

## Chapter XLI.

### THE MEMBERS.<sup>1</sup>

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1. Decorum, conduct, etc. Sections 1136–1141.
  2. Leaves of absence. Sections 1142–1147.
  3. Compensation, clerks, etc. Sections 1148–1157.<sup>2</sup>
  4. Mileage and stationery. Sections 1158–1162.
  5. The franking privilege. Section 1163.
  6. Statutes relating to bribery and contracts. Sections 1164–1166.
  7. Resignation and vacancies. Sections 1167–1219.<sup>3</sup>
  8. Resignations to take effect at a future date. Sections 1220–1229.<sup>4</sup>
  9. Resignations before taking the oath. Sections 1230–1235.
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**1136. By rule the Member is restricted as to his movements during business or debate, and as to wearing his hat and smoking.**

**Members may not remain near the Clerk's desk during a vote.**

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<sup>1</sup> See also:

Volume I, Chapter II, sections 14–63, for precedents as to Members' credentials and enrollment at organization of House.

Volume I, sections 183–195, 500, as to status of a Member-elect.

Volume I, Chapter V, sections 127–185, administration of oath to Members.

Volume I, Chapters XIII to XVI, sections 414–506, for precedents as to qualifications of Members.

Volume 1, sections 417, 478, 485–506, as to whether or not a Member is an officer of the Government.

This volume, sections 1603, 1606—Attempt to bribe a Member a breach of privilege.

This volume, Chapter LII, sections 1641, 1651—Punishment of Members for contempt.

Volume III, Chapter LXXXII, sections 2667–2725—Privilege as related to Member.

Volume III—Section 1726, Member called as witness before the House. Section 1811, paper demanded of a Member by the House. Sections 2033, 2034, Members examined as witnesses in impeachment trials.

Volume V, Chapters CXII–CXIV—Sections 4978–5202, as to conduct of Member in debate. Sections 6971–6974, as to revision of remarks in Congressional Record; and sections 6990–7012, as to “leave to print” in the Record.

<sup>2</sup> Questions as to deductions of pay. (Sec. 3011, Vol. IV.)

<sup>3</sup> Term of a Member who fills a vacancy (sec. 3, Vol. I); of a Senator, (secs. 787–790, Vol. I, and sec. 6689, Vol. V).

<sup>4</sup> Appointment of a future day for resignation to take effect. (Sec. 488, Vol. I.)

Resignation appears satisfactorily from Member's letter to the governor of his State. (Secs. 565–567, Vol. I.)

Instances wherein Speaker was directed to inform the State executive of a vacancy. (Secs. 773, 824, Vol. I.)

As to what constitutes a declination. (Sec. 500, Vol. I.)

**The Sergeant-at-Arms, and Doorkeeper are charged with the enforcement of certain rules relating to decorum.**

**Form and history of Rule XIV, section 7, relating to decorum of Members.**

The decorum of Members within the Hall is regulated in part by section 7 of Rule XIV:

While the Speaker is putting a question or addressing the House no Member shall walk out of or across the Hall, nor, when a Member is speaking, pass between him and the Chair; and during the session of the House no Member shall wear his hat, or remain by the Clerk's desk during the call of the roll or the counting of ballots, or smoke upon the floor of the House; and the Sergeant-at-Arms and Doorkeeper are charged with the strict enforcement of this clause. Neither shall any person be allowed to smoke upon the floor of the House at any time.

This rule, in very nearly its present form, was adopted in the revision of the Forty-sixth Congress.<sup>1</sup> It was derived from the old rule No. 65, which in its main provision dated from April 7, 1789.<sup>2</sup> The portions relating to wearing the hat was the fruit of a considerable agitation. In early years, following the custom of Parliament, Members wore their hats during the sessions.<sup>3</sup> As early as March 13, 1822.<sup>4</sup> Mr. Charles F. Mercer, of Virginia, proposed this rule:

Nor shall any Member remain in the Hall covered during the session of the House.

but it was not adopted. Again, on March 18, 1828,<sup>5</sup> the matter was laid on the table when presented by Mr. George McDuffie, of South Carolina. On December 3, 1833,<sup>6</sup> Mr. James K. Polk, of Tennessee, again suggested the change, but the objection was made successfully that Members would have no places in which to put their hats if they should not wear them, and also that the custom of wearing hats was the sign of the independence of the Commons of England, and therefore a good usage to preserve in the American House. Again in 1835<sup>7</sup> Mr. James Parker, of New Jersey, urged the reform unsuccessfully. But on September 14, 1837,<sup>8</sup> the House adopted the rule that no Member should wear his hat during the session of the House or remain near the Clerk's table during a roll call.<sup>8</sup> The prohibition of smoking dates from February 28, 1871.<sup>9</sup> The last sentence, prohibiting smoking at any time, was added on January 10, 1896.<sup>10</sup>

**1137. The Member should rise in objecting to a request for unanimous consent.**—On April 24, 1902,<sup>11</sup> in Committee of the Whole House on the state of the Union, Chairman Marlin E. Olmsted, of Pennsylvania, declined to take notice of an objection made by a Member who did not rise to make it.

<sup>1</sup> Congressional Record, second session Forty-sixth Congress, pp. 206, 830.

<sup>2</sup> Journal, first session First Congress, p. 9.

<sup>3</sup> "Sketches of America," by Henry Bradshaw Fearon (London, 1818), records of the House of Representatives that "contrary to the practice of the Upper House (the Senate) at once Members and visitors wear their hats."

<sup>4</sup> First session Seventeenth Congress, Annals, p. 1301; Journal, p. 353.

<sup>5</sup> First session Twentieth Congress, Journal, pp. 424, 426.

<sup>6</sup> First session Twenty-third Congress, Journal, p. 25; Debates, pp. 2138, 2139, 2163.

<sup>7</sup> First session Twenty-fourth Congress, Journal, p. 39; Debates, p. 1957.

<sup>8</sup> First session Twenty-fifth Congress, Globe, p. 31.

<sup>9</sup> Third session Forty-first Congress, Globe, p. 1764.

<sup>10</sup> First session Fifty-fourth Congress, Journal, p. 103.

<sup>11</sup> First session Fifty-seventh Congress, Record, p. 4641.

**1138.** On May 15, 1854,<sup>1</sup> Mr. Speaker Boyd insisted that a gentleman making an objection must rise in his place and do so.

**1139. The House has discussed but not settled the question as to its power to compel a Member to accompany it without the Hall on an occasion of ceremony.**—On June 2, 1797,<sup>2</sup> the House had completed consideration of its address in reply to the speech of the President, and had voted:

That Mr. Speaker, attended by the House, do present the said address.

Mr. Matthew Lyon, of Vermont, at his own request, was excused from attending with the House.

Again, on November 29, 1797,<sup>3</sup> under similar circumstances, Mr. Lyon made the same request. The request was debated at some length, Messrs. Nathaniel Macon, of North Carolina, and Albert Gallatin, of Pennsylvania, taking the ground that the House had no power to compel a Member to accompany it without its walls.

The motion was finally removed from consideration by a negative decision of the motion, "Shall the main question be now put?"<sup>4</sup>

**1140. Origin of the title 11 Father of the House," as applied to the Member of longest continuous service.**—On February 24, 1842,<sup>5</sup> Mr. John Quincy Adams, speaking of the death of Mr. Lewis Williams, of North Carolina, referred to his title of "Father of the House," and said that it was borrowed from the practice of the British House of Commons, where the oldest member was so called. Mr. Williams had served since 1814.

**1141. A Senator having changed his name, the Senate instructed its Secretary to use the new name.**—On January 12, 1846,<sup>6</sup> in the Senate, Mr. James D. Westcott, of Florida, announced that his colleague, Senator David Levy, of Florida, had been permitted by act of the Florida legislature to change his name to David Levy Yulee, and after having exhibited the journals of the legislature to show the action moved that hereafter the Secretary of the Senate, when he should have occasion to use the name of the gentleman, should designate him as Mr. Yulee. This motion was agreed to.

**1142. Instance wherein leave of absence was granted by motion made and carried.**—On May 2, 1906,<sup>7</sup> the Speaker laid before the House the request of a Member for leave of absence. Usually such leaves are granted by unanimous request, but in view of the fact that objection was being made to all requests for unanimous consent, the Speaker was proceeding to put the question on granting the leave.

Thereupon Mr. John S. Williams, of Mississippi, objected that no motion had been made.

<sup>1</sup> First session Thirty-third Congress, Globe, p. 1189.

<sup>2</sup> First session Fifth Congress, Journal, p. 23 (Gales & Seaton ed.); Annals, pp. 234, 235.

<sup>3</sup> Second session Fifth Congress, Journal, p. 92 (Gales & Seaton ed.); Annals, pp. 650–652.

<sup>4</sup> Such was the effect of the previous question in its early use. See sections 5443–5446 of Vol. V of this work.

<sup>5</sup> Second session Twenty-seventh Congress, Globe, p. 264.

<sup>6</sup> First session Twenty-ninth Congress, Globe, p. 181.

<sup>7</sup> First session Fifty-ninth Congress, Record, p. 6295.

The Speaker<sup>1</sup> thereupon entertained a motion made by Mr. Williams that the Member have leave of absence, and the motion was agreed to by the House.

**1143. Requests for leaves of absence are sometimes opposed and even refused.**—On December 11, 1816,<sup>2</sup> Mr. Joseph Hopkinson, of Pennsylvania, moved—

that the House excuse John Sargeant, one of the Representatives for the State of Pennsylvania, for nonattendance on his duties in this House during the present session.

As Mr. Hopkinson first presented the motion it was to grant leave of absence. Objection was made both to the first form and to the modified form. Mr. John Forsyth, of Georgia, characterized the motion in its first form as unprecedented and incorrect, inasmuch as the Member had not yet attended during the session. Moreover, his duties to the House were paramount to any other, except those of necessity. In this case the Member was to depart for Europe.

It was urged in the debate that the Member's absence was a question between him and his constituents, but, on the other hand, it was replied that the House should not by vote sanction a relinquishment of public duties.

The motion was disagreed to—yeas 74, nays 81.

**1144.** On May 25, 1882,<sup>3</sup> a request for a leave of absence was opposed in the House, and on a yea-and-nay vote was denied, yeas 13, nays 134.

**1145.** On August 28, 1888,<sup>4</sup> the request of a Member for leave of absence was objected to, and the question on granting the leave was put to a vote.<sup>5</sup>

**1146. Under a former rule a request for a leave of absence has been entertained as a privileged question.**—On September 9, 1850,<sup>6</sup> Mr. Nathaniel S. Littlefield, of Maine, claiming the floor for a privileged question, asked the House to grant him a leave of absence from and after the 23d instant for the remainder of the session.

The Speaker,<sup>7</sup> after inquiring under what rule of the House the request was presented, and being referred to the sixty-sixth rule,<sup>8</sup> entertained the motion and put the question to the House.

**1147.** On December 19, 1882,<sup>9</sup> several requests for leave of absence were presented, and objection being made, the question was put on each, and on one there was a yea-and-nay vote.

Mr. Robert M. McLane, of Maryland, proposed, while the requests were being

<sup>1</sup> Joseph G. Cannon, of Illinois, Speaker.

<sup>2</sup> Second session Fourteenth Congress, Journal, p. 57; Annals, p. 265.

<sup>3</sup> First session Forty-seventh Congress, Record, p. 4239.

<sup>4</sup> First session Forty-eighth Congress, Record, p. 8040.

<sup>5</sup> On January 30, 1828, the Speaker laid before the House a letter from John Randolph (of Roanoke), of Virginia, stating that he deemed it incumbent on him to inform the House that, without leave of absence, he had been detained from the House by sickness. The letter was read and inserted in the Journal (first session Twentieth Congress, Journal, p. 232.)

<sup>6</sup> First session Thirty-first Congress, Globe, p. 1777.

<sup>7</sup> Howell Cobb, of Georgia, Speaker.

<sup>8</sup> See section 5941 of Volume V of this work for present form of rule and the form at that time. The form of rule at that time mentioned leaves of absence, but such reference does not appear in the present form of rules.

<sup>9</sup> Second session Forty-seventh Congress, Record, pp. 436–438.

submitted and acted on, to offer a resolution providing for the holiday recess of Congress.

The Speaker<sup>1</sup> declined to entertain the resolution until the requests were disposed of.

Mr. McLane made the point of order that such requests had no standing under the rules, and that it was only the practice of the House which gave them privilege.

The Speaker thereupon expressed the opinion that a motion to adjourn would have precedence, but declined to pass upon the question raised by Air. McLane.

**1148. Rate and method of payment of compensation and mileage of Speaker and Members.** The Constitution of the United States, Article I, section 6, provides that—

Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States.

The statutes<sup>2</sup> fix the salaries of Members and Delegates at \$7,500<sup>3</sup> per annum, computed from the 4th of March next succeeding the general election and payable thereafter monthly during the term of two years after the taking of the oath.<sup>4</sup>

<sup>1</sup>J. Warren Keifer, of Ohio, Speaker.

<sup>2</sup>The subject of the compensation of Members has been treated of in several statutes. The act of September 22, 1789 (1 Stat. L., pp. 70, 71), provided for each Representative and Senator a compensation of "six dollars for every day he shall attend," and also an allowance "at the commencement and end of every session, six dollars for every twenty miles of the estimated distance, by the most usual road, from his place of residence to the seat of Congress." There was also provision for the salary of the Member when detained from the sessions by illness.

By the act of January 22, 1818 (3 Stat. L., p. 404), this compensation was changed to "eight dollars for every day he has attended, or shall attend, the House of Representatives." Senators received the same.

This per diem pay was continued until the act of August 16, 1856 (11 Stat. L., p. 48), when the compensation was changed to six thousand dollars for each Congress, which is the same as three thousand dollars a year, the term of a Congress being two years. The law of 1856 (11 Stat. L., p. 49) also provided that there should be a deduction of the proportionate amount due for each day for every day that the Member should be absent for any other reason than illness of himself or family. But this provision has been generally inoperative, although in 1894, at a time when peculiar conditions of obstruction prevailed, the deductions were actually made.

By the act of July 28, 1866 (14 Stat. L., p. 323), the compensation of each Senator and Representative was fixed at five thousand dollars a year, "and in addition thereto mileage at the rate of twenty cents per mile, to be estimated by the nearest route usually travelled in going to and returning from each regular session." (There is one regular session each year.) By the same act the salary of the Speaker was fixed at eight thousand dollars a year.

By act of March 3, 1873 (17 Stat. L., p. 486), the compensation of Representatives and Senators was increased to seven thousand five hundred dollars per annum, and the salary of the Speaker to ten thousand dollars per annum, these sums to be in lieu of all pay and allowance except actual individual travelling expenses going to and returning from the seat of government. This law was obnoxious to the people, perhaps largely because of a provision giving certain back pay to the legislators who enacted it, and was repealed by the act of January 20, 1874 (18 Stat. L., p. 4).

So the pay and mileage continued until 1907 at the rates fixed by the act of July 28, 1866.

For an early and elaborate report on the compensation of Members see American State Papers (Miscell.), Vol. II, p. 403.

<sup>3</sup>Speaker raised from \$8,000 and Members from \$5,000 by legislative appropriation act of 1907. (34 Stat. L.)

<sup>4</sup>Revised Statutes, section 39.

The salary of the Speaker is \$12,000<sup>1</sup> per annum. In addition to the salary, Members receive mileage at the rate of 20 cents per mile, estimated by the nearest route usually traveled in going to and returning from each regular session.

When a Member or Delegate dies the salary and traveling expenses due him at the time of his death are paid to his widow or heirs, and in such case the salary is computed and paid for a period not less than three months.<sup>2</sup> A Member's successor, whether the vacancy was occasioned by death or otherwise, receives compensation from the date the compensation of his predecessor ceased.<sup>3</sup>

When a Member is unseated in a contest he retains the compensation already received and is paid his salary to the day on which his case is decided. When the contesting Member is seated his salary is paid him for the entire term up to the day on which he is declared entitled to his seat. Both contestant and contestee are allowed a sum not exceeding \$2,000 each for actual expenses of conducting the contest.<sup>4</sup>

The pay and mileage of Members are disbursed by the Sergeant-at-Arms,<sup>5</sup> or, in case of his disability, by the Treasurer of the United States.<sup>6</sup> The Speaker certifies the amounts due the Members during the sessions,<sup>7</sup> and the Clerk during the months when the House is not in session.<sup>8</sup>

The statutes also provide for deductions from the pay of Members who are absent from the sessions of the House for reasons other than illness of themselves or families, or who retire before the end of the Congress,<sup>9</sup> but this penalty is rarely enforced.<sup>10</sup>

No Member is entitled to any allowance for newspapers;<sup>11</sup> and books ordered for Members or Delegates by resolution of either or both Houses must be paid for by the Members, except when the books are ordered printed by the Congressional Printer.<sup>12</sup> Each Member and Delegate is entitled to ten charts of the coast survey for each regular session of Congress.<sup>13</sup>

**1149. The statutes provide that a Member or Delegate withdrawing from his seat before the adjournment of a Congress shall suffer deductions from his compensation.**—The act of July 17, 1862,<sup>14</sup> provides:

When any Member or Delegate withdraws from his seat and does not return before the adjournment of Congress, he shall, in addition to the sum deducted for each day, forfeit a sum equal to the amount

<sup>1</sup> Speaker raised from \$8,000 and Members from \$5,000 by legislative appropriation act of 1907. (34 Stat. L., pp. 993, 994.)

<sup>2</sup> See Revised Statutes, sections 49 and 50, and Laws 1–43, p. 4.

<sup>3</sup> Revised Statutes, section 51. See Report No. 269, third session Thirty-fourth Congress, for examination by the Judiciary Committee; also First Comptroller's Decisions (1882), Vol. III, pp. 321, 328.

<sup>4</sup> See 20 Stat. L., p. 400; 18 Stat. L., p. 389.

<sup>5</sup> See 26 Stat. L., p. 645.

<sup>6</sup> See Sess. Laws 1–47, p. 108, act of June 22, 1882.

<sup>7</sup> For statement as to early functions of the Speakers and Sergeants-at-Arms in disbursing pay, see first session Twenty-second Congress, Journal; p. 856; Debates, p. 3318.

<sup>8</sup> 19 Stat. L., p. 145; Revised Statutes, sections 38, 47, and 48.

<sup>9</sup> Revised Statutes, sections 40 and 41.

<sup>10</sup> See Cong. Record, first session Fifty-first Congress, p. 9922; second session Fifty-third Congress, pp. 5042–5051.

<sup>11</sup> Revised Statutes, section 433; 15 Stat. L., p. 35.

<sup>12</sup> Revised Statutes, section 42.

<sup>13</sup> 28 Stat. L., p. 620.

<sup>14</sup> 12 Stat. L., p. 628, see. 41, R. S.

which would have been allowed by law for his traveling expenses in returning home; and such sum shall be deducted from his compensation, unless the withdrawal is with the leave of the Senate or House of Representatives, respectively.

**1150. The statutes provide for deductions by the Sergeant-at-Arms from the pay of a Member or Delegate who is absent from his seat without a sufficient excuse.**—The act of August 16, 1872,<sup>1</sup> provides:

The Secretary of the Senate and Sergeant-at-Arms of the House, respectively, shall deduct from the monthly payments of each Member or Delegate the amount of his salary for each day that he has been absent from the Senate or House, respectively, unless such Member or Delegate assigns as the reason for such absence the sickness of himself or of some member of his family.<sup>2</sup>

**1151. The old and new systems of providing clerks for Members.** On July 20, 1893, in response to a series of questions by the Clerk of the House, the First Comptroller of the Treasury rendered a decision<sup>3</sup> that the resolution of March 3, 1893,<sup>4</sup> authorizing the allowance of clerk hire to Members and Delegates, House of Representatives, authorized the following: (1) That Members and Delegates should employ clerks at and during the extra or called session of Congress; (2) that where a Member or Delegate pays the clerk the agreed compensation and certifies the amount thereof in compliance with the terms of the resolution, such Member or Delegate is to be paid the amount of such expenditure; (3) that where two or more Members certify that they have each employed the same clerk and each agreed to pay him a fixed amount, the total thereof being either less or greater than \$100 per month, such person may be legally paid as clerk for each of said Members and the amount each certifies he has agreed to pay him; (4) payments may be made from the contingent fund of the House to the Members and Delegates of the amounts they have paid for clerical services or to the clerks employed by such Member or Delegate or of the agreed compensation, without such payments being first sanctioned by the Committee on Accounts of the House, under the requirements of the act of October 2, 1888;<sup>5</sup> (5) the clerks provided under the above resolution are not required to take the oath prescribed by section 1756, Revised Statutes.

The legislative appropriation act of 1907<sup>6</sup> changed the system, however, and provided for the payment to—

each Member and Delegate for clerk hire, necessarily employed by him in the discharge of his official and representative duties, one thousand five hundred dollars per annum, in monthly installments.

And further provided that—

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 31, Revised Statutes of the United States, shall be entitled to payment under this appropriation.

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<sup>1</sup> 11 Stat. L., p. 49, sec. 40, R. S.

<sup>2</sup> See also section 1153 and 1154 for discussions as to this law.

<sup>3</sup> Decisions of the First Comptroller, 1893–94 (Bowler), pp. 43, 44.

<sup>4</sup> 27 Stat. L., p. 757.

<sup>5</sup> Supp. Rev. Stat., p. 627, par. 8.

<sup>6</sup> 34 Stat. L.

**1152. The old law as to clerk hire for Members, and construction thereof.**—On July 7, 1898, in response to a request of the Clerk of the House, the Comptroller of the Treasury<sup>1</sup> rendered a decision in the claim of Mr. H. H. Powers, of Vermont, chairman of the Committee on Pacific Railroads. This committee was entitled to a “session clerk,” and Mr. Powers claimed that he was entitled to reimbursement, not to exceed \$100 per month, for the amount expended by him for clerk hire necessarily employed in the discharge of his official and representative duties, notwithstanding he is chairman of a committee having a clerk.

The Comptroller decided:

The appropriation for the fiscal year ending June 30, 1898, as contained in the act of February 19, 1897 (29 Stat., 543), is as follows:

“To pay Members and Delegates the amount they certify they have paid or agreed to pay for clerk hire necessarily employed by them in the discharge of their official and representative duties, as provided in the joint resolution approved March third, eighteen hundred and ninety-three, during the session of Congress, and when Congress is not in session, as provided in House resolution passed May eighth, eighteen hundred and ninety-six, four hundred thousand dollars, or so much thereof as may be necessary.”

This joint resolution of March 3, 1893 (27 Stat., 757), and the House resolution of May 8, 1896,<sup>2</sup> referred to in the appropriation, are as follows:

“That on and after April first, eighteen hundred and ninety-three, each Member and Delegate of the House of Representatives of the United States may, on the first day of each month during sessions of Congress certify to the Clerk of the House of Representatives the amount which he has paid or agreed to pay for clerk hire necessarily employed by him in the discharge of his official and representative duties during the previous month, and the amount so certified shall be paid by the Clerk out of the contingent fund of the House on the fourth day of each month to the person or persons named in each of said certificates so filed: *Provided*, That the amount so certified and paid for clerical services rendered to each Member and Delegate shall not exceed one hundred dollars for any month during the session: *And provided further*, That the provisions of this resolution shall not apply to Members who are chairmen of committees entitled under the rules to a clerk.

“That the Clerk of the House of Representatives be, and he is hereby, authorized to pay out of the contingent fund of the House to each Member and Delegate for annual clerk hire an amount not exceeding the sum of one hundred dollars per month, to be certified by them on the first day of each calendar month in the manner provided in the joint resolution approved March third, eighteen hundred and ninety-three: *Provided*, That the provisions of this resolution shall not apply to Members who are chairmen of committees entitled under the rules to annual clerks.”

It is to be noticed that the resolution of May 8, 1896, is not a law, but simply an order of the House to its Clerk directing him to make certain payments from the contingent fund. But in view of the fact that a specific appropriation has been made to meet the expenditures contemplated by the resolution, it is clear that that appropriation is exclusive; and as the House resolution is, in effect, made a part of the appropriation, it must be considered in connection with the laws on the subject of clerk hire.

The resolution of 1893 gives the right to clerk hire to each Member who is not chairman of a committee “entitled under the rules to a clerk,” and limits that right to the time Congress is in session. The resolution of 1896 grants the clerk hire to each Member for every month in the year, but excludes Members who are chairmen of committees “entitled under the rules to annual clerks.”

If those two resolutions were of equal force, there could be no doubt that the later would supersede the earlier one, so that the chairman of a committee entitled to a clerk during the session only could receive the clerk-hire allowance for the entire year. But the later resolution is of no force as law except as it must be considered in construing the language of the appropriation. In my opinion all doubt is removed when we examine the appropriation act. It specifically provides for payments when Congress is in session in accordance with the resolution of 1893 (i. e., to Members who are not

<sup>1</sup> Comptroller R. J. Tracewell.

<sup>2</sup> Cong. Record, first session Fifty-fourth Congress, p. 4990.

chairmen of committees entitled to either an annual or a session clerk), and when Congress is not in session in accordance with the resolution of 1896 (i.e., to Members who are not chairmen of committees entitled to an annual clerk).

In the general deficiency appropriation act approved by the President to-day, there is the following clause:

“That hereafter Members of the House of Representatives who are chairmen of committees entitled to annual clerks shall be entitled to the same allowance for clerk hire as is authorized to other Members of the House of Representatives who are not chairmen of committees by the joint resolution approved March third, eighteen hundred and ninety-three, and by House resolution passed May eighth, eighteen hundred and ninety-six; and the appropriation for clerk hire to Members and Delegates made in the legislative, executive, and judicial appropriation act for the fiscal year eighteen hundred and ninety-nine is hereby made available to pay such clerk hire as herein provided: *Provided*, That this provision shall apply to members [chairmen?] of committees entitled to annual clerks, during the vacation of Congress only.”

This legislation refers only to chairmen of committees having annual clerks, and does not affect the claim made by Mr. Powers, whose committee has a session clerk. By this act chairmen of the first-named class of committees are placed in the same position in regard to personal clerk hire as are those of the second-named class—that is, they receive the allowance only during vacation.

For the reasons stated I have to advise you that you are not authorized to pay Mr. Powers's claim.<sup>1</sup>

**1153. The pay of a Member may be deducted on account of absence.—**  
In 1894<sup>2</sup> the provisions of section 40<sup>3</sup> of the Revised Statutes of the United States

<sup>1</sup> On May 15, 1894, Mr. Barnes Compton, chairman of the Committee on the Library, which has a clerk, resigned his seat in the House, and Mr. Franklin Bartlett, of New York, under the provisions of section 3 of Rule X of the House, became chairman and assumed the duties of the position. The question then arose as to whether Mr. Bartlett was entitled to the clerk hire provided by the joint resolution of March 3, 1893 (27 Stat. L., p. 757). The First Comptroller decided (Decisions of the First Comptroller (Bowler) 1893–94, p. 259) that Mr. Bartlett was not entitled to the clerk hire.

On March 14, 1895, the Comptroller of the Treasury decided (Decisions of the Comptroller of the Treasury (Bowler), Vol. I, p. 299) that Members who were chairmen of committees of the House of Representatives of the Fifty-third Congress ceased to be such chairmen upon the expiration of that Congress on March 3, 1895, and were, under an act of March 2 (28 Stat., p. 864), extending for thirty days the allowance for clerk hire made by the joint resolution of March 3, 1893 (27 Stat., p. 757), entitled to payment on that account to the same extent as Members who had not been chairmen of committees.

On July 17, 1896, the Comptroller of the Treasury decided (Decisions of the Comptroller of the Treasury (Bowler), Vol. III, p. 22) that under the appropriation in the act of June 8, 1896 (29 Stat., p. 302), a Member of the House of Representatives was entitled to clerk hire from June 12 (the day after the adjournment of the session) to June 30, 1896, notwithstanding the session clerk to the committee of which he was chairman was paid for the entire month of June.

On July 17, 1896, the Comptroller of the Treasury, in the case of Mr. C. J. Boatner, of Louisiana, decided (Decisions of the Comptroller of the Treasury (Bowler), Vol. III, p. 20) that the act of June 8, 1896 (29 Stat., p. 302), for the payment of clerk hire to Members of the House of Representatives from the adjournment of the first session to the beginning of the second session, did not authorize payment to a Member-elect who had not qualified.

<sup>2</sup> Second session Fifty-third Congress, Reports H. of R., Nos. 704, 1218; Record, pp. 3797, 4130–4133. On February 19, 1897 (second session Fifty-fourth Congress, Record, pp. 2013, 2049–2057), a paragraph in the deficiency appropriation bill provided for reimbursement of those Members of the Fifty-third Congress whose pay had been deducted. This paragraph was fully debated, the method by which the Speaker made the deduction and the form of vouchers used being described; on February 20 the paragraph was stricken out by a vote of ayes 113, noes 55. On June 7, 1832 (first session Twenty-second Congress, Journal, p. 856; Debates, p. 3318), the Speaker made a statement of interest to the House in regard to the method of disbursement of the pay of Members.

The House voted that this statement should be printed in the Journal.

<sup>3</sup> See section 1150 for the exact form of this statute.

relating to the deduction of the pay of Members for absence was the subject of long and minute examination on the part of the Judiciary Committee of the House. The majority of the committee found that the statute was still in force, and recommended a resolution directing the Sergeant-at-Arms to enforce it. It does not appear that this resolution was actually adopted by the House, but the Speaker and the Sergeant-at-Arms proceeded to enforce the statute, and deductions were made from the pay of absent Members. The minority of the Judiciary Committee took the ground that the statute had been repealed, and in the reports there is an exhaustive review of the statutes relating to the pay of Members.

**1154. The House has decided that the law relating to deductions from the pay of Members applies only to those who have taken the oath.**—On December 16, 1869,<sup>1</sup> the Speaker laid before the House a letter from S. G. Ordway, Sergeant-at-Arms of the House, stating that the law of 1856<sup>2</sup> made it the duty of the Sergeant-at-Arms to deduct from the pay of Members the number of days which each Member should be absent during the session of Congress, except when detained by the sickness of himself or some member of his family. The Sergeant-at-Arms stated that the law was undoubtedly meant to apply to Members admitted and duly qualified at the opening of the first session; but its mandatory provisions raised a question as to whether he ought not to deduct from the pay of Members and Delegates who had been elected and taken their seats since the commencement of the present Congress the number of days the House was in session previous to their admission.

This communication was referred to the Committee on the Judiciary, and on March 16, 1870, Mr. John A. Peters, of Maine, made from that committee this report:<sup>3</sup>

That in the opinion of said committee, the act of 1856, which requires a per diem deduction from the pay of Members on account of absences, being intended as a forfeiture to compel the attendance of Members who were already sworn into their seats, has no application to such as were not admitted to seats, and that no deduction shall be made on that account; such a conclusion, however, not to be construed so as to allow compensation to the Representatives of States admitted under the acts of reconstruction for any period of time prior to their election under such acts.

On March 16, 1870,<sup>4</sup> this report was agreed to by the House.

**1155. The question relating to the compensation of Ernest M. Pollard in the Fifty-ninth Congress.**

**The question as to the pay of a Member elected after the beginning of the term of the Congress to fill a vacancy caused by a declination or resignation of effect on the day the term of the Congress began.**

On December 13, 1906,<sup>5</sup> Mr. Ernest M. Pollard, of Nebraska, as a question of privilege, offered this resolution, which was agreed to by the House:

Whereas on July 18, 1905, Ernest M. Pollard was elected to fill the vacancy in the Fifty-ninth Congress caused by the resignation of Hon. E. J. Burkett; and

Whereas the Sergeant-at-Arms of the House of Representatives paid Ernest M. Pollard for the

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<sup>1</sup> Second session Forty-first Congress, Journal, p. 79; Globe, p. 196.

<sup>2</sup> Now section 40, Revised Statutes. See section 1150 of this chapter

<sup>3</sup> Second session Forty-first Congress, House Report No. 37.

<sup>4</sup> Journal, p. 477.

<sup>5</sup> Second session Fifty-ninth Congress, Record, pp. 351, 352.

period intervening between March 4, 1905, the beginning of the Fifty-ninth Congress, and July 18, 1905, the date of his election thereto; and

Whereas Mr. Pollard's legal right to receive pay for this period has been questioned and his action in accepting it has been severely criticised by certain parties; and

Whereas section 51 of the Revised Statutes of the United States, under which payment was made, has never been construed by the courts in a case exactly like this: Therefore, be it

*Resolved by the House of Representatives*, That this whole matter be referred to the Judiciary Committee of the House with instructions to investigate the legal questions involved and report its conclusions to this House before the termination of the present Congress.

On February 21, 1907,<sup>1</sup> Mr. John J. Jenkins, of Wisconsin, submitted the report of that committee:

<sup>1</sup>Report No. 8043.

Your committee have carefully examined the legal question involved as directed. The question turns, under section 51, Revised Statutes of the United States, upon whether or not there was a vacancy after the commencement of the Fifty-ninth Congress, and whether or not Mr. Pollard had a predecessor in the Fifty-ninth Congress, for, to entitle Mr. Pollard to the salary from March 4, 1905, to July 18, 1905, two things must concur. There must have been a vacancy after the commencement of the Fifty-ninth Congress, and Mr. Pollard must have had a predecessor in the Fifty-ninth Congress. Section 51 of the Revised Statutes of the United States provides that if the vacancy occurs after the commencement of the Congress to which Mr. Pollard was elected, he should be paid from the time the compensation of his predecessor ceased. To understand and apply the law, your committee state that it is found as undisputed facts that Hon. E. J. Burkett was elected to and served the full term of the Fifty-eighth Congress from the First district of the State of Nebraska; that he was elected to the Fifty-ninth Congress from the same district and State, but before the expiration of his term in the Fifty-eighth Congress, he was elected to the Senate of the United States from the State of Nebraska. Mr. Burkett received no compensation as a Member of the House of Representatives in the Fifty-ninth Congress. His compensation as a Member of the House ceased upon the close of the term of the Fifty-eighth Congress. He accepted the Senatorship before the expiration of the Fifty-eighth Congress.

On January 19, 1905, Mr. Burkett filed his resignation with the governor of the State of Nebraska as a Member of the Fifty-ninth Congress, to take effect March 4, 1905.

At a special election called for that purpose, Hon. Ernest M. Pollard was elected July 18, 1905, as a Member of the Fifty-ninth Congress, as successor to the Hon. E. J. Burkett. The President of the United States called a special session of the Senate to convene March 4, 1905, at 12 o'clock noon, and Mr. Burkett entered the Senate at that time and took the oath of office as a Senator of the United States.

The language of section 51, Revised Statutes of the United States, is as follows:

"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."

This statute was passed July 12, 1862, resolution No. 54, 12 Stat. L., 624.

It is very plain that there was a vacancy, but this concession does not determine the question, for the vacancy within the meaning of the statute must have occurred after the commencement of the Fifty-ninth Congress, and whether the words "commencement of the Congress" relate to the beginning of the term on March 4 or to the assembling of the Congress in December, is unnecessary for the committee to determine, because in this case no vacancy occurred after the term itself commenced.

If the vacancy occurred after the commencement of the Fifty-ninth Congress, the salary of Mr. Pollard would commence from the time the compensation of Mr. Burkett ceased, if Mr. Burkett was a predecessor of Mr. Pollard in the Fifty-ninth Congress. Unquestionably, speaking generally, Mr. Burkett was the predecessor of Mr. Pollard, but was not the predecessor within the meaning of section 51. The word "predecessor" there used means predecessor in the same Congress, when Mr. Pollard had no predecessor in the Fifty-ninth Congress. It can not be successfully urged that there might have been a small portion of time on March 4, 1905, when Mr. Burkett was a Member of this House, as a Member of the Fifty-ninth Congress—between the time when he ceased to be a Member of the Fifty-

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<sup>1</sup>Report No. 8043.

eight Congress and became a Senator—and therefore a predecessor of Mr. Pollard and a Member of the Fifty-ninth Congress, for the time was too short and the doctrine of relation and incompatibility would apply and prevent it.

Your committee fully agree with what the courts of the United States have said on this subject. This section (51) contemplates a vacancy occurring after the commencement of a Congress, not one existing at its commencement, and authorizes a reference back to the predecessor, who is to be found in some individual previously in the same, not a preceding Congress. (Page *v.* United States, 23 C. C. R., 4.)

“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. (Page *v.* United States, 127 U. S., 67.)

While no doubt the construction placed upon the statute is correct, the resignation of Mr. Burkett settles the matter beyond all question, conclusively showing that Mr. Burkett was only a Member-elect to the Fifty-ninth Congress; that there was no vacancy after the commencement of the Fifty-ninth Congress, no matter what those words mean; and that Mr. Pollard had no predecessor in the Fifty-ninth Congress. The resignation of Mr. Burkett took effect March 4, 1905, on the day of the commencement of the term of the Fifty-ninth Congress. Generally speaking, the law does not regard fractions of a day, but when important to the ends of justice or conflicting interests are involved the courts have, as in the case of the approval of a statute or an act done, ascertained the precise time of the approval of the statute or the doing of the act. This is not such a case. Mr. Burkett elected to have the resignation effective March 4, and when that day came the resignation went into effect. In such case the law can not and will not regard a fraction of a day. When March 4, 1905, came, Mr. Burkett ceased to be a Member of the House of Representatives of the Fifty-ninth Congress, and the time of day that the two separate acts became final and operative is immaterial.

Neither can your committee find any warrant for the payment of this compensation under section 38 of the Revised Statutes. The material part of this section is as follows:

“Representatives and Delegates-elect to Congress whose credentials in due form of law have been filed with the Clerk of the House of Representatives in accordance with the provisions of section 31, may receive their compensations monthly from the beginning of their term until the beginning of the first session of each Congress, etc.”

Undoubtedly the expression herein “from the beginning of their term” relates to the term for which each Member is elected. If it had been intended by this section that Members-elect should be paid by the Sergeant-at-Arms from the beginning of the term of the Congress to which they are elected, the language would have been different. The use of the expression “the term” instead of “their term” would make some difference in the meaning of the section. What was the term of Mr. Pollard? Undoubtedly it was the unexpired term of the Fifty-ninth Congress, existing or remaining on the date of his election. He had nothing to do with and no relation to any part of this term that had expired before he was elected. His term commenced on July 18, 1905, the day of his election, and upon the proper filing of his certificate of election it was the duty of the Sergeant-at-Arms to pay him his salary from that day until the first assembling of the Fifty-ninth Congress. There was no warrant of law for the payment to him of any compensation for any period of time prior to his election. The payment to him, therefore, of compensation from March 4, 1905, to July 18, 1905, was without authority of law.

Your committee concludes therefore that the Hon. Ernest M. Pollard was not entitled to compensation as a Member of this House from March 4, 1905, to July 18, 1905, under section 51 of the Revised Statutes of the United States.

A bill (H. R. 25771) “to authorize the Treasurer of the United States to receive \$1,861.84 from Ernest M. Pollard,” etc., was introduced after the Judiciary Committee had reported, and was referred to the Committee on Ways and Means. On February 22, 1907,<sup>1</sup> Mr. Charles H. Grosvenor, of Ohio, from that committee reported the bill with the following recommendations:

Your committee is unable to concur in the opinion of the Committee on the Judiciary, and, without elaborating the argument, we find that the resignation of Mr. Burkett did not take effect until the 4th

<sup>1</sup> Report No. 8064.

day of March, 1905, and that on that day his resignation created a vacancy in the membership of the Fifty-ninth Congress, and therefore coming within the statute, which is as follows:

“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.”

We believe that Mr. Pollard was entitled to his pay and that the proper construction of the statute was put upon it by the disbursing officer of the House of Representatives. But inasmuch as Mr. Pollard insists on returning this money to the Treasury of the United States, and for the purpose of aiding him to that end, we advise the following amendments:

In line 8 strike out the words “without authority of law,” and insert at the end of line 9 the following:

“prior to his election as a Member of the Fifty-ninth Congress to fill a vacancy, which salary the said Pollard desires to return to the Treasury, the said funds to be credited to the general funds of the United States.”

No action was taken by the House.

**1156. The Speaker during sessions and the Clerk during recesses of Congress certifies to the compensation of Members; and the Speaker certifies as to mileage.**—The act of July 28, 1866,<sup>1</sup> provides:

The salary and accounts for traveling expenses in going to and returning from Congress of Senators shall be certified by the President of the Senate, and those of Representatives and Delegates by the Speaker of the House of Representatives.

The Act of August 15, 1876,<sup>2</sup> provides:

The Clerk of the House of Representatives is authorized and directed to sign, during the recess of Congress after the first session, and until the first day of the second session, the certificates of the monthly compensation of Members and Delegates in Congress, which certificates shall be in the form now in use and shall have the like force and effect as is given to the certificate of the Speaker.

The Act of March 3, 1873,<sup>3</sup> provides:

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 31, may receive their compensation monthly from the beginning of their term until the beginning of the first session of each Congress, upon a certificate in the form now in use to be signed by the Clerk of the House, which certificate shall have the like force and effect as is given to the certificate of the Speaker.

**1157. Certificates of salary and mileage of Members may be signed for the Speaker by a designated employee.**

A joint resolution, approved November 12, 1903,<sup>4</sup> provides:

*Resolved*, That the Speaker is authorized to designate from time to time some one from among those appointed by him and appropriated for and employed in his office, whose duty it shall be under the direction of the Speaker to sign in his name and for him all certificates required by section forty-seven of the Revised Statutes for salary and accounts for traveling expenses in going to and returning from Congress of Representatives and Delegates.

**1158. The statutes provide for Members a mileage of 20 cents a mile going to and coming from each regular session of Congress.**—The statutes provide that Members shall receive mileage at the rate of 20 cents per mile, to be estimated by the nearest route usually traveled in going to and returning from each

<sup>1</sup> 14 Stat. L., p. 323, sec. 47, R. S. See page 191 of Vol. 5 of Opinions of Attorneys-General for opinion of Attorney-General Reverdy Johnson as to the effect of the certificate of the Speaker and President of the Senate as to salaries.

<sup>2</sup> 19 Stat. L., p. 145.

<sup>3</sup> Sec. 38, R. S., 17 Stat. L., p. 488.

<sup>4</sup> 33 Stat. L., p. 1.

regular session, the accounts to be certified by the Speaker,<sup>1</sup> and the mileage to be payable on the first day of each session.<sup>2</sup> In no case may "constructive mileage" be computed or paid.<sup>3</sup> In case a Member leaves his seat before the adjournment, of Congress without leave, and does not return thereto, he forfeits a sum equal to his mileage for his return home.<sup>4</sup> The certificate of the Speaker of the House of Representatives, as to the salary and mileage, is conclusive upon all departments of the Government, and the Comptroller has no jurisdiction to render a decision upon the amount due to a Member for salary or mileage.<sup>5</sup>

**1159. The law relating to mileage of Members applies only to the regular sessions of Congress.**—On July 22, 1893, the First Comptroller decided that section 17 of the act of July 28, 1866,<sup>6</sup> which provides for the pay of the mileage of Members, applied only to regular sessions, and would not apply to the extra session about to meet in the coming August.<sup>7</sup>

**1160. An appropriation for mileage of Members at a regular session is authorized by law, although mileage may have been appropriated for a preceding special session.**

**In the later view an existing session ends with the day appointed by the Constitution for the regular annual session.**

**Citation of statutes relating to the pay and mileage of Members.**

On January 29, 1904,<sup>8</sup> the urgent deficiency appropriation bill was under consideration in Committee of the Whole House on the state of the Union, when this paragraph was read:

HOUSE OF REPRESENTATIVES.

For mileage of Members of the House of Representatives and Delegates from Territories for the second session of the Fifty-eighth Congress, \$145,000.

SENATE.

For mileage of Senators for the second session of the Fifty-eighth Congress, \$45,000.

Mr. John W. Maddox, of Georgia, made the point of order that the appropriation was not authorized by existing law.

The question of order was debated at length on this day and on January 30, with abundant citations of precedents and a discussion of the constitutional question involved.

At the conclusion of the debate the chairman held:<sup>9</sup>

The question raised by the point of order made by the gentleman from Georgia [Mr. Maddox] does not involve the question of whether or not Senators, Representatives, and Delegates attending Congress at this time should or should not receive mileage. That is a question for the Committee of the Whole to decide and not the Chair. The question presented to the Chair is the parliamentary

<sup>1</sup> 14 Stat. L., p. 323; Sess. Laws, first session Forty-third Congress, p. 4.

<sup>2</sup> 11 Stat. L., p. 367.

<sup>3</sup> 11 Stat. L., pp. 442, 443.

<sup>4</sup> Revised Statutes, section 41.

<sup>5</sup> Decisions of Comptroller, Vol. II, p. 339. (January 10, 1896.)

<sup>6</sup> 14 Stat. L., p. 323.

<sup>7</sup> Decision of the First Comptroller, 1893, 1894 (Bowler), p. 48.

<sup>8</sup> Second session Fifty-eighth Congress, Record, pp. 1397–1402, 1407–1415.

<sup>9</sup> James A. Tawney, of Minnesota, chairman.

question of whether or not there is any existing law authorizing the payment of the mileage for which it is proposed to appropriate the amount stated in this bill.

The legislative, executive, and judicial appropriation bill passed at the last session of the Fifty-seventh Congress appropriated for the payment of mileage to Senators, Representatives, and Delegates attending the first annual session of the Fifty-eighth Congress. This appropriation, however, was not available until the day appointed by the Constitution for the assembling of this Congress at its first annual session.

The Fifty-eighth Congress was convened by proclamation of the President of the United States November 9, 1903. Soon thereafter it passed the following resolution:

*“Resolved, etc.,* That the appropriations for mileage of Senators, Members of the House of Representatives, and Delegates from the Territories made in the legislative, executive, and judicial appropriation act for the fiscal year 1904, approved February 25, 1903, be, and the same are hereby, made immediately available and authorized to be paid to Senators, Members of the House of Representatives, and Delegates from the Territories for attendance on the first session of the Fifty-eighth Congress.”

By this resolution the money appropriated for the payment of mileage at the session of this Congress beginning on the first Monday of December last was paid to Senators, Representatives, and Delegates attending the session of this Congress convened by the President. By the wording of this resolution Congress declared that the session convened by the President was the first session of the Fifty-eighth Congress. It is now declared by the paragraph in this urgency deficiency appropriation bill that this is the second session of this Congress, and it is proposed to appropriate money for the payment of mileage to Senators, Representatives, and Delegates attending upon this second session.

The gentleman from Georgia makes the point of order against this paragraph, claiming there is no existing law authorizing the appropriation, and that therefore the paragraph is not in order under section 2 of Rule XXI, which is as follows:

“2. No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress; nor shall any provisions changing existing law be in order in any general appropriation bill or in any amendment thereto.”

The Chair has spent some time in endeavoring to ascertain what, if any, law there is governing the payment of mileage. As a result of this investigation it has been ascertained that under various statutes Senators, Representatives, and Delegates attending the sessions of Congress have received mileage whether the session was convened by the President or assembled at the time fixed by the Constitution or by statute, the only exception being in the Fortieth Congress. When the act fixing the 4th of March for the assembling of Congress, in addition to the times fixed by the Constitution, was passed, by that act it was provided that Members and Senators of the previous Congress should not receive mileage for attendance upon the session beginning March 4, and for the information of the committee, and with its permission, the Chair will print, in connection with this ruling, these several statutes.

The act of 1874, repealing the increase of salaries of Members of Congress to \$7,500 a year, revived the act of 1866, since which time there has been no legislation upon this subject. Therefore the act of 1866 is the law in force to-day in respect to the compensation to be paid to Senators, Representatives, and Delegates, and also the law now in force governing the question of mileage. This law reads as follows:

“SEC. 17. *And be it further enacted,* That the compensation of each Senator, Representative, and Delegate in Congress shall be \$5,000 per annum, to be computed from the first day of the present Congress, and in addition thereto mileage at the rate of 20 cents per mile, to be estimated by the nearest route usually traveled in going to and returning from each regular session.”

It will be observed that the language of this act in respect to mileage is significant, and from it there can be but one conclusion, and that is that the mileage authorized to be paid is intended as additional compensation without any particular reference to the expense incurred in traveling to and from the sessions of Congress, just as the law allows a certain per diem in addition to the salary paid to the officers and agents of the Government who are obliged to travel on the business of the Government or in the discharge of their duties. The language which follows is merely descriptive of how the mileage authorized to be paid is to be estimated. The law says it is “to be estimated by the nearest route usually traveled in going to and returning from each regular session.” In the opinion of the Chair the words “regular session” do not mean alone the sessions of Congress convened under authority of the Con-

stitution, but rather that this mileage is to be paid at any session of Congress lawfully convened, and the amount is to be estimated as stated in the act—that is, on the same basis that mileage is paid to Senators and Representatives when attending the regular or annual sessions provided for by the Constitution.

Of course no one contends that under this law Senators and Representatives and Delegates are entitled to more than one payment as mileage for attending one session of Congress. The question, therefore, of whether this paragraph is in order or whether there is any existing law authorizing the appropriation of this money turns upon the proposition of whether Congress is now in the session convened by the President of the United States or whether that session expired by operation of law, and Congress is now in session under and by virtue of that provision of the Constitution which designates the first Monday in December as the day when it shall assemble in annual session.

When this Congress convened on November 9 the business of the Congress proceeded as usual, and it was in session on Saturday, December 5, 1903, the last secular day before the first Monday in December. In the House of Representatives, at the close of that day, as appears from the Record, the simple motion to adjourn was agreed to, and the Speaker announced, "The House stands adjourned," without adding, as usual, the day to which the "House stands adjourned." No resolution to terminate the session was proposed. In the Senate on the same day it was voted to take a recess until 11.50 a.m., Monday, December 7. On that day and hour the Senate met, and after the transaction of the usual business and the adoption of the usual vote of thanks to the presiding officer, the hour of 12 o'clock having arrived, the President pro tempore said:

"Senators, the hour provided by law for the meeting of the first regular session of the Fifty-eighth Congress having arrived, I declare the extraordinary session adjourned without day."

And the President pro tempore left the chair.

Immediately thereafter the President pro tempore called the session to order for the second session of the Fifty-eighth Congress.

In the House at the same hour the Speaker called the House to order and, after prayer by the Chaplain, directed that the roll be called by States to ascertain the presence of a quorum, and business proceeded as at the beginning of a session. The usual resolution was passed, notifying the President of the United States that the second session of the Fifty-eighth Congress was assembled and that a quorum of the two Houses was present and ready to receive any message which he might deem proper to submit.

This is a complete Statement, as shown by the Record, of what took place in the two Houses of Congress on December 5 and December 7.

On the following day the Journal of the House records the fact that on Monday, December 7, the second session of the Fifty-eighth Congress assembled. The language of the Journal is as follows:

"JOURNAL OF THE HOUSE OF REPRESENTATIVES, CONGRESS OF THE UNITED STATES.

"Begun and held at the Capitol, in the city of Washington, in the District of Columbia, on Monday, the 7th day of December, in the year of Our Lord 1903, being the second session of the Fifty-eighth Congress, held under the Constitution of the Government of the United States, and in the one hundred and twenty-eighth year of the Independence of said States.

"MONDAY, *December 7, 1903.*

"On which day, being the day fixed by the Constitution of the United States for the meeting of Congress, Joseph G. Cannon, the Speaker (a Representative from the State of Illinois), and the following Members of the House of Representatives answered to their names."

This journal declaring this to be the second session of the Fifty-eighth Congress was unanimously approved by the House. The Journal of the Senate reciting the same facts was likewise approved.

In the opinion of the Chair the question of whether this is a continuation of the session of Congress convened by the President or the second session convened under and by virtue of the provision of the Constitution fixing the time for the assembling of Congress is a mixed question of law and fact, and the Chair, as the presiding officer of this committee appointed by the Speaker of the House, in deciding this question is bound to take cognizance of what the House itself has done in determining whether or not this is or is not the second session of the Fifty-eighth Congress.

As a matter of law, the Chair is clearly of the opinion that the session of this Congress convened by the President of the United States terminated when the moment of time arrived for the Congress to convene in its regular annual session under the Constitution. That session of Congress there termi-

nated by operation of law, not because there is any law fixing the limit of time that a session of Congress convened by the President should remain in session, but because of the constitutional provision fixing the time when the first regular annual session of this Congress should convene. The contention that because Congress was in session on the last secular day preceding the first Monday in December, and that there was no formal termination of this session at that time, and that therefore this is a continuation of that session, seems to the Chair untenable. It would, in the opinion of the Chair, be as reasonable to say that because there will be no formal ending of to-day and no formal beginning of to-morrow therefore Saturday will continue forever or throughout our existence.

The illustration used by the gentleman from Maine to prove his contention that this is a continuous session—namely, that if the House was in the act of calling the roll upon the passage of some bill when the hour arrived for the convening of Congress in its annual or constitutional session that the roll call could not be further proceeded with—does not prove anything. As a matter of fact, and as the records of Congress show, that incident or circumstance has occurred on several occasions when the time for the termination by operation of law of the second annual session of Congress arrived. The opinion of the Chair that the first session of the Fifty-eighth Congress convened by the President terminated by operation of that provision of the Constitution which fixes the time for the beginning of the annual session of this Congress is not without precedent.

In the Fortieth Congress this same question arose. Just at the close of the extra session, Mr. Sherman, then a Senator from Ohio, said:

“I can not see any object in passing this concurrent resolution.”

The concurrent resolution he referred to was that the presiding officers of the two Houses should at a specified time declare their respective Houses adjourned without day.

Said Mr. Sherman:

“The Constitution provides that the regular session of Congress shall be on the first Monday of December, and, according to law, I believe—or, at any rate, such is the usage—the hour for meeting on that day is 12 o’clock. We shall meet at that time in a new session. The recent law has not changed that regular time of meeting, and the result is that the next session of Congress will commence necessarily at noon on Monday.”

Mr. Sumner, on the same occasion, said:

“And that brings me to the exact point as to whether the present session should expire precisely at the time when the coming session begins. I see no reason why it should not. I see no reason why we should interpose the buffer even for five minutes.”

It was proposed to adjourn to 11 o’clock and 55 minutes.

“Let one session come right up close upon the other, and then we shall exclude every possibility of evil consequences from the character of the Chief Magistrate. \* \* \* Now, I know not why when this session expires we may not at the same time announce the beginning of the new session.”

These quotations, taken from the *Globe*, show that in the judgment of such men as Mr. Sherman and Mr. Sumner, two of the ablest men in either House of Congress at that time, if not since, the called session of the Fortieth Congress expired by operation of law when the time for the Congress to assemble under the Constitution arrived.

The proceedings of the Forty-fifth Congress have been referred to, and the Chair desires to present to the committee in support of its ruling the history of the matter from the precedents prepared by Mr. Asher C. Hinds, clerk at the Speaker’s table.

On October 15, 1877, Congress met in extraordinary session on the call of the President and remained in session until the first Monday in December, the day appointed by the Constitution for the regular assembling of Congress.

On Saturday, December 1, 1877, Mr. Fernando Wood, of New York, offered the following resolution, which was agreed to by the House:

“*Resolved (the Senate concurring)*, That the President of the Senate and the Speaker of the House of Representatives be, and they are hereby, directed to adjourn their respective Houses, without delay, at 3 o’clock p.m. this day.”

Later on the day of December 1 the House took a recess until 10 a.m. of the calendar day of Monday, December 3, the day prescribed by the Constitution for the meeting of the regular session of Congress.

On the same day, December 1, the Senate adjourned until Monday, December 3, at 10 a.m.

As soon as the Senate had approved its Journal on Monday, December 3, Mr. George F. Edmunds, of Vermont, offered this resolution, which was agreed to without debate:

*“Resolved by the Senate (the House of Representatives concurring), That it is the judgment of the two Houses that the present session of Congress expires by operation of law at 12 o'clock meridian this day.”*

On the same day this resolution was agreed to by the House without debate.

After the above resolution had been agreed to the Senate took up the resolution of the House of December 1, and agreed to it with an amendment striking out the words “3 o'clock p.m. this day” and inserting “11 o'clock and 50 minutes a.m., Monday, the 3d of December, instant.” The House concurred in that amendment.

Then the two Houses agreed to the usual resolutions authorizing the appointment of a joint committee to wait on the President and inform him of the adjournment.

And at 11.50 a.m. the Speaker declared the House adjourned sine die in accordance with the resolution of the two Houses; and ten minutes later the Speaker, at 12 m., called the House together in the new session, the roll being called by States.

Some gentlemen have said that the value of this precedent is practically destroyed because the resolution declaring it to be the judgment of both Houses of Congress that the extra session expired by operation of law was agreed to without debate. The Record shows that there was considerable discussion over this proposition. There was some trouble or fear of trouble in the matter of securing a sine die adjournment, and at the last moment, in order that the question might be settled, Senator Edmunds offered the concurrent resolution expressing the judgment of the two Houses upon this question.

In the judgment of the Chair, therefore, the session of Congress convened by the President on November 9, 1903, terminated by operation of law; that this is a session of Congress separate and distinct from that one, and, as declared by the unanimously approved Journals of the House and Senate, is the second session of the Fifty-eighth Congress. It being the regular annual session, and as the law of 1866 authorizes the payment of mileage to Senators, Representatives, and Delegates attending this session, in the opinion of the Chair the paragraph appropriating the money for the payment of that mileage is clearly in order.<sup>1</sup>

The Chair therefore overrules the point of order.

**1161. Each Member is allowed \$125 annually for stationery and the Clerk maintains a stationery room for supplying articles.**

**The Clerk furnishes stationery to the several committees and to the offices of the House.**

The stationery for the use of the House is contracted for by the Clerk.<sup>2</sup> The annual appropriation allows \$125 to each Member for stationery, or commutation therefor. By resolution of the House<sup>3</sup> the clerk is required to deliver to every Member of the House the usual articles of stationery furnished to Members to an amount not exceeding in value that authorized by law, at the cost price, in the stationery room, or, at the option of the Members, to pay them the proper commutation in money; to keep a true and accurate account of all stationery which he may so deliver to the several Members of the House; and if in any case a Member shall receive a greater amount of stationery during any session than is above provided, the Clerk shall, before the close of such session, furnish to the Sergeant-at-Arms an account of such excess beyond the amount above specified, who is required to deduct the amount of such excess from the pay and mileage of such Member, and refund the same into the Treasury. This limitation is not intended to be made

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<sup>1</sup>The Chair inserted as an appendix to this decision the various statutes enacted for compensation and mileage for Members of Congress:

<sup>2</sup>See section 251 of Vol. I of this work.

<sup>3</sup>Second session Fortieth Congress, Journal, p. 1173.

applicable to the use of wrapping paper and envelopes which may be required in the folding room.

The Clerk is also authorized and required to deliver to the chairman of each of the committees of the House, for the use of such committees, and to the Postmaster, Sergeant-at-Arms, and Doorkeeper, for the use of their respective offices, at every session of Congress, similar articles of stationery, not exceeding in value an amount which from time to time shall be fixed upon by the Committee on Accounts and approved by the Speaker.

Stationery for the House and committees, except such as is purchased for sale in the stationery room, is furnished by the Public Printer on requisition from the Clerk.<sup>1</sup>

The act of February 12, 1868,<sup>2</sup> provided:

“From and after the 3d day of March, 1868, no Senator or Representative shall receive any newspapers except the Congressional Globe, or stationery, or commutation therefor, exceeding one hundred and twenty-five dollars for any one session of Congress.”

**1162.** By the legislative, executive, and judicial appropriation bill of March 3, 1893, a sum was appropriated which would allow \$125 to each Member for stationery for the fiscal year 1894. The question arose as to whether the commutation of \$125 might be allowed during the extra session of Congress; and the First Comptroller decided that it might be, as there was no time fixed when the commutation should be made. A Member might avail himself of his right whenever he should see fit. Whether or not the Member would be entitled to additional stationery or commutation therefor during the regular session would depend upon whether Congress made an appropriation therefor and also upon such rules as the House might adopt.<sup>3</sup>

**1163. Conditions under which the franking privilege is exercised by the Member.**—No allowance is made the Member for postage;<sup>4</sup> but Members and Delegates and the Clerk may send and receive free through the mail all public documents printed by order of Congress, the name of the user and designation of the office being written thereon, this privilege continuing until the 1st day of December following the expiration of the user's term of office.<sup>5</sup> The Congressional Record or any part thereof, or speeches or reports contained therein, may, under the frank of a Member or Delegate, to be written by himself, be carried free under such regulations as the Postmaster-General may prescribe.<sup>6</sup> Seeds transmitted by the Commissioner of Agriculture, or by any Member or Delegate receiving seeds from the Department for transmission, are sent free in the mails under frank, and this privilege applies to ex-Members and ex-Delegates for a period of nine months after the expirations of their terms.<sup>6</sup> The Public Printer furnishes to the Department of Agriculture for the use of Members franks for the transmission of seeds.<sup>7</sup> Members, Members-elect, Delegates, and Delegates-elect may send free through the mails, under their franks, any mail matter to any Government official or to any

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<sup>1</sup> 28 Stat. L., p. 624.

<sup>2</sup> 15 Stat. L., p. 35.

<sup>3</sup> Decision First Comptroller, 1893–94 (Bowler), p. 47.

<sup>4</sup> Rt. S., sec. 44.

<sup>5</sup> 19 Stat. L., p. 336; 20 Stat. L., p. 10.

<sup>6</sup> 18 Stat. L., p. 343.

<sup>7</sup> 32 Stat. L., pp. 741, 742.

person, correspondence not exceeding 2 ounces in weight upon official or departmental business.<sup>1</sup>

**1164. Penalties are provided for attempts to bribe Members; and a Member may not be interested in a public contract.**—The statutes of the United States prescribe severe penalties for whomsoever attempts to bribe a Member of either House of Congress with intent to influence his vote or decision on any matter pending in either House; and also for any Member who solicits or receives such a bribe, or who receives any valuable consideration for services in regard to contracts or offices under the Government or claims, etc., against the Government.<sup>2</sup> Neither may Members be interested in any public contract.<sup>3</sup>

**1165. A Member who was interested in a contract forbidden to him by law was relieved by legislation.**—In 1867 a joint resolution was passed (S. Res. 29) by Congress and signed by the President, canceling a contract into which a citizen who subsequently became a Member of Congress had entered before his election for the transportation of mails. The law forbade (act of Congress approved April 21, 1808) a member of Congress being interested in a contract.<sup>4</sup>

**1166. Opinion of the Attorney-General as to construction of the statute forbidding Members from being interested in contracts.**—On October 21, 1903,<sup>5</sup> the Attorney-General of the United States, P. C. Knox, submitted to the Secretary of War an opinion as to the provision of law relating to the interest of Members of Congress in contracts:

The provision of law referred to, as carried into the Revised Statutes (section 3739), reads as follows:

“No Member of or Delegate to Congress shall directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States by any officer or person authorized to make contracts on behalf of the United States. Every person who violates this section shall be deemed guilty of a misdemeanor, and shall be fined three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced on the part of the United States, in consideration of any such contract or agreement, it shall be forthwith repaid; and in case of refusal or delay to repay the same, when demanded by the proper officer of the Department under whose authority such contract or agreement shall have been made or entered into, every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law for the recovery of any such sum of money so advanced.”

Your inquiry is this: If a contract under the jurisdiction of your Department is entered into in violation of the above section and is completely executed on both sides, the articles contracted for having been delivered and the consideration paid at the time of the delivery, what portion of the consideration, if any, is subject to a demand for repayment?

The answer, which seems clear, turns entirely on the sense in which Congress used the word “advanced” or some form of it. Did it use it in its legal sense, or in a broader sense, including not only “advances,” strictly speaking, but payments made upon the delivery of the thing, or the performance of the work contracted for? The word, as you point out, has always had a definite and well-understood meaning in law. An “advance,” in connection with a contract, is something paid in

<sup>1</sup> 28 Stat. L., p. 622; 26 Stat. L., p. 1081; 30 Stat. L., p. 443.

<sup>2</sup> The law also provides that no Member shall practice in the Court of Claims. (Revised Statutes, section 1058.)

<sup>3</sup> See Revised Statutes, sections 5450, 5500, 1781, 1782.

<sup>4</sup> First session Fortieth Congress, Journal, p. 360; Globe, p. 93.

<sup>5</sup> Vol. 25, Opinions of Attorneys-General, p. 71.

anticipation of the performance of the contract—a part of the consideration paid in “advance” of the delivery of the thing, or the performance of the work bargained for. It is therefore plain that the term is without meaning or significance except where the contract is in an executory state. If the thing contracted for was delivered and the consideration paid at the time of the delivery—in other words, if the contract has been executed—there can, of course, be no such thing as an “advance” in the legal sense of the word. Whence it follows that in the case you put, which is the case of an executed contract, the Government having received and paid for all it contracted for, you are not authorized by section 3739 of the Revised Statutes to demand the repayment of any portion of the consideration paid by the Government, if the term “advance,” as used in that section, is to be understood in its general legal acceptance.

The issue, then, narrows down to this: Did Congress, in the enactment of the provision in question, use the word “advance” in any other than its generally accepted legal meaning? I am clear that it did not.

**1167. In recent, as well as early, practice a Member frequently informs the House by letter that his resignation has been sent to the State executive, such letter being presented as a privileged question.**—On January 4, 1887,<sup>1</sup> the Speaker<sup>2</sup> as a privileged question laid before the House a letter from Mr. Abram S. Hewitt, of New York, informing the House that he had tendered his resignation, to take effect on the 1st day of January, 1877.

**1168.** On January 17, 1887,<sup>3</sup> Mr. William McAdoo, of New Jersey, as a question of privilege, submitted to the House the letter of Mr. Robert S. Green, of New Jersey, in which the latter announced his resignation, which he had forwarded to the governor of New Jersey, to take effect on the date of the letter.

The letter, which was addressed to the Speaker, was read and ordered to lie on the table, in accordance with the usual custom.

**1169.** On April 16, 1830,<sup>4</sup> the Speaker laid before the House a letter from Mr. John M. Goodenow, of Ohio, informing the House that he had transmitted his resignation as Congressman to the governor of Ohio.

**1170.** On January 23, 1816,<sup>5</sup> Mr. Peter B. Porter, of New York, informed the House, by letter to the Speaker, that he had transmitted his resignation to the governor of New York.

**1171.** As early as 1797<sup>6</sup> it appears to have been the practice for a Member to transmit his resignation to the executive of his State.

**1172.** On January 4, 1858,<sup>7</sup> Mr. Speaker Orr laid before the House, by unanimous consent, a letter from Mr. Nathaniel P. Banks, of Massachusetts, informing the House that he had transmitted his resignation to the governor of his State.

**1173.** On January 8, 1834,<sup>8</sup> the Speaker laid before the House a letter from Mr. H. A. Bullard, of Louisiana, informing the House, through the Speaker, that his seat had become vacant by resignation addressed to the State of Louisiana. The letter was read and laid on the table.

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<sup>1</sup> Second session Forty-ninth Congress, Journal, p. 164.

<sup>2</sup> John G. Carlisle, of Kentucky, Speaker.

<sup>3</sup> Second session Forty-ninth Congress, Journal, p. 293; Record, p. 739.

<sup>4</sup> First session Twenty-first Congress, Journal, p. 544.

<sup>5</sup> First session Fourteenth Congress, Journal, p. 212.

<sup>6</sup> Second session Fifth Congress, Journal, pp. 95, 433 (Gales & Seaton ed.).

<sup>7</sup> First session Thirty-fifth Congress, Journal, p. 121.

<sup>8</sup> First session Twenty-third Congress, Journal, p. 172; Debates, p. 2364.

On January 15,<sup>1</sup> Mr. John Davis, of Massachusetts, informed the Speaker by letter that he had “signified to the government of the State of Massachusetts” his resignation of his seat in the House. This letter was read and laid on the table.

**1174.** On April 16, 1830,<sup>2</sup> the Speaker laid before the House a letter from Mr. John M. Goodenow, of Ohio, informing the House that he had transmitted his resignation as Congressman to the governor of Ohio.

**1175.** On December 18, 1860,<sup>3</sup> the Speaker, by unanimous consent, laid before the House a letter from Mr. Israel Washburn, jr., of Maine, informing the House that he had resigned his seat as a Member, the resignation to take effect on January 1, 1861.

**1176.** On January 7, 1884,<sup>4</sup> the Speaker laid before the House a letter from Mr. George D. Robinson, of Massachusetts, informing the House that, having been elected governor of Massachusetts, he had delivered to the governor of the Commonwealth his resignation of the office of Representative to the Forty-eighth Congress from the Twelfth Congressional district of Massachusetts.

**1177. Forms of letters tendering a Member’s resignation to the House or the governor of a State.**

**Instance wherein a Member tendered his resignation to take effect at a future date.**

On December 13, 1906,<sup>5</sup> the Speaker laid before the House the following communication, which was read and laid on the table:

HOUSE OF REPRESENTATIVES  
COMMITTEE ON INSULAR AFFAIRS,  
*Washington, D. C., December 13, 1906.*

To the SPEAKER:

I herewith tender my resignation as a Member of the Fifty-ninth Congress, to take effect on the 15th day of January, 1907.

I have the honor to inclose a copy of a letter addressed to the Hon. John I. Cox, governor of Tennessee, notifying him of my said resignation.

I have the honor to be, respectfully,

M.R. PATTERSON,  
*Member of Congress, Tenth District, Tennessee.*

DECEMBER 13, 1906.

His Excellency JOHN I. COX,

*Governor of Tennessee.*

SIR: I have the honor to notify you that I have this day tendered my resignation as a Member of the Fifty-ninth Congress to the Speaker of the House of Representatives, said resignation to take effect January 15, 1907.

A copy of said resignation is herein inclosed.

I have the honor to be, respectfully,

M. R. PATTERSON,  
*Member of Congress, Tenth District, Tennessee.*

<sup>1</sup>Journal, p. 205.

<sup>2</sup>First session Twenty-first Congress, Journal, p. 544.

<sup>3</sup>Second session Thirty-sixth Congress, Journal, pp. 90, 91; Globe, p. 121.

<sup>4</sup>First session Forty-eighth Congress, Journal, p. 211.

<sup>5</sup>Second session Fifty-ninth Congress, Record, p. 370.

**1178.** On May 2, 1902,<sup>1</sup> the following communication was presented to the House by the Speaker, read, and laid on the table:

HOUSE OF REPRESENTATIVES, UNITED STATES,  
*Washington, D. C., May 1, 1902.*

HON. DAVID B. HENDERSON,

*Speaker of the House of Representatives.*

SIR: I beg leave to inform you that I have this day transmitted to the governor of the Commonwealth of Massachusetts my resignation as a Representative in the Congress of the United States from the Sixth Massachusetts district.

I have the honor to be, your obedient servant,

WILLIAM H. MOODY.

**1179. In a few instances Members have announced their resignations to the House verbally.**—On July 14, 1856,<sup>2</sup> a resolution for the expulsion of Mr. Preston S. Brooks, of South Carolina, was disagreed to, and thereupon Mr. Brooks rose, and having by unanimous consent submitted remarks, announced that he—was no longer a Member of the Thirty-fourth Congress.

On July 16, 1856,<sup>3</sup> Mr. Lawrence M. Keitt, of South Carolina, who had been censured by the House, rose, and after submitting remarks, announced that—he was no longer a Member of this House.

The *Globe* indicates that he announced that he had sent his resignation to the governor of his State, but this does not appear from the journal.

**1180.** The journal of July 30, 1850,<sup>4</sup> has this entry:

Robert C. Winthrop, a Member from the First Congressional district, in the State of Massachusetts, rose and announced his resignation of his seat in the House.

The record of debates shows that Mr. Winthrop gave the reason for his resignation—his appointment to the Senate—requested that the fact of his resignation be announced in the usual form to the governor of Massachusetts, and took farewell of the House.

**1181. A Member may resign his seat by a letter transmitted to the House alone.**—On February 11, 1802,<sup>5</sup> the Speaker laid before the House a letter from Mr. Richard Sprigg, of Maryland, containing his resignation of his seat in the House.

On March 24<sup>6</sup> Mr. Walter Bowie, his successor, appeared and took the oath. March 25, the Committee on Elections, to whom were referred Mr. Bowie's credentials, reported that he appeared to have been duly elected, and that—

the resignation of Richard Sprigg satisfactorily appears from his letter of the 10th of February last, addressed to the Speaker of the House of Representatives.

**1182.** On March 28, 1796,<sup>7</sup> the Speaker laid before the House a letter from Gabriel Duvall containing his resignation of a seat in the House as one of the Members for the State of Maryland. The letter was read and ordered to lie on the table.

<sup>1</sup> First session Thirty-first Congress, Journal, p. 1271.

<sup>2</sup> First session Thirty-fourth Congress, Journal, p. 1202; *Globe*, p. 1629.

<sup>3</sup> Journal, p. 1221; *Globe*, p. 1646.

<sup>4</sup> First session Thirty-first Congress, Journal, p. 1205; *Globe*, p. 1474.

<sup>5</sup> First session Seventh Congress, Journal, p. 93 (Gales & Seaton ed.)

<sup>6</sup> Journal, pp. 156, 158.

<sup>7</sup> First session Fourth Congress, Journal, p. 485 (Gales & Seaton ed.).

**1183.** On August 17, 1850,<sup>1</sup> the Speaker, by unanimous consent, laid before the House a communication from Charles M. Conrad, tendering his resignation as Representative from the Second Congressional district of Louisiana.

**1184.** On August 4, 1852,<sup>2</sup> the Speaker, by unanimous consent, laid before the House a communication from Mr. Humphrey Marshall, resigning his seat in this House as a Member from the State of Kentucky.

**1185.** Three Members resigned during the second session of the Forty-fourth Congress—Smith Ely, jr., of New York, on December 12, 1876; William B. Spencer, of Louisiana, on January 17, 1877, and Frank Hereford, of West Virginia, on January, 31 1877. Each of these resignations was tendered to the House in a communication addressed to the Speaker, and not in the form of a letter informing the House that the resignation had been transmitted to the governor of the State.<sup>3</sup>

**1186.** On July 27, 1846,<sup>4</sup> the President of the Senate laid before the Senate a letter from William H. Haywood, jr., resigning his seat as one of the Senators from North Carolina.

Some discussion arose, participated in by Messrs. Webster, Calhoun, and Berrien, as to the form of resignation. It seemed to be the opinion that it was according to usage for the Senator to send his resignation to the President of the Senate, and for the Senate, on motion made and carried, to authorize the President of the Senate to communicate the fact of the resignation to the executive of the State.

**1187. When a Member resigns directly to the House, it is the practice to inform the State executive of the vacancy.**—On April 9, 1806,<sup>5</sup> the Speaker laid before the House a letter from Joseph Hopper Nicholson, esq., one of the Members from the State of Maryland, containing the resignation of his seat in the House.

On April 10—

*Resolved,* That the Speaker be requested to inform the executive of the State of Maryland of the resignation of Joseph H. Nicholson, one of the Representatives from that State.

On November 23, 1804,<sup>6</sup> Mr. Samuel L. Mitchell, of New York, who had been elected a Senator of the United States, transmitted his resignation by letter to the Speaker, and the same having been laid before the House, the Speaker was directed to inform the executive of New York of the resignation.

**1188.** February 17, 1808,<sup>7</sup> the Speaker laid before the House a letter from Mr. David Thomas, of New York, containing his resignation as a Member. The House thereupon directed the Speaker to inform the executive of the State of New York.

**1189.** On May 19, 1830,<sup>8</sup> the Speaker laid before the House a letter from Mr. James W. Ripley, of Maine, resigning his seat in the House.

<sup>2</sup>First session Thirty-second Congress, Journal, p. 1010.

<sup>3</sup>Second session Forty-fourth Congress, Journal, pp. 68, 250, 347.

<sup>4</sup>First session Twenty-ninth Congress, Globe, p. 1141.

<sup>5</sup>First session Ninth Congress, Journal, pp. 378, 379 (Gales & Seaton ed.).

<sup>6</sup>Second session Eighth Congress, Journal, p. 22 (Gales & Seaton ed.).

<sup>7</sup>First session Tenth Congress, Journal, p. 182 (Gales & Seaton ed.).

<sup>8</sup>First session Twenty-first Congress, Journal, p. 444.

On May 29,<sup>1</sup> on the eve of the close of the session, the House directed the Speaker to inform the governor of Maine of the vacancy.

**1190.** On April 7, 1838,<sup>2</sup> the Speaker presented to the House a letter from Mr. John M. Patton, of Virginia, resigning his seat in the House to accept an appointment conferred on him by the legislature of his State. The letter having been read, it was ordered that the Speaker communicate to the governor of Virginia the fact that a vacancy had occurred.

**1191.** On March 23, 1842,<sup>3</sup> Mr. Joshua R. Giddings, of Ohio, who had been censured by the House, sent to the Speaker his resignation, which was laid before the House, as follows:

WASHINGTON CITY, *March 22, 1842.*

SIR: I hereby resign my office as Representative in the Congress of the United States from the Sixteenth Congressional district of Ohio.

With great respect, your obedient servant,

J. R. GIDDINGS.

HON. JOHN WHITE,

*Speaker of the House of Representatives.*

The letter having been read—

*Ordered,* That the said communication do lie on the table, and that the Speaker communicate a copy thereof to the governor of the State of Ohio.

**1192.** On September 9, 1850,<sup>4</sup> the Speaker, by unanimous consent, laid before the House a communication from James Wilson, resigning his seat in the House as a Representative from New Hampshire. It was then

*Ordered,* That the Speaker notify the governor of New Hampshire thereof.

**1193. The executive of a State may inform the House that he has received the resignation of a Member.**—On July 10, 1876,<sup>5</sup> the Speaker laid before the House a telegram from the governor of Maine, announcing that he had tendered to Hon. James G. Blaine the appointment as United States Senator, and that Air. Blaine had placed in his hands his resignation as Representative, to take effect Monday, July 10.

**1194.** On May 4, 1886,<sup>6</sup> the Speaker laid before the House a letter from the secretary of state of the State of New York, informing the House that the resignation of Mr. Joseph Pulitzer as Representative of the Ninth Congressional district of that State was filed in the office of secretary of state on April 12.

**1195. Sometimes the House learns of the resignation of a Member only by means of the credentials of his successor.**—On December 5, 1796,<sup>7</sup> the first day of the session, the House was apprised of the resignation of Messrs. Jeremiah Crabb, of Maryland; James Hillhouse, of Connecticut, and Daniel Hiester, of Pennsylvania, through the presentation of the credentials of their successors.

<sup>1</sup>Journal, p. 807.

<sup>2</sup>Second session Twenty-fifth Congress, Journal, p. 716.

<sup>3</sup>Second session Twenty-seventh Congress, Journal, pp. 586, 587; Globe, p. 349.

<sup>4</sup>First session Thirty-first Congress, Journal, p. 1433.

<sup>5</sup>First session Forty-fourth Congress, Journal, p. 1242; Record, p. 4491.

<sup>6</sup>First session Forty-ninth Congress, Journal, p. 1487. The letter of the secretary of state appears in the Journal in full.

<sup>7</sup>Second session Fourth Congress, Journal, p. 606 (Gales & Seaton ed.).

**1196. An instance wherein the State executive transmitted the resignation of a Member with the credentials of his successor.**—On November 30, 1797,<sup>1</sup> the Speaker laid before the House a letter from the secretary of state of Pennsylvania, inclosing a letter from George Ege, containing his resignation of a seat in this House; also a return of the election of Joseph Hiester as successor of said Ege.

It was the practice at this time for Members to transmit their resignations to the governors of their States.<sup>2</sup>

**1197. On unofficial information that a Member's resignation had been accepted and a successor elected, the Senate held that the Member's seat was vacated.**

**A Senator tendered his resignation to take effect at a future day.**

On January 20, 1815,<sup>3</sup> the President of the Senate laid before that body a letter from Mr. Jesse Bledsoe, of Kentucky, stating that he had doubts as to his right to continue in his seat in the Senate. Previous to December 24, 1814, he had forwarded his resignation by mail to the governor of Kentucky, to take effect on December 24, 1814, and to be by him communicated to the legislature of the State, then, and so far as he was informed, still in session. The governor acknowledged the receipt of the resignation, but stated that he would withhold it in the hope of a change in Mr. Bledsoe's determination until the last of the month, when he would lay it before the legislature. Unofficial information indicated he did so, and that the legislature had chosen a successor.

Under these circumstances Mr. Bledsoe asked the decision of the Senate as to his right to continue in the seat.

Thereupon a resolution was proposed that the facts stated did not vacate the seat. The word "not" was stricken out by a vote of 25 to 8, and then, by a vote of 27 to 6, the amended resolution was agreed to. So the seat was declared vacant.

**1198. It was long the practice to notify the executive of the State when a vacancy was caused by the death of a Member during a session.**—On January 13, 1801,<sup>4</sup> the death of Mr. James Jones, of Georgia, was announced to the House. Besides the appointment of the usual committee, and the order for wearing crape and attending the funeral, it was—

*Resolved*, That the Speaker address a letter to the executive of Georgia, to inform him of the death of James Jones, late a Member of this House, in order that measures may be taken to supply the vacancy occasioned thereby.

The same resolution was passed on January 1, 1801,<sup>5</sup> upon the death of Thomas Hartley, of Pennsylvania.

**1199.** On January 12, 1805,<sup>6</sup>—

*Resolved*, That the Speaker address a letter to the executive of the State of North Carolina, communicating information of the death of James Gillespie, late a Member of this House, in order that measures may be taken to supply any vacancy occasioned thereby in the representation from that State.

<sup>1</sup>Second session Fifth Congress, Journal, p. 95 (Gales & Seaton ed.).

<sup>2</sup>Second session Fifth Congress, Journal, p. 433.

<sup>3</sup>Third session Thirteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 869.

<sup>4</sup>Second session Sixth Congress, Journal, p. 758 (Gales & Seaton ed.).

<sup>5</sup>Journal, p. 750.

<sup>6</sup>Second session Eighth Congress, Journal, p. 86 (Gales & Seaton ed.).

**1200.** On December 19, 1820,<sup>1</sup>—

*Resolved,* That the Speaker of this House be requested to inform the executive of the State of Rhode Island of the death of Nathaniel Hazard, one of the Representatives from said State.

**1201.** On January 19, 1828,<sup>2</sup> the House directed the Speaker to notify the executive of New Jersey of the death of George Holcombe, late a Member of the House.

**1202.** On February 28, 1838,<sup>3</sup> after Mr. Jonathan Cilley, of Maine, had been killed in a duel, the House, on motion of Mr. George Evans, of Maine—

*Resolved,* That the Speaker communicate to the governor of the State of Maine that a vacancy has occurred in its representation in the House of Representatives by the decease of Jonathan Cilley, late a Member thereof from that State.

**1203. A seat being declared vacant the House directs that the executive of the State be informed.**—On January 2, 1808,<sup>4</sup> it was—

*Resolved,* That the Speaker address a letter to the executive of the State of North Carolina, communicating information of the decision of this House vacating the seat of John Culpeper, one of the Members returned from that State to serve in this House, in order that measures may be taken to supply the vacancy occasioned thereby in the representation from that State.

**1204.** On April 20, 1870,<sup>5</sup> Mr. Michael C. Kerr, of Indiana, offered as a question of privilege, and the House received as such, without objection, the following:

*Resolved,* That the Speaker of the House be directed to inform the governor of the State of Louisiana that there is a vacancy in the representation of that State in the First Congressional district thereof.

**1205.** On September 25, 1890,<sup>6</sup> the House having declared the Member from the Second district of Arkansas not entitled to his seat, the House, by resolution, directed the Clerk to inform the governor of that State of the fact by transmitting to him a copy of the resolution.

**1206. Discussion as to the length of term of a Member elected to fill a vacancy caused by the House having declared a seat vacant.**—On January 22, 1895,<sup>7</sup> Mr. W. I. Hayes, of Iowa, from the Committee on Elections, submitted a report on the claim of Charles H. Page for a certain balance claimed to be due him as a Member of the Forty-ninth Congress from the Second district of Rhode Island. The regular election for Representatives to the Forty-ninth Congress was held in the Second Rhode Island district on November 4, 1884, and William A. Pirce received the governor's certificate of election. Mr. Page, who was the opposing candidate, contested the election, and on January 25, 1887, the House declared the seat vacant, no one having obtained the majority required by the State law. A new election was ordered, and occurred February 21, 1887. Mr. Page was elected by a majority over all, and took his seat February 25, 1887, within a few days of the expiration of the Forty-ninth Congress. He received the usual mileage, and pay

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<sup>1</sup> Second session Sixteenth Congress, Journal, p. 80 (Gales & Seaton ed.).

<sup>2</sup> First session Twentieth Congress, Journal, p. 191; Debates, p. 1063.

<sup>3</sup> Second session Twenty-fifth Congress, Journal, p. 507.

<sup>4</sup> First session Tenth Congress, Journal, p. 106 (Gales & Seaton ed.).

<sup>5</sup> Second session Forty-first Congress, Journal, p. 652; Globe, p. 2859.

<sup>6</sup> First session Fifty-first Congress, Journal, p. 1080.

<sup>7</sup> Third session Fifty-third Congress, House Report No. 1645; Rowell's Digest, p. 493.

from January 26, 1887 (the time Mr. Pirce was unseated), until the expiration of the Congress. He claimed, however, the pay for the whole term of the Congress, two years in all.

In considering this claim, the committee discussed the status of Mr. Pirce, who had been unseated:

The claim is based upon the following clause of the Constitution of the United States (section 5 of article 1):

“Each House shall be the judge of the elections, returns, and qualifications of its own Members.”

And upon section 35 of the Revised Statutes of the United States, as amended by the act of January 20, 1874, which fixes the salary or compensation of a Representative in Congress at \$5,000 per annum.

In this case the House decided that William A. Pirce was not elected, as before stated. Mr. Page was elected to, sworn in, and took his seat as a Representative in the Forty-ninth Congress, from the Second district of Rhode Island, and is the only one ever so entitled to act, and is entitled to full compensation.

A title to membership in the House of Representatives is only obtained by virtue of the clause in the fifth section of the first article of the Constitution, which says, “Each House shall be the judge of the elections, returns, and qualifications of its own Members,” and the laws passed in accordance therewith.

The certificate of the governor of Rhode Island, on which William A. Pirce was recognized, only justified the Clerk of the House in placing his name on the roll under the provisions of section 31 of the Revised Statutes, which says:

“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 show that they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States.”

This section does not give the governor of any State the authority to judge of the constitutional or legal right of anyone to be a Member of the House. The governor’s certificate is only good as to a Representative who, by virtue of such a certificate, is entitled to have his name placed on the Clerk’s roll until such time as the House may judge of the election, returns, and qualifications of the person holding such certificate.

The House of Representatives, acting under the authority given it by this clause of the Constitution of the United States, declared that William A. Pirce was not elected, and by the laws of Rhode Island and under the facts as determined no one was then elected, and it follows that Mr. Page was the only one ever legally elected to that Congress or entitled to any standing as a Member. Its declaration was as follows:

“*Resolved*, That William A. Pirce was not elected a Member of the House of Representatives of the Forty-ninth Congress from the Second Congressional district of Rhode Island, and that the seat be declared vacant.”

The House of Representatives knew its duty under the Constitution and as affected by the laws of Rhode Island, and asserted it, the certificate of the governor to the contrary notwithstanding. William A. Pirce was never, in legal contemplation, a Member of the Forty-ninth Congress, and no one but Mr. Page ever so legally represented this district.

The report then quotes section 51 of the Revised Statutes, wherein it provides that where a vacancy occurs after the commencement of the Congress, the person elected to fill it shall receive compensation from the time the salary of his successor ceased, and points out that it has no application, since there never was a vacancy except from the failure to elect, and therefore Mr. Page had no predecessor in the sense of the statute. A predecessor to a Member must be a Member, and to be a Member must have been elected. The vacancy therefore existed from the very beginning of the Congress, and Mr. Page, when elected, was chosen for the whole Congress and not to any fractional part thereof.

As to the practice of the House in the payment of Members who take seats after the sessions have commenced, the report says:

The Revised Statutes provide that Members of Congress shall be paid a salary of \$5,000 per annum. There are no restrictions as to the time when the Member shall be elected, provided he is elected in accordance with law, to entitle him to the per annum salary. He may be elected before the Congress begins or at any time during the Congress if he is the only Member legally elected for a given district for that Congress. He is the Member mentioned in the Constitution and laws, and entitled to all the privileges and emoluments thereof.

The uniform practice has been that Members who were elected after the beginning of Congress were paid from the beginning of the Congress to which they were elected, or from the time the vacancy occurred, if there had been an actual predecessor. The cases are numerous in support of this practice, and it is not necessary to refer to those where, upon contest, the contestant is seated, and in those cases both draw salary, the contestant from the beginning of the Congress and the contestee for the time he holds, and the fact that Mr. Pirce so drew here need excite no comment and should make no difference.

There have been such cases where the seating of contestant was on the very last day of the Congress. The cases most nearly analogous to this one are the Sypher and Morey cases from Louisiana in the Forty-first Congress, where neither party was held entitled to a seat, and upon new elections each of these men were elected in their respective districts, and out of their pay was deducted what was allowed them for expenses of contest in the first instance, and in the Sypher case the Forty-sixth Congress determined practically in accordance with this resolution upon a resolution to reimburse him this deduction, and in the report the committee said:

“The decision of the question your committee believe depends upon the time from which the salary of a Congressman begins. We have examined the question and have come to the conclusion that the general practice has been to allow a Member his salary, without qualification or condition, for the whole Congress to which he was elected, although he may have taken his seat after the expiration of a portion of the term when such election was not held to fill a vacancy occurring after the commencement of the Congress. If Mr. Sypher was entitled to the salary of a Member of the Forty-first Congress, under the facts as found, we think it should have been allowed him freed from the conditions imposed by the resolutions of the 12th of December, 1870. [This condition was deducting what he had been paid as a contestant.] We are strengthened in the conclusion to which we have arrived by the action of the Forty-third Congress in allowing to Mr. Morey the amount which he had been compelled to refund by the terms of the same resolution—the case of Mr. Morey and that of Mr. Sypher being alike in every material particular. Should the doctrine of *res adjudicata*, be invoked as applicable to this case, and as a bar to the claimant’s right to the allowance he asks, we would remark that the action of the Forty-third Congress in allowing to Mr. Morey the amount he had been compelled to refund we regard as a precedent directly applicable and decisive of the question involved.

“We therefore recommend that the claim of Mr. Sypher be favorably considered, and that the following resolution be adopted and referred to the Committee on Appropriations.”

There seems to be no reason, law, or precedent to deny Mr. Page the relief asked.

This report was not acted on by the House.

**1207. A Member’s name remains on the roll until the House is officially notified of his resignation, or takes action respecting it.**

**A resolution relating to the status of one borne on the roll of membership of the House was held to be privileged.**

On May 3, 1885,<sup>1</sup> Mr. Alphonso Hart, of Ohio, from the Committee on Elections, submitted a report from the Committee on Elections, to whom was referred the following resolutions:

Whereas on October 14, 1884, Hon. James S. Robinson, a Representative in the Forty-eighth Congress from the ninth district of the State of Ohio, was elected to the office of secretary of state of the State of Ohio;

Whereas said Hon. James S. Robinson is still, to all intents and so far as any official notification of

<sup>1</sup>Second session Forty-eighth Congress, House Report No. 2679.

resignation to this House is concerned, a Member of this body, and that his name is still borne upon the roll as a representative in Congress: Therefore,

*Resolved*, That the Committee on Elections of the House be ordered to investigate and report to this House at the earliest moment the status of the right of said Hon. James S. Robinson as Member of this body.

A question of order being raised, the Speaker<sup>1</sup> held<sup>2</sup> them to be privileged, as they related to the status of one borne on the roll as a Member.

The committee found the facts to be as stated in the preamble and that Mr. Robinson had at 11 o'clock on January 12, 1885, tendered his resignation as a Member of the Forty-eighth Congress to the governor of Ohio. This resignation was duly placed on file in the office of the governor, and on the day of the resignation Mr. Robinson duly qualified as secretary of state. Since that time he had not been a Member of the House, nor had he attempted to exercise any of the rights and privileges which would belong to a Member of the House. The committee therefore concluded that he was not and did not claim to be a Member of the House, and recommended that the Clerk be instructed to omit the name of James S. Robinson from the roll of Members.

This report was made within a few hours of the close of the Congress, and was not acted on.

**1208. The fact of a Member's resignation not appearing, either from the credentials of his successor or otherwise, the House ascertained the vacancy from information given by other Members.**—On December 31, 1800,<sup>3</sup> the Committee on Elections reported that Samuel Tenney was entitled to take his seat in the House in place of William Gordon, as the certificate of the governor of New Hampshire showed him duly appointed, and as "it is further made to appear by information from several Members of the House from the said State, that such appointment was made to supply the vacancy occasioned by the resignation of William Gordon."

**1209. An inquiry of the Clerk having elicited from the State executive the fact that a Member had resigned, the Speaker directed his name to be stricken from the roll.**—On February 16, 1875,<sup>4</sup> the Speaker laid before the House the following letter from the Clerk of the House:

CLERK'S OFFICE, HOUSE OF REPRESENTATIVES,  
*Washington, D.C., February 16, 1875.*

SIR: The secretary of state of Florida informs me by telegraph, in reply to an inquiry made of him by me, that Hon. William J. Purman resigned his seat in the Forty-third Congress on the 25th of January, 1875.

Very respectfully, your obedient servant,

EDWARD MCPHERSON,  
*Clerk House of Representatives.*

HON. JAMES G. BLAINE,  
*Speaker House of Representatives.*

The letter having been read, the Speaker said:

Upon this statement the chair directs the name of Mr. Purman to be stricken from the roll. It is the only notification the House has had of his resignation officially.

<sup>1</sup> John G. Carlisle, of Kentucky, Speaker.

<sup>2</sup> Record, p. 1038.

<sup>3</sup> Second session Sixth Congress, Journal, p. 748 (Gales & Seaton ed.)

<sup>4</sup> Second session Forty-third Congress, Journal, p. 476; Record, p. 1322.

**1210. Instances wherein Members have been reelected to fill the vacancies occasioned by their own resignations.**—On May 5, 1842,<sup>1</sup> the Journal has this entry:

A new Member, viz, Joshua R. Giddings, from the State of Ohio, elected to supply the vacancy occasioned by the resignation of Joshua R. Giddings (the same person who now appears), appeared, was sworn to support the Constitution of the United States, and took a seat in the House.

**1211.** On August 1, 1856,<sup>2</sup> the Journal has this entry:

Mr. Preston S. Brooks, a Member-elect from the State of South Carolina, to supply the vacancy occasioned by his own resignation, appeared, was sworn to support the Constitution of the United States and took a seat in the House.

**1212.** On August 6, 1856,<sup>3</sup> the Journal has this entry:

Mr. Lawrence M. Keitt, a Member-elect from the State of South Carolina, to fill the vacancy occasioned by his own resignation, appeared, was sworn to support the Constitution of the United States, and took a seat in the House.

**1213. A Member who had resigned was not permitted by the House to withdraw his resignation.**

**The House declined to consider as privileged a resolution that a former Member be permitted to withdraw his letter announcing his resignation and resume his seat.**

On February 28, 1870,<sup>4</sup> the Speaker laid before the House the following letter from Mr. Jacob S. Golladay, of Kentucky:

HOUSE OF REPRESENTATIVES,  
*Washington, February 28, 1870.*

SIR: I enclose you a letter herewith tendering my resignation to the State of Kentucky as a Member of Congress from the Third district.

Very respectfully,

J. S. GOLLADAY.

Hon. JAMES G. BLAINE.

The inclosed letter, which was also read to the House, was as follows:

HOUSE OF REPRESENTATIVES,  
*Washington, D.C., February 28, 1870.*

DEAR SIR: I herewith tender you my resignation as a Member of Congress from the Third district of Kentucky.

Very respectfully,

J. S. GOLLADAY.

His excellency JOHN W. STEVENSON.

Of this resignation, and the resignation of another Member presented at the same time, the Journal had the following entry:

The Speaker laid before the House communications from Jacob S. Golladay and John T. Deweese, respectively, notifying the House that they had resigned their seats as Members of the House, the former from the State of Kentucky and the latter from the State of North Carolina; which were severally laid on the table.

<sup>1</sup> Second session Twenty-seventh Congress, Journal, p. 784.

<sup>2</sup> First session Thirty-fourth Congress, Journal, p. 1336; Globe, p. 1863.

<sup>3</sup> First session Thirty-fourth Congress, Journal, p. 1377; Globe, p. 1944.

<sup>4</sup> Second session Forty-first Congress, Journal, pp. 390, 427, 433; Globe, pp. 1597, 3739–1743.

On March 7, 1870, Mr. William B. Stokes, of Tennessee, claiming the floor for a question of privilege, offered the following:

Whereas on the 28th day of February, 1870, Jacob S. Golladay, a Member of this House, tendered his resignation to the governor of the State of Kentucky; and whereas he inclosed a copy of his communication to said governor to the Speaker of this House, by whom it was communicated to this House; and whereas the governor of the State of Kentucky peremptorily refused to accept the resignation tendered as aforesaid, and has requested a withdrawal of the same, which request has been complied with. Now, therefore, be it

*Resolved*, That in view of said refusal of the governor of Kentucky to accept the resignation tendered to him, and in view of the withdrawal of his communication to said governor, Jacob S. Golladay be, and is hereby, permitted to withdraw his communication to the Speaker of the House, and resume his seat in this body.

The Speaker laid before the House letters received by him confirming the assertion of the preamble. Mr. Golladay had been charged with selling cadetships, and the governor had declined his resignation on the ground that he owed it to the State, to his constituency, and to himself to return to the House and demand a Congressional investigation.

A question arose as to the effect of the notification to the House that a resignation had been transmitted to the governor, and whether or not the fact that this notification had been recorded on the Journal and Mr. Golladay had been dropped from the rolls, constituted such a resignation to the House as prevented his return after he had withdrawn the actual resignation filed with the governor. It was urged especially by Mr. John A. Bingham, of Ohio, that the governor, in declining to accept the resignation, had far exceeded his powers, and had neglected the constitutional mandate requiring him to issue writs for a new election. There was also discussion of the control of the House over the resignations of its Members, if any.

Finally, Mr. Noah Davis, of New York, made the point of order that the Whittemore case had determined that the right of resignation was purely personal to the Member; that when he has exercised this right he becomes ipso facto no longer a Member; that Mr. Golladay's resignation had been announced to the House, entered on the Journal after being accepted sub silentio, and thus became a complete resignation de jure. The gentleman retired from the House and ceased to act as a Member, and the House ceased to treat him as a Member. Therefore the pending resolution was a proposition to give a seat to an entire stranger, a man not entitled to a seat by virtue of any election.

Mr. John A. Bingham, of Ohio, supported this point of order.

The Speaker<sup>1</sup> said:

The gentleman from Tennessee rose and stated that he had a question of privilege under the rules of the House. Whatever may be the opinion of the Chair, it is his duty to submit that question to the House. In the judgment of the Chair, Mr. Golladay is no more a Member of the House than any stranger in the gallery. That is his individual opinion; but the Chair can not interpose his individual judgment so as to preclude the gentleman from Tennessee presenting his question of privilege. Under the point of order presented by the gentleman from New York and the gentleman from Ohio, the Chair will submit the question to the House whether it will entertain the preamble and resolution of the gentleman from Tennessee as a question of privilege.

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<sup>1</sup>James G. Blaine, of Maine, Speaker.

The question was put, and the House, without division, decided that the preamble and resolution should not be entertained as a question of privilege.

Thereupon Mr. Davis offered the following, which was agreed to:

Whereas it is of grave importance to the constitution of this House that it should be determined whether a Member thereof during the session may resign his seat without the consent of the House, and thereby evade his duties and responsibilities: Therefore be it

*Resolved*, That the Committee on the Judiciary be instructed to inquire and report to this House, by bill or otherwise, at any time, what action or rule should be taken or established for the determination of that question.

It does not appear that any report was made.

**1214. Only in a single exceptional case has the House taken action in the direction of accepting the resignation of a Member.**—On May 20, 1876,<sup>1</sup> the Speaker pro tempore, by unanimous consent, laid before the House the following communication:

SALISBURY, CONN., *May 18, 1876.*

SIR: Having been elected by the legislature of Connecticut a Senator in Congress to fill the unexpired term of the late Hon. Orris S. Ferry, I hereby tender to you, and through you to the House of Representatives, my resignation as a Member of Congress from the Fourth Congressional district of Connecticut.

I have the honor to be, respectfully, your obedient servant,

WM. H. BARNUM.

TO MICHAEL C. KERR,  
*Speaker of the House of Representatives, Washington, D.C.*

On motion of Mr. Nathaniel P. Banks, of Massachusetts, the said letter was ordered to be entered on the Journal as an acceptance of the resignation of Mr. Barnum.

On July 19 the resignation of W. W. Ketcham, of Pennsylvania, transmitted, direct to the Speaker, was read, but no further action was taken.<sup>2</sup>

**1215. In exceptional cases old Members have expressed in their letters of resignation their feelings toward the House**—On February 15, 1844,<sup>3</sup> the Speaker laid before the House a letter from Mr. Henry A. Wise, of Virginia, announcing that he had transmitted his resignation to the governor of the State of Virginia. Mr. Wise in his letter went on to express his feelings of attachment and respect for the Congress. The letter appears in full in the Journal.

**1216.** On March 6, 1844,<sup>4</sup> the Speaker laid before the House a letter from Mr. Samuel Beardsley, of New York, announcing that he had forwarded to the governor of New York his resignation of his seat in the House. Mr. Beardsley also went on to express his regret at leaving the associations of his membership in the House. The letter appears in full in the Journal.

**1217.** On December 13, 1815,<sup>5</sup> the Speaker laid before the House a letter from Nathaniel Macon informing the Speaker and the House that he had that day, by

<sup>1</sup> First session Forty-fourth Congress, Journal, pp. 987, 988; Record, p. 3237.

<sup>2</sup> Journal, P. 1297.

<sup>3</sup> First session Twenty-eighth Congress, Journal, p. 392.

<sup>4</sup> First session Twenty-eighth Congress, Journal, p. 529.

<sup>5</sup> First session Fourteenth Congress, Journal, p. 50 (Davis ed.); Annals. p. 384.

letter to the governor of North Carolina, resigned his seat in the House of Representatives. Mr. Macon also expressed a grateful appreciation of his pleasant relations with Members of the House for many years.

**1218. The withdrawal of Members caused by the secession of States.—**

On December 24, 1860,<sup>1</sup> the Speaker laid before the House a letter from the Members from South Carolina, announcing the secession of their State, which had “thereby dissolved our connection with the House of Representatives.” The letter was read and laid on the table.

On January 12, 1861,<sup>2</sup> a letter from the Mississippi Members announced the secession of their State, and announced their “withdrawal” from the House. On March 2<sup>3</sup> a vacancy on a committee caused by the withdrawal of one of the Mississippi Members was recorded in the Journal as caused by the Member’s “declination.” On January 21<sup>4</sup> the Alabama Members announced their “withdrawal.” On January 23<sup>5</sup> the Georgia Members announced that they were no longer Members, except one, Mr. Joshua Hill, who tendered his resignation. On January 30<sup>6</sup> a letter from Mr. Williamson R. W. Cobb, of Alabama, announced that, as his State has seceded, he would “decline further participation” in the business of the House.

In all the above cases the Speaker presented the communications by unanimous consent, and the only action of the House was to lay them on the table, as in the case of letters of resignation.

**1219. Senators having withdrawn from the Senate, the Secretary was directed to omit their names from the roll.**

**The Journal of the Senate made no mention of the withdrawal of Senators by reason of the secession of their States.**

On January 22, 1861,<sup>7</sup> in the Senate, the Vice-President stated that no notice had been taken in the Journal of the withdrawal of certain Senators from the Chamber on yesterday, and that no paper had been filed with the presiding officer by those Senators notifying him that they had withdrawn from the Senate; and that he would like some instruction as to what vacancies existed in the committees, and whether the names of those Senators should continue to be called in taking the yeas and nays.

Thereupon Mr. Judah P. Benjamin, of Louisiana, submitted the following motion:

*Ordered*, That the Journal of the proceedings of the Senate be so corrected as to record the fact that the Senators from the States of Florida and Alabama, and the Hon. Jefferson Davis, Senator of the State of Mississippi, made announcement that the said States of Florida, Alabama, and Mississippi had seceded from the Union, had resumed the powers delegated by the said several States to the United

<sup>1</sup> Second session Thirty-sixth Congress, Journal, p. 112; Globe, p. 190.

<sup>2</sup> Journal, p. 179.

<sup>3</sup> Journal, p. 484.

<sup>4</sup> Journal, p. 208.

<sup>5</sup> Journal, p. 221; Globe, p. 531.

<sup>6</sup> Journal, p. 247.

<sup>7</sup> Second session Thirty-sixth Congress, Globe, pp. 500–505.; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 951.

States of America, and that they, the said Senators, considered themselves by reason of said action of said States as being no longer entitled to retain their seats as Senators, and accordingly thereupon withdrew from the Senate.

At once debate arose as to proper method of making up the Journal. It was urged that the Journal should contain only those things voted on, and that there would be great difficulty in determining and stating exactly the grounds of their action. Mr. Stephen A. Douglas contended that the Senate could with propriety enter only the fact of their withdrawal, and he moved as a substitute for the order the following:

That Jefferson Davis, of Mississippi, Stephen R. Mallory and David L. Yulee, of Florida, C. C. Clay and Benjamin Fitzpatrick, of Alabama, having announced to the Senate their withdrawal from the same,

*Ordered*, That their names be stricken from the list of Senators, and the Secretary directed no longer to call the same.

Finally the subject was laid on the table, yeas 32, nays 22.<sup>1</sup>

On March 13, 1861,<sup>2</sup> Mr. William Pitt Fessenden, of Maine, proposed the following:

*Resolved*, That Albert G. Brown and Jefferson Davis, of Mississippi, Stephen R. Mallory, of Florida, Clement C. Clay, jr., of Alabama, Robert Toombs, of Georgia, and Judah P. Benjamin, of Louisiana, having announced that they are no longer Members of the Senate, and having withdrawn therefrom, their seats in this body have thereby become vacant, and the Secretary is directed to strike their names from the roll of Members.

Considerable debate arose as to the effect of the action of the Senators in question and their States, and finally, after various propositions had been made and rejected, the resolution was amended and agreed to, as follows:

Whereas the seats of Albert G. Brown and Jefferson Davis, of Mississippi, Stephen R. Mallory, of Florida, Clement C. Clay, jr., of Alabama, Robert Toombs, of Georgia, and Judah P. Benjamin, of Louisiana, as Members of the Senate, have become vacant: Therefore,

*Resolved*, That the Secretary be directed to omit their names, respectively, from the roll.

**1220. Members have presented their resignations to take effect at a future date, and until that time have sometimes participated in the proceedings.**—On January 7, 1873,<sup>3</sup> the Speaker presented to the House the resignation of Mr. John L. Beveridge, of Illinois, to take effect January 4, 1873, the date the letter of resignation was written.

**1221.** The Journal of August 18, 1856,<sup>4</sup> the last day of the session, has the following entry:

The Speaker laid before the House a letter from the Hon. William A. Richardson, announcing that he had notified the governor of Illinois of his resignation of his seat as a Member of this House from the State of Illinois, to take effect on the 25th instant.

The House adjourned sine die on this day, but on the 21st of August Congress was convened again by proclamation of the President, but Mr. Richardson does not appear to have participated in proceedings during the remainder of the time before the 25th.

<sup>1</sup>The Senate Journal contains no reference to the withdrawal on the 21st, but records the proceedings on the 22d. Journal, pp. 131, 132.

<sup>2</sup>Second session Thirty-sixth Congress, Globe, pp. 1452, 1454–1456.

<sup>3</sup>Third session Forty-second Congress, Journal, p. 137; Globe, p. 393.

<sup>4</sup>First session Thirty-fourth Congress, Journal, p. 1521.

**1222.** On April 30, 1894,<sup>1</sup> the Speaker laid before the House a letter from Mr. John A. Caldwell, of Ohio, announcing that he had forwarded to the governor of his State his resignation as a Member of the House, to take effect on May 4, 1894.

On May 3 there was a call of the roll, and it appears that the name of Mr. Caldwell was called.

The letter of resignation appears in full in the Journal.

**1223.** On December 24, 1846,<sup>2</sup> the Speaker laid before the House the following communication:

HOUSE OF REPRESENTATIVES, *December 24, 1846.*

SIR: I have the honor to announce that I have forwarded to his excellency the governor of the State of Illinois my resignation as a Member of the House of Representatives, to take effect from the 15th of January, or sooner if my successor shall appear and take his seat.

Very respectfully, your obedient servant,

E. D. BAKER.

To the Hon. J. W. DAVIS,

*Speaker of the House of Representatives.*

Mr. Baker remained a Member of the House and participated in its debates until December 30. At that time a question was raised as to the propriety of Mr. Baker holding a seat in the House and a commission in the Army, and in the course of the debate Mr. Baker tendered his resignation, which the Journal records as follows:

Mr. Edward D. Baker rose and said: "Mr. Speaker, I now resign my seat as a Representative from the Seventh district in the State of Illinois in the Twenty-ninth Congress."

**1224.** On January 25, 1906,<sup>3</sup> the Speaker laid before the House the following letter, which was read and laid on the table:

WASHINGTON, D.C., *January 24, 1906.*

*To the Speaker of the House of Representatives.*

SIR: I have this day transmitted to the governor of the Commonwealth of Virginia my resignation as a Member of the House of Representatives of the Fifty-ninth Congress for the Fifth district of Virginia, to take effect January 30, 1906.

Respectfully, yours,

CLAUDE A. SWANSON.

On January 26,<sup>4</sup> Mr. Swanson was present, participating in the proceedings by voting on a roll call and by introducing sundry private bills.

**1225.** On January 8, 1903,<sup>5</sup> the following communication was laid before the House:

Washington, D.C., *January 8, 1903.*

To the Hon. DAVID B. HENDERSON,

*Speaker of the House of Representatives, Washington, D.C.*

MY DEAR SIR: I have this day tendered my resignation as a Representative in Congress from the Eighth Congressional district of Texas to the Hon. Joseph D. Sayers, governor of the State of Texas, to take effect on the 15th instant.

I have the honor to be, very respectfully, your obedient servant,

S. W. T. LANHAM,

*Member of Congress, Eighth District, Texas.*

<sup>1</sup> Second session Fifty-third Congress, Journal, pp. 365, 372; Record, pp. 4273, 4392.

<sup>2</sup> Second session Twenty-ninth Congress, Journal, pp. 91, 112; Globe, p. 100.

<sup>3</sup> First session Fifty-ninth Congress, Record, p. 1588.

<sup>4</sup> Record, pp. 1604, 1627.

<sup>5</sup> Second session Fifty-seventh Congress, Journal, pp. 92, 97.

On January 9<sup>1</sup> Mr. Lanham was relieved from duty on the Committee on the Judiciary and also on a conference committee.

**1226. Instance wherein a Senator resigned, appointing a future date for the resignation to take effect.**—On February 10, 1873,<sup>2</sup> the Vice-President laid before the Senate the following letter, which was read and ordered to lie on the table:

TO SCHUYLER COLFAX, *Vice-President of the United States.*

SIR: On the 8th instant I transmitted to the governor of Massachusetts my resignation as a Senator of the United States, to take effect at the close of the Forty-second Congress, on the 3d of March next.

Your obedient servant,

HENRY WILSON.

SENATE CHAMBER, *February 10, 1873.*

Mr. Wilson was inaugurated as Vice-President on March 4.<sup>3</sup>

On March 17<sup>4</sup> Mr. Charles Sumner, of Massachusetts, presented the credentials of Mr. George S. Boutwell, elected by the legislature of Massachusetts as Mr. Wilson's successor.

**1227. After full consideration the Senate decided that a Member might resign, appointing a future date for his retirement**—On December 6, 1852,<sup>5</sup> the credentials of Archibald Dixon, of Kentucky, were presented in the Senate. A question was at once raised as to whether or not a vacancy existed in the representation from that State. The peculiar circumstances of the case were clearly explained, on December 20, by Mr. William H. Seward, of New York:

The following facts make up the case: On the 17th of December, 1851, Henry Clay was a Senator from Kentucky, chosen by the legislature for six years, which would have expired on the 3d of March, 1855. Being so a Senator, he resigned by a communication to the legislature of Kentucky, declaring that it was to take effect on the first Monday in September, 1852. The legislature, then in session, received the resignation and chose Mr. Dixon to fill the vacancy thus to occur from the first Monday in September, 1852, to the 3d day of March, 1855. The legislature then adjourned. On the 29th day of June, 1852, during the recess of the legislature of Kentucky, Mr. Clay died, and the governor of that State made a "temporary appointment" of Mr. Meriwether as a Senator from Kentucky, to hold the seat until the first Monday of September, 1852. Mr. Meriwether immediately took the vacant seat, and held it until Congress adjourned on the last day of August, 1852. On the 6th of December, 1852, the Senate reassembles, Mr. Meriwether does not appear, and Mr. Dixon appears and presents his credentials, and claims the vacant seat.

Manifestly, Mr. Dixon is one of two Senators "chosen by the legislature" of Kentucky "for six years," and he was chosen to fill a vacancy which has happened in the term of Mr. Clay.

The whole question turns on the point, How did this vacancy happen? Mr. Clay resigned, fixing the first Monday of September as the day when he should vacate his seat, and died, nevertheless, a Senator before that day arrived. Mr. Dixon was appointed by the legislature when in session, before not only the day which Mr. Clay's resignation fixed for his retirement, but also before Mr. Clay's death.

We who maintain Mr. Dixon's title insist that the vacancy happened by Mr. Clay's resignation. On the contrary, those who deny Mr. Dixon's title insist that the vacancy happened by Mr. Clay's death.

Four questions arise:

First. Can a Senator resign?

Second. Can a Senator resigning appoint a future day for his retirement from the Senate?

<sup>1</sup> Record, pp. 622, 628.

<sup>2</sup> Third session Forty-second Congress, Senate Journal, p. 305.

<sup>3</sup> Senate Journal, pp. 594, 600.

<sup>4</sup> Senate Journal, p. 615.

<sup>5</sup> Second session Thirty-second Congress, Globe, pp. 2, 93, 96.

Third. Can the proper appointing power receive such a resignation and prospectively fill the vacancy?

Fourth. If the legislature so prospectively fill the vacancy, can the appointment be defeated by the death of the resigning Senator before the arrival of the day fixed for his retirement from the Senate?

If a Senator can resign, and can so resign prospectively, and if the legislature can so fill the vacancy prospectively, and if their action can not be defeated by the death of the resigning Senator, then Mr. Dixon's title is good, valid, and complete.

The first question is expressly decided by the Constitution, which declares that vacancies may "happen by resignation."

The second question is decided by an unbroken succession of precedents from the foundation of the Government. Mr. Bledsoe so resigned, fixing a future day; so did Mr. Clay in 1842; so did Mr. Berrien in 1852; and so did Mr. Foote in 1852.

The third question is answered with equal distinctness by precedents. The legislature of Kentucky prospectively filled the vacancy made by Mr. Clay's resignation in 1842, the governor of Georgia prospectively filled the vacancy of Mr. Berrien in 1852, and the governor or legislature of Mississippi prospectively filled the vacancy of Mr. Foote in 1852.

The only question remaining is the fourth: Can the death of the resigning Senator after the legislature has prospectively filled the vacancy, and before the day fixed for his retirement, defeat the appointment of his successor already made?

On December 20, after long debate, the Senate declined to refer the case to a committee, and by a vote of yeas 27, nays 16, adopted a declaration that Mr. Dixon had been duly elected to fill the vacancy occasioned by the resignation of Henry Clay, and that he was entitled to the seat.

**1228. The Senate election case of Horace Chilton, of Texas, in the Fifty-second Congress.**

**A Senator may resign, appointing a future day for his resignation to take effect, and the State executive may by appointment fill the vacancy before that date.**

On December 7, 1891,<sup>1</sup> the Vice-President laid before the Senate the credentials of Horace Chilton, appointed a Senator by the governor of the State of Texas to fill the vacancy occasioned by the resignation of John H. Reagan in the term expiring March 3, 1893; which were read and placed on file.

On the same day Mr. Chilton appeared. The oath prescribed by law was administered to him, and he took his seat.

On the same day, on motion of Mr. George F. Hoar, of Massachusetts,

*Ordered*, That the Committee on Privileges and Elections be directed to inquire into the circumstances and validity of the appointment of Horace Chilton as a Senator from the State of Texas.

On January 25, 1892,<sup>2</sup> Mr. Hoar, from the Committee on the Judiciary, submitted a report as follows:

Mr. Reagan, elected Senator from the State of Texas for the term of six years from the 4th of March, 1887, resigned his office, the resignation to take effect on the 10th day of June, 1891. The executive of the State of Texas, on the 25th day of April, 1891, and after the receipt of the resignation of Mr. Reagan, appointed Mr. Chilton to fill the vacancy occasioned by said resignation. Mr. Chilton's credentials set forth the resignation of Mr. Reagan, and further declare—

"Now, therefore, I, J. S. Hogg, governor of the State of Texas, by virtue of the authority vested in me by the Constitution and laws of the United States and of the State of Texas, do hereby appoint Horace Chilton, of Smith County, Tex., Senator in the Congress of the United States from the State of

<sup>1</sup> First session Fifty-second Congress, Record, p. 3.

<sup>2</sup> Senate Report No. 105.

Texas, to fill the vacancy occasioned by the resignation of the Hon. John S. Reagan. This appointment to take effect the 10th day of June, A. D. 1891."

The certificate bears date April 25, 1891.

Mr. Chilton is in all other respects duly qualified to be a Senator from the State of Texas. The only question is whether the governor might lawfully make this appointment before the resignation of Mr. Reagan actually took effect.

The provision of the Constitution affecting the question is as follows:

"Art. I, sec. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years, \* \* \* and 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."

A similar state of facts has arisen in a number of instances since the Constitution went into operation.

The term of Uriah Tracy, Senator from Connecticut, expired March 3, 1801; he was appointed by the governor of Connecticut February 20, 1801, "from the 3d of March next until the next meeting of the legislature of said State," the legislature of the State not being in session at the time of said appointment or thereafter until after said 4th of March. Exception being taken to his credentials, he was admitted to the seat by a vote of 13 yeas to 10 nays, and held the seat during the special session of the Senate, March 4 and 5.

Joseph Anderson, of Tennessee, was appointed by the executive February 6, 1809, to fill the vacancy which would result from the expiration of his term, March 3, 1809. He held the seat under these credentials during the special session of the Senate, March 4 to March 7, 1809.

John Williams, of Tennessee, was appointed by the executive to fill the vacancy which would result from the expiration of his own term, March 3, 1817. Under these credentials he held his seat from March 4 to 6, 1817.

John McPherson Berrien, of Georgia, resigned by letter dated Washington, May 28, 1852, addressed to the President pro tempore, and read in Senate same date. (*Globe*, first session Thirty-second Congress, p. 1493.)

Robert M. Charlton, his successor, appeared June 11, 1852, with credentials signed by the governor of Georgia, and dated May 18, 1852, to take effect from and after May 31, 1852. He was sworn and took his seat without objection. (*Senate Journal*, first session Thirty-second Congress, p. 468.)

March 4, 1825, James Lanman, of Connecticut, presented credentials showing an appointment made February 8, 1825, by the governor of the State to fill the vacancy about to result from the expiration of his term, March 3, 1825. Objection being made, Mr. Lanman was refused a seat by a vote of 23 to 13. There is no historical evidence from which we can determine on what ground the Senate rejected Mr. Lanman, whether it was on the ground that the governor could not fill a vacancy happening at the beginning of a term, or on the ground that the governor could not lawfully make the appointment in anticipation and before a vacancy occurred, and before he could possibly know whether the legislature might not be called together before that time. Judge Story (*Const.*, sec. 727, n. 2) says:

"In the case of Mr. Lanman, a Senator from Connecticut, a question occurred whether the State executive could make an appointment in the recess of the State legislature in anticipation of the expiration of the term of office of an existing Senator. It was decided by the Senate that he could not make such an appointment. The facts were that Mr. Lanman's term as Senator expired on the 3d of March, 1825. The President had convoked the Senate to meet on the 4th of March. The governor of Connecticut, in the recess of the legislature (whose session would be in May), on the 9th of the preceding February appointed Mr. Lanman as Senator, to sit in the Senate after the 3d of March. The Senate by a vote of 23 to 18 decided that the appointment could not be constitutionally made until after the vacancy had actually occurred."

The following statement appears in the *National Intelligencer* of Tuesday, March 8, 1825:

"An important constitutional question was yesterday decided in the Senate by the refusal to admit Mr. Lanman to a seat in the Senate under a commission from the governor, granted before the expiration of Mr. Lanman's late term of service. This is the first time this question has been adjudicated under such circumstances as to form a precedent; and we presume it may now be considered a settled construction of the constitutional provision that a vacancy must have literally 'happened' or come to pass before an appointment can be made to fill it. The case has once been questioned and decided differently, but it was in strong party times, all the Federal Members voting for the Member's taking

his seat and all the Democratic Members against it, under which circumstances the decision has not been much respected as a precedent. So far as it was a precedent it is now reversed.”

Gorden's Digest of the Laws of the United States, 1827, appendix, note 1 B, states the ground of the decision in the same way, but manifestly bases the statement on the authority of the National Intelligencer.

On the other hand, Mr. Grundy, in his report from the Committee on the Judiciary in the case of Mr. Sevier, Senator from the State of Arkansas, who was appointed by the governor of Arkansas January 17, 1837, to fill the vacancy which would occur on the 3d of March following by the expiration of Mr. Sevier's previous term, declared that the decision in the Lanman case was on the ground “that the legislature must provide for all vacancies, which must occur at stated and known periods, and that the expiration of a regular term of service is not such a contingency as is embraced in the second section of the first article of the Constitution.” He distinguished Mr. Sevier's case from the Lanman case by the fact that the time that Mr. Sevier was to go out of office was decided by lot, he having been one of the Senators appointed by the State on its admission.

Niles's Register of Friday, March 12, states the question in regard to the Lanman case:

“The question was whether the failure by the legislature to make a choice of Senator constitutes the contingency in which the governor may appoint a Senator.”

Mr. Benton, in his Thirty Years' View, states that the principal argument against the admission of Mr. Lanman was made by Mr. Tazewell, that argument being that the word “happen” in the Constitution could not apply to a foreseen event, bound to occur at a fixed period, and that therefore it was the right of the legislature only to fill a vacancy which was foreseen, regular, and certain, and that there was no right in the governor to supply that omission.

Mr. Lanman was not admitted to the seat. There is nothing in the contemporary record of the debates or in the resolution which enables us to determine whether the majority of the Senate based its action on the ground stated by Mr. Benton to have been maintained by Ms. Tazewell, or on the ground stated by Judge Story and by the National Intelligencer. The case, therefore, is not an authority on either side of the question. So that it is impossible to determine whether the Senate meant to overrule the Tracy case on one ground or the other.

On the other hand, an examination of the very numerous cases where the executives of States have made appointments when the legislature was not in session shows that in a great many of them the executive has postponed action, where the resignations were made to take effect at a future time or where the previous term had expired by its own limitation, until after the vacancy existed. In all probability this postponement was caused by a belief on the part of the executive that he had no authority to provide for filling a vacancy until it actually occurred or, at any rate, that the question was so far in doubt that it would be unsafe to make the appointment in anticipation.

So far, then, as the precedents are concerned, it appears that in three cases persons so appointed have been admitted to their seats without question; that Mr. Tracy was admitted and Mr. Lanman rejected, where the executive made the appointment in anticipation of a vacancy, there being a discussion in the Senate, but no satisfactory evidence of the grounds of the judgment; that in one case, that of Mr. Sevier, a person so appointed has been admitted, when the validity of the appointment was questioned, upon other grounds, without raising this question specifically; and that in modern times, the practice has been uniform for the State executive to delay appointment until the actual happening of the vacancy.

Under these circumstances, it seems to us that the Senate may now determine the question, unhampered by any precedents of its own.

We suppose that where the power is given to fill vacancies in public offices, it has been the uniform practice to permit resignations of such offices to be made, to take effect at a future day, and to hold that the appointing power is entitled to make the appointment in advance to fill the vacancy, to take effect when the resignation becomes operative, unless the language of the constitutional or statute provision under which the authority is exercised forbids such construction.

The Constitution of the United States, Article II, section 2, in providing for the appointing power, enacts:

“The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”

We believe it has been the uniform practice of the Executive from the beginning to accept resignations which are to take effect in the future, and to make appointments, also to take effect in the future, to

fill them. We suppose that a like practice also prevails in regard to the heads of Departments in the exercise of the appointing power conferred by law upon them. The language of the provision of the Constitution under consideration, that "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," seems to us to admit easily of a like construction. We do not suppose that it was the intention of the framers of the Constitution to establish different rules for these two cases.

The Senate has recently, after full consideration, determined that the constitutional provision that the Senate shall choose a president pro tempore in the absence of the Vice-President permits the choice of an officer in advance of the actual occurrence of the contingency referred to, who may take the chair whenever the Vice-President may be absent, until the Senate otherwise order. In all these cases, including that which we are now considering, the important consideration is that it must have been the purpose of the framers of the Constitution, as it is clearly for the public interest, that the office as far as possible should always be filled. This consideration applies with peculiar force to the office of Senator. We should be very unwilling to establish a construction of the Constitution which would make it certain that in no case of the resignation of a Senator, however necessary that resignation might be, there should be a succession without a considerable interval.

This would bear with peculiar hardship upon States remote from the seat of government, and might determine the policy of the country in great emergencies and in matters peculiarly affecting particular States, when such States were but partially represented, or possibly not represented at all. The tendency of the opinion of the Senate, as evidenced by its more recent decisions, has been more and more to lean to a construction which, as far as possible, secures that the seats in the Senate should be filled without any interruption in the representation of the State. Thus, in the case of Mr. Bell and Mr. Blair, Senators from the State of New Hampshire, it has been held that the executive might fill the vacancy occurring at the beginning of the constitutional term in consequence of the failure or the inability of the legislature to elect a Senator for that term, in compliance with the statute of 1866 (Rev. Stat., secs. 14 and 19), in spite of very weighty and influential opinions to the contrary.

So it has been held and is now the settled construction, that if a vacancy occur during the recess of the Senate, and a person be regularly nominated to the Senate at its next session to fill it, and be rejected, and the Senate adjourn without the office being filled, the President is entitled to make a new appointment in the next vacation. So, if the officer died during the session, and his death be not known until after the adjournment, as is said by Attorney-General Taney in his able report (Opinions of Attorneys-General, vol. 2, p. 523):

"It is admitted by everyone that the President may appoint in such cases, and the practice of the Government has continually conformed to that construction."

"It was the intention of the Constitution," Mr. Taney further says, "that the offices created by law and necessary to carry out the operations of the Government should always be full, or, at all events, that the vacancy should not be a protracted one." (See also, to the same effect, the opinion of William Wirt, 1 Op. Attys. Gen., 631.)

It has been suggested that if this construction be established it will be in the power of the governor of the State to provide by appointment for the filling of future vacancies long before they occur, and, therefore, the will of the people of the State, as it exists at or near the time of filling the vacancy, fail of being carried into effect. But the instances must necessarily be very rare indeed where the vacancy can be anticipated beforehand under circumstances which will create such temptation to the executive. Against that, as against many other evils which are possible under a popular government, as under other governments, the protection in general must be in the character and integrity of the persons clothed with high public office.

We therefore are of the opinion that Mr. Chilton was lawfully appointed by the executive of the State of Texas to the seat which he now holds, and recommend the adoption of the following resolution:

*Resolved*, That Mr. Horace Chilton, appointed by the executive of the State of Texas on the 25th day of April, 1891, to fill the vacancy occasioned by the resignation of the Hon. John H. Reagan, which had been previously been made, to take effect on the 10th day of June, 1891, is entitled to retain his seat.

On January 27<sup>1</sup> the Senate agreed to the resolution reported by the committee.

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<sup>1</sup>Record, p. 635.

**1229. The Senate election case of James A. Hemenway, of Indiana, in the Fifty-ninth Congress.**

**A Senator may resign, appointing a future day for the resignation to take effect, and the State legislature may fill the vacancy before that date.**

On February 21, 1905,<sup>1</sup> in the Senate, Mr. Albert J. Beveridge, of Indiana, presented the following credentials, to be placed on file:

In the name and by the authority of the State of Indiana. Executive department.

*To all who shall see these presents, greeting:*

This is to certify that on the 17th day of January, 1905, James A. Hemenway was duly chosen by the legislature of the State of Indiana a Senator to represent said State in the Senate of the United States for the unexpired portion of the term of six years from the 4th day of March, 1903, and to fill the vacancy occasioned therein by the resignation of the Hon. Charles W. Fairbanks.

Witness, his excellency our governor, J. Frank Hanly, and our seal hereto affixed at the city of Indianapolis, Ind., this 18th day of February, A. D. 1905.

By the governor:

J. FRANK HANLY, *Governor.*  
DANIEL E. STORMS, *Secretary of State.*

[SEAL.]

Mr. Joseph W. Bailey, of Texas, said:

Mr. President, before the credentials are placed on file, I want to call the attention of the Senate to what I think is a fatal objection to this certificate of election and to the election itself.

The certificate shows that that election occurred in the legislature of Indiana during the month of January, and that Mr. Hemenway was chosen to fill a vacancy occasioned by the resignation of Senator Fairbanks, to take effect on the 4th of March. Thus the legislature of Indiana has asserted its right to fill a vacancy not only when no vacancy exists, but when it was possible under the law that no vacancy ever would exist. The courts have more than once held—and no court has held it more distinctly than the supreme court of Indiana—that a resignation to take effect at a future day is not a resignation at all, but simply a notice of an intention to resign, such resignation becoming effective if it remains with the officer authorized to receive it up to the time it was to take effect. But all the courts that have discussed the matter—possibly, that is too broad—I will say a large majority of the courts that have discussed the matter, hold that until the date indicated in the resignation the officer may withdraw it, and may thus prevent a vacancy.

Of course nobody believes that the distinguished Senator from Indiana [Mr. Fairbanks] will withdraw his resignation in order to remain amongst us instead of accepting the call to preside over us, but the probability or the improbability of the withdrawal of a resignation does not affect the law of the case.

I do not, however, intend to insist upon any reference of this particular credential, because the Senate seems to have considered and decided the very question in the Chilton case. There a Senator from my own State was appointed in April to fill a vacancy which, by the terms of the resignation, was to occur in June. His credentials were referred to the Committee on Privileges and Elections, and that committee reported unanimously that he was entitled to his seat. But the remarkable thing is that, although that report was prepared and presented by so great and so accurate a lawyer as the late Senator from Massachusetts, Mr. Hoar, it does not appear to have taken into consideration at all the very vital question in the case. The report devotes itself almost entirely to a line of reasoning upon the right of executives and legislatures to fill a vacancy which is certain to occur, in advance of its occurrence. But the report in no part of it, as I now recall—it has been some time since I examined it; I did examine it closely at the time, and remember distinctly to have believed, although I had no interest in it, that the Senate was wrong—the report, so far as I can now recall, does not consider the question as to whether a resignation may be withdrawn or not, and yet the courts have held over and over again that it may be.

I venture to say that the records of Congress will verify my statement that Senators have telegraphed their resignations to the governors of their States and afterwards withdrawn them. But, recognizing that—although it did not seem to consider the vital point in the case—the report and the action of the

<sup>1</sup>Third session Fifty-eighth Congress, Record, pp. 2971, 2972.

Senate in the Chilton case are on all fours with the present case, I am not going to ask that the credentials be referred to the Committee on Privileges and Elections, but content myself with simply saying that if it were an important question, I should not want it to be understood as concluded by the action of the Senate here.

Mr. Julius C. Burrows, of Michigan, referred to the precedents in the cases of Clay and Dixon; and Mr. Henry M. Teller, of Colorado, referred to the report in the Chilton case, saying:

Mr. President, I was chairman of the committee when the report was made. This matter was referred more particularly to Senator Hoar, who made the report. I was somewhat embarrassed at the time by the question from the fact that in 1882 I had resigned my seat in the Senate to take another place, and I had resigned to take effect when my successor should be elected or appointed. I had remained in the Senate until the governor of the State had appointed and sent here my successor to be sworn in, and then I took the other place.

When this question came before the Committee on Privileges and Elections it was a new question to me, although I knew that some Senators had raised the question, but not until after I had gone out of the Senate, and I did not take any part in that discussion or in the report except pro forma.

The credentials were placed on file.

On March 4, 1905,<sup>1</sup> at the organization of the Senate, Mr. Hemenway appeared and took the oath and his seat without question.

**1230. A Member-elect may resign before taking the oath.**

**A Member-elect having resigned, the House decided that the person elected as his successor was entitled to the seat.**

**The House very early found the law of Parliament inapplicable in the case of a resignation.**

On November 9, 1791<sup>2</sup> the Speaker laid before the House a letter from the governor of Maryland, inclosing a letter to him from William Pinckney, a Member returned to serve in this House from Maryland, containing his resignation of that appointment; also a return of John Francis Mercer, elected a Member to serve in this House in place of the said William Pinckney. These papers were referred to the Committee on Elections.

This Congress had organized on October 24, 1791. Mr. Pinckney did not appear that day, nor thereafter, and so did not qualify as a Member.

On November 18 Mr. Samuel Livermore, of New Hampshire, submitted the report of the Committee on Elections, which found that Mr. Mercer was entitled to the seat.

On November 22 the report was debated at considerable length, the discussion relating to the status of the Member-elect before he takes his seat, and whether such an one may resign. It was urged on one side that the usage of the British Parliament, which did not permit resignations, should be adhered to; and on the other, that there being no analogy between the House of Representatives and Parliament, and the Constitution not prohibiting resignation, it should be concluded that a Member may resign. Doubt was expressed, however, as to whether the present case should be termed a resignation.

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<sup>1</sup>First session Fifty-ninth Congress, Record of Special Session of the Senate, pp. 1, 2.

<sup>2</sup>First session Second Congress, Journal, pp. 451, 457, 461; Annals. pp. 205-207.

On November 23 the House adopted the resolution reported by the committee, which was as follows:

It appears that, at an election held for the State of Maryland, on October 1, 1790, William Pinckney was duly elected a Representative for that State, to Serve in the House of Representatives of the United States; that the certificate of his election has been duly transmitted by the executive thereof, and heretofore so reported by your committee; that, by letter dated September 26, 1791, directed to the governor and council of that State, William Pinckney resigned that appointment; and that, in consequence of such resignation, the executive issued a writ for an election, to supply a vacancy thereby occasioned, and have certified that John Francis Mercer was duly elected, by virtue of that writ, in pursuance of the law of the State of Maryland in that case provided.

*Resolved*, That it is the opinion of this committee that John Francis Mercer is entitled to take a seat in this House, as one of the Representatives for the State of Maryland, in the stead of William Pinckney.

**1231. An instance of the resignation of a Member who had not taken his seat.**—In the Thirty-third Congress, Mr. Zeno Scudder, of Massachusetts, did not appear in the House, being detained away by an accident, and resigned without having taken his seat. His resignation appears from the fact that his successor appeared on April 17, 1854,<sup>1</sup> and was qualified. The Journal does not seem to have any other mention of the fact of resignation except for a resolution presented on June 23 to pay to Mr. Scudder his per diem and mileage to the date of his resignation.

**1232. A Member-elect's letter of resignation, transmitted to the Speaker before the election of that officer, was laid before the House after organization.**—On December 2, 1901,<sup>1</sup> at the organization of the House, after the Speaker had been elected and the Members sworn in, the Speaker laid before the House the following letter:

NEW YORK, *November 19, 1901.*

SIR: I hereby resign the office of Representative in the House of Representatives of the Congress of the United States in and for the Seventh Congressional district of the State of New York; this resignation to take effect the 1st day of December, 1901.

Yours, respectfully,

NICHOLAS MULLER.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES  
OF THE CONGRESS OF THE UNITED STATES,  
WASHINGTON, D. C.

Mr. Muller's name had been called on the roll call of States, but he did not answer.

**1233. A Senator-elect has resigned before taking the oath.**—On March 15, 1893,<sup>3</sup> Mr. Asahel C. Beckwith, of Wyoming, presented his credentials as Senator, being appointed by the governor to fill a vacancy. There being a question as to the legality of the appointment, the oath was not administered to Mr. Beckwith, but his credentials were referred to the Committee on Privileges and Elections. On March 27 Mr. George F. Hoar, of Massachusetts, reported from that committee a resolution declaring Mr. Beckwith "entitled to be admitted to a seat as a Senator from the State of Wyoming."

On August 7, before this resolution had been acted on, the Vice-President laid

<sup>1</sup> First session Thirty-third Congress, Journal, pp. 643, 1036; Globe, pp. 924, 1463.

<sup>2</sup> First session Fifty-seventh Congress, Journal, p. 6; Record, p. 45.

<sup>3</sup> Senate Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 83.

before the Senate the following communication, which was read and ordered to lie on the table:

[The Beckwith Commercial Company, merchants. Incorporated 1887.]

EVANSTON, WYO., *July 11, 1893.*

DEAR SIR: Owing to a combination of circumstances over which I had no control, I have been obliged to hand in my resignation to Governor Osborne of my appointment as United States Senator from Wyoming.

I beg to remain, your obedient servant,

A. C. BECKWITH.

Hon. ADLAI E. STEVENSON, *Washington, D. C.*

**1234. An instance wherein one who had been declared elected to a seat in the House declined to accept it.**

**One who had been declared elected to a seat in the House having failed to appear, the House directed the State executive to be notified of its action.**

On March 9, 1830,<sup>1</sup> the Speaker laid before the House a letter from Silas Wright, Jr., stating that he declined to accept the seat in the House lately occupied by George Fisher, to which he had been declared to be entitled as one of the Representatives from the State of New York.

The letter was read and laid on the table.

Mr. Wright's memorial asking to be admitted to a seat in place of Mr. Fisher, had been presented December 15, 1829,<sup>2</sup> and on February 5, 1830,<sup>3</sup> the House had declared him entitled to the seat.

On February 13,<sup>4</sup> Mr. Wright having failed to appear and qualify, the House directed the Speaker to inform the executive of New York that the seat lately occupied by Mr. Fisher had been awarded to Mr. Wright.

On December 6, 1830,<sup>5</sup> at the opening of the next session, there appeared "Jonah Sanford, in the place of Silas Wright, jr., who declined to take the seat awarded to him at the last session."

**1235. Instance wherein a Senator-elect notified the Senate that he had formally declined to accept an appointment to be a Senator.**—On January 5, 1881,<sup>6</sup> the Vice-President laid before the Senate a letter of James A. Garfield, as follows:

"MENTOR, OHIO, *December 23, 1880.*

"SIR: On the 13th and 14th days of January, 1880, the general assembly of the State of Ohio, pursuant to law, chose me to be a Senator in the Congress of the United States from said State for the term of six years, to begin on the 4th day of March, A. D. 1881.

"Understanding that the lawful evidence of that fact has been presented to the Senate and filed in its archives, I have the honor to inform the Senate that I have by letter dated December 23, A. D. 1880, and addressed to the governor and general assembly of the State of Ohio, formally declined to accept the said appointment and have renounced the same.

"I am, Sir, very respectfully, your obedient servant,

"J. A. GARFIELD.

"To the PRESIDENT OF THE SENATE OF THE UNITED STATES, *Washington, D. C.*"

This letter was read and ordered to be placed on the files of the Senate.

<sup>1</sup> First session Twenty-first Congress, Journal, p. 394.

<sup>2</sup> Journal, p. 34.

<sup>3</sup> Journal, p. 358.

<sup>4</sup> Journal, p. 293.

<sup>5</sup> Second session Twenty-first Congress, Journal, p. 7.

<sup>6</sup> Third session Forty-sixth Congress, Senate Journal, pp. 83, 84.

Mr. Garfield was a Member of the House of Representatives in the Forty-sixth Congress, and participated in the proceedings of the second session, which adjourned on June 16, 1880.<sup>1</sup>

In the summer of 1880 he was nominated for President of the United States and was elected to that office in November, 1880. When the third session of the Forty-sixth Congress met, on December 6, 1880,<sup>2</sup> Mr. Garfield did not appear; and on December 13<sup>3</sup> the credentials of Ezra B. Taylor, "to fill the vacancy occasioned by the resignation of James A. Garfield," were presented.

The credentials of Mr. Garfield as a Senator-elect were presented in the Senate on May 7, 1880,<sup>4</sup> for the term to begin March 4, 1881.

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<sup>1</sup>Second session Forty-sixth Congress, House Journal, p. 1521.

<sup>2</sup>Third session, House Journal, pp. 6, 7.

<sup>3</sup>House Journal, p. 58.

<sup>4</sup>Second session Forty-sixth Congress, Senate Journal, p. 526.