to sit and vote as Members by the returns.

The resolution and proposed substitute were debated at length.[2] Mr. Campbell, in presenting his resolution[3] stated that it was usual for gentlemen contesting seats to bring their claims before the House by petition or memorial. But as they had waited from day to day without any movement from either of the parties he conceived it his duty as chairman of the Committee on Elections to bring the matter before the House.

Some objection was made to this view. Mr. Isaac Fletcher, of Vermont, thought no question could arise until the claimants should present themselves to be sworn, meaning evidently the five not having certificates, as those having certificates had demanded to be sworn and had been refused. Mr. John Quincy Adams, of

[1] First session Twenty-sixth Congress, Journal, pp. 185, 187; Globe, pp. 105, 106.

[2] Globe, pp. 105, 108, 109, 113, 118, 119.

[3] Globe, p. 105.

Massachusetts, thought there was no objection to the resolution, but conceived that first the Speaker should be directed to inform the executive of New Jersey that his commissions had been rejected. Mr. Millard Fillmore, of New York, raised a question as to whether or not there was any evidence in possession of the House. He did not think there could be any unless it had been referred to it. Furthermore, was the whole question to be referred, or only the question as to who in the first instance were to be regarded as sitting Members.

Mr. Campbell stated that the credentials were already in possession of the House, and that the Committee on Elections would expect to decide not only as to final right, but also as to who were entitled to the returns.

On January 13[1] the House, without division, ordered the previous question, thereby, according to the practice of that date, removing from before the House the amendment proposed by Mr. Bell. Thereupon the House—by a vote of yeas 110, nays 68—agreed to the resolutions proposed by Mr. Campbell.

792. The "Broad seal case," continued.

The Elections Committee, at the outset of an investigation, called on the claimants to state in writing the grounds of their respective claims.

Position of the claimants relating to prima facie right in the "Broad seal case."

The Committee on Elections met on January 14, 1840.[2] It was constituted as follows: Messrs. John Campbell, of South Carolina; Millard Fillmore, of New York; Francis E. Rives, of Virginia; William Medill, of Ohio; George W. Crabb, of Alabama; Aaron V. Brown, of Tennessee; Charles Fisher, of North Carolina; Truman Smith, of Connecticut, and John M. Botts, of Virginia.

This committee at the outset received from the Clerk of the House certain papers: (1) The credentials by the governor; (2) remonstrance of J. B. Aycrigg et al. (3) proceedings of the governor and privy council of New Jersey; (4) depositions; (5) returns, tabular statements, certificate of the secretary of state of New Jersey, etc.

It was ordered by the committee that the various claimants be notified of the organization of the committee, and at a later session it was.

Resolved, That the claimants to the vacant seats from New Jersey be requested to lay before the committee, in writing, the grounds of their respective claims to said seats, and that they be confined to a statement of such facts as they propose to prove by testimony before the committee, together with any legal points they may choose to submit.

In these statements of grounds the fundamental questions involved in the case were set forth.[3] The claimants who bore the regular credentials urged—

The undersigned, Representatives of the State of New Jersey in the Twenty-sixth Congress, protesting, in behalf of the State and themselves, against all acts of the other Members of the House of Representatives, as well since as before the election of a Speaker, in derogation of the rights of said State and of her Representatives, and disclaiming, now and ever, all acquiescence therein; and also respectfully protesting against so much of the resolution adopted by the Committee of Elections on the 15th instant as implies that the seats of the Representatives of New Jersey are vacant, and designates the undersigned as claimants-in compliance with the request in said resolution, lay before the committee the following as the grounds upon which they are Members of the House of Representatives, and claim to be recognized as such:

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[1] Journal, pp. 195, 196.

[2] House Report No. 506.

[3] Report No. 506, pp. 3, 6, 8, 9.

That the undersigned have received, and now produce, the commissions of the State of New Jersey, under the great seal and signed by the governor, constituting them Representatives of said State in the Twenty-sixth Congress; which commissions, thus duly authenticated in the manner prescribed by the laws of the State, are the only return and evidence of membership recognized by said laws.

That the said commissions were given, in conformity with said laws, to the persons whom the governor and privy council, after casting up the whole number of votes from the several counties, determined to have the greatest number of votes from the whole State.

That these commissions, by the Constitution of the United States, by the laws of New Jersey, by the uniform and unvarying practice of Congress since the origin of the Government, by the usage of all similar bodies, and by the very principles upon which representative governments are organized, are sufficient and conclusive evidence of right, until set aside by the House of Representatives in the exercise of its constitutional powers.

That they have never been set aside by any competent authority and have never yet been impeached by any legal evidence whatever.

The undersigned have received notice from Messrs. Philemon Dickerson, Peter D. Vroom, Daniel B. Ryall, William R. Cooper, and Joseph Kille that they intend to contest the right of the undersigned to seats as Members of the Twenty-sixth Congress; and are also informed (though without notice from them) that the ground of their claim is that the votes of the townships of Millville, in Cumberland, and of South Amboy, in Middlesex County, which were not legally returned, should be counted; and that these votes, added to those legally returned, would give them a majority. The undersigned, therefore, apprise the committee that, in any investigation respecting the election beyond the credentials by which they appear here as Members, they will claim the right to prove that they were duly elected Members of the House of Representatives by a majority of all the legal votes at said election, as well as by a majority of the votes legally returned.

The claimants who had not received credentials presented their claim in part as follows:

We claim those seats, and we now propose to prove that at the election holden in New Jersey on the 9th and 10th days of October, A.D. 1838, we received the greatest number of votes from the whole State. We, having the majority of votes, respectfully insist that, by the returns of the several election officers then made, we were entitled to the commissions from the governor, and we are now entitled to occupy the seats as Members of this House.

As there appears to be some difference of opinion as to the meaning of the terms elections and returns, as used in the Constitution of the United States, it is proper for us at this time to express our views upon the subject, in order that we may not be misunderstood.

We consider that the elections are made by the people, and the returns by their agents. The election ceases when the ballot box closes; the people have then done their duty and made their election. It then becomes the duty of their agents, appointed by law for that purpose, to make the returns; and the whole object of those returns is to communicate to this House the true result of such election. A contest of election involves an inquiry into the legality and regularity of the proceedings up to the time of the close of the ballot box; and a contest of the returns involves an inquiry into the legality and regularity of the proceedings of the different officers, in communicating the result of such election to this House. By the laws of New Jersey the election officers of each township make their returns to the county clerks of the several counties; and they make their lists, or returns, to the governor; and upon these he issues his commission.

For the purpose of establishing the fact that at the election held for Members of the Twenty-sixth Congress we received the greatest number of votes from the whole State, we offer the certificate of the secretary of state of the State of New Jersey, under his seal of office, showing that upon an examination of the returns in his office, including the returns of the townships of South Amboy, in Middlesex, and Millville, in Cumberland County, we had a majority of all the votes in the State; and as the foundation of that certificate we also offer a certified copy of the statement of votes upon which the governor and his council made their determination, embracing the votes of all the State except those of South Amboy and Millville; and also copies of the returns from those two townships, as filed in

the office of the secretary of state, and referred to by him in his general certificate; and as further evidence of the returns of those two townships we offer copies of the returns made by the officers of the elections of those townships to the clerks of the said counties, and by those clerks duly certified under their respective hands and seals of office.

These papers were laid before the Clerk of this House before the meeting of Congress; and are now offered as legal evidence of the fact that we received the greatest number of votes from the whole State.

* * * * * * *

In further support of our claim, and for the purpose of making its truth and justice more manifest, we offer to the committee, for their consideration, a sworn copy of the minutes of the proceedings of the governor and his privy council upon this case, by which it appears that the returns from South Amboy and Millville were laid before the council by the governor himself, and were referred to a committee, with the other returns from the State; that they were rejected because they were not transmitted by the clerks of the said counties of Cumberland and Middlesex, and for no other reason; and that they proceeded to count up the votes of the State, excluding those from the said townships of South Amboy and Millville, and determined that Mr. Aycrigg and his associates were duly elected Members of the Twenty-sixth Congress, although it appeared from the returns before them that the votes of said townships, if counted, would have changed the result.

* * * * * * *

By the laws of New Jersey the governor and his privy council shall "determine the six persons who have the greatest number of votes from the whole State;" "which six persons the governor shall forthwith commission under the great seal of the State." Such are the words of the act. The governor in his opinion to his privy council uses the following language: "What does the law direct the governor to lay before the privy council? The said lists, referring manifestly to the lists transmitted by the county clerks, which have been mentioned immediately before. What are the governor and privy council to do with the lists thus laid before them? They are to cast up the votes. When this is done, what are they to determine? Who are entitled, under all the circumstances, to seats in Congress? No; but they are to determine the six persons who have the greatest number of votes. No language can be plainer. Was it ever intended by our laws to make the governor and his privy council the arbiters of an election? There is no power conferred on us to examine a single witness, to send for persons or papers, or to take one step toward a judicial investigation. If we may go behind the return of the county clerks to those of the township officers, why should we stop there? We may by the same authority and with equal reason undertake to examine the proceedings of those township officers at the polls. Who has ever dreamed of the governor and privy council of New Jersey setting themselves up to decide on any of these matters? They always have been and, from the very words of the act, must be confined to the clerk's returns and to the duty of casting up the votes." Here we have the law and the governor's opinion on that law; from both of which it is most manifest that the duty of the governor and council was to determine, in the first place, the six persons who had the greatest number of votes from the whole State. It is upon that determination that the governor is authorized to issue his commission; and yet, upon looking into their own record, it appears that they did not determine the six persons who had the greatest number of votes from the whole State, but, in the teeth of the governor's opinion and of the law, they determined who, "under all the circumstances, were entitled to seats in Congress," and made their adjudication in the following words: "We do determine that John B. Aycrigg, John P. B. Maxwell, William Halsted, Joseph F. Randolph, Charles C. Stratton, and Thomas Jones Yorke are duly elected Members of the Twenty-sixth Congress of the United States," when they knew, and their own record shows, that those gentlemen had not the greatest number of votes and that they were not duly elected Members of the Twenty-sixth Congress of the United States. We may at this time with great propriety repeat the words of the governor: "Who ever dreamed of a governor and privy council in New Jersey setting themselves up to decide any of these matters?"

793. The "Broad seal case," continued.

In the "Broad seal case," the Elections Committee, while admitting the prima facie effect of regular credentials, at first decided to investigate only final right.

In the examination incident to the "Broad seal case" the Elections Committee held votes received by authorized officers acting legally as prima facie good.

Instance wherein testimony in an election case was, in the absence of law or rule, taken by direction of the committee.

The committee, after the statements of the parties had been filed, proceeded to determine the scope of the inquiry. The minority views, filed later and signed by Messrs. Fillmore, Botts, Crabb, and Smith, give a résumé [1] of these proceedings:

These statements were not completed and laid before the committee until the 23d day of January, and it was obvious from an examination of them and of the resolution of the House referring the matter that the committee must pursue one of two courses—that they must either make a preliminary report awarding the vacant seats to one set of claimants until the whole subject could be investigated and the final right determined, or proceed to a full and thorough investigation of the subject and decide upon the merits of the whole case at once.

Eight members of the committee out of nine were in favor of submitting a preliminary report by which the vacant seats would have been filled, but they differed as to the basis on which the report should be founded. We entertained the opinion that it should be based on the legal returns of the only authority recognized by the laws of New Jersey as authorized to grant the return, that being the highest prima facie evidence of an election that could be presented, and which it has ever been the practice of Congress and of all other legislative assemblies to treat as conclusive in the first instance; and accordingly one of our members submitted the following proposition:

"Resolved, That this committee will now proceed to ascertain and determine who have the returns, according to the Constitution of the United States and the laws of New Jersey, which will authorize them to occupy the contested seats from that State until the question of ultimate right can be determined."

Other gentlemen of the committee, differing with us in opinion, thought that the executive commissions should be entirely overlooked, and that it was the duty of the committee to proceed at once to ascertain which party had received a majority of all votes, good and bad, given at the polls, and were therefore entitled to the returns, and submitted amendments to that effect.

This view of the subject we deem utterly fallacious, but time will not permit us to enter into the argument. The consequences resulting from this novel doctrine are well illustrated by the scenes of disorder and confusion which resulted from its application at the present session—scenes in a high degree discreditable to the House and endangering the peace of the country and which must greatly impair the confidence of all right-thinking people in the perpetuity of our free institutions.

Upon a careful examination of the laws of New Jersey we ascertained that the governor and privy council were mere ministerial officers, charged with a certain specified duty, plainly set forth, viz, to ascertain and determine which six of the persons voted for received the greater number of votes according to the returns made by the clerks of the several counties of the State. That the individuals who were commissioned by the governor of New Jersey as the Representatives of that State had received the greatest number of votes thus returned according to law was a fact not disputed or denied.

Finding this difference of opinion, however, to exist in the committee as to the basis of a report, the mover of the original proposition modified the same with the view of reaching the sense of the committee, and merely proposed, in general terms, that a preliminary report should be made designating the individuals who should occupy the vacant seats until the question of ultimate right could be determined, thus manifesting a disposition to have the seats filled as the committee and the House might determine according to their sense of justice and propriety. But, from an apprehension, as we presume, that they could not succeed in the untenable ground they had taken, that the report should be made favorable to those who barely obtained a majority of all the votes, legal and illegal, given at the election, the modified resolution was likewise resisted and a substitute offered which proposed to inquire who were entitled to be returned as Members-elect, evidently on the ground of good and bad votes, for when it was proposed to insert an amendment which would make the case turn on the majority

[1] Report No. 506, p. 274.

of legal votes such amendment was strenuously resisted and carried only by the casting vote of the chairman. This resolution, as ultimately adopted, was as follows:

"Resolved, That this committee will now proceed to ascertain which five of the ten individuals claiming the five vacant seats from New Jersey received a majority of legal votes, and therefore are duly elected Members of the Twenty-sixth Congress from that State, according to the Constitution of the United States and the laws of New Jersey."

Thus it will be perceived that the committee came to an early determination to investigate the ballot boxes and ascertain who were entitled to the seats on the ground of having received a majority of legal votes, in which decision we acquiesced.

The minority then go on to describe how the committee made decisions that the certificates of the governor of New Jersey were prima facie evidence that the holders were entitled to the seats; but, after reconsidering a former action, finally agreed on the following:

Resolved, That the credentials of the governor of New Jersey are prima facie evidence that they who hold them are entitled to seats, but, being questioned on the ground that all the votes polled were not counted, this committee will now proceed to inquire and ascertain who of the ten claimants for the five contested seats received the greatest number of votes polled in conformity with the laws of New Jersey, at the late election for Members of Congress in that State.

Resolved, That all votes received by authorized officers acting in conformity with the laws are prima facie legal; but it being alleged and offered to be sustained by evidence that pluralities were obtained by means of illegal votes and frauds perpetrated on the ballot box, this committee will admit evidence as to the truth of these allegations, and inquire who of the claimants received the greatest number of legal votes, in conformity with the Constitution of the United States and the laws of New Jersey, and therefore are entitled to occupy, as Members of the Twenty-sixth Congress, the five contested seats from that State.

Resolved, That the adoption of the above resolutions does not preclude this committee from reporting the facts and testimony, with its opinion thereon, for the consideration of the House, at any stage of its proceedings that it may deem it expedient to do so.

Resolved, That a copy of the foregoing resolutions be communicated to each of the claimants to the vacant seats from New Jersey, and that they be informed that the committee has reconsidered and indefinitely postponed the resolutions furnished them on the 28th instant, and that this committee will hear them at their committee room on Saturday, the 1st of February, proximo, at 10 o'clock in the forenoon, on the subject of the measures which should be adopted to obtain the evidence applicable to the inquiry before the committee.

The parties accordingly met again in the committee room, and, after they were severally heard, the committee adopted the following resolution:

Resolved, That we will now take up the testimony which has been referred to this committee in the New Jersey case, and if, during the investigation of the subject, it shall be desired by either party to furnish additional testimony, that then the parties be allowed such reasonable time as may be determined by the committee, to take such additional testimony, in the manner prescribed by the laws of New Jersey relating to contested elections, unless the parties agree upon some other mode which may be sanctioned by the committee.

Thus, it will be perceived, that before a paper purporting to be testimony in this case was opened by the committee, it was resolved to decide upon its competency alone; and it was further resolved that time should be allowed either party requiring it, to take additional testimony, with a view, as we supposed, of ascertaining the whole truth touching the merits of the election.

The minority views describe briefly how the committee took up and decided on the admissibility of evidence, rejecting much as ex parte. Then, at the suggestion of the parties, the committee agreed to the following:

Whereas the people of the State of New Jersey are at present deprived of five-sixths of their representation in the House of Representatives, and it being highly expedient that a decision of the question between the several claimants to the five contested seats in the House aforesaid be made as speedily

as practicable consistent with due investigation and deliberation, and the contestors having alleged that, if the committee go into an investigation of the question of who received the plurality of legal votes they desire time also to take testimony; and J. B. Aycrigg, William Halsted, and others, having made application to the committee for time to take further evidence to maintain their right to seats in said House: Therefore

Resolved, That the chairman be requested to notify the several claimants aforesaid that this committee will not proceed to a final decision upon the question of ultimate right depending before them until the second Monday in April next, at which time the committee will expect the proofs to be closed and will not receive any testimony taken by either of the parties after that time, but nothing in this resolution shall prevent this committee at any time before that day from taking up and deciding said case, if the parties shall declare themselves ready with all their testimony.

The minority views then proceed:

In justice to the chairman of the committee it should be stated that he indicated to the committee an anxious wish that the time allowed for the completion of the proofs should be abbreviated, with a view to bring the case, upon its merits, before the House at as early a day as practicable; and three of the undersigned, in deference to the opinions and feelings of the chairman, cooperated with him in an effort to procure a reconsideration of the above resolution, which was defeated by the votes of the other members of the committee.

Nothing now remained to be done but to carry out the original plan as exhibited in the said resolutions, and accordingly the following resolution was offered by one of the undersigned and adopted by the committee:

"Resolved, That the parties to the contested election from the State of New Jersey be, and they are hereby, authorized to take the testimony of such witnesses as either of them may desire to examine, by depositions in conformity with the laws of that State in force at the time of taking any such testimony, on the subject of contested elections in similar cases: *Provided,* That the parties may, by any agreement under their hands, regulate the mode of giving notice and other matters of form at their discretion."

Soon after the adoption of these resolutions the commissioned Members left the city for the State of New Jersey to finish taking their evidence, where they still remain. We did not anticipate, nor had we an intimation from any quarter, that further proceedings in the case were contemplated, either in the committee or the House, until the expiration of the time allowed the parties to complete their evidence.

794. The "Broad seal case," continued.

Instance wherein the House ordered its committee to report on prima facie right before ascertaining final right.

Instance wherein the House, disregarding the certificate of the governor, ascertained prima facie right on the returns of the local officers.

The Elections Committee, in determining prima facie right, declined to open evidence relating to final right.

The Elections Committee declined to consider ex parte evidence in determining prima facie right.

Overruling the Speaker, the House, in 1840, decided to receive as a matter of privilege a report in an election case. (Footnote.)

At this point in the proceedings action by the House intervened. On February 14 [1] Mr. Campbell reported from the Committee on Elections this resolution:

Resolved, That the Committee of Elections be authorized to have such papers printed, under its direction, as may be thought necessary to facilitate its investigations into the subjects referred to its consideration.

[1] Journal of House, p. 409.

Mr. Cave Johnson, of Tennessee, proposed an amendment so that the resolution should read as follows:

Resolved, That the Committee of Elections be authorized to report to this House such papers and such other proceedings as they may desire to have printed by order of the House; and that they be instructed also to report forthwith which five of the ten individuals claiming seats from the State of New Jersey receiving the greatest number of [lawful] votes from the whole State for Representatives in Congress of the United States at the election of 1838 in said State, with all the evidence of that fact in their possession: *Provided,* That nothing herein contained shall be so construed as to prevent or delay the action of said committee in taking testimony and deciding the said case upon the merits of the election.

On February 28,[1] after long consideration, the word "[lawful]" was inserted on motion of Mr. Fillmore by a vote of yeas 97, nays 96, and then the resolution as amended was agreed to, yeas 103, nays 90.

These instructions, when received in the Committee on Elections, were a subject of disagreement. The majority of the committee in their report say:[2]

When the proposition to instruct was originally introduced as an amendment to the application with which the committee had come before the House, its intent was clear that a report should be immediately made of the names of those who had received the greatest number of votes at the late Congressional election in New Jersey. If anything more was wanting to explain the meaning of this proposition, it is to be found in the proviso which was added, and which clearly indicated that the action which the House was moved to demand did not contemplate an interference with the course adopted by the committee for the "taking of testimony and deciding the case upon the merits of the election."

Under these circumstances, if the proposition to strike out the word "forthwith" and insert the word "lawful" had fully succeeded there would still have remained that prominent clause of proviso, and it might well have been understood that, notwithstanding the omission of the word "forthwith," the House desired an immediate report, and that, notwithstanding the insertion of the word "lawful," the House contemplated that the report should be independent of testimony now in the process of being obtained for the purpose of deciding the election upon its merits.

Upon what basis, then, could such a report be constructed? Manifestly not upon the partial, inconclusive, and incompetent testimony as to the legality of votes now in the possession of the committee. The House can not have contemplated a report involving an investigation of the ballot boxes without allowing time or opportunity for that investigation to be thorough.

The majority finally conclude that the House meant that a report be made on "the prima facie case upon the returns of the local officers of the several polls."

The minority contended that the insertion of the word "lawful" had so modified the resolution that the committee would be justified in reporting as to the final right, the word "forthwith" meaning only that it should be done without unnecessary delay.

The minority also contended that before reporting certain testimony described in the following proposition should be examined:

That inasmuch as the depositions offered to this committee to prove that the poll of South Amboy was not held in conformity to law were rejected by this committee on account of a defect of notice in taking said depositions; and Mr. Smith, a member of this committee, has this morning presented a sealed package, directed. to the Speaker of the House of Representatives of the United States, to the care of the Hon. J. Campbell, chairman of the committee, purporting to be depositions taken in the case of the New Jersey election, under a resolution of this committee postponing the examination into the ultimate right of the claimants until the second Monday in April next; and which the said Mr. Smith asserts, on the authority of a letter received from Mr. Halsted, relates to the manner of conducting the election at South Amboy, and the validity of the poll there holden: Therefore,

[1] Journal, pp. 465, 469.

[2] Report, No. 506, p. 256.

Ordered, That the said sealed package be sent forthwith to the Speaker, to the end that it may be opened; and that this committee will proceed to examine said new depositions and to determine whether said poll was held in conformity with law.

But the committee declined by a vote of 5 to 2 to agree to the order.

The majority of the committee say that on the inconclusive testimony in their possession it would be unsatisfactory and unjust to look beyond the face of the poll, and continue:

It is proper, however, to state that should all the votes proved to be illegal by competent testimony be deducted from those who received the greatest number at the polls which appear to have been held in conformity with law the result would not affect the right of any candidate to a seat.

With this explanation, which they have considered due to the House and to themselves, the committee will now proceed to examine the allegations against the validity of certain township elections, as far as such an examination can be made upon the testimony in their possession.

Upon this branch of the case the claimants holding the governor's commissions claim—

First. That, apart from their not being received in time to be counted according to law, the votes of Millville should be set aside for the fraudulent and illegal conduct of the officers of elections, in proclaiming their intention to receive the votes of aliens, and in receiving a large number of such knowingly and in violation of the laws of the State.

Without inquiring into the effect of these charges, if they were substantiated by competent and satisfactory testimony, it is sufficient to state that they are unsupported by any testimony in the possession of the committee.

Second. They allege that, apart from all defects and irregularities in the return, the votes of South Amboy should be set aside, because one of the officers of election, duly chosen, was unlawfully prevented from acting, and another substituted in his place, who acted, and signed the list, etc.; and because the board, thus unlawfully constituted, received a large number of alien votes, contrary to law.

In support of these allegations numerous depositions have been produced, but without expressing an opinion whether, if satisfactorily proved, they would constitute sufficient evidence of fraud to set aside the votes of this township, it is only necessary to state that the evidence was taken ex parte, without sufficient notice, and has been rejected by the committee as incompetent to be considered in this case. (See Doc. E.)

Third. It is further claimed that the poll held at Saddle River, in Bergen County, should be set aside: Because at least eight votes given for them were fraudulently abstracted from the ballot box, and as many for their opponents fraudulently substituted;

Because, in making out the list of votes in said township, at least eight votes less than were given for them were counted in their favor, and at least as many were counted for their opponents more than they received; and,

Because the list of votes in said township bears upon its face evidence of mistake or fraud.

In support of these charges the depositions of numerous voters have been submitted; but being taken ex parte, and without sufficient notice, they have been rejected by the committee as incompetent testimony. (See Document F.)

It is also claimed that the polls held at the townships of Newton, Hardenton, and Vernon, in Sussex County, should be set aside, for reasons that will more fully appear by reference to the document marked "A," accompanying this report; but there is no competent evidence before the committee in support of these allegations.

The majority of the committee then proceeded to ascertain the result on the face of the polls, adding the votes of Millville and South Amboy to the returns on which the governor's certificates had been issued, and found:

Thus it appears that, prima facie, upon the evidence in the possession of the committee, Philemon Dickerson, Peter D. Vroom, Daniel B. Ryall, William R. Cooper, and Joseph Kille are the "five of the ten individuals claiming seats from the State of New Jersey" [who] "received the greatest number of lawful votes from the whole State, for Representatives in the Congress of the United States, at the election of 1838, in said State."

The minority of the committee say:

The majority, without considering the proofs admitted to be competent, the tendency of which was to show that unlawful votes had been polled for noncommissioned claimants, settled "forthwith" the principles upon which the report should be made, and peremptorily instructed the chairman to add the votes of Millville and South Amboy to those counted by the governor in privy council, thus resolving the duties of the committee into the solution of an arithmetical problem of the most simple character.

But there is an additional and most imposing fact which we desire to present for the consideration of the House before they decide this important question.

At the moment the committee had the report under consideration, and before any vote was taken thereon, the chairman had in possession a sealed package of depositions, addressed to the Speaker of the House, to the care of the chairman, and indorsed "depositions in the New Jersey case," forwarded by the commissioned claimants, and which the majority of the committee refused to send to the Speaker, to the end that the same might be opened and taken into consideration in the decision of the question then pending in committee. On examination we find that the said depositions establish and prove illegal votes cast for the noncommissioned claimants, which added to other unlawful votes already proven are sufficient to give one of the commissioned claimants [Mr. Stratton] his seat, on the ground of receiving a majority of lawful votes cast at the polls.

The following table will show how many illegal votes the commissioned Members must prove (if the votes of Millville and South Amboy be added) to establish their right over their opponents to the vacant seats, viz:

Mr. Stratton over Mr. Kille	31
Mr. Maxwell over Mr. Ryall	59
Mr. Halsted over Mr. Dickerson	117
Mr. York over Mr. Cooper	135
Mr. Aycrigg over Mr. Vroom	199

The proofs laid in the first instance before the committee would have established both Messrs. Stratton and Maxwell in their seats had the same been in all respects competent.

The injustice of refusing to examine the new depositions is the more apparent from the facts that they were taken as substitutes for other depositions on the same subject, which had been rejected under circumstances hereinbefore detailed. Their weight and effect are greatly enhanced by the fact that the contesting party was present and cross-examined the witnesses.

Therefore the minority recommended that the report be recommitted.

On March 5[1] Mr. Campbell submitted the report of the committee.[2] On March 10[3] the House, by a vote of yeas 111, nays 82, agreed to a resolution declaring that the five claimants recommended by the majority of the Committee on Elections

are entitled to take their seats in the House of Representatives, as Members of the Twenty-sixth Congress; and that the Speaker of the House, on their presenting themselves, qualify them as such: *Provided,* That nothing herein contained shall prevent the investigation into said election from being continued in the manner heretofore authorized by a majority of the Committee on Elections on the application of the five claimants of said State.

At various times thereafter the gentlemen thus seated appeared and took their seats.

795. The "Broad seal case," continued.

An early instance where partisan bias was charged against the Elections Committee.

Instance wherein, in the decision of an election case, each vote was treated as a distinct controversy.

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[1] House Journal, p. 520; Report, No. 506: Journal, p. 1284.

[2] Journal, pp. 569–578; Globe, p. 256.

[3] House Report No. 541, pp. 693, 733.

In the "Broad seal case" the Elections Committee delegated the arrangement of testimony to the parties.

Where poll lists were not preserved as a record parol proof was resorted to for showing that the vote was actually cast.

Hearsay evidence rejected in an inquiry as to whether votes were actually cast at the polls.

The Committee on Elections continued the investigation, and on July 16, 1840,[1] Mr. Campbell submitted the report of the majority of the committee on the question of final right, and at the same time Mr. Smith presented the minority views, signed by himself and Messrs. Fillmore, Botts, and Randall. The minority views especially show much partisan feeling, especially in the portion where it is declared that "the conclusions and judgment of the majority of the committee are wholly unworthy of the sanction of this House, and of the confidence of the country."[2] The investigation of the committee related to nearly 600 distinct cases of votes alleged either to have been cast unlawfully or to have been refused unlawfully. The most minute and tedious course was adopted, the case of each individual vote being treated as a distinct controversy, testimony being admitted and arguments made as to it. The question was then put upon a formal resolution, devised with reference to the prima facie legality of the proceeding at the polls and the burden of proof.

The report says, as to the sifting of evidence:

In the hope that the grounds of the controversy might be more strictly defined and narrowed, and that the testimony scattered through so many separate depositions, bearing on the same points, might be so arranged and collected as to facilitate the labors of the committee, while it should insure the ends of justice, the testimony in the possession of the committee was, on the 16th day of April, by the mutual arrangement of the parties, delivered into their hands, and the committee continued the investigation of other cases pending before them.

Although, from this arrangement, much greater delay ensued than the committee anticipated, the subsequent investigation proved that, without the assistance of the parties, the difficulties of the investigation would have been almost insurmountable; testimony in relation to the same vote being often found to have been taken not only from many different witnesses, but at various and distant times and places, to which no clew would else have been furnished.

Nevertheless, impatient of delay, the committee passed resolutions calling on the parties on the 13th and 20th of May, and, finally, on the 2d of June.

The committee having previously, under the power granted by the House, ordered the papers to be printed, the final investigation was commenced on the 3d of June, with a volume of evidence of nearly 700 printed pages.

The majority further say as to the rule adopted for arriving at a decision:

As applied to alleged unlawful votes, it presents two affirmative propositions: First, that the vote in question was not a lawful vote; and, second, that it be deducted from the votes of one or the other of the parties. The first proposition involved the inquiry whether the vote was actually cast at the polls; and, for the ascertainment of this point, the committee necessarily resorted to parole proof, as the best evidence which the nature of the case would admit of; the laws of New Jersey not requiring the poll lists to be preserved as a record of the actual voters. Mere hearsay declarations of the alleged voter, as to the fact of his having voted, have been uniformly rejected.

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[1] Mr. Campbell claimed the right to make this report as a matter of privilege. Mr. Speaker Hunter ruled against this contention; but on appeal the House overruled the decision, yeas 124, nays 39. So the report was made as a matter of privilege. (Journal, pp. 1281, 1284.)

[2] See also Section 785 for a similar charge.

796. The "Broad seal case," continued.

An admitted ballot is prima facie good, and the burden of proof is on the party objecting that the voter is an alien.

A vote being received as sound, the mere fact that the voter is alien born does not compel the party claiming it to prove naturalization.

Distinction between a controversy at the polls as to a vote and a controversy before the Elections Committee where the voter is not a party.

In a controversy as to votes objected to because the voter is an alien, the party attacking the qualification may be required to prove a negative.

The inquiry naturally divided itself into several branches:

1. The lawfulness of the votes, with respect to the qualifications of the persons casting them or claiming the right to cast them, involving inquiries as to—

(*a*) The nature of the proof as to aliens.

The majority say on this point:

A minority of the committee were of opinion that it was sufficient for the party objecting to the vote to prove that the voter was alien born; and that the burden of proof was thereby thrown upon the party for whom the vote had been rendered at the poll, to prove that the voter had been naturalized. And it was urged, with great earnestness, that, to adopt any other rule of evidence would be to depart from the plainest principles of law and reason—to impose upon the party objecting to a vote the proof of a negative; and a negative, too, which nothing short of searching of every court of record having common-law jurisdiction, a clerk, and seal, in the Union, could possibly establish.

Without minutely criticising the argument, it is deemed proper to inquire to what practical consequences the rule would lead, if it be fully admitted; for the proposition is to be taken, not as a mere abstract annunciation of the order of proof, but as practically applicable to the decision of cases of contested election in the House of Representatives.

The committee, as the organ of the House, have a positive affirmative proposition to adjudge and declare, before a sitting Member can be displaced, or a single vote received for him at the polls can be ejected from the ballot box. Before a Member is admitted to a seat in the House, something like the judgment of a court of competent jurisdiction has been pronounced upon the right of each voter whose vote has been received; and in order to overturn this judgment, it must be ascertained affirmatively that the judgment was erroneous. Prima facie, it is to be taken that none but the votes of qualified voters have been received by officers whose sworn duty it was to reject all others. This principle will be found to have been solemnly and unanimously declared by the committee as a basis of future action, soon after entering upon the investigation of this case. (See Report No. 506, p. 46.)

It is not sufficient that there should exist a doubt as to whether the vote is lawful or not; but conviction of its illegality should be reached, to the exclusion of all reasonable doubt, before the committee are authorized to deduct it from the party for whom it was received at the polls.

Will the mere naked fact that a voter was alien born, in the absence of all other proof, produce such conviction on any candid mind? Is it not already answered, or, rather, is not even a presumption from that fact alone precluded, by the judgment at the polls? All foreigners from birth are not disqualified from voting, but only a certain class. Are we to presume that the voter, whose vote has been received by the officers of the election, to be of the disqualified or the qualified class? The question is answered by the unanimous resolution of the committee already referred to, as well as by the reason and analogy of the case.

The committee can not believe that the House of Representatives would eject a Member from his seat upon the mere proof that every man of his constituents was alien born. It is not apprehended that, after an election has been regularly held, the House would even consider an investigation necessary upon a petition which alleged no other fact.

The report continues:

But it may be asked, Does not the presumption originally arising from the fact of foreign birth acquire additional strength, and may it not overturn the decision at the polls, when neither the voter

nor the party claiming the benefit of his vote before the committee adduces here any evidence of his naturalization? If the voter refuses to testify to his own disqualification (as he legally may) how can the party impeaching his vote proceed further in the proof of his allegation? Shall he be put to the proof of a negative? Is not the voter a party to the proceeding, and is not his neglect to rebut the proof of his birth by the evidence of his naturalization conclusive against him?

Undoubtedly if the voter be, to all intents and purposes, a party to this proceeding, claiming to exercise a right here, such would be the conclusion; and, unless he should make out his right affirmatively, he must fail to establish it. So it was at the election; and so it would be here, if the committee were holding a poll. But such is not the vocation of the committee or the House. If it were, the mere reference of the petition, the mere creation of a controversy, would annul all that has been done at the election. Then, indeed, things would be taken up and treated de novo; voters who had once maintained their right and exercised it at the polls would be required to come forward and submit themselves to another challenge, and a new affirmation of their franchise.

Again, if the voter is, to all intents and purposes, a party to the proceeding before the House or its committee, how is it that he is admitted to testify as a witness? Why are not all his declarations or admissions, wheresoever and howsoever made, in relation to the subject-matter of the controversy, the best evidence when proved by a competent witness? The distinction between the controversy at the polls and that before the committee is manifest. At the polls the voter is a party. When the polls are closed and an election is made the right of the party elected is complete. He is entitled to the returns; and when he is admitted to his seat, there is no known principle by which he can be ejected, except upon the affirmative proof of a defect in his title. Whoever seeks to oust him must accomplish it by proving a case. The difficulties in his path can form no possible reason why the committee should meet him halfway. The rule of reason requires that he should fully make out his case, even though it involve the proof of a negative; and such is also the rule of Parliament in analogous cases. (See 3d Douglas, 219.)

In Rogers's Law and Practice of Election Committees, page 116, it is said: "So in cases of petitions against candidates on the ground of want of sufficient qualification—although a negative is to be proved, it is the usage of Parliament that the party attacking the qualification is bound to disprove it."

It may be added that this rule has been applied by the committee, without controversy, to every other species of alleged disqualification. In the cases of aliens alone was a different rule contended for. Adhering to the rule, the committee have uniformly required something more than the mere affirmative proof of foreign birth; the disqualification not being foreign birth, but the actual state of alienage at the time of voting.

The great number of cases in which the disqualification has been fully made out, and the votes deducted from the one party or the other, sufficiently answer the objection which has been supposed to arise from the alleged impossibility of proving the negative. In none of these instances were the parties put to the necessity of searching every "court of record having common-law jurisdiction, and a clerk, and seal, in the Union." In some cases the voters themselves have declared, under oath, that they were never naturalized; in others, while asserting their naturalization, they have stated circumstances inconsistent with it. In short, an infinite variety of circumstances, which will be found in the evidence, joined with the fact of foreign birth, have completely proven the disqualification in a great number of cases.

On the other hand, the hardship of requiring the sitting Member, upon the mere proof of foreign birth, to produce before the committee evidence of the naturalization of hundreds or thousands of persons over whom he has no control, and who, by withholding that proof, may vacate his election, must readily be admitted. The proper season to demand such proof is at the polls. There the voter is the actor; he comes forward claiming to exercise a right, and there he should prove his qualification. Where the case assumes the form of a contested election between other parties, the disqualification must be made out by the party seeking to overthrow the right of the sitting Member thus acquired at the polls.

The minority in their views discuss this question thus:

To enable the House to appreciate the action of the committee on the cases to which we are about to refer, we would remark that it was conceded by all the Members that the reception of a vote by the election officers raised a presumption in favor of the legality of such vote. Early in our deliberations we adopted a resolution declaratory of this principle, the justice and propriety of which must be

apparent to all, but very soon after we commenced scrutinizing the votes we perceived that there was a radical difference of opinion in the committee touching the use which should be made of this presumption.

The undersigned are persuaded that the only effect which can be given to the reception of a vote at the polls is to throw the burden of proof on the party objecting to its legality. But the majority seemed disposed to carry the principle much further and to convert the presumption into a "swift witness" in favor of the opposite party. If a credible witness was adduced, who proved the fact of illegality by his positive oath, the majority would confront such witness with the presumption and would give it all the efficacy appertaining to testimony under oath; and thus, balancing the oath of the living witness against the presumption, they would come to the conclusion that nothing was proved. Nay, more. The majority, strange as it may seem, held that the presumption was so strong that it imposed on the party excepting to a vote the burden of proving a negative. When Messrs. Aycrigg and others objected to a vote on the ground of alienage, they were required to prove, not merely that the voter was an alien born, but that he had not been naturalized—a task which, in many cases, is wholly impracticable.

The undersigned can not omit noticing one curious circumstance, and that is, that this presumption seldom visited the committee room except when one of these parties was endeavoring to establish the illegality of votes.

If it appeared at all when the other party was making the same effort, the undersigned must say they were scarcely conscious of its presence.

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Any general rule, the effect of which, though administered with impartiality, should be to increase the embarrassment would obviously operate in their favor; and we ask what rule could be better adapted to the end suggested than that of giving an inordinate effect to the reception of a disputed vote at the polls? This idea was a prolific source of difficulty to the committee, and, what is of more consequence, of flagrant injustice to one of the parties. One of the many progeny of this suggestion was the legal absurdity that the party objecting on the ground of alienage must, under all circumstances, prove not only that the voter was an alien born, but, in addition, that he never had been naturalized. The committee knew at the outset that Messrs. Aycrigg and others expected to prove many alien votes to establish their right to the seats. This was set forth fully in the exposition of facts which they submitted to the committee at an early stage of the proceedings. The House can not fail to observe how admirably the rule of negative proof is fitted to embarrass one side of this controversy and to fortify the position of the other side, but, nevertheless, it is the duty of the party thus embarrassed to submit to the evil if the rule itself be founded in law. But we insist that it is not so founded. No precedent can be found of the application of such a rule to such a case. The party having the affirmative of the issue takes the burden of proof. A foreigner comes to the polls and votes. You can prove that he is such, but how can you prove that he has not been naturalized? Perhaps he may be willing to testify, and then you may prove the fact by his own oath. But suppose he is dead, or has removed away, or chooses to stand mute. He can not be put to the question, He can not be compelled to criminate himself. The rule imposes on the party objecting the necessity of searching all the records in the Union and of getting the testimony of every record keeper to prove the fact. This is manifestly impossible. No man in his senses can believe that any such rule exists. It is a principle of the law of evidence "that the affirmative of the issue must be proved; and he who makes an assertion is the person who is expected to support it before he calls on his opponent for an answer." And again: "The burden of proof lies on the person who has to support his case by proving a fact of which he is believed to be cognizant." (Vide Rogers's Law and Practice of Elections, p. 114–117.)

To suppose any member of the committee to be ignorant of a rule of law so old and universal and founded in so much good sense would be to justify his integrity and maintain his impartiality at the expense of his judgment and of every qualification required for the proper discharge of the duties of a committee on elections. We disclaim all design of charging the course adopted by the majority to corrupt intentions, but we very reluctant to embrace the other branch of the alternative; and conclude, therefore, that some strange prejudice must have taken possession of the mind and led the judgment captive at will.

But not only did the committee adopt a very extraordinary rule, but they applied it to the case in a very extraordinary manner, and they essentially aggravated the evil which that rule was adapted

to inflict, for they held votes to be lawful on account of the absence of proof of nonnaturalization in cases where—

(1) The election officers decided that aliens had a right to vote according to law and avowedly admitted them to vote on that ground.

(2) Where aliens were summoned before the magistrates who took the evidence and where they refused to attend, or, if they attended, stood mute as to their right.

(3) Where the two circumstances above indicated were combined, as they were in many of the cases submitted to the committee.

(4) Where aliens produced at the polls, as evidence of naturalization, a declaration of an intent to become naturalized at a future period, which we all know is a mere preliminary step to, but is not, naturalization itself.

In many cases the committee held votes to be lawful where all the above circumstances were united against the voter.

797. The "Broad seal case," continued.

Although the State law did not disqualify a person non compos mentis as a voter, the Elections Committee examined.

(*b*) As to nonresidents.

The report cites the law of New Jersey and states that in settling the various questions they endeavored "to apply the well-settled principles of law."

(*c*) As to persons non compos mentis.

The report says:

Persons non compos mentis are not expressly disqualified by the terms of the law; but the committee entertained the allegation in a single instance from the general reason and nature of the case. Questions of sanity, however, being of the most delicate and difficult which arise in the courts, the committee could not consent to disqualify a voter on this ground except upon the most distinct and indubitable proof, and none such being adduced, his vote was not disturbed.

798. The "Broad seal case," continued.

Where a State law made payment of tax evidence of property qualifications, the House did not count the ballot of a voter whose tax another paid.

(*d*) As to the qualifications of voters as taxpayers.

The fundamental law of New Jersey required the voter to be "worth $50 proclamation money, clear estate, within the colony." And by statute it was further provided that—

SEC. 5. Every person who shall, in other respects, be entitled to a vote, and who shall have paid a tax for the use of the county or the State, and whose name shall be enrolled on any duplicate list of the last State or county tax, shall be adjudged by the officers conducting the election to be worth $50, money aforesaid, clear estate.

SEC. 6. That no person shall hereafter be deemed, by the officers conducting the election, to be a qualified voter, who has not either paid a tax, or whose name is not enrolled on the duplicate, as aforesaid, except in case of persons removing from one township, wherein they have paid a tax, to another township in the same county, or of persons who have been inadvertently overlooked by the assessor; in either of which cases, such persons claiming a vote, and being in other respects qualified, shall be admitted; and in the case of persons who have been inadvertently overlooked by the assessor, as aforesaid, their names shall be immediately entered on the tax list.

The report continues:

Without attempting, in this place, to criticise minutely the respective provisions of these laws, it may be sufficient to state, that they seem at least to confine the right of suffrage, in all cases, to bona fide taxable citizens, in other respects duly qualified. When, therefore, it has appeared that previous to, and at the time of voting, the voter has received support from the town as a pauper, and has not paid a

tax, the committee have not considered him a "qualified voter in respect of estate." So, also, where a person of that class was brought to the polls, and a tax there paid for him by another, on condition that he should vote a certain ticket, the committee did not consider the former a bona fide taxpayer, and his vote was deducted.

The minority say:

The undersigned have felt much embarrassment in giving a construction to these sections, and they can not but feel much surprised that the good people of New Jersey should have suffered the invaluable right of suffrage to be involved in all the perplexity and doubt of absurd and contradictory phraseology; but, on full consideration, they are disposed to give these sections a construction conforming to what they understand to be the practice of the State; and to hold that, if a person has either paid a tax, or has had his name enrolled on any duplicate list of the last State or county tax, he is entitled to the elective franchise, as he is also in the excepted cases specified in the last section.

It is usual, in New Jersey, for a person whose name has not been enrolled, and who desires to exercise the elective franchise, to appear at the polls and to demand the enrollment of his name; which is always done, under the idea that it has been "inadvertently overlooked" by the assessor; and thus (by the payment of a trifling tax) the elective franchise is put within the reach of every citizen of New Jersey. But it would obviously be improper to enroll a pauper; it can not be supposed that the name of such a person was "inadvertently overlooked," and it would be absurd to call on a man to pay taxes who can not do so; and, if he could, to whom the money would be forthwith returned for his support. Hence, we deem it settled that paupers can not vote in New Jersey. This brief exposition of the laws of that State will enable us to contrast some of the cases under this head; and the House can judge whether the committee were any more successful in administering "equal and exact justice" to the parties in this than they were in the other branches of this inquiry.

799. The "Broad seal case," continued.

The voter not being compelled to testify for whom he voted, proof of general reputation as to political character and party preferences was accepted to determine the vote.

Votes improperly rejected were, in absence of direct testimony, counted on proof of the general political action of the voter.

2. The deduction of unlawful votes from the poll, and the determination as to votes improperly rejected.

The majority say:

It being satisfactorily ascertained that an unlawful vote was counted at that election, the next inquiry which arose was as to the party for whom it was cast at the polls.

The elections in New Jersey are by ballot; and it will readily be perceived that this inquiry was not without serious difficulties.

Although, in numerous instances, the voter, being examined as a witness, voluntarily disclosed the character of his vote, yet, in many cases, he either did not appear, or, appearing, chose to avail himself of his legal right to refuse an answer on that point. In such cases the proof of general reputation as to the political character of the voter, and as to the party to which he belonged at the time of the election, has been considered sufficiently demonstrative of the complexion of his vote. Where no such proof was adduced on either side, proof of the declarations of the voter has been received; the date and all the circumstances of such declarations being considered as connecting themselves with the questions of credibility and sufficiency. In every instance where the proof, under all the circumstances, was not sufficient to produce conviction, the vote has been left unappropriated.

The same principles have governed the committee in regard to the votes decided to have been improperly rejected at the polls.

The undersigned would observe, that, early in the investigation, a question arose as to the character of the proof which should be received and deemed sufficient to enable them to appropriate such of the votes as they might determine to have been unlawful. In New Jersey the vote by ballot obtains, as in most of the States of the Union. If an unlawful vote be cast, how are we to ascertain who had the

benefit of such vote? It is obvious that in many cases it will be impracticable to obtain positive proof. In some cases, the voter may be willing to appear and disclose the fact under oath; in other cases, it may be in the power of the party to produce a witness who can swear to the character of the vote given; but in many more, no evidence of that description can be obtained to ascertain the fact in controversy. It seems to the undersigned to be indispensable to receive secondary evidence to this point, such as the declaration of the voter, either at the election or soon after; and also proof of his political character, which, when well defined, will be a sufficient guide to the truth. But we ought to be very careful not to receive and act upon evidence of an equivocal character, which may have been created or manufactured for the occasions. In adopting these views, there was a good degree of unanimity in the committee; but the majority have been by no means consistent in carrying them out.

800. The "Broad seal case," continued.

The charge that an election officer was not legally chosen not being fully established, the committee declined to reject the poll.

Failure to transmit to a county clerk certificate of the choice of an election officer is not a reason for rejecting the poll.

3. As to the conduct, qualifications, and competency of election officers.

(*a*) The majority say:

It only remains to notice the objections made to the validity of the election at South Amboy, and the allegation of fraudulent practices by the officers of the election at Saddle River.

The objections to the election in those two townships will be considered in the order in which they are named.

For himself and associates, "Mr. Halsted objects to the election held in the township of South Amboy, in the county of Middlesex, because the said election was held by judges who were not chosen according to law.

"And because John B. Appelget, who had been duly chosen inspector of said election, according to law, to supply the place of Clarkson Brown, who was disqualified, was not permitted to act as inspector at said election in said township.

"And because James M. Warne acted as inspector of said election in said township, without having been duly elected inspector according to law.

"And because there was no certificate of the election of the said James M. Warne, inspector, signed by three reputable freeholders, transmitted to the clerk of the common pleas of the county of Middlesex within the time prescribed by law.

"And because the judge of the election in said township of South Amboy knowingly received illegal votes.

"And because the said judges of said election did not conduct the said election in said township according to law."

After having heard and considered the testimony in support of the above allegations, the committee unanimously resolved "that there did not appear any sufficient reason for setting aside the election in South Amboy."

In New Jersey the election is conducted in each township by a judge, and the assessor and collector of the township, who are ex officio inspectors of election; and the law prescribes that "if the judge, assessor, and collector, or either of them, shall not be present at the time and place of holding the election, or shall be disqualified to hold the same, then, at the hour of 10 o'clock, the people present entitled to vote shall proceed to choose a person or persons to serve in the place of him or them so absent or disqualified."

One inspector at South Amboy being disqualified, three persons were placed in nomination for the vacancy. As to whether or not James M. Warne, one of these, was elected substantially in conformity with law, there was a conflict of testimony. After weighing the evidence the majority conclude that the contestants failed to establish their allegations that the South Amboy election "was held by officers not chosen according to law."

The minority say as to this point:

In the township of South Amboy, a whig inspector was duly elected by the majority of the people present at the time prescribed bylaw, but was not permitted to act. The moderator of the town meeting, after such choice, took it upon himself to proclaim a new election; and he kept the same open until a sufficient number of his political friends were assembled to secure the election of the administration candidate. This of itself would seem to us to be sufficient to render the election, so far as this township is concerned, irregular and void.

(*b*) The majority further say:

The third allegation, to wit: "That there was no certificate of the election of James M. Warne, inspector, signed by three reputable freeholders, transmitted to the clerk of the common pleas of the county of Middlesex within the time prescribed by law," although proved, is believed by the committee to be entirely inadequate to affect the validity of an election legally held. Surely, it can not be that one of the dearest rights of Jerseymen—a right which, more than any other, distinguishes the citizen of a representative Government from the subject of a despot—is to be trampled in the dust, because, forsooth, there was no certificate of the election of James M. Warne, inspector, signed by three reputable freeholders, transmitted to the clerk of common pleas of the county of Middlesex within three days thereafter! Whatever pretext such an omission may have afforded to the clerk of the county of Middlesex for the perpetration of a daring outrage upon the rights of his fellow-citizens, in suppressing the votes polled at South Amboy, in the return transmitted by him to the governor, it can not affect the legality of the election. It was not necessary that a certificate of the election of the inspector should have been transmitted to the clerk of common pleas, either before or during the election; and the omission to do so afterwards, can not have a retrospective effect to defeat the will of the people, expressed in conformity with law. The disqualification of an officer, to affect the legality of an election, must evidently be coexistent with the election.

801. The "Broad seal case," continued.

An election being honestly conducted, the reception of illegal votes does not vitiate the poll.

No fraud being shown, a poll is not rejected because the ballot box does not contain as many votes as are proved by oath of voters.

(*c*) The majority further say:

The fourth and fifth allegations are, in substance, that the judges of the election knowingly received illegal votes, and did not conduct the election according to law.

Illegal votes were proved before the committee to have been received for both parties at South Amboy, of which the poll has been purged by the committee; but, so far as intention was concerned, it appears, by the evidence, that the election was fairly, honestly, and legally conducted; and the proof is insufficient to establish the fact that a single illegal vote was knowingly received.

(*d*) The majority further say:

Mr. Halsted and associates also claim to set aside the poll held at the township of Saddle River, in the county of Bergen, because eight votes, at least, given for them by persons legally entitled to vote, were fraudulently abstracted from the ballot box, and at least as many for their opponents substituted in their place; because, in making out the list of votes in said township, at least eight votes less than were actually given for them were counted in their favor, and at least as many were counted.for their opponents more than they actually received; and because the list of votes of said township shows upon its face evidence of mistake or fraud.

In support of these allegations the depositions of 31 voters are produced, each one of whom swears that he voted the Whig ticket; and, by the deposition of the clerk of the election, it appears that one other, who was not sworn in person, voted the same ticket—making, in all, 32 votes. (See testimony accompanying this report, from page 424 to 446, inclusive.)

They also show that the officers of the election at Saddle River returned but 24 votes for them, leaving 8 votes to be accounted for; and that 127 votes, in all, were returned, when it appears that there should have been but 126.

On the part of Messrs. Vroom and his associates it was contended that the election was fairly and legally conducted, and that the ballot box was so secured that its violation was impossible. They also offered explanations to cover nearly the whole discrepancy. The majority of the committee say that they—

are so well convinced, from the evidence, that the election was fairly and legally conducted, and that no fraud was perpetrated on the ballot box, that they have determined to take the return of the officers of election as the best evidence produced, and to sustain the legality of the Saddle River poll.

The minority say as to this poll:

It appears, from proof which we deem quite satisfactory, that 32 votes were deposited in the ballot box at Saddle River for the opposition candidates; the voters themselves swear to it in positive terms; and yet, from some cause, when the votes came to be counted off, the number appeared to be only 24. We do not intend to cast an imputation upon the inspectors of the election; they are, doubtless, respectable men; but the House can hardly fail to be impressed with the fact, that evidence is adduced as to the good character of the inspectors, but none at all as to that of the clerk; and as he had charge of the ballot box, he can, doubtless, explain the rule of reduction which seems to have operated so mysteriously in Saddle River Township.

802. The "Broad seal case," continued.

Discussion as to duties of returning officers with reference to technical requirements of law.

4. As to the conduct of certain returning officers.

The majority in their report say:

The committee do not think it necessary to comment upon the extraordinary transactions which occurred in New Jersey shortly after the closing of the polls, and from which, it is believed, all the difficulties of this case originated, further than to say that in suppressing the votes of Millville and South Amboy, the clerks of Middlesex and Cumberland were guilty of a gross violation of the elective franchise, calculated virtually to deprive the people of one of their dearest rights, and to keep from this House a knowledge of those facts by which alone it can judge of the election of its Members. The duties of those clerks, as returning officers, were strictly ministerial; and when, instead of making a faithful record of the people's will, as expressed at the polls, and transmitting those records to the governor, or person administering the laws of the State, they undertook to decide upon the legality of the polls, and to act in accordance with those decisions, they exercised an unauthorized power, which, for more than three months, silenced the voices of five out of the six Members to which New Jersey was entitled in the House of Representatives; and for which their conduct, whether proceeding from ignorance or design, must meet with the unqualified disapprobation of the honest and intelligent of every party.

The minority say:

Much censure has been cast upon the clerks of Cumberland and Middlesex, because the return of votes from the townships of Millville and South Amboy were not included in their general lists forwarded to the governor. With how little justice, the following facts will show. The Millville return was made to the clerk on the 13th of October, "between the hours of 10 and 11 in the afternoon;" and as the law of New Jersey is positive that the return shall be made to the clerk "before 5 o'clock of that day," and he is then, at 5 o'clock, to make his "general list," to be transmitted to the governor, of course he could include in that general list no returns except such as were received "before 5 o'clock." The clerk had no discretion; he proceeded according to law, and is in no way censurable; the blame, if any, belongs to the election officers.

The return from South Amboy was made by a judge and inspector, and by James M. Warn, representing, himself as an inspector; his name, however, as such, does not appear in the list of town officers, nor was there any certificate or other evidence of his election as inspector filed with the clerk, as the law requires. If he had been duly elected to supply a vacancy (which we insist he was not), the law requires the certificate of such election to be filed with the clerk within three days. None such was ever filed. The certificate was presented to the clerk ten days after the election, and after the general list had been

made out and sent to the governor. Of course, as the return was not made according to law, the clerk could not receive it; especially in a case like South Amboy, where the election of this very inspector was disputed as illegal and fraudulent, and where he and those who acted with him decided to receive alien votes, and actually did receive a number of such. The evidence adduced to sustain the charge of fraud against the clerk of Middlesex very clearly disproves the whole charge; and his conduct, like that of the clerk of Cumberland, was strictly in accordance with the law, and in nowise censurable, unless the refusal to violate the law, in order to receive an illegal return, including a number of alien and illegal votes, be censurable.

The majority of the committee, as a result of their application of the enunciated principles, recommended the following resolution:

Resolved, That Peter D. Vroom, Philemon Dickerson, William R. Cooper, Daniel B. Ryall, and Joseph Kille are entitled to occupy, as Members of the House of Representatives, the five contested seats from the State of New Jersey.

The minority admitted the election of Messrs. Vroom and Cooper, but contended that the contestants were elected to the remaining three seats.

On July 16,[1] under the operation of the previous question, the resolution proposed by the majority was agreed to, yeas 102, nays 22. Many members declined to vote, apparently with the intention of breaking a quorum.

803. The Pennsylvania election case of Ingersoll v. Naylor, in the Twenty-sixth Congress.

Two claimants appearing with conflicting credentials at the time of organization, the Members-elect examined and determined which should vote.

Instance wherein citizens of a district, by memorial, participated in an election contest.

Before the enactment of a law, the Elections Committee, having power to compel testimony, delegated the duty of taking depositions.

Before the enactment of the law, the Elections Committee directed testimony to be sealed and transmitted to its chairman.

When the House met for organization on December 2, 1839, and the clerk of the last House began the call of the roll of Members-elect, which at that time was made up in pursuance of usage and not in accordance with law, a question arose when the State of New Jersey was reached. This question caused a prolonged controversy, during which the assembled Members-elect chose Mr. John Quincy Adams, a Member-elect from Massachusetts, chairman. As the proceedings went on it appeared that there were participating in the proceedings Messrs. Charles Naylor and Charles J. Ingersoll, claimants from the same district in Pennsylvania. Each had what purported to be credentials, and on December 10 and 11,[2] a question came as to which of the two should be allowed to participate. After examination of the credentials and law of Pennsylvania the assemblage decided that Mr. Naylor should be permitted to vote and that Mr. Ingersoll should not vote.

On December 17,[3] when the House had finally elected a Speaker, the oath was administered to Mr. Naylor with the other Pennsylvania Members.

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[1] Journal, p. 1297.

[2] First session Twenty-sixth Congress, Journal, pp. 11–14, 20; Globe, pp. 38–40.

[3] Journal, p. 84.

On January 24, 1840,[1] Mr. George M. Keim, of Pennsylvania, presented the petition of Mr. Ingersoll setting forth that he was elected to Congress from the Third district of Pennsylvania; that Mr. Naylor was not elected, and praying an investigation. Mr. William S. Ramsay, of Pennsylvania, also presented a petition of citizens and electors of the said district complaining of fraud and illegality in the election of Charles Naylor, and praying for an investigation.

These petitions were referred to the Committee on Elections.

On February 24[2] the House, by resolution, authorized the Committee on Elections in this case "to send for persons and papers."

On February 26[3] the Elections Committee, in accordance with the usage at that time, and in the absence of any law prescribing the manner of conducting election contests, adopted a resolution authorizing the parties to take testimony "before Boys Newcomb and William Grennell, esqs., commissioners," or such persons as they might appoint, providing for notice between the parties, etc., and also containing the following further provisions:

And that, if any witness or witnesses shall refuse to attend, upon a subpoena for that purpose being served upon him or them, by order of the commissioners or commissioner, or, attending, shall refuse to testify, the name or names of such witness or witnesses shall be reported forthwith to this committee, by the commissioners or commissioner, for such further proceeding as this committee shall direct.

And that all testimony taken by virtue of this resolution shall be certified, sealed up, and transmitted by the commissioners or commissioner to the chairman of this committee on or before the 3d day of April next.

804. The case of Ingersoll v. Naylor, continued.

Hearsay evidence is rejected in considering an election contest.

No illegal vote being shown, the poll was not rejected because of presumptions created by a census and arithmetical calculations.

An election may not be impeached by comparison with the result at another election in the same constituency.

In the absence of fraud or injustice irregular action by election officers does not vitiate the poll.

On July 17,[4] Mr. Millard Fillmore, of New York, submitted the report of a majority of the committee, five of the nine Members concurring in it. Three members of the committee signed minority views, and one member of the committee did not act in the case and concurred neither in the report nor the views.

The majority reported a resolution confirming the title of Mr. Naylor to the seat, while the minority proposed that the seat be declared vacant.

Two questions were involved in the case.

1. Mr. Ingersoll alleged that in Spring Garden and in five wards of an incorporated district called the Northern Liberties there were frauds and irregularities, and that—

by a conspiracy among the election officers to carry the election by fraud many hundred names were illegally and fraudulently added to the registries of voters, being the names of persons having either no existence or no right to vote, whose votes or pretended votes were nevertheless counted and allowed to Mr. Naylor.

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[1] Journal, p. 228.

[2] Journal, p. 429.

[3] Report No. 588, p. 1.

[4] Journal, p. 1300; Globe, p. 537; Report No. 588, pp. 545, 551.

The majority say that a large amount of hearsay evidence was brought in to sustain this allegation, but the committee rejected it, saying that—

The rule upon which the committee reject all this hearsay evidence they conceive too well settled and too clear and just to require any argument.

Mr. Naylor's majority was 775. The majority say:

No attempt was made by direct evidence to purge the polls; nor has the petitioner shown, or attempted to show, that a single illegal vote was received by the officers of election, or a single fictitious one allowed to the sitting Member. Though the addition of a large number of names to the register in one of the wards in Spring Garden, by the officers whose duty it was to prepare it, was a suspicious circumstance, requiring careful scrutiny, yet, as the error, if any, was corrected before the election commenced, and as there is no proof of any illegal vote having been given in that ward at that election, the committee do not see how this fact can possibly be invoked to affect the result.

The attempted political census, had it been otherwise competent, was clearly too vague and uncertain to lay the foundation for any judicial decision; all the material facts in it came under the general denomination of heresay evidence, of the most loose and unsatisfactory kind; and besides when contrasted with the other authentic evidence it becomes utterly worthless.

The report also condemns "arithmetical calculations" founded on "uncertain and unsatisfactory bases" as unworthy of credit.

The report continues:

The petitioner also charges a number of small irregularities in conducting the election and counting the votes, consisting mainly in slight deviations from the strict requirements of the law. There is no proof that any injustice was done or fraud intended; and as there was manifestly a substantial compliance with the law the committee do not conceive that it could be for the advancement of substantial justice to entertain objections of this kind. Our election laws must necessarily be administered by men who are not familiar with the construction of statutes, and all that we have a right to expect are good faith in their acts and a substantial compliance with the requirements of the law.

The minority, taking the ground that the seat should be declared vacant because of the "imputed frauds and irregularities of the election of 1838," which had caused much excitement in the State of Pennsylvania, say:

At that election the majority returned for Mr. Naylor was 775 votes yet at the succeeding election of 1839 the majority against his party in the same district was about three times that number of votes, which extraordinary change is believed by the undersigned to be ascribable solely to an alteration of the law so as to prevent, in 1839, the frauds and irregularities which are supposed to have taken place in 1838.

The minority further contend that the irregularities on the part of the election officers were very great; that they permitted the count to be made and the returns to be drawn up by unauthorized persons, and that these irregularities were in pursuance of a conspiracy.

2. It was alleged that at Spring Garden the election officers were not sworn in order that they might carry the election of Mr. Naylor. It was alleged that a mock oath was taken, "either on a Philadelphia directory" or "The Narrative of the Sufferings of Some Shipwrecked Marines," to "do justice to their party this day." The majority of the committee, after an examination of the testimony, decided to give no credit to the charge.

The report was, when presented to the House, laid on the table.[1]

[1] Journal p. 1300.

On January 15, 1841,[1] after arguments by the contestant and sitting Member, the report of the majority of the committee was agreed to by the House, yeas 117, nays 85.

A proposition to secure certain evidence was proposed, but not admitted.

805. The Virginia election case of Smith v. Banks, in the Twenty-seventh Congress.

Instance wherein, pending decision on an election case, the sitting Member resigned for a new appeal to the people.

Instance wherein an election contest abated by resignation of sitting Member for a new appeal to the people.

Early instance wherein compensation was voted to a contestant.

On June 8, 1841,[2] Mr. Thomas W. Gilmer, of Virginia, presented the memorial of William Smith, claiming to be duly elected a Member of the House from the Thirteenth district of Virginia, instead of Ann Banks, who had been returned and was the sitting Member. This memorial was referred to the Committee on Elections. Thereafter at various times[3] during the session testimony relating to this contest was presented and referred to the committee.

It appears indirectly from the Journal that about September 4,[4] at the instance of the sitting Member, the decision of this case was postponed until the next session of Congress.

On December 8, 1841,[5] at the next session, Mr. Smith appeared with credentials showing that he had been "elected to supply the vacancy occasioned by the resignation of Linn Banks." Mr. Smith was seated without objection.

On August 31[6] Mr. Smith, in explaining a resolution to give to himself pay for the time he was a contestant, made a statement of the case, which was corroborated on the floor by the chairman of the Committee on Elections. Mr. Smith stated that at the first session he conducted his case before the Elections Committee until he overcame the sitting Member's majority. It was then, he said, upon the application of his competitor, and against his own earnest remonstrance, that the case was postponed. Then he and Mr. Banks agreed to refer the matter to the people. The people decided the case in Mr. Smith's favor. He believed that in the first instance he had been fairly elected, and therefore considered himself entitled to the compensation. The House voted the compensation.

806. The Maine election case of Joshua A. Lowell, in the Twenty-seventh Congress.

Instance of an election contest instituted by the remonstrance of citizens and electors of the district.

The House did not make critical examination in an election case wherein the petitioners were indifferent.

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[1] Second session Twenty-sixth Congress, Journal, pp. 173, 189; Globe, pp. 98, 104.

[2] First session Twenty-seventh Congress, Journal, p. 52.

[3] Journal, pp. 76, 282, 335, 350.

[4] Journal, p. 465.

[5] Second session Twenty-seventh Congress, Journal, p. 27.

[6] Globe, p. 979.

On January 13, 1842,[1] the Speaker laid before the House testimony in the election case relating to the seat occupied by Mr. Joshua A. Lowell, of Maine. It does not appear that any other papers were presented to the House or referred in this case, except a protest presented to the House on June 11, 1841.[2] The sitting Member, in his statement to the Committee on Elections, states that as to this protest or remonstrance, which was signed by George Hobbs and 17 other citizens and legal voters of the district, that it was not "addressed to the House," was not "presented by the Speaker or by a Member in his place," and "a brief statement of the contents thereof" was not made verbally by the introducer, and therefore should not have been received. It appears, however, that the Speaker did present it on June 11.

The committee considered the case, and on March 9[3] reported on the "remonstrance and evidence," but gave no discussion of the case, presenting simply a resolution confirming the title of Mr. Lowell to the seat.

On March 16,[4] after a brief debate, the resolution was agreed to. From this debate, taken in connection with the remonstrance and sitting Member's answer, it is possible to arrive at an understanding of the leading issues of the case.

The remonstrants had specified three objections which, if sustained, would have shown that Mr. Lowell was not elected. A majority of the votes was required at this time for an election of Representative to Congress from Maine, and the remonstrants merely asked that the seat be declared vacant, it not being claimed that any other candidate was elected.

Mr. Lowell in his statement to the committee answered the objections made, and adduced charges as to other irregularities, which, if investigated, would lead to corrections which would increase his majority.

The committee do not state the grounds of their decision.

It is worth noticing, however, that the sitting Member made this point:

> The laws of the United States do not provide for taking testimony to be used in cases of contested Congressional elections; and the laws of Maine, while they provide for taking testimony to be used in cases of contested elections in the State legislature, are silent on the subject of contested elections in Congress. Testimony to be used in contested elections to Congress can therefore be taken in Maine only by the consent of parties, or by virtue of some power to be given to commissioners by the House itself. And I here repeat the notice which I gave to the committee, at their session on the first instant, that I shall object to all evidence heretofore taken which has been or may be offered against my right to a seat in the House, as taken ex parte, without law and against law.

The committee, however, appear to have examined the evidence and also to have examined evidence on the other side. It was stated that the remonstrants did not take great interest in the case, since the unseating of Mr. Lowell would require a new election, and the people of the district were content to have Mr. Lowell represent them for the remainder of the term.

807. The Virginia election case of Goggin v. Gilmer, in the Twenty-eighth Congress.

The acts of proper officers, acting within the sphere of their duties, are presumed correct unless shown to be otherwise.

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[1] Second session Twenty-seventh Congress, Journal, p. 173; Globe, p. 130.

[2] First session Twenty-seventh Congress, Journal, p. 83.

[3] Journal, p. 514; Globe, p. 301.

[4] Journal, pp. 545, 546; Globe, p. 323; 1 Bartlett, p. 37.

In the absence of fraud the failure of election officers to be sworn should not vitiate a poll.

Discussion of directory and mandatory laws as related to irregularities in conduct of elections.

A minority argument that a poll should be rejected for failure of an election officer to be sworn.

The House did not endorse a proposition to declare a seat vacant because of irregularities on the part of election officers not shown to be corrupt.

A Member being appointed to an incompatible office, a contestant not found to be elected was not admitted to fill the vacancy.

On December 7, 1843,[1] Mr. Willoughby Newton, of Virginia, presented a memorial of William L. Goggin, contesting the seat of Thomas W. Gilmer, of Virginia. This memorial was referred to the Committee on Elections.

On January 25, 1844,[2] Mr. Lucius Q. C. Elmer, of New Jersey, presented the report of the committee. At a later time Mr. Robert C. Schenck, of Ohio, on the part of himself, and Messrs. Garrett Davis, of Kentucky, and Willoughby Newton, of Virginia, filed minority views.

Mr. Gilmer was returned by a majority of 20 votes over Mr. Goggin. The validity of this majority was attacked on several grounds, which are discussed as follows:

1. The law of Virginia had at that time the following provision:

> If the electors, who appear to be so numerous that they can not all be polled before sun setting, or if by rain or rise of water courses many of the electors may have been hindered from attending, the sheriff, under sheriff, or other officer conducting the election at the court-house, and the superintendents of any separate poll, if such cause shall exist at any separate poll for the adjournment thereof, may, and shall, by the request of any one or more of the candidates, or their agents, adjourn the proceedings on the poll until the next day, and from day to day for three days (Sundays excluded), giving notice thereof at the door of the court-house.

In two counties polls were continued by reason of rains, and it was from the votes cast at these postponed elections that all of the sitting Member's majority was obtained. On the poll of the regular first day Mr. Goggin had a majority of 74 votes.

The majority and minority differed in their interpretation of this law and as to whether or not the acts of the elections officers were in accordance with its provisions. The majority say:

> It being a clear principle that the acts of the proper officers, acting within the sphere of their duties, must be presumed to be correct unless shown to be otherwise, it is incumbent on Mr. Goggin to prove, by competent evidence, that the adjournments were, in point of fact, made without the request of any candidate or his agent. This he has failed to do.

The minority say:

> While the undersigned believe, therefore, and admit that much should be allowed to the discretion of the officers, and that the first presumption should always be in favor of a sound and rightful exercise of that discretion, yet there is no reason why, in a proper case, there should not be an inquiry

[1] First session Twenty-eighth Congress, Journal, p. 30.

[2] Journal, pp. 291, 312; Globe, pp. 192, 193, 205; House Report No. 76, pp. 1 and 129.

into the sufficiency of the cause assumed by them for their action. The undersigned are of opinion, also, that such judgment of the officers conducting the election, so far as they may have acted in reference to that which the law in any way leaves to their discretion, ought not to be disturbed or set aside, except in a case of clear and flagrant error or wrong.

2. The petitioner alleged that certain election officers were not sworn.

The majority report says:

Without stopping to inquire whether the votes taken in a county or district ought to be rejected, and the voters be thus disfranchised, or the people put to the expense and trouble of a new election, on account of the officers neglecting a part of their duty, even so important a matter as that of being sworn, in a case where there is no allegation that the omission produced any practical evil, the committee are of opinion that the evidence produced does not amount to even prima facie proof that the superintendents conducting the elections * * * were not sworn.

The majority examine this evidence. The minority, while not agreeing entirely, say:

Great looseness and negligence appear to have prevailed at almost every precinct in the district. * * * The undersigned, however, have been always satisfied with anything approaching to a substantial compliance with what the law prescribes. They believe that whenever a failure of obedience to these directory provisions does not necessarily involve the probability of a wrong or tend to make a dangerous precedent by taking away some of the substantial safeguards which are to secure the purity of elections, such failure ought not to be treated as sufficient to make void the apparent returns. Every regulation in relation to elections—of time, place, manner, form of vote, officers who are to conduct them, poll books, returns, and whatever else pertains to the exercise of that invaluable franchise of the citizen—is, in fact, directory; but there are some of these regulations more substantive and important in their use and character than others; and somewhere it is necessary to draw the line, distinguishing between that which is proper, but not essential, and that which so enters into the essential character of a good election that a failure in it should be held a fatal defect. Of this latter class the undersigned believe to be the requirement of an oath from the election officers.

The minority refer to the cases of McFarland *v.* Purviance, McFarland *v.* Culpepper, Porterfield *v.* McCoy, Easton *v.* Scott, and Draper *v.* Johnston.

As a result of their examination the majority of the committee found the sitting Member elected by at least a majority of 4 votes, even allowing contentions which they did not admit. Therefore they reported a resolution confirming the title of Mr. Gilmer to the seat.

The minority found as the result of their examination that Mr. Goggin had a majority of 30 votes. They say:

They are clearly satisfied that Mr. Gilmer, the sitting Member, has not obtained a majority of the votes legally taken in the district entitling him to retain his place as a Representative in this body. But such result being produced (in part at least) by the failure or duty or misconduct of officers, whose action should not be permitted to interfere with an opportunity afforded to the electors of the district to express clearly and with certainty their will, by a properly ascertained majority, the undersigned do not agree that the seat, if thus vacated, ought to be given to Mr. Goggin. They recommend, therefore, the passage of the following resolution:

Resolved, That the seat now held by Thomas W. Gilmer, as Representative from the Fifth district of Virginia in this House, is hereby declared vacant, and that a communication be sent to the governor of that State to inform him of that fact that an election may be made by the people of that district to fill the vacancy.

On February 15,[1] before the report was acted on, a message of President Tyler

[1] Senate Executive Sourrial, 1841–1845, pp. 235, 236.

was received in the Senate, nominating Mr. Gilmer as Secretary of the Navy, and on the same day the nomination was confirmed.

On February 16[1] Mr. Willoughby Newton, of Virginia, proposed the following:

Ordered, That William L. Goggin have leave to withdraw his memorial contesting the right of Thomas W. Gilmer to a seat as a Member of the House of Representatives.

Mr. Newton stated that Mr. Goggin did not concede that Mr. Gilmer had been elected, but as the latter had sent his resignation to the governor of Virginia the object of the contestant, which was to procure another trial before the people, had been attained.

The House agreed to the order without division.

On February 17[2] Mr. Gilmer's resignation was announced in the House.

On May 10[3] Mr. Goggin, with credentials showing his election to fill the vacancy caused by Mr. Gilmer's resignation, appeared and took his seat.

808. The Massachusetts election case of Osmyn Baker, in the Twenty-eighth Congress.

Instance of an election contest instituted by a memorial from citizens of the district.

The parties complaining of an undue election failing to present evidence, the House did not pursue the inquiry.

On February 5, 1840,[4] Mr. William Parmenter, of Massachusetts, presented, a memorial of citizens and legal voters of the Sixth Congressional district of Massachusetts, remonstrating against the return of Osmyn Baker, by the governor and council of that State as a Member of the House, and praying that his seat may be vacated for the reason that he did not receive a majority of the votes given by the legal voters.

This memorial was referred to the Committee on Elections.

On March 19[5] a further representation and memorial in this case was presented and referred.

On February 24[6] the Committee on Elections was authorized to send for persons and papers in reference to this case.

On July 17[7] Mr. John Campbell, of South Carolina, from the Committee on Elections, reported this resolution, which was agreed to:

Resolved, That the Committee on Elections be discharged from the further consideration of the petitions of certain electors of the Sixth Congressional district of the State of Massachusetts, alleging that Osmyn Baker, the sitting Member from that district, was not duly elected a Member of the House of Representatives, there being no evidence produced to the committee in support of the allegations of the petitioners, and the time limited by agreement of parties and the authority of the committee for completing the taking of the same having expired on the fourth Monday of May last.

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[1] House Journal, p. 414; Globe, p. 289.

[2] Journal, p. 416; Globe, p. 291.

[3] Journal, p. 890.

[4] First session Twenty-sixth Congress, Journal, p. 278; Globe, p. 164.

[5] Journal, p. 638; Globe, pp. 278, 279.

[6] Journal, pp. 429–433.

[7] Journal, p. 1300.

809. The Virginia election case of Botts v. Jones, the Speaker, in the Twenty-eighth Congress.

The seat of the Speaker being contested, he vacated the chair on every question relating to the contest.

The Speaker's seat being contested, the House directed that the Elections Committee be appointed by the Speaker pro tempore.

On December 4, 1843,[1] the House elected John W. Jones, of Virginia, Speaker On December 7,[2] Mr. John Quincy Adams, of Massachusetts, indicated his purpose to present the memorial of John M. Botts contesting the seat of John W. Jones, of Virginia. The Speaker thereupon called Mr. Samuel Beardsley,[3] of New York, to the chair. Then Mr. Adams presented the memorial, which was ordered to be referred to the Committee on Elections when appointed. Later in the same day[4] the Speaker, by general consent, stated that it seemed proper for him to ask the House that he be relieved of the appointment of the standing Committee on Elections in view of the fact that his own seat was contested. The Speaker again called Mr. Beardsley to the chair, and after debate, by a vote of 98 to 48, the House decided that Mr. Beardsley should appoint the committee.

Mr. Beardsley thereupon appointed the committee, Mr. William W. Payne, of Alabama, being chairman.

On December 13[5] the Speaker again left the chair, calling Mr. Linn Boyd, of Kentucky, as Speaker pro tempore.

Then it was ordered, on motion of Mr. L. Q. C. Elmer, of New Jersey, a member of the Committee on Elections, that all documents in possession of the clerk in the case of Botts *v.* Jones be referred to the Committee on Elections.

On May 21, 1844,[6] the Speaker called Mr. John B. Weller, of Ohio, to the chair, and thereupon Mr. Elmer submitted the report of the majority of the Committee on Elections. Again, on May 31,[7] the Speaker called Mr. Weller to the chair, and Mr. Willoughby Newton, of Virginia, submitted the views of the minority.

810. The case of Botts v. Jones, continued.

A person whose vote has been received by the officers of election is presumed to be qualified.

Instance wherein by agreement of parties evidence in an election case was taken under a State law.

A poll fairly conducted should not be set aside because an election officer had not been sworn.

The issues in the case were as follows:

The testimony in the contest had been taken by agreement of the parties according to the Virginia law regulating contests before the State legislature, and acting in accordance with that practice each party considered himself bound to establish the right of the voter challenged by the other party. The committee

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[1] First session Twenty-eighth Congress, Journal, p. 8.

[2] Journal, p. 30; Globe, p. 18.

[3] Mr. Beardsley belonged to the majority party in the House.

[4] Journal, p. 40; Globe, p. 21.

[5] Journal, p. 50.

[6] Journal, p. 948; Report H. of R., No. 492.

[7] Journal, p. 989; Report H. of R., No. 520.

expressed the opinion that every voter admitted by the regular officers authorized to decide the question at the polls ought to be considered legally qualified, unless the contrary be shown. But as the parties had proceeded on the contrary principle, the committee conformed its examination to the Virginia practice.

At one precinct there was evidence showing that the sheriff and one of the superintendents were not sworn, as required by law. The majority of the committee considered this evidence taken without the notice required by the Virginia law, and were therefore not disposed to give it full effect. The minority held that, there being no law of any kind expressly governing the taking of testimony, the rules of convenience and propriety prescribed by the courts should hold, and that the evidence had been properly taken. The majority considered that at this time the functions formerly exercised by a sheriff at Virginia elections had so far ceased as to render the objection as to the oath immaterial. The minority, while conceding that he could no longer admit or reject a vote, found that he was still custodian of the polls and had important duties to perform. Also one of the two superintendents was not sworn, and the majority admit that this was "irregular and illegal," but do not think the poll should be set aside as wholly null and void where it appears to have been fairly conducted. The minority insisted that the votes of this precinct should be thrown out, "not being disposed to regard these oaths, solemnly prescribed by the wisdom of the law-making power, as mere idle forms." Had these votes been thrown out it would have made no difference in the result.

811. The case of Botts v. Jones, continued.

The House rejected votes cast by persons not naturalized citizens of the United States, although entitled to vote under the statutes of a State.

No fraud or injury being shown, the proper acts of an unqualified or unauthorized election officer do not vitiate the poll.

A contestant admitted to be heard in an election case is governed by the hour rule of debate.

The minority, in their views, also state the following:

A number of votes were stricken from the poll of Mr. Botts upon the ground that, although the voters, who were by birth foreigners, had taken the oath of fidelity to the Commonwealth, under the statutes of Virginia they were not strictly citizens of the United States. A large majority of the committee being of opinion that, as the power of the Federal Government "to enact uniform laws upon the subject of naturalization" is, when exercised, exclusive, the statutes of Virginia prescribing an oath of fidelity to the Commonwealth and declaring the mode in which persons shall become citizens of Virginia, are merely void; and that such persons, although treated by the laws of Virginia as citizens, can not exercise the right of suffrage for Members of the House of Representatives, which right is guaranteed by the Constitution to all "free white male citizens of the Commonwealth" possessing other prescribed qualifications. From this opinion one of the undersigned dissents; and, whether such persons are technically citizens or not, thinks they ought to come within the description of persons upon whom the right of suffrage is conferred by the constitution of the State; and being permitted, under its provisions, "to vote for members of the most numerous branch of the State legislature," ought not to be denied the privilege of voting for Members of the House of Representatives.[1]

In the House Mr. Robert C. Schenck, of Ohio, called attention to the importance of this question.[2]

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[1] This minority report is signed by Messrs. Willoughby Newton, of Virginia, Robert C. Schenck, of Ohio, and Garrett Davis, of Kentucky.

[2] See discussion below.

A question as to the appointment of writers at the polls involved a construction of the Virginia laws as to the number of these officials required. There was disagreement as to the meaning of this law, but the majority say:

Should the true construction of the laws be considered to require the superintendents to appoint more than one writer to keep the poll of each officer voted for, still the committee do not think that the omission to do so is such an irregularity as to render the election null and void, and thus deprive the people of their votes or put them to the trouble and expense of a new election. No fraud or unfairness is complained of, nor is it shown that any mistakes were made by the writer employed. The memorialist was himself present during a considerable part of the day, saw how the election was conducted, and made no objection to it. No decision of this House, so far as the committee are informed, has ever sanctioned such a result. The case of Easton *v.* Scott, referred to by Mr. Botts in his memorial, is entirely different from this.

The minority views also expressed the opinion that Mr. Botts's contention on this point was untenable.

As a result of their conclusions the majority recommended this resolution:

Resolved, That John W. Jones is entitled to his seat in this House as a Representative from the Sixth Congressional district of the State of Virginia.

The minority did not dissent from the conclusions embodied in this report.

On May 31,[1] in the House, Mr. Robert C. Schenck, of Ohio, called attention to the fact that the decision of the committee had turned on the qualifications of voters, and that if voters admitted to citizenship in the State without being citizens in every respect had not been held to be disqualified, Mr. Botts would have had a majority of several votes. Mr. Schenck said that he had concurred in excluding the class of voters excluded by the majority because the admission of such votes (under the qualifications prescribed by the States) would be rendering nugatory the power granted to the Congress of the United States, the States being permitted to admit to citizenship those who were not recognized as citizens in every respect, and particularly under the laws of the United States. It was true it would cut off thousands of voters in Michigan and other States, and he would say to his New England friends that it would "cut off the votes of all colored persons." To this Mr. Stephen A. Douglas, of Illinois, a member of the Committee on Elections, replied that he did not understand the decision of the committee as involving the question as to whether that class of voters in other States should be admitted or excluded. He held that any State of the Union had a right to prescribe the qualifications of voters within the State, and that this House had not the power to reject a Member elected by such voters.

On May 31[2] leave was granted to Mr. Botts to be heard in person at the bar of the House.

On June 6[3] the case came up in the House, the Speaker calling Mr. John B. Weller, of Ohio, to the chair.

On motion of Mr. George W. Hopkins, of Virginia, it was—

Ordered, That the Speaker of this House, whose right to a seat as a Member of the House is contested, have leave to speak upon this resolution, notwithstanding that clause of the Manual which restrains the Speaker from addressing the House except upon questions of order.

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[1] Globe, p. 634.

[2] Journal, p. 990.

[3] Journal, pp. 1011–1014; Globe, pp. 648, 649.

Mr. Garrett Davis, of Kentucky, having raised a question as to whether the petitioner would be limited by the hour rule, the Speaker pro tempore held that he would be, and on appeal the decision was sustained, yeas 102, nays 76.

Thereupon Mr. Botts addressed the House, and was followed by Mr. Jones. the Speaker.

Then, on the question of agreeing to the resolution reported by the Committee on Elections, there appeared, yeas 150, nays 0.

812. The Florida election case of Brockenbrough v. Cabell, in the Twenty-ninth Congress.

A State law requiring returns to be made to the secretary of state within a given time was held to be directory merely and not to prevent the House from counting the votes.

A certificate of a State officer with belated returns from election inspectors (whose authority to make such returns was doubtful) was admitted although procured ex parte.

The House declined to recommit an election case in order to count votes in precincts whence no votes had been returned or proven.

The petition of a contestant was admitted although defective in its specification of particulars.

There being no law of Congress to regulate election contests, proceedings taken according to State law were approved.

Instance wherein questionable prima facie right was not disturbed pending decision as to final right.

In 1846[1] the Committee of Elections reported in the case of Brockenbrough *v.* Cabell, from Florida.

The contestant objected that, from the lawful returns, he was entitled to the credentials that had been given to the sitting Member by the governor, and that the greatest number of votes of the legally qualified voters were cast in his favor and not in favor of the sitting Member.

Objection was made by the sitting Member that the petition of the contestant should specify the particulars of the illegalities complained of as to the return; but the committee deemed the petition—which was somewhat more definite than given above, but did not go into particulars—sufficient and determined to proceed with the inquiry.

The point on which the case turned was the construction of the laws of Florida in regard to the returns. The contestant contended that under the law the judges of probate were the returning officers, and the majority of the committee concurred in this view. The sitting Member contended that the inspectors of precincts were the returning officers, and the minority of the committee concurred in this view. The committee was as nearly evenly divided in the case as possible. It is also to be noted that a large portion of the total vote was returned by election inspectors, the remainder being by judges of probate or legal substitute—the county clerk.

[1] First session Twenty-ninth Congress, House Report No. 35; 1 Bartlett, p. 79; Rowell's Digest, p. 123. The report was submitted by Mr. Hannibal Hamlin, of Maine; the minority views by Mr. Erastus D. Culver, of New York.

This indicates a division of opinion in the State as to who were the proper returning officers.

The law of the State further provided indisputably that the secretary of state should count the returns at the expiration of thirty days after the election and certify the result to the governor, who should issue the commission.

At the expiration of thirty days the secretary of state had received returns from judges of probate in fourteen counties, from a county clerk in one county where there was no judge of probate, and from precinct inspectors in eight counties. The fifteen counties returned by judges of probate and the county clerk showed a majority for Mr. Brockenbrough, but with the eight counties returned by inspectors added, the majority was for Mr. Cabell. The secretary of state certified this result to the governor, who issued his certificate to Mr. Cabell, who had the majority of inspectors' returns and also of all the returns. The contestant objected that only the returns from the judges of probate (and the county clerk where there was no judge) were lawful returns, and therefore that the certificate should have been issued to him instead of to Mr. Cabell.

After the expiration of the thirty days returns were received from judges of probate in three counties, from two of which inspectors' returns had been counted by the secretary of state.

Also after the expiration of thirty days inspectors' returns were received from Monroe County, the same being the only returns of any kind from that county.

If only the belated returns by judges of probate were added to the tabulation of the secretary of state, Mr. Cabell would still be elected.

But if the Monroe County returns also should be added, Mr. Brockenbrough would be elected.

Thus it appeared that if only returns of judges of probate were to be admitted as lawful—the question as to time of return being waived—Mr. Brockenbrough was elected.

And if—the time limit being waived—all the votes returned from all the counties should be counted, still Mr. Brockenbrough was elected.

The committee did not question the prima facie right of Mr. Cabell to the seat.

As to the final right, the decision was complicated by a curious condition of rule as to evidence.

The contestant offered the certificate of the secretary of state as to the belated judge of probate returns from the three counties. The sitting Member objected, that he had not been notified of an intention to procure this evidence; that the returns were received after the expiration of thirty days, and that, as judges of probate were not proper returning officers, their certificates and that of the secretary were extra-official. These objections were overruled, and the principle seemed to be thereby established that the judges of probate and not the inspectors were the returning officers.

Next the contestant offered the certificate of the secretary of state with extract of returns of inspectors of Monroe County. This was objected to on the ground that sitting Member had not been notified of the procuring or production of it; that it was not a legal return, and that it was inadmissible under the decision just made

that the judges of probate were the returning officers. The majority of the committee decided the last objection well taken and rejected the evidence.

This decision left the majority for the sitting Member, and it was originally the intention of the larger portion of the committee to so report. The argument was very strong that such ex parte depositions as those relating to Monroe County should not be admitted. Spaulding *v.* Mead was quoted in support of this principle.

The minority contended that these returns might not be admitted on the plea that the other inspectors' returns had been admitted, because evidence as to the other inspectors' returns was offered by the contestant as part of a document tending to prove his right to a seat, and therefore that he could not ask that the part of the paper which favored his adversary should be disregarded after the committee had received it. It was like the case of an admission proved by a party; he must take the whole of it, that against him as well as that for him. After proving a state of facts by his own evidence, the contestant might not disavow part of the evidence and seek to avail himself of the remainder. Nor could it be used subsequently as a pretext for the introduction of confessedly illegal ex parte evidence.

The majority of the committee concluded that the law requiring the returns to be made to the secretary of state to be directory merely, and that to throw out votes returned after that time would lead to bad results and tend to defeat the will of the people.

For the same reason, as expressed by Mr. Hannibal Hamlin, of Maine, chairman of the committee, in the debate, the committee decided not to confine itself to its narrow construction that the legal returns were those returned by the judges of probate.

And following this principle further, the majority decided that, as the inspectors' returns of the eight counties counted by the secretary of state were admitted, so also the inspectors' returns of Monroe County should be admitted.

This conclusion as to Monroe showed the election of Mr. Brockenbrough, and the committee reported that Mr. Cabell was not entitled to the seat and that Mr. Brockenbrough was entitled to it.

In course of consideration of this case the committee overruled the objection of the sitting Member that contestant's notice of contest had not been seasonably given. The committee found that the proceedings had been taken in accordance with the requirements of a State law relating to contests before the State legislature only; but held by the committee to be proper as a rule in this case.

As a result of their conclusions the majority of the committee reported the following resolutions:

Resolved, That E. Carrington Cabell, returned to this House as a Member thereof from the State of Florida, is not entitled to his seat.

Resolved, That William H. Brockenbrough is entitled to a seat in this House as a Representative from the State of Florida.

The minority recommended the following:

Resolved, That William H. Brockenbrough has not supported his petition, and that Edward C. Cabell is entitled to his seat in this House.

The report was debated on January 20, 21, 22, 23, and 24.[1] It appeared from the debate that from a few precincts in the district no returns had been made.

[1] Globe, pp. 222, 230, 236, 238.

Indeed, in one of them there was doubt as to whether or not an election had been held. There was no evidence to show what had been done at these precincts, and therefore during the debate Mr. Alexander D. Sims, of South Carolina, proposed[1] a motion reciting this lack of certain returns, and providing that the report in this case be recommitted to enable further testimony to be taken. Mr. Hamlin admitted that there were precincts from which no returns had been received; but by informal statements made before the committee by the contestant, and apparently not disputed by the sitting Member, the committee had understood that the votes of such precincts were in favor of contestant. In one county there was nothing to show whether an election had been held or not.

The motion of Aft. Sims, under the practice prevailing at that time, was thrust aside by the ordering of the previous question. Then the first resolution, unseating Mr. Cabell, was agreed to,[2] yeas, 105; nays, 80. The resolution seating Mr. Brockenbrough was agreed to, yeas 100, nays 85.

Mr. Jacob Thompson, of Mississippi, then moved[3] to reconsider this vote in order that the case might be delayed until testimony might be produced as to the votes of the missing precincts. He based this proposition on the statement of the sitting Member to the House that there were precincts from which no returns had been made, and also the further statement of sitting Member that the counting of the votes of those precincts would give him a majority of the votes in the district.

Mr. Thompson's motion to reconsider was disagreed to, yeas 87, nays 91.

Mr. Brockenbrough then appeared and took the oath.

813. The New Jersey election case of Farlee v. Runk in the Twenty-ninth Congress.

Discussion of the meaning of the word "residence" as related to the qualifications of a voter.

The House, by a close vote, sustained the contention that certain students were residents in the place wherein they attended college

In 1846,[4] in the contested election case of Farlee v. Runk, from New Jersey, the returns showed that—

	Votes.
Mr. Runk received	8,942
Mr. Farlee received	8,926
Majority for Mr. Runk	16

Mr. Farlee represented to the House by his memorial that this majority was obtained by the illegal votes of 36 students in the college and seminary at Princeton.

The committee divided on the question of the right of the students to vote, the majority finding that 19 of them were entitled, and the minority finding that none were entitled under the law and constitution of New Jersey.

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[1] Journal, p. 281; Globe, p. 230.

[2] Journal, pp. 293, 294, 295.

[3] Journal, p. 296; Globe, p. 238.

[4] First session Twenty-ninth Congress, House Report No. 310; 1 Bartlett, p. 87; Rowell's Digest, p. 124. The majority report was by Mr. James C. Dobbin, of North Carolina; the minority views by Mr. Lucien B. Chase, of Tennessee.

As the voting in New Jersey was by ballot, both minority and majority experienced difficulty in determining what the actual effect of the students' votes had been. The 19 whom the majority considered entitled to vote had made depositions in which 4 acknowledged that they voted for Mr. Runk and 1 that he voted for Mr. Farlee. The other 14 availed themselves of their privilege not to answer and declined to declare how they voted. The majority of the committee did not attempt to ascertain for whom the 14 voted, since it was not necessary under their contention that the votes of the students were legal, and recommended a resolution that Mr. Farlee was not entitled to the seat.

The minority, following the example in the Now Jersey case of 1840, contended that secondary evidence should be admitted, and from the deposition of a person who testified that 16 of the students whose votes were not known were Whigs, concluded that those 16 voted for Mr. Runk, the Whig candidate. With the 5 who acknowledged their votes, the minority arrived at a deduction of 20 votes from Mr. Runk and 1 from Mr. Farlee. This left a majority of 3 for Mr. Farlee, and the minority reported the conclusion that he was entitled to the seat.

The argument on the question as to whether or not the students were qualified to vote involved the question of residence. The then recently adopted constitution of New Jersey defined voters as "every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State one year and of the county in which he claims his vote five months next before the election." There was, moreover, a law passed in 1844 expressly declaring that students so circumstanced as those in question should not vote in New Jersey. The majority, however, held that this law, which had been passed under the old constitution, was of no effect under the new constitution. The minority, while not relying on this law to support their contention, yet denied that it had become inoperative.

The main issue, therefore, was joined on the meaning of the word "resident" in the constitution. The majority admitted that most of the students at Princeton would be incapable of voting, since they had left their homes for a temporary purpose, meaning to return. But they conceived that the few who had voted were entitled to do so, on the showing made in their depositions, "for they swear that they left their last residence animo non revertendi, and adopt Princeton as their residence for a space of time—not very brief, not certain as to its duration—undertermined in their minds as to the adoption of any particular residence should they choose to abandon Princeton." The supreme court of New Jersey, in the case of Cadwallader *v.* Howell and Moore, decided in November, 1840, had declared:

> The residence required in the laws of this State to entitle a person to vote at an election means his fixed domicile or permanent home, and is not changed or altered by his occasional absence, with or without his family, if it be animo revertendi. A residence in law, once obtained, continues without intermission until a new one is gained.

But the opinion further went on—

> The place where a man is cormorant may, perhaps, be properly considered as prima facie the place of his legal residence; this presumption, however, may be easily overcome by proof of facts to the contrary. If a person leave his original residence animo non revertendi, and adopt another (for a space of time, however brief), if it be done animo manendi, his first residence is lost. But if, in leaving his original residence, he does so animo revertendi, such original residence continues in law, notwithstanding the temporary absence of himself and family.

The minority contended that residence was defined by Judge Story, who said in his Conflict of Laws that "domicile, in a legal sense, is where the person has his true, fixed, and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." All of the students testified that they went to Princeton for purposes of study. Some of them stated that after they had accomplished their objects they intended to leave Princeton; others that they should go "wherever the providence of God may call them." There was no proof whatever that they intended to make Princeton their "true, fixed, and permanent home;" no evidence that they intended to remain at Princeton an "unlimited time." The minority call attention to the fact that several of the students who voted had already left Princeton and the committee had been unable to procure their testimony. These students were entered on the college catalogue as residing in other places; several in other States. This had undoubtedly been done on the authority of the students themselves. Although the students may have left their homes animo non revertendi, yet there was neither positive nor presumptive proof that they came to Princeton animo manendi. The evidence showed the contrary. The court in the case above quoted had held—

It is for the reason that the students of our colleges, the inmates of our law schools and medical universities, and hundreds of others who are scattered on land and sea, engaged for the time being in the prosecution of some transient object, are considered in law as residing in their original homes, although in point of fact they may be living for the time being elsewhere.

The majority had reported a resolution as follows:

Resolved, That Isaac G. Farlee is not entitled to a seat in this House as a Representative from the State of New Jersey.

The minority recommended the following:

Resolved, That John Runk is not entitled to a seat upon this floor.

Resolved, That Isaac G. Farlee, having received a majority of the legal votes of the legally qualified voters of the Third Congressional district of New Jersey, is entitled to his seat upon this floor.

Mr. Hannibal Hamlin, of Maine, on March 3,[1] when the report was considered, moved to strike out all after the word "resolved" in the resolution of the majority, and insert the text of the two minority resolutions.

This motion was decided in the negative, yeas 76, nays 112.

Thereupon the House, by a vote of yeas 119, nays 66, agreed to the resolution of the majority of the committee, declaring petitioner not entitled to the seat.

Thereupon Mr. Hamlin, as a question of privilege, offered the following:

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

A motion that the resolution lie on the table was disagreed to, yeas 93, nays 99.

Then, on agreeing to the resolution, there appeared yeas 96, nays 96.

"The House being equally divided," says the Journal, "the Speaker voted with the nays, and so the House refused to agree to the said resolution; and Mr. Runk, the sitting Member, retains his seat."

[1] Journal, pp. 431, 477–483; Globe, pp. 448, 454, 456.

814. The New York election case of Monroe v. Jackson, in the Thirtieth Congress.

Discussion of the qualifications of voters in respect to residence of paupers in an almshouse.

Discussion of the evidence required to establish for whom a voter has cast his ballot.

Form of resolution by which the House, in 1848, provided for taking testimony in an election case.

The earlier regulations for taking testimony in an election case provided that the depositions should be forwarded to the Speaker.

On March 25, 1848,[1] the Committee on Elections reported in the case of Monroe v. Jackson, from New York. This was a case wherein the contestant charged fraud sufficient to account for the majority of 143 votes returned for the sitting Member. The majority of the committee satisfied itself of the truth of the charges and reported in favor of the contestant. The minority contended that there was not positive proof sufficient to set aside the result certified to by the governor of the State, and recommended resolutions confirming the sitting Member in his seat.

The House, on April 19,[2] by a vote of 160 to 13, declined to agree to a proposition that, as it did not satisfactorily appear that either was elected, the seat should be declared vacant. Then the propositions of the minority, that Mr. Jackson was entitled to the seat and Mr. Monroe was not entitled to it, were disagreed to—yeas 102, nays 93.

The question recurring on the first proposition of the majority, that Mr. Jackson was not entitled to the seat, it was decided in the affirmative—yeas 103, nays 93.

On the second proposition of the majority, that Mr. Monroe was entitled to the seat, there appeared 91 yeas and 104 nays.

So the seat was left vacant.

While a large number of frauds and irregularities were alleged, and attempt was made to sustain them by evidence of varying degrees of strength, the principal and most tangible issue in the case arose over the charge that 163 paupers from an almshouse had cast their ballots for the sitting Member, and that to these his apparent majority was due. The law of New York provided that no person should "be deemed to have lost or acquired a residence by living in any poorhouse, almshouse, hospital, or asylum, in which he shall be maintained at public expense." The right of the paupers to vote in the election district where their legal residence was could not be questioned, but neither majority nor minority contended that they might vote on their almshouse residence.

The issue was as to the sufficiency of proof. The majority satisfied themselves that the paupers were not qualified voters in respect to residence by the testimony of officers of the almshouse as to names on its books. The minority contended that the voters themselves should have been called to testify as to residence, and

[1] First session Thirtieth Congress, I Bartlett, p. 98; Rowell's Digest, p. 126; House Report No. 403. The majority report was made by Mr. Joseph Mullin, of New York; the minority views by Mr. Timothy Jenkins, of New York.

[2] Globe, p. 643; Journal, pp. 705–709.

that the secondary evidence adduced was not conclusive. Not even the almshouse books were put in evidence.

Elections in New York being by ballot, it also became necessary to show for whom the alleged illegal votes were thrown. Again, the voters were not interrogated, but the majority of the committee satisfied themselves that the illegal votes were for the sitting Member because tickets of his party were distributed at the almshouse, because officers of that institution and those who conveyed the paupers to the polls were of his party, and because witnesses noticed the ballots when cast and professed to distinguish and recognize them by texture of the paper. The minority combated this evidence as too indefinite and inconclusive.

The majority, on the strength of the evidence which they allowed, found for the contestant a majority of 14 votes. The minority denied this conclusion.

The testimony in this case was taken in accordance with this resolution:[1]

Resolved, That the parties * * * be, and they hereby are, authorized to take the testimony of such witnesses as either of them may require, by depositions, in conformity to the laws of the State of New York, in force at the time of taking such testimony, on the subject of contested elections in that State: *Provided,* That the parties may, by agreement under their hands, regulate the mode of giving notice and other matters of form, at their discretion; but if no such agreement shall be made, then each party shall give to the other such notice of the time and place of taking such depositions as are prescribed in the aforesaid laws of New York: *Provided, also,* That when such depositions are taken they shall, together with the agreements or notices aforesaid, be sealed up by the officer taking the same and directed to the Speaker of the House.

815. The Iowa election case of Miller v. Thompson, in the Thirty-first Congress.

In earlier times the taking of testimony is an election case was governed by a resolution of the House.

Testimony in an election case, under the earlier practice, was sent to the Speaker and referred by the House.

In 1849 election contests were instituted by memorial.

On December 31, 1849,[2] Mr. Edward D. Baker, of Illinois, presented the memorial of Daniel F. Miller, claiming election from the First Congressional district of Iowa, and praying to be admitted to the seat occupied by William Thompson. This memorial was referred to the Committee on Elections.

On January 23, 1850,[3] the House agreed to a resolution providing for the taking of testimony in accordance with the provisions of the laws of Iowa, and also making certain stipulations not provided for by those laws. It was provided that this testimony should be forwarded to the Speaker, and on March 19[4] the Speaker laid before the House certain depositions forwarded to him under the resolution.

On June 18, Mr. William Strong,[5] of Pennsylvania, presented the report of the majority of the committee and Mr. John Van Dyke, of New Jersey, presented the views of the minority.

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[1] Journal, p. 174.

[2] First session Thirty-first Congress, Journal, p. 190.

[3] Journal, p. 394.

[4] Journal, p. 684.

[5] Journal, p. 1029; House Report No. 400.

The sitting Member, William Thompson, had been returned by an official majority of 386 votes.

The contestant alleged two main objections which, if sustained, would have destroyed this majority. The board of canvassers rejected the vote of Kanesville, which had given Miller, the contestant, 493 votes, and Thompson, the sitting Member, 30. Contestant claimed that this rejection was illegal. The contestant further objected that the canvassers had counted illegally the votes of Boone Township, in Polk County, which were 42 for Thompson and 6 for contestant.

Therefore the questions relating to Kanesville and Boone in Polk County were of prime importance in the consideration of the case. But other questions were involved, and the subject naturally divides itself as follows:

816. The election case of Miller v. Thompson, continued.

Being satisfied as to the intention of the voter, the Elections Committee counted ballots from which the middle initial of candidate's name was lacking.

Votes apparently intended for Congressional candidates, but returned as for a State office, were counted without further inquiry.

1. As to ballots lacking the middle initial of contestant's name.

The contestant claimed that he should be allowed 7 additional votes of Marion County which were given for "Daniel Miller" and were rejected by the canvassers on account of the omission of the initial of the middle name, though the Christian and surnames were correctly described. The committee were unanimously of the opinion that the 7 votes should be counted for contestant. The minority views state:

> The committee, therefore, are satisfied that the said 7 votes were honestly intended for the contestant and allow them accordingly.

2. As to certain irregularities in the conduct of an election.

The majority and minority of the committee united in crediting to sitting Member 11 votes and to contestant 3 votes in the town of Wells, in Appanoose County. The minority views state the case as to this precinct:

> It does not appear by the election proceedings that the officers of election were sworn., nor is it at all proved in any other way. And although it appears that "W. Thompson" and "D. F. Miller" were voted for for Congress, yet it does not appear how many votes either of them received; and the only mode of inferring that either of them received any votes at all is that the poll book states that for "superintendent of public instruction," William Thompson received 11 votes, and that for the same office D. F. Miller received 3 votes. No proof is brought to bear on this case to prove anything whatever about it, and if ever irregularity or illegality should set aside an entire poll, it should be such as this. But the committee, from a very strong indisposition to deprive the citizen of his right to vote in consequence of the errors and blunders of others, nevertheless allow this vote to be counted.
>
> The vote of the committee on counting these votes was ayes 8, noes 1.

817. The election case of Miller v. Thompson, continued.

In determining the residence of a voter, the intention to remain is held consistent with an intention to change the abode at a future indefinite day.

Instance wherein a committee reported its proceedings, which thereby became a proper subject of debate. (Footnote.)

Residence in a county being a qualification of voters, the votes of nonresidents were rejected.

3. As to the qualifications of certain voters whose residence was questioned.

This question concerned certain voters at Kanesville, but is not to be confounded with the different and more important question to be considered later in relation to that place.

Mr. Joseph E. McDonald, of Indiana, in the course of the debate [1] stated that the people of Kanesville were certain Mormons, who had from necessity settled there temporarily on their way to the valley of Salt Lake. They had gathered from all parts of the United States and from foreign countries. Kanesville was only a stopping place for them; they did not regard it as their permanent home. This was shown by the testimony. He thought the law of Iowa conferred the right of suffrage not for domicile merely, but for a residence and interest in the place. "If a citizen of the United States goes abroad," said Mr. McDonald, "and chooses to wander through foreign countries, when he returns home he is not treated as an alien, but resumes the rights he had temporarily laid down. But if an alien comes here to settle and does not become a citizen of the United States in due form of law, he is not entitled to participate in the franchise which belongs to a citizen."

The report of the majority says:

> The committee dismiss the * * * objections urged by the sitting Member * * * with the single remark that they are not sustained by the evidence which has been presented. The qualifications of voters in the State of Iowa, as defined in her constitution, are six months' residence in the State of any white male citizen of the United States and twenty days' residence in the county in which the vote is claimed next preceding the election. It is doubtless true that to constitute residence within the constitutional meaning of the term there must be the "intention to remain;" but this intention is entirely consistent with a purpose to change the place of abode at some future and indefinite day. Actual abode is prima facie residence, and we are unable to perceive anything in the evidence submitted which removes the presumption of qualification arising from the actual abode of the Kanesville voters within the State.

The vote in the committee on receiving the Kanesville vote was ayes 5, noes 4,[2] but it seems evident that the principal issue on the vote was not the question herein set forth, but another question, which is considered later.

4. The sitting Member objected to 56 votes cast for contestant in Dallas County at Boone Township on the ground that the voters were nonresidents of the county. The issue involved on this point was largely one of fact. The majority of the committee, by a vote of 6 to 3, decided to reject from the poll for contestant 38 of these votes. The minority say:

> These votes were all received as legal votes by the judges of election, who are presumed to have made all due inquiry and to have decided correctly.

Therefore the minority, in the absence of what they considered conclusive proof from the sitting Member, held that the votes should stand.

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[1] Globe, p. 1295.

[2] The report of the committee presents the record of the yea and nay votes on the various questions arising in the committee, and therefore the action of the committee became a legitimate subject of discussion on the floor. (Report No. 400, p. 12; Globe, pp. 1295, 1299.)

818. The election case of Miller v. Thompson, continued.

Votes cast by voters having all qualifications except the required residence within the county were rejected by a divided committee.

5. The principal question as to the Kanesville votes.

This precinct cast 493 votes for contestant and 30 for the sitting Member.

The minority views say:

It is fully established, as well as admitted, that the persons voting at this precinct had a perfect right to vote in the First Congressional district, and to vote for either the contestant or the sitting Member. It is not pretended that any fraud, injustice, or unfairness was practiced by either the voters or the election officers toward anyone, but everything seems to have been done honestly, fairly, and in good faith, and that the persons voting were legal voters in the district.

The voting precinct of Kanesville, for the election in question, was organized by the authorities of Monroe County under peculiar provisions of the Iowa laws, which provided that sparsely settled communities not within organized counties should be attached for certain purposes to adjacent counties. The minority views claim that at the time of the election in question no one doubted that Kanesville precinct should vote with Monroe County; but that by a survey made after the election it was shown that Kanesville was in fact so situated that it belonged under the technical terms of law with Marion or Mahaska County. The majority report also claimed that even supposing the territory of Kanesville to be properly within the limits assigned to the jurisdiction, yet the laws of Iowa, properly construed, did not give the commissioners of Monroe County the authority to appoint the election officers as they had done; but that the law appointed a different, way for the appointment of such officers. The majority say in their report:

By the Constitution of the United States, the times, places, and manner of holding elections, and the qualifications of voters, are left to the control of the States. The elective franchise is a political, not a natural, right, and can only be exercised in the way, at the time, and at the place which may be designated by law. If, by the constitution and laws of Iowa, therefore, it is required that electors should vote only in the counties in which they resided, and at designated places within those counties, it can not be doubted that votes given in other counties, or at other than the designated places, must be treated as nullities. To deny this is to deny to the State the power expressly reserved in the Constitution to prescribe the place and manner of holding the elections—a power essential to the preservation of the purity of elections. Assuming, then, that those who voted at Kanesville were qualified voters, it remains to be considered whether they voted at the place prescribed by law.

The majority conclude that they did not, and continue:

In many of the States the right to vote is confined by law to voting in the ward or township in which the elector resides; and, even under this more stringent provision, votes in other wards or townships have, it is believed, been uniformly adjudged illegal.

The majority further answer another objection:

Nor is their the voters' belief that they were rightly voting at Kanesville at all material, though it may have been their misfortune. Their right to vote was a political right, restricted by their actual residence, and not by what they may have supposed it to be. The opposite doctrine would convert the constitutional provision into a declaration that the voter should vote in the county in which he supposes he resides, and make his franchise dependent upon his own conjecture.

The minority call attention to the fact that the entire board of commissioners of Monroe County and a majority of the election officers at Kanesville were the political friends of the sitting Member. No question was raised against the cor-

rectness of the procedure until after the election. After commenting on the purely technical objections to the votes, the minority conclude that they should not be sustained, "in view of the great principle in our institutions which seeks to afford to all the citizens of the Union the right of suffrage."

In the committee, 5 members voted to receive the votes of Kanesville and 4 voted against the reception.

This question was debated at considerable length on June 26, 27, and 28,[1] when the report was before the House.

819. The election case of Miller v. Thompson, continued.

A question as to counting the votes of persons whose position in relation to the boundaries of the district was in doubt.

Instance wherein the majority of a committee agreed on a report, but disagreed on the facts necessary to sustain the report.

An Elections Committee being curiously confused as to its majority and minority conclusions, the House disregarded both.

The report of the Elections Committtee not leading to a certain conclusion, the House declared the seat vacant.

The House having negatived a declaration that sitting Member was entitled to the seat, it was then declared by resolution that the seat was vacant.

Instance wherein the minority of an Elections Committee recommended declarations as to the question in issue.

6. The contestant claimed that the votes of Boone Township, in Boone County, which were cast, 42 for Thompson and 6 for Miller, should be rejected because Boone Township was not in the First Congressional district, but in the adjoining district, the Second. The minority views claim that all the persons who voted in Boone Township actually resided at that time in the Second Congressional district, saying:

> About this there is no dispute, as the districting line of Iowa places the whole of Polk County in the First district, and the whole of Boone County in the Second district; and the only ground on which it is claimed that these votes given in Boone were correctly counted in Polk County is, that by an act of the legislature of Iowa, approved January 17, 1846, Boone County was attached to Polk County, for election, revenue, and judicial purposes, and that the constitution of that State prohibits the division of counties in making Congressional districts. But, by an act of Congress approved June 25, 1842, every State that is entitled to more than one Representative is required to vote by district * * * and in pursuance of this act of Congress, the State of Iowa, on the 22d of February, 1847, divided herself into two Congressional districts. * * * Now it seems impossible that Congress * * * could have intended that, for Congressional purposes, the inhabitants and residents of one district could lawfully vote in another. And can it be supposed that the State of Iowa, when, subsequently to all these other laws, she ran a line across her territory dividing it into two districts, meant to say that after all that line meant nothing, and that the inhabitants living in one district, when voting for Representatives in Congress, might still vote in the other district?

Therefore the minority favored the exclusion of the votes of Boone.

The majority of the committee, after showing how Boone Township was for judicial and election purposes added to Polk County, says:

> The constitution of Iowa declares that any country attached to any county for judicial purposes shall, unless otherwise provided for, be considered as forming a part of said county for election purposes.

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[1] Globe, pp. 1293, 1301, 1310,

But, unless the vote of Boone Township be received and counted as part of Polk County, this constitutional provision becomes a nullity, and the voters of Boone are entirely disfranchised. Their vote could be received and counted at no other place. No provision was ever made for their voting in any other county than Polk. The electors at Kanesville could have voted, had they chosen to do so, in the county lying east of them, to which they had been attached; but these voters could have had no voice in the choice of a Representative, unless their votes had been received as a portion of the vote of the First district, of which Polk County was declared to be a part. It is, however, objected that the constitution also contains the following provision: "No county shall be divided in forming a Congressional, senatorial, or representative district." It is urged that, if Boone is to be considered as forming a part of Polk County, then a county has been divided in forming a Congressional district, and therefore the districting act must be considered as repealing the antecedent act attaching Boone to Polk. To this it may be answered, that if, within the meaning of the constitution, the districting act did divide Polk County by separating Boone Township from it, the act itself is unconstitutional and inoperative, so far as it aims to sever Boone from the county of which, under the constitution and law, it forms a part. Nor does there appear to be the least reason for asserting that it repealed the act attaching Boone to Polk.

Therefore the majority report concludes that the Boone returns should be counted.

It appears that in the committee, on the question of rejecting the Boone returns, there were six ayes and three noes, Mr. Strong, who drew the majority report, being among the noes. So it is evident that while the majority report favors counting the Boone votes, the majority of the committee voted that they should not be counted.

The majority report concluded that the sitting Member had a majority of 15 votes, and recommended this resolution:

Resolved, That William Thompson is entitled to the seat in this House which he now holds as the Representative from the First Congressional district of Iowa.

The minority found that, as a result of their conclusions, the contestant had a majority and was entitled to the seat; but instead of reporting a resolution declaratory of his rights, reported a series of resolutions in form as follows:

Resolved, That the 7 votes cast at Pleasant Grove with the middle letter of the contestant's name omitted be counted.

Resolved, That the vote cast at Kanesville be allowed and counted as a legal vote.

And in five other resolutions the remaining points in the case were included.

In the debate in the House on June 27[1] Mr. E. W. McGaughey, of Indiana, a member of the Committee on Elections, commented on the curious state of the report. A majority of the committee had concluded that the sittmg, Member was elected, but the Members who composed that majority did not all agree on the reception of certain votes needed to elect the sitting Member. Mr. McGaughey said:

Mr. Ashe votes with the majority in favor of the admission of the votes at Kanesville, and with the minority against the rejection of Boone Township, in the Second district, and as it requires the admission of the first and the rejection of the other to decide the case in favor of Mr. Miller, it follows that Mr. Ashe comes to the final result by his individual computation that Mr. Thomas is elected, while, on the other hand, Mr. Harris, of Alabama, and Mr. Harris, of Tennessee, voted in committee with the minority against the admission of Kanesville, and with the majority in favor of the rejection of Boone Township, in the Second district; but as they are in the minority against the Kanesville vote, although in the majority in regard to the other question, they can by their computation arrive at the final conclusion that Mr. Thompson is elected. This presents the singular anomaly of men agreeing in a result,

[1] Globe, p. 1299.

and disagreeing about the very facts necessary to produce that result. Now, sir, I maintain, that inasmuch as a majority of the committee agree upon a state of facts which shows conclusively that the contestant has received a majority of the legal votes, that it follows as a necessary consequence that the honorable chairman had no right to make a report which denies the right to a seat of the person thus decided to have received a majority of the votes, and that his report, submitted under such circumstances, should not and can not be regarded as the majority report.

The report was debated on June 26 to 28,[1] and on the latter date the resolutions of the minority, with an added resolution declaring Daniel F. Miller, the contestant, entitled to the seat, was offered as a substitute for the resolution reported by the majority, confirming the title of the sitting Member.

On the substitute there appeared, yeas 95, nays 94. Thereupon, the Speaker voted with the nays, making a tie vote, and so the amendment failed.

The question recurring on the resolution of the majority declaring William Thompson, the sitting Member, entitled to the seat, there appeared, yeas 94, nays 102. So the House declined to affirm that the sitting Member was "entitled to the seat."

Some question arose as to the effect of this vote, and whether or not it produced a vacancy such as would authorize the Speaker to notify the executive of Iowa. After debate[2] Mr. McGaughey, offered this resolution, which was ruled by the Speaker[3] to present a question of privilege:

Resolved, That there is now a vacancy in this House in the representation from the First Congressional district of the State of Iowa, and that the fact of vacancy be notified to the executive of the State of Iowa by the Speaker of this House.

This resolution was agreed to, yeas 108, nays, 84.

820. The Pennsylvania election case of Littell v. Robbins, Jr., in the Thirty-first Congress.

In 1850 election contests were yet instituted by memorial and conducted by rule laid down by the House.

The records and returns of election officers are presumed to be correct and are to be set aside only on conclusive proof.

Discussion of degree and kind of evidence required to rebut the presumption in favor of the acts of election officers.

On February 4, 1850,[4] Mr. Joseph R. Chandler, of Pennsylvania, presented the memorial of John S. Littell representing that he was duly elected a Representative from the Fourth Congressional district of Pennsylvania, and praying an opportunity to establish his right to the seat occupied by John Robbons, Jr. This memorial was referred to the Committee on Elections.

On January 29,[5] there being no law at that time regulating the conduct of contested elections, the House agreed to a resolution governing the taking of testimony and the forwarding of the depositions.

On August 19,[6] Mr. William Strong, of Pennsylvania, presented the report of

[1] Globe, pp. 1292, 1299, 1305, 1315; Journal, pp. 1057–1066.

[2] Globe, pp. 1316, 1317; Journal, p. 1065.

[3] Howell Cobb, of Georgia, Speaker.

[4] First session Thirty-first Congress, Journal, p. 223.

[5] Journal, p. 426.

[6] Journal, p. 1275; House Report, No. 488.

the majority of the committee in favor of sitting Member; and Mr. John Van Dyke, of New Jersey, minority views in favor of declaring the seat vacant.

The official majority for Mr. Robbins was 410. In the Penn election district of Philadelphia, 924 votes were returned for Mr. Robbins and 169 for Mr. Littell. The latter alleged frauds which diminished his actual vote in the district from 263 to 169, and increased the actual vote of the sitting Member from 445 to 924.

The sitting Member presented no testimony. The testimony relied upon by the contestant principally was that given by a committee of citizens who stood by the window through which the votes were passed to the election officers. In one precinct of the Penn district the list of the committee showed 269 less voters than were returned by the officers within—all of whom were of the same party as the sitting Member. At the other precinct—where the election board was also partisan—the committee counted 167 voters less than were recorded by the official returns. It further appeared that the return of the election showed the names of more persons than were on the registration lists provided by law; and it also appeared that an effort to find voters recorded by the election officers, but not recorded by the committees who watched the voting, failed, although the contestant caused officers with subpoenas to search for them.

It was asserted by the majority of the committee, and admitted by the minority, that the contestant had not proven conclusively that any votes given for him had been counted for the sitting Member. It was also evident that the evidence of the committees of citizens who stood by the polling places, even if admitted to be conclusive, did not show a sufficient number of fraudulent returns to overcome the majority of the sitting Member; but the minority urged that the fraud proven was sufficient to justify the throwing out of the whole vote of the Penn division. The elimination of that vote would give the seat to the contestant; but the minority merely recommended that the seat be declared vacant.

The majority of the committee, however, did not give to the evidence of the committees of citizens the importance that the minority attributed to them. The majority considered that—

> in the absence of anything to rebut it, the presumption must be in favor of the correctness of the record kept by the officers of the election and their return." Fraud is not to be presumed" is a maxim not only of law but of common justice. The means of knowledge, the facilities for accuracy, the impossibility of inattention, and the responsibilities connected with the failure to discharge their duty, all unite to secure a credence to the acts of the officers, which can not be justly accorded to the acts of others, especially if those others be mere partisans.

The committee further go on to state that the laws of Pennsylvania tended to guard against the perpetration of the frauds alleged. Therefore the committee held that the prima facie presumption had not been overturned, and reported a resolution declaring the sitting Member entitled to his seat.

On September 11 [1] the minority moved to substitute for the majority resolution a declaration that the seat should be declared vacant. This was decided in the negative, yeas 56, nays 110. Then the resolution of the majority, declaring Mr. Robbins entitled to the seat, was agreed to without division.

[1] Journal, pp. 1444–1446.

Chapter XXVII

GENERAL ELECTION CASES, 1850 TO 1860.

1. **House cases from the Thirty-second to the Thirty-sixth Congresses. Sections 821–843.**[1]
2. **The Senate ease of James Harlan. Section 844.**

821. The Pennsylvania election case of Wright v. Fuller, in the Thirty-second Congress.

Construction of the provision of the law of 1851 requiring the notice of contest to "specify particularly."

The notice of contest need not specify the names of voters objected to as not qualified.

On April 22, 1852,[2] the Committee on Elections reported in the case of Wright *v.* Fuller, of Pennsylvania. This case involved three main features: The sufficiency of the notice of contest under the law of 1851, the conduct of election officers, and alleged fraudulent votes.

The sitting Member alleged that the notice was not in accordance with the requirement that the contestant should "specify particularly" the grounds of the contest. The minority and majority of the committee differed in their interpretation of the law. After printing in full the notice, the majority report contends:

> A majority of the committee deeming this notice sufficiently certain and definite to apprise the sitting Member of the reasons "of the grounds" on which his election was contested, overruled this objection. The first section of the law which directs the contestant to give notice to the sitting Member reads in conclusion thus: "And in such notice shall specify particularly the grounds upon which he relies in the contest." What are the "grounds," the reasons on which the seat is to be contested? The notice furnishes us with the answer: The gross and flagrant misconduct and irregularities of the officers constituting the election board, and also the reception of such a number of illegal votes as changed the

[1] Additional cases in this period, classified in different chapters, are:

Thirty-fourth Congress, Tumey *v.* Marshall and Fouke *v.* Trumbull, Illinois. (See. 415.)
Thirty-fifth Congress, Fuller *v.* Kingsbury, Dakota. (See. 408.)
Thirty-fifth Congress, Whyte *v.* Harris, Maryland. (See. 324.)
Thirty-fifth Congress, Phelps, Cavanaugh, and Becker, Minnesota. (Sec. 519.)
Thirty-fifth Congress, Vallandigham *v.* Campbell, Ohio. (Sec. 726.)
Thirty-sixth Congress, Williamson *v.* Sickles, New York. (Sec. 597.)
Thirty-sixth Congress, Harrison *v.* Davis, Maryland. Sec. 325.)

[2] First session Thirty-second Congress, House Report No. 136; 1 Bartlett, p. 152; Rowell's Digest, p. 137.

result of the election. The intention of the law requiring this notice to be given was to prevent any surprise being practiced, to put the sitting Member upon a proper defense. As no surprise has been alleged-no want of due information protested—the committee could but conclude that the notice, within the purview of the law, was all sufficient. If, as the sitting Member contends, the act required that the names of the illegal voters should have been particularly specified in the notice, we would certainly have the fact set forth and declared in the sixth section, which provides that the "names of the witnesses to be examined, and their places of residence, should be given, by leaving a copy with the person to be notified, at his usual place of abode, at least ten days before the examination." The furnishing of a list of names of the illegal voters might possibly have put the sitting Member in a stronger position to rebut the contestant's proof; but that the contestant was required to furnish such a list is not within the letter nor demanded by the spirit of the statute.

The minority, who from their views evidently considered that on this point the case turned principally, contended:

Now what do the words "specify particularly," in this connection, mean? In our opinion they mean a clear, precise, definite, and full statement of the facts on which an election is proposed to be contested. The charges must be positive, tangible, direct, and particular. If a party complain of illegal voting, therefore, inasmuch as illegal voting is susceptible of particular specification, he must state where it was done, when it was done, the number of illegal votes, and by whom given, and the disqualification. Clearly nothing less would be "a particular specification," and the absence of any of these requisites must render such specification vague, indefinite, and therefore insufficient. The notice of the contestant in this case does not state the number or the names of any who voted illegally, and is, therefore, in our judgment, insufficient. It should state the number, because any number less than the returned Member's majority would not, of course, defeat his election; and an investigation of any less number would, therefore, be unnecessary. A general allegation of illegal votes may mean five, or ten, or twenty, or five hundred; it is uncertain, and not particular. Nor would a subsequent averment that the illegal votes received, and the illegalities complained of, had changed the result, be sufficient. This point was expressly ruled in case of Lelar, sheriff of Philadelphia, in 1846. The courts say they will require of the party complaining of illegal votes to state the number, for instance, thus: Twenty voted under age; fifteen voted who were unnaturalized foreigners; ten who were nonresidents, etc. This particularity the courts of Pennsylvania say they will require, because otherwise they would be converted into a mere election board, for the purpose of counting disputed ballots. It is true that in this case they did not require the names, but Congress, in the case of Joseph B. Varnum, of Massachusetts (see Contested Elections, p. 112), expressly ruled that the allegation that persons vote who were not qualified to vote is not sufficiently certain, and that the name of the persons objected to for want of sufficient qualification must be set forth prior to the taking of the testimony.

Again in the case of Easton *v.* Scott, from Missouri (see Contested Elections, p. 272), it was decided that the party complaining of illegal votes must state the names and the particular disqualifications. This was also required in the case of Littell against Robbins, at the last Congress. It has always been required in the English House of Commons. Such, we believe, is the usual and correct practice in all cases of contested elections; and surely if Congress, in the absence of any law prescribing the mode of taking testimony in such cases, has required parties to be thus particular, how can we be less so when Congress by positive law declares they shall "specify particularly?"

822. The case of Wright v. Fuller, continued.

The House, in judging on election, returns, and qualifications, should, by reason of the functions delegated to the States, be governed by certain State laws.

Discussion as to what constitutes a fatal irregularity in the conduct of election officers.

The Elections Committee, in an unsustained report, held that a seat should be declared vacant for a fraud which might have reversed the result.

Not knowing who profited by certain decisive votes cast by disqualified voters, the House hesitated to declare the seat vacant.

As to the conduct of the election officers and the fraudulent voting, the majority lay down this rule of conduct:

Having disposed of this preliminary point, the committee proceeded to the examination of the law and testimony involved in this case. In discharging the last duty, the committee considered that, although the House of Representatives, by virtue of the fifth section of the first article of the Federal Constitution, are made the judges of the election, returns, and qualifications of its Members, yet this power is not plenary, but is subordinate to the second and fourth sections of the same article—the first of these sections providing that the electors of the Members shall have the qualifications requisite for the most numerous branch of the State legislature; the fourth section empowering and authorizing the legislature in each State to prescribe the places, times, and manner of holding elections for Senators and Representatives—such regulations being subject to alterations made by the Congress.

By force of these provisions, the House is compelled, when adjudicating in any matter affecting the elections, returns, or qualifications of any of its Members, to make the law of the respective States from which such Members may be returned its rule of action.

In relation to the conduct of election officers the majority found that at the Danville precinct, where the vote was suspicious—

The evidence furnished the committee proves that the judge, Mr. Kitchen, elected by the people to officiate in the particular capacity of judge, did, for a great portion of the time while the election was going on, neglect his peculiar business and was engaged in discharging the duty of inspector. Not only the oath but the duties of these officers are entirely different. The two inspectors are required to stand at the window to receive votes, and whenever they may disagree respecting the qualifications of a voter the judge is to decide between them. His duty is strictly that of an umpire. His oath carries no further obligation with it. Usurping the duties of an inspector, he was, pro hac vice, an unsworn officer. If this irregularity of conduct of the judge could be considered as resulting from ignorance or casual carelessness, it might not demand the serious attention of the House, but this was not the case.

Each inspector is required to select one clerk, whose duties, as prescribed by law, are to keep the list of voters as voting, and to record the reasons of persons voting on age, or such as are not found on the alphabetical list, and as admitted by the inspectors, and who are bound by the obligations of an oath. E. W. Concklin and B. Brown were selected to act in this capacity. Do we find them more regardful of duty, more faithfully observant of the requirements of the law? The evidence is strong that one of them, Concklin, while he delegated to another individual, an unsworn officer, a right to discharge his duties, assumed for a portion of the time the office of inspector. It is proven that Concklin was engaged in taking and counting out votes from the boxes—a duty which is imposed by the law exclusively upon the judge and inspectors.

The assessor was also required by law to be present to give information as to the right of persons to vote; but at the Danville precinct the assessor laid aside his register and acted for a time as distributer of tickets.

The majority therefore concluded that the action of the election officers was fatally at variance with the requirements of law.

The minority contended that the acts of the election officers were not fatally illegal. The judge was sworn to "faithfully assist the inspectors," among his other duties, and the minority concluded that this justified the acts of Judge Kitchen.

The minority contended that the proof of illegal voting was insufficient. The majority showed that the total result at the Danville precinct, where contestant received 32 votes and sitting Member 659, was suspicious when compared with votes of previous elections. Furthermore, certain voters whose qualifications were impeached refused to answer subpoanas and so defied investigation. On the whole, the testimony satisfied the majority that frauds had been committed; but they

could not satisfy themselves as to how many illegal votes the sitting Member received. The sitting Member had been returned by a majority of 59 votes, and the committee found enough unqualified voters to reverse the result if it could have been definitely ascertained that all or a large portion of them had been cast for sitting Member. Not being able to establish this positively, the committee reported a resolution declaring the seat vacant because the election at the Danville precinct had been "irregularly and illegally conducted."

The case was considered in the House June 24, 26, and 28 and July 2.[1] On the latter day the whole subject was laid on the table, by a vote of yeas 87, nays 64.

So the sitting Member retained the seat.

823. The election case of Lane v. Gallegos, from the Territory of New Mexico, in the Thirty-third Congress.

In the absence of fraud on the part of the voters, whose choice was in doubt, the House overlooked irregularities on the part of the election officers.

On February 24, 1854,[2] the Committee on Elections reported in the case of Lane *v.* Gallegos, of New Mexico, that there were undoubtedly great irregularities in the returns, but no greater than might be expected in the recently organized Territory, where the people generally did not understand the institutions or language of the country. It did not appear that in any single instance was fraud committed or attempted, or that any return from any of the precincts was corruptly made.

The contestant alleged gross frauds in the voting and that returns had been changed in the office of the secretary.

The committee found that the votes of certain Indians had been properly excluded, since they were not qualified voters according to the laws of the Territory. There was no proof showing material fraud in the voting.

The probate judge of San Miguel County, in returning the abstract of votes of certain precincts to the office of the secretary of the Territory, had failed to accompany his return with the poll book. But subsequently, and within the limit of time prescribed by law, the lists of voters were furnished.

The committee concluded:

> Neither in these precincts of San Miguel nor in those of any other county from which the returns are alleged by the contestant to be informal and contrary to law have the committee been able to perceive so substantial a defect as to justify their total exclusion. In the absence of all attempt at fraud on the part of the voters it would be manifestly unjust to deprive them of the effect of their suffrages for a slight failure upon the part of the officers conducting the election fully to comply with all the forms of law when enough is clearly shown to determine the wishes of the people.

Therefore the committee arrived at the unanimous opinion that Mr. Gallegos was entitled to the seat as Delegate from New Mexico.

The House concurred in the report of the committee.

824. The Illinois election case of Archer v. Allen in the Thirty-fourth Congress.

Opinion from a divided committee as to the degree of definiteness of specifications required in a notice of contest.

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[1] Journal, pp. 840, 845, 849, 852, 857–859; Globe, pp. 1613, 1627, 1655.

[2] First session Thirty-third Congress, 1 Bartlett, p. 164; Rowell's Digest, p. 140.

A notice as to taking testimony having been delayed in delivery so that one of the parties could not attend, the committee ordered the testimony taken anew.

When a Member was returned by a majority of 1, which was rendered uncertain by a recount, the House declared the seat vacant.

As to the effect of an unofficial recount of votes on the return as originally made.

A seat being declared vacant, the House directed the Speaker to notify the executive of the State.

The case of Archer *v.* Allen, from Illinois, in 1856,[1] involved four questions: The sufficiency of the notice of contest under the law, the sufficiency of a notice of the taking of certain testimony, the legality of a recount of votes in a certain precinct, and the legality of three votes.

The contestant had notified the sitting Member of his intention to contest on the following grounds:

> That the returns made by the returning officers, as officially announced, are incorrect, and that the poll books of the several counties in this district show that I received a majority of the legal votes polled in the said district for the said office and am entitled to the certificate of election therefrom.

The majority of the committee concluded this notice was sufficient:

> Your committee are dearly of opinion that the first specification is sufficiently certain and definite to authorize an investigation of the correctness of the returns made by the returning officers of any precinct in the district. The notice embraced all the precincts in general terms, and was as good a compliance with the law of 1851[2] and as serviceable to the sitting Member as if every precinct in the district had been specifically named. The law was substantially complied with. Besides, it does not appear, and it has not been suggested, that injury or inconvenience has resulted to the sitting Member from any want of certainty in the notice.

The minority contended that the notice fell far short of the requirement of law, that the contestant should "specify particularly the ground upon which he relies in the contest," and declared that it could hardly have been more vague and indefinite.

The second consideration related to the taking of testimony as to the return of Livingston precinct, on which depended the seat. The sitting Member objected that the notice given him was not due or legal. The law required ten days' notice; but it was not until February 28 that the notice was served on him in Washington, and the time for taking the testimony was designated as March 9, and the place the State of Illinois. The minority of the committee contended that the time was but nine days, and the distance too great to allow of attendance. Therefore the testimony was ex parte and should not be allowed to impeach the Livingston vote as returned originally. The majority of the committee contended that the notice which was dated February 20, and delayed by no fault of contestant, was sufficient under the rule of law that the day upon which the notice was given might be counted under certain circumstances, and on the further ground that the law relating to

[1] First session Thirty-fourth Congress, 1 Bartlett, p. 169; Rowell's Digest, p. 142; House Reports Nos. 8 and 167.

[2] 9 Stat. L., p. 568. The prior laws on this subject were Stat. 1798, chap. 8, and Stat. 1800, chap. 28, which extended the former act for four years.

contests was directory and cumulative, having for an object the protection and not the defeat of contesting parties and the people. But the committee decided to have the depositions retaken at a time and place where the sitting Member could be present and cross-examine. The sitting Member availed himself of this privilege, although he had expressly denied that the depositions, as originally taken, contained anything that. could warrant the committee in setting aside the official returns.

At the election held November 7, 1854, the returns showed for the sitting Member a majority of one vote. The return of Livingston precinct was 100 votes for William B. Archer and 47 votes for James C. Allen.

But on March 2, 1855, the election officers of Livingston made affidavit that a recount of the votes—which had been put in a locked box and kept by one of the judges—showed 102 votes for Mr. Archer and 46 votes for Mr. Allen.

The majority of the committee were satisfied with the correctness of the recount, the three original ballots which occasioned the discrepancy having been exhibited to the committee, although they were lost before the subject came up in the House. The minority held that the correctness of the recount was not proven. There was no law requiring the ballots to be kept after the first count and return. The testimony was not conclusive that other persons than the judge keeping the box had not had access to it.

There was also a question as to three votes, two alleged to have been cast by minors and one by a nonresident. The testimony as to the two alleged minors was not sufficient to determine for whom they cast their ballots. The alleged nonresident testified that he voted for contestant, but the majority of the committee declined to rule that he was ineligible as a voter, as it was "to be presumed that the judges of election did their duty and received no illegal votes."

Therefore the majority reported the following resolution:

Resolved, That James C. Allen was not elected and is not entitled to a seat in this House.
Resolved, That William B. Archer was elected and is entitled to a seat in this House.

On July 16, 17, and 18[1] the report was considered in the House, and after long debate the first resolution was agreed to, yeas 94, nays 90.

By the second resolution, declaring Mr. Archer elected, the yeas were 89 and the nays 91. So the contestant was not seated, although a persistent effort was made to reconsider the vote.

Then the House agreed to the following:

Whereas this House having declared that neither James C. Allen nor William B. Archer is entitled to a seat on this floor from the Seventh Congressional district of Illinois;

Be it resolved, That in the judgment of this House, a vacancy exists in said district, and that the election which was contested in this House therefrom be referred back to the people of the district, and that the Speaker of this House notify the governor of that State of this resolution of the House.

825. The first election case of Reeder v. Whitfield, from the Territory of Kansas, in the Thirty-fourth Congress.

Instance wherein an election contest was instituted by memorial after the enactment of the law of 1851.

[1] Journal, pp. 1221, 1223, 1226–1234; Globe, pp. 1646, 1656; Appendix, pp. 923–936.

In 1856 the idea was advanced that the House was not bound to proceed in an election case according to the law of 1851.

On February 2, 1856, the House elected a Speaker after a contest which had begun December 3, 1855.

On February 4, 1856,[1] after the oath had been administered to the Members, the Delegates were called. When the name of John W. Whitfield, of Kansas, was called, Mr. Lewis D. Campbell, of Ohio, expressed the belief that the circumstances surrounding the election of Mr. Whitfield were sufficient to cause the House to depart from its usual custom in admitting Delegates on prima facie evidence; but as the House had been long delayed in organizing, and as a Delegate had no vote, he would not object to the swearing in of Mr. Whitfield. The latter then took the oath.

On February 14[2] the memorial of A. H. Reeder, contesting Mr. Whitfield's seat was presented to the House. The grounds of contest were as follows:

> That the election of October 1, 1855, at which Mr. Whitfield was returned as elected, was void, inasmuch as the law under which it was held had been passed by a legislature elected through the participation of superior numbers of nonresidents of the Territory.
>
> That the law had been passed by the legislature sitting at an unauthorized place, where no valid legislation could be had.
>
> That the election for Delegate had not been conducted according to the forms of that pretended law, even; and that many illegal votes were polled by nonresidents and others. The memorialist excused himself from further specifications on this objection because he could not obtain the necessary information from the executive offices of the Territory.
>
> The memorialist further claimed that he was elected Delegate by a large majority of the legal voters at an election held October 9, 1855.

This memorial was referred, and on March 5, 1856,[3] the Committee on Elections reported. The committee in this report did not go into the merits of the case but asked the adoption of the following resolution:

> *Resolved*, That the Committee on Elections, in the contested election case from the Territory of Kansas, be, and are hereby, empowered to send for persons and papers, and to examine witnesses upon oath or affirmation.

It appeared from the memorial that Mr. Reeder did not claim the seat; but this was not seriously urged as an objection to proceedings by the House, which was conceded to have undoubted authority to examine its own constituent parts. The majority of the House also considered that common rumor, as well as the declarations of the memorialist, furnished abundant reasons for the investigation.

A preliminary question of importance was involved in the fact that the proceeding by the contestant were not in accordance with the law of 1851 governing procedure in cases of contested elections. That law, while in terms applying to States only, was said to apply by implication also to contested elections from the Territories. But it was argued,[4] apparently with prevailing effect, that even if it did apply to Territorial contests, the law of 1851 could not prevent the House, under the Constitution, from passing such orders and resolutions to procure testimony whether by witnesses or deposition, as it might think proper.

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[1] First session Thirty-fourth Congress, Globe, p. 353; Journal, p. 448.

[2] Journal, p. 533; House Report No. 3, p. 26.

[3] House Report No. 3.

[4] By Mr. Israel Washburn, of Maine, Globe, p. 454.

The right of the House to send for persons and papers in such a case was not seriously questioned, the precedents in the New Jersey contest, and earlier cases in the First and Second Congresses being cited.

826. The first case of Reeder v. Whitfield, continued.

The House decided that it might investigate all matters pertaining to the election of a Delegate, including the constitution of the legislature which provided for the election.

Form of resolution providing for the Kansas investigation of 1856.

Discussion of the nature of the office of Delegate.

A Territorial legislature being chosen under duress of armed invaders, the House unseated the Delegate chosen under a law passed by that legislature.

The main point not being a question as to which of the two parties to the contest received the most votes, but a question as to the validity of the legislative act providing for the election, it was contended that Mr. Reeder was estopped from raising this question because he was governor of the Territory at the time the legislature was elected and assembled, and issued to the Members their certificates of election, and treated the legislature, when assembled, as a lawful body. The majority of the committee contended that the doctrine of estoppel was applicable only to matters of private right, and an official acting in a public capacity could not, by the performance of his duty, thereby estop himself from any other duty which he might afterwards owe to the public as a private citizen, or in another and different official capacity.

These questions were incidental to the main controversy, as to the right of the House to examine into the legality of the existence of the Territorial legislature which had passed the law, in accordance with which Mr. Whitfield had received the election and return.

It was urged with great vigor[1] that the House might not make this inquiry, since the House in this case was in the position of a court, and while a court might inquire into the validity of a statute, it might not inquire into the legality of the election of the members of the legislature that passed the statute. That question belonged to the two houses of the legislature itself, and their decision when made was considered the judgment of a court of competent jurisdiction, which no other court would inquire into. It was the inherent right of the Kansas legislature to inquire into the election, returns, and qualifications of its own members, and having done so the National House of Representatives might not examine that subject. This position was fortified by numerous citations from the law writers of England.

In support of the committee's proposition it was argued[2] that it did not follow that this House was bound by the limitations of a court. A judicial tribunal might not examine into the elections, qualifications, and returns of Members of this House, but this House did decide on those questions. It did not follow, therefore, that this

[1] By Mr. Alexander H. Stephens, of Georgia, and others. See Appendix of Globe, first session Thirty-fourth Congress, pp. 120, 121, 179.

[2] By Mr. Henry Winter Davis, of Maryland. (Appendix of Globe, p. 227.) Mr. Davis occupied a middle ground, not going to the whole extent of the committee's contention.

House might not decide a question because the courts could not. The question before the House was not a judicial question, but a political question. This distinction cleared away the difficulties over this branch of the question. This House having the right to examine into the election of its Members,[1] had the power to look into every fact upon which the election depended. There was no object in citing authorities as to the right of a legislature to judge of the election, returns, and qualifications of its members, because there was a prior question first to be decided, viz, whether or not there was a legislature to judge. Even in the case of a State one of the branches of Congress had passed upon a status of the legislature in the contested election case in the Senate of Robbins and Potter.[2] But the Territorial legislature of Kansas did not stand on any such basis. Its authority was limited by the terms of the organic law passed by Congress—the Kansas and Nebraska act. That legislature was not only a usurping body, elected by violence, but its legislation in regard to the election of a Delegate to Congress violated the organic act, notably in that it presumed to delegate powers which it might not delegate.

The question of the legality of the removal of the legislature to another place, as well as the validity of the election of October 9, when Mr. Reeder was chosen, did not figure essentially in the report or debate.

The preliminary report of the committee was debated on February 19, 20, March 6, 7, 14, 17, 18, and 19.[3] On February 20 the House agreed to the resolution by a vote of 71 yeas to 69 nays, but at once reconsidered it by a vote of 75 yeas to 67 nays. The resolution was then recommitted, with instruction to report the reason and grounds for which the authority to send for persons and papers was asked. On March 6 the House took up the subject again, the committee having reported the reasons and the same resolution.

Several propositions were then made as substitutes for the resolution of the committee, and finally, on March 19,[4] the House, by a vote of 102 yeas to 93 nays, adopted the following resolution:

Resolved, That a committee of three of the Members of this House, to be appointed by the Speaker, shall proceed to inquire into and collect evidence in regard to the troubles in Kansas generally, and particularly in regard to any fraud or force attempted or practiced in reference to any of the elections which have taken place in said Territory, either under the law organizing said Territory or under any pretended law which may be alleged to have taken effect therein since; that they shall fully investigate and take proof of all violent and tumultuous proceedings in said Territory at any time since the passage of the Kansas-Nebraska act, whether engaged in by residents of said Territory or by any person or persons from elsewhere going into said Territory and doing, or encouraging others to do, any act of violence or public disturbance against the laws of the United States or the rights, peace, and safety of the residents of said Territory; and for that purpose said committee shall have full power to send for and examine, and take copies of all such papers, public records, and proceedings, as in their judgment will be useful in the premises; and also to send for persons and examine them on oath or affirmation as to matters within their knowledge touching the matters of said investigation; and said committee, by their chairman, shall have power to administer all necessary oaths or affirmations connected with their aforesaid duties.

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[1] Argument of Mr. Israel Washburn, of Maine. Appendix of Globe, p. 191.

[2] Arguments of Messrs. J. A. Bingham, of Ohio, and Washburn, of Maine. Appendix of Globe, pp. 126, 192.

[3] Journal, pp. 561, 568, 646, 650, 678, 685, 691, 693; Globe, pp. 451, 475, 611, 612, 659, 674, 677, 690; Appendix, pp. 118, 122, 166, 179, 189, 227.

[4] Journal, p. 698.

Resolved, further, That said committee may hold their investigations at such places and times as to them may seem advisable, and that they have leave of absence from the duties of this House until they shall have completed such investigation; that they be authorized to employ one or more clerks, and one or more assistant sergeants-at-arms, to aid them in their investigations; and may administer to them an oath or affirmation faithfully to perform the duties assigned to them, respectively, and to keep secret all matters which may come to their knowledge touching such investigation as said committee shall direct, until the report of the same shall be submitted to this House; and said committee may discharge any such clerk or assistant sergeant-at-arms for neglect of duty or disregard of instructions in the premises, and employ others under like regulations.

Resolved, further, That if any person shall in any manner obstruct or hinder said committee, or attempt so to do, in their said investigation, or shall refuse to attend on said committee, and to give evidence when summoned for that purpose, or shall refuse to produce any paper, book, public record, or proceeding in their possession or control to said committee when so required, or shall make any disturbance where said committee is holding their sittings, said committee may, if they see fit, cause any and every such person to be arrested by said assistant sergeant-at-arms and brought before this House to be dealt with as for a contempt.

Resolved, further, That for the purpose of defraying the expenses of said commission there be, and hereby is, appropriated the sum of $10,000, to be paid out of the contingent fund of this House.

Resolved, further, That the President of the United States be, and is hereby, requested to furnish to said committee, should they be met with any serious opposition by bodies of lawless men, in the discharge of their duties aforesaid, such aid from any military force as may at the time be convenient to them, as may be necessary to remove such opposition and enable said committee without molestation to proceed with their labors.

Resolved, further, That when said committee shall have completed said investigation they report all the evidence so collected to this House.

Messrs. John Sherman, of Ohio; William A. Howard, of Michigan; and Mordecai Oliver, of Missouri, were appointed on this committee, and conducted the investigations as ordered. On July 2, 1856,[1] the report was referred by the House to the Committee on Elections.

On July 24[2] the Committee on Elections reported.[3] The majority found that each election in Kansas held under the organic or alleged Territorial law had been carried on by organized invasion from Missouri, which had prevented the people of Kansas from exercising their rights; that the alleged Territorial legislature was illegally constituted, and its enactments null and void; that the election of Mr. Whitfield was not in pursuance of valid law, and should be regarded only as the expression of the choice of those resident citizens who voted for him; that the election of Mr. Reeder was not held in pursuance of law, and was the expression only of resident citizens who voted for him; and that Mr. Reeder received a greater number of the votes of resident citizens than did Mr. Whitfield.

Therefore the majority reported resolutions to unseat Mr. Whitfield and seat Mr. Reeder.

As to the propriety of seating Mr. Whitfield the majority say:

The office of a Delegate from a Territory is not created by the Constitution. Such Delegates are not Members of the House, and have no votes in its deliberations. They are received as a matter of favor—as organs through whom may be communicated the opinions and wishes. of the people of the Territories. It is competent for the House—and this power has been often exercised—to admit private parties to be heard before it by counsel. It must be equally competent for the House, at its discretion, to admit any person to speak in behalf of the people of the Territories. It may, if it sees fit, admit more than one such person from each Territory. Under ordinary circumstances, no case calling for the exer-

[1] Journal, p. 1148.

[2] Journal, p. 1275.

[3] House Report No. 275.

cise of this discretionary power will arise. In all the laws creating Territories provision is made for the election of Delegates to Congress; and the people of the Territories, having the opportunity to be heard through such Delegates, and by memorial and petition under the general provisions of the Constitution, could not ask to be heard through any other agency. In the present case, however, the people of the Territory of Kansas have been deprived of the power to make a strictly legal election of a Delegate by an invasion from Missouri, which subverted their Territorial government and annihilated its legislative power. To deny to Kansas the right to be heard through the choice of its resident citizens, merely because that choice was manifested outside of legal forms, and necessarily so, because the law-making power was destroyed by foreign violence, is to deny to Kansas the right to be heard at all on the floor of the House.

The minority contended, in a report apparently drawn by Mr. Alexander H. Stephens, of Georgia, that the question was the same as before the report of the investigating committee, that all question as to the validity of the law passed by the Kansas legislature was res adjudicata according to the well-settled principles of all our representative institutions. The minority also called attention to a letter alleged to have been written by the contestant and laid before the House in the report of the investigating committee, wherein he admitted the legality of the legislature. The minority denied the charges of outrages in Kansas, while at the same time denying the power of the House to give them weight in this case had there been such.

On July 31 and August 1[1] the report of the committee was debated. In the course of this debate, by unanimous consent, a statement of the contestant was read by the Clerk at the desk.[2] On August 1, by a vote of yeas 110, nays 92, the House agreed to the resolution declaring Mr. Whitfield not entitled to the seat.

On the resolution to admit Mr. Reeder to a seat there were yeas 88, nays 113. So the seat became vacant.

827. The second election case of Reeder v. Whitfield, from the Territory of Kansas, in the Thirty-fourth Congress.

The House declined to reverse its conclusion that a Delegate, elected in pursuance of a law enacted by an illegally constituted legislature, should not retain his seat.

When the organic law requires an act of the legislature to fix the times, etc., of a Territorial election, an election called by the governor is not valid.

A Territorial legislature of impeached status having by a law virtually disfranchised qualified voters, the Elections Committee considered the status of the returned Delegate adversely affected.

The integrity of the laws governing the election being impeached, the committee recommended that the seat be declared vacant.

On February 12, 1857,[3] the Committee on Elections reported in the contested election case of Reeder *v.* Whitfield, from Kansas. This was a second contest. At the first session of this Congress Mr. Whitfield had been unseated.[4] At the third session Mr. Whitfield again appeared with the certificate of the governor of the

[1] Journal, pp. 1333, 1337–1340; Globe, pp. 1758, 1842, 1859, 1863, 1873; Appendix, p. 1114.

[2] Journal, p. 1333.

[3] Third session Thirty-fourth Congress, 1 Bartlett, p. 216; Rowell's Digest, p. 149; House Report No. 186.

[4] See Section 826 of this volume.

Territory, and, after opposition, was sworn in on the prima facie evidence of the certificate.[1]

In the report on this second contest the committee say:

> The sitting Delegate * * * bases his claim to his seat upon an election held in October, 1856, in pursuance of a proclamation fixing the day of the election, issued by the governor * * * and which said election was conducted according to "An act to regulate elections," enacted in 1855, by a body of men claiming to be the legislature of Kansas, and which derived its existence from an election held in that Territory on March 30, 1855. It appears from the report of the special committee, appointed by this House during its first session, to investigate the affairs of Kansas, that the Territorial legislature, claiming to have been chosen at the election of March 30, 1855, "was an illegally constituted body, and had no power to pass valid laws, and their enactments are, therefore, null and void." In this conclusion of the special committee this House has manifested its own concurrence by many decisions and on many occasions. * * * It is a fatal objection, therefore, to the claim of the sitting Delegate to have been elected in pursuance of law, that he bases it upon an election held under the direction of officers deriving their authority from an usurping legislative body, and regulated by laws emanating from the same vicious sources.

The minority of the committee denied that these assertions of the majority had been proven, and maintained that the legislature in question was legal, elected by a majority of the actual bona fide settlers or residents of the Territory.

The majority of the committee further contended that there was another fatal objection to the claim of the sitting Delegate to the seat. The organic act of the Territory—the Kansas-Nebraska act of 1854—provided that the first election for a Delegate to Congress should be held in accordance with the precept of the governor, but that "at all subsequent elections the times, places, and manner of holding the elections shall be prescribed by law." Therefore the governor of Kansas was not authorized by the organic law to issue the proclamation for the election of October, at which the sitting Delegate claimed to have been elected. Neither was there to be found such authority in the law enacted by the so-called legislature. The minority did not assent to this proposition, contending that the organic act secured to the people of the Territory the right to representation, and they "should not be held to have lost this high privilege merely because the Territorial legislature omitted to pass an act prescribing the 'times, places, and manner of holding the elections.'" The unseating of the Delegate at the preceding session had left a vacancy, and to carry out the spirit of the organic law and keep a Delegate in Congress it resulted, from the very necessity of the case, that it was the duty of the governor to issue the proclamation for the election. Such a construction of the organic act as the majority contended for would have left the Territory without representation had the legislature failed to pass a law prescribing "the times, places, and manner of holding the elections." The minority also claimed sanction for the act of the governor in the law of 1817, which provided that every Territory in which a temporary government had been established should have the right to send a Delegate to Congress, such Delegate to "be elected every second year, for the same term of two years for which Members of the House of Representatives of the United States are elected."

The majority of the committee say that, while the sitting Delegate had no legal claim to the seat, he might as a matter of "indulgence and discretion" be

[1] See Section 529 of this volume.

allowed to retain the seat if it sufficiently appeared that his election was in fact concurred in by a majority of those who were or ought to be the legal voters of Kansas. But the committee found that the act of the "pretended legislature" under which the election was held had certain provisions in regard to the choice of election officers and the qualifications of voters that virtually disfranchised large numbers of the citizens of Kansas and permitted reckless nonresidents to exercise the suffrage. The majority were of the opinion that several hundred persons were restrained from voting by what was in effect a "test oath."

The majority stated they were not prepared to recommend that the contestant, Mr. Reeder, be admitted to the seat, it not being contended that he had received the greater number of votes cast at the election in question.

The majority of the committee recommended the following resolution:

Resolved, That John W. Whitfield is not entitled to a seat in this House as a delegate from the Territory of Kansas.

On February 21[1] the resolution was taken up and a motion to lay it on the table was agreed to, yeas 96, nays 87. An attempt was at once made to reconsider this vote, but the motion to reconsider was laid on the table, yeas 99, nays 94. From the slight debate it appears that there was a disposition to table the subject in order to attend to other business in the closing hours of the session; and that the vote did not strictly involve the merits of the question.

828. The Maine election case of Milliken v. Fuller in the Thirty-fourth Congress.

The returns of election officers de facto, acting in good faith, were counted by the House.

Instance wherein returns were held valid although there were serious irregularities on the part of the returning officers.

On April 10, 1856,[2] the Committee on Elections reported in the case of Milliken *v.* Fuller, of Maine, recommending the following resolution, which was agreed to by the House without debate or division:

Resolved, That Thomas J. D. Fuller is elected to, and rightfully entitled to, his seat in the Thirty-fourth Congress.

The report of the committee says that they did not investigate alleged defects in ballots—

for the reason that, whether so allowed or not, the result would not thereby be changed, unless—

First. That votes from "plantations organized for election purposes only," from which lists of the voters were not returned to the office of the secretary of state, as is contended the law required as a condition to being allowed, be rejected; or,

Second. That the votes of Hancock plantation be rejected, because the officers who held the election were chosen at a meeting held in the month of April, when, as the contestant contends, the law of the State required that it should have been held in the mouth of March.

There is no controversy about the facts in either case, and although there was difference of opinion in the committee, whether the election of municipal officers in the Hancock plantation was held at a time permitted by the law of the State, yet the committee is unanimously of the opinion that the persons

[1] Journal, p. 509; Globe, p. 798.

[2] First session Thirty-fourth Congress, 1 Bartlett, p. 176; Rowell's Digest, p. 143; House Report No 44; Journal, p. 903.

officiating were officers de facto, acting in good faith; and, as no fraud is alleged, the votes from the district were rightfully counted for the sitting member.

In regard to the returns from "plantations organized for election purposes only," the members of the committee were, as were the governor and council of the State of Maine before them, divided in opinion, and are not prepared to say what conclusion they would have come to in the case, had this been an original question; but, inasmuch as contemporaneous constructions by the State canvassers have recognized the returns from these plantations, and that they have received and counted them as valid, notwithstanding the list of voters was not returned with the number of votes cast; therefore, under the circumstances, the committee do not feel authorized, whatever the opinion of some of its members may be of the effect of a noncompliance on the part of the plantation officers with the plain requirements of the law, to exclude the votes of these plantations.

829. The election case of Bennet v. Chapman, from the Territory of Nebraska, in the Thirty-fourth Congress.

Discussion of the extent of irregularities in returns required to justify their rejection.

Discussion as to residence within the limits of the constituency as a qualification for voters.

Instance wherein the report of the Elections Committee was overruled by the House.

On April 18, 1856,[1] the Committee on Elections reported in the case of Bennet *v.* Chapman, from the Territory of Nebraska. This case involved two varieties of question: One as to the returns, and the other as to the qualifications of certain voters.

A count of all the votes cast at the election gave the contestant a plurality of 13 votes. But the Territorial canvassers and governor rejected the returns from half the counties of the Territory, affecting nearly half of the total vote. As a result of this action, a plurality resulted for the sitting Member.

The returns were rejected because they were not made in accordance with the Territorial law. The majority of the committee considered that these variations were not sufficient to cause the rejection of the returns, in the absence of anything impeaching the integrity of the vote. The minority contended that the deviations from the requirements of the statutes were sufficient to make the returns fatally defective.

The deviations may be described as follows:

In Otoe County the poll books were forwarded to the office of the secretary of the Territory instead of being kept in the office of the county register, as the law required, there to be canvassed by the probate judge and three assistants. An abstract of this canvass should have been certified and sent by the county register to the secretary of the Territory. The majority considered these provisions merely directory, and that the failure to comply with them should not affect the Otoe return. The minority on the other hand deemed the canvass by the probate judge and the certification of the abstract of essential importance. The actual returns sent to the office of the Territorial secretary were signed by persons purporting to have acted as judges of election and clerks of election in Otoe County; but there was nothing accompanying the return to show that they had authority so to act.

[1] First session Thirty-fourth Congress, 1 Bartlett, p. 204; Rowell's Digest, p. 147; House Report No. 65.

In Washington County the abstract of the canvass was certified by the register; and the register in making out the certificate certified that no poll books were returned from two of the three precincts, the law requiring the poll book to be sent to the county clerk. The majority contended that the certified abstract was all the register was required to send, and that the certification as to the poll books, being outside of his duties, should be rejected. The probate judge might have refused to make the abstract without the poll books; but that abstract being made, it was the duty of the register to certify it. Proof of the failure to return the poll books should have been made in some other way than by the certificate of the county register. The majority did not consider this failure to send the poll books with the precinct return sufficient reason for disfranchising a whole county. The minority contended that the Washington County returns had not been duly authenticated according to law, and that they were properly rejected by the Territorial canvassers. The minority claimed that the abstract also was made out and certified by the register and not by the judge of probate, as required by law. Also it was held that the omission to return the poll books was fatal to the authenticity of the canvass.

As to Richardson County, the majority and minority of the committee do not seem to lay stress on the same facts. The minority find from the evidence that at two of the three voting places the election was conducted without legally appointed officers. The minority, referring to the precedent of Jackson *v.* Wayne, contended that the elections at those precincts were illegal and void. The majority of the committee do not meet this point in their report, but contend that the entire vote of the county should have been counted by the Territorial canvassers, instead of being rejected.

In this county, moreover, there was the further objection that about twenty illegal votes were cast by certain persons residing on an Indian reservation known as the "Half-breed tract." It was agreed that these votes were cast for the contestant. The majority considered that the testimony left it to be inferred that these votes were not counted for the contestant; but held that if they were so counted it was done properly. The governor had excluded them from the census, but this could not affect their right of suffrage, which was held by the law of the land. It was also alleged that they were trespassers on Indian lands, but this also could not interfere with their right of suffrage. Doubts as to whether they were in any election precinct and as to whether they were within the limits of Nebraska did not appeal so strongly to the majority as to the minority of the committee. The minority also laid stress on the fact that the people themselves did not claim to be within the civil jurisdiction of the Territory, and refused to pay taxes. The minority felt sure the votes were counted for contestant.

It appeared that if all the votes returned to the office of the secretary of the Territory were counted the contestant would be returned, but if from this total the votes from "Half-breed strip," about 20 in number, should be deducted the plurality would be left with the sitting Member.

The rejection of all the returns from the counties impeached also left the plurality for the sitting Member.

The majority reported resolutions declaring Mr. Chapman not entitled to the seat, and seating the contestant.

The report was considered on July 21 and 22,[1] and after debate the resolution declaring Mr. Chapman not entitled to the seat was disagreed to—yeas 63, nays 69.

On July 23 the second resolution for seating the contestant was laid on the table without division.

So the House sustained the contention of the minority of the committee.

830. The election case of Otero v. Gallegos, from the Territory of New Mexico, in the Thirty-fourth Congress.

The notice of contest need not give the names of voters objected to for qualifications.

The presence of names on a list of foreign citizens enrolled under authority of a treaty was held prima facie evidence of disqualification for voting.

The disqualification of certain voters being shown prima facie, the burden of proof was thrown on the party claiming the votes.

On May 10, 1856,[2] the Committee on Elections reported on the case of Otero *v.* Gallegos, from New Mexico. This case involved the following points: That the notice of contest was defective; that certain persons who voted for the sitting Delegate were not qualified; that certain votes should be counted in spite of the misconduct of election officers, and that certain ballots should be impeached on testimony of the voters.

As to the first point, the objection to the sufficiency of the notice, the sitting Delegate contended that notice of impeachment of votes should be accompanied by the names of the particular voters intended to be impeached. The committee overruled the objection, holding that the notice was sufficient to permit the taking of the testimony, and that the sitting Delegate should have entered his objection at the time of taking the depositions.

The objection as to the qualification of voters related to certain inhabitants of the Territory who, under the terms of the treaty with Mexico, had elected to remain citizens of Mexico, and were expressly disqualified from voting under the law of New Mexico. The number of these disqualified persons alleged to have participated in the election for the sitting Delegate was more than enough to account for the majority of 99 votes by which he was returned. The law of New Mexico, while providing for voting by ballot, also provided that each ballot should be numbered when received, the number being entered with the name of the voter on the poll book, but the identity of the vote not to be disclosed except in case of contested election. So it was practicable to decide for whom the disqualified voters cast their ballots. The evidence as to disqualification consisted in the books whereon, in obedience to the precept of the military governor, the Mexican citizens who desired to retain their Mexican citizenship had been enrolled. The comparison of this enrollment with the poll books showed the names of the Mexicans who had voted, and this was taken as prima facie evidence of the disqualification of the voters. The committee admit that, in the absence of testimony to connect the names with the persons, the evidence was not conclusive, but it was considered sufficient to throw the onus pro-

[1] Journal, pp. 1245, 1259, 1264; Globe, pp. 1688, 1711, 1729.

[2] First session Thirty-fourth Congress, House Report No. 90; 1 Bartlett, p. 177; Rowell's Digest, p. 144.

bandi on the sitting Delegate. The committee found that the sitting Delegate failed to overthrow the prima facie evidence in enough cases to result in the wiping out of his majority.

The sitting Delegate objected that the enrollment of these Mexican citizens was invalid because not made in accordance with a law of Congress. The committee held that the action of the military governor under the treaty was sufficient.

831. The case of Otero v. Gallegos, continued.

Failure of the judges of an election to take the required oath was held to vitiate the return.

Instance wherein absence of certificate that election officers were sworn was deemed conclusive in absence of testimony to the contrary.

The destruction of the secrecy of the ballots by crying out the votes as given was deemed a reason for rejection of the poll.

Testimony taken before an officer other than the one named in the notice was rejected by the committee.

After the election the testimony of the voter as to how he voted may not be received to impeach the ballot recorded as cast by him.

Another objection urged by the contestant was that the secretary of the territory had counted for the sitting Delegate certain votes of the precinct of Mecilla, which the probate judge, assuming to act under the law, had rejected in making up his return for irregularities. The committee did not inquire as to the legality of the act of the probate judge, since the House had the right to determine whether or not the election in this precinct had been conducted in accordance with the laws of New Mexico.

The committee found that the poll-book certificate, that the judges were sworn, was wanting, although required by law; and considered this evidence, given by the judge of probate, as sufficiently conclusive in the absence of testimony to the contrary, the onus probandi being thrown onto the other side in accordance with the principle established in the case of Draper *v.* Johnston. The failure of the judges to take the oath vitiated the election, in the opinion of the committee, who cited the cases of McFarland *v.* Culpepper, Draper *v.* Johnston, and Easton *v.* Scott.

It was furthermore found in regard to this precinct that the officer receiving the ballot cried it out, thus destroying its secrecy and causing the proceeding to amount practically to viva voce voting.

Then, also, a bystander, who was neither judge nor clerk, assisted in receiving the votes; the poll books furnished by law were not used, and others substituted, and 192 ballots, neither numbered nor registered as required by law, were found in the box.

For all these reasons the committee recommended the rejection of the vote of the precinct.

The sitting Delegate alleged and attempted to prove frauds in the precinct of Chamisal, the charge being that 160 legal votes for him were abstracted and an equal number for the contestant put in.

The sitting Delegate in his notice had declared that he should examine the witnesses to prove the above before the chief justice of the supreme court of the ter-

ritory, but in fact the testimony was taken before a probate judge. For this reason a majority of the committee held that this testimony should be rejected.

The sitting Delegate had taken the testimony of the voters to prove that the ballots counted were not the ballots cast. The committee say:

> It would be productive of unending frauds and perjuries to permit parties to come forward, after an election by ballot, and swear that they voted differently from what the ballots themselves exhibit. Especially must this principle apply under the system adopted in New Mexico, where every ticket is numbered, and the number also recorded in the poll books opposite to the name of the voter. The only proof which ought to be admitted to establish a fraud such as that charged in this case would be to show, by affirmative testimony, that the judges, clerks, or some other persons actually withdrew the tickets given by the voters and substituted others for them. Until this shall be shown, the oath of the voters should not be received to contradict the record and the ballots themselves. The very nature of the ballot renders this principle a necessity; otherwise, every election might be tried over a second time by the oath of the voters instead of the ballots deposited in the boxes in the presence of the officers and of the public.

In support of this doctrine the committee cite the case of Van Rensselaer *v.* Van Allen.

The conclusions of the committee showed a majority for the contestant, and resolutions declaring Mr. Gallegos not elected, and that Mr. Otero was entitled to the seat were reported.

On July 23,[1] the two resolutions were agreed to after debate without roll call; but on the motion to lay on the table the motion to reconsider the yeas, and nays were ordered, and the motion was agreed to, yeas 128, nays 22. This vote seems to have been on the merits of the case, the Member demanding the yeas and nays saying that he did so because he believed the sitting Member entitled to the seat.

832. The Iowa election case of Clark *v.* Hall in the Thirty-fourth Congress.

The House declined to reject for mere informality a return which truly represented the aggregate vote cast.

The House declined to reject returns, although it was shown that some votes (not enough to change the result) actually cast were not included.

On February 4, 1857,[2] the Committee on Elections reported in the case of Clark *v.* Hall, of Iowa. They came to the conclusion that the sitting Member was duly elected, and entitled to the seat. This conclusion was concurred in by the House without division.

The grounds of the contest and conclusions of the committee are set forth in the following extract from the report:

> It appears from the canvass of the State canvassers of Iowa that the sitting Member received one hundred and seventy-seven more votes than the contestant, of the votes which they received and allowed.
>
> The State canvassers, by the laws of Iowa, canvass abstracts furnished by certain county officers of the votes thrown in the several counties.
>
> Objections are made in this case, both to alleged informalities in these county abstracts and to their alleged want of correspondence with the state of the votes as actually cast in the voting precincts.

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[1] Journal, pp. 1265, 1266; Globe, p. 1736.

[2] Third session Thirty-fourth Congress, Journal, p. 356; Globe, p. 569; 1 Bartlett, p. 215; Rowell's Digest, p. 148; House Report No. 178.

In conformity with the principles acted upon by your committee in the case of the contested seat of the Delegate from the Territory of Nebraska, your committee would not reject for mere informality a county abstract which truly presents the aggregates of the votes actually cast in the voting precincts.

In this case there is evidence that legal votes actually cast both for the contestant and the sitting Member are not embraced in the county abstracts. It does not, however, sufficiently appear that the corrections authorized by the evidence would so far change the result as to give the contestant as many votes as the sitting Member received.

833. The Maryland election case of Brooks v. Davis in the Thirty-fifth Congress.

It was conceded in 1858 that the House was not necessarily bound by the law of 1851 in judging of the elections, returns, and qualifications, of its Members.

In 1858 the House deemed insufficient reasons urged by a contestant for proceeding in a manner different from that prescribed by the law of 1851.

In 1858 a proposition that witnesses in an election case be examined at the bar of the house found no favor.

On February 12, 1858,[1] the Committee on Elections reported in the case of *Brooks* v. *Davis,* of Maryland, on the petition of contestant that he be not required to continue to proceed under the law of 1851, but that a committee with adequate powers be appointed to investigate the election. The contestant assigned the following reasons for granting the request: (1) That the authorities of Baltimore were unwilling or unable to so preserve the public peace as to prevent the intimidation of witnesses; (2) that the extensive nature of the conspiracy charged necessitated a longer time than the sixty days allowed by law for taking testimony; (3) that the required ten days' notice to sitting Member of names and residence of witnesses would enable the intimidation of those witnesses; and (4) that the bearing and evident disposition disclosed by witnesses would be lost in its effect if the evidence should be in the nature of depositions.

This memorial was accompanied by the indorsement of reputable citizens of Baltimore.

The majority of the committee found no reason for extraordinary action by the House. It was not established that evidence could not be safely taken in Baltimore under the act of 1851. Another contestant in another case was actually taking such testimony at this time. As to the argument that sixty days was too short a time the majority considered that the contestant should have gone on taking testimony, and asked for an extension if the time should be found too short. The third reason was subject to the same answer as the fourth. As to the fourth reason, the committee considered that under no circumstances could the House examine the witnesses at the bar.

The minority of the committee[2] considered that the act of 1851 was intended to apply to such cases as involved personal contests of election, while the pending

[1] First session Thirty-fifth Congress, House Report No. 105; 1 Bartlett, p. 245; Rowell's Digest, p. 154.

[2] Messrs. Henry M. Phillips, of Pennsylvania; Thomas L. Harris, of Illinois; John W. Stevenson, of Kentucky, and Lucius Q. C. Lamar, of Mississippi.

case was rather one of popular remonstrance against the validity of an election. There seemed to be reason for such an investigation as was asked. The governor of Maryland, in his message to the legislature, had recorded his opinion that the election was fraudulently conducted; that thousands of people had been excluded from the polls, and that there was no expression of the popular will. Here was a case where there was justifiable ground for not complying strictly with the terms of that law. "If it is claimed," say the minority, "that the act of 1851 prevents the House of Representatives from pursuing an investigation in any other manner than prescribed by that act, it would then be wholly inoperative, coming into conflict with the fifth section of the first article of the Constitution of the United States, which provides 'each House shall be the judge of the elections, returns, and qualifications of its own Members.' No prior House of Representatives can prescribe rules on this subject of binding force upon its successor, nor can the Senate interfere to direct the mode of proceeding. The House of Representatives is not a continuing body, each body of Representatives having an independent and limited existence, and having the clear right to determine, in its own way, upon 'the elections, returns, and qualifications of its own Members.' A like authority is given, and in similar terms, to each House to 'determine the rules of its proceedings, punish its Members for disorderly behavior,' etc.; and no Member will pretend that a general law, passed in such terms as the act of 1851, would restrain any House from acting on these subjects independently of the law."

On February 16 and 17 [1] the report of the committee was considered and acted on. In this debate Mr. W. W. Boyce, of South Carolina, who submitted the report of the majority of the committee, did not deny the power of the House to proceed independently of the act of 1851. The power of the House to "judge of the elections, returns, and qualifications of its own Members," being granted by the Constitution, could not be taken away by law.

But Mr. Boyce argued very strongly that it was not expedient in this case to go outside the law. The fact that Mr. Brooks was not himself contesting the seat did not the less make the law applicable.

Mr. Horace Maynard, of Tennessee, argued [2] that the law of 1851 did not trench on the constitutional prerogative of the House, simply determined the mode by which the question should be presented to the House, and said that under his interpretation of the law and Constitution he could not conceive of any other mode than the act of 1851 by which a seat could legally be contested.

The proposition of the minority that the Committee of Elections have power to send for persons and papers, etc., in order to investigate the election, was disagreed to, yeas 86, nays 110.

Then the resolution of the majority, "that it is inexpedient to grant the prayer of the memorialist for the appointment of a committee to take testimony," was agreed to, yeas 115, nays 89.

On May 19, 1858,[3] the committee was discharged from the further consideration of the case, and it was laid on the table.

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[1] Journal, pp. 394, 397–400; Globe, pp. 725, 745.

[2] Globe, p. 727.

[3] Journal, p. 848.

834. The election case of Chapman v. Ferguson, from the Territory of Nebraska, in the Thirty-fifth Congress.

Instance wherein the House permitted the time for taking testimony in an election case to be lengthened, although one or both parties had been negligent.

The House decided to count as cast for "Fenner Ferguson" certain ballots cast for "Judge Ferguson."

The House decided to count certain returns rejected by local canvassers because not transmitted within the time required by law.

The House, by reason of the ex parte nature of the evidence, declined to follow its committee in rejecting the poll where the conduct of election officers was irregular and apparently fraudulent.

On April 21, 1858,[1] the Committee on Elections reported a resolution allowing a further time of sixty days for the taking of testimony by the parties in the contested election case of *Chapman* v. *Ferguson,* of Nebraska Territory.

The committee reported that the election had been held in the preceding August; that the result was not announced officially until the 3d of the following September; that the contestant gave notice to the sitting Member on September 16 of his intention to contest, and the response of the sitting Member, dated October 2, 1857, was served on contestant on the 10th day of that month. The committee further say:

> No notice of intention to take testimony was given by the contestant until the 13th and 14th days of November, when more than one-half of the time allowed by law to take the same had expired, nor until after the sitting Member had left the Territory for this city to enter upon the discharge of his duties. The sitting Member has made oath that he knew nothing of the testimony taken in this case until he saw it printed in Miscellaneous Document No. 5, of this House, and that he has had no opportunity to rebut and disprove the same.
>
> Your committee are of opinion that the sitting Member erred in not leaving an acknowledged attorney in the Territory to look after the contest, of which he had been notified; and were the contestant and the sitting Member alone those who have an interest in its decision, your committee might hesitate before coming to the conclusion to which they have arrived. The question to solve is, not simply what these parties have done or omitted to do, but what was the expressed wish of the people of Nebraska, as between these candidates, at their late election? And what is a reasonable time and indulgence, under the circumstances, to obtain proof of that wish?
>
> As the contestant permitted more than one-half of the time allowed by law to elapse before commencing his proof, he can have but little cause for complaint should the period for taking proofs be extended. And as the election has been so recently held, and the contestee averring that he never had any notice of taking testimony, your committee are of opinion that justice to the contestee, as well as to the people of Nebraska, requires that time be given to take further evidence.

Considerable doubt arose as to this proposition, it being objected that the extension of sixty days would deprive the Territory of its Delegate's services during the greater part of the session. So an amendment was agreed to extending the time to the first of October next. As amended the resolution was agreed to, yeas 98, nays 86.[2] The opposition based their course on the fact that the notice had been left at the sitting Member's house, occupied by a man alleged, but not admitted, to be the agent of the sitting Member.

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[1] First session Thirty-fifth Congress, House Report No. 51; Globe, pp. 1717–1720; 1 Bartlett, p. 267; Rowell's Digest, p. 159.

[2] Journal, p. 662.

On February 4, 1859, the majority and minority reports were submitted. Both majority and minority agreed on the following conclusions:

That certain votes cast for "Judge Ferguson" instead of "Fenner Ferguson" and rejected by the board of canvassers should be counted for the sitting Delegate.

That contestant was entitled to certain votes cast at the precinct of Cuming City and not counted by the Territorial canvassers because the judges of election did not return the poll books to the county clerk within the time required by law, by reason of which the county clerk failed to certify an abstract to the governor. The cases of Richards, Bard, Spaulding *v.* Mead, and Mallary *v.* Merrill were cited in support of the doctrine that these votes should be counted for the contestant.

The corrections of the vote in accordance with the above principles did not fatally affect the title of the sitting Member to the seat.

But the contestant charged extensive frauds in three precincts, which would, if proven, be sufficient to take away the majority of the sitting Delegate and show the election of the contestant.

The evidence in relation to these precincts was conflicting. In general, residents of the precincts in question testified or made affidavit that the election was pure. The testimony that there was fraud was quite largely from persons who had gone to the precincts and testified as to what had been told them. This evidence was attacked as hearsay. There were suspicious circumstances admitted, such as the names of "Samuel Weller" and "Oliver Twist" among the voters, the keeping of the polls open in one precinct after the legal time of closing. While admitting that votes received after the hour for closing the polls should be deducted, the minority did not consider the testimony sufficient to justify further deductions, and therefore found that the sitting Delegate was entitled to the seat.

The majority of the committee, on the other hand, recommended the deduction of votes which they considered proven to be fraudulent in two of the precincts. In the third precinct where the polls were kept open after the legal hour, where 401 votes were returned for the sitting Member and 4 for the contestant, where it was alleged that the election officers were not properly sworn, and in relation to which the county canvassers had unanimously recommended the rejection of the entire precinct vote, the majority recommended that the entire vote be thrown out. This recommendation, if carried out, would entitle the contestant to the seat.

The report was debated at length on February 9 and 10, 1859.[1] The discussion was on the weight of the evidence (much of which was taken ex parte by contestant) in regard to the frauds alleged in the three precincts; and there appeared a diversity of opinion, which was finally settled by laying the whole subject on the table, by a vote of yeas 99, nays 93.

So the sitting Delegate retained his seat.

835. The Ohio election case of Vallandigham v. Campbell in the Thirty-fifth Congress.

It is not necessary that the notice of contest specify the names of individual voters whose qualifications are challenged.

A certificate of the returns, under seal of the State, was admitted as

[1] Second session Thirty-fifth Congress, Journal, pp. 375, 377; Globe, pp. 914, 941.

evidence in an election case without regard to the requirements of the law of 1851 as to testimony.

On May 13, 1858,[1] the Committee on Elections reported its inability to agree upon a recommendation in the contested election case of Vallandigham *v.* Campbell, of Ohio. Four of the committee found the contestant entitled to the seat; four found the sitting Member entitled to it; and the remaining Member reached the conclusion that the seat should be declared vacant on account of the difficulty of ascertaining who was elected.

The following were the principal questions involved in the examination: The sufficiency of the contestant's notice of contest; the admissibility of a certificate of the secretary of state as to the votes cast, and the nature of this and the poll books as evidence; the admissibility and sufficiency of evidence as to how certain voters cast their ballots; the qualifications of certain voters' especially some mulattoes.

The minority favoring the sitting Member, whose views were submitted by Mr. John A. Gilmer, of North Carolina, contended that contestant's notice had not been sufficient, for the reason that it did not specify "particularly" the grounds of contest by naming the voters whose qualifications were questioned and the legal objections to the admission or exclusion of each. Mr. Gilmer cited the cases of Varnum. and Easton and Scott in support of this contention. The further objection was made that the contestant had made no particular specification as to the number of votes questioned and their relation to the votes cast and the result. The specifications as to "sundry ballots," "sundry persons," etc., were not specifications at all.

In opposition to these objections, it was argued by Mr. Lucius Q. C. Lamar, of Mississippi, who presented the views of another portion of the committee, that the law did not require any more to be set forth than the class to which the voters belonged, especially as by express provision it required each party to furnish ten days in advance the names of the witnesses proposed for examination. This view had been taken in 1852 in the case of Wright *v.* Fuller, and in the more recent case of Otero *v.* Gallegos.

Mr. Gilmer's minority objected that there was no proof whatever which professed to give either the aggregate vote for each party or the majority for the sitting Member. After the time allowed by law for taking testimony had expired, a paper had been presented under the seal of Ohio and the official certification of the secretary of state, giving an abstract of the votes given at the election in question. This paper was not admissiable as testimony, for the time for taking testimony had expired when it was presented. Furthermore it was only a mere copy of a certificate which itself was merely a result ascertained by calculation from the original and only source of information, the poll books. The law of Ohio required each voter to be registered in the poll book at the time of voting, and this book to be returned to the clerk of the county. From it the county clerk certified to the governor the summary of votes. Thus the original record was not the clerk's certificate to the governor, but the poll books. The certificate might be adequate foundation for the mere ministerial acts of the governor in giving the certificate of election—but it was not

[1] First session Thirty-fifth Congress, House Report No. 380; 1 Bartlett, p. 228; Rowell's Digest, p. 151.

evidence in a legal contest when the question was not how many votes were certified to the governor, but how many were actually cast at the polls. If the certificate were to be admitted as evidence that the voters actually cast the votes as enumerated in the certificate, it would be on the supposition that the certificate in the secretary's office was written official evidence of the votes cast. If so this would exclude all parol evidence of the contestant to show how particular persons voted. For it would follow that the poll books were the original records of those who voted at the election; and being the written legal evidence preserved by law, all secondary evidence, even of the voter himself that he voted for either party, would be excluded.

Mr. Lamar argued against the above contentions. He held that the testimony required by the act of 1851 was the testimony of "witnesses," or at most such writing as could be proved only by the examination of witnesses. But documentary evidence, at least such as proved itself, might be obtained at any time after sixty days, and be produced before the committee. The document in question, bearing the great seal of the State, was of the highest authenticity. It was further urged that in most of the cases since 1851 the abstract of the returns had been obtained subsequent to the sixty clays limited in the act. As to the poll books, no provision was made anywhere for furnishing copies for any person, and that they were not within the acts of Congress touching the authentication of records, and were not anywhere declared to be records. Not only were they not the sole and best evidence to prove that a particular person voted, but they were not themselves sufficient. Parol evidence of identity was always necessary; and the name on the list was only corroborative evidence. In Newland *v.* Graham the committee had received evidence that persons voted whose names were not on the poll books at all. In the New Jersey case of 1840 the committee "resorted to parol proof as the best evidence the case would admit, the laws of New Jersey not requiring the poll lists to be preserved as a record of die actual voters." A comparison of those laws with the laws of Ohio on the subject of poll books would show that this precedent was precisely in point.

836. The case of Vallandigham v. Campbell, continued.

The vote thrown by an alleged disqualified voter may be proven by his own testimony or that of friends who heard his declarations.

A theory that a voter, whose qualifications are challenged, is a party whose confession is proper evidence.

Argument that an election case is a public inquiry which should proceed on more liberal principles than a private litigation.

As to the qualifications of voters, there were charges that disqualified persons voted at various places. The minority, led by Mr. Lamar, held that enough was proved as to these alleged disqualified voters to show the election of the contestant. Mr. Thomas L. Harris, of Illinois, who signed the third minority views, considered the evidence sufficient to destroy confidence in the election, but thought the difficulty of determining how people voted by secret ballot too great to enable a satisfactory decision as to who was elected. After a vote was proved to be illegal, the great difficulty was to show for whom it was cast. Hearsay evidence must be resorted to, and that was always dangerous, and should be received with the greatest caution.

Mr. Lamar, on the other hand, argued that the committee and the House should proceed upon liberal principles in a contested election, which was not a mere private litigation, but a great public inquiry. The distinction between the House and the ordinary forensic court was recognized both by Congress and the usages of Parliament. The admissibility of evidence consisting of the declarations of voters as to any matter concerning their own voting has been settled in the British Parliament repeatedly and uniformly for one hundred and fifty years, and was no longer to be questioned. As to the hearsay declarations of third powers, the reception of such was put upon the ground that each voter challenged was a party to the proceeding, and therefore what he said about his own voting was an admission or confession. Mr. Lamar illustrates the kind of evidence accepted by his portion of the committee by the following description:

> Anderson testifies to his own vote and as to the declaration of two others, his friends, one of whom worked with him; that there was an understanding between him and them that they were to vote, and they did vote, for the sitting Member. As to those who voted in Oxford, Lawrence, one of the twelve, declared to the witness that he voted for the returned Member and advocated his election; and the proof as to the others, including Lawrence, though circumstantial, is just such as has been repeatedly received and acted upon by committees and the House. That it is not positive and direct is because the nature of the case, the vote being by secret ballot, does not usually admit of such proof.

By the admission of such testimony as to voters, Mr. Lamar's minority found a majority of 23 votes for the contestant. A portion of the challenged voters were persons of color—mulattoes—and there was a legal question as to whether under the constitution of Ohio and the judicial decisions some of these should be considered white or black. Mr. Lamar's minority arrived at the conclusion that they were black and were not qualified. The point was not dwelt upon in Mr. Gilmer's report, which based its defense of the sitting Member on the other questions in the case.

The report was debated May 22,[1] especial attention being given to the nature of the evidence by which it was attempted to show that the mulatto voters supported the sitting Member.

Mr. Lamar, in the debate,[2] also dwelt upon the allegation of the contestant which had not been noticed in the reports—that the election in the second ward of Dayton was void because the person who presided as judge was elected in violation of law. The House had waived informalities in the returns frequently, provided the election itself was fairly and legally conducted. The case of Jackson *v.* Wayne was quoted in support of this view.

On May 25[3] the House began voting on the case, a motion to recommit for the purpose of allowing further testimony to be taken being decided in the negative, yeas 92, nays 116.

The question being next put on a proposition declaring the sitting Member entitled to the seat, it was decided in the negative, yeas 92, nays 116.

The question was next taken on two resolutions: First, that the sitting Member was not entitled to the seat; second, that the contestant was entitled to it.

On the two resolutions the question was decided in the affirmative, yeas 107, nays 100.

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[1] Globe, p. 2316.

[2] Globe, p. 2331.

[3] Journal, pp. 902–910.

837. The Michigan election case of Howard v. Cooper in the Thirty-sixth Congress.

The sitting Member having clearly neglected his opportunities, the Elections Committee decided against his request for additional time to take evidence.

A State law requiring a residence of ten days in a ward as qualification of a voter, yet it was held that he must be there with the intention of remaining.

On March 15, 1860,[1] the Committee on Elections reported a resolution declaring it inexpedient to grant the application of the sitting Member for additional time to take testimony in the contested election case of Howard *v.* Cooper, of Michigan. The sitting Member accompanied his memorial by 29 ex parte affidavits, which he asked to have made a part of the case. If this request should be refused he asked for the extension of time. The majority of the committee did not favor either request, but concluded that the sitting Member, by delaying more than eleven months after the legal limit for taking testimony, and until one-half of the time of service of the Congress had expired, had presented a clear case of laches. In the case of Vallandigham *v.* Campbell it had been determined that the two parties might proceed to take testimony simultaneously during the sixty days allowed by law; and further, that if either should wish more time he should proceed (Congress not being in session) to give notice to the other party and take it after the expiration of the sixty-days' limit, relying on its being accepted by the House.

The minority of the committee favored granting the request, finding a distinction between this case and others in that the sitting Member desired to impeach the veracity of witnesses examined at the last moment allowed for taking testimony under the act of 1851, and which might not be impeached if the permission was not granted.

The question was debated at length on March 22,[2] when the resolution proposed by the majority of the committee, denying the request, was agreed to, yeas 89, nays 79.

On April 19,[3] the majority of the committee reported that the sitting Member, Mr. Cooper, was not entitled to the seat, and that Mr. Howard, the contestant, was entitled to it.

The contestant sought to overcome sitting Member's plurality of 75 votes by alleging several instances of fraud and irregularity, either of which, if substantiated, would be sufficient to overcome the plurality. The points were four:

(1) Illegal votes: The committee found over 100 illegal votes cast for sitting Member. In certain wards of the city of Detroit men were brought in from other wards of the city, from other States, and even from Canada, the legal limit of ten days before election, and were allowed to vote, the testimony indicating that they voted for sitting Member. The committee came to the conclusion that under the law of the State of Michigan a man must have gone to the ward where he voted with the

[1] First session Thirty-sixth Congress, House Report No. 87; 1 Bartlett, p. 276; Rowell's Digest, p. 161.

[2] Journal, p. 568; Globe, pp. 1307–1318.

[3] House Report No. 445.

intention of making it his permanent residence, as the law of Michigan required a residence of three months within the State and of ten days before election within the township or ward where the vote is cast. Therefore the majority concluded that the votes brought in within the ten days' limit were illegally cast. The minority of the committee contended that there was no evidence to show that the men whose votes were impeached resided out of the State of Michigan, and that as they had resided in the ward ten days before election, and as their votes had been challenged on election day and admitted, the votes should generally be counted. Such votes as the minority admitted to be impeached were not sufficient to affect the plurality of the sitting Member.

838. The case of Howard v. Cooper, continued.

A voting place fixed by competent authority being changed without competent authority, the votes cast there were rejected.

There being only two inspectors of election where the law required three, the returns were rejected.

Irregularities being so great as to prevent a determination of how many bona fide votes were cast, the poll was rejected.

Charges of riot and intimidation being to some extent substantiated, yet the committee believed that in case of doubt the returns should stand.

(2) At Grosse Pointe parish the place of voting was changed from the accustomed place, in disregard of the law of Michigan, which provided that the "annual and special township meetings" should be held at the last place of meeting or such other place as the previous meeting had directed. The committee considered that the voting place had been fixed by competent authority and changed without competent authority, and therefore that the vote could not be counted. The minority contended that the law quoted by the committee applied only to the township meetings and not to general elections, and claimed that the place of meeting had been properly changed under provisions of another law which required the town clerk as inspector of election to give due notice of the time and place of election. The majority denied, however, that this function of giving notice involved the other function of "fixing" the place. The minority further contended that no evidence was given to show that any persons were prevented from voting by the change of place of the meeting. The rejection of the poll at this voting place would be sufficient of itself to determine the contest in favor of the contestant.

(3) The majority of the committee decided in favor of rejecting the vote of the township of Van Buren because the proof was clear that there were but two inspectors present at the polls, while the law required that the board of inspectors should be composed of three persons.

(4) The majority of the committee decided in favor of throwing out the entire vote of the Fourth Ward of Detroit because of "irregularities and informalities, such clear violations of the statutes of Michigan, and such errors of substance as to destroy all certainty as to the accuracy of the result." Two tickets, one for State officers and one for Member of Congress, were cast in one box. No poll lists were kept so as to show whether of the two tickets cast by a voter one was for State officers and the other for Congressman, or both were for Congressman or both for

State officers. The committee considered that this was sufficient to prevent determining how many bona fide votes were cast for Congressman.

It was also found in this ward that one of the ex officio inspectors of election, who was, as appears from the debate, a candidate voted for at the election, declined to serve when the polls were opened, and another was chosen, conformably to law, to fill his place. But when the polls closed the elected substitute retired and the ex officio inspector, who had declined in the morning, came forward and assisted at the count. The majority alleged that the evidence showed that he was not sworn, but the minority did not admit this.

The charge was made that the polls in the Second Ward of Detroit were in the possession of rioters and prize fighters during the day and that the entire vote should be thrown out. There was testimony tending to substantiate this charge, but the committee recommended that the poll stand, saying:

> If the state of facts proved leave it doubtful whether, on the whole, the poll should be retained or rejected, your committee are of opinion that they will best avoid the establishment of bad precedents by giving effect to the returns in all cases of doubt.

On May 14 and 15[1] the report was debated in the House at length, and on the latter day the House, by a vote of yeas 97, nays 77, agreed to a resolution declaring the sitting Member not entitled to the seat. Then, by a vote of yeas 92, nays 71, the resolution seating the contestant was agreed to.

839. The election case of Daily v. Estabrook, from the Territory of Nebraska, in the Thirty-sixth Congress.

A contestant may serve more than one notice of contest, provided that each notice be served within the required time.

A certified copy of the official abstract of the vote is competent proof in an election case.

The limit on the time of taking testimony in an election case applies to witnesses and not to a certified copy of the returns.

On April 20, 1860,[2] the Committee on Elections reported in the case of Daily *v.* Estabrook, of Nebraska Territory. Besides the merits of the case there were raised also certain preliminary questions of importance:

(*a*) Sitting Delegate asserted that under the act of 1851 but one notice of contest could be served by contestant on contestee and that the contestant must abide by this notice, whether sufficient or not. The committee did not sustain this view, but concluded that more than one notice might be served, provided they be served within the time required by the act.

(*b*) Sitting Delegate also challenged the competency as proof of the certified copy of the official abstract showing the result of the vote in the Territory. The committee overruled this objection, saying:

> The act of organization of Nebraska provides that the secretary of the Territory shall preserve all the acts and proceedings of the governor which pertain to his executive duties. He is, therefore, made the custodian of this abstract, and, as the original must remain where it is, it is competent to prove its contents by a certified copy. That is done in this case, and the committee think it is the best evidence that could be offered.

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[1] Globe, pp. 2092, 2101, 2110; Journal, pp. 841, 843.

[2] First session Thirty-sixth Congress, House Report No. 446; 1 Bartlett, p. 299; Rowell's Digest, p. 163.

(*c*) Sitting Delegate further objected that the above abstract could not properly be received as evidence, because procured after the contestant had given notice that he would procure no further testimony and would give notice in case of a change in this determination. The committee construe this as referring only to the "examination of witnesses," and consider the certificate from the secretary of the Territory proper evidence, properly obtained, especially as sitting Delegate did not allege it to be false.

(*d*) Sitting Delegate alleged that the evidence was not taken before a proper officer, claiming that a judge of probate in Nebraska was not a judge, of a court of record, as required by the act of 1851. The committee considered such a court a court of record from the nature of the case, and furthermore showed it to be such by express provision of Nebraska law.

On the merits of the case the committee found sufficient irregularities and frauds to overcome the majority of 300 returned for the sitting Delegate and show a majority of 119 votes for the sitting Delegate.

840. The case of Daily v. Estabrook, continued.

Votes from a county illegally organized, whose election officers were improperly commissioned and where there was some fraud, were rejected.

Returns in themselves suspicious, transmitted irregularly and opened by an unauthorized person, were rejected.

A tainted vote from an illegally organized county was rejected.

Returns from a precinct not by a law a part of the district were rejected.

Fraud, shown by oral testimony as to a stolen poll book and inferred from acts of violence, was held to justify the rejection of a greater part of the returned votes.

The irregularities and frauds occurred under the following conditions:

(1) The county of Buffalo returned 292 votes for the sitting Member. The committee found that this county was not legally organized, that the officers who must have conducted the election were improperly commissioned by the governor of the Territory, and that the votes returned from the county had been therefore illegally counted by the canvassers and should be deducted from the poll. The committee also were convinced from the evidence that there was fraud, the votes of one place not within the county being included in the vote of the county.

(2) The county of Calhoun, not being organized, should under the law have returned its poll books to the clerk of the next adjoining county, Platte County, whose duty it was under the law to send an abstract of them to the governor. But the Calhoun County returns were sent directly to the governor, whose private secretary took them from the post-office, opened them, examined them, and then sent them to the clerk of Platte County, with direction to return them with the Platte County returns. The committee say:

This was manifestly a violation of law. The law of the Territory, as also of all the States, has pointed out a particular mode of making election returns and has designated particular officers who shall open and inspect them. If they are opened and inspected by any others, they are thereby vitiated, for if such a practice were tolerated innumerable frauds might be perpetrated and the popular will defeated. By the law of Nebraska Territory the votes polled in Calhoun County could not be properly opened by

any other persons than the probate judge and three disinterested householders of Platte County. Yet it is in proof that they were opened by the private secretary of the governor, and it is not proven or pretended that the probate judge or any three householders of Platte County ever saw them. On the contrary, it is proven that they were sent by the private secretary of the governor to the clerk of Platte County and by him sent back to the governor. The clerk must have opened them himself; this is the necessary inference.

In the opinion of the committee, therefore, this violation of law vitiates the whole of the returns from Calhoun County.

The committee further found evidence to justify the belief that the returns from this county were originally fraudulent, being evidently forged by some one.

(3) The committee found that the vote of Izard County was fraudulent, there being no population sufficient to account for the vote returned, and not being an organized county where an election could be legally held.

(4) The precinct of Genoa, in Monroe County, was within an Indian reservation, which could not, under the organic law of the Territory, be considered a part of Nebraska Territory until the Indian titles should be extinguished—a condition which had not been complied with. Therefore the returns from the precinct were illegal and fraudulent and should be rejected.

(5) The committee were entirely satisfied that all but 60 of the 128 votes counted for sitting Delegate in L'Eau Qui Court County were fraudulent. Not only did the testimony show that there could not be more than that number of votes in the county, but two witnesses who attempted to bring away a copy of the poll book were prevented by a mob, who declared they were parties to the fraud, and were resolved not to be exposed. The committee furthermore say:

The original poll books were afterwards stolen from the clerk's office, and doubtless were also detroyed by the same men; but the witnesses saw enough of them to swear that they contained the names of Howell Cobb, Aaron V. Brown, "ten names of McRea in consecutive order," and several others whom they knew to be nonresidents of the county.

This proof of the contents of this poll book is entirely competent, since the loss of the original is shown, and shows such fraud as ought not to go unpunished by the proper Territorial authorities. The committee, in view of them, are satisfied that they have made a liberal allowance for the vote of the county

On May 18,[1] after debate, but without division, the House concurred in the report unseating the sitting Delegate and seating the contestant.

841. The Missouri election case of Blair v. Barrett in the Thirty-sixth Congress.

A suspicious increase of votes as compared with the previous election was considered in an election case where fraud was alleged.

It not being shown that election officers were sworn and fraud appearing, the House declined to admit the usual presumption in favor of de facto officers.

The required return of the oaths of election officers not being made, the burden of proving the oath is thrown on the party claiming benefit from the votes.

On May 22, 1860,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted the report in the case of Blair *v.* Barrett, of Missouri. In

[1] Journal, p. 861; Globe, pp. 2180–2185.

[2] First session Thirty-sixth Congress, House Report No. 563; 1 Bartlett, p. 308; 1 Rowell, p. 165.

this case the corrected returns showed for sitting Member a plurality of 607 votes. The majority of the committee found irregularities, frauds, and violence, and after purging the poll there resulted a plurality of 168 votes for the contestant. The minority admitted some fraud and irregulaxities, but not enough to overcome sitting Member's plurality.

At the outset the majority laid stress upon a suspicious increase of the vote as compared with the vote at the Congressional election two years before. In the two years the total vote of the district showed an increase of 5,491 votes. Nearly the whole of this increase went to the sitting Member if the comparison with the vote of his party two years ago was to be taken as an indication. Furthermore, practically all of this increase was in 7 or 8 out of the 35 precincts of the district. And these precincts were those where irregularities and frauds were shown.—The minority of the committee did not admit that the increase of votes was unnatural.

Various questions were involved in the investigation of this case.

(*a*) The law of Missouri required that the judges of elections should take an oath, and that their qualifications should be returned with the return of the votes. It was alleged as a ground of contest that the judges in certain precincts had not taken the oath. The committee came to the conclusion that the burden was on the sitting Member, who claimed the advantage of the votes returned from these precincts, to show that the officers had actually taken the required oath. The committee say:

> The precedents of Congress justify the rejection of polls where the judges of election or clerks neglect or refuse to take the prescribed oath of office. (See McFarland *v.* Purviance, contested-election cases, p. 131; Same *v.* Culpepper, ibid., 221; Easton *v.* Scott, ibid., 281.) Of the precincts above named there was no evidence returned with the return of votes nor before the committee in any shape at the hearing that the judges of election were sworn in either the Harlem House precinct or the Gravois coal mine precinct, nor was there any in respect to the G. Sappington precinct. Had it appeared from the evidence that the election had been fairly conducted at these precincts and there were no traces of fraud, no taint of the ballot box, the committee would not have been willing to have recommended a rejection of these polls. The honest electors should not be disfranchised and their voice stifled from a mere omission of the officers of election to take the oath of office; but where, as in the case of the election districts now under consideration, gross frauds are made to appear, some of them of such a character as necessarily to complicate the officers of the election themselves; where the whole ballot box becomes so tainted as to be wholly unreliable, and it is next to impossible to ascertain what portion of the poll returned is an honest vote; when one judge has been convicted by a jury of a conspiracy to cheat, another can neither read nor write, a third is so deaf as to be incompetent from physical infirmatory to act; where one mingles in the fights of the crowd, encourages illegal voting, forgets the obligations of his position in the zeal and passion of the partisan, it is believed by the committee that they could not do less than require of the sitting Member to prove that these officers had conformed to the law before the votes they had (under these circumstances) returned should be counted. In this connection they cite a late cue of contested election in a court of law, the case of Mann *v.* Cassidy, for the office of district attorney in the city of Philadelphia at an election held October 14, 1856, contested in the court of quarter sessions in that city.

The committee further say that had the election appeared in other respects regular they would have been constrained to give the sitting Member the benefit of the principle that the acts of officers de facto are valid as regards the public and third persons who have an interest in their acts' as applied in the recent New York case of The People *v.* Cook (14 Barb. Reports, 245). The case of Draper *v.* Johnston (Twenty-second Congress) was also cited.

The minority of the committee did not admit that these election officers were not sworn, and contended that even if they were not, the principle as to the validity of acts of such de facto officers was well established. "To disfranchise and defeat the declared will of a whole community," say the minority, "for no fault of their own, or of the candidate on whom their suffrages were bestowed, through the mere omission of a judge or clerk to subscribe his name to the oath, would be an intolerable hardship and wrong."

842. The case of Blair v. Barrett, continued.

Discussion of the nature of evidence required to prove the qualifications of voters.

As to the admission of the declaration of voters challenged as to their qualifications.

As to the testimony of third persons, objected to as hearsay, in cases of voters challenged for disqualifications.

(*b*) The law of Missouri provided for a ballot which should be numbered opposite the name of the voter casting it. So, in questions as to the qualifications of voters, it was not a matter of difficulty to ascertain for whom the disqualified voter cast his ballot. As to the nature of evidence admitted by the majority to prove the disqualification of voters, the committee generally admitted evidence of the following description:

Of the voters whose qualifications have been challenged on both sides, and which the committee decided to reject as disqualified, the evidence touching some of them was from their own lips directly, either testified by themselves or by others as their admissions. This latter testimony was admitted in the case of Vallandigham *v.* Campbell in the last Congress, and has been admitted in many other cases in this country and in England, and was not strenuously opposed in this case. Many voters were charged to be nonresidents-some of the State, and more of the particular precinct in which they voted. The very nature of the charge shows the difficulty of the proof. It involves to a great extent proof of a negative respecting persons whose names are not even known; and, except in the few instances where there may be a personal acquaintance with the man in another State or in a distant part of the same State, the proof can hardly be, from the nature of the case, of a positive and direct character. In these cases the committee based their conclusion upon evidence that these men had never voted in that precinct before; were strangers to the old residents of the precinct, to individuals who had acted as judges and clerks of election for a great number of years; had no home or business in the precinct known to those best acquainted with its homes and business, and that they had disappeared from the day of election, their whereabouts not having been discovered since even by census takers. Some of these precincts are small, casting ordinarily but two or three hundred votes; and men living within their limits for ten, fifteen, and twenty years see the vote doubled and sometimes tripled by the presence of men seen for the first and last time on the day of election. With this evidence on the one side, so easy of rebuttal by the production of the voter, if a resident, or of some one who knew him to be a resident, yet left uncontradicted, the committee could come to no other conclusion than to reject all such votes as illegal.

Another class of voters challenged was unnaturalized persons, those of not sufficient residence in the State or precinct, or minors, or having some other disqualification, though not unknown to the witnesses, as in the case of nonresidents. As to the qualification of this class of voters, the admission of the voter, the testimony of his acquaintances and family, of those who had heretofore acted as officers of election, and circumstantial testimony of various kinds, was admitted for what it was worth.

The minority of the committee criticised this testimony as hearsay, indefinite, and inadmissible. The contestant had not been at pains to produce the best evidence within his reach, but had generally not called the person cognizant of the fact which he proposed to prove, but some one who heard, perhaps at second hand,

the declarations of such person. The minority opposed the admission of the declarations of third persons, except in the case of the declarations of voters. In that case they were willing to receive them "whenever they constituted a part of the act of voting, or were offered in corroboration of declarations made in reference thereto."

843. The case of Blair v. Barrett, continued.

The reports of the census taken f or a city directory, produced from the archives of the city and proven by the takers, were admitted as prima facie evidence as to qualifications of voters.

Riots at the polls, even involving election officers, were not given weight except where contributing to impeach the integrity of unsworn election officers.

An ex parte deposition, tending to show that certain election officers had been sworn, was not admitted.

There being no doubt as to the intention of voters, the House declined to reject ballots on which the designations of the offices were confused.

(*c*) On one kind of evidence admitted by the majority of the committee a sharp issue was joined. The city census of St. Louis had not only enumerated the inhabitants, but included various statistical matter, such as nationality, length of residence, etc.

It was to the evidence which the reports of these census takers disclosed that the sitting Member strenuously objected. First, because under no circumstances could they be evidence of facts which they purport to contain; and, secondly, because of the manner of bringing that evidence before the committee.

The committee answer, that, so far as the census takers themselves were witnesses, testifying to the facts contained in their report obtained by themselves, which was the case in very many instances in which this kind of testimony was offered, it is the ordinary case of men making memoranda, or writing down what they know, and then coming into court and testifying to the facts thus acquired, refreshing their memory from the paper thus made out by them. Nor is there any objection to others comparing the poll books with those memoranda thus verified, and testifying to the result of the comparison. But these reports of the census takers, now in the archives of the city, are official documents, and are prima facie evidence of the facts they contain. They are like the land lists of Virginia, which are prima facie evidence that the men whose names are in them, purporting to be landowners, were voters (see Robert Porterfield *v.* William McCoy, Contested Election Cases, p. 267; George Loyall *v.* Thoma Newton, ibid., p. 520); or the list of taxables in Pennsylvania, which were used as evidence for the same purpose in the case of Mann *v.* Cassidy, before referred to, and votes of men not found on these lists rejected. And the poll books are always prima facie evidence, both of the fact that a man has voted and of the qualification of the voter, without evidence to rebut it stand as the fact. (See Porterfield *v.* McCoy, Contested Election Cases, p. 267, and First Peckwell on Contested Elections, English, p. 208, and Second Peckwell, p. 270.)

Nor is there any well-grounded objection to the manner of producing this testimony before the committee; so far as it was brought before the committee by the census taker himself, when testifying to the facts contained in his report, the objection has been already sufficiently answered. And all the evidence so introduced has been from men swearing that the paper exhibited by them is an exact copy pro tanto of the census return. In some instances the commissioner taking the deposition has annexed the identical paper thus sworn to the deposition, and in others he has himself instead written out their contents in the answer of the witness. These extracts from the reports of the census takers, used by the committee, thus become pro tanto examined copies. And this is one method of producing copies laid down in the elementary books. (See Greenleaf on Evidence, Ist vol., secs. 483, 484; 1 Phillips on Evidence, p. 432.) In the case of Vallandigham *v.* Campbell, decided in the last Congress, the secretary of state examined the contents of the returns from the several counties composing the Third Congressional district of Ohio, computed an abstract of them all, and then certified,

under his official seal, not a copy of any record return on file in his office, but the abstract, which had been the result of his own examination of the contents of another paper or papers, and that certified abstract was used as evidence. This was carrying this point much further than the admission of the evidence here offered. The sitting Member has also resorted for evidence, both in challenging votes and in rebutting testimony offered by contestant on other points, to this very census, to the introduction of which he objected. The committee, for the foregoing reasons, admitted the testimony, giving to it such weight as its own intrinsic merit and other corroborative testimony in the case, in their opinion entitled it.

The minority of the committee assailed this testimony at length. The census takers had no right to inquire as to nativity and residence and all the information which they received must be voluntary. Because the name of a voter was not found on the census lists was not sufficient reason for his disqualification. What evidence was there to identify the voter as the bearer of the name on the list?

(*d*) As to riot as a reason for rejecting the votes of a precinct, the minority contended that a mere fight or series of fights, even if the election officers should be involved therein, was no ground for throwing out the vote of the precinct. There must be an organized, concerted design to intimidate and overawe, in order to justify the disfranchisement of the whole precinct. The minority cite in view of this contention the cases of Trigg *v.* Preston and Biddle *v.* Wing.

The majority of the committee had not laid stress on the riotous disturbances, except as they had occurred in precincts where the election officers were not sworn, and where they contributed to impeach the integrity of de facto officers.

(*e*) The majority of the committee declined to admit an ex parte affidavit, presented by the sitting Member forty days after the parties had been fully heard, and tending to show that certain judges were actually sworn. The disqualification of these judges had been among the grounds of the contest and there had been opportunity to examine witnesses on the point.

(*f*) The committee counted certain ballots thrown out by the judges of election which were headed "For Congress, Francis P. Blair;" then followed "For the State Senate ————;" then right over the list of candidates for representatives to the State legislature was, in large letters, "For Representatives for Congress," followed by 13 names. The committee having no doubts that the votes were intended for Mr. Blair, counted them, following the rule of Turner *v.* Baylies.

On June 5, 6, and 8,[1] the report was considered at length by the House, and on the latter day the House, by a vote of 94 yeas to 92 nays agreed to the resolution declaring Mr. Barrett, the sitting Member, not entitled to the seat.

Then, by a vote of yeas 93, nays 91, the House agreed to the resolution declaring Mr. Blair, the contestant, elected and entitled to the seat.

844. The Senate election case of James Harlan in the Thirty-fourth Congress.

In 1857 the Senate declined-to seat a claimant elected by a majority of all the members of the State legislature but not by a joint session of the two Houses.

A legislature having proceeded without objection to elect a Senator, failure to comply with requirements of a directory State law did not vitiate the election.

[1] Journal, pp. 1010, 1014, 1034–1038; Globe, pp. 2645, 2678, 2761.

On January 12, 1857,[1] after a long debate, the Senate by a vote of yeas 28, nays 18, declared James Harlan not entitled to his seat as a Senator from Iowa. This action was taken on the recommendation of the Committee on the Judiciary. This was a case of involving a construction of the meaning of the word "legislature" in that clause of the Constitution providing for the election of the United States Senators. The joint session of the two houses of the Iowa legislature had failed to elect; but finally an election was effected by the House of Representatives in conjunction with certain Members of the Senate. A quorum of the Senate was not present, but enough members of the legislature voted for Mr. Harlan to give him a majority of the whole number of the members of the general assembly. The question therefore arose as to whether the term "legislature" meant the individual members or the bodies composing it. After long debate the Senate decided as above recorded.[2]

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[1] Third session Thirty-fourth Congress, Globe, pp. 112, 221, 248, 260, 287, 299; 1 Bartlett, p. 621; Senate Election Cases, Sen. Doc. No. 11, special session Fifty-eighth Congress, p. 235.

[2] On March 11, 1857, third session Thirty-Fourth Congress, Appendix of Globe, pp. 387, 391; 1 Bartlett, p. 627) the Senate Committee on the Judiciary reported on certain charges of irregularities in the election of Mr. Simon Cameron, of Pennsylvania. One of these irregularities is thus disposed of by the report: "It appears from the journal of the Senate that the appointment of a teller and the nomination of candidates, and the communication to the other house of the appointment and nomination so made, all took place on the day of the election, instead of one day previous to the election, as required by the law of the State; but your committee regard this provision of law as purely directory in its nature, and are of opinion that a failure to comply with this formality would under no circumstances suffice to vitiate as election otherwise legal and valid; but where, as in the present case, both houses proceeded without objection from any source to perform their constitutional duty of electing a Senator, the necessity of complying with any particular forms required by law may fairly be considered as waived by common consent, and it is entirely too late, after the result of the voting has been ascertained, to raise a question as to the mode of proceeding." On March 13 the report, which contained other features, was debated and agreed to without division. The debate was on other features.

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